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# **EXHIBIT BB 17**

**CHRISTOPHER FRANCIS NEALE  
TODD**



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

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**AFFIDAVIT**

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I, the undersigned,

**CHRISTOPHER FRANCIS NEALE TODD**

do hereby make oath and state that:

1. I am an adult male attorney and am a director of Bowman Gilfillan Inc. I have been a director of the firm since March 1998.
2. The facts deposed to in this affidavit are, save where otherwise stated or apparent from the context, within my personal knowledge and are, to the best of my belief, true and correct.
3. I depose to this affidavit at the request of the Commission of Inquiry into State Capture ("the Commission"). The purpose of this affidavit is to set out certain facts concerning the proceedings that resulted in the termination of employment of Mr Siyabonga Gama by Transnet on or about 29 June 2010, and to set out certain steps that preceded Mr Gama's reinstatement pursuant to a settlement agreement concluded in February 2011.
4. Bowman Gilfillan was first instructed by Transnet in early May 2009 regarding allegations of misconduct by Mr Gama. I was at all material times the attorney



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responsible for discharging the firm's mandate to advise and represent Transnet in the matter.

5. The background to the instruction is summarised in a report that I prepared (in circumstances that I will refer to further below) on or about 2 February 2011. I attach a copy of that report, marked "A".
6. From May 2009 onwards, when Bowman Gilfillan was first instructed in the matter, I was the attorney ultimately responsible for all advice and legal assistance given to Transnet in relation to the disciplinary process involving Mr Gama which resulted in his dismissal in June 2010. At all material times Mr Gama was represented by Mr Themba Langa, practising as Langa Attorneys.
7. On 10 September 2009, after Transnet had instituted disciplinary proceedings, Mr Gama approached the High Court in an attempt to stop the disciplinary process. He brought those proceedings against Transnet and cited members of Transnet's board of directors individually as Respondents in the proceedings. Bowman Gilfillan represented Transnet in that litigation, while the board and its members were represented separately by other attorneys and counsel. Mr Gama's application was dismissed, with costs, including the costs incurred by both legal teams representing Transnet on the one hand and its board on the other. An application for leave to appeal brought by Mr Gama was similarly dismissed, with costs.
8. The disciplinary proceedings then took place. They were chaired by Adv. Mark Antrobus SC. Both Transnet and Mr Gama were represented throughout by senior counsel.



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9. I assume that the Commission has copies of the two findings of the chairperson. They are lengthy and so I do not attach them here, but if necessary I will provide them. In the first finding, the chairperson found Mr Gama guilty of three separate charges of misconduct. The second finding contained the chairperson's findings and recommendation on the appropriate sanction. The chairperson recommended the sanction of dismissal, and Mr Gama was dismissed at the end of June 2010.
10. After his dismissal, Mr Gama referred a dispute to the Transnet Bargaining Council, alleging that his dismissal had been unfair. The reasons for the contention that his dismissal had been unfair were set out in the referral document, a copy of which is attached marked "B". These contentions were subsequently clarified and limited, as set out in a letter from Langa Attorneys dated 14 October 2010, a copy of which is attached marked "C".
11. In essence, Mr Gama now (for the first time since the disciplinary proceedings had been instituted) accepted that he had indeed been guilty of the charges of misconduct of which he had been found guilty. He nevertheless alleged that his dismissal was unfair (i) on procedural grounds, because he contended that the disciplinary process should have been run as a pre-dismissal arbitration and not as an internal disciplinary hearing, and also that the chairperson should not have been appointed because he had previously performed work for Transnet and had been briefed by Bowman Gilfillan; and (ii) because dismissal was not an appropriate sanction.
12. The procedural complaints were, in my respectful submission, entirely without merit when one has regard to the sequence of events that are set out in paragraphs 34 to 50 of Annexure "A". Furthermore, even if there had been merit in those complaints, they would have entitled Mr Gama to some form of compensation only, and not to



reinstatement, since reinstatement is not a competent remedy under the provisions of the Labour Relations Act for a finding of procedural unfairness only.

13. Mr Gama could have succeeded in securing the remedy of reinstatement in the bargaining council proceedings only if Transnet had been unable to persuade the arbitrator that dismissal was an appropriate sanction for the misconduct of which Mr Gama had been found guilty. I reiterate that Mr Gama had at all times previously strenuously denied the misconduct, but now, in the bargaining council proceedings, he admitted it.
14. As indicated in paragraph 58 of Annexure "A", during the stage of the internal disciplinary process that was concerned with the question of an appropriate sanction, Mr Gama had chosen not to lead evidence and instead to submit written representations only. His attorney had given notice that he would not attend the further hearing that had been scheduled to deal with the question of sanction. The reason given for this non-attendance was simply that Mr Gama wished to make written representations only on the question of sanction. Transnet, by contrast, led evidence and made submissions on the appropriate sanction.
15. In a lengthy written finding on the question of sanction, the chairperson of the hearing concluded that the appropriate sanction in respect of each of the charges viewed in isolation was dismissal. Since the misconduct was to be viewed cumulatively, this served only to emphasise that dismissal was the appropriate sanction in the circumstances. The reasons for the chairperson holding this view and making this recommendation are clearly set out in the detailed finding.

  
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16. As indicated earlier, Mr Gama was dismissed at the end of June 2010. The bargaining council arbitration, having initially been scheduled during October 2010, had been postponed and scheduled by agreement between the parties for evidence and argument during the week of 24 January 2011. There was no reason to doubt, in light of the limited points that had been placed in issue, that it could be completed during that week.
17. In the interim, in October 2010 a new Minister was appointed to the Public Enterprises portfolio, and in early December 2010, the Minister appointed a new board to Transnet. From public statements made at the time I understood that three members of the previous board were reappointed, and twelve new members were appointed. One of these new members, Mr Mafika Mkhwanazi, was appointed as chairperson of the board. In addition, with the position of Group Chief Executive formally vacant at that time, Mr Mkhwanazi also assumed the role of acting Group Chief Executive, pending the appointment of someone to that office. The new board was appointed approximately six weeks before the agreed dates for the conduct of the bargaining council arbitration.
18. By January 2011 Mr Gama had not, despite demand, paid the taxed costs that had been awarded in Transnet's favour more than a year earlier in the High Court proceedings referred to in paragraph 7 above. Bowman Gilfillan was in the process of taking steps to execute the cost orders on Transnet's behalf. The amount due by Mr Gama in respect of the taxed costs of Bowman Gilfillan and the counsel that it had engaged on Transnet's behalf was R426,666.37 together with interest at the prescribed rate from date of judgment to date of payment.



19. On Friday 21 January 2011, three days before the agreed commencement of the bargaining council arbitration, I received a telephone call from Mr Ndiphiwe Silinga, who was at the time a Transnet internal legal advisor. Mr Silinga informed me that settlement discussions were taking place between Transnet and Mr Gama, and that he had received instructions directly from Mr Mkhwanazi that all pending proceedings should be put on hold. Mr Silinga followed up this call with an email in which he communicated the instruction that Bowman Gilfillan should cease all steps to execute the cost orders against Mr Gama and should postpone the arbitration that was scheduled to take place on Monday morning, 24 January 2011. A copy of that email appears in the document attached marked "D".
20. On Monday morning, 24 January 2011, we carried out the instruction to postpone the arbitration proceedings *sine die*.
21. As Transnet's legal representative I was, however, concerned to have learned that settlement discussions were taking place without any reference to us, and indeed without our knowledge or involvement. I had been informed by Mr Silinga that the matter was being dealt with by Mr Mkhwanazi himself, who had been in the role for less than two months. Bowman Gilfillan had not, in its capacity as legal advisors, been asked to brief Mr Mkhwanazi on the matter and it was unclear how settlement discussions could reasonably be conducted without any briefing on the detailed background to the matter or advice on the prospects of success in the pending arbitration. It was also completely unclear what information was available to the newly appointed chairman or to the majority of the board, who had also been newly appointed, about the serious governance concerns and proven misconduct of Mr Gama (now admitted by him) that had led to his dismissal in the first place.



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22. For this reason, on 24 January 2010 I drafted a letter to Mr Silinga (a copy of which is attached marked "E"). I requested him to bring the letter to the attention of Mr Mkhwanazi as well. In that letter I also clearly stated our willingness, as legal advisors to Transnet, to meet to discuss the issues raised in the letter and the facts and circumstances relevant to the dispute. I sent this letter to Mr Silinga under cover of an email on the following day, 25 January 2010. A copy of that email also appears on Annexure "D".
23. I received no response to the letter nor any invitation to brief Mr Mkhwanazi or members of the board.
24. Instead, at the end of January or beginning of February 2011 I was contacted by Mr Sbu Gule, a partner at the firm then known as Deneys Reitz. I understood from Mr Gule that Transnet had instructed Deneys Reitz to review the disciplinary process concerning Mr Gama.
25. In these circumstances, I considered it appropriate to prepare a report to Transnet setting out what I considered to be key points that should inform any further decision making on the matter, and that were relevant to the merits of the pending arbitration proceedings. I thought it appropriate to deal with the factual matters that were relevant in response to the three contentions being pursued by Mr Gama in the arbitration proceedings, and also to raise additional matters that I considered would be important for Transnet to take into account if it was to take further decisions on possible settlement of that dispute. As a result, on or about 2 February 2011, I prepared the report which is Annexure "A" to this affidavit. I also sent a copy of that

  
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report to Mr Gule on the following day, together with certain other documents, under cover of an email a copy of which is attached marked "F".

26. Bowman Gilfillan was not, after this, asked for any further input or advice on the matter. I do not know whether Mr Gule or Deneys Reitz provided any advice to Transnet. I have never seen any such advice.
27. I learned of Mr Gama's reinstatement three weeks later, on or about 24 February 2011, from public reports that announced it. I was not aware of the terms of settlement at the time, nor was I provided with a copy of the settlement agreement.
28. I have since been provided with a copy of the settlement agreement, and have been invited to comment on its terms.
29. I note that the agreement appears to have been signed by Mr Mkhwanazi himself. I do not know whether Mr Mkhwanazi concluded the agreement on the strength of a general authority delegated to the office of the Group Chief Executive, which is the executive position in which he was acting at the time, or on the strength of a board resolution that he should conclude the agreement. As a result, I do not know whether Mr Mkhwanazi was the only decision maker within Transnet or whether the board as a whole took the decision.
30. What is immediately apparent from the terms of the settlement agreement is that it represented a complete capitulation by Transnet to the stance advanced by Mr Gama in the bargaining council arbitration. This was despite the fact that Mr Gama had now admitted to having been guilty of the serious misconduct that had resulted in his dismissal, and despite Transnet's strong prospects of success in the arbitration. In



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addition, the agreement conferred significant financial benefits on Mr Gama that he could not have secured in the arbitration process or in any other legal process.

- a. Mr Gama was reinstated retrospectively. This meant that he was paid all remuneration that he would have earned during the intervening period, including incentive benefits.
- b. Transnet (as represented either by its acting Group Chief Executive or, if the agreement had been authorised by it, the board) now took the view that the appropriate sanction for Mr Gama's misconduct was a final written warning that clearly served no valid purpose. I say that the warning served no valid purpose because the agreement expressly provides that the warning had already run its course, and had expired during the intervening period between Mr Gama's dismissal and his reinstatement. Mr Gama was therefore reinstated without any ongoing consequence or sanction arising from his admitted misconduct. I refer further below to the serious adverse consequences of this for the governance of the company.
- c. Although not expressly stated in the settlement agreement, Transnet effectively gave up its rights under the cost orders that had been made in its favour by the High Court, referred to in paragraph 18 above. This was a legal obligation imposed on Mr Gama by court order. No legal proceedings were available to him that could have resulted in him escaping that obligation. But Transnet not only absolved Mr Gama of this obligation, it went further. It voluntarily assumed an entirely new obligation, to pay 75% of Mr Gama's costs incurred in his unsuccessful High Court proceedings, despite the fact that the



High Court had ordered the reverse of this. These were, I reiterate, High Court proceedings brought by Mr Gama in an unsuccessful attempt to interdict a disciplinary inquiry into allegations of misconduct which he strenuously denied at the time but had now, in the bargaining council proceedings, admitted.

d. In addition, Transnet undertook a similar obligation to pay Mr Gama's legal costs incurred in pursuing his unfair dismissal dispute in the bargaining council, despite the fact that there were no reasonable grounds on which these costs could have been claimed by Mr Gama or awarded to him in the arbitration proceedings.

e. I do not know what amounts and in respect of what legal services Transnet in fact subsequently paid Mr Gama or his legal representative under these provisions of the settlement agreement. The payments should only have been of 75% of taxed costs in the High Court litigation and a similar proportion of costs in the bargaining council. Transnet will no doubt have details available of the amount it in fact paid, following the submission by Mr Gama of the supporting documents referred to in clause 3.6 of the settlement agreement.

31. I do not know whether Mr Mkhwanazi or the Transnet board relied on any legal advice when taking the decision to enter into this agreement. It is manifestly clear, however, that the terms of the settlement agreement were materially adverse to Transnet, and that they bore no resemblance whatsoever to a proper or reasonable assessment of the respective legal positions of Transnet on the one hand and Mr Gama on the other.

32. The settlement agreement was concluded approximately three weeks after our report (Annexure "A") had been provided to Transnet. It is possible that legal advice was



obtained from other sources during that period that was materially different to our advice, or alternatively that legal advice was considered irrelevant to the decision to reinstate Mr Gama. In either event, it appears reasonable to assume that the contents of our report (Annexure "A") were completely ignored by those who decided to conclude the settlement agreement.

33. The settlement agreement was concluded less than three months after the appointment of the new board, including Mr Mkhwanazi. The decision to conclude the agreement, and the terms on which it was concluded, could not rationally have been motivated by Transnet's legal position in the arbitration, by Transnet's financial interests, or by the requirements of good governance.

- a. As to its legal position, I have no doubt that Transnet had strong prospects of success in the arbitration. It was also clear at the time that there were good prospects that an arbitration award would be made within two or three weeks of the arbitration taking place, that is by mid to late February 2011. The fact that Transnet chose not to proceed with the arbitration in those circumstances, and instead chose to capitulate, gives rise to a strong inference that those making the decision wanted to reinstate Mr Gama whether or not this was a likely outcome of the arbitration process. I say this because if the approach of the decision makers had been that they were willing to reinstate Mr Gama if so ordered by the arbitrator, but would not otherwise do so, then the rational thing to have done, even if the prospects in the arbitration were believed to have been evenly balanced or weighted against Transnet, would have been simply to have awaited the outcome of the arbitration. This was imminent. Since the decision makers chose not to do this, it is reasonable to conclude



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that they wanted Mr Gama to be reinstated irrespective of the outcome of the arbitration. That being so, an arbitration award in Transnet's favour would have served as an obstacle to the reinstatement of Mr Gama. I cannot see any other reasonable explanation for the decision makers choosing to preempt the outcome of the arbitration in the way that they did.

- b. As regards Transnet's financial interests, with strong prospects of success in the arbitration, or even with prospects more evenly balanced than I have suggested, or weighted against Transnet, the financial terms of a full retrospective reinstatement represented no compromise by Mr Gama whatsoever. Compromise, having regard to the risks associated with litigation, is a common characteristic of the terms on which litigation is settled. Not only did the terms of settlement in this instance represent no compromise on the part of Mr Gama at all, they went further. Mr Gama was also awarded financial benefits that were unobtainable by him in any legal process. The terms of settlement were clearly materially adverse to Transnet's financial interests.
- c. As regards governance, the decision to reinstate Mr Gama was a decision to put back at the helm of Transnet's largest operating division a person who now admitted to serious negligence in the context of two very material procurement processes. Mr Gama's negligence in authorising the security contract in favour of GNS was described by the chairperson of the hearing as gross negligence of a particularly inexcusable kind. I refer, by way of example, to the findings of the chairperson in paragraphs 38 and 39 of the finding on sanction. There are numerous similar statements in that finding and recommendation to Transnet, none of which was ever, to the best of my



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knowledge, taken into consideration by those who decided to reinstate Mr Gama. I have not seen or heard of any written analysis that contradicts these unequivocal statements by the hearing chairperson about the risk that the continued employment of Mr Gama posed to good governance at Transnet. In addition, one of the points that we made in Annexure A, at paragraph 67.3, was that Transnet would be required to take into account its duty to act consistently when it imposed sanctions in the future for instances of serious misconduct of the kind committed by Mr Gama. In matters of discipline, consistency of sanction across an employer's operations is a key component of the duty to act fairly. The consequence of the decision to reinstate Mr Gama, putting aside for the moment the extraordinary terms on which that occurred, was that Transnet made a very public statement about the consequence in future, in terms of sanction, for misconduct of the kind to which Mr Gama had now admitted. The consistent application of discipline meant that other employees guilty of similar misconduct, with all of the characteristics summarised in the chairperson's finding on sanction, could reasonably expect in the future to be sanctioned with a final written warning valid for six months. That was one further element of the decision that stood out as entirely contrary to the requirements of good governance.

34. If it is reasonable to state that the conclusion of the agreement and the terms of settlement were not rationally connected to the legal, financial or governance interests of Transnet, the question must be asked why the agreement was concluded on those terms, or at all. I do not have any personal knowledge of why the agreement was concluded. The circumstances in which it was concluded, however, its terms, and its timing give rise to a strong inference that the decision to restore Mr Gama to

A handwritten signature in black ink, consisting of a stylized 'O' followed by the letters 'FA'.

his position at Transnet on the most favourable terms possible was a decision that was taken elsewhere, outside the governance structures of Transnet. I say this because in my respectful view, taking into account what I have stated in paragraph 33 above and its sub-paragraphs, the decision could not rationally have been taken by the board of Transnet if its members had exercised their fiduciary duties and had applied their minds to the best interests of the company. Nor could it rationally have been taken by Mr Mkhwanazi acting in his capacity as Group Chief Executive and at the same time as a director, with the high level of fiduciary responsibilities that such a position entailed.

35. The decision to reinstate Mr Gama had other consequences, which may or may not have been intended.
36. Mr Gama had alleged, in the High Court proceedings referred to in paragraph 7 above and also in the course of the disciplinary proceedings, that the decision to take disciplinary action against him had been motivated by the ulterior purpose of thwarting his ambitions to be appointed to the highest executive position in Transnet to which he aspired, as Group Chief Executive.
  - a. On 16 February 2011, a few days before Mr Mkhwanazi concluded the settlement agreement reinstating Mr Gama as chief executive of Transnet Freight Rail, Minister Gigaba announced the appointment of Mr Brian Molefe as Group Chief Executive of Transnet.
  - b. In due course, however, after Mr Molefe was moved to a similar position at Eskom during or about April 2015, Mr Gama was appointed to replace him,



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initially in an acting capacity. In April 2016, then Minister Brown announced his permanent appointment as Transnet's Group Chief Executive.

37. The evidence led in the sanction portion of the disciplinary hearing in 2010 described the adverse consequences for Transnet of the procurement irregularities and related conduct by Mr Gama concerning the procurement of 50 refurbished locomotives. These adverse consequences were described in some detail in the finding on sanction. I have no personal knowledge of any longer term consequences of Mr Gama's tenure at Transnet in relation to the procurement of locomotives. I do, however, have some knowledge of the consequence of Mr Gama's subsequently admitted misconduct in approving the appointment of General Nyanda Security Risk Advisory Services ("GNS") without following a procurement process.

a. In that instance, Mr Gama exceeded his authority, which was at that stage limited to R10 million, for a contract awarded on "confinement", which meant without following any competitive process. The annual value of the contract at the time was approximately R18 million. I attach, marked "G", a copy of the contract that was subsequently entered into to regulate the relationship between the parties, and I refer in particular to its Annexure C, the last page, which sets out how the costs of the security services to be rendered to Transnet were to be calculated.

b. As a matter of fact, soon after the appointment a significant extension to the contract was approved by a senior security manager, a Mr Senamela. Following other extensions of services, which substantially increased the number of personnel for whose services GNS invoiced Transnet on a monthly

  
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basis, the total amount that Transnet paid to GNS for security services over a period of some two years and two months was R95,5 million. When, while the disciplinary process against Mr Gama was still pending, Transnet investigated the contract further it established that GNS in fact employed no staff at all, and so could not have been deploying or providing its own staff as the resources for which it was invoicing Transnet monthly.

- c. Towards the end of 2009 or early 2010, Transnet proposed to terminate the contract. GNS protested vigorously. I attended a meeting held between representatives of Transnet and GNS at around that time to discuss this. I was present as Transnet's legal representative, while GNS was represented at the meeting by a partner from the firm Werksmans. From Transnet's perspective the meeting was intended to give GNS an opportunity to explain its operating model and to disclose the number and identity of the persons it had deployed to Transnet and for whom it had been invoicing Transnet monthly for some two years.
- d. Representatives of GNS confirmed at the meeting that GNS did not employ the resources itself, but explained that it sub-contracted with third parties to procure staff. This was a breach of the agreement with Transnet, which expressly precluded any sub-contracting arrangement without the permission of Transnet. Transnet nevertheless requested, in the meeting, that it be provided with more details of the sub-contracting arrangements with the third parties concerned, including invoices from the subcontractors which showed the number and type of human resources that each contractor had provided to GNS from month to month. Transnet's objective was to be placed in a



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position in which it could verify that the investigators, researchers, handlers, guards and similar resources for which it had been charged by GNS in fact existed and had been deployed to provide services to Transnet.

e. GNS refused, in the meeting and at all times thereafter, to provide the information requested. Following that meeting, Transnet terminated the contract with GNS, and later issued summons to recover the R95,5 million that it had paid to GNS. I attach a copy of the summons, marked "H". GNS had by then changed its name to Abalozi Risk Advisory Services (**Abalozi**), but the legal entity was the same. The Annexure A referred to in the summons was the contract between Transnet and GNS, attached to this affidavit as "H". Abalozi in turn filed a plea and counterclaim, a copy of which I do not have available at present, but will obtain if required.

f. Ultimately, however, Transnet made a decision not to proceed with this claim against Abalozi and concluded a settlement agreement under which it withdrew the claim and agreed to pay Abalozi's costs. That agreement, too, was to the best of my knowledge not concluded on the strength of advice from Bowman Gilfillan, which had at all times represented Transnet in the litigation against Abalozi. By the time the litigation was brought to an end in this way Abalozi had still failed to deliver any information whatsoever regarding the actual personnel purportedly deployed to render services to Transnet under the contract, ostensibly supplied by subcontractors, whose increasing numbers over the twenty six month period when services were rendered had generated the rising monthly costs of the contract to Transnet. Transnet agreed, however, to pay legal costs on a punitive attorney and own client



scale, including legal costs incurred by Abalozi, its directors and the co-founders and directors of GNS.

38. I mention these facts because the misconduct of Mr Gama had very serious consequences for Transnet. The decision to reinstate him, taken for reasons other than the interests of Transnet, also had very serious consequences. It may well be that those consequences were intended by the person or persons who decided to reinstate Mr Gama. It would be surprising if they did not foresee those consequences. The only person I am aware of who made the decision or was directly involved in it was Mr Mkhwanazi. I do not know who else may have been involved in making the decision. I also do not know what motivated Mr Mkhwanazi, or anyone else involved in the decision, to make that decision. It was not discussed with me, by any decision maker, before it was made.

  
CHRISTOPHER FRANCIS NEALE TODD

I CERTIFY that this affidavit was signed and sworn to before me at \_\_\_\_\_ on this the \_\_\_\_ day of JULY 2020, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".



  
F. Apolo

COMMISSIONER OF OATHS

Name: FEREKA APOLO

Address: 16 MAIN ROAD  
KLEINMOND

Capacity: FIAS  
CST

C:\Documents and Settings\CTODD\My Documents\current matters\Transnet\TFR\Reports to Transnet\Report on Gama disciplinary process, 2 Feb 2011.doc

"A"

**REPORT FOR TRANSNET ON DISCIPLINARY PROCESS INVOLVING MR S GAMA:  
PREPARED ON 2 FEBRUARY 2011**

**The Investigations that preceded disciplinary action**

1. The investigations that preceded disciplinary action against Mr Gama related to two separate procurement contracts. The first was the acquisition of 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 Security Risk Advisory Services (Pty) Ltd ("GNS").
2. In a letter dated 31 January 2008, the then Minister of Public Enterprises (Minister 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. A lengthy and detailed investigation was conducted by Ernst & Young (E&Y), performing Transnet's internal audit function. The investigation of these matters commenced during the first half of March 2008. The initial stage of the investigation focussed on irregularities in the tender processes relating to the procurement of 212 locomotives and problems identified with the 50 "like-new" procurement process, and resulted in disciplinary action being instituted, during May 2008, against the person primarily responsible for these procurement processes, the then General Manager: Engineering in TFR.
4. One of the key problems identified in the course of this investigation was the fact that Mr Gama had concluded the relevant agreement (with a value of more than R800 million rand) on the authority of a specific Board resolution but without complying with the single and important condition set by the Board in that resolution. Further investigations on this issue were delayed by various disputes with the joint venture when the tender process for 212 locomotives was cancelled and Transnet took various steps to correct the non-

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compliance with the Board resolution. The EMS joint venture brought a High Court challenge against Transnet which was successfully defended by Transnet in early 2009.

5. The investigation concerning Gama's own conduct in relation to this issue resumed in the latter part of 2008 and concluded in early 2009.
6. Unrelated to the locomotive acquisition, on 18 September 2008 an anonymous letter was received by Maria Ramos, then Group Chief Executive. The letter contained *inter alia* allegations of irregularities regarding the conclusion of the GNS contract. It mentioned the name Mr Gama and suggested that he be interviewed.
7. Ramos asked Mr Wells and Mr Kahla, then Group CFO and Executive in the Office of the CEO respectively, to look into the issue in terms of the usual processes. Wells requested the head of internal audit to investigate, and the matter was handed to the responsible partner at E&Y.
8. 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 a confidential basis any complaints in relation to Transnet. Complaints received via this hotline and involving fraud or corruption or very sensitive matters were typically referred to TIA.
9. Members of the investigation team met with Gama on 10 December and informed him in broad terms of the matters being investigated.
10. By the end of December 2008 the investigators had examined the contract with GNS. They had established that on its own terms the contract (for some R18 million) exceeded Mr Gama's delegated authority of R10 million for contracts awarded on confinement (without a tender process). It was also clear that there had been significant unlawful extensions to the contract, and that there were serious irregularities in the procurement process leading to the approval of the contract by Mr Gama.
11. In about January 2009 internal audit communicated to Ramos its concerns about the signatories to the GNS contract.
12. Ramos was at that time the executive responsible for bringing these issues to a conclusion and deciding whether or not to implement disciplinary steps against Mr

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Gama. Ramos had, however, by that stage announced her resignation from Transnet, to be effective at the end of February 2009.

13. At Ramos' request, internal audit reports on both of the issues that involved Mr Gama were provided to her on 12 February 2009, the day before what was to be her last meeting of the Transnet Board.
14. In the course of this "hand-over" meeting, on 13 February 2009, Ramos handed the matter of both investigations over to the Board.
15. On 19 February 2009 the then Transnet Chairman, Mr. Phaswana, called a meeting with the responsible internal audit official, together with a number of other senior members of the Board (Professor Geoff Everingham the Chairman of the Audit Committee, Mr. Joubert of the Risk Committee and Mr. Hastings of the Remuneration Committee). The purpose of this meeting was to discuss what should be done about the matter. The Board members were taken through key aspects of the internal audit reports. The Chairman and Board members present decided to obtain a legal opinion from attorneys Edward Nathan Sonnenberg (ENS).
16. In March 2009 ENS was asked to advise on whether the conduct of Mr Gama justified disciplinary action. ENS provided a legal opinion on 26 March 2009. The ENS opinion concluded, in essence, that the allegations on the face of them constituted serious misconduct, and recommended that Mr Gama's response to the issues should be obtained before a further decision was taken on disciplinary steps.
17. On 8 April 2009 Mr Gama was interviewed in relation to each of the separate issues, and his response was given.
18. On 23 April 2009 a further meeting was called by the Transnet Chairman, Phaswana, together with the chairs of all Board sub-committees and ENS. It was decided in light of the legal opinion from ENS to pass the investigations on to Wells, then in his capacity as Acting Group CEO.
19. In discussion with ENS and other executives, Wells decided to seek his own independent legal advice as to whether to proceed with disciplinary action against Gama. Bowman Gilfillan attorneys were then instructed in early May 2009.

20. On 11 May 2009 Wells met with Gama, told him that he was the subject of a formal investigation, and asked for his co-operation. Wells offered a collegial approach to discussing and resolving the issue.
21. Bowman Gilfillan attorneys provided a legal opinion dated 29 May 2009. The legal advice confirmed the earlier advice of ENS, and was to the effect that the issues were serious, and needed to be dealt with through an appropriate disciplinary process which would give Gama an opportunity to respond to the concerns raised.
22. Thereafter, and in an attempt to deal with the issues in a collegial and non-confrontational way, Wells set out the basis of the disciplinary allegations, in detail and with all supporting documentation attached, in a letter dated 18 June 2009. Wells met with Gama to discuss the issues and gave him a copy of the letter. The letter invited Gama to respond to the concerns about his conduct raised in it.
23. Gama requested additional time to answer and ultimately provided a written response a month later, 20 July 2009. In that response, Gama denied any form of misconduct, and alleged in strong terms that he was the victim of a conspiracy against him lead by Wells. He refused to take any responsibility for any of the concerns raised with him in writing.
24. After considering Gama's written response a decision was taken during August 2009 to charge Gama with misconduct. Formal charges were drawn up and handed to Gama on 24 August 2009.

#### Initial attempts to convene the disciplinary process

25. Transnet's disciplinary code and Gama's contract of employment gave Transnet a choice between holding an internal disciplinary hearing or an external arbitration process with an independently appointed arbitrator (appointed by Tokiso or another suitable dispute resolution agency). Transnet indicated its intention to conduct an arbitration process.
26. The notice of disciplinary enquiry scheduled an initial pre-hearing meeting between Transnet, Gama and their respective legal representatives on 27 August 2009. At that meeting Transnet acknowledged that the situation was difficult for Gama, and expressed its wish to hold a quick, fair and independent arbitration process that would resolve the misconduct allegations as quickly as possible in the interests of all concerned.



Transnet's representatives made it clear that it was Transnet's wish to deal with the matter speedily but fairly, and as far as reasonably possible on a consensual basis.

27. Gama's representative agreed that, subject to a query as to whether there was valid delegated authority to issue the disciplinary notice, the matter could be scheduled during approximately mid-September 2009. This was subsequently recorded in writing in a letter from Transnet's attorneys (Bowman Gilfillan or BG) to Gama's attorney (Themba Langa) on 3 September 2009.

#### Gama's High Court application to interdict the enquiry

28. Instead of pursuing the approach proposed by Transnet, and rather than seeking to explain his conduct in an independent arbitration process, Gama chose to institute High Court proceedings to challenge the decision to institute a disciplinary process, and tried to interdict that process.
29. The High Court proceedings were instituted on 10 September 2009. Gama cited each member of the then Board as respondents in the proceedings in their individual capacities. Gama, the Board, and Transnet were all represented by senior counsel.
30. Gama's complaint in the High Court was in essence that the decision to take disciplinary action was unlawful and was part of an orchestrated campaign to prevent his becoming the new Group CE. This allegation was strongly refuted by the Board, and in particular those members of the Board who had been involved in the process of recommending to the then Minister a candidate for appointment to the position of Group CE.
31. In a detailed affidavit, the Board set out the reasons why the Board considered Gama to be unsuitable for the position. These reasons were unrelated to the charges in the disciplinary process.
- 31.1 The affidavits set out the Board's recommendation to the then Minister (Minister Mabandla), in a letter dated 13 February 2009 from Mr Phaswana, the then Chairman. The Board's recommendation was that Mr Gama was not suitable for current appointment as Group Chief Executive: *"Mr Siyabonga Gama was thoroughly considered but there are important gaps, relative to the requirements for this position. He currently requires greater cognitive development to handle the complexity of this position."*

- 31.2 After the initial candidate that was recommended by the Board (Mr Gordhan, now Minister of Finance) withdrew from the process, the Minister requested the Board to provide an assessment of the other candidates who had been shortlisted. Mr Phaswana responded on 9 March 2009. In his response, Mr Phaswana explained the Board's reasons for not recommending any one of the other four shortlisted candidates. In respect of Mr Gama, Mr Phaswana stated that he *"did not in fact demonstrate the required level of skill in the management of the complexities for the position of the Group Chief Executive. Further, the results of the competency-based assessment reports indicated worrying concerns in relation to the exercise of personal judgment."* Mr Phaswana went on to state that the Board had, since its letter of 13 February 2009, *"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..."*
32. Judgement in the High Court proceedings was handed down in favour of the Board and Transnet on 7 October 2009. The High Court rejected all of Gama's arguments, and dismissed the application with costs.
33. Gama was publically reported as stating that the Court had clarified that there was no ulterior purpose and that the disciplinary proceedings had been instituted on proper authority. He was reported as stating that he now looked forward to an opportunity to deal with the merits of the charges in the disciplinary process. He did, however, still apply for leave to appeal against the High Court judgment. That application was also dismissed with costs. He did not attempt to appeal further, to the Supreme Court of Appeal.

#### **Attempts to schedule a disciplinary enquiry by arbitration through Tokiso**

34. On 9 October 2009 Transnet's attorneys (BG) wrote to Gama's attorney (Langa) advising of Transnet's intention to request Tokiso to appoint a suitably qualified arbitrator to deal with the disciplinary matter. Langa was invited to indicate any additional requirements that he believed should be communicated to Tokiso. Tokiso is the dispute resolution agency provided for in terms the contract of employment of all members of senior management of Transnet, including Gama.



35. Tokiso subsequently appointed Adv. John Myburgh SC as arbitrator. Myburgh is the most senior Tokiso panellist, and is a former High Court Judge and former Judge President of the Labour Appeal Court.
36. Langa responded to this by recording in an email dated 26 October 2009 that there was no objection to the arbitrator.
37. On 2 November 2009, Langa was reported in the media as stating that Adv. Myburgh SC had been appointed as arbitrator. As at that date, Gama and his team had clearly accepted the appointment of Adv. Myburgh SC as arbitrator.

**Gama's subsequent objection to Adv. Myburgh SC and proposal of alternative arbitrators**

38. On 5 November 2009, and without explanation, Langa wrote a letter to BG advising that "we still have to agree on the arbitrator", and proposing one of 7 alternative arbitrators, subject to Transnet's consent.
39. Subsequently, also on 5 November 2009, Gama's counsel informed Transnet's counsel that Gama's team was considering bringing an application for the recusal of Adv. Myburgh SC as arbitrator on the grounds that he had allegedly worked closely with Maria Ramos during the Banking Commission of Enquiry of 2002.
40. The parties' attorneys and counsel agreed to meet during the morning of 6 November 2009 prior to the scheduled 14h00 start of the arbitration process before Myburgh.
41. At that meeting Gama's counsel repeated that his legal team was "considering" bringing an application for the recusal of Myburgh on the grounds mentioned above. They proposed that to avoid any delay and dispute about the identity of the arbitrator, Transnet should agree to one of the 7 alternative arbitrators proposed in Langa's letter of 5 November 2009. They specifically confirmed that Transnet could select any one of the arbitrators proposed in that list.
42. The first of the seven alternative arbitrators on the list proposed by Gama's legal team was Adv. Antrobus SC. Transnet established his availability to conduct the arbitration, and then communicated that it would agree to the appointment of Adv. Antrobus SC instead of Adv. Myburgh SC.

**Gama's refusal to accept the appointment of Adv. Antrobus SC**

43. Subsequently, in the course of further correspondence over the following days, Gama (through his attorney) attempted to repudiate the appointment of Adv. Antrobus SC as well, and to secure agreement to first one then another alternative arbitrator. It was, however, at all times made clear in this correspondence that Gama raised no question or issue about the independence or integrity of Adv. Antrobus SC.
44. In an effort to avoid controversy on the issue of the chosen arbitrator, a meeting was held with Gama's counsel on Monday 16 November 2009. At that meeting, which Langa did not attend, Gama's counsel confirmed having made it clear at the 6 November meeting between the parties' legal representatives that Transnet could select any one of the 7 alternative arbitrators that had been proposed on Gama's behalf. They further made it clear that Transnet was entitled to insist on Adv. Antrobus SC as the agreed and appointed arbitrator. They suggested, however, that Transnet should nevertheless consider the consequences of proceeding with an arbitrator who was now apparently no longer acceptable to Gama.
45. Langa then advised, in a letter of 23 November 2009, that if the "issue of the identity of the arbitrator" was not resolved on that day Gama would "approach the Shareholder to intervene" and that "the allegations/ charges against Mr Gama arise from issues which are within the ambit and capability of the shareholder".
46. Transnet was not willing to make a further change to arbitrators in this way, for the following reasons:
- 46.1 Antrobus was proposed as arbitrator by Gama, and was accepted by Transnet.
- 46.2 Gama's representative had confirmed that there was no objection whatsoever to Antrobus as arbitrator.
- 46.3 There had been no rational or valid explanation for the "dispute" that allegedly existed as to the identity of the arbitrator.
- 46.4 There appeared to have been no factual basis for the earlier objection to Adv Myburgh SC either, who had been initially appointed as arbitrator (and accepted by Gama).

- 46.5 It could not reasonably be expected of Transnet to accept the appointment of another arbitrator in the circumstances.
- 46.6 Gama's approach on the issue appeared to be consistent with an ongoing attempt to delay having to deal with the merits of the allegations against him, or to disrupt the process established to do so.
- 46.7 It was unlikely that another arbitrator acceptable to both parties would be available on the dates agreed in January 2010, and there was no guarantee that another similar "dispute" would not be created in relation to any new arbitrator.
- 46.8 There was in fact no objection to Antrobus himself, who was proposed by Gama, and there now appeared to be a pattern of creating "issues" or "disputes" for no apparent purpose.
47. In those circumstances, Transnet decided to hold Gama to the appointment of Antrobus. Gama nevertheless continued, through his attorneys, to oppose attempts to convene the arbitration before Antrobus.
48. Transnet then put Gama on terms to accept that the arbitrator had been agreed. Langa reiterated Gama's stance that no arbitrator had been agreed.

**Decision to proceed by way of disciplinary enquiry instead of arbitration**

49. Ultimately, because of the risk of ongoing disputes about the identity of the arbitrator and the inevitability that this would simply delay the process further, Transnet elected to treat Gama's conduct as a repudiation of the arbitration agreement. It gave notice of its intention to proceed, instead, by way of a disciplinary enquiry that would not have the status of a final and binding arbitration process. The enquiry would be chaired by Adv Antrobus SC as an independent and impartial external enquiry chairperson.
50. Gama's attorney first threatened a further attempt to interdict the enquiry, but subsequently indicated that he would agree (with reservation of rights) to participate.

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### The disciplinary enquiry and its outcome

51. The disciplinary enquiry took place over 14 days between 13 January and 25 February 2010. Gama was represented by advocates G. Pretorius SC and V. Ngalwana. Transnet was represented by Advocate P. Pretorius SC.
52. Prior to presentation of closing argument, Gama's counsel initiated an attempt to negotiate an agreed termination of employment. An agreement on terms acceptable to Transnet was reached in principle between legal representatives, but Gama subsequently withdrew from this attempt to settle the matter.
53. The findings were ultimately delivered on Saturday, 5 June 2010. The delay was explained to the parties by the enquiry chairman as being a combination of the volume of evidence lead in the matter and pressures from other matters in his practice.
54. The findings ran to 200 pages. The conclusion was that 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 statements 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).

### Summary of key findings

55. The findings set out a very detailed analysis of the facts relating to each charge before setting out the conclusions on each. The key findings were as follows:
- 55.1 The chairperson dismissed a number of preliminary and technical points raised by Mr Gama (that Ms Ramos had considered the GNS allegations against him and dismissed them; that the delay in pursuing the 50 like new complaint was unreasonable; that the charges were too vague; and that Transnet was acting inconsistently in taking disciplinary action against Mr Gama).
- 55.2 On the GNS charge, the following extracts from the findings summarise the key conclusions on this charge:

"Clearly Gama ought to have known that what he was signing was a confinement. The document which he signed was headed "GNS confinement" and clearly reflects in no less than 15 places over 7 pages

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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."

....

"It is apparent that Gama failed to read and properly consider the documents placed before him by Beattie. .... Gama's explanation for his failure 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.

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."

....

"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. Later in the interview he repeated that Beattie *"would have shown the names of companies"* and that *"He showed me three companies in this document to say: These are the companies that we have interviewed."* 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."* 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.



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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 documentation though he accepted that he "perused" the documents 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 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.

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

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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*". 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. 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.

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. 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.

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 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."

55.3 The chairperson went on to consider whether it had been proved that Gama's conduct in fact constituted wilful misconduct rather than simply "clear and serious negligence". He concluded that it had not been shown, on the probabilities, "that Gama acted wilfully rather than merely negligently."

55.4 The chairperson concluded on this charge as follows:

"In conclusion therefore I find that on charge 1 Gama is guilty of misconduct in that:

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
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."

56. The essence of the chairperson's conclusions on the 50 "like-new" charge are set out in the following paragraph of the finding:

"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."

57. The key findings of the chairperson on the charge that Gama's criticism of Transnet executives and board was unwarranted and constituted misconduct are set out in the following passage:

"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 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, 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.

For these reasons I find that Gama is guilty of misconduct under this charge."

#### Dealing with the question of sanction

58. After these findings had been made, and in accordance with what had been agreed by the parties at the conclusion of the initial stage of the hearing, the matter was enrolled for evidence and submissions on sanction. Gama chose to submit written representations on sanction only, and his attorney gave notice that he would not attend the further hearing scheduled for that purpose. The only reason given for this was that he only wished to make written representations. Transnet lead evidence (which was unchallenged) and made submissions on sanction.

59. The chairperson subsequently made findings on sanction. The key findings were as follows:

59.1 On the general approach to deciding on sanction:

"A few opening remarks about the assessment of sanction and the question of evidence in mitigation or aggravation is relevant. "Mitigation" is really a criminal law concept with no place in employment law. When an employer determines that an employee should be dismissed for misconduct that is not an expression of moral outrage and is certainly not an act of vengeance. Rather it is, as has been pointed out by the Labour Appeal Court, "... a sensible operational response to risk management in the particular enterprise. So for example supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise."

59.2 After dealing with the evidence lead by Transnet on sanction, the chairperson set out his conclusions in relation to each of the three relevant charges:

"Charge 1 The negligence on Gama's part in signing the GNS confinement document is nevertheless particularly inexcusable as he is the authorised person with delegated authority on behalf of TFR who as such is the gatekeeper tasked with ensuring that contracts of that nature can only be concluded for a value of more than R 10 million if an open tender process has been undergone. He is the key person in the

procurement process whose duty it was to ensure that because the value of the contract exceeded his delegated authority for confinement a contract of that nature it could not be authorised by him where the contract was to be concluded following a confinement process. The failure of the CEO as the gatekeeper to bother to read the document which constitutes the approval in that situation can fairly be described as gross negligence. Undermining this governance process is a serious internal adverse consequence for Transnet Gama knew that security, and particularly security regarding cable theft, was a high priority and he should have taken particular care when authorising what he knew to be a security contract.

The consequences of the negligent misconduct in approving the GNS contract can also not be ignored. The consequences of Gama's failure to read the document placed before him by Beattie his General Manager meant that he failed to recognize that he was dealing with a confinement process and moreover that he was dealing with the contract concluded with a company controlled by a friend of his. The ensuing consequences of Gama's negligent conduct in relation to the interests of Transnet were testified to by Wells as described above. The undermining of the governance process in respect of procurement is an important factor. This is all the more so where special efforts had been made within TFR to ensure that of the procurement processes were of a high standard and properly in place. Wells' unchallenged evidence is that in consequence of what had occurred in relation to the security contract security within TFR was a real mess. There is in addition the consequence of the adverse publicity that has surrounded the GNS contract and consequent reputational damage to Transnet which is also a consequence of this negligence by Gama. There is no doubt that having regard to the *consequences* his negligent conduct that it must be regarded as serious.

Transnet is placed in a position where it can really not be confident once negligence of this nature has occurred that Gama will in future be sufficiently careful to ensure that he knows whether what he is signing is a confinement or an open tender contract. Gama is the CEO of the largest division in Transnet and in fairness the company cannot be expected to continue to employ him in this role while the company lives

with the doubt as to whether or not he will again in future make an error of this nature. An organisation like Transnet creates policies and procedures precisely so that it does not spend all day looking over the shoulders of its senior employees to ensure that they are properly fulfilling their tasks within those prescribed policies and procedures. As CEO Gama is a very senior guardian and keeper of this system and his failure to properly consider what he was signing in my view constitutes very serious negligence even though he relied on Beattie's guidance.

Taking all these factors into account the misconduct under this charge is of such gravity and seriousness in the case of such a senior employee that the appropriate sanction is dismissal, even on a first offence."

....

#### **\*Charge 2**

In relation to the 50 like new contract the negligent conduct of which Gama has been found guilty is that he signed the contract without ensuring that the assembly work would be secured to TRE. This was the single condition of the delegation to him of authority to implement the contract. The 50 like new contract was for a very large amount of money in excess of R800 million. In relation to the second charge it was submitted for Gama that it must be taken into account that his legal department viewed the contract and assisted and advised him. It is in respect of assessing the seriousness of this negligence importance to understand the evidence surrounding Gama's testimony that the Internal legal advisors were aware of and had applied their minds to the contract. The nub of the issue, as set out in paragraph 321 of the previous findings is that although the wording of the 50 like new contract had been considered by the legal team their focus had been on other aspects of the contract and Gama had not required them to focus specifically on ensuring that the contract was worded so that TRE would secure all the work as required by the boards condition. The point really is that whilst Gama may have genuinely been under the impression that he had obtained the necessary legal advice, in fact he had not done so given that he was not pursuing that particular question with the legal advisors. This



was ultimately his responsibility and is the reason why he was found guilty of negligent misconduct for having failed to ensure that the contract complied with the board resolution.

One must have regard to the fact that the board needs to be able to be confident that when it delegates authority to a divisional CEO subject to a particular condition, that he will take specific and reliable steps to ensure that that condition is complied with. In fairness to the Transnet board it would be a big ask for the board to be required to continue entrusting Gama with large management projects when he has exhibited negligent failure of this nature and with these consequences. Bearing all these factors in mind, the misconduct under this charge viewed in isolation would probably be sufficiently grave to warrant a sanction as severe as dismissal on a first offence."

#### **"Charge 4: Unwarranted criticism of Transnet and its executives**

....

A CEO is employed to make the decisions necessary for the successful and profitable operation of area of the company under his control. He must independently recognise when decisions are to be made, make those decisions correctly and ensure their effective implementation. He is employed in the position of CEO precisely because he is thought to have the insight, ability and experience to do this. Our Courts recognise that because of the gravity of the responsibility which a senior executive such as a CEO bears, and the dire consequences which can follow if he fails to properly discharge that duty, that the standard of conduct with which such an employee must comply is an exacting one.

Our courts have recognised that employees in senior management positions are in a completely different position from more menial employees in that simple lack of confidence in the ability or willingness of that senior manager to perform the job the way that the owners or other senior executives require it to be performed could justify dismissal.

In the context of this approach in our law, the evidence of Wells on sanction that the continued employment relationship remains intolerable

cannot be doubted. Gama's public statements demonstrate without doubt that there has been a total breakdown in trust and confidence between the parties. His contention that he would be prepared to discuss matters with Wells and apologise to him really takes the matter no further as the destruction of the relationship is far more wide ranging than merely the personal relationship between himself and Wells. In any event, although Wells testified that he would be prepared to accept such a personal apology, he would only do so in circumstances where Gama was prepared to admit that his public attacks on Transnet and its executives were made up of statements which were untrue and that he was prepared to publically recognise this and recant such statements. Wells correctly points out that even if this were to now occur the damage has been done and it would not be practically possible to run an organisation and to maintain discipline therein if the CEO were permitted to conduct himself in this way with impunity in the sense that he was able to retain his employment.

In relation to the fourth charge it was submitted for Gama that he was incited or provoked into making the statements which he did because Transnet was alleging that his actions were intentional and wilful and thereby insinuated that he had acted fraudulently and that corruption could not be excluded. It is submitted that this was a normal reaction for anybody accused of corruption and that Transnet had insisted right up until closing argument in the enquiry that Gama's conduct was wilful. It was argued that this showed that Transnet had not acted objectively and that Gama had every reason to react in the way in which he did. This argument overlooks the fact that although the previous findings concluded that it was ultimately not shown that Gama had knowingly and intentionally granted to the GNS contract to his friend General Nyanda, there was nevertheless considerable evidence which showed various other irregularities in the tender process related to the GNS contract and in the TFR security department. These irregularities were shown in circumstances where the GNS contract was in fact granted to a company owned and controlled by a friend of Gama's. The argument which I am in effect now asked to accept would amount to saying that Transnet should not have investigated these apparent irregularities and not viewed them as potentially wilful and corrupt. Clearly, an investigation was called for.



BG

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Matters looked very suspicious and at least in respect of Mr Gama the investigation into the GNS contract was not complete up until the conclusion of the disciplinary enquiry. In the end much turned on the fact that there was no available witness who could testify about exactly what had happened in Gama's one-on-one meeting with Beattie. Transnet was constrained to argue that an adverse inference had to be drawn before a finding could be made on the probabilities that Gama had intentionally engaged in corrupt conduct. Ultimately, that inference could not be drawn. But it does not follow that there was not a substantial amount of circumstantial evidence to support Transnet's case that the conduct may have been intentional. Gama's conduct in making public statements of the nature which he did while the jury was still out was always going to be risky. Not only did he run the risk that Transnet might ultimately prove a case of wilful misconduct, but he also ran the risk that even if he was proved right, his conduct would severely damage if not destroy his relationship with his employer and the other senior executives within Transnet. That is in fact what happened.

It was contended that the first and second charges are an entirely new formulation at Transnet as it has never occurred in the history of that company that a CEO or senior executive for that matter has been held to have committed misconduct for activities and practices that are usually automatically condoned and accepted by various mechanisms and committees within Transnet. Apart from the fact that there is no evidence to this effect, it seems to me that if the conduct in question amounts to misconduct and then it is misconduct quite regardless of what mechanisms and committees within Transnet may have to say about that. If this submission is an attempt to make out a case of inconsistency, then it is necessary to say no more than that I have already concluded in the previous findings that there is no merit in the case of alleged Inconsistency.

...

Then it was argued that as Gama's delegated authority in relation to the GNS contract was R 10 million and the contract value was R 18 million the amount for which he signed negligently in excess of his mandated

BG

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authority was only R 8 million and that this was a "minute level of detail" when considered in the context of this being a R20 billion turnover company and having regard to ordinary human frailty. This argument is breathtaking when one has regard to the fact that the R8 million concerns public funds and was contracted for in breach of stipulated and well known procurement procedures. I venture to suggest that the vast majority of South Africans would not consider the unauthorised expenditure of R8 million a minute level of detail. This argument only lends credence to Transnet's submission that Gama has consistently trivialised his misconduct.

[Note by BG: As indicated further below, Transnet ultimately paid R95 million to GNS pursuant to the contract authorised by Gama. This is the subject of separate civil proceeding by Transnet for the recovery of that amount, and of a criminal investigation as well.]

It was contended that the notion of an irretrievable breakdown in the relationship between an employer and employee should be viewed differently where government employees are concerned as opposed to the private sector. This is a novel submission. So far as I am aware there are not two separate arenas in which employment law principles operate when it comes to assessing misconduct and appropriate disciplinary sanctions. What makes it even more strange is that this submission is immediately followed by a statement in the same paragraph to the effect that I should consider the fact that Gama as CEO of a division of Transnet *"has turned around and contributed immense profits to the Transnet group"* which strikes me as a notion far more closely associated with the profit driven private sector than with public sector enterprises.

I would however comment that there is evidence to the effect that Gama was part of a team (and as the CEO no doubt an important part) which turned TFR around from a loss-making to a profit-making enterprise. This fact makes the fact that Transnet no longer wishes to employ Gama particularly tragic. The suggestion it seems is that because government is the shareholder of Transnet and only government can appoint the Group CEO of Transnet that relationships within the company are substantially

"entangled and synchronised with those of the public sector". It was submitted that it was therefore not up to an individual or group of individuals (a handful of Transnet management) to contend that there had been a breakdown in relationships and that they could no longer work together. There is no principle in our law which permits a shareholder to intervene in a company's disciplinary functions and an employee could legitimately complain if a shareholder did so. It seems to me that even if this is correct that only the government can determine the future of Transnet (which was not an aspect pertinently canvassed in evidence before this hearing) then "government" whatever that may entail in this context needs to take cognizance of the fact that the Acting Group CEO and other senior executives within Transnet no longer have a workable relationship with Mr Gama. ....

Transnet submits that no employment relationship can continue to exist in the circumstances of this public attack on its executives and on Transnet itself. In short, Wells' evidence on this aspect set out above is overwhelming and is un-contradicted. This charge goes to the heart of Transnet's loss of faith in Gama and there can be no doubt that dismissal is the only appropriate penalty for Gama's conduct under this fourth charge."

60. The chairperson concluded by making the recommendations on sanction, in the following terms:

**"Recommendations**

In conclusion I am satisfied that the appropriate sanction in respect of each of the charges viewed in isolation is dismissal.

Moreover, having regard to the unavoidable situation where the question of whether Gama should be dismissed or not entails a recognition that he is guilty of all three charges and that by their nature the misconduct is therefore to be viewed cumulatively, this serves only to emphasise that dismissal is the appropriate sanction.

Accordingly, the sanction which I recommend to Transnet is that of summary

dismissal of Mr Gama."

**Dismissal and dispute referred to the Transnet Bargaining Council**

61. Following this recommendation, Gama was dismissed.
62. Gama then referred a dispute to the Transnet Bargaining Council, alleging that his dismissal was unfair. In doing so, he was exercising rights conferred on him under the Labour Relations Act. It should be pointed out that if the disciplinary enquiry had taken place by way of pre-dismissal arbitration before Adv. Antrobus SC, as initially agreed by Gama and his legal team, Gama would have enjoyed no right to pursue a dispute in the bargaining council in this way, and the findings of Antrobus would have been final and binding on him. The reasons why the initial enquiry did not proceed by way of arbitration in this way are set out earlier.
63. In the bargaining council process Gama has, contrary to the approach adopted by him in the disciplinary process, now formally admitted that he was guilty of all three of the charges of misconduct of which he was found guilty in the disciplinary process. This has been recorded in a statement of case and pre-arbitration minute, and has been formally placed on record in the bargaining council proceedings. The only ground on which Gama claims that his dismissal was substantively unfair is that dismissal was not a fair sanction.
64. The bargaining council arbitration that will determine this question once and for all was scheduled by agreement to take place in the week of 24 January 2011. A decision by the arbitrator might reasonably have been expected to be made by mid-February 2011. However, the parties agreed that in light of ongoing attempts to settle the dispute, the arbitration should be postponed by agreement. No further dates have yet been set.

**Gama's weak prospects of success in the bargaining council arbitration**

65. The legal team representing Transnet in the bargaining council proceedings, including senior counsel, believes that on Gama's own current version (in which he admits guilt on all three charges) it is likely that the sanction of dismissal will be found by the agreed bargaining council arbitrator to have been a fair sanction.
66. In addition Transnet and its legal team have prepared, for the purpose of the bargaining council arbitration proceedings, to present facts and circumstances showing that Gama's

current version is in any event false in material respects. This further aggravates the seriousness of the misconduct, and makes it even more likely that the arbitrator will find Gama's dismissal to have been fair.

67. Further considerations to be taken into account are that:

- 67.1 the GNS contract approved by Gama has resulted in Transnet instituting civil proceedings (against GNS, now known as Abalozi) for repayment of R95 million that was in fact paid by Transnet under the contract. There is also a criminal investigation pending.
- 67.2 The disciplinary proceedings against Gama were instituted with due regard to Transnet's obligations under the PFMA, which required that disciplinary action be taken. Gama's dismissal took place following a properly and fairly constituted enquiry.
- 67.3 Transnet is required to take into account its duty to act consistently in the future when it imposes sanctions for instances of serious misconduct of the kind committed by Gama.
- 67.4 There would have to be compelling reasons not to abide by the outcome of a properly constituted disciplinary enquiry, and the outcome of the bargaining council arbitration mechanism that is prescribed by law (the Labour Relations Act) to determine a dispute about the fairness of a dismissal.

**IMPORTANT**

READ THIS FIRST

**WHAT IS THE PURPOSE OF THIS FORM?**

This form assists a person or organisation refers a dispute to the TBC.

**WHO FILLS IN THIS FORM?**

Employer, Union or employee.

**WHERE DOES THIS FORM GO?**

To the Secretary, Transnet Bargaining Council, P.O. Box 2951, Houghton, 2041, Fax no. (011) 486-1226.

A copy of this form must be served to the other party.

**OTHER INSTRUCTIONS**

Transnet Bargaining Council is a single employer Bargaining Council, covering only Transnet and its employees. If you are not working for Transnet you may have to refer your dispute to the CCMA, another council or other appropriate body.

**REFERRING A DISPUTE TO THE TRANSNET BARGAINING COUNCIL**

1. FOR CONCILIATION,
2. FOR ARBITRATION OR
3. FOR CON-ARB

**ADDRESSED TO:**

MR M MASHIYA  
GENERAL SECRETARY  
TRANSNET BARGAINING COUNCIL  
P.O. BOX 2951  
HOUGHTON Tel. (011) 486-3003/8 Fax. (011) 486-1226  
2041 E-Mail: [secretary@tbc.co.za](mailto:secretary@tbc.co.za) [www.tbc.co.za](http://www.tbc.co.za)

- **PLEASE COMPLETE ALL SUBTITLES IN FULL**
- **PLEASE COMPLETE IN CLEAR CAPITAL LETTERS.**
- **INCOMPLETE FORMS WILL BE RETURNED AS WELL AS THOSE FORMS THAT DO NOT HAVE THE ATTACHED PROOF OF BEING SERVED ON THE OTHER PARTY.**



**1) DETAILS OF PARTY REFERRING THE DISPUTE**Tick one box ☒

As the referring party, are you?

☒

An employee

☐

a Trade Union

☐

an employer

If more than one party is referring the dispute, write their details on a separate page and staple it to this form.

**(a) Detail of the referring party if the referring party is a Trade Union or an Employer**

Your contact details

Name: .....

ID Number: .....

Address: .....

Postal Code: .....

Tel: ..... Cell: .....

Fax: ..... Email: .....

Contact person: .....

**Alternate contact details of employee:**

Name: .....

Postal Address: .....

Postal Code: .....

Tel: ..... Cell: .....

Fax: ..... Email: .....

**(b) Details of the party/employee on whose behalf the dispute is being referred or details if the referring party is a non-unionised employee**Your name: **MR SIYABONGA GAMA** .....Name of Trade Union: **N/A**Employee Number: **CFK 653 R**.....Grade: **A**.....Employee Address: **POSTNET SUITE 165, P/B X23 GALLO MANOR, SANDTON 2025**Tel: **0118025139**..... Fax: **0118025583**.....Fax: ..... Email: **nanag@mweb.co.za**Depot: **N/A**.....

Alternative contact details of employee (e.g. A relative or a friend):

Name: **MR THEMBA LANGA**Address: **C/O LANGA ATTORNEYS 181 JAN SMUTS AVENUE, ROSEBANK OFFICE PARK, PARKTOWN NORTH, BLOCK B, GROUND FLOOR.**Tel: **0114473424**..... Fax: **0114472351**.....Fax: ..... Email: **langa@langaattorneys.co.za**



**2) DETAILS OF OTHER PARTY (THE OPPOSING PARTY)**Tick one box ☒**The other party is:**
☐ an employee
 ☐ a Trade Union

☒ **an employer**

**Name:** TRANSNET LTD  
**Address:** 49<sup>TH</sup> FLOOR, CARLTON CENTRE, 150 COMMISSIONER STREET , JOHANNESBURG

**Postal Code :** 2001.

**Tel:** 0113082719..... **Fax:** 0113082430.....

**E-mail:** pradeep.maharaj@transnet.co.za.....

Name of person dealing with the matter and other party's reference number (if known): **MR PRADEEPKUMAR MAHARAJ**.....

If more than one other party is involved in the dispute, write their details on a separate page and staple it to this form.

**3) NATURE OF THE DISPUTE**

What is the dispute about (tick only one box)?

☒ Unfair Dismissal – why were you dismissed?

☐ For misconduct

☒ Operational Requirements (retrenchment)

☐ For incapacity

☐ Constructive dismissal

☐ Unknown reason

☐ Unilateral change to terms and conditions of employment

☐ Interpretation/Application of Collective Agreement

☐ Freedom of Association

☐ Refusal to Bargain

☐ Other (please describe) .....

☐ Unfair Labour Practice

☐ Promotion, demotion, probation, training or provision of benefit, Unfair suspension or discipline short of dismissal

☐ Failure to reinstate or re-employ in terms of agreement

☐ Contravention of Protected Disclosures Act, 2000
**(Give details)**
☐ Mutual Interest

☐ Severance pay (S41 BCEA)

☐ S80 BCEA

If the dispute concerns an alleged unfair dismissal you must also tick the block describing the type of dismissal.

Summarise the facts of the dispute you are referring: **REFER TO STATEMENT AS PREPARED BY MY ATTORNEYS ATTACHED HERETO AS ANNEXURE A**.....

#### 4) SPECIAL FEATURES (IF ANY)

I/we would like to bring the following special features of this dispute to the attention of the Secretary:

Special features might be the urgency of a matter, the large number of people involved, important legal or labour issues etc.

#### 5) DATE OF DISPUTE

Dismissal disputes must be referred (i.e. received by the Transnet Bargaining Council) within 30 days of dismissal or if it is a later date within 30 days of the employer making a final decision to dismiss or to uphold the dismissal. If more than 30 days has elapsed since the date of the dismissal, you are required to apply for condonation.

(a) The dispute arose on: **24 AUGUST 2009**.....  
(give the date, or approximate date)

(b) Date of dismissal: **29 JUNE 2010**.....  
(Date)

(c) Was dismissal related to probation?

NO

How were you informed of your dismissal?

☒  
☐  
☐

In writing

Orally

Other

(d) In the case of an **UNFAIR LABOUR PRACTICE** dispute:

When did the act or omission giving rise to the unfair labour practice occur?

**29 JUNE 2010**

(Date)

#### 6) COMMENCEMENT OF EMPLOYMENT

When did you start working for the employer? **1 SEPTEMBER 1994**

#### 7) DETAILS OF DISPUTE PROCEDURES FOLLOWED

(a) Have you followed all internal grievance/disciplinary

☒

YES

☐

NO

Procedures before coming to the Transnet Bargaining Council?  
Describe the procedures followed: **REFER TO ANNEXURE A**

(b) In the case of a dismissal dispute - ☐ YES ☒ NO  
(i) Was the dismissal procedurally fair?

If no, why? **REFER TO ANNEXURE A**

(ii) Was the dismissal substantively fair? ☐ YES ☒ NO

If no, why? **REFER TO ANNEXURE A**

8) BUSINESS UNIT AND REGION

The dispute exists in the following Business Unit :

☒

**Tick one box only**

- |                                   |                                     |                               |                          |
|-----------------------------------|-------------------------------------|-------------------------------|--------------------------|
| Transnet Freight Rail             | <input type="checkbox"/>            | Transnet Port Terminals       | <input type="checkbox"/> |
| Transnet Group Services           | <input checked="" type="checkbox"/> | Transnet Rail Engineering     | <input type="checkbox"/> |
| Transnet National Ports Authority | <input type="checkbox"/>            | Transnet Properties / Propnet | <input type="checkbox"/> |
| Transnet Pipelines                | <input type="checkbox"/>            | Transnet Projects             | <input type="checkbox"/> |

Others (specify): TRANSNET LTD.....

The dispute exists in which region?

☐

**Tick one box**

- |                |                                     |               |                          |              |                          |
|----------------|-------------------------------------|---------------|--------------------------|--------------|--------------------------|
| Eastern Cape   | <input type="checkbox"/>            | Limpopo       | <input type="checkbox"/> | North West   | <input type="checkbox"/> |
| Free State     | <input type="checkbox"/>            | Mpumalanga    | <input type="checkbox"/> | Western Cape | <input type="checkbox"/> |
| Gauteng        | <input checked="" type="checkbox"/> | National      | <input type="checkbox"/> |              | <input type="checkbox"/> |
| Kwa-Zulu Natal | <input type="checkbox"/>            | Northern Cape | <input type="checkbox"/> |              | <input type="checkbox"/> |

Where did the dispute arise? Usually this will be the address of the workplace / region

Address in the region: **TRANSNET HEAD OFFICE, FLOOR 149 CARLTON CENTRE**.....

If you ticked **TRANSNET FREIGHT RAIL** in the box above:

Tick one box ☒

**Functional Area:**

Security  
Coal Line  
Infrastructure  
Ore line  
Resource Management


Intermodal &  
Automotive  
Finance  
Operations  
Other (Specify)


Where did the dispute arise? Usually this will be the address of the workplace / functional department.

Other (specify): **Management**.....

Address in the functional area (if it differs from paragraph 2):  
.....  
.....  
.....

9) INTERPRETER SERVICE

Do you require an interpreter? If **yes** please indicate which language:

Afrikaans  
Sepedi  
Tshivenda  
Isindebele  
Sesotho


Xitsonga  
Isixhosa  
Isizulu  
Setswana  
IsiSwati


Describe the outcome or result you would like from this referral. You are not bound by the proposals you make here.

10) DESIRED OUTCOME

The outcome I/we would like:

**I WOULD LIKE TO BE REINSTATED**.....

11) DISPUTE ABOUT UNILATERAL CHANGE TO TERMS AND CONDITIONS OF EMPLOYMENT [S64(4)]

Only fill this in if this is a dispute about unilateral change to terms and conditions of employment.

I/we require that the employer party not implement unilaterally the proposed changes that led to this dispute for 30 days, or that it restore the terms and conditions of employment that applied before the change.

Signed: ..... (Referring Party)

12) OBJECTION TO CON-ARB PROCESS

The Con-Arb process involves arbitration being held immediately after the conciliation if the dispute remains unresolved.

I/we object to the arbitration commencing immediately after the conciliation in terms of Section 191(5A) (c).

Signed: .....

If any party objects to the arbitration commencing immediately after the conciliation the party must submit a written notice in terms of the Bargaining Council Rules at least 7 days prior to the scheduled date of the conciliation. The parties must attend the conciliation regardless of whether it makes this objection.

If any party objects to the arbitration commencing immediately after the conciliation the party must submit a written notice in terms of the Bargaining Council Rules at least 7 days prior to the scheduled date of the conciliation. The parties must attend the conciliation regardless of whether it makes this objection.

### 13) INFORMING THE OTHER PARTY

Proof that a copy of this form has been sent could be:

- a copy of a Registered slip from the Post Office;
- a copy of a signed receipt if hand-delivered;
- a signed statement confirming service by the person delivering the form; or
- A copy of a fax confirmation slip.

A copy of this form has been sent to the other party to the dispute. Proof of this is attached to this form.

Signed at Pretoria North Date: 22 July 2010

Referring Party

### URGENT ATTENTION!!!!!!!!!!!!!!

DID YOU COMPLETE?

INDICATE WITH A TICK



- ✓ DETAILS OF TRADE UNION
- ✓ DETAILS OF EMPLOYER
- ✓ DETAILS OF EMPLOYEE
- ✓ NATURE OF DISPUTE
- ✓ DATE OF DISPUTE
- ✓ DESIRED OUTCOME
- ✓ PROOF OF SERVICE

✓
✓
✓
✓
✓
✓
✓

Annexure A

---

**STATEMENT**

---

- 1 I was employed as the Chief Executive Officer of Transnet Freight Rail (which was previously known as Spoornet). It is an operating division of Transnet Limited.
- 2 *Transnet Limited* is a parastatal, fully owned by the State. Its main office is at Carlton Centre, 150 Commissioner Street, Johannesburg. For convenience, I shall refer to it below as "*Transnet*".
- 3 I was permanently appointed in April 2006 in my current position, being that of Chief Executive Officer ("CEO") of Transnet Freight Rail (previously known as Spoornet), but I first commenced employment at Transnet in 1994.
- 4 I was dismissed subsequent to a dismissal hearing on the 29<sup>th</sup> of June 2010. I submit that my dismissal was procedurally and substantially unfair for reasons set out hereunder:

- 4.1 During August 2009, decision was taken by Mr. Pradeepkumar Maharaj, to proceed with an action against

- 2 -

09016

me. I submit that he was not duly authorised to take this decision.

4.2 Transnet first opted to proceed with a pre-dismissal arbitration, but later unilaterally changed their mind and imposed a disciplinary hearing on me. This unilateral change or imposition of their decision is procedurally unfair.

4.3 Transnet and I had reached an 'agreement' or 'negotiated understanding', whereby the presiding officer should not to have done work for Transnet for the reasonable period prior to the appointment of such a person but I then learned only after the delivery of the findings, that the presiding officer was a regular service provider to Transnet immediately prior to his appointment and the presiding officer continued to do work for Transnet even during the course of my hearing, and this aspect was admitted by Transnet's attorneys.

4.4 My contract of employment allows for termination in the event I am found guilty of **serious misconduct**. I was charged with misconduct. The presiding officer found me



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03/2016

guilty of misconduct and not of serious misconduct and therefore I contend that Transnet, is in violation of its own contract of employment as it filed charges based on alleged misconduct and not serious misconduct as contemplated in the employment contract, and sought for my dismissal, which is in fact the wrong sanction as the contract can only be terminated if I have been charged and found guilty of serious misconduct, and not misconduct. It is procedurally unfair to be dismissed in a manner that violates my employment contract.

4.5 The Transnet Compliance Mechanisms condone the conduct of exceeding authority for operational reasons if such is pointed out through the internal control system, which is generally performed by Internal Auditors, Ernest and Young. In this instance the internal auditors did not raise the 'lapse' in compliance process with me as they ought to do instead the internal auditors overzealously pursued a forensic investigation, instead of informing me of what they identified, which could have been remedied, in the normal way, and therefore it is not a reasonable rule or standard for dismissing an employee for a remediable

- 4 -

09006

demeanour such, as it was not a reasonable rule or standard of practice at Transnet. No CEO of the relevant subsidiary of Transnet has been charged or dismissed for such non compliance, in the history of Transnet, except for me. Transnet deliberately turned a management matter into a legal dispute.

4.6

There are many inconsistencies with the findings of the presiding officer and his conclusion and I submit that this amounts to substantive unfairness.

I submit that the disciplinary hearing was both substantive and procedurally unfair.

I reserve all my rights and more specifically my right to lead additional evidence not contained herein at the hearing of this matter, should it become necessary to do so.

**MR. SIYABONGA GAMA**



181 Jan Smuts Avenue  
Rosebank Office Park  
Block B, Ground Floor  
Parktown North  
PO Box 2138, Parklands, 2121

Tel: 011 447 3424  
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info@langaattorneys.co.za  
www.langaattorneys.co.za

Our reference: Mr Themba Langa/ Ms S Maharaj

Your reference: BC.GAMA/TNET (GR)/10934

**TO: MR CHRIS TODD**

Email: [c.todd@bowman.co.za](mailto:c.todd@bowman.co.za)

Dear Sirs,

14 October 2010

**RE: MR S GAMA/ TRANSNET GROUP**

We refer to the above.

1. In our preparation, we have encountered the difficulty or impossibility to canvass argument on 4.3 of our client's statement without canvassing the circumstances on 4.2 of our client's statement which we had excluded at the pre-arbitration conference minutes. We are of the view of resuscitating 4.2 of our client's statement, by amending the pre-arbitration minutes accordingly would alleviate the difficulty we are faced with, as 4.2 and 4.3 are intertwined. Unfortunately this paragraph was inordinately excluded as per the pre-arbitration minutes and we apologise for this. Our client has instructed us to persist with the issue, and we do not foresee any prejudice caused to your client as this issue was canvassed in our client's statement and therefore your client had full knowledge of the same.

A handwritten signature in dark ink, appearing to be 'FA' or similar, enclosed within an oval shape.

2.2



2. Secondly, we will raise the issue relating to 4.4 and 4.5 of our client's statement which relates to the sanction of dismissal.
3. Our client will not contest that he was guilty of the charges 1, 2 and 4 as found by the chairperson of the enquiry. Our client however, wishes to submit that dismissal was an inappropriate sanction.
4. In this respect our client intends leading evidence about the nature of the offence, his loyalty and commitment to the organisation, personal circumstances, length of service and any other mitigating circumstances that he believes are appropriate in order to challenge the fairness of sanction of the dismissal.
5. Our client also contends that the chairperson did not consider alternative sanctions to dismissal and that the sanction of dismissal was accordingly unfair and inappropriate.
6. We would require you to consider revising the pre-arbitration minutes to include paragraph 4.2 of our client's statement of claim and we confirm that our client will not persist with issues encompassed in paragraph 4.6 of the statement.
7. Our client will persist with his claim to be re-instated alternatively, payment of our client's salary for 24 months which will be calculated accordingly to the salary increases applicable to the employees of Transnet for the applicable years together with bonuses applicable for the 24 months which was generally calculated as 80% of the annual salary and all Long Term Incentive Bonuses for the years 2007, 2008 and 2009 and Short Term Incentive Bonuses for the year 2010 and a contribution towards legal costs in the amount of R 3 million.



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All our client's rights are strictly reserved.

Yours Faithfully,

LANGA ATTORNEYS

PER: SAMIKSHA MAHARAJ



"D"

**Chris Todd**

**To:** Chris Todd  
**Subject:** FW: Gama Siyabonga / Transnet Limited & 12 Others: Case No.09/38956  
**Attachments:** letter BG to Transnet\_24 01 11.pdf

**From:** Chris Todd  
**Sent:** 25 January 2011 11:06  
**To:** 'Ndiphiwe.Silinga@transnet.net'  
**Cc:** Zola.Stephen2@transnet.net; Siyabulela.Mapoma@transnet.net  
**Subject:** RE: Gama Siyabonga / Transnet Limited & 12 Others: Case No.09/38956

Dear Ndiphiwe

I confirm that we have carried out the instructions in your mail below. I attach a letter setting out certain considerations that may be important to the negotiations referred to in your mail.

Please keep us informed of any developments and do not hesitate to contact us if you have any queries or further instructions.

Kind regards

Chris

**Chris Todd**  
Director

**BG Bowman Gilfillan**

165 West Street, Sandton, Johannesburg  
P O Box 785812, Sandton, 2146  
South Africa

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E: [c.todd@bowman.co.za](mailto:c.todd@bowman.co.za)  
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**From:** Ndiphiwe.Silinga@transnet.net [mailto:Ndiphiwe.Silinga@transnet.net]  
**Sent:** 21 January 2011 10:23  
**To:** Chris Todd  
**Cc:** Zola.Stephen2@transnet.net; Siyabulela.Mapoma@transnet.net  
**Subject:** Gama Siyabonga / Transnet Limited & 12 Others: Case No.09/38956

Dear Chris

I refer to our telephone conversation this morning, in which you advised that Shares belonging to Mr Gama were attached pursuant to a Warrant of Execution Issued to recover costs awarded to some of the Respondents in the above matter.

FA

I confirm that the Acting Group Chief Executive and Chairman of the Board of Transnet, Mr Mkwana, has instructed as follows;

1. That any sale in execution of the shares or any property belonging to Mr Gama, attached pursuant to the aforementioned Warrant of Execution be cancelled forthwith,
2. That the shares or any property attached pursuant to the aforesaid Warrant of Execution be immediately released from judicial attachment, and
3. That the Warrant of Execution issued in this matter be held in abeyance until further instructions.

Regarding Mr Gama's appeal against the decision of the disciplinary hearing, that is set down for hearing before the Bargaining Council on Monday the 24 January 2011, your instructions are to postpone that matter sine die, to allow the negotiations between the parties to run their course.

Kindly act accordingly and advise once the above instructions have been acted upon.

Regards,

TRANSNET

Ndiphiwe Silinga  
Legal Advisor  
Litigation and Administrative Law Transnet Group Legal  
Transnet Limited

(011) 308 - 2350 0731774947  
(011) 308 - 2348 Ndiphiwe.Silinga@transnet.net  
www.transnet.net

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**BG Bowman Gilfillan**  
Attorneys

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PO Box 785812, Sandton, 2146, South Africa  
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Web www.bowman.co.za Docex no 6 jhb

Our Reference: C Todd  
Direct Line: (011 6699538  
E-mail Address: c.todd@bowman.co.za

Your Reference: N Silinga  
Date: 24 January 2010

### PER EMAIL

Transnet Limited  
Ndphiwe.Silinga@transnet.net

Dear Ndphiwe

### S GAMA vs TRANSNET LIMITED

1. We refer to your mail of 21 January 2011 in which you instructed us to terminate the steps that had been taken to recover the amount due by Mr Gama to Transnet, and to postpone the arbitration process scheduled to take place in the Transnet Bargaining Council from 24 to 28 January 2010 to allow negotiations between the parties to run their course.
2. We have carried out those instructions.
3. To ensure that we carry out our professional obligations as legal advisors to Transnet, and to enable Transnet to make a decision on possible settlement with the benefit of full knowledge of the present status of the dispute and the likely outcome of Mr Gama's challenge to the fairness of his dismissal, it is appropriate for us to record that:
  - 3.1 The amount due to Transnet by Mr Gama is due under an order of the High Court, and is not in dispute.
  - 3.2 Mr Gama has, in contrast to the approach adopted by him in the disciplinary process, now admitted in the bargaining council arbitration that he was guilty of all three of the charges of misconduct of which he was found guilty. The nature and seriousness of that misconduct on the part of a senior executive such as Mr Gama, and the effect of that misconduct on Transnet, are set out clearly in a number of extracts in the written findings. The written findings also identify a range of concerns about the credibility of Mr Gama's version in the disciplinary process.

Bowman Gilfillan Inc. Reg. No. 1997/011409/21 Attorneys, Notaries, Conveyancers, Patent and Trade Mark Attorneys

Directors: JH Schlesberg (Chairman) DB Allaway AG Anderson DP Anderson J Banoochai AM Barco-Webb TL Beins ARL Bertrand LM Botha  
CM Bouwer JWD Brand K Brink R EW Bursman VMM Cudman RMA Carr PM Carter GN Charnock RA Chester RA Cohen AJ Colegrave  
CN Cunningham GH Damant RA Davey MEC Davids DM Dees ID Dikadima TC Dini CR Douglas HD Gaffey BR du Plessis S Esterhuysen K Foad  
J Handberg L Helzer KA Fulton BJ Garven DJ Gerst M Gerber AA Gordon TJ Gordon-Smart K Goss A Hale M Haman AS Harris P Hart-Davies  
GB Higginbotham PA Hirsch EE Honey FB Joffe JR Kaapu AJ Keop CP Kennedy MG Khojane FJ Khoza J Kotze JG Kruger R Labuschagne HY Lohr  
T Laubscher RA Leigh DA Lotter PM Maduna M Makala DL Marriotti A McAllister JM McKinnell Y Meijer AJ Meirnsz L Meyer PH Modi  
KG Modine SN Mokate RPM Morison HL Mwangi AV Munro-Smith UEBU Nannem H Ngobho D Olivier LD Parker NF Perold BB Peterston  
JD Prain DM Pretorius MA Purchase CL Reddy ND Rieck MS Ruse G Rushon MY Sess KM Savage TR Sereto LC Shawe KZ Shole S Smit  
AM Smith CD Stein PW Stelling R Struhsman BCM Struydom TM Sulekazi MS Sufalman CFN Todd CE Tucker CL Valkin CL van Heerden  
FA van Hoogstraten RJ Van Voore NC Van Zuylen C Von Ludwig ER von Witt DS Webb W Weertman PE Whelan HJ Willemach SG Wilson  
DD Yull H Zondo-Kabini  
Consultants: RW Alberts DE Jooste V Mogg NG Tunbridge  
Special Counsel: MW Adecock | Chief Executive Officer: LA Kruger | Chief Financial Officer: H Wright

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B E M W E E

**LEX MUNDI**

THE WORLD'S LEADING ASSOCIATION OF INDEPENDENT LAWYERS

**BG** *Bowman Gilfillan*  
Attorneys

- 3.3 The legal team representing Transnet in the bargaining council arbitration, including senior counsel, is satisfied that even on Mr Gama's own current version it is likely that the sanction of dismissal will be upheld as fair for the three separate charges of misconduct of which he has now admitted guilt. The chairperson of the enquiry who reached this conclusion is a highly respected senior counsel and labour arbitrator who was initially proposed as arbitrator by Mr Gama and whose integrity has never been called into question.
- 3.4 In addition, Transnet and its legal team are aware of, and are ready to present in the bargaining council arbitration, further facts and circumstances that show that Mr Gama's current version is false in material respects. This significantly aggravates the seriousness of the misconduct and makes it more likely still that the bargaining council arbitrator will find Mr Gama's dismissal to have been fair.
4. We understand that the likelihood of success in the dispute may not be the only relevant consideration in deciding whether or not to settle and on what terms. It may, for example, make commercial sense to pay a settlement amount to eliminate further legal costs and to bring the dispute to an end. A further relevant consideration is that Transnet complied with a legal obligation under the PFMA when it instituted disciplinary action against Mr Gama, and it conducted a properly constituted enquiry pursuant to that obligation, which resulted in the dismissal.
5. We request, pursuant to our obligations as legal advisors to Transnet, that you bring the contents of this letter to the attention of the Chairman and acting Group Chief Executive. We are willing, if required, to meet to discuss the issues raised in this letter and the facts and circumstances relevant to the dispute that we have referred to earlier.

Kind regards  
Yours sincerely

  
BOWMAN GILFILLAN

"F"

Chris Todd

**To:** Chris Todd  
**Subject:** FW: Transnet and Gama  
**Attachments:** dispute referral and statement of case.pdf; Langa letter on issues in arbitration\_14 Oct 2010.pdf; Gama submissions in arbitration.pdf; report to Transnet\_2 Feb 2011.pdf

**From:** Chris Todd  
**Sent:** Thursday, 03 February 2011 11:20  
**To:** [swg@deneysreitz.co.za](mailto:swg@deneysreitz.co.za)  
**Cc:** [sbs@deneysreitz.co.za](mailto:sbs@deneysreitz.co.za)  
**Subject:** Transnet and Gama

Dear Sbu

I attach copies of the following:

1. Gama's dispute referral and statement of case in the bargaining council arbitration.
2. A letter from Langa attorneys dated 14 October 2010 setting out the issues in the arbitration. This letter narrows down the issues set out in the statement of case.
3. The submissions ("heads of argument") presented by Gama's counsel on the first day of the arbitration, in October 2010. These submissions were handed in as part of an opening address to identify and clarify what was at issue in the arbitration. The arbitration was then postponed by agreement to the week of 24 January 2011 for evidence and argument. On the 24<sup>th</sup>, although we were prepared to run the matter, the arbitration was further postponed by agreement, *sine die*, on the grounds of ongoing settlement discussions in which we are not involved.
4. A high level summary of the disciplinary process, from initial investigation to bargaining council arbitration, prepared yesterday for Transnet. I thought your counsel may find this useful to get an overview. I would be happy to elaborate and provide more detail on any aspect of the process set out in the summary, and to provide supporting documentation wherever this is available, if you or your counsel think necessary.

Please do not hesitate to contact me if you require anything further.

Kind regards

Chris

Chris Todd  
Director

**BG Bowman Gilfillan**  
ATTORNEYS-AT-LAW

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South Africa

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W: [www.bowman.co.za](http://www.bowman.co.za)

FA

Annexure 138  
TRANSNET  
"G"

## AGREEMENT

For Investigation and Gathering of High Level Information on  
Cable and Goods Theft and Reduction of Risk Exposure at  
Transnet Freight Rail

Between

### TRANSNET LIMITED

A limited liability company registered in the Republic of South  
Africa under registration number 1990/000900/23  
Trading as Transnet Freight Rail  
(Transnet or the "Client")

and

### GENERAL NYANDA SECURITY RISK ADVISORY SERVICES

A company registered in the Republic of South Africa under  
registration number 1998/012205/07  
(A division of General Nyanda Security Group)  
(The Service Provider or Contractor)

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## 1. DEFINITIONS AND INTERPRETATION.

- 1.1 In this Agreement (including the preamble and recodal which shall form part of this agreement), the following words and expressions shall, unless otherwise stated or inconsistent with the context in which they are used, when such words or expressions are used with a capitalised first letter, have the meanings assigned to them and cognate words or expressions shall bear corresponding meanings except where the context indicates otherwise.
- 1.1.1 "Agreement" means the agreement recorded herein and all Appendices and Annexure hereto.
- 1.1.2 "Business Day" for purpose of legal notices only, means any day of the week other than a Saturday, Sunday or a national public holiday recognised as such in the Republic of South Africa.
- 1.1.3 "BBBEE Act" means Broad Based Black Economic Empowerment Act, 53 OF 2003 as amended from time to time.
- 1.1.4 "Commencement date" means the date stipulated in this Agreement as the commencement date.
- 1.1.5 "Companies Act" means the Companies Act, 61 of 1973 as amended from time to time.
- 1.1.6 "Comprehensive Total Security Package" means the total security services to be provided by the Service Provider as set out in this Agreement.
- 1.1.7 "Confinement" means all the documents produced by Transnet and all documents submitted by the Service Provider in connection with the process followed to lead to the conclusion and signing of this Agreement.
- 1.1.8 "Contractual Documentation" means all bills, calculations, designs, drawings, programmes, reports, specifications, data, software, working papers, electronic financial models and other documents, matters or things collected or prepared by the Service provider in connection with the performance of the Services.
- 1.1.9 "Contract period" means the period stipulated in this agreement as the period this contract will run.
- 1.1.10 "OHS Act" means the Occupational Health and Safety Act 85 of 1993 as amended from time to time.

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- 1.1.11 "Parties" means the parties to this agreement jointly, being Transnet and General Nyanda Security.
- 1.1.12 "Party" means one of the Parties to this Agreement.
- 1.1.13 "Prime Rate" means the prime rate of interest published from time to time by the Standard Bank of South Africa Limited as its prime overdraft lending rate and certified as such by any manager of the said Bank, whose authority need not be proven and which shall, in the absence of any manifest error, be final and binding on the Parties.
- 1.1.14 "Proprietary Technology" means the various concepts, ideas, methods, methodologies, procedures, processes, know-how, and techniques; models (including without limitation, function, process, system and data models); templates; the generalized features of the structure, sequence and organization of software, user interface and screen designs, general purpose consulting and software tools, utilities and routines; and logic, coherence and methods of operation of systems which the Service Provider has created, acquired or otherwise obtain rights in;
- 1.1.15 "Rand" or "R" means the lawful currency or legal tender applied from time to time in the Republic of South Africa.
- 1.1.16 "Republic" means the Republic of South Africa.
- 1.1.17 "General Nyanda Security" or "The Service Provider", or "The Contractor" means General Nyanda Security (Pty) Ltd registration number 1990/012205/07 a limited liability Company registered in terms of the Companies Act, having its registered place of business at 3rd Floor 20 Baker Street Rosebank.
- 1.1.18 "Risks" means those events the occurrence of which would result in financial, proprietary or non proprietary loss or harm to Transnet.
- 1.1.19 "Transnet" means Transnet a public company with limited liability registered and incorporated in terms of the provisions of the Companies Act, having its principal place of business at 150 Commissioner Street, Carlton Centre, Johannesburg or such other address as maybe advised by Transnet.
- 1.1.20 "Transnet Freight Rail" or "TFR" means a division of Transnet.
- 1.1.21 "VAT" means value-added-tax levied in terms of the Value Added Tax Act, 89 of 1981 as amended from time to time.
- 1.2 In this Agreement, unless the context clearly indicates otherwise:
- 1.2.1 references to any statutory provisions include reference to any rules, regulations and any subordinate legislation made in terms from time

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to time under that provision and include that provision as amended or re-enacted from time to time;

- 1.2.2 words importing any particular gender include the other genders and the singular include the plural and vice versa;
- 1.2.3 reference to a "person" includes a natural person, a company, close cooperation or any other juristic person or other cooperate entity, a trust, partnership, joint venture, syndicate or any other association of persons;
- 1.2.4 reference to "subsidiary" or "holding company" shall be reference to a subsidiary or holding company as defined in the Companies Act;
- 1.2.5 if a definition imposes substantive rights and obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding the fact that they are contained in a definition;
- 1.2.6 If there is any conflict between the definitions in this Agreement and those in the Appendixes or Annexure hereto, then, for purposes of interpreting any clause in this Agreement, the definitions in this Agreement shall prevail and for purposes of interpreting a provision in the Annexure or Appendix, the definition in that Annexure or Appendix shall prevail over any other conflicting definition appearing anywhere in this Agreement;
- 1.2.7 where any number of days is stipulated, those days shall be reckoned exclusively or the first day and inclusively of the last day unless that last day falls on a day which is not a Business day, in which event the last day shall be next succeeding Business day;
- 1.2.8 where a day upon or by which an act is required to be performed not a Business day, the Parties shall be deemed to have intended such act to be performed on or by the next succeeding Business day;
- 1.2.9 any provision in this Agreement which is or may be illegal, invalid or unenforceable in any jurisdiction affected by this Agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated as having not been written (*pro non scripto*) and will be severed from the balance of this Agreement, without invalidating the entire Agreement or affecting the validity of such provision in any other jurisdiction;
- 1.2.10 reference to any amount shall be reference to that amount exclusive of VAT unless reference is made of the inclusion of VAT;
- 1.2.11 the rule of construction that if general words or terms are used in association with specific words or terms which are a species of a particular genus or class, the meaning of the general words or terms

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shall be restricted to that same class (i.e. *eiusdem generis* rule) shall not apply, and whenever the word "including" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given.

- 1.3 Clause headings are meant as a reference only and shall not affect the interpretation of this Agreement.
- 1.4 The expiration or termination of this Agreement shall not effect those provisions of this Agreement which by their very nature are meant to operate after such termination, or which as a matter of necessity must continue to have effect after such expiration or termination, notwithstanding the fact that such provisions themselves do not provide for such.
- 1.5 The provisions of this Agreement have been negotiated by the Parties and drafted for the benefit of the Parties and as such the rule of interpretation that the Agreement will be interpreted against the Party who drafted it (i.e. the *contra proferentem* rule) shall not apply.

## 2. PREAMBLE AND RECORDAL

- 2.1 Transnet has identified security risks to its operations as a result of theft and other criminal activity.
- 2.2 Transnet Freight Rail, a division of Transnet Limited, wishes to engage the services of a security specialist to provide a comprehensive total security package in all its operations throughout the Republic of South Africa as more fully set out in this Agreement.
- 2.3 General Nyanda Security, the provider of the above service has agreed to provide and assist in the implementation of the service referred to above and as more fully described in this agreement.
- 2.4 The Parties wish to record the terms of their Agreement in writing.
- 2.5 This agreement is read together with the following document;
- Annexure A - Project Cost Estimation
  - Annexure B - Key Performance Areas and Indicators
  - Annexure C - Project Cost

## 3. IMPLEMENTATION OF SERVICE

- 3.1 The scope of work contemplated in this Agreement shall involve the investigation, apprehension and assistance in the prosecution of the

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individuals and/or syndicates found to be responsible for cable theft and other criminal activity affecting Transnet Freight Rail nationally.

- 3.2 The scope of work shall include the development of investigations strategies and policies to address the Security and Risk Transnet is exposed to in cable and goods theft and to measurably reduce the incidents of these as set out in Annexure "B".
- 3.3 The service shall also include the monitoring and evaluation of the private security personnel posted to safeguard the railway line, infrastructure and freight.
- 3.4 The Service Provider shall provide a list of all the personnel to be deployed for this service including a list of their qualifications or certificates issued in terms of the legislation that governs the security and investigations professionals.
- 3.5 In the implementation of the service, the Service Provider shall do so in terms of the agreed Key Performance Indicators as set out in Annexure "B" to this Agreement.
- 3.6 The Service Provider shall conduct continuous Security Audits at Transnet's sites in terms of the key performance indicators as set out in Annexure "A".
- 3.7 The Service Provider shall conduct continuous Risk Audits at Transnet in accordance with the terms set in Annexure "B" hereto.
- 3.8 In the implementation of the service, the service provider shall do so in accordance with the following agreed categories of action:
- Category 1. Intelligence (Information gathering and analysis)
  - Category 2. Investigations and Analysis
  - Category 3. Monitoring and Evaluation
- 3.9 Transnet has the right to oversee, manage and direct the project anytime it deems necessary and the Service Provider shall commit the appropriate resources to comply with such request.

#### 4. CATEGORY 1 ACTIVITY- INFORMATION GATHERING AND ANALYSIS.

4.1 The Service Provider shall;

- 4.1.1 conduct a project brief to obtain an understanding of the scope of work required for the provision of the service.

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- 4.1.2 develop a systems description to build a database of knowledge of Transnet's rail business and processes and obtain an overview of all risks and threats facing the Client.
- 4.1.3 evaluate the applicable security standards.
- 4.1.4 provide intelligence on the high risk areas in the business of Transnet Freight Rail, including asset activity and the monitoring and surveillance of Transnet's assets.
- 4.1.5 shall gather intelligence and monitor incidents or suspected incidents of internal fraud.

## 5. EXECUTION OF CATEGORY 1 ACTIVITY.

### 5.1 The Service Provider shall:

- 5.1.1 provide personnel to be based at strategic locations in order to effectively monitor and provide surveillance on security related matters and occurrences regarding the objectives of this Agreement activity.
- 5.1.2 shall keep a record of all security related occurrences in an occurrence book and a daily activity report.
- 5.1.3 monitor and report all activities including but not limited to suspicious behaviour to that Manager responsible for the area or as advised by Transnet from time to time.
- 5.1.4 provide investigated information on all suspicious individuals and/or activity
- 5.1.5 meet with the designated Transnet representative to review progress and resolve any outstanding matters relating to gathering and analysis of information and also attend to requests arising from Transnet from time to time.

## 6. REPORTING OF CATEGORY 1 ACTIVITY.

- 6.1. The Service Provider shall prepare and submit a report on a monthly basis in detailing the Category 1 Activity.

TCS: [Signature] RM

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## 7. CATEGORY 2 ACTIVITY - INVESTIGATION AND ANALYSIS

- 7.1. The investigation and analysis shall include developing in-depth knowledge and understanding of the current security Risks and threats at all Transnet sites.
- 7.2. Define trends and tendencies to determine future Risks and recommend measures to handle these.
- 7.3. Develop a system(s) of effective data collection, research and analysis of historical and current trends and developments.
- 7.4. Undertake a detailed or micro assessment of each potential threat base on the risk improvement priority during the macro assessment.
- 7.5. Generate, verify and validate research data on new trends that pose the Risks and the methods to combat such threats.
- 7.6. Transnet shall provide the necessary human and technological capacity to enable the Service provider to carry out the above deliverables.
- 7.7. Transnet shall provide information on policies, procedures and also make available internal and external reports generated by or on behalf of Transnet.

## 8. EXECUTION OF CATEGORY 2 ACTIVITY

- 8.1. The Service Provider shall;
  - 8.1.1. develop an investigating strategy and policies.
  - 8.1.2. conduct investigations regarding stolen goods and cable theft in the different areas where such occurs.
  - 8.1.3. ascertain the perceived roles and interests of all the role players, including but not limited to, the South African Police Services and its employees, Government and crime syndicates.
  - 8.1.4. in consultation with Transnet, develop an action plan for the execution of the above service.
  - 8.1.5. collect data and information from sources, compile, maintain and collate this list for use by its researchers.
  - 8.1.6. consolidate all information gathered and results of any action taken and report to the Client in the specified reporting format.

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- 8.1.7. arrange together with the Client periodical meetings to discuss and resolve any outstanding issues, review progress or discuss and resolve any other matter that may need to be dealt with in the normal course of events. Such meetings will take place on a weekly basis and there shall be briefing session on a daily basis.

## 9. REPORTING OF CATEGORY 2 ACTIVITY

- 9.1 The Service Provider shall, in addition to the above, produce progress reports as set out in Annexure "B".
- 9.2 The Service provider shall develop an action plan that details matters requiring corrective action and strategies to implement such corrective action.
- 9.3 When the final report has been provided, The Service Provider shall consult with Transnet on its implications.

## 10. CATEGORY 3 ACTIVITY- MONITORING AND EVALUATION

- 10.1. In monitoring the Service Provider shall develop security objectives and procedure to avert the Risks contemplated in this Agreement.
- 10.1.1. The Service Provider shall develop system descriptions to build a body of knowledge and understanding of the existing Risks and security threats.
- 10.1.2. The Service provider shall obtain information and develop an overview of all Risks and security threats facing Transnet.
- 10.1.3. The Service Provider shall evaluate the applicable security standards and recommendations of the Risks assessment report obtained pursuant to this Agreement.
- 10.1.4. In planning the security strategy for Transnet, the Service Provider shall do so in conjunction with Transnet.
- 10.1.5. The Service Provider shall re-evaluate the level and quality of protection of high risk areas and provide advice on the required interventions.

## 11. EXECUTION OF CATEGORY 3 ACTIVITY

- 11.1. The Service Provider shall formulate security objectives and procedures to meet the stated objectives of this Agreement.

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- 11.2. The Service Provider shall, in consultation with Transnet, develop action plans to combat suspected fraud within Transnet and deploy security experts to monitor and evaluate the Risks and crime in certain identified areas and continuously conduct security audits.
- 11.3. The Service provider shall attend to any security related query or request by Transnet.
- 11.4. The Service Provider shall deploy teams to the various to conduct continuous security and fraud audits and provide security and fraud crisis management.
- 11.5. The Service Provider shall provide a security management strategy to ensure that Transnet is able to commence on an effective security service delivery.
- 11.6. The Service Provider shall develop an action plan to address matters requiring corrective action.
- 11.7. The Service Provider shall formulate security objectives and procedures and attend to any security related matters arising from this contract and as outlined by Transnet from time to time.

## 12. REPORTING OF CATEGORY 3 ACTIVITY.

- 12.1. The Parties shall hold meetings to resolve any outstanding issues relation to the above Category 2 Execution.
- 12.2. The Service Provider shall provide reports on a regular basis to Transnet from time to time) regarding its findings and recommendations.

## 13. DUTIES OF THE SERVICE PROVIDER

### 13.1. General

- 13.1.1. The Service Provider shall perform the Service detailed in this Agreement and the performance of the Services shall be in a manner most suited to the requirements of the Project and, where appropriate, in accordance with the reasonable instructions as may be issued by the Client from time to time.
- 13.1.2. The Service Provider shall take all measures necessary to comply with all laws and regulations in force from time to time in any place where the Services are to be wholly or partially performed.

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13.1.3. The Service Provider shall ensure that it and all its employees rendering the services pursuant to this Agreement are aware of and comply with The Private Security Industry Regulations Act 56 of 2001 and The Firearms Control Act, 60 of 2000, including any regulations and codes of conduct passed in terms thereof.

### 13.2. Provision of Personnel

13.2.1. The Service Provider shall provide and supervise such other suitably qualified and competent staff that is necessary for the performance of the Service by the Service Provider. Furthermore, the Service Provider shall provide the Client with details of the qualifications and experience of the staff provided.

### 13.3. Standard of Care

13.3.1. The Service Provider shall exercise all reasonable skill, care and diligence in the performance of the Services.

### 13.4. Manner of Working

13.4.1. The Service Provider shall;

13.4.2. Take instructions and directions and, where appropriate, receive the Client's decisions only through:

13.4.3. the Client's officially nominated Representative, or

13.4.4. subject to any limitations imposed by the Client and which are notified in writing to the Service Provider, such other person to whom the Client may nominate;

13.4.5. Keep the Client advised on all matters materially related to its performance of the Services according to the reporting formats specified by the Client in the Appendices to this Agreement.

13.4.6. Answer all reasonable enquiries received from the Client.

13.4.7. Render status reports on Project progress at such periods as the Client might instruct.

13.4.8. Attend or be represented at regular meetings as set out in the Appendices and such other meetings of which the Client might give the Service Provider Reasonable notice.

### 13.5. Accounts and Record Keeping

13.5.1. The Service Provider shall, in the case of cost reimbursable work, keep and maintain, in such form and detail as shall be notified by the Client, accurate and complete accounts in respect of expenditure incurred by it in connection with the performance of the Services for

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the purposes of making payment or settling accounts under this Agreement.

### 13.6. Conflict of Interest

13.6.1. On appointment and throughout the currency of this Agreement, the Service Provider must advise the Client if it considers that the continued performance of the Services will result in a conflict of interest with its other work.

### 13.7. Consents

13.7.1. The Service Provider shall be responsible for obtaining and maintaining all necessary consents required to perform the Services for which purpose the Client shall provide such assistance as the Service Provider may reasonably require

### 13.8. Duties Of The Client

13.8.1. Subject to reasonable notification of its requirements, the Client shall give to the Service Provider such instructions and/or decisions pursuant to this Agreement as are required to be given by the Client at such a time and in such a manner as shall enable the Service Provider properly to perform the Services.

13.8.2. The Client shall supply or make available to the Service Provider, without charge and in such time as not to delay or disrupt the performance of its duties under this Agreement, all data and information in its possession (except for data and information which is already in the public domain) which the Service Provider reasonably requires to perform the Services.

## 14. VARIATIONS

14.1. The Client may require the Service Provider to undertake variations, additions or other amendments to the Services. Such requests will be given in writing. Any additions or deletions from the Services that cause an increase or decrease to the remuneration to be paid by the Client to the Service Provider must first be agreed to in writing by the Client and the Service Provider before they can be implemented.

## 15. INTELLECTUAL PROPERTY RIGHTS

15.1. Except as provided below, upon full and final payment to the Service Provider of the fees, all deliverables provided by the Service Provider pursuant to this Agreement ("Deliverables") will become the property of the Client. To the extent that any Proprietary Technology is embodied in any of the Deliverables, the Service Provider hereby

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grants the Client, upon full and final payment to the Service Provider hereunder, a royalty-free, fully paid-up, worldwide, non-exclusive licence to use such Proprietary Technology in connection with the Deliverables.

- 15.2. Notwithstanding the fact that the Client owns or has the right to use the Deliverables, the Client acknowledges that the Deliverables have been prepared specifically for the circumstances and factors unique to the Client and not for any third party, including, without limitation, any holding, subsidiary or other associated company of the Client. Accordingly the Client hereby indemnifies and holds the Service Provider harmless against any and all claims arising out of the use of the Deliverables by any such third party without the prior written consent of the Service Provider.
- 15.3. To the extent that the Service Provider utilises any of its property (including, without limitation, the Proprietary Technology or any hardware or software of the Service Provider) in connection with the performance of Services hereunder, such property shall remain the property of the Service Provider and, except for the license expressly granted in clause 16.1, Client shall acquire no right, title or interest in such property.
- 15.4. The Service Provider shall indemnify the Client against all direct loss, damage, legal costs and professional and other expenses of any nature whatsoever incurred or suffered by the Client as a result of any dispute or contractual, delictual or other claims or proceedings brought against the Client by a third party alleging infringement of its intellectual property rights by reason of the use or exploitation of the Contractual Documentation, or by infringement of any patent, registered design, copyright, trademark, methodologies, computer programmes, formulae, analytical tools, electronic financial models or other intellectual property rights.
- 15.5. Any plans, drawings, documents, handbooks codes of practice, electronic data or other information (hereinafter called "the Documents") and any intellectual property contained therein, provided by the Client pursuant to this Agreement shall at all times remain its property and the Service Provider shall not use, reproduce, disseminate, adapt, transmit in any form or by any means the Documents or any part thereof or permit the same to be so used, reproduced, disseminated, adapted or transmitted as aforesaid or published other than for the purposes of carrying out its obligations under this Agreement. Forthwith upon completion of the work hereby agreed to be carried out, all the Documents shall be returned to the Client together with all copies thereof save for one copy of each of the Documents which may be retained by the Service Provider for their use as a record of the transaction only and for no other purposes.
- 15.6. The Service Provider shall notify the Client immediately if proposes to make application for letters patent in respect of any invention made by

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it or by its employees that arises from or in connection with this Agreement. Should such invention not be in breach of the Client's rights and should such invention be patentable, then the Client shall have the right (which shall be deemed to be a paid up licence) to make use of the invention covered by such patent (and pending the grant thereof) and to grant sub-licences in respect of any work to be carried out by or on behalf of the Client.

## 16. CONFIDENTIALITY AND SECURITY

- 16.1. Each party ("Receiving Party") shall treat and shall use its best endeavours to ensure that its employees, agents and Sub-Contractors, treat as strictly confidential, all information relating to this Agreement, the other Party ("Disclosing Party") and/or the Project of which it becomes aware as a result of performing or receiving the Services. The Receiving Party shall not and shall use its best endeavours to ensure that its employees and Sub-Contractors do not disclose any such information to third parties at any time except with the prior approval in writing the Disclosing Party. This obligation shall survive the expiration or earlier termination of this Agreement for a period of 5 years.
- 16.2. The obligations of confidence referred to in this Clause 16.1 shall not apply to any information which:-
- 16.2.1. is in the possession of and is at the free disposal of the Receiving Party or is published or is otherwise in the public domain prior to the receipt of such information by the Receiving Party;
- 16.2.2. is or becomes publicly available on a non-confidential basis through no fault of the Receiving Party;
- 16.2.3. is received in good faith by the Receiving Party from a third party who, on reasonable enquiry by the Receiving Party claims to have no obligations of confidence to the Disclosing Party in respect of it and who imposes no obligations of confidence upon the Receiving Party.
- 16.3. The Receiving Party shall not, except with the prior approval in writing of the Disclosing Party (which approval shall not be unreasonably withheld), publish, alone or in conjunction with others, any information relating to the performance of the Services.
- 16.4. The Receiving Party shall use its best endeavours to maintain an effective security system at its premises so as:
- 16.4.1. to keep safe and secure from any form of unauthorised interference any confidential information (including, but without limitation, any computer generated information) provided by the Disclosing Party and,

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18.4.2. to keep safe any property of the Disclosing Party in its care.

## 17. GIFTS AND PAYMENT OF COMMISSION

17.1. The Service Provider or any person acting on its behalf shall not:

17.1.1. offer, give or agree to give any person in the service of the Client or any other person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the obtaining or execution of this Agreement or any other contract with the Client or for showing or forbearing to show favour or disfavour to any person in relation to this Agreement or any other contract with the Client.

17.1.2. enter into this Agreement or any other contract with the Client in connection with which commission has been paid or agreed to be paid by it or on its behalf, or to its knowledge, unless before the Agreement or contract is made particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to the Client and the written approval of the Client has been obtained.

## 18. PAYMENT

18.1. The Service Provider's remuneration for the performance of the Services shall be as set out in the Cost Schedule Annexure "C".

18.2. The Service Provider shall invoice the Client on a monthly basis after completion of a monthly progress report submitted to Transnet as provided for in this Agreement. Transnet reserves the right to verify the accuracy of the report in terms of clause 19.

18.3. Should there be discrepancies relating to the invoices the Client shall pay those parts of any invoice not in dispute, and shall refer the disputed items to the Service Provider for correction. The Client shall also be entitled to invoke the provisions of Clause 19 below to verify any items on the invoice. The Client shall not be liable for any delays in payment arising out of incorrect items on invoices rendered.

18.4. The amounts payable in terms of Annexure C shall be the Service Provider's sole remuneration for the performance of the Services. Neither it nor any of its employees or Sub-Contractors shall accept any trade commission, discount, allowance or indirect payment or other consideration in connection with or in relation to the performance of the Services.

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**19. AUDIT**Sub-Contracting

- 19.1. The Service Provider shall afford access to the Client's authorised representatives at all reasonable times and upon reasonable prior notice to all data and information in its possession reasonably necessary to allow such authorised representatives to verify that the content of the Service Provider's invoices submitted under clause 18 represent charges that have been properly incurred.
- 19.2. The Service Provider shall comply with any reasonable instructions of the Client as to the matters covered in this clause 19 following an audit undertaken pursuant to this clause.

**20. ASSIGNMENT AND SUB-CONTRACTING**

- 20.1. Except with the prior written approval of the Client, the Service Provider shall not:
- 20.1.1. in whole or in part assign, transfer or otherwise dispose of its rights or obligations under this Agreement;
- 20.1.2. sub-contract, or otherwise transfer responsibility for the performance of the whole or any part of the Services.
- 20.2. Any sub-contract permitted by Sub-clause 20.1 shall be subject to the terms and conditions of this Agreement.
- 20.3. The appointment of any Sub-Contractor shall not relieve the Service Provider from any liability or obligation under this Agreement and the Service Provider shall be responsible for the acts, defaults and neglects of such Sub-Contractor as fully as if they were the acts, defaults or neglects of the Service Provider.

**21. LIABILITY OF THE SERVICE PROVIDER**

- 21.1. The Client will be relying upon the Service Provider's skill, expertise and experience in the provision of the Services and also upon the accuracy of all statements made and advice given by the Service Provider in connection with the provision of the Services and the accuracy of any Contractual Documentation.
- 21.2. Each Party (the Indemnifying Party) hereby indemnifies the other Party and its employees, officers and agents (the Indemnified Party) against direct damages, costs or losses incurred by the Indemnified Party arising out any claim by any third party for, or in respect of, injury, death or illness affecting such third party, or any loss or damage to property of such third party caused by the negligence or wilful misconduct of the Indemnifying Party or its

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Personnel (acting within the course and scope of its employment or appointment with the Indemnifying Party).

- 21.3. The Indemnified Party shall give the Indemnifying Party prompt written notice of all such third party claims and subject to the Indemnifying Party providing the Indemnified Party adequate security to the satisfaction of the Indemnified Party for the payment of all such claims and costs, including attorney and client costs which may arise relating to such claims, the Indemnifying Party shall have the authority to assume and control the defence thereof, including appeals, and to settle same. The Indemnified Party shall furnish the Indemnifying Party with all reasonable assistance to facilitate the defence and/or settlement of any such claim.
- 21.4. The Indemnifying Party's liability pursuant to the indemnity in clause 21.2 shall be reduced proportionately to the extent that any act or omission of the Indemnified Party contributed to the damages, costs or losses.
- 21.5. The Service Provider undertakes to:
- 21.5.1. maintain, or procure the maintenance, at its own cost, of public liability insurance for an amount not less than the total value of fees and expenses stated or R1 million whichever is the lesser amount,
- 21.5.2. maintain, or procure the maintenance, at its own cost, professional indemnity insurance to ensure that its activities under this Agreement are insured and remain insured under an annual Professional Indemnity policy or policies for an amount of R1 million.
- 21.5.3. if requested by the Client, submit to the Client a certificate signed by the Service Provider's insurers or the insurer's appointed agents confirming that the Service Provider is insured in accordance with the requirements of this Clause 21.
- 21.5.4. from time to time on request produce evidence to the Client that such insurance cover remains in force.
- 21.6. The Service Provider shall at all times:
- 21.6.1. use its reasonable endeavours to check and verify that the data, information, plans, drawings, documents, handbooks and codes of practice supplied by the Client are accurate and
- 21.6.2. notify the Client immediately it discovers errors or discrepancies in the data, information, plans, drawings, documents, handbooks and codes of practice supplied by the Client.
- 21.7. The provision of this Clause 21 (other than 21.4) shall survive the termination of this Agreement for any reason.

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## 22. FORCE MAJEURE

- 22.1. Neither party shall be responsible for any delay or failure to perform its obligations under this Agreement if the delay or failure is attributable to an event of *force majeure* as defined in Sub-clause 13.4. Should the performance by either party of its obligations under this Agreement be prevented or adversely affected by an event of *force majeure*, it shall forthwith give notice to the other party in writing of the event of *force majeure* and the likely impact on the performance of that Party's obligations under this Agreement. In either case the Client may, if it considers it appropriate, issue an instruction to the Service Provider under Sub-clause 14.1.
- 22.2. In the event of the happening of a *force majeure* event which delays performance of the whole or a substantial part of the Services for more than sixty (60) days, either Party shall have the right, at the expiration of such period upon having given not less than 14 days' prior notice in writing to the other Party, to terminate this Agreement forthwith.
- 22.3. In the event of the happening of a *force majeure* event which delays performance of the whole or a substantial part of the Services for more than thirty (30) days, the Client agrees to make payment to the Service Provider for work done prior to the *force majeure* event.
- 22.4. For the purposes of this Clause, an event of *force majeure* shall mean any unforeseen and unavoidable event beyond the reasonable control and contemplation of the Party invoking the existence of such an event.

## 23. SUSPENSION

- 23.1. The Service Provider shall, on the written instructions of the Client, suspend the performance of the Services or any part thereof for such time and in such manner as the Client may require, subject to reasonable notice being given of any such required suspension.
- 23.2. Where the performance of the Services or any part thereof has been suspended under Sub-clause 24.1. and the Services are to be resumed, the Client shall grant the Service Provider a reasonable period of time in order to resume performance of such Services.
- 23.3. Unless any suspension is:
- 23.3.1. otherwise provided for in any provision of this Agreement, or
- 23.3.2. necessary by reasons of some default of, or breach by, the Service Provider of any provision of this Agreement.

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- 23.4. The Service Provider shall be entitled to reimbursement of its reasonable costs or expenses caused by such suspension.

## 24. COMMENCEMENT OF SERVICES AND DURATION OF AGREEMENT

- 24.1. The Agreement shall be deemed to have commenced on the 1<sup>st</sup> December 2007 and terminates on the 30<sup>th</sup> November 2008.
- 24.2. This Agreement can be terminated by Transnet after giving one month's written notice to the other party of its intention to do so.

## 25. DEFAULT AND TERMINATION

- 25.1. Either party shall have the right to terminate this Agreement forthwith by notice in writing to the other party if the other party.
- 25.1.1. commits a material breach of this Agreement which in the case of a breach capable of remedy shall not have been remedied within 14 days of the receipt by the other party of a notice from the innocent party identifying the breach and requiring its remedy.
- 25.1.2. is unable to pay its debts or enters into compulsory or voluntary liquidation (other than for the purpose of effecting a reconstruction or amalgamation in such manner that the company resulting from such reconstruction or amalgamation if a different legal entity shall agree to be bound by and assume the obligations of the relevant party under this Agreement) or compounds with or convenes a meeting of its creditors or has a receiver or manager or an administrator appointed or ceases for any reason to carry on business or takes or suffers any similar action which in the opinion of the party giving notice means that the other party may be unable to pay its debts.
- 25.2. On receipt of such notice the Service Provider shall ensure that expenditure under this Agreement is reduced as rapidly as possible and the Service Provider shall take immediate steps to bring an end to the Services in an orderly manner.
- 25.3. The Service Provider may terminate this Agreement forthwith if the Client has, within a period of 60 (sixty) days after the due date, failed to pay any amount due from it and in respect of which no bona-fide dispute has arisen.
- 25.4. In the event of this Agreement being terminated under Sub-clause 26.1.2 the Client shall indemnify the Service Provider against any commitments made prior to the giving of such notice to the extent that:

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25.4.1. they represent liabilities or expenditure which are reasonably and properly chargeable by the Service Providers to the Client in connection with the performance of the Services.

25.4.2. but for this indemnity they would otherwise represent an unavoidable loss to the Service Provider.

25.5 Termination of this Agreement for whatever reason shall not affect the accrued rights of the parties hereto arising in any way out of this Agreement as at the date of termination and, in particular but without limitation, the right to recover damages against the other and all provisions which are expressed to survive this Agreement shall remain in full force and effect.

## 26. DISPUTE & RESOLUTION

26.1. Any dispute arising in connection with the Services which cannot be resolved by the representatives of the Client and the Service Provider involved in the provision of the Services shall; in the first instance, be referred to the Senior Managers of the parties for resolution.

26.2. In the event that the Senior Managers cannot, within a period of 14 days resolve the dispute to their mutual satisfaction the dispute shall be referred to an independent mediator appointed by the Senior Managers for this purpose.

26.3. If the mediator cannot procure resolution of the dispute, either Party may approach a court of appropriate jurisdiction for relief.

## 27. COMMUNICATION AND NOTICES

27.1. Any communication, notification, submission, demand or request required to be transmitted under this Agreement shall be deemed to have been duly transmitted if it shall have been delivered by courier, first class mail, or facsimile by either Party to the other at the appropriate address or facsimile number indicated in Sub-clause 18.2 below or at such other address or facsimile number as that other Party may have indicated in writing. In the case of delivery by courier, delivery shall be proved by evidence of receipt. In the case of delivery of first class mail, delivery shall be deemed to have occurred two days after evidence of posting; in the case of facsimile, delivery shall be proved by production of a clear confirmation of printing.

27.2. Notices shall be delivered to the following physical addresses or facsimile numbers:

For the Client

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Transnet Freight Rail – Supply Chain Services  
Carlton Centre 33<sup>rd</sup> Floor  
150 Commissioner Street,  
Johannesburg  
Tel: (011) 308 1302  
Fax: (011) 308 2946

For the Service Provider:

General Nyanda Security Trading (Pty) Ltd  
3<sup>rd</sup> Floor  
20 Baker Street (cnr Cradock Avenue)  
Rosebank  
Tel: (011) 880 9720  
Fax: (011) 880 9723

### 27.3. Use of Electronic Mail

- 27.3.1. Electronic mail (E-mail) shall be acceptable for the transmission of day-to-day data related to the Services between the Client and the Service Provider. However, formal notices and communications served under any clause of this Agreement shall use the methods described in Clause 27.1 and 27.2 of this Agreement.

## 28. LIMITATION OF LIABILITY

- 28.1. Notwithstanding the form (whether in contract, deed, or otherwise) in which any legal action may be brought, and subject to the provisions of clause 28, the Service Provider's maximum liability for general and/or direct damages for any breach of this Agreement or any wilful or negligent misconduct or omission arising during the course and scope of fulfilling its obligations in terms of this Agreement, shall be limited to an aggregate amount of all the Fees paid by the Client to the Service Provider during the 12 (twelve) month period preceding the date on which the relevant cause of action first arose. Such maximum amount shall be an aggregate amount for all claims thus arising.
- 28.2. Neither Party shall be liable for any loss of profits, goodwill, business, clients, contracts, revenue, the use of money, anticipated savings or data; or any special, indirect or consequential loss and such liability is excluded whether it is foreseen, foreseeable, known or otherwise. For the purposes of clarity it is recorded that the provisions of this clause 28.2 apply whether such loss is direct, indirect, consequential or otherwise, but shall not apply to any claim by the Service Provider in respect of any fees payable by the Client for Services rendered, or in respect of same relating to the remaining term of this Agreement.

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## 29. NON-SOLICITATION

- 29.1. The Parties agree that neither Party shall, without the prior written consent of the other, either during, or within 12 (twelve) months of the termination of this Agreement, engage, employ or otherwise solicit for employment whether directly or indirectly, any person who during the currency of this Agreement was a member of the Staff of the other Party involved in the acquisition or provision of Services in terms hereof. To the extent that either Party breaches this provision ("the Defaulting Party"), such Party shall pay the innocent Party a recruitment fee equal to half the gross annual package (or annualised annual package if applicable) (including any quantifiable bonuses or incentives) paid by the innocent Party to the person concerned. Such amount shall be payable within 30 (thirty) days of commencement of such person's appointment with the Defaulting Party.

## 30. GENERAL

- 30.1. This Agreement shall be governed by and be construed in accordance with South African law.
- 30.2. All documents and communications generated by, or required pursuant to, this Agreement shall be in the English language. In the event that any document or communication is translated from any other language then its English text alone shall be authoritative.
- 30.3. If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such invalidity, unenforceability or illegality shall not prejudice or affect the validity and legality of the remaining provisions of the Agreement.
- 30.4. This Agreement constitutes the complete understanding of parties concerning the Project and the performance of the Services and supersedes all prior negotiations and agreements (written or otherwise) between them.
- 30.5. The terms of this Agreement may not be varied except by an agreement in writing signed by the parties.
- 30.6. No waiver by either party or any other default by the other in performance of any of the provisions of this Agreement shall operate or be construed as a waiver of other or further default whether of a like or different character.

## 31. SAFETY CLAUSE

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- 31.1 The parties agree on the following arrangements in terms of the Occupational Health and Safety Act (OHS), to ensure compliance by the Contractor with the provisions of the said Act
- 31.1.1. that the Contractor is an "employer" in its own right as defined in the section 1 of the OHS Act and that it must fulfil all its obligations as an employer in terms of the said Act.
- 31.1.2. the Contractor shall comply with the requirements of the OHS Act in its entirety.
- 31.1.3. where special permits are required, such as electrical switching, hot work permits, etc. the Contractor shall obtain them from Transnet for this purpose, and all requirements of the Contractor must rigidly comply with the permit.
- 31.1.4. the Contractor must appoint Health and Safety Co-ordinator to liaise with Transnet on matters pertaining to Occupational Health and Safety.
- 31.1.5. the appointed Safety Co-ordinator must liaise at least once a week with Health and Safety Section / Risk Manager / Occupation Risk Manager and Transnet.
- 31.1.6. the Contractor shall furnish the Health and Safety Section / Risk Manager / Occupation Risk Manager of Transnet immediately with full particulars of any sub-contractor which may involve in the Contract in order that the sub-contractor himself can be made aware of all the issues pertaining to the Health and Safety.
- 31.1.7. the Contractor shall advise the Health and Safety Section / Risk Manager / Occupation Risk Manager of Transnet of any hazardous situations which may arise from the work being performed either by the Contractor or its sub contractor.
- 31.1.8. copies of all appointments required in terms of the OHS Act must be given to Health and Safety Section / Risk Manager / Occupation Risk Manager Transnet.
- 31.1.9. a letter good standing in terms of Section 80 (Employer to register with the Compensation Commissioner) of the Compensation Occupational Injuries and Diseases Act 1993 (Act 130 of 1993) must also be furnished.
- 31.1.10. all clauses in the Tender documents pertaining Health and Safety forms an integral part of this Agreement and non-compliance therewith may be construed as a breach of this Agreement.
- 31.1.11. all loading and removal operations must be strictly in accordance with the OHS Act.

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31.1.12 Insurance against accidents and 3<sup>rd</sup> party loss will be for the Contractor's account.

## 32. BROAD BASED BLACK ECONOMIC EMPOWEMENT

- 32.1. The Contractor warrants to comply with the requirements of the BBBEE Codes of Good Practice as gazetted in December 2005 and February 2006.
- 32.2. The Contractor warrants that the Black ownership (narrow based BEE) and/or BBBEE status of the company shall remain the same and or improve whilst the agreement/contents/annexures are in place.
- 32.3. The contractor shall submit a detailed BBBEE strategy and plan for the first five years.
- 32.4. The contractor shall submit its BBBEE certificate and detailed scorecard to Transnet Freight Rail on or before the expiry of the current BBBEE certificate.

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## SIGNATORIES

## 1. SERVICE PROVIDER/CONTRACTOR

1. RELIABLE MISOKEENG (full names)  
 in my capacity as PROJECTS MANAGER of General  
 Nyanda Security (Pty) Ltd do hereby acknowledge that I have read and  
 understood all the terms and conditions as set out in all pages of this  
 document, and I accept them on behalf of the aforementioned company  
 unconditionally by my signature hereto.

1. B. NTSINGILA  
[Signature]  
 Witness

[Signature]  
 General Nyanda Security (Pty) Ltd

Date: (Day/Month/Year):

02 JUNE 2008

Place (City or Town):

PARKTOWN

## 2. TRANSNET FREIGHT RAIL

1. PETER FEARNHEAD (full names)  
 in my capacity as CHIEF OPERATING OFFICER of Transnet  
 Freight Rail do hereby acknowledge that I have read and understood all the  
 terms and conditions as set out in all pages of this document, and I accept  
 them on behalf of the aforementioned company unconditionally by my  
 signature hereto.

1. [Signature]  
 Witness

P. Fearnhead  
 Transnet Freight Rail

Date: (Day/Month/Year):

04 JUNE 2008

Place (City/Town):

PARKTOWN

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ANNEXURE A

EMPLOYEE PROJECT NAME LIST

1. Project management

First name	Surname	National I.D. number	Designation	Telephone number	Fax number	E – mail address
			Director			
			Coordinator			

2. Investigations

First name	Surname	National I.D. number	Designation	Telephone number	Fax number	E – mail address
			Manager			
			Investigators X 8			

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## 3. Monitoring and Evaluation

First name	Surname	National I.D. number	Designation	Telephone number	Fax number	E-mail address
			Manager			
			Researcher X 8			

## 4. Information gathering and analysis

First name	Surname	National I.D. number	Designation	Telephone number	Fax number	E-mail address
			Manager			
			Handlers X 8			
			Sources X 20 (Confidential)			

725  
RM  
EDN

29

167

## ANNEXURE B

## Project Key Performance Areas and Indicators

Role	Responsibility Output (KPA)	Key Performance Indicators (KPI)
Project Director	<ul style="list-style-type: none"> <li>Will be based at Transnet Freight Rail.</li> <li>Will deal with all three arms of the project.</li> <li>Facilitate relevant project planning meetings.</li> <li>Ensure deadlines are met.</li> <li>Ensure accountability of all involved in the project.</li> </ul>	
Project Coordinator	<ul style="list-style-type: none"> <li>Manage the relationship with the client.</li> <li>Will be based at Transnet Freight Rail.</li> <li>Will coordinate the three arms of the project.</li> <li>Report to the Project Director.</li> <li>Brief and Debrief managers.</li> <li>Provide overall project management</li> <li>Liaise with the relevant stakeholders to ensure smooth running of the project.</li> </ul>	
Investigations Manager	<ul style="list-style-type: none"> <li>Coordinate and manage all the investigators.</li> <li>Collate reports from investigators and other source of information.</li> <li>Delegate tasks to investigators.</li> <li>Verify information from investigators</li> </ul>	
Investigators	<ul style="list-style-type: none"> <li>Physically conduct the investigations</li> <li>Liaise with the relevant law enforcement</li> </ul>	

	agencies. o Compile and submit weekly reports to the manager.	
Manager: Monitoring and Evaluation	o Provide overall monitoring and evaluation guidance. o Develop a concept document and project implementation plan for the project. o Coordinate and participate in meetings with client	
Researchers	o Conduct regular site visits to all Transnet Freight Rail sites. o Collate information from subcontractors. o Monitor the database of all the subcontractors.	
Manager: Intelligence	o Collate information and verify its accurateness. o Compile and submit weekly reports. o Liaison with the relevant law enforcement agencies.	
Handlers	o Protect the confidentiality of handlers. o Gather information directly from the source o Compile a list of sources and maintain the list o Collate information from the source and report to the manager.	

## ANNEXURE C

## PROJECT COST:

The following budget is based on cost estimated using current resources available; the costs include disbursements and any other project related costs. V.A.T. Excl.

RESOURCE	COST/MONTH
Project Director	R 40 000-00
Project Co-ordinator	R 25 000-00

## INVESTIGATIONS


RESOURCE	COST/ HOUR	COST/ MONTH
Manager		R 25 000-00
Investigators x10	R320	R 537 600-00
TOTAL		R 562 800-00

## MONITORING &amp; EVALUATION

RESOURCE	COST/ HOUR	COST/ MONTH
Manager		R 25 000-00
Researchers x 8	R320	R 430 080-00
TOTAL		R 455 080-00

## INTELLIGENCE

RESOURCE	COST/ HOUR	COST/ MONTH
Manager		R 25 000-00
Handlers x 8	R320	R 430 080-00
Informers x 20	@ 2000/ month each	R 40 000-00
TOTAL		R 495 080-00
SUB-TOTAL		R 1 577 760-00
TOTAL PER ANNUM		R 18 933 120-00

 ESN  
 Pcs RM



PH. 128

ORIGINAL

GRIFPIER VAN DIE SUID-GAUTENG  
HOOGGEREGSHOF JOHANNESBURG  
PRIVAATSAK/PRIVATE BAG X7

2010-10-27 CASE NO. 10/143494

JOHANNESBURG 2000  
REGISTRAR OF THE SOUTH GAUTENG  
HIGH COURT JOHANNESBURG

COMBINED SUMMONS

IN THE SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

In the matter between :

**TRANSNET LIMITED**

and

**ABALOZI RISK ADVISORY SERVICES (PTY) LIMITED****SHERIFF SANDTON****28 OCT 2010**

Plaintiff

TEL: 781-3445

Defendant

TO: THE SHERIFF OR HIS DEPUTY

**INFORM ABALOZI RISK ADVISORY SERVICES (PTY) LIMITED**, a duly incorporated company, having its registered offices at 3<sup>rd</sup> Floor, 20 Baker Street, Rosebank, Johannesburg, hereby institutes an action against the Defendant in which the Plaintiff claims the relief and on the grounds set out in the Particulars of Claim annexed hereto (hereinafter called "the Defendant")

**THAT**

**TRANSNET LIMITED**, a duly incorporated company in terms of Section 2 of the Legal Succession to the South African Transport Services Act, 1989, having its principal place of business at the Carlton Centre, 150 Commissioner Street, Johannesburg, Gauteng (hereinafter called "the Plaintiff")

hereby institutes action against Defendant in which action the Plaintiff claims the relief and on the grounds set out in the particulars annexed hereto.

**INFORM** the Defendant further that if it disputes the claim and wishes to defend the action it shall:-

- (i) within 10 (ten) days after the service upon it of this Summons, file with the Registrar of the High Court, South Gauteng, Johannesburg, notice of its intention to defend and serve a copy thereof on the Plaintiff's Attorney, which notice shall give an address (not being a post office or poste restante) as

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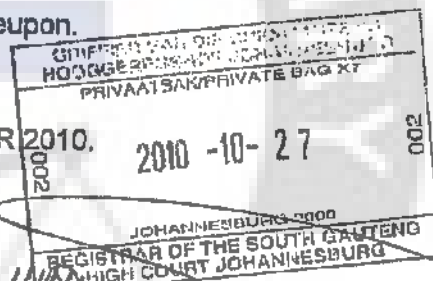
referred to in Rule 19 for the service upon the Defendant of all notices and documents in the action;

- (ii) thereafter and within 20 (twenty) days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the Plaintiff a Plea, exception or an Application to Strike Out (with or without a counterclaim).

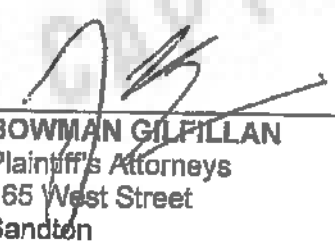
**INFORM** the Defendant further that if it fails to file and serve notice as aforesaid, Judgment as claimed may be given against it without further notice to it, or if having filed and served such notice, it fails to plead, except, make application to strike out or counterclaim, Judgment may be given against it.

**AND** immediately thereafter serve on the Defendant a copy of this Summons and return the same to the Registrar with whatsoever you have done thereupon.

DATED at JOHANNESBURG this the 27<sup>th</sup> day of OCTOBER 2010.



REGISTRAR OF THE HIGH COURT  
SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

  
BOWMAN GILFILLAN  
Plaintiff's Attorneys  
165 West Street  
Sandton  
(P O Box 785812, Sandton, 2146)  
Tel: 011-669-9000  
Fax: 011-669-9001  
Ref: G Higgins / 1198618

### PARTICULARS OF CLAIM

1. The plaintiff is **TRANSNET LIMITED**, a duly incorporate company in terms of Section 2 of the Legal Succession to the South African Transport Services Act, 1989, having its principal place of business at the Carlton Centre, 150 Commissioner Street, Johannesburg.
2. The defendant is **ABALOZI RISK ADVISORY SERVICES (PTY) LIMITED**, a duly incorporated company, having its registered office at 3<sup>rd</sup> Floor, 20 Baker Street, Rosebank, Johannesburg. The defendant was previously known as GNS Risk Advisory Services (Pty) Limited.

### UNDERLYING FACTS

3. At all times material hereto:
  - 3.1 the plaintiff operated through certain operating divisions, including Transnet Freight Rail (TFR), formerly known as Spoornet;
  - 3.2 Siyabonga Gama (“Gama”) was employed by the plaintiff as Chief Executive Officer of TFR, until his dismissal on 29 June 2010;
  - 3.3 Dingaan Senamela (“Senamela”) was employed as Senior Manager: Security at TFR until his dismissal on 23 March 2010;

- 3.4 Sipho Khanye ("Khanye") was employed by the plaintiff as Contracts Manager: Security at TFR until his dismissal on 23 March 2010;
- 3.5 the plaintiff was a major public entity, listed in Schedule 2 of the Public Finance Management Act, 1 of 1999 (PFMA);
- 3.6 the plaintiff's Board was an accounting authority in terms of the PFMA;
- 3.7 the plaintiff's Board had, in writing, delegated its powers for the day to day running of the TFR business to Gama;
- 3.8 the plaintiff was an organ of state and was bound to comply with the provisions of Section 217 of the Constitution of the Republic of South Africa 1996, in particular the obligation that when it contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;
- 3.9 the plaintiff had in place a detailed procurement procedure policy (DPP Policy);
- 3.10 the DPP Policy –

- 3.10.1 set out an open tendering process for the procurement of goods and services for the plaintiff;
- 3.10.2 provided that in exceptional circumstances, where due to urgency, or restrictive markets and the like, it would not be possible, practical or economically viable to invite open tenders, goods and services could be procured on a confined basis;
- 3.10.3 provided that a manager may only communicate acceptance of a tender and conclude a contract with the provider of goods or services if the value of the business awarded is within the level of his powers to contract in terms of his Special Delegation of Authority or where the value of the business exceeds the delegated authority, where the manager had obtained a mandate from higher authority to conclude and administer the contract;
- 3.10.4 stated that confinement of tenders for services above R2m in value should involve the obtaining of three quotes from suppliers, failing which it must be fully justified; and

3.11 Gama's Special Delegation of Authority provided that he was authorised in relation to confinement tenders to approve an expenditure of up to but not exceeding R10m.

4. On or about 4 October 2007, the defendant submitted a proposal to the TFR division of the plaintiff for the provision of services for the gathering of intelligence, the investigation and response of criminal activities, including the theft of cable from the plaintiff.

5. The defendant made the following representations to the plaintiff:

5.1 the defendant was a renowned security risk management specialist with a longstanding unparalleled reputation for thoroughness and discretion;

5.2 the defendant had represented leading corporations and government institutions, its activities are performed in strict compliance with South African legislation;

5.3 it was able to apply the skills of 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;



5.4 in past cases it had not only established key facts, but exposed jury tampering, bogus “expert” witnesses, counterfeit venues and conspiracies. Recent investigations had dealt with bankruptcies, anti-trust fact-finding, leaking of confidential information, mergers and acquisitions, fraud, industrial espionage, theft, product counterfeiting, licence infringement and missing persons; and

5.5 in advising on threat assessments and security risk analysis, it offered projections of future risk based on a variety of methodologies, including multi-variant quantitative analyses and qualitative scenario building.

6. The aforesaid representations were false.
7. On 27 November 2007 the Transnet Freight Rail Acquisition Council supported the confinement subject to the final approval of the Chief Executive Officer, Gama.
8. On or about 5 December 2007, Gama purportedly approved the award of a contract on confinement to the defendant to provide security services for the period 1 November 2007 to 31 October 2008.
9. The approval of the award of a contract to the defendant was not in compliance with the DPP in one or more of the following respects –

- 9.1 it was not in terms of the open tender process;
- 9.2 it purportedly followed the application of a confined tender process, despite the requirements for this process not having been fulfilled;
- 9.3 Gama approved the award of the contract on confinement when he lacked the necessary authority to do so; and
- 9.4 three quotes from different suppliers were not obtained, nor was a justification for the failure to obtain the quotes provided.
10. Pursuant to the aforesaid approval by Gama, the plaintiff and the defendant entered into a written contract for the provision of security services by the defendant on 4 June 2008, the plaintiff being represented by Peter Fearnhead and the defendant represented by Relibile Mofokeng. A copy of the agreement is annexed hereto and marked "A".
11. On 31 March 2008 an extension of the scope of the aforesaid contract was approved by Senamela in breach of the provisions of the Plaintiff's Delegated Authority Framework (DAF) and without the requisite authorisation to do so.
12. On 11 December 2008 the Transnet Freight Rail Acquisition Council resolved that the defendant's contract was not to be extended past 28

February 2009 and that the tender process for the security services was to be completed by the end of March 2009.

13. During 2009 there were two further contracts entered into with the defendant in breach of the plaintiff's DPP and DAF namely:

- 13.1 on 24 April 2009 and 19 May 2009, on a month to month basis, for the security services the defendant was to have provided in terms of written contract, annexure "A";

- 13.2 on 20 April 2009 a further contract was awarded to plaintiff for train crew escorting and physical guarding.

14. These further contracts were awarded by Senamela in violation of the resolution of the Transnet Freight Rail Acquisition Council.
15. In acting as aforesaid, in respect of the contract awarded on a month to month basis on 24 April 2009, Senamela was not duly authorised.
16. The written contract (including the additional contracts) was terminated on or about 10 January 2010 by the plaintiff.
17. For the period December 2007 to January 2010,

17.1 the defendant purported to render security services to the plaintiff when –

17.1.1 the defendant did not have the necessary staffing with necessary skills and experience to perform the services, as the defendant had no employees;

17.1.2 no security services were provided directly by the defendant, but were sub-contracted to third parties without the prior written approval of the plaintiff; and

17.1.3 the services as required in the contract were not provided by the defendant, or its sub-contractors.

17.2 the defendant was paid R95,691,368.80 by the plaintiff in respect of the security services purportedly provided in terms of the agreement and its extensions.

#### PLAINTIFF'S CLAIMS

18. The appointment of the defendant and the conclusion of the security services agreement were invalid or void for one or more or all of the following reasons:

*Non-compliance with the plaintiff's procurement procedures*

18.1 The plaintiff was obliged in terms of Section 217 of the Constitution to follow a competitive tender process.

18.2 In breach of the provisions of Section 217 and/or the DPP, the defendant was appointed and awarded the security services contract despite the failure to follow a competitive tender process, alternatively despite the failure properly to follow the comprehensive tender process provided by Section 217 of the Constitution and the DPP.

18.3 In the premises, the award of the contract and the conclusion thereof was invalid and therefore void.

*Award of the contract in breach of the PFMA*

18.4 The Transnet Board delegated powers relating to procurement to the defendant.

18.5 The payment of money to the defendant as a result of the approval referred to in paragraph 17 above and the conclusion of the subsequent security services agreement was an irregular expenditure, alternatively a fruitless and wasteful expenditure.

18.6 Gama caused or permitted the irregular expenditure alternatively a fruitless and wasteful expenditure referred to above by virtue of his

approval of the award of the contract to the defendant under circumstances in which he should not have.

18.7 In the premises, the contract is invalid and void.

*Non-compliance with Private Security Industry Regulation Act*

18.8 At all material times the defendant rendered security services for remuneration or reward.

18.9 At the time of the approval of the award of the contract and the conclusion of the security services contract, neither the defendant nor its directors were duly registered as a security service provider or security service providers.

18.10 In terms of Section 20(3) of the Private Security Industry Regulation Act, 56 of 2001 the security services contract between the plaintiff and the defendant was invalid, and accordingly void.

*Misrepresentation*

18.11 The defendant made the misrepresentations referred to in paragraph 5 above.



18.12 The misrepresentations were material and were intended to and did in fact induce the plaintiff to enter into the security services agreement.

18.13 In the premises, the award of the contract and the security services agreement entered into with the defendant are void.

19. As a consequence of the foregoing, the plaintiff is entitled to restitution of the sums paid to the defendant under the contract, being the sum of R95, 691,368.80, which amount, despite demand the defendant has failed, refused, alternatively neglected to pay.

**WHEREFORE** the plaintiff prays for judgment against the defendant in the following terms:

- (a) payment of the sum of R95 591 368.80;
- (b) interest on the sum of R95 591 368.80 at the prescribed legal rate of 15.5% per annum *a tempore morae*; and
- (c) costs of suit.

DATED AT SANDTON ON THIS THE 27<sup>th</sup> DAY OF OCTOBER 2010.

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PP

  
CJ DREYER

Plaintiff's counsel

  
BOWMAN GILFILLAN

Plaintiff's attorneys

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SANDTON

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Tel: (011) 669-9000

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Ref: G Higgins/1175783

c/o Keith Sutcliffe &amp; Associates

210 Barkston Drive

BLAIRGOWRIE, Randburg

Tel: (011) 789-7667

Fax: (011) 787-2745

Ref: M Gornley

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**FURTHER AFFIDAVIT**

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I, the undersigned,

**CHRISTOPHER FRANCIS NEALE TODD**

do hereby make oath and state that:

1. I am an adult male attorney and am a director of Bowman Gilfillan Inc. I have been a director of the firm since March 1998.
2. The facts deposed to in this affidavit are, save where otherwise stated or apparent from the context, within my personal knowledge and are, to the best of my belief, true and correct.
3. I depose to this affidavit at the request of the Commission of Inquiry into State Capture ("the Commission") to deal with a specific query raised with me on the issue of condonation.

**The issue of condonation**

4. I have been provided with a copy of an affidavit deposed to by Mr Mafika Mkwana on 31 August 2020, and have been requested to comment on the statements in paragraph 9 of that affidavit and the reference there to the concept of condonation of procurement irregularities.

Tm. 

5. It is, with respect, difficult to understand from these paragraphs what exactly Mr Mkwanzazi is saying.
- a. He states, in paragraph 9.4, that he personally fully agrees with the disciplinary process and findings that resulted in the dismissal of Mr Gama.
  - b. He then states that "Gama should have by virtue of consistency of its application, been afforded the opportunity to apply for condonement", and that if he had been, the "outcomes could have been different".
  - c. In the next paragraph, 9.5, he states that the incoming board (that he chaired) "had to somehow try and deal with the Gama matter on the assumption that he would have been granted condonation had it been offered".
6. I cannot, with respect, follow this reasoning. Mr Mkwanzazi appears to be saying that because board members believed that Mr Gama should have been given the opportunity to apply for condonation, it follows that board members were, even if they believed that Mr Gama had been guilty of conduct that justified his dismissal, nevertheless obliged to deal with the matter on the assumption that Mr Gama would have been granted condonation.
7. This explanation is, in my respectful submission, not rational, and it does not ring true on its own terms. Quite apart from this, the explanation cannot be correct, for the following reasons –

T.M.



- a. First, condonation was a procurement process entirely distinct from decision making about the consequences that should follow from employee misconduct;
- b. Second, not one of the three instances of misconduct to which Mr Gama ultimately admitted and for which he was dismissed was capable of or suitable for condonation as an application of the procurement policy;
- c. Third, such contentions as Mr Gama sought to make during the disciplinary process concerning consistency of treatment were fully, carefully, and fairly considered by the disciplinary chairperson, as appears from his lengthy findings.
- d. Fourth, as far as I am aware there was no report or evidence before the board when the decision was taken to reinstate Mr Gama that showed a track record of condonation being granted in procurement situations that involved similar facts and conduct by a senior executive, or that indicated that any of the instances of misconduct by Mr Gama was suitable for condonation.

8. I elaborate on each of these points briefly below.

**Condonation a procurement process distinct from decisions on employee conduct**

9. To the best of my knowledge condonation within the Transnet procurement environment had nothing to do with condoning acts of misconduct by employees. Condonation was a procurement procedure under which a person or body with authority to incur expenditure was permitted to "*condone non-compliance with the*

T.M.

*laid-down policy and procedures and directives provided such non-compliance is submitted via the relevant line manager of the employee in the particular Division". I refer in this regard to the opening paragraph of a Transnet internal memorandum dated 12 May 2010, a copy of which is attached marked "A".*

10. In this way, usually minor deviations from required procurement policies could be "condoned", after careful consideration by the authorized person or body, so that if expenditure was approved or had been incurred in these circumstances it would not constitute unauthorized or irregular expenditure for the purpose of the Public Finance Management Act (PFMA).
11. The distinction between condonation as a procurement procedure and disciplinary processes to deal with employee misconduct is a logical distinction which is apparent from Transnet policy directives at the time, including annexure "A". That memorandum deals with the authority of what is referred to as a Divisional Acquisition Council – the procurement body within a Transnet division – to condone non-compliance with prescribed procurement policies and procedures. As the memorandum makes clear -
  - a. Condonations "are not there for the asking";
  - b. As a general rule condonation should be given for relatively minor transgressions of procurement rules and procedures; and that material non-compliance will usually not be condoned because these "have PFMA implications which could result in civil, criminal or disciplinary steps being taken";

T.M. 

c. A condonation submission was required to state whether disciplinary steps had been taken because of the non-compliance; and

d. Even where matters have been submitted for condonation, where certain individuals are found to be guilty of transgressions, disciplinary action should be considered.

12. In summary, the two processes - (i) condoning minor non-compliance with rules and procedures and (ii) responding to employee misconduct - were at all times, both as a matter of logic and as a matter of policy, entirely distinct.

**No condonation would or could have been applicable to Gama's misconduct**

13. Quite apart from the logical distinction referred to above, not one of the three instances of misconduct, for each of which the sanction of dismissal was imposed on Mr Gama, would have been suitable for or capable of condonation in the sense contemplated in Transnet's procurement policy.

a. The misconduct in relation to the 50 like new locomotives arose from Mr Gama's conclusion of a major contract that had been authorized by the board, but with Mr Gama failing to comply with the single important condition prescribed by the board, which was that local (South African) work performed on refurbished locomotives should be done by Transnet itself and not by an external partner. Mr Gama's conduct in concluding a contract that directly contradicted this condition was not a procurement irregularity that could be condoned, and more importantly it was not in fact condoned by the board. On

T. V. 



the contrary, the board required the contract to be cancelled, with Transnet incurring various significant costs as a result. No question arose of irregular expenditure that could be condoned on application by Mr Gama. Mr Gama did not in fact "apply" for condonation, and this would in any event not have mitigated or detracted from the serious concerns about his conduct which the disciplinary chairperson found to have justified his dismissal.

b. The procurement irregularities in relation to the appointment of GNS were completely unsuitable for condonation, for various reasons.

i. First, the procurement process was so seriously flawed that no rational person could have attempted to use the condonation procedure to seek to regularize it. I refer to the multiple and serious respects in which the process was found to be defective by the chair of the disciplinary proceedings brought against Messrs Khanye and Senamela – as appears from the copy of those findings attached marked "B".

ii. Second, and perhaps more importantly of relevance to Mr Gama's position, Mr Gama himself had described it as an irregular process which had been materially misrepresented to him by the official who had procured his signature on the crucial procurement document. Mr Gama described the process as "fishy" and a "scam", and stated that he would not have approved it if he had known the true facts at the time.

iii. I attach, marked "C" a transcript of that part of the disciplinary proceedings that took place on 10 February 2010. As is apparent from

T. M.




the transcript, Mr Gama stated that when he had later seen the confinement document after an investigation into the matter he had realized that there were "quite a few gaps and loopholes", and he had begun to smell "something fishy" (annexure "C" page 36); stated that if he had known that it was a confinement he would probably not have approved it (annexure "C" page 48); confirmed that it had been improper to stop an existing tender process when GNS came into the picture (annexure "C" page 89 - 91); confirmed that what the relevant official had done by representing to him that a tender process had been followed "was a complete fraud", and stated that "once you get all of the documentation, it becomes clearer what was happening" (annexure "C" page 138); and stated that at the time when he received all of the relevant documents in June 2009 "it became clearer to me, in terms of what this scam was about" (annexure "C" page 143).

iv. It makes no sense, when this was Mr Gama's own stance on the matter, to suggest that the procurement condonation procedure would have been appropriate in these circumstances.

c. The third charge of misconduct, for which the sanction of dismissal was also imposed on Mr Gama, had nothing to do with procurement at all, and the question of condonation was entirely irrelevant.

14. To state, in these circumstances, that the Board "had to somehow try and deal with the Gama matter on the assumption that he would have been granted condonation

1.2. 

had it been offered and therefore had to try and put him in a position that he could have been in had a condonation been offered" simply cannot be correct.

**Gama's own contentions on consistency were fully and fairly considered in the disciplinary process**

15. To the extent that Mr Gama himself considered this issue to be relevant to the allegations of misconduct and introduced evidence and made submissions in the course of the disciplinary hearing on questions of consistency, these were carefully considered and were dealt with fully by the disciplinary chairperson in his findings.
16. I attach a copy of the main findings in the disciplinary hearing, marked "D", and the findings on sanction, marked "E".
  - a. To the extent that Mr Gama contended, in the disciplinary hearing itself, that discipline was being applied inconsistently, this is dealt with in paragraphs 429 to 433 of the main findings (at pages 198 to 200 of annexure "D"). There the disciplinary chairperson concluded as follows:

*"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 categorization 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."*

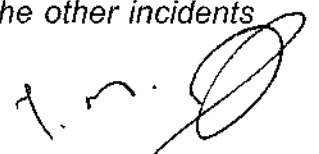
Tm. 

*There was unchallenged evidence that in each case conducted by Transnet a discretion was exercised in relation to the 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.*

*I find that there is no merit in the argument of inconsistency."*

- b. The issue was raised again in written submissions by Mr Gama on the question of the appropriate sanction. The issue was dealt with by the chairperson at paragraph 54 of the findings on sanction (at page 32 of annexure "E") in the following terms:

*"It is further contended that I should take into account the fact that there were in the same financial year in which Gama committed his acts of misconduct some 42 incidents and transactions of corporate non-compliance or irregularities in respect of which nothing was done (presumably by way of taking disciplinary action). It is not clear to me to precisely what evidence reference was being made in this regard. However, insofar as it refers to the report of the tender process audit ... this is no more than a re-casting of the alleged inconsistency issue which has already been rejected in .... the previous findings. In any event, even if there is other evidence to which reference is being made in this regard, it was certainly not established that the other incidents*



*were of a similar factual nature or similarly committed by a senior executive.”*

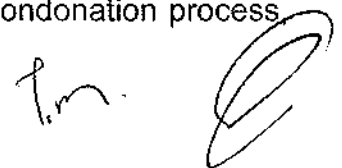
17. This raises the question whether the incoming board was presented with facts or evidence that was materially different from the facts and evidence that had been relied upon by Mr Gama himself in the course of his disciplinary hearing that could have lead the board to conclude that Mr Gama should in fact have had his conduct “condoned” (assuming, contrary to what I have stated above, that this would have been a permissible course of action under Transnet policy).

**No evidence of a report or other credible information before the board that condonation would have been applicable to Mr Gama’s misconduct**

18. None of the members of the incoming board could, in my respectful submission, have considered the question of condonation to be relevant to the decision on Mr Gama unless they had before them a detailed report setting out how condonation applied, what relevance it had to Mr Gama’s situation, on what grounds it might have been applied to his situation, and what consequences this should have had on the sanction imposed on Mr Gama - it being clear to all at that stage that Mr Gama now admitted that he had committed misconduct in each of the respects alleged.
19. For board members to be in a position to attach weight to this consideration they would, presumably, have insisted on credible information about the track record of condonation being granted in comparable procurement situations, and dealing with the implications of this in relation to the instances of misconduct by Mr Gama and the impact on Transnet of reinstating him.

T.m. 

20. For members of the board to have concluded, contrary to what had been found by the disciplinary chairperson, that Mr Gama had been treated inconsistently, they would have had to have been presented with compelling evidence, that had not been presented in the disciplinary process, that established other incidents involving the same or similar conduct as that of which Mr Gama had been found guilty, and committed by a similarly senior executive.
21. I am not aware of any information or report of that kind that in fact served before the board, nor any coherent submission that was made to Mr Mkwanazi or the board at the time dealing with these matters.
22. I do not find it credible that Mr Mkwanazi and other members of the board could have reached a conclusion that was so directly at odds with the findings of the highly reputable chairperson of a properly constituted disciplinary process, where their decision would have such far reaching consequences (the reinstatement of Mr Gama), without having been presented with and having carefully interrogated compelling evidence or analysis on this topic.
23. I have been provided with a minute of a meeting of the Transnet Corporate Governance and Nominations Committee held on 11 April 2011, a copy of which is attached marked "F". I was not present at the meeting but believe that this is the approved minute of that meeting.
24. The minute records, on the third page, at paragraph 5.2.3.4 (the numbering is somewhat out of sequence) the Committee having requested the management team to make a presentation covering a range of issues about the condonation process

Handwritten signature and a circular stamp.

including what it is, where it originates, and where matters get approved and regularized.

25. It is reasonable to assume from this minute that board members of that Committee at least were at that stage not at all familiar with what a condonation process entailed, and they wished to be briefed, in April 2011, on what it was and how it was used at Transnet. This strongly suggests that the incoming board simply could not have been sufficiently informed about the practice of condonation within Transnet at an earlier date, in February, so as to have been able to conclude that Mr Gama had been unfairly treated for that reason.

  
CHRISTOPHER FRANCIS NEALE TODD

I CERTIFY that this affidavit was signed and sworn to before me at CAPE TOWN on this the 29<sup>th</sup> day of **SEPTEMBER 2020**, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".

  
COMMISSIONER OF OATHS

Name: Marhasi

Address: Off Bay & Buie Bterse Drive

Capacity: CST

SOUTH AFRICAN POLICE SERVICE
COMMUNITY SERVICE CENTRE
<b>29 SEP 2020</b>
GEMEENSKAPDIENSSENTRUM SEA POINT/SEEPUNT
<del>GUID-AFRIKAANSE POLISIEDIENS</del>





Office of the General Manager: Business Services  
T +27 11 308 1282  
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## MEMORANDUM

<b>Attention</b>	All Corporate & OD users dealing with RFXs/Tenders
<b>From</b>	General Manager: Business Services
<b>Date</b>	12 May 2010
<b>Subject</b>	PPM Directive 03/2010 – Condonations
<b>Pages</b>	2

## CONDONATIONS

### Circumstances warranting condonation

In terms of PPM 8.1.3.1 (v) (e), the Divisional Acquisition Council has the authority to condone "non-compliance with the laid-down policy and procedures and directives provided such non-compliance is submitted via the relevant line manager of the employee in the particular Division". However, condonations are not there for the asking. It should be borne in mind that as a general rule condonation should be given for relatively minor transgressions of procurement rules and procedures. Non-compliance with material aspects of Transnet's policies and procedures will usually not be condoned as such lapses have PFMA implications which could result in civil, criminal or disciplinary steps being taken.

### Possible action for non-compliance

The line manager may decide to do either of the following:

- Sign the condonation request (in which case he agrees that there was non-compliance and he recommends that the DAC condone such non-compliance); or
- In cases of serious non compliance, he may choose to terminate the procurement process if a supplier has not yet been awarded the business (in which case the DAC must be approached to approve a non-award).

In cases of serious non-compliance, the manager may decide to institute disciplinary action against the employee/s involved. Whether the Manager decides to take action or not, it must be borne in mind that the DAC also has the discretion to report the non-compliance to the CEO.

### The DAC's role

The discretion which the DAC has to grant condonations must be carefully exercised, taking into account all relevant factors. These include the following:

- the extent and cause of the non-compliance,
- the seriousness of the non-compliance,
- the reasonableness of the explanation for the non-compliance,
- the effect of the non-compliance on the fairness of the procurement process
- whether the matter would in all likelihood have been approved had the proper processes been followed,
- whether the DAC was approached for condonation as soon as possible (at the next DAC meeting) after business became aware of the non-compliance.

It is important to note that the DAC may only condone matters which fall within their jurisdiction in the first instance.

For transactions above R2 million, the main DAC must consider the non-compliance. For transactions below R2 million, the Local Acquisition Council must consider all those transactions falling within as well as below its jurisdiction. The Local Acquisition Council will submit the condonations it receives to the main DAC for information purposes.

The following are examples where the DAC does not have the authority to condone non-compliance as it did not have the authority to approve the matter in the first instance:-

- condone a confinement in excess of R10 million which had not been approved by Group - *In this instance the DAC may merely support the recommendation for condonation by Group in terms of the Transnet DOA Framework;*
- condone the placing of a supplier's name on the Transnet List of Excluded Bidders without following proper process - *In this instance the DAC may merely recommend to Group SSM for consideration and onward transmission and final sign-off by the Group CFO as laid down in the PPM.*
- condone the unauthorized appointment of a consultant - *In this instance the DAC may merely recommend condonation to the Group CFO or the Group CE (depending on the value of the contract).*

*Despite the DAC's recommendation, the Group CFO or GCE will have the discretion as to whether or not to grant the necessary condonation.*

#### **Information to be contained in a condonation submission**

At the very least, a submission to obtain condonation should contain the following information:

1. When did the business first become aware of the non-compliance?
2. The nature of the non-compliance, including the provision of the PPM (or Construction Procurement Manual) that was not followed.
3. A full explanation for the non-compliance i.e. why was the process not followed?
4. What steps will be taken to ensure that the non-compliance will not occur again?
5. Has any person been reprimanded or has disciplinary action been instituted against any person because of the non-compliance (including details thereof)?

(The attached standard template (SSM 11) must be completed when submitting condonations to the DAC)

Matters submitted for condonation must be regarded in a serious light and where certain individuals are found to be guilty of transgressions, disciplinary action should be considered.

Please do not hesitate to contact this office should there still be any uncertainties.

Kind regards



Garry Pita  
General Manager  
Business Services

13/05/10

**"B"****IN THE DISCIPLINARY HEARING  
HELD AT JOHANNESBURG**

In the matter between:

**TRANSNET**

Employer

and

**MR DINGAAN SENAMELA**

First Employee

**MR SIPHO KHANYE**

Second Employee

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**FINDINGS**

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**Introduction**

1. Mr Dingaen Senamela ("Senamela") and Mr Sipho Khanye ("Khanye") have been charged with serious misconduct, which is substantially similar in nature, in one disciplinary hearing. The charges of misconduct levelled against Senamela are to be found at pages 1-4 of the bundle. These are three charges and there are four charges preferred against Khanye which are to be found at pages 5-8 of the bundle.<sup>1</sup>

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<sup>1</sup> The employers bundle comprises 616 pages.



2. Ms Kate Savage of Bowman Gilfillan Attorneys presented the case on behalf of the employer and the employees were ably represented by Advocate Sam Cohen instructed Attorney Larry Marks. Ms Savage and Advocate Cohen dealt with this matter professionally, efficiently and comprehensively. I am grateful for their assistance. The written submissions filed on behalf of both parties are of the highest quality and competence.
3. I sit as the chairperson of a domestic internal disciplinary hearing. My findings of fact are binding on the employer and the sanction, if any, which I recommend is a recommendation. I appreciate that I, in my capacity as chairperson, and the employer cannot, in law, procure evidence outside the domain of that which an employer can reasonably procure. As such, I must do the best with the material available and that which is reasonably procurable.
4. Senamela was appointed as Senior Manager: Security at Transnet Freight Rail ("TFR") on 23 July 2007. Khanya was employed by Transnet in 1994 and at the date of his suspension was employed in the position of Manager: Contracts and Administration at TFR. Both employees have been suspended on full pay since approximately 11 November 2009 and the finalization of this hearing was delayed arising from a number of factors including the illness of Senamela. It is imperative that the matter be finalized in the interest of all concerned rather sooner than later. Any unnecessary delay is not conducive to

efficiency. In this context, fairness must take into account the interests of the employer, the employees and the public at large.

5. Transnet is a public entity and its sole shareholder is the Government of the Republic of South Africa. As such, all South Africans have a stake in the efficient operations of Transnet, in that any wasteful expenditure inevitably prejudices the people of this country.

#### Tender law

6. Section 217 of the Constitution of the Republic of South Africa guarantees fair, equitable, transparent, competitive and cost-effective procurement processes. Fairness is inherent in the tender procedure. "It's very essence is to ensure that, before government, national or provincial purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and other facts mentioned in Section 217 permeate the procedure for awarding or refusing tenders. (see: *Logbro Properties CC v Bedderson N.O. & Others* 2003 (2) SA 460 SCA; *Steenkamp N.O. v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 CC).<sup>2</sup>

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<sup>2</sup> *Mthiyane JA in Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 at 443B-C

**The award of contracts to General Nyanda Security (GNS) at Transnet Freight Rail ("TFR")**

7. As I understand the position, TFR is a division of Transnet Limited and at all material times its CEO was and remains Mr Gama.
8. In the following paragraphs, I have borrowed extensively from the opening statement of Ms Savage to record common cause facts.
9. On 17 July 2007 tender number: 1030 98739 was issued by Transnet. It constituted a request for proposal ("RFP1") to provide a complete security package across various regions for a two year period. The closing date for the tender was 10h00 on 7 August 2007.
10. The request for proposal at part 3 of the tender documents contained a problem statement which identified that:
  - 10.1. well organized syndicates in Gauteng, KZN and Mpumalanga steal copper and aluminium cables; and
  - 10.2. the task of securing the rail infrastructure is the task of the company's in-house security and service providers.

11. The request for proposal required solutions that would deliver the following outcomes:

11.1. Prevention of cable theft and theft of other related rail infrastructure alongside the rail network;

11.2. Visible 'policing/securing';

11.3. Rapid response to crime incidents on the rail network;

11.4. Investigations, arrests, prosecution and conviction of perpetrators for the theft of cable and other associated infrastructure;

11.5. Any other focus areas that aim at eradicating such crimes.

12. The request for proposal specified that all personnel would have to undergo training and that deployment and/or implementation would be focused on the central and eastern regions, as defined.



13. By 7 August 2007 eleven offers were received in response to RFP1. It was agreed at a meeting on 23 August 2007 that four companies were shortlisted and would be requested to make a presentation in respect of their proposals. Presentations were made on 31 August 2007.
14. The Head Office Acquisition Council evaluation report proposed that a confined tender be issued limited to the shortlisted bidders.
15. By 2 October 2007 the award of the tender was being finalized with a view to presenting the matter to the Transnet Freight Rail Acquisition Council ("TFRAC").
16. This tender process, however, came to an abrupt halt on 15 October 2007. The reason for this proffered by Khanye in an email of 15 October 2007, is that one of the companies shortlisted in the request for proposal had already been awarded business by Transnet to audit companies. According to Khanye, the decision to stop the process is that of Virginia Dunzwa ("Dunzwa") from Transnet's head office.

17. If, indeed, this is a proper reason to disqualify one of the four shortlisted in terms of the tender process, I would have thought that the best qualified candidate from the remaining shortlisted tenderers would then qualify to be awarded the tender.
18. This, however, does not happen. Moreover and significantly, it is not TFRAC that puts the process on hold – in terms of Transnet's Detailed Procurement Policy ("DPP") it is TRFAC that cancels the tender process and not any particular individual. Dunzwa has no authority to cancel or halt the tender process.
19. The tender is then awarded to General Nyanda Security ("GNS"). This is done contrary to tender law principles and I now analyze, to the extent that it is necessary, to demonstrate that this was an irregular tender.

#### **The contracts awarded to GNS**

20. I propose to record common cause facts and to this extent, I have repeated extracts of Ms Savage's opening address which are incontrovertible.

21. The justification for the award of a contract to GNS was that this was "on confinement" the inference being that it was an emergency matter where the normal process of tender could not be adhered to.
22. The scope of work in the confinement was to *"investigate, apprehend and assist in prosecuting suspects responsible for cable theft and criminal activities against Freight Rail Nationally and evaluate private security guards posted to protect the railway line and its freight en-route to their destinations"*.
23. The reasons for recommending a confined tender were stated to be that:
- 23.1. The contract with the previous service provider had expired on 31 August 2007;
- 23.2. The RFP process was stopped based on an instruction from Virginia Dunjwa given that business had been awarded by Transnet to one of the four companies short-listed for the RFP;
- 23.3. Cable theft has increased to its peak and is anticipated to get worse as the festive season approaches;

23.4. Research of potential companies was conducted and GNS was asked to make a presentation in the form of a proposal;

23.5. The GNS proposal contained the required solution and GNS is highly recommended based on its expertise, track record and national footprint in providing specialized security solutions; and

23.6. An open tender process will be followed after the confinement has expired.

#### Further common cause facts

24. A budget of R13 million was available for the project. The estimated total contract value awarded to GNS was R18,933,120 (or R1,577,760 per month). The total contract period was one year with a performance review undertaken after five months.

25. The other companies researched were ARM which provides physical security and limited intelligence and Circle 7 which specializes in VIP protection and body guarding.

26. The Directors of General Nyanda Security (Pty) Ltd were recorded as Sylvester Sithole and General Sphiwe Nyanda, although General Nyanda was not registered as a director with PSIRA.
27. In terms of the confinement, GNS was to provide nationally a complete security package to curb and prevent copper theft with a "proactive, reactive and active approach" through informers, investigations, awareness campaigns and visibility.
28. On or about 8 November 2007, Khanye and Senamela were amongst those members of the cross-functional evaluation team who signed off on the confinement. On the same date Senamela signed the request that the confinement be awarded. On 5 December 2007 Siyabonga Gama, the chief executive approved the award of the confinement.
29. On 7 November 2007, the Head office Acquisition Council (HOAC) supported the confinement subject to final approval from the chief executive, Mr Gama.
30. In a letter emailed on 23 November 2007 to Khanye and Jaco van Wyk from Nayle Outsourcing, a copy of which was found on Khanye's computer, Redibile Mofokeng from GNS confirms a telephone conversation held on 22 November 2007 with Khanye in which:

30.1. GNS was advised that it had been appointed to render services as per its quotation dated 12 October 2007;

30.2. GNS was advised as a matter of urgency to deploy agents in the field to begin the assignment; and

30.3. GNS will receive the appointment letter in due course;

30.4. Agents will be at TFR offices on 23 November 2007.

31. By way of letter dated 6 December 2007, TFR informed GNS that it was awarded a comprehensive total security packaged to be supplied to TFR.<sup>3</sup> Prior to this, however, Khanye informs GNS that GNS has the contract in a manner of speaking "in the bag".

#### The first contract

32. Thus GNS was awarded a contract the value whereof was R18,933,120 (or R1,577,760 per month) which excluded VAT. The contract period was 1 December 2007 to 1 December 2008.

<sup>3</sup> Bundle – pages 129-137

### The second contract

33. As from 1 April 2008, the contract awarded to GNS in confinement was doubled.<sup>4</sup>

### The third contract

34. On 13 August 2008, the TRFAC condoned the increase of the contract value to GNS from R13,943,040 to R32,876,160 on condition that a detailed progress report on investigation is forwarded to the council by latest before the end of October 2008. The council also resolved that the contract period should not exceed November 2008.

35. I was informed by Ms Savage that this third contract has been cancelled, *inter alia*, because the conditions imposed by the council *apropos* the third contract were not met.

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<sup>4</sup> Bundle – pages 129-137



**The difficulties or criticisms of the award of the contracts to GNSI**

36. A considerable portion of the time spent in the hearing before me sought to demonstrate that the award of contracts to GNS were irregular. I do not propose to be exhaustive in summarizing the objective facts supported by documents to demonstrate that the award of contracts to GNS was irregular in material respects.

37. For purposes of these findings, I also do not need to make any findings on whether there was fraud or corrupt practices in that my function is to evaluate the conduct of the two employees in relation to the contracts awarded to GNS, bearing in mind the irregular features surrounding these transactions and the role of the two employees, if any, as to whether their conduct in the allocation and implementation of the contracts is tainted with improper behaviour.

38. The following common cause facts demonstrate, in my view, that the award of the contracts to GNS was irregular in material respects.

38.1. The first contract was awarded to General Nyanda Security (Pty) Limited ("GNS company") which was not registered with the Private Security Industry Regulating Authority

("PSIRA") when the initial contract was awarded to it. Such registration is imperative, or put differently, a peremptory requirement of the PSIRA Act, 56 of 2001, in order for the GNS company to render the services in respect of which it was awarded the initial contract.

38.2. The General Nyanda Security Advisory Services (Pty) Limited (not GNS company) applied for PSIRA registration on 6 June 2008 and was registered on 9 June 2008. The first contract was for the period 1 December 2007 to 31 December 2008 with GNS company which was not licensed to provide the services in respect of which it was handsomely rewarded, nor is there any indication to this date that GNS company could lawfully have entered into the first contract.

38.3. Contrary to its contractual obligations, the GNS company could not, without prior written approval of Transnet, sub-contract or transfer responsibility for the performance of the whole or any part of the services for which it had contracted. In reality, GNS were using sub-contractors to perform the work it had undertaken to perform.

38.4. Whilst I appreciate that in our new found democracy the interest of black entrepreneurs must be promoted arising from past injustices, I am not prepared to accept that GNS, in whatever form it existed, should be the recipient of a contract and then sub-contracts its responsibilities, in this case, to Revert and in the process earn a massive profit – this is not black empowerment but simply opportunism which cannot be tolerated as it leads to a situation where a government entity in this case, Transnet, pays money for no value received to a black company without the comfort that the black company is in fact being empowered in its skills and know-how. Self-enrichment, on its own, is not good enough.

38.5. The second contract was signed on 4 June 2008 with General Nyanda Security Risk Advisory Services (Pty) Limited which, however, acquired registration status on 5 June 2008.

38.6. The price paid to GNS was excessive. The tender process which was aborted sought to replace the services which were then rendered by a service provider known as CPI on a monthly basis. CPI was paid approximately R500,000 per month and in its place GNS was paid some R1,7 million per month in terms of the first contract. If there was a *bona fide* reason to fill the gap, then the question arises as to why the contract of CPI, which was on a monthly basis, was not extended for a further defined limited period or on a monthly basis whilst the tender process was once again used to obtain the services of a service provider; instead GNS is preferred and awarded a contract for 12 months and which, in the end, endures for almost two years.

38.7. In summary, I am not persuaded that good and acceptable reasons existed to deviate from the requirements of tender law and fair processes in awarding contracts to GNS. The objective evidence before me demonstrated that this was not the kind of emergency which warranted a deviation from the employer's procurement procedures.<sup>5</sup>

<sup>5</sup> See: Transnet's Detailed Procurement Procedures and Contracting Procedures Manual for TFR, bundle – pages 497-616 which seeks to give effect to section 51(1)(3) of the PFMA, 1 of 1999

**The contracts awarded to GNS is fraught with irregularities**

39. The public tender process was wrongfully cancelled or put on hold. No explanation has been tendered as to why the open tender process (which had progressed to final stages) could not have been continued with the remaining three bidders in the public process.
40. The apparent reason proffered for the emergency, namely that during the festive season, there is an alarming increase in copper theft justifying the appointment of GNS is not supported by the research – the stats show that there is, during this period, a decline. In any event, this should have resulted in the extension of CPI's contract for a limited duration of say three months or the award to an alternative service provider for this limited period. Instead GNS, as the facts reveal, was given effectively speaking a long term contract lasting for almost two years.
41. GNS, disguised in whatever legal form, seized the opportunity to make money. It had no registration status with the regulating authority to engage in the activity as a security service provider. It had no history, nationally or locally of a track record in providing the service for which it was awarded handsome contracts.
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42. GNS had no employees. Its status with the South African Revenue Service proved that it did not have the employee body (with the apparent expertise) to render the services it purported it was eminently qualified to do.
43. The beneficial owners of GNS at the material time were General Sphiwe Nyanda, then a politician and presently a Minister in the Government of the Republic of South Africa and Sylvester Sithole, then a practicing attorney. Mr Sithole features in allegations of wrongdoing in the highly publicized abuse of State funds at SABC.
44. In the event the value received by the employer from GNS is minuscule compared to the price it paid. This is the unchallenged evidence of Keeran Madhav ("Madhav") who conducted a forensic investigation concerning the allocation of the contracts to GNS on behalf of Transnet. Nayager, at the material time, intimately involved in the operations of the contracts awarded to GNS testified that during his night time check on GNS, (a spot check properly organized) – it was ascertained that GNS was not rendering the services in respect whereof it was paid and contractually bound to render services.

45. The unchallenged evidence before me demonstrates that GNS was paid too much and did not have the expertise it held out that it had. In short, no proper value was received for the monies paid to GNS.
46. The proposal submitted by GNS is lacking in authenticity. It is designed to create the impression that it has the capabilities to serve as a problem solver for TRF.<sup>6</sup>
47. The proposal of GNS was probably prepared in conjunction with an "insider", i.e. an employee of TRF versed in TRF's requirements *apropos* the contract/s awarded to GNS. The detail contained in the proposals, dated from 4 October 2007 and then revised in various drafts dated 12 October 2007, all of which Madhav testified were found in Senamela's office, indicated GNS's in-depth knowledge of the requirements of the contract. I agree with Ms Savage that such knowledge could only have come about if GNS received information directly from TFR security. Madhav's testimony was that "no one could have prepared this without liaising or communicating with someone from security" must, in the circumstances, be correct.

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<sup>6</sup> Bundle – pages 43-60, 83-109



48. The proposal also has the hallmarks of extracting the kind of expertise rendered by experts in this field from other material. Thus for instance, in the profile of GNS sent to Khanye on behalf of GNS on 3 October 2007; the activities of GNS is described as follows:

*"For past cases, GNS has not only established key facts, but exposed jury tampering, bogus "expert witnesses", counterfeit venues and conspiracies. Recent investigations have dealt with bankruptcies, anti-trust fact finding ..."*

49. It is clear that GNS provided a profile which is a sham. It copied this profile on the probabilities from the profile of an American service provider because we do not have juries in this country in criminal matters. In the USA they do have. It must follow that to the ordinary reader the profile of GNS is a bogus and to the discerning enquirer GNS is not puffing but being untruthful in describing its executive overview. In real terms, it has no history or experience in the field and has no track record.

**The contracts awarded to GNS is wrongful**

50. In my view, the contracts awarded to GNS constitute a fraud on the employer. The shareholder and indirectly the taxpayer have been prejudiced because no proper value has been received for the services in respect of which GNS was paid. The contracts were thus irregularly awarded and resulted in wasteful expenditure.

51. This came about because of a conspiracy by a number of people in the employment of the employer who facilitated this transaction. On the facts before me, the CEO was instrumental in this wrongful and unlawful transaction.

52. South Africa has legislated and developed a sophisticated system whereby tenders by government are meant to be administered. In simple terms, the procedure is based on common sense principles that proper value must be received for payment made to a service provider. Within the realm of this structure is a fair process so that all South Africans can compete and have an opportunity to share in the wealth of the nation. In turn, proper value must be received for such services. The structure also accommodates the aspirations of black empowerment because in granting a tender, it is imperative to examine

to what extent the tenderer represents black aspirations and provides a framework for skills transformation. Thus for instance, an organ of State can legitimately award a tender to a service provider that is not necessarily the most cost-effective provided fair value is received and this particular tenderer meets the requirements of BBBEE.

53. I have no doubt that a number of individuals in the employment of the employer behaved dishonourably in favouring GNS. I was informed that disciplinary action has commenced against the CEO and others. It is my task, however, to determine to what extent Senamela and Khanye are implicated in dishonest behaviour or misconduct arising from the award of tenders to GNS. I am not required to determine whether the employer is consistent in its treatment of others who may or may not be culpable inasmuch as the process of carrying out investigations and disciplinary hearings is incomplete.

#### **Senamela**

54. Senamela was one the most senior person among whom the responsibilities rested in the allocation process of the contracts to GNS.

55. I find that this individual not only failed to take any measures to alert the board of Transnet of wrongdoing *apropos* GNS, but instead actively participated in promoting the interest of GNS to be the recipient of the contracts.
56. Senamela signed the motivation that a contract be awarded on confinement to GNS. I have considered the recommendation that Senamela made in this motivation and in my view he knowingly promoted the interest of GNS with the knowledge that it did not have the specialized investigators it held out to have. This motivation, to be found at pages 112 and 113 of the bundle, contains a host of false statements. Thus for instance, Senamela does not question the reason why the open tender process was stopped – not by the TFR Acquisitions Council, but apparently by one or two individuals.
57. The more damning evidence against Senamela is the unchallenged evidence of Nayager who testified that Senamela told him and Khanye that a decision had been taken, prior to the confinement, to use GNS and that it had been approved by the chief executive, referring to Mr Gama. Senamela did not give evidence to rebut this and I must accept that he was content to go along with Gama in awarding the contracts to GNS in contravention of the law.

58. Nayager further testified that Senamela threatened him with suspension had he not gone along with the scope extension, i.e. the second contract awarded to GNS, on the basis that Gama had approved the scope extension. Nayager explained to me how Senamela victimized him because he, Nayager, was unhappy with GNS as a service provider to the extent that Nayager was not given any work to do, but frustrated arising from having no work to do and this led Nayager to apply for a position with Eskom. Having succeeded in his endeavours to find alternative employment, Transnet offered him an alternative position to work on a project which he had a personal passion to do and is accordingly presently in the employment of Transnet, but not at TFR. The point being that Senamela victimized Nayager who was dissatisfied with the performance of GNS. There is no doubt that Senamela was promoting the interests of GNS and on the probabilities may well have an interest albeit indirectly in GNS.

59. Senamela did not testify. He did not take me into his confidence. It is not his case that he carried out instructions. On the contrary, he facilitated the entry and continuation of GNS in the employer's business.

60. Senamela took no steps whatsoever to monitor the performance of GNS. Senamela also took no steps to obtain alternative quotations which could serve as a comparison to the cost of the services quoted for by GNS. Senamela allowed the entering into the first contract which exceeded the level of the CEO's delegated authority, namely R10 million.
61. Senamela allowed payment to GNS on an average of 20 days whereas the previous service provider, CPI, had been paid on 60 days. Senamela doubled the contract value awarded on confinement to GNS within 4 months of the approval of the award of the initial contract by Gama. Thus, Senamela ensured that from 1 April 2008, GNS was paid double that which was payable in terms of the first contract which was for a period of 12 months.
62. Senamela allowed the approval of the scope extension in contravention of the DAF and his own delegated authority and I must infer that he was aware of this and yet took a decision to the prejudice of his employer and in the interest of GNS.

63. On 19 May 2009, Senamela recommended that the GNS' services continue to run on a month to month basis and that payment for March 2009 be approved. Senamela approved payment of invoices dated 7 May 2009 and 28 May 2009 with the knowledge or at least deemed knowledge that this was in breach of his employer's procurement policies and procedures.
64. Thus, Senamela brought about the situation to grant the first contract to GNS. This contract terminated at the end of December 2008 and again Senamela then facilitated the continuation of services to be rendered on a month to month basis for the most part of 2009, but at a price far in excess of the price which would otherwise have been payable for the services required.
65. Senamela did not deny the evidence of Nayager that he was the kind of person who would victimize employees who did not carry out his instructions.
66. I am satisfied that Senamela behaved dishonestly in promoting the interest of GNS to the prejudice of his employer.



**Khanye**

67. It is not Khanye's case that he carried out the instructions of Senamela. He testified under oath and I found him to be an unimpressive witness because the responses he gave to me sought to conceal or wish away his bad conduct in this entire matter.
68. If he was an innocent party or, on his version, an inexperienced individual and put in a position where matters were beyond his comprehension, he took no steps to bring this to the attention of his employer. On the contrary, he facilitated the scam perpetrated on his employer.
69. By 2 October 2007, the open tender was in the process of being finalized. On 15 October 2007, the tender is brought to an abrupt halt. I have already pointed out that detailed proposals dated 4 October 2007 and revised versions thereof dated 12 October 2007 were found in Senamela's office. On 3 October 2007, the profile of GNS is emailed to Khanye from Charlene Jongwe (bundle – page 61). A company profile of GNS was thus received by Khanye prior to any suggestion that the open tender process should be placed on hold and should not proceed.

70. I am unpersuaded that Khanye carried out any proper investigation to ascertain the legal status of GNS as a service provider. It was his function to do so, but he did not do so because he also facilitated, in my view, the award of the contract and later extension thereof to GNS.
71. Khanye also signed the motivation that the contract be awarded on confinement to GNS in circumstances in which he should not have done so. This was the first step in the manipulation of the process to avoid an open public tender and to unlawfully prefer GNS.
72. Khanye admitted knowledge of his employer's detailed procurement policy and the DAF and yet allowed the contract to be awarded to GNS in breach thereof.
73. Khanye deliberately lied in the motivation in stating that in the festive season there is an alarming increase in copper theft to justify the grant of the contract to GNS when the scientific evidence indicates that during the festive season, this particular crime is down.

74. Khanye took no steps to compare other prices. Khanye took no steps to investigate whether GNS had a national footprint as it suggested or that it had any experience in this field. Khanye allowed excessive charging and, contrary to his job duties, was indifferent as to whether GNS was performing or not.
75. GNS received notification that it had been granted the first contract before it was formally notified by TFR. This was probably the doings of Senamela and Khanye who were in close contact with the people from GNS and in fact assisting GNS to meet, on paper at least, the requirements of TFR.
76. Khanye knew that GNS had subcontracted its functions to Revert who were in fact providing the personnel to do the work and GNS added on a considerable profit on the charges levied by Revert for such functions. Khanye knew that the GNS contract was, in the circumstances, unjustified and yet facilitated this process.
77. I am satisfied, on a balance of probability, that Khanye behaved dishonestly and misconducted himself in relation to his duties as an employee of TFR.

78. I do not consider it necessary to analyse each and every one of the charges separately as set out in the disciplinary notices addressed to both employees. I am satisfied, as a whole that both employees misconducted themselves in material respects deliberately or alternatively recklessly in the manner in which they carried out their duties.

#### Findings

79. I find Senamela guilty on all three charges which he faces.

80. I find Khanye guilty of all four charges which he faces.


81. In respect of both employees, I find them guilty of misconduct in that in breach of their contractual obligations of good faith, they carried out their functions to unlawfully promote the interests of GNS to the prejudice of their employer.

#### Appropriate sanction

82. I have carefully considered the mitigation submitted on behalf of both employees by their legal representatives. This was done in writing and attached to my findings as "A" and "B".

83. I accept that both individuals have families to support. In the case of Senamela, I accept that he has struggle credentials. I cannot agree with the argument that if they are dismissed, it would be too severe a sanction because jobs are hard to find. In my view, employees must not believe, in particular State employees, that they have a job for life. They have to render proper services to maintain their positions. They must behave appropriately in executing their functions. In this case, in my view, the employer has a good reason to dismiss them and in my view they have had a fair opportunity of putting their case before me. This employer cannot be expected to put up with the kind of misconduct these employees have committed. In the least, this employer cannot be expected to put up with the kind of behaviour these employees have associated themselves with.
84. In this case, they have behaved abominably. Their behaviour is not only dishonest but prejudices the welfare and wellbeing of our country. They deliberately set on a course to bypass the strictures of tender process. If this goes unabated, we will be a bankrupt country to the detriment of all our people.

85. No employer can be expected to put up with the conduct of these two employees. They have breached the trust and good faith required in the employment relationship.
86. In my view, it is not only desirable but imperative that both Senamela and Khanye be summarily dismissed. Justice must not only be done, but must be seen to be done. All right thinking employees must be comforted by the reality that delinquent employees cannot profit or be rewarded for their wrongdoing. All South Africans are entitled to believe that our legal system is fair and just and does not favour the wrongdoer.
87. In my view, summary dismissal of both Dingaan Senamela and Sipho Handsome Khanye would, in the circumstances, be fair and just.

  
NA CASSIM SC  
Chairperson

Chambers, Sandton  
5 March 2010

"C"

*RealTime Transcriptions*

TRANSCRIPTION OF THE

**DISCIPLINARY INQUIRY**

COMPANY:	<b>TRANSNET LIMITED</b>
REPRESENTED BY	ADV P PRETORIUS SC
INSTRUCTED BY:	BOWMAN GILFILLAN
<b>AND</b>	
EMPLOYEE:	<b>SIYABONGA GAMA</b>
REPRESENTED BY	ADV G PRETORIUS SC
INSTRUCTED BY:	LANGA ATTORNEYS
<b>BEFORE</b>	
CHAIRPERSON:	ADV M ANTROBUS SC

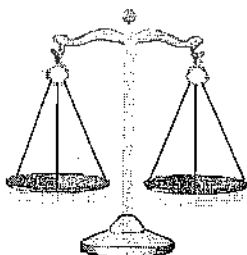
**HELD ON**

10 FEBRUARY 2010

PAGES 1 TO 154

**HELD AT**

BOWMAN GILFILLAN, 165 WEST STREET, SANDOWN, SANDTON

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Transnet and Siyabonga Gama

Disciplinary Inquiry

[PROCEEDINGS ON 10 FEBRUARY 2010]

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[10:16] CHAIRPERSON: Alright, for purposes of the record, it's now the morning of the 10th of February 2010 and the hearing of Transnet Limited and Mr Gama resumes. The representation is as it was before. We were busy with Mr Gama still, his evidence in chief. Mr Gama, will you again swear that the evidence you are about to give will be the whole truth, nothing but the truth? Raise your right hand and say, so help me God.

MR GAMA: So help me God.

CHAIRPERSON: Thank you.

SIYABONGA GAMA: S.U.O.

EXAMINATION BY ADV G PRETORIUS: Thank you very much, Mr Chairman. Morning, Mr Gama. We are going to deal, Mr Gama, principally with the Exhibits B1 and D. So if you could get those two files close by? Now am I correct that you have not read the evidence that you gave in chief? You did not have a transcript available?

MR GAMA: No, I have not.

ADV G PRETORIUS: Alright. Could you then in Exhibit B1 please go to page 8A? What is the document that appears on page 8A and 8B?

MR GAMA: The document at 8A is a document relating to comprehensive security, the

Page 3  
ADV G PRETORIUS: There is no date next to Mr Mokoena or Mr Gama's signatures. And then the last one, the last signature has got a date, the 4th of November.

CHAIRPERSON: Hmm.

ADV G PRETORIUS: Now why did you make this manuscript note?

MR GAMA: The reason I made it was basically to make sure that the company performs and that we had some kind of process to assess the performance.

ADV G PRETORIUS: Then page 8H. And I am referring to the one, because we have a replacement, lets make sure we have the same document that has the inscription, "received by N Goosen 27/10/09", at the bottom. You seem to have the original?

MR GAMA: Ja, I have. Both.

ADV G PRETORIUS: Ja, there would be two, but I'm referring to the 8H.

MR GAMA: Ja.

ADV G PRETORIUS: With the inscription, "received by N Goosen". It would be the clearer one?

MR GAMA: Ja, ja.

ADV G PRETORIUS: Now this, there is an evaluation report on tenders according to the document, is that correct?

Page 2  
appointment of TTL.

ADV G PRETORIUS: And on 8B there are a number of signatures and yours appears on it as well, is it correct?

MR GAMA: Correct.

ADV G PRETORIUS: And what are the manuscript notes next to your signature?

MR GAMA: It says, "enter into assessment contract and reassess."

ADV G PRETORIUS: And the date of this document is in 205, is that correct?

MR GAMA: Yes, it is 2005.

ADV G PRETORIUS: According to Mr Van Staden, next to Mr Van Staden's signature it says 26 October and next to Nana Mohlala 4 November, there is no date next to your signature?

MR GAMA: That is correct.

CHAIRPERSON: Alright, just take me through that again. I did not get it properly.

ADV G PRETORIUS: Next to Mr Raymond van Staden, "requested by", that is the first signature.

CHAIRPERSON: Yes, yes?

ADV G PRETORIUS: The date is 26 or 28 October 2005.

CHAIRPERSON: Yes.

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MR GAMA: That is correct.

ADV G PRETORIUS: And it is dated March 2007?

MR GAMA: That is correct.

ADV G PRETORIUS: And it is approved by, there's a manuscript note on the right-hand side, next to your signature. Can you just read that out for the chairman?

MR GAMA: It says that: "Other than for January month I have not seen a reduction in cable theft. Let us extend this only to end of June. In the interim let us review whether these services are required. If so, let us go on a public tender process which will ensure we have a new contract from the 1st of July. The contract also appears very expensive. There is a need to have meaningful KPI's which will reduce the number of incidents and reduce costs to Spoomet." Signed 3rd of March 2007.

ADV G PRETORIUS: Ja. Then if you could please turn to page 9, which is some distance from page 8H. What is this document?

MR GAMA: This document is actually the document that was used to go out on tender.

ADV G PRETORIUS: And the issuing date?

MR GAMA: It says 17th of July.

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ADV G PRETORIUS: And the closing date?

MR GAMA: 7th of August 2007.

ADV G PRETORIUS: And it's a request for a proposal to provide a complete security package service across various regions for a two-year period?

MR GAMA: That is correct.

ADV G PRETORIUS: Were you at the time aware of this tender?

MR GAMA: No, I was not personally aware of the actual tender.

ADV G PRETORIUS: Now what was your involvement in the appointment of GNS Security Services?

MR GAMA: My involvement was basically the discussion that I had with John on December 5.

ADV G PRETORIUS: And John is Mr John Beattie?

MR GAMA: John Beattie, yes.

ADV G PRETORIUS: Well your, you've been, there's a transcript of your interview that you had with Ernst &amp; Young to which we will come, but I won't read it to you. Can you tell the chairman what, how it came about that Mr Beattie came to see you about this appointment?

MR GAMA: Mr Beattie was the General Manager of Safety &amp; Security. So Safety &amp; Security was

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his responsibility. So he came to see me in order to get my formal approval for the security contract.

ADV G PRETORIUS: Now what time of did he come to see you?

MR GAMA: I, I wouldn't remember the exact time, but it was in the morning when I noticed him sitting outside my office, wanting to see me urgently.

ADV G PRETORIUS: Did he have an appointment with you?

MR GAMA: No, he did not.

ADV G PRETORIUS: And you saw him outside your office. Did you then invite him into your office?

MR GAMA: Yes, I did.

ADV G PRETORIUS: And after he was invited in, what then transpired?

MR GAMA: He came in with a stack of documents and -

ADV G PRETORIUS: Sorry, Mr Gama, if you say stack of documents, could you indicate roughly how high it was or?

MR GAMA: Ja, he came in with a file, a lever arch files like this and probably had maybe three-quarters.

ADV G PRETORIUS: So it was about

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three-quarters of an ordinary lever arch file?

MR GAMA: Ja.

ADV G PRETORIUS: Documents?

MR GAMA: Yes.

ADV G PRETORIUS: And what did he say to you?

MR GAMA: Well he basically indicated that we needed to approve the security contract and that, so I had asked him a few questions and he sat across from me and he showed that, a document which I would say is probably this document.

ADV G PRETORIUS: On page 9?

MR GAMA: On page 9, that showed that there was a tender. He then took me through the process. I asked him a few questions.

ADV G PRETORIUS: Sorry, the type of questions you asked him, could you just elaborate on that?

MR GAMA: The questions were basically around the process, I asked him questions as to whether it had been to the tender board. I asked him questions around the KPI in terms of whether or not they'd finalised KPI's, because that was always a big issue where we paid service providers and, and there were no penalties if we didn't think that they were not

Page 8

performing. And then we, we then proceeded to, he then showed me the document that needed to be signed. And basically all I really did was to look at the last page of that document. He'd satisfied me that it had gone into the tender board and on that document I could see that it had already been signed by the people in the tender board. So I signed for the contract. Then we just had a few general discussions around it. But it was something where he was indicating to me that it was urgent that we sign because we were experiencing a number of problems. I had been aware of these problems because we discussed these at our Monday sort of meetings. We had meetings every Monday. Operational meetings, where we discussed immediate problems that needed to be resolved.

ADV G PRETORIUS: Now when he said it had been to the tender board, what did he say about that process?

MR GAMA: Well he basically said everything had gone through a tender process and that the tender board had approved it, but also I could see on, on the, on the page that he indicated to me and it showed me also during the course of that, the companies that had tendered, it showed me a number of companies and it then showed me the last three or so I think that had gone

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through a second stage of the tender process.

ADV G PRETORIUS: Could you please in Exhibit B, turn to page 114? Now on page 114 to 120, do you recognise that document?

MR GAMA: Yes.

ADV G PRETORIUS: Now if you look at page 120A to 120H, is a copy of the same document, but without the much of a handwriting and the other notes made on it. Can you recall which of these two documents you saw on 5 December 2007?

MR GAMA: It would probably be this, the second document with A to H.

ADV G PRETORIUS: Ja. Now you signed, if you go to page 120H, is that your signature? "Approved", with the date 5 December 2007, correct?

MR GAMA: That is correct.

ADV G PRETORIUS: Ja. Now have you subsequently ascertained what this document is?

MR GAMA: Yes, I have.

ADV G PRETORIUS: At the time that you signed it, what did you believe the document was?

MR GAMA: I believed that this was a document that indicated the tender process that had been gone through. I saw the different signatures, including that of Mr Pita himself as the General Manager concerned

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as well as the acquisition council, which basically safeguards the process in terms of tenders. So I believed that here was the document that indicated that the proper process had actually been followed, because it was always my contention that for security tenders there were many service providers out there and if we went through a process we would then find the appropriate one.

ADV G PRETORIUS: Now the evidence has been that on this document, if you go from the first page to the last, there are some 17 odd references to confinement? When did you first become aware that this document is not the approval of an open tender, but a document referring to the confinement of the tender or the supplier?

MR GAMA: I, I became aware of it some time in June when -

ADV G PRETORIUS: Which year?

MR GAMA: - June '09.

ADV G PRETORIUS: '09?

MR GAMA: '09. When Mr Oates gave me copies of this, of these documents.

ADV G PRETORIUS: Now after you signed it, what was your involvement with the appointment of the security company?

MR GAMA: No, there was no involvement.

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ADV G PRETORIUS: On page 127, which part of it is 127 DD in my volume. What is this document that appears on page 127 to 137?

CHAIRPERSON: 127A?

ADV G PRETORIUS: 127, no 127 -

CHAIRPERSON: Oh.

ADV G PRETORIUS: No, the A's are for the -

CHAIRPERSON: Okay, 127 itself, okay?

ADV G PRETORIUS: Ja, 127 itself to 137.

MR GAMA: I don't see it. Oh, it's at the back. This is a document that seems to have emanated from the procurement department, which is in charge of all processes related to tenders.

ADV G PRETORIUS: Who specific in the procurement department?

MR GAMA: This was signed by the chief procurement officer in our supply chain.

ADV G PRETORIUS: Mr Brian Fredericks?

MR GAMA: Mr Brian Fredericks, ja.

ADV G PRETORIUS: And the date of the document is 6 December 2007?

MR GAMA: That is correct.

ADV G PRETORIUS: And it is a

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appointment for a period of a year of the General Nyanda Security Pty Limited, correct?

MR GAMA: That is correct.

ADV G PRETORIUS: So when did you first become aware of this document?

MR GAMA: I first became aware of this particular document probably just as we got these packs, which is around December of '09.

ADV G PRETORIUS: Then page 138? Page 164 it goes on further, but the signature appears, signatures appear on page 164. What is this document?

[10:36] MR GAMA: This document is the actual contract that was entered into between Transnet Freight Rail, a division of Transnet, which generally under security risk advisory services.

ADV G PRETORIUS: When was this agreement concluded?

MR GAMA: 2 June 2008.

ADV G PRETORIUS: You find that on page 164?

MR GAMA: Yes.

ADV G PRETORIUS: Who signed on behalf of Transnet?

MR GAMA: It was signed on behalf of Transnet by the chief operating officer Mr Peter

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Fearnhead.

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ADV G PRETORIUS: Ja, when did you become aware of this document, first become aware of this document?

MR GAMA: I first became aware of this document round about November, December 2009.

ADV G PRETORIUS: Now early in 2009 Mr Oates had a discussion with you concerning the GNS Security contract, do you recall that?

MR GAMA: Yes, I recall that.

ADV G PRETORIUS: What did you tell him about the appointment of GNS, how it occurred?

MR GAMA: I had indicated to him that like any other security company it had gone out on a tender process.

ADV G PRETORIUS: So was that in 2009 or 2008 that you had the discussion with Mr Oates?

MR GAMA: It was in 2009.

ADV G PRETORIUS: 2009?

MR GAMA: Ja, I can't recall the date, it could have been around June or early July.

ADV G PRETORIUS: Well we know that you were interviewed by the internal audit department in April of 2009, and maybe we should now turn, that is in Exhibit D, to the transcript of that interview. We've

ADV G PRETORIUS: December, the breakfast meeting?

MR GAMA: The breakfast meeting on the 10th of December 2008.

ADV G PRETORIUS: And then you say in the second line next to Mr Gama "as far as I'm aware, and as far as I'm concerned there was never any consignment on this particular matter. Even if somebody may have, for some reason then returned it to the manner and way that it looked like it was a consignment", why did you say that?

MR GAMA: Because my instruction as we saw on the previous matter that you asked me to read out, I had indicated quite clearly that there should be a tender process.

ADV G PRETORIUS: And what did Mr Beattie tell you?

MR GAMA: Mr Beattie had also indicated that the tender process had been done and it was now complete.

ADV G PRETORIUS: And at the bottom of page 78 you said "I came in at the tail end of this, basically John" and then over to 79 "Beattie, who was my general manager of safety and security, came to my office and said look, we need you to sign this, it is urgent,

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dealt with it already, part of it when you testified earlier. If you got to page 78. Now you will see that there is discussion with the chairperson and then Kieran Maddove[?], and on page 78 in the middle of the page, we don't have line numbers, Kieran says "Sir, I am just going to take you back, sometime back, it was round about the end of 2007, what is your understanding of security contracts at that time, and in particular there was a contract called --" and it should be GNS, is that correct?

MR GAMA: Ja, correct.

ADV G PRETORIUS: Now we have already established last time that you came into that meeting without any precognition or having seen any documents correct?

MR GAMA: That's correct, ja.

ADV G PRETORIUS: So he's asking you about something that happened at the end of 2007 and April 2009, and then you say "ja, I think we've discussed with -- you were not at that meeting. No, I was not, I think Michael was at that meeting where they briefed you", to what meeting were you referring there? You say the end of last year, that would be the end of 2008.

MR GAMA: I think that would have been the meeting that we had with Mr Viv Oates I think on the 10th of ...

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and I sort of them asked him just verbally why is it urgent, what are the pertinent issues and he then he explained it", and you have testified about that. Then on the bottom of page 79 you said it is only John Beattie that is present, correct?

MR GAMA: That's correct ja.

ADV G PRETORIUS: And Mr Maddove then asked you "what document was presented to you, do you recall it at that time, was it just one document or various documents", you say "well it's their motivation. These things, they come to you. The guy will come to you with a file and he sits with you and he says look here is my motivation, I need you to proof it. It's been to the tender board you know, I just need your formal approval. The tender board has approved it. We need you to sign it" is that correct?

MR GAMA: Ja, that's correct.

ADV G PRETORIUS: Ja, and you then, in the middle of the page say that the meeting lasted about five to ten minutes.

MR GAMA: Ja, five to 10 minutes at most, probably five.

ADV G PRETORIUS: Ja, and at the second last Mr Gama on a page said "we discussed the document", is that the document that appears at page 120A?

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<p style="text-align: right;">Page 17</p> <p>MR GAMA: It was not the only document that was discussed. As I indicated in his motivation he had brought this lever arch file and he had shown me various things just to indicate the actual process that had taken place, and the document at 120A is the document that we had to actually sign on to do the formal approval.</p> <p>ADV G PRETORIUS: Was there anything in the documents that you and Mr Beattie discussed on the 5th of December 2007 that indicated to you that it was a consignment?</p> <p>MR GAMA: No, there wasn't anything that indicated it was a consignment. I think from looking at the actual document that showed there was a tender, because I was looking at it from the other side, I clearly believed at the time that they had in fact gone out on tender.</p> <p>ADV G PRETORIUS: Well the evidence was that they did go out on tender. There was a tender that stopped, not formally, then on page 81 just below the middle of the page where the punched hole is of the ring binder, the second one, the bottom one, you say in the last sentence "because they'd gone through a process and he showed me that process", that process, what process did you believe at the time it was?</p>	<p style="text-align: right;">Page 19</p> <p>just want to confirm that this is your signature", and you respond "of course it's my signature". So he showed you the page on which your signature appears is that correct?</p> <p>MR GAMA: Yes, he showed me the last page of that document.</p> <p>ADV G PRETORIUS: Ja, then after confirming that you signed the document on page 83 he then asked you whether you read the document is that correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: Then you said there was a whole stack of things, and that is in the middle of the page "John sat on this side and I sat on that side and he took me through", and the last sentence "I do not think I would have gone into all the detail of this".</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: Ja. Then you say Mr Gama "me, I see you marked certain things", what were you then commenting on?</p> <p>MR GAMA: He was now on the front of the actual document.</p> <p>ADV G PRETORIUS: Would that be page 114 if you go to Exhibit B1?</p> <p>MR GAMA: Correct.</p>
<p style="text-align: right;">Page 18</p> <p>MR GAMA: I believed that it had gone through the tender process.</p> <p>ADV G PRETORIUS: Ja, then on page 82 the Chairman said that Kieran got the file here, sorry might have had the file that he had. At this stage had you seen any of the documents that he had in the file?</p> <p>MR GAMA: No, I had not seen any of the documents that he had on the file. I had come in very cold in terms of what was going to be discussed.</p> <p>ADV G PRETORIUS: And then again below the bottom ring binder Mr Maddove said "see, this is the document we are referring to", and if you look at the next inaudible, "this is a document that we are referring to". You say "yes, it would have been something coming from the acquisition counsel. Okay, what is it that you want me to look at". At this stage in the interrogation what was happening, what was Mr Maddove doing and what were you doing?</p> <p>MR GAMA: I think all that he did was to show me a document to say this is the document, and all he could really probably see is just the headlines of it. And I was eager that he shows me the actual document so that I can see what it is that he's referring to. So he still kept it in his hand you know.</p> <p>ADV G PRETORIUS: And then it says "I</p>	<p style="text-align: right;">Page 20</p> <p>ADV G PRETORIUS: Is that the document? On 114 there is certain things marked, on 120A there is nothing marked.</p> <p>MR GAMA: Yes, it was this document, I think he had been working on this document.</p> <p>ADV G PRETORIUS: Ja, so you then said, and I am going back to page 83 in EXHIBIT D1, "I see you marked certain things. The process was stopped, the contract expired. He mentioned -"</p> <p>MR GAMA: Well, I was just reading from what the document said.</p> <p>ADV G PRETORIUS: What the document said ja, and then you see efforts to go on open tenders and instructed by chief executive, you found that on the document?</p> <p>MR GAMA: Yes.</p> <p>ADV G PRETORIUS: Ja, and that was your instruction that there should be open tenders correct?</p> <p>MR GAMA: That is correct.</p> <p>ADV G PRETORIUS: And in fact there was an open tender.</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: And then you said in the interview "so obviously I would have said that they must go out on open tender and for approval, what is the</p>

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<p style="text-align: right;">Page 21</p> <p>difference now", and then on page 84 you say in the first Mr Gama "I would not have, you know read this thing word for word" correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: Then again next to the bottom ring binder the chairperson asked you "did John" referring to Mr Beattie "actually alluded you to the fact that this was a consignment as stipulated in document here on the header", and then you said "no, no".</p> <p>MR GAMA: That's correct ja.</p> <p>ADV G PRETORIUS: At that stage, having now been confronted with this document for the first time since 2007 what was your belief, in the meeting when you were interrogated?</p> <p>MR GAMA: My belief was that the procurement people had gone on an open tender process and that in fact that had been confirmed by John at the meeting when he requested me to approve this particular contract. So I didn't have any reason to believe otherwise.</p> <p>ADV G PRETORIUS: And on page 85 you say in the second paragraph "this notion of a consignment in this contract is actually untrue", why did you say that?</p> <p>MR GAMA: Because in the discussions</p>	<p style="text-align: right;">Page 23</p> <p>ADV G PRETORIUS: And at the bottom of page 89 to Mr Gama in the third line can you explain how you perceived your role. You said, my role in this thing is to say to the GM who comes to me, do you have the funds to pay for this? Have you followed the processes? I've got a tender board and I can see the chairman of the tender board has signed this. So if somebody comes to me – and that's why I always say to people, I do not want to see any document until it has gone to the tender board and they've agreed. Why is that?</p> <p>MR GAMA: The tender board serves a number of purposes in terms of the proper checks and balances. It would do all of the work in terms of making sure that proper processes are followed. The tender board would look at all of the requirements that Transnet requires and satisfy itself that all of those requirements have been met. So in essence once the document has been to the tender board you would then rely on the cleanliness of the process.</p> <p>ADV G PRETORIUS: And then on page 90 after saying that – just above the bottom ring binder you say, "so I think they must suspend this discussion. Let me try and find all of the documents." Why did you want to suspend that discussion at that point in time?</p> <p>MR GAMA: Well, I had been trying to</p>
<p style="text-align: right;">Page 22</p> <p>that we had had with John, and in the stack of papers that he had showed me I had seen the words "tender", and I had also seen that it had actually also gone through the tender board. And in fact he had indicated to me that there had been an adjudication as well that had taken place, which had reduced the number of companies from I think 11 or 12 to a preferred three.</p> <p>ADV G PRETORIUS: Then on page 85 Mr Maddove now shows a little bit more, he says that "Chairperson, can I just give you a bit of background" and you say "yes". And then he explains it and he says the process was stopped and then there was consignment.</p> <p>[10:56] MR GAMA: The company was new to me. I just remembered that when John came to me he had shown me three names. So when I said this no, no, no it was because as we were proceeding with the interview. He kept pulling a document out of the hat, and I really didn't know where we were going with this. And I then indicated that it would be better for all of us if he gave me all the documents so that I could go and study them, because I just couldn't remember everything that had happened. It had been more than a year, probably close to 18 or 19 months, after I'd signed the document, and I just couldn't remember everything. But I was indicating that the notion of it was clearly new to me.</p>	<p style="text-align: right;">Page 24</p> <p>suspend the discussion for some time. I think this was my third or fourth attempt. Because basically they kept – documents just kept flying out of a hat, and I was not familiar with all of the documents that he was showing me. And he had marked certain aspects, and he was just really showing me the aspects that he had marked. So I needed to re-familiarise myself with these documents because it had happened quite some time back.</p> <p>ADV G PRETORIUS: And -</p> <p>MR GAMA: But also he appeared to have a number of documents, but it didn't appear to me to amount to all of the documents that John had shown me, because the picture that I had in my mind was of a larger -</p> <p>ADV G PRETORIUS: About three quarters of a Lever Arch file.</p> <p>MR GAMA: Ja.</p> <p>ADV G PRETORIUS: Then on page 91 after discussing what your delegate authority was, and referring to the document and R4.9 million, which is a saving amount, at the bottom of the page you come back to your consistent stance in the interview that it was not a consignment.</p> <p>MR GAMA: Yes.</p> <p>ADV G PRETORIUS: And on page 92, the</p>

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second and third lines, you said, "certainly when John and I had the discussion we were not discussing the consignment."

MR GAMA: That's correct.

ADV G PRETORIUS: And then at the bottom of the page you return to the instruction to go out on the open tender. And John had told you they had gone open a tender. They had three companies.

MR GAMA: Ja.

ADV G PRETORIUS: On page 93 after the second, third person, Mr Gama, "in terms of consignments my consignment limit is R10 million." Correct?

MR GAMA: That's correct, ja.

ADV G PRETORIUS: And then the bottom page, Mr Gama, I mean if I read the entire document – the last paragraph – I also said to them this is not a consignment in terms of what you just told me because you said to me we've gone out on tender.

MR GAMA: That's correct, ja.

ADV G PRETORIUS: Now at this stage you are now saying, well, had they told you – you read the entire document. Had you at that stage read the entire document in the interview process?

MR GAMA: No, I had not read the entire document, but we were looking at just pertinent aspects

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of it during the interview. And I was indicating that had I read that document I would have said to John that in terms of what he had told me around the tender process that it's a tender process, it's not a consignment. But if I had read the document and it said consignment then we would have to carefully go through it and say, why do you say it's a tender process if it's a consignment?

ADV G PRETORIUS: Ja. You deal with that on page 94 after the chairman said - when you said you have to go on an open tender that makes sense. That makes complete sense. You said if I actually read this thing line by line I would have said to them the wording here is wrong. Go back to the tender board and actually write it correctly because all that is now the issue here is whether I thought this was a consignment or not. It was not presented to me as a consignment. It was presented to me as a tender process. Correct?

MR GAMA: That's correct.

ADV G PRETORIUS: And then on page 94 the chairperson said, "if you could get some documentation it would be helpful. Kieran could collect it from you," what documentation was Mr Steenkamp referring to?

MR GAMA: It was all the documentation that related to the tender process. It would have been

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the document that had the tender number and all of the other documents that accompanied it.

ADV G PRETORIUS: Did you find Mr Beattie's file?

MR GAMA: Yes, I did ask the procurement people to find the file. They could not find Mr Beattie's file per se, but they found something that began to resemble the documentation that had been contained in this file.

ADV G PRETORIUS: On page 96 in the middle of the page against Mr Gama, "no, but I'm saying to you this is not true." Referring to the consignment. "Whatever they may have written in here is shown me my documents. Okay."

MR GAMA: It should be, "they have shown me documents."

ADV G PRETORIUS: Me documents. You know, and you said by the way this was a five month. Ja, this is also the other thing. This was a five month contract where they said okay. Now, where did the five months suddenly come in?

MR GAMA: The five months didn't suddenly come in. At our initial discussion you'll recall that I always had a problem with penalties and KPI. And when they came in to me they then indicated

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that look, we will do a five month contract. We'll review, and then if we're satisfied we'll then continue. So which meant that at the end of five months they would stand back, review the success of it and then decide whether or not they wanted to continue with this particular service. And if they wanted to continue with that service they would then have to go back to the tender board to indicate that they wanted to continue or not.

ADV G PRETORIUS: And then it goes on, and the end was that on this Mr Maddove agreed to give you a copy of his file. Is that correct? You undertook to give documents to them.

MR GAMA: Ja.

ADV G PRETORIUS: Now, you – both Mr Oates and Mr Naicker testified about what you said at the meeting of the 10th December when they discussed your relationship with General Nyanda. Do you recall that evidence?

MR GAMA: Yes, I do.

ADV G PRETORIUS: And do you recall that your instructions were put to him that you disputed that evidence to say that you knew General Nyanda as they would know other public figures or words to that effect.

MR GAMA: That's correct.



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ADV G PRETORIUS: What is your relationship with General Nyanda?

MR GAMA: I've known General Nyanda for some time. But when Vivant Naicker came here I noticed that they were beginning to infer that there might have been some improper relationship between me and General Nyanda, which I felt was not true. And when I instructed council I wanted to put some distance between me and the General. I think I was wrong in that respect in the sense that while he's not a friend or a close friend he is an acquaintance of mine. I've played golf with the General in the past. He has phoned me when we've had bereavements in our family when people have indicated to him – I know some people who know him, rather than me knowing him closely. And also he had phoned me when I got suspended to commiserate with me. I have on occasion spoken to him.

ADV G PRETORIUS: Now, the implicit implication that was expressed – you're not charged with it – that somehow your relationship with General Nyanda in the end appeared to be an irregular appointment of a company had anything to do with you, what's your comment on that?

MR GAMA: My comment is that I would not have put myself in a position where there was an

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improper appointment. It's just not what I would do.

ADV G PRETORIUS: Now, if we could stay in exhibit D but go to D2. It's in the same file. What is the document that appears on page one of D2?

MR GAMA: This is my response to the letter of the 12th June on the 20th or 19th of June.

ADV G PRETORIUS: I'm not going to deal with what Mr Wells' letter is. We all know that and we've had it. And we've already dealt with parts of this letter dealing with the 50 Like New contract. So this is going to deal with the GNA security contract. You begin with referring to the letter of Mr Wells dated 18th June, and the first paragraph has response. And paragraph 1.1 says, "let me start by indicating that in October 2008 when the anonymous tip-off was received I had an opportunity to discuss its contents with the then Group Executive, Ms Maria Ramos, who dismissed them as baseless and utter rubbish."

MR GAMA: Correct.

ADV G PRETORIUS: Will we please then turn to D1? And the sequence is incorrect. Page D15 is the first page, which is also the same as D14. As I see it – you can just confirm it – the sequence should be D15, D17 and then D16. The pages have been – go to page 15. Go to page 15 and confirm that the sequence is 15,

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17 and then 16.

CHAIRPERSON: It seems to have been altered.

ADV G PRETORIUS: Oh, it's been altered. That's fine.

CHAIRPERSON: 15 is 15, and the 17 starts with the layman's terms.

ADV G PRETORIUS: All right then. That makes sense then. All right. Now, the anonymous tip-off that you referred to, is it this or another document?

MR GAMA: No, it is this document.

ADV G PRETORIUS: Now, this document on page 15 deals with fraud and corruption, a heading. And then allegations of rape, 10th March 2008. And then on page 16, renumbered 16, there is a heading GNS, and it says the following. "We were further made aware of the origin of this company which we need fully investigated for the investigation. In a nutshell, GNS is an abbreviation of General Nyanda Security. All in South Africa will confirm that we are right. This company was given special treatment because of its association with a famous former MK soldier and one of the most senior Luthuli House cadets. They did not go through proper tendering process like the rest. They were allegedly brought to Gauteng by Mr Siyabonga Gama." Page 17. "It

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is suspected that any contract that might have been given could only have been obtained by Transnet freight rail security back door in an underhanded manner." Next paragraph. "Mr Siyabonga Gama is also rumoured to be the co-owner of Enlightened Security Services." Is there any truth in that allegation?

MR GAMA: No, that's no true.

ADV G PRETORIUS: "This company is guarding Inanda House, Transnet's freight rail head office in Parktown." Is there any truth in that allegation?

MR GAMA: I wouldn't know whether they were or not guarding, that company. All I recall is that we had actually taken some legal action against this company at some point. But I don't think there is any truth to it.

ADV G PRETORIUS: Then it says, "This company is runned" – well, it's obviously someone that has the same difficulty with English as a second language as I have – "is runned by some ANC politicians for quite some time now. In light of the above we request that a very long leave be given to Mr Siyabonga Gama pending the outcome of the investigation." As far as you're aware, Ms Ramos' comment to you that the contents of the anonymous tip-off is baseless and utter rubbish, to what was she

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<p style="text-align: right;">Page 33</p> <p>referring from your perspective?</p> <p>MR GAMA: She was referring to the issues in this related to me, the allegation that I had brought this General Nyanda company to Gauteng, and also this notion around Enlightened Security Services and this issue that they had obtained a security contract in an underhanded manner. So those were the issues that I had discussed with her, because when I went to see her I already had a copy of this document, because you see it had also been given to my Chief Operating Officer.</p> <p>[11:16] ADV G PRETORIUS: Now, if you go to D2, your letter, page 16 paragraph 3, you deal in paragraph 3 with the CPI and the termination of its month to month contract. Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV G PRETORIUS: And you said the following. "The issues relating to the initiation, administration and management of security contracts falls within the ambit of the security department." Is that correct?</p> <p>MR GAMA: Where are you now?</p> <p>ADV G PRETORIUS: Page 16. Paragraph 3. CPI and the termination of its month to month contract.</p> <p>MR GAMA: Ja.</p>	<p style="text-align: right;">Page 35</p> <p>MR GAMA: Yes, I had an opportunity to look at the documents more carefully, but I still lacked quite a great number of other documents that I had requested, especially the investigation report so that I could satisfy myself in terms of what was happening. But I had begun to review, albeit not very fully, but I had started that process.</p> <p>ADV G PRETORIUS: At this stage were you still persuaded or of the view that it was – that the appointment of GNS was through an open tender process?</p> <p>MR GAMA: No, at this stage the documentation I had indicated that during the last days of that tender process there had been a new process and it had been altered.</p> <p>ADV G PRETORIUS: On page 17 your letter then continues. "I've conducted a preliminary interview with the security personnel and requested a written submission of the processes they followed." Their submission and relevant annexures is contained in annexure is contained in annexure SG4. Is that what appears on page 90 to 97?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: And on page 97 we see that it was compiled by Mr K. Naidoo and Mr Dingaan Senamela.</p>
<p style="text-align: right;">Page 34</p> <p>ADV G PRETORIUS: At this stage I'm going to deal with paragraph 3 and 4 which deals with CPI and the appointment of GNS. "The issues relating to the initiation, administration and management of security contracts fall within the ambit of the security department." Is that correct?</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV G PRETORIUS: "The process of calling out for tenders must necessarily be guided by the procurement department."</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: "I have no personal knowledge as to the initiation of these processes." Correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: "The common practise is that it will be dealt with by the acquisition council and the relevant general manager. If it's a particular amount it may then be referred to the Chief Executive." Then, "A similar process is followed by other departments in procuring services for the company." Correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: Now, at this stage this is July 2009. Did you have the opportunity at that stage to review the documents more carefully?</p>	<p style="text-align: right;">Page 36</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV G PRETORIUS: Back to your letter on D2 page 17. You said, "You will note that this work remains incomplete with certain documents still missing and will require some further enquiry."</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV G PRETORIUS: What was your view at that time regarding this matter? What would happen going forward?</p> <p>MR GAMA: My view was that there were certain documents that the security department had not given to me. There were some which they referred to which were not even in this document. But I was pressed for time in terms of answering to Chris' letter and I needed to continue this particular investigation. There did seem to me quite a few gaps and loopholes and something fishy I was beginning to smell in terms of this particular issue.</p> <p>ADV G PRETORIUS: What would the normal process have been in this case with an investigation? Who would have done the investigation?</p> <p>MR GAMA: In terms of the normal process I would have been informed that there were particular issues. I would have been given the total picture in terms of what it is that is suspected. I</p>

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would have then given – I would have then called in the general manager responsible for security, and I would have then said, here are the issues that are suspected. Go and do an investigation. If you need any further resources you can then come back to me, but I will need a periodical progress report in terms of where we are with the process so that we could then discover completely what the issues were. In this instance unfortunately I was trying to discover what was happening, but also myself learning what the processes were. I was not involved in trying to form an opinion in terms of what could have been happening.

ADV G PRETORIUS: If internal audit had investigated certain conduct what would normally have happened if they wanted you to take the process forward?

MR GAMA: Internal audit would have met with me and probably together with the GM or just by myself, and then indicated to me what they thought was happening. I would have then taken the matter further. I would have then found somebody to do a proper investigation, normally the head of that function or line department, and then gone on to take whatever steps that that particular investigation led us to.

ADV G PRETORIUS: Well, we know the evidence presented by the employer, Transnet, is that

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waiting for his reply to this letter when I was served with charges in August.

ADV G PRETORIUS: So the response to your suggestion that the matter be followed up and an investigation should be conducted was a charge against you and a suspension.

MR GAMA: That's correct.

ADV G PRETORIUS: In paragraph 4.2 you said that "I was never privy to the first security tender process that you refer to where G4 Security had to be withdrawn." Is that correct?

MR GAMA: That's correct.

ADV G PRETORIUS: "I could never therefore have been familiar with that process or the personalities involved as I do not get involved in this nitty-gritty of our organisation's work."

MR GAMA: That's correct.

ADV G PRETORIUS: And then you refer in paragraph 4.3 to the reasons why GNS was the preferred service provider. Where did you get that information from?

MR GAMA: It was on the letter that the security department had given me during the preliminary discussions that they had had. The letter that they had attached on 91.

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internal audit investigated the appointment of GNS – it's an ongoing investigation according to them – from about December 2008. As of July 2009 had internal audit given you any information relating to their investigation?

MR GAMA: No, they had not given me any information except those two or three documents that had been appended to the letter from Wells.

ADV G PRETORIUS: And then you deal further in paragraph 3, the sub-paragraphs with certain issues relating to CPI and certain subsequent matters. In paragraph 4 – is that correct?

MR GAMA: Yes.

ADV G PRETORIUS: In paragraph 4 you deal with the appointment of GNS. You're quite specific. In paragraph 4.1 you say, "I deny any involvement in any possible manipulation that you may be referring to relating to the GNS appointment." Is that correct?

MR GAMA: That's correct.

ADV G PRETORIUS: "If indeed there was any manipulation that you suspect by any party I would follow up on that matter and carry out an investigation."

MR GAMA: That's correct.

ADV G PRETORIUS: Did Mr Wells say to you, well please carry out the investigation?

MR GAMA: He did not. I was still

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ADV G PRETORIUS: So that's the memorandum. That's the document prepared by Mr Naicker and Mr Senamela.

MR GAMA: That's correct.

ADV G PRETORIUS: Then on page 20 you refer to the minutes of the tender board that stated that they supported the consignment subject to the CE approval.

MR GAMA: Yes.

ADV G PRETORIUS: And then you say the consignments were signed for a period of five months, 1st December 2007 till 30th April 2008 on a performance review period at R1.5 million, plus minus R7.8 million. Where did you get that information from?

MR GAMA: I got it from two sources. One was the people in the tender board itself who said they understood that it had been a consignment with a review period. But also on the document that we referred to as -

ADV G PRETORIUS: On page 120, capital something.

MR GAMA: Yes.

ADV G PRETORIUS: That's in B1. Page 120, capital B.

MR GAMA: It's 120, capital B, under

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point 4 where it says 1st November to 30th April. What had actually happened was that it was not 1st November but 1st December.

ADV G PRETORIUS: Page 120, capital B. It's in B1. Paragraph 4, contract period. So the statement in your letter that the consignment was signed for a period of five months, the source you said was conveyed to you by members of the acquisition council. Secondly, the document itself says that from 1st November to 30th April is the performance review period.

MR GAMA: Yes, which was actually not November but December.

ADV G PRETORIUS: Then paragraph 5 of the letter – we're back in D2 page 20 – delegation of authority for consignments. You in paragraph 5.1 state that your consignment authority is R10 million and on open tender it's R100 million.

MR GAMA: Correct.

ADV G PRETORIUS: Then you say if the consignment was for five months, and we know that Transnet said it was for a year and the contract was signed for a year, but if the consignment was for five months it fell within your delegated authority.

MR GAMA: That's correct.

ADV G PRETORIUS: Then in 5.2 you

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matter attests. It is sometimes impossible not to enter into short-term consigned contracts, for instance where operational problems such as cable theft is rampant. It would be similarly negligent not to support efforts to curb this practise." In 5.3, "You may be aware that from the last tender audit TFR did poorly on tender administrations." The last tender audit to which you refer, when would that have been if this letter was written in July 2009?

MR GAMA: The tender audit would have been in reference to the document dated October 2008 from Ernst & Young which I think would have been received by us around December 2008. And we started in the new year, 2009, to deal with the issues.

ADV G PRETORIUS: And then it goes on. Again I quote. "Together with my CFO" – that would be Mr Nick Thompson.

MR GAMA: That is Mr Nick Thompson.

ADV G PRETORIUS: "and CPO" – which is Mr Fredericks – "we have already implemented stringent actions to create hassle-free tender processes. In this instance we noted that what was supposed to be a five month trial period subject to a full review in April 2008 and then re-submitted to the tender board did not happen. The contract was issued as a one year contract, and no

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stated, and I quote, "It is clear to me from the document that it is written poorly and I will reinstruct the GM concerned to follow up on the pertinent aspects related to the quality of these submissions. I'm informed that both training intervention and enquiry on security submissions in general is underway." So the general manager that you refer to, who was he?

MR GAMA: It was now the new general manager responsible for network planning in the office of the Chief Operating Officer.

ADV G PRETORIUS: And who was he or she?

MR GAMA: His name is Siya Mtetwa.

ADV G PRETORIUS: Siya Mtetwa. Then further the CPO, what does CPO stand for?

MR GAMA: The Chief Procurement Officer, Mr -

ADV G PRETORIUS: Fredericks.

MR GAMA: Brian Fredericks.

ADV G PRETORIUS: "Has implemented a procurement and management process to ensure communication on tenders is dispatched to all parties that applied to participate in tenders. I've always had a belief that most security services can be obtained via the public tender process as the submission on the GNS

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mention was made that it would be subject to a probation period of April and would only be extended if the outcome of the assessment was positive." Then, "A recent incident when a security manager hired another security company as a pilot for eight months without obtaining any authority has pointed out that there's perhaps a need for a full review of the security area."

MR GAMA: Correct.

ADV G PRETORIUS: Did you envisage such a review?

MR GAMA: The review had started at the time when I was suspended. I don't know where that process – what that process led to, but I had indicated at the time that there must be disciplinary processes in terms of what we call maverick spend that was taking place.

ADV G PRETORIUS: "A new general manager responsible for security has been tasked by me to investigate this matter and to ensure together with the CPO that this matter is given urgent attention." That general manager responsible for security, who is he or she?

MR GAMA: That's Siya Mtetwa.

ADV G PRETORIUS: "It would be prudent that within the next three months such a review is



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<p style="text-align: right;">Page 45</p> <p>completed and any possible suspicions that our internal auditors have on any existing contracts be assessed and concluded." Did Transnet give you the opportunity of completing the review?</p> <p>MR GAMA: No, I did not get that opportunity. I asked for three months to finish everything and look at everything.</p> <p>ADV G PRETORIUS: And we know that -</p> <p>MR GAMA: I think one month later I was suspended.</p> <p>ADV G PRETORIUS: And we know that Transnet internal audit for their own reasons did not share their investigations with you.</p> <p>MR GAMA: That is correct.</p> <p>ADV G PRETORIUS: Then you refer to the sponsored golf day. In 6.1 you say, "It really baffles me why the General Nyanda golf day has been singled out in this case." And then you go on and deal with the particular golf day and the attendance of two people. Were you invited to that golf day?</p> <p>MR GAMA: Yes, I had been invited to that golf day.</p> <p>[11:36] ADV G PRETORIUS: Did you plan to attend the golf day?</p> <p>MR GAMA: I planned to attend the golf</p>	<p style="text-align: right;">Page 47</p> <p>ADV G PRETORIUS: I apologise.</p> <p>[11:55] ADV G PRETORIUS: Thank you very much, Mr Chairman. Then just to conclude Mr Gama, could you please go to Exhibit A. You can put the other files away now as well for the moment, I am sure my learned friend starts cross-examining you it will open again. Don't put them too far away. A1 is the notice to attend disciplinary hearing. Now the first charge where it is alleged that you authorised the conclusion of a contract for the provision of security services by General Nyanda Security Advisory Services on confinement in excess of your delegated authority, when you signed the document were you aware that it was a confinement?</p> <p>MR GAMA: No, I was not aware.</p> <p>ADV G PRETORIUS: Then in 1.2 it is alleged that when the irregularities in the process were brought to your attention, you failed to take appropriate steps either to investigate the irregularities, you have testified about that, is that allegation true?</p> <p>MR GAMA: No, it is not true.</p> <p>ADV G PRETORIUS: Or to implement any other appropriate measures to deal with the situation, is that equally not true?</p> <p>MR GAMA: Equally not true.</p> <p>ADV G PRETORIUS: And they say that -</p>
<p style="text-align: right;">Page 46</p> <p>day.</p> <p>ADV G PRETORIUS: Did you attend it?</p> <p>MR GAMA: No, I did not attend the golf day.</p> <p>ADV G PRETORIUS: Why not?</p> <p>MR GAMA: There was a bereavement in my family, so that particular week I had to take days off because I had to go and bury my aunt.</p> <p>ADV G PRETORIUS: Now, we then know that about a month after this you were suspended.</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: Now, we have dealt with the court application and the correspondence and why you used some stringent language. I'm not going to revisit that again.</p> <p>CHAIRPERSON: Mr Pretorius, is there an appropriate moment to take a tea break?</p> <p>ADV G PRETORIUS: Yes.</p> <p>CHAIRPERSON: Are you nearly finished?</p> <p>ADV G PRETORIUS: I'm nearly finished.</p> <p>So it's an appropriate time, and then I can see whether there's anything - sorry, I didn't realise what the time was.</p> <p>CHAIRPERSON: Let's break for 10 minutes.</p>	<p style="text-align: right;">Page 48</p> <p>in 1.4 your conduct in approving the contract with GNS falls far short of the standard that they reasonable expected of a person in your position. If you had known, and you testified about that, that it was a confinement what would you have done?</p> <p>MR GAMA: If I had known that it was a confinement I probably would not have approved it in the first instance because I hold a very strong belief that these security contracts must just go out on open tender, there are numerous supplies of security services.</p> <p>ADV G PRETORIUS: And we have dealt with 50 Like New contract, and then on page 4 it is alleged that the conduct set out has irretrievably broken the relationship between you and Transnet. What is your comment on that?</p> <p>MR GAMA: I do not believe so.</p> <p>ADV G PRETORIUS: Thank you, Mr Chairman. Mr Gama just - we have dealt with in general the letters and your approach to it so I am not going into each individual letter to deal with it. If my learned friend thinks it is relevant he will deal with it in cross-examination. I have got no further questions thank you.</p> <p>CHAIRPERSON: Thank you, Mr Pretorius. Cross-examination, Mr Pretorius?</p>

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<p style="text-align: right;">Page 49</p> <p>CROSS-EXAMINATION BY ADV P PRETORIUS SC: Thank you. Mr Gama, you accept I presume, that in terms of your contract of employment you are bound by the provisions of the detailed procurement policy?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And you accept too that you are bound by the provisions of the delegation of authority framework?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And as chief executive officer of Transnet Freight Rail you would have made yourself aware of their contents, the contents of those two documents.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And that is because ultimately you would be accountable for their application and enforcement within your area of jurisdiction, that is Transnet Freight Rail.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: Your authority on confinement is R10 million, was at the time R10 million is that correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And as the evidence has shown your authority in relation to an open</p>	<p style="text-align: right;">Page 51</p> <p>ADV P PRETORIUS SC: So you are saying to Mr Arbitrator that because of the comment made by Ms Ramos in October 2008 you should not be called to account for your conduct in relation to the GNS matter, is that what you are saying?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So because Ms Ramos made a remark prior to any investigation of these issues raised, you say it is quite legitimate for a CEO to say I cannot be held to account at all for the issues raised in the first charge, is that what you are saying?</p> <p>MR GAMA: No, that's not what I am saying.</p> <p>ADV P PRETORIUS SC: What are you saying?</p> <p>MR GAMA: What I am saying is the issues were discussed at the time. Some of them were not the issues as they had been put in, and that once the issues were known, I should have been afforded the opportunity by internal audit to give me the actual issues so that I would then have been able to deal with it.</p> <p>ADV P PRETORIUS SC: Mr Gama, you are a CEO, you understand, or I thought you understood what appeared in paragraph 5. Would you take your time to</p>
<p style="text-align: right;">Page 50</p> <p>tender process is R100 million.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: It was at the time, and the reason is because confinement is a process which may be open to abuse, and that is why the authority levels are so much lower than the open tender limits am I correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And the internal procurement policy therefore provides in effect that one must be far more cautious when dealing with the confinement than one would be in dealing with an open tender process where other procedures have taken place is that correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Would you look at bundle A, page 19 please. The document begins at page 17 and it is the employee's response to the disciplinary charges, and if you look at page 19 under the heading B there are some preliminary objections raised, and it is contended under the heading in paragraph 5, that the first charge should be dismissed. Firstly do you persist with this preliminary objection?</p> <p>MR GAMA: Yes, on the basis that it was put in on this submission.</p>	<p style="text-align: right;">Page 52</p> <p>read it. You know what is said here, you obviously have considered this document, discussed it with your legal representatives. You have now had an opportunity to read the whole of paragraph 5 am I correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: Paragraph 5 states in effect that the first charge against you in relation to GNS Security should be dismissed does it not?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And it says so for the reasons set out in paragraph 5, not for any other reasons, correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: Let me put my question to you again. Are you saying to Mr Arbitrator that because of a remark made by Ms Ramos in October 2008, prior to any investigation having taken place, you as CEO of Transnet Freight Rail should not be called to account for your conduct in relation to the GNS charge at all?</p> <p>MR GAMA: What I am saying is that we discussed the matter. I was then given the assurance that it was utter rubbish and baseless. Then at a much later stage, without my knowledge, I found out that behind my back there had in fact been an investigation</p>

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when I myself had indicated earlier that if it needed to be investigated - was told by my superior officer that as it looked there was no need for it to be investigated any further.

ADV P PRETORIUS SC: Who told you that?

MR GAMA: Ms Ramos.

ADV P PRETORIUS SC: Are you saying there was another meeting later than the meeting in October 2008 or do I misunderstand your answer?

MR GAMA: I am not sure which part you do not understand.

ADV P PRETORIUS SC: Well let's look at what this document says at paragraph 5.1. You refer to a particular meeting in October 2008.

MR GAMA: Yes, I am referring to that meeting.

ADV P PRETORIUS SC: Right, you are referring to that meeting?

MR GAMA: Yes.

ADV P PRETORIUS SC: At that time no investigation at the hands of Transnet internal audit had yet taken place.

MR GAMA: That's correct.

ADV P PRETORIUS SC: At that meeting Ms Ramos said to you, on your version, that this was rubbish

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and you should not bother yourself with it. That's the contents of the document.

MR GAMA: That's correct.

ADV P PRETORIUS SC: Are you saying that on the basis of that comment by Ms Ramos, prior to any investigation taking place, it is legitimate for you as a CEO to contend that you should not be held accountable for your conduct in relation to the GNS Security contract at all, is that your version?

MR GAMA: No, I am not talking about the issue of whether I should be accountable or not. I am referring to the issue that the whole notion of even conducting an investigation had been thrown out by Ms Ramos at the time, and I had not been aware until quite some time later, which would have been in May 2009, that in fact an investigation into me was taking place.

ADV P PRETORIUS SC: Are you saying that it was not competent to initiate an investigation into the GNS Security matter?

MR GAMA: I'm saying that I was not informed.

ADV P PRETORIUS SC: That's a different matter.

MR GAMA: So this is what this charge relates to, to say at the point in time when the matter

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arose, which was in October, I was informed that there was no need for her to pursue anything related to this, and that I have never become aware until in May of 2009 that there was in fact an investigation against me.

ADV P PRETORIUS SC: So are you complaining here about your awareness of the investigation, because that is not what this says at all. It says nothing about your awareness of the investigation. It says nothing about delay. It says, look at 5.3 Mr Gama, and once again I put it to you that you clearly are capable of understanding this document, at 5.3 it says very clearly "when the employee inspected Ramos' letter it was identical to the one he had received. Then Ramos said this was rubbish, and that he should not bother himself with it. Her words were to the effect that those were flimsy accusations from nameless people, and that the company does not have to deal with such things as they were rubbish anyway." The next paragraph reads "from that the employee considered the matter closed." Are you saying firstly, as it is apparent from your answer, that it was incompetent of Transnet to initiate an investigation into those matters because of that remark that Ramos made?

MR GAMA: Yes, I'm saying that Transnet should not have persisted with it without informing me

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about it.

ADV P PRETORIUS SC: That is not what this complaint -

CHAIRPERSON: Please let the witness finish.

MR GAMA: I am saying that Transnet should not have persisted with it without informing me about it, and that it was really part of our values that if there was any such investigation after I'd been told that there would not be an investigation, that Transnet would have been frank with me but they were inconsistent in terms of applying our own values and code.

ADV P PRETORIUS SC: So had they informed you of the investigation would Transnet, in your view, have been entitled firstly to persist with the investigation?

MR GAMA: Yes, they would have been entitled.

ADV P PRETORIUS SC: In fact they would have been duty bound to do so not so.

MR GAMA: They would have been entitled to do so.

ADV P PRETORIUS SC: And duty bound to do so where allegations and irregularities are made within Transnet there is a duty to investigate them not



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so?

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MR GAMA: Ja, not when the chief executive has indicated that there appeared to be flimsy.

ADV P PRETORIUS SC: Anyway, you concede that they are entitled to persist with their investigation had they informed you.

MR GAMA: Yes.

ADV P PRETORIUS SC: And had they informed you of it, and those investigations revealed possible misconduct on your part, they would have been entitled to call you to account.

MR GAMA: Yes they would have been entitled to call me to account but also I would have wished, as I continued to do so, that I be given all of the information at the disposal of Transnet so that I could be in a position to deal with it comprehensively.

ADV P PRETORIUS SC: Alright, so your complaint is that you were not informed of the investigation, and your complaint is that you were not given sufficient documentation.

MR GAMA: That's correct.

ADV P PRETORIUS SC: Where in paragraph 5.1 to 5.5 does it say that?

[12:14] MR GAMA: This is not a comprehensive document that we enrolled in terms of answering this. We

issues where I was not the process controller and if I had been given the opportunity and given a full disclosure in terms of what the issues are, I would have been able myself - as the CEO - to also be in a position to prosecute the people that were involved in it.

ADV P PRETORIUS SC: Would you concede that those complaints were not raised in paragraph 5 that you've just given in your rather lengthy answer?

MR GAMA: Yes, they're not raised because it is not a comprehensive document.

ADV P PRETORIUS SC: Of course you were informed of the fact of an investigation on the 10th of December 2008 by Mr Oates.

MR GAMA: No, I was not. Mr Oates did not come to me to tell me about an investigation on myself. He came to inform me and to seek my cooperation in terms of getting certain of the sales team of the company to cooperate on an investigation relating to recruitment and selection of the LPO's and as well as an investigation into the rape allegation. Since my discussion with Ms Ramos, I had not been specifically informed that there was now an investigation also into me. So, that meeting of the 10th dealt completely with different issues.

ADV P PRETORIUS SC: Mr Oates' evidence

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basically gave just the -

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ADV P PRETORIUS SC: On the contrary, Mr Gama. The preliminary objection in paragraph 5 is quite clear, comprehensive and I'm going to argue that your answers are simply evasive.

MR GAMA: No they are not.

ADV P PRETORIUS SC: So, do I understand you correctly that the mere fact that Ramos said this was rubbish, on its own did not preclude calling you to face the charge on GNS. Do I understand your evidence now correctly? Without the delay and without the lack of information, the mere fact that Ramos says that the allegations and the communication were rubbish, would not preclude Transnet from calling you to account.

MR GAMA: You're correct in that it would not have precluded Transnet. I myself had discussed it with her on the basis that if there was a requirement to investigate, there should be an investigation but the process followed in terms of charging me was very different from the manner in which Transnet normally dealt with these kinds of issues in that I was never given the opportunity to look at what the actual issues are and - when I was charged - it became very clear to me that I was being charged on

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was clear that the meeting of the 10th of December 2008 he informed you that he was investigating the IPO matter, the rape matter and the GNS matter. That was not faced an issue in cross examination.

MR GAMA: No, he did not say to me there was any matter on the GNS - I think - on his own version. He indicated that the issues that were on the tip-offs he did not find them to be necessary. He even indicated that he knew that I was not an owner or a co-owner of Security and he also indicated that there was nothing else that he needed to follow up based on that particular anonymous tip-off.

ADV P PRETORIUS SC: The evidence will show that Mr Oates did inform you at the meeting of 10 December that he was investigating issues related to the appointment of GNS - that was never challenged in cross examination.

MR GAMA: Mr Oates merely asked me the question whether I knew General Nyanda - that was not to be inferred as to indicated that there was now an investigation into me on GNS.

ADV P PRETORIUS SC: Well of course at that stage your involvement in the GNS matter would not have been understood or known - it was still to be investigated. All they had was the complaint. Correct?

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<p style="text-align: right;">Page 61</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: If you look at the document that you say is the document that constituted the complaint – the evidence was that this document had paid 15 to 17 – was received some time in October 2008 by Transnet because if you look at the page – the new page 17 – it refers to the Group Chief Executive of Transnet, Maria Ramos was made aware by means of a letter on 12 September 2008 - so you had done nothing about this. This was the second tip-off clearly -</p> <p>MR GAMA: The document that they discussed actually with the Group Chief is the document on page 5 to 10.</p> <p>ADV P PRETORIUS SC: So it was incorrect evidence that you gave earlier that it was the document on pages 15 to 17.</p> <p>MR GAMA: Ja, they actually look exactly the same somehow -</p> <p>ADV P PRETORIUS SC: Although they are not the same.</p> <p>MR GAMA: - the document I was actually referring to – I'm sorry – is the document that we looked at</p> <p>ADV P PRETORIUS SC: Any explanation for the -</p>	<p style="text-align: right;">Page 63</p> <p>ADV P PRETORIUS SC: Why didn't you make sure that the documents that were presented to this Arbitration were correct, a meeting that you say now happened in September and not October and you can remember it clearly by reference to events that are present to your mind?</p> <p>MR GAMA: Because I had to ask people when was the actual – unfortunately I don't have access to my diary so that I can give you precise dates -</p> <p>ADV P PRETORIUS SC: Just give me precise dates.</p> <p>MR GAMA: A lot of these things happened some time ago and it is quite difficult for me to give you precise dates on most of the issues without me having access to my actual diary.</p> <p>ADV P PRETORIUS SC: Mr Gama, you've just given evidence - by reference to matters present to your mind - that this meeting with Ms Ramos now happened in September not October.</p> <p>MR GAMA: When it was in the same week, the very last days of September – 29, 30th, thereabout.</p> <p>ADV P PRETORIUS SC: Do you accept – as appears on page 4 – that on the 2nd of October 2008 Maria Ramos penned that note at the top of bundle B page 4.</p> <p>MR GAMA: Yes that's her handwriting.</p>
<p style="text-align: right;">Page 62</p> <p>CHAIRPERSON: On page 5.</p> <p>MR GAMA: Yes, and I think it has the same sort of issues.</p> <p>ADV P PRETORIUS SC: Well, it might have the same sort of issues but they are different documents Mr Gama. Is there any explanation for the confusion?</p> <p>MR GAMA: No, I was just asked to refer to the document. I think we may have just made a mistake in terms of which one is the actual document. That is the one that has marked up to 17 or 18.</p> <p>ADV P PRETORIUS SC: Let's look at the doc – are you saying now that the document at page 5 and following is the document that you received and the document that you discussed with Ms Ramos some time in October.</p> <p>MR GAMA: Yes, I think it was during the first week of October.</p> <p>ADV P PRETORIUS SC: Could it have been on the 2nd of October?</p> <p>MR GAMA: It would have been the end of September beginning of - the sense I get is, it was around 28, 29 September because of I remember some of the events related that I was going to the Drakensberg for a conference - actually at the end of September.</p>	<p style="text-align: right;">Page 64</p> <p>ADV P PRETORIUS SC: Do you accept that she instructed Chris to look into this as per the normal processes as would be her duty?</p> <p>MR GAMA: Ja. I accept it.</p> <p>ADV P PRETORIUS SC: If you look at the document at page 5 to page 10 - you are mentioned at the top of the page and you are referred to in the following manner – the document reads "The information is that the company is original from Durban and Mr Siyabonga Gama brought it up to Gauteng for one and other reasons known to him" - that is the allegation there.</p> <p>MR GAMA: Do you say I accept the allegation?</p> <p>ADV P PRETORIUS SC: No, I'm saying that "Do you accept that that is the allegation?"</p> <p>MR GAMA: Ja. That is the allegation.</p> <p>ADV P PRETORIUS SC: And the second time that you are mentioned is on page 10 which you suggested that you be interviewed together with two other persons.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So, the only allegation against you in this document is that you "brought the company from Durban to Gauteng for one and other reasons known to him" – that's the only allegation</p>

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<p style="text-align: right;">Page 65</p> <p>in this document. If you want time to read the document, please feel free to ask that which I presume you already –</p> <p>MR GAMA: On page 5 I'm not mentioned by name but there's this issue of direct access.</p> <p>ADV P PRETORIUS SC: Mr Simonelli having direct access to you? You're not charged for that, are you?</p> <p>MR GAMA: No. I'm not charged for that.</p> <p>ADV P PRETORIUS SC: And who are you charged with the allegation at the top of page 7?</p> <p>MR GAMA: Not correct.</p> <p>ADV P PRETORIUS SC: Ms Ramos didn't dismiss as utter rubbish any charge in relation to your signing a confinement beyond your authority, did she?</p> <p>MR GAMA: No, she did not. But neither did she inform me that there was any other investigation that would be conducted relating to any security contract.</p> <p>ADV P PRETORIUS SC: Would you have expected her to inform you of an investigation into your signing the confinement document at that stage?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: But she didn't</p>	<p style="text-align: right;">Page 67</p> <p>ADV P PRETORIUS SC: Do you accept that in the face of such allegations Transnet is entitled to investigate those issues?</p> <p>MR GAMA: I accept that Transnet is entitled to investigate in the face of that. The only issue that I raise on this matter is that - issues pertaining to my person – there was never any suggestion that I could be involved in any of this.</p> <p>ADV P PRETORIUS SC: I don't understand that answer. Let me put the question to you in this way. You accept – as I understand it – that Transnet is entitled to investigate these allegations concerning the award of the contract to GNS. Do you accept that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: If those investigations reveal misconduct on your part – if they do – misconduct not referred to in this tip-off – you accept – I take it – as the CEO of TFI that Transnet would be entitled to investigate and call to account in relation to that.</p> <p>MR GAMA: Transnet would be entitled to investigate. Transnet would also have to inform me that I am now formally under investigation and then they would investigate – they wouldn't be precluded from doing so.</p> <p>ADV P PRETORIUS SC: And of course if</p>
<p style="text-align: right;">Page 66</p> <p>know anything – how could you expect that?</p> <p>MR GAMA: No, I'm saying after she became aware.</p> <p>ADV P PRETORIUS SC: Well, that Mr Oates informed you of.</p> <p>MR GAMA: No, Mr Oates did not inform me.</p> <p>ADV P PRETORIUS SC: Well, that's a matter we will argue. And of course Maria Ramos only became aware of the implications pertaining to you in relation to your signing of the confinement document when she received the report in February.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: This document deals with serious matters, doesn't it?</p> <p>MR GAMA: It does.</p> <p>ADV P PRETORIUS SC: It suggests that there was underhand activity in relation to the award of the contract to GNS, doesn't it?</p> <p>MR GAMA: Yes. It talks about a number of different companies.</p> <p>ADV P PRETORIUS SC: Amongst other things it suggests that the award of the contract to GNS was underhanded.</p> <p>MR GAMA: Ja. That's what it suggests.</p>	<p style="text-align: right;">Page 68</p> <p>they're entitled to investigate, they're entitled to call to account. Provided they do so fairly in your view any misconduct which is revealed in that investigation.</p> <p>MR GAMA: Yes.</p> <p>[12:34] ADV P PRETORIUS SC: Look at the document please, at 8A and 8B. This is a document that was placed before you for your approval in 2005. Is that correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: Your signature appears on page 8B. It's undated but presumably it was between 26 October 2005 and 4 November 2005.</p> <p>MR GAMA: Probably after.</p> <p>ADV P PRETORIUS SC: But in 2005 presumably, or early 2006.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: It's not really important. Against your signature you make a note "enter into a six month contract and re-assess." Correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: You must have applied your mind to the contents of this document.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You must have read the document.</p>

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<p style="text-align: right;">Page 69</p> <p>MR GAMA: Yes, I read the document.</p> <p>ADV P PRETORIUS SC: And you applied your mind to the extent that you directed that the period of the contract be reduced to six months.</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: Then, if you look at page 8H, this is a document dated the 3rd March 2007.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Now, it was signed by Mr Tobias, the Chairman of the Spoornet Acquisition Council on the 19th January 2007. I presume you accept that.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And the note that he appends to it, he says, "extension reduced to one year instead of two years initially proposed – will test the market in the interim on alternative supplier". Do you see that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: He applied his mind and he decided no, this should be extended for two years as initially proposed but rather for one year. He must have considered the surrounding circumstances, the contract itself and the period and the appropriateness of a two-year contract. You nod your head, is that correct?</p>	<p style="text-align: right;">Page 71</p> <p>ADV P PRETORIUS SC: And then you say, "In the interim let us review whether these services are required. If so, let us go on a public tender process." In other words, you issue an instruction that matters should be closely monitored. Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And you say, "Which will ensure that we have a new contract from 1 July 2007."</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: In other words, present to your mind at this stage is that a new contract should be in place by 1 July 2007. Correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: These matters such as cable theft, acquisitions, I presume are discussed at your weekly meetings.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: You go on to say, "The contract appears very expensive." Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You must have given consideration to the costs and you must have applied your mind to the costs.</p> <p>MR GAMA: Correct.</p>
<p style="text-align: right;">Page 70</p> <p>MR GAMA: Ja, sorry.</p> <p>ADV P PRETORIUS SC: And then you sign on the 3rd March 2007. Do you see that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You append a long note. And you say, "Other than for January, I have not seen a reduction in cable theft". In signing this you must have had regard then to the month to month statistics in relation to cable theft.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And you must have considered them in relation to this request for approval put before you.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You say, "Let us extend this only to the end of June." I put it to you that you must have read this document, you must have seen that the proposal was originally for two years, reduced on Tobias' recommendation to one year but you, having considered all the relevant information, decided that this should only be done to the end of June.</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: And it would be your duty to give such consideration to these requests.</p> <p>MR GAMA: Yes.</p>	<p style="text-align: right;">Page 72</p> <p>ADV P PRETORIUS SC: And concluded that it was expensive. Correct?</p> <p>MR GAMA: I thought it appeared expensive, yes.</p> <p>ADV P PRETORIUS SC: You must have looked at the cost and passed a judgment on the cost. Correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: Then you say, "There's a need to have meaningful KPIs", which stands for key performance indicators. Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So, not only did you consider all the other matters in your note; not only did you have regard to the detailed contents of the document being placed before you, but you also made a remark, gave an instruction in regard to the management of the contract going forward and its contents.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You say that – it says elsewhere in the documentation and I'll refer to it if necessary but you say the cable theft is a very important issue within Transnet.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: It delays trains,</p>



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<p style="text-align: right;">Page 73</p> <p>it affects service delivery?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You were involved in a turnaround strategy at the time?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: It was very important to you as CEO to have regard to and ensure that quite simply cable theft didn't happen.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And this would have been one of the items dealt with at your weekly meetings?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You would presumably have taken the trouble as CEO to discuss these matters too with your subordinates?</p> <p>MR GAMA: Yes, we discussed them regularly and also with our superiors as well.</p> <p>ADV P PRETORIUS SC: Now, this document, certainly at page 8A. Do you have page 8A in front of you?</p> <p>MR GAMA: Yes, I do.</p> <p>ADV P PRETORIUS SC: In the left-hand column, "Reasons for deviating from the prescribed procurement procedures", in other words, where a</p>	<p style="text-align: right;">Page 75</p> <p>ADV P PRETORIUS SC: Would it not concern you as a matter of general management to know that cable theft is being dealt with and how?</p> <p>MR GAMA: Sorry, I think maybe we're talking about two different issues.</p> <p>ADV P PRETORIUS SC: Alright. Let's just, let me be kind, be a bit more explicit and perhaps fairer to you. At least as at the time you read and signed this document you would have known CPI is the only known company that specialises in this field of work and they are already in possession of the relevant databases and information sources to assist Spoornt in curbing this crime.</p> <p>MR GAMA: Yes, that's what was being indicated.</p> <p>ADV P PRETORIUS SC: You would have accepted that surely?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You didn't query it?</p> <p>MR GAMA: The preceding paragraph would also indicate that they were also doing work for Eskom as well.</p> <p>ADV P PRETORIUS SC: Yes, and over the page, it is said in the second box, "CPI is the only</p>
<p style="text-align: right;">Page 74</p> <p>confinement is in issue the reasons for deviating from the prescribed procurement procedures, in other words, open tender procedures have to be fully explained?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You, in signing a consignment, would have to have regard to these reasons and examine them closely to justify a confinement?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And you would do so?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Third bullet states, "The CPI is the only known company that specialises in this field of work. They are already in possession of relevant databases and information sources to assist Spoornt in curbing this crime."</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: As part of your duties and activities as CEO of Transnet Freight Rail, you would have been aware of this information in any event, I presume.</p> <p>MR GAMA: No, it's not information that I would be aware of but the specialist, people who specialise in that would be the ones who would know about this kind of thing.</p>	<p style="text-align: right;">Page 76</p> <p>known company that offers this service."</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: So at the end of December 2005, you were in possession at least of that knowledge?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Then if one goes to page 8H, you've already told Mr Arbitrator that you read the document that you were signing and that you gave it the attention as evidenced by the comments on page 8H.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Were you aware of the fact that the award of the contract to CPI followed a pilot project involving CPI?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Now, we know now from the documents which you've just dealt with and particularly the documents at 8H that on the 3rd March 2007 you approved an extension of the CPI contract until the end of June 2007.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You gave an instruction that a public tender process should be instituted and that that should be concluded by 1 July 2007?</p>

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<p style="text-align: right;">Page 77</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Is it your evidence that the next occasion on which you became aware of any contractual issues relating to specialised security services was on the 5th December 2007 when you signed the document put before you allegedly by Mr Beattie?</p> <p>MR GAMA: When you say contractual -</p> <p>ADV P PRETORIUS SC: Well, are you saying that the next time - well, you gave evidence, Mr Gama, that you didn't know of any tender process which followed. Do I understand your evidence correctly? And that the first you knew was when Mr Beattie allegedly spoke to you on the 5th December 2007?</p> <p>MR GAMA: Yes, I did not know of the nitty-gritty of the processes but I would have been aware that I had asked on tender, but I never dealt with anything relating to it until the 5th December.</p> <p>ADV P PRETORIUS SC: I don't really understand the words nitty-gritty in this context. They're very precise.</p> <p>MR GAMA: I'm talking about the actual tender processes.</p> <p>ADV P PRETORIUS SC: Did you know that there was a tender process taking place?</p>	<p style="text-align: right;">Page 79</p> <p>March 2007 and the 5th December 2007. It's quite improbable.</p> <p>MR GAMA: I don't find it extraordinary in the sense that I don't deal with tender processes. I don't even sit on these Tender Boards. There are people who are employed to deal with these issues. People would raise these issues with me if maybe operationally there was an issue that was happening and it was because there wasn't a contract, but if they didn't say it's because there's no contract I wouldn't know.</p> <p>ADV P PRETORIUS SC: You wouldn't know?</p> <p>MR GAMA: No, I wouldn't.</p> <p>ADV P PRETORIUS SC: You wouldn't discuss it at your weekly operational meetings?</p> <p>MR GAMA: Unless people actually volunteered to me that the reasons they're having problems is because they don't have contracts.</p> <p>ADV P PRETORIUS SC: You wouldn't ask? You wouldn't say I ordered on the 3rd March that there be a new contract in place on the 1st July 2007, is there? You wouldn't even bother to ask at your weekly operational meetings?</p> <p>MR GAMA: If I recalled it but there were so many things that we needed to deal with, that we were dealing with, so I wouldn't, unless people said to</p>
<p style="text-align: right;">Page 78</p> <p>MR GAMA: No, I was not aware that there was.</p> <p>ADV P PRETORIUS SC: So my proposition then, I put to you again, the next thing you knew of any tender process or any award of any contract was on the 5th December 2007?</p> <p>MR GAMA: Yes, I think though, if I had asked in March that they go out on tender, maybe remotely one would be aware that they should because the process, but I didn't know whether in fact they were conducting the process. I didn't know.</p> <p>ADV P PRETORIUS SC: Sorry, you're saying to Mr Arbitrator that once you had signed this document on the 3rd March 2007, commenting on the need to reduce cable theft, directing a public tender process, instructing meaningful KPIs to take place, you knew nothing of any tender process, you knew nothing of any award of any contract on whatever basis until the 5th December 2007?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: I put it to you that that's an extraordinary piece of evidence, Mr Gama. That you as Chief Executive Officer would simply be ignorant of anything that happens in relation to tenders, of confinements, or whatever process, between the 3rd</p>	<p style="text-align: right;">Page 80</p> <p>me, look, the reason for the problem is that we don't have a contract. I wouldn't know. I would ask them why has this thing gone up and if people just said no, it's because of the criminal element that's gone up, which seems to be the issues that people were discussing that the criminals are moving from one area to the next. I wouldn't chase up on security contracts. There are general managers who deal with these issues and if it was a big issue they would come to me and say we have an issue here and then I would still have to ask them what is it that you are doing about it. Is there something that you need me to help with in order for you to execute? But they were, on the day to day issues relating to that, fell under the ambit of the Chief Operating Officer and the general managers concerned.</p> <p>[12:54] MR P PRETORIUS: Mr Gama, I presume you accept as a CEO of an operating division of Transnet, it is your duty proactively to deal with key issues under your jurisdiction such as cable theft and how it is dealt with?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And it is not sufficient for a Chief Executive Officer just to wait for people to raise issues with him? It is your duty to lead?</p>

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MR GAMA: That is correct. The issue of contracting was not one of the issues, but cable theft we dealt with quite actively.

ADV P PRETORIUS SC: So can we accept in addition that the instruction that you gave that a new contract should be placed in place on 1 July 2007, you never followed that issue up with those beneath you?

MR GAMA: No, I would not have derived it, because once I've asked them to do it, I would then have assumed that they started that process.

ADV P PRETORIUS SC: Were there problems in the procurement department at the time?

MR GAMA: Yes, there were many problems.

ADV P PRETORIUS SC: Was that an issue requiring attention?

MR GAMA: Yes, it was an issue that the CFO or I think the CPO was new -

ADV P PRETORIUS SC: It was priority issue?

MR GAMA: - At that time. So these were issues that they were faced with.

ADV P PRETORIUS SC: Procurement and the problems within procurement at the time were a priority issue within Transnet Freight Rail at the time?

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MR GAMA: Correct.

ADV P PRETORIUS SC: And you still say that you did not feel it necessary to follow up on an instruction you give that there should be an open tender process and a contract in place by 1 July 2007? I find that most improbable.

MR GAMA: No, I did not specifically follow up whether it was happening. I always knew that when you'd asked the right General Managers to deal with an issue, they'll deal with them. We had very senior people dealing with these issues at the level of the CFO and the CPO.

ADV P PRETORIUS SC: So you trusted them entirely?

MR GAMA: Yes, it is my style that once we have the correct people in a particular area, then I should indicate to them what our requirements are. I am not a control freak. I give them the space to act. I direct in terms of what it is that is required from them and then I expect of them to execute and then periodically in terms of whatever KPI that we've agreed with them, either at the end of the year or during our monthly meetings or at our half-year review, we would then have detailed discussions. And I always invite them that whenever you are having any difficulty, raise it

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with me.

ADV P PRETORIUS SC: Mr Gama, it is precisely because there were such problems with procurement within Transnet Freight Rail at the time that you couldn't rely absolutely on your managers.

MR GAMA: I don't think it is true to say you couldn't rely on the managers. They were there to actually execute the work. Procurement for instance we had a 24 month project called Operation Clean-up which we put into place. So we always knew that whatever the issues were, they were being diminished, but they wouldn't overnight disappear.

ADV P PRETORIUS SC: But it was necessary to have Operation Clean-up in procurement precisely because the system wasn't operating properly?

MR GAMA: That is correct. And that is why we brought in new people.

ADV P PRETORIUS SC: Would this be a convenient time?

CHAIRPERSON: you know that you can't discuss the matter now?

MR GAMA: Ja.

[HEARING ADJOURNS HEARING RESUMES]

[14:03] ADV P PRETORIUS SC: Mr Gama, further to the questions asked of you this morning, we know that

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on the 3rd of March 2007 you signed a procurement document authorising the extension of the CPI contract to the end of June 2007. Am I correct?

MR GAMA: Yes.

ADV P PRETORIUS SC: And we know that you instructed that a new contract pursuant to open tender be concluded before 1 July 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: Were you aware of the fact that after the end of June 2007 CPI continued to perform these services?

MR GAMA: Yes. I became aware of it when I did my investigations in July.

ADV P PRETORIUS SC: July of what year?

MR GAMA: 2009.

ADV P PRETORIUS SC: Were you aware - you had extended the contract or instructed the extension of the contracts to the end of June 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: Were you aware that after that CPI continued to do the services.

MR GAMA: Yes. I became aware that they had a month to month contract.

ADV P PRETORIUS SC: You became aware of that in July 2009.



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<p style="text-align: right;">Page 85</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: At the time in 2007 did you know who was doing the specialised security service contract? After June?</p> <p>MR GAMA: No. I didn't specifically know what – it is common practice in Transnet that if you haven't finalised tender processes wherever you have can continue subject to following certain procedures with the tender board.</p> <p>ADV P PRETORIUS SC: Oh you say you didn't specifically know. Did you know or didn't you know?</p> <p>MR GAMA: No. I didn't know.</p> <p>ADV P PRETORIUS SC: After June you didn't know who was performing the services.</p> <p>MR GAMA: No. I didn't know.</p> <p>ADV P PRETORIUS SC: And you already told Mr Arbitrator you didn't know whether any procurement process had been put in place.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: So, you wouldn't have known that – it appears from B9, bundle B1 page 9 – you wouldn't know that this – according to your evidence – that this tender had ever been issued.</p> <p>MR GAMA: No. I wouldn't know.</p>	<p style="text-align: right;">Page 87</p> <p>Some of them I never even met. I don't know them.</p> <p>ADV P PRETORIUS SC: Well, Mr Senamela you certainly knew well.</p> <p>MR GAMA: Yes. I knew Mr Senamela, Naidoo and Nyanda.</p> <p>ADV P PRETORIUS SC: And you would have presumably kept an eye on Mr Senamela and his performance at the time.</p> <p>MR GAMA: Not really. He didn't report to me. Mr Senamela would only report to me if there were certain exceptions that had happened and these would be exceptions that needed my attention or exceptions which I needed to also report to Group – serious things that would –</p> <p>ADV P PRETORIUS SC: You would have met him at the weekly meetings.</p> <p>MR GAMA: No. Mr Senamela was not one of the people at the weekly meetings.</p> <p>ADV P PRETORIUS SC: Did Mr Nyanda attend the weekly meetings?</p> <p>MR GAMA: No.</p> <p>ADV P PRETORIUS SC: Who did?</p> <p>MR GAMA: Mr Beattie.</p> <p>ADV P PRETORIUS SC: Mr Beattie attended the weekly meetings?</p>
<p style="text-align: right;">Page 86</p> <p>ADV P PRETORIUS SC: At page 24 there is a list of names – Mr Nyanda, Mr Khanye, Mr Naidoo, Mr Motebe, Mr Martin and Mr Nxumalo – who followed you was Mr Senamela – do you see that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: All these people worked underneath you in Transnet Freight Rail.</p> <p>MR GAMA: They work inside Transnet Freight Rail but not underneath me.</p> <p>ADV P PRETORIUS SC: But everyone at Transnet Freight Rail is underneath you.</p> <p>MR GAMA: Ultimately, yes.</p> <p>ADV P PRETORIUS SC: Yes. And all these people at least would have known.</p> <p>MR GAMA: Yes. They were dealing with the issues.</p> <p>ADV P PRETORIUS SC: None of them mentioned to you at the time that there was a procurement process under way.</p> <p>MR GAMA: No.</p> <p>ADV P PRETORIUS SC: And you didn't enquire.</p> <p>MR GAMA: Most of this people whom – they don't report directly to me. They will just talk to me by exception or if there was key issues to be raised.</p>	<p style="text-align: right;">Page 88</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So you wouldn't have known on your evidence that on the 23rd of August 2007 four bidders were short-listed for the first tender.</p> <p>MR GAMA: No. I wouldn't have known.</p> <p>ADV P PRETORIUS SC: And you wouldn't have known on your evidence that those four short-listed bidders were invited to make presentations on the 31st of August 2007.</p> <p>MR GAMA: No. I wouldn't have known.</p> <p>ADV P PRETORIUS SC: That's according to your evidence. And at page 21 – sorry page 28 of bundle B1 – the head office acquisition counsel seeks authority to issue a confined tender to four short-listed companies who submitted proposals. That's the tender process which you say you were completely ignorant of.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And then you've heard evidence that somehow in October 2007 this whole process was stopped.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And the allegation is that the instruction came from Transnet at Group level. You know that now?</p> <p>MR GAMA: Yes. I know that now.</p>

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ADV P PRETORIUS SC: So it seems that Transnet at Group level must have known about this process. People under you knew about this process but you didn't.

MR GAMA: That's what people at Group level who were dealing specifically with the security contracts.

ADV P PRETORIUS SC: And the fact that this process was stopped when it was in your own words "nearing completion" never came to your knowledge.

MR GAMA: No. It never came to my knowledge.

ADV P PRETORIUS SC: And it appears from the evidence that at this time management underneath you in Transnet Freight Rail were communicating with GNS regarding the possibility of GNS becoming the institution to provide specialised security services. You know that now?

MR GAMA: Yes. I know that now.

ADV P PRETORIUS SC: Are you saying that –

CHAIRPERSON: When you say at this time

ADV P PRETORIUS SC: At the beginning of October – the first days of October 2007 – for example

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at page B61 it seems that Mr Sipho Kanye receives the profile of General Nyanda's Security Risk Advisory Services on the 3rd of October 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: So we know – if one looks at B32b – that as at 15 October 2007 there is in place a tender process for the supply of specialised security processes – services rather.

MR GAMA: Yes.

ADV P PRETORIUS SC: We know now from the communications – and it's clear on page 32B and 32C – that somehow or other this process is brought to a halt.

MR GAMA: Yes.

ADV P PRETORIUS SC: We know now – according to the documentation – that prior to that – prior to that process being stopped – GNS came onto the scene.

MR GAMA: Yes. I know that now.

ADV P PRETORIUS SC: And you say you didn't know anything about this at the time.

MR GAMA: No.

ADV P PRETORIUS SC: We know too, Mr Gama, that four bidders had been short-listed during the open tender process that took place in 2007. Is that correct?

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MR GAMA: Yes. That we now know.

ADV P PRETORIUS SC: We know that one of the bidders – G4 Security – had been instructed to audit security services within Transnet and that it could therefore not properly be considered. Correct?

MR GAMA: Yes.

ADV P PRETORIUS SC: We know that there was nothing to prevent that original tender process from reaching its conclusion however.

MR GAMA: No. Nothing could prevent it.

ADV P PRETORIUS SC: In fact, it was very strange that this process was brought to a halt – quite improper in fact.

MR GAMA: Yes. We now know that.

ADV P PRETORIUS SC: In fact, it wouldn't have been difficult at any stage to establish those facts upon enquiry because the documents must've been there. Persons underneath you must have known that there were four short-listed bidders – one disqualified – nothing to prevent that process from reaching its ordinary conclusion which was near conclusion as at October 2007. And you concede – as I understand it – that it's most irregular that it was indeed stopped.

MR GAMA: That's correct.

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ADV P PRETORIUS SC: You knew nothing of it?

MR GAMA: No. I didn't know anything about it.

ADV P PRETORIUS SC: And it was stopped shortly after GNS had started communicating with managers under your jurisdiction.

MR GAMA: Yes.

ADV P PRETORIUS SC: Now, shortly before that there had been – to your knowledge I understand – a sponsorship of a General Nyanda golf day.

MR GAMA: Yes.

ADV P PRETORIUS SC: And what was the sponsorship for?

CHAIRPERSON: That golf day – by the way – was scheduled for the 17th and 18th of August 2007.

ADV P PRETORIUS SC: Do you recall that?

MR GAMA: Yes. I think those were the dates ja.

ADV P PRETORIUS SC: And you were aware of that?

MR GAMA: I was aware of the golf day yes.

ADV P PRETORIUS SC: You were aware of

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General Nyanda's association with that?

MR GAMA: Yes.

ADV P PRETORIUS SC: Do you know what the sponsorship was?

MR GAMA: The sponsorship was basically for a Colchestershire Home - it's a charity home - an organisation that deals with children. That was my understanding.

ADV P PRETORIUS SC: Were you in exile in Swaziland.

MR GAMA: In exile?

ADV P PRETORIUS SC: Did you go to Swaziland prior to 1994?

MR GAMA: Yes. I was in Swaziland prior to 1994.

ADV P PRETORIUS SC: Was General Nyanda also in Swaziland prior to 1994?

MR GAMA: I believe so but I never met him.

ADV P PRETORIUS SC: Did you know that you attended the same school?

MR GAMA: No. I didn't know that.

ADV P PRETORIUS SC: According to the cell phone records which are admitted you were in telephonic communication with General Nyanda on the 6th

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of July 2007?

MR GAMA: Possibly yes.

ADV P PRETORIUS SC: On the 15th of July 2007?

MR GAMA: Possibly.

ADV P PRETORIUS SC: On the 27th of August 2007?

MR GAMA: Yes.

ADV P PRETORIUS SC: And on the 1st of December 2007?

MR GAMA: Yes.

[14:23] ADV P PRETORIUS SC: Certainly on the 1st of December 2007 you were about to sign a confinement document in favour of General Nyanda Security.

MR GAMA: Yes.

ADV P PRETORIUS SC: And as we understand your evidence this morning you gave an instruction to your counsel with the deliberate intention of distancing yourself from any acquaintance with General Nyanda.

MR GAMA: No, I didn't want to distance myself from any acquaintance with General Nyanda. What was being inferred was a close friendship which I know doesn't exist. In fact, he's simply not in the age range that he would become a close friend of mine.

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ADV P PRETORIUS SC: No evidence of given of a close friendship. Neither Mr Oates nor Mr Naicker gave any evidence of any close friendship.

MR GAMA: But they were inferring that there might have been some kind of an improper relationship and -

ADV P PRETORIUS SC: So you therefore gave an instruction to your counsel to distance yourself from General Nyanda, the effect of which was (a) untrue, and (b) was intended to distance yourself from General Nyanda. That was your evidence, Mr Gama.

MR GAMA: Ja, I was wrong in terms of what their interpretation of it was but my intention, I have never said that he is not my acquaintance. I have indicated even in the court documents that I know him.

ADV P PRETORIUS SC: So what was the incorrect instruction you gave to your counsel?

MR GAMA: No, there was the use of the word friendship which implied or implicated that we were very close friends, which I'm saying is untrue.

ADV P PRETORIUS SC: Well, no-one gave that evidence, Mr Gama.

MR GAMA: Well, it was an inference and an implication.

ADV P PRETORIUS SC: Nobody even made

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that inference. It was an inference made in your own mind, if at all.

MR GAMA: Well, that is the conclusion that I drew from what they were saying.

ADV P PRETORIUS SC: You drew that conclusion and then you deliberately gave your counsel a false instruction in that regard. Why?

MR GAMA: It was not a deliberate false instruction. All I intended to do at the time was to say there's an insinuation of a close friendship which doesn't exist.

ADV P PRETORIUS SC: You gave your counsel a version on the conversation with Mr Naicker and Mr Oates that was wrong and your counsel put that version very clearly in the same terms to two witnesses.

MR GAMA: It was not a wrong version. I made an interpretation in terms of an inference of close friendship. I do know a lot of people who hold very high positions. They could be chief executives of banks or people in corporate South Africa but I certainly don't hold them to be friends and therefore that is all I merely wanted to portray an indicate.

ADV P PRETORIUS SC: Mr Gama, I would ask you to listen to the question very carefully and if possible answer it directly. Your counsel put it not to

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one witness but to two witnesses, that you knew General Nyanda like any other member of the public would know him. Do you recall that proposition being put?

MR GAMA: That's correct, yes.

ADV P PRETORIUS SC: You revealed to Mr Arbitrator this morning that that version was put on your instruction.

MR GAMA: That's correct.

ADV P PRETORIUS SC: It was put not once, on the 15th January, but several days later too to Mr Naicker on the 21st January. The same version.

MR GAMA: I could not recall the use of the word friend.

ADV P PRETORIUS SC: Mr Gama, the version that you knew General Nyanda like any other member of the public would know him was put to Mr Oates on the 15th January, correct?

MR GAMA: That's correct, yes.

ADV P PRETORIUS SC: It was put in very clear terms in response to a contrary version given by Mr Oates, correct.

MR GAMA: That's correct, yes.

ADV P PRETORIUS SC: It was put to Mr Naicker six days later on the 21st January in the same terms in relation to the same evidence. Is that correct?

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MR GAMA: Yes, as I've indicated it was because I understood them to be inferring a relationship that was much closer than what actually exists.

ADV P PRETORIUS SC: The version that your counsel put on your admission this morning on your instructions was not correct.

MR GAMA: It was not correct and as I've indicated I apologise because I was wrong.

ADV P PRETORIUS SC: You apologise because – sorry.

MR GAMA: It was because of the inference that I thought they were making because it is just not possible that General Nyanda and myself would be close friends and also in terms of what you've quoted, friends don't speak three or four times a year on the phone. They probably speak on a weekly basis.

ADV P PRETORIUS SC: Mr Gama, you're quite entitled to explain your answers to questions. I can't stop you but I would ask you to answer the questions that I do ask. The version that your counsel put on the 15th January was put on your instructions.

MR GAMA: That's correct.

ADV P PRETORIUS SC: It was incorrect. So incorrect that it warrants an apology.

MR GAMA: That's correct.

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ADV P PRETORIUS SC: Between the 15th January and the 21st January if you'd had any doubts about the propriety or the appropriateness of putting an incorrect version or allowing an incorrect version to be put to a witness under oath you did not deem it fit to retract. It was put again on the 21st January.

MR GAMA: Ja, it was put on the basis that I could not recollect the use of the word friend and my interpretation of it was that they were putting him as a much closer friend than he actually is. To me he's basically an acquaintance, somebody I know, somebody I've played golf with in the past.

ADV P PRETORIUS SC: Do you concede that the version put by your counsel was incorrect and misleading?

MR GAMA: I concede that I was wrong in putting it that way. It was largely based on the inference that I saw.

ADV P PRETORIUS SC: And of course, the telephone transcripts showing that you had indeed had contact with General Nyanda were handed over on the 26th January to you and admitted by you. And it was only after that that the retraction came.

MR GAMA: Even without the transcripts, if it had been put to me I would not have said that I'd

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never spoken to him on the phone.

ADV P PRETORIUS SC: And I'm going to put it to you that the only reason the retraction came was because the cell phone records showed that your version put by your counsel was false. That's the only reasonable inference we can draw.

MR GAMA: That's not correct. Even if I'd been asked without any records I would have readily been able to volunteer that information that we talked on the phone.

ADV P PRETORIUS SC: And you say there's nothing untoward, no untoward inference that can be drawn from your actual relationship with General Nyanda?

MR GAMA: No, there's nothing untoward.

ADV P PRETORIUS SC: Then why not say that then? Why not say quite simply I've spoken to him a few times on the phone. I've played golf with him but that's the limit. Why not tell the truth, if the truth is innocent?

MR GAMA: No, no, look, my counsel was aware that I've spoken to the general, that was not the issue. It was really just around the inference that Mr Oates was making.

ADV P PRETORIUS SC: It's a serious



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matter when counsel puts to a witness that what you're saying under oath is not correct. You know that, don't you, Mr Gama?

MR GAMA: I think it was not an issue of trying to hide anything.

ADV P PRETORIUS SC: If you weren't trying to hide anything why not give your counsel the correct instruction?

MR GAMA: It was really just to say some of the words that were used and the inference that was being made to me sounded incorrect because it made an improper inference in my mind but as I've indicated I was wrong and I apologise for it.

ADV P PRETORIUS SC: Mr Gama, if your relationship with General Nyanda was entirely innocent, then I put it to you there's no reason why you couldn't have given your counsel the correct instruction.

MR GAMA: There wasn't, there is nothing that is not entirely innocent in my relationship with Mr Nyanda.

ADV P PRETORIUS SC: That's what I'm putting to you.

MR GAMA: All that I was indicating was that the inferences of both Mr Naicker and Mr Oates was that he was a close friend when in fact he's not.

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ADV P PRETORIUS SC: Let's make it clear once again. They didn't say so in their evidence. You heard their evidence.

MR GAMA: Yes, they said I'd said he was a friend and I couldn't recall that. They'd asked me whether I knew him and I said that I know him.

ADV P PRETORIUS SC: You said you knew him like any other member of the public. That's what your version was. But, Mr Gama, please listen to the question when I ask you and try and answer it. The question to you is that, if your relationship with General Nyanda was entirely innocent in fact, then there is absolutely no reason why you couldn't have told your counsel that and allowed him to put the correct version before the arbitrator. Am I correct?

MR GAMA: No, you are not correct. My relationship with Mr Nyanda is above board and there isn't anything untoward about it.

ADV P PRETORIUS SC: And if that is so, you could have told your counsel the correct version, am I not correct in that?

MR GAMA: It's just something that I never thought was a very important issue. I worked more on the inferences that they were making.

ADV P PRETORIUS SC: Mr Gama, by your

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own admission you thought it was so important to distance yourself from General Nyanda to allow your counsel to mislead, not once but twice, this arbitrator.

MR GAMA: I did not want my counsel to mislead anybody about anything.

ADV P PRETORIUS SC: You've just admitted that an incorrect version was put forward and you've apologised for that.

MR GAMA: Yes.

ADV P PRETORIUS SC: Now I'm going to put the question once more to you and I'm going to request you to answer it once more. If your relationship was in truth and in fact with General Nyanda an innocent one, there was nothing to prevent you from telling the truth to your counsel and allowing your counsel to put the true version, as you've put it today.

MR GAMA: It was just a matter of what I thought they were concluding, which I thought was untrue.

ADV P PRETORIUS SC: Today you were telling Mr Arbitrator that one cannot infer anything untoward in the relationship. One cannot infer a friendship, from what you now say is the correct version.

MR GAMA: Yes.

ADV P PRETORIUS SC: And I'm going to

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put it to you one last time, why couldn't you say that to your counsel?

MR GAMA: I did.

ADV P PRETORIUS SC: No, you didn't, Mr Gama. By your own admission you only told him after the cell phone records had been revealed.

MR GAMA: No, that's not correct. I've never said I do not know General Nyanda.

ADV P PRETORIUS SC: You said to your counsel that you knew General Nyanda as any other member of the public would know him. That's what you told your counsel. The precise proposition was you knew General Nyanda like you, Mr Naicker, would know him because he's a public figure. That was the proposition. That was an incorrect proposition based on incorrect information given to your counsel by you.

MR GAMA: I've never talked to Mr Naicker about General Nyanda. I only had a discussion in the presence of Mr Naicker with Mr Oates.

ADV P PRETORIUS SC: Well, then, let's not split hairs. The proposition put by your counsel was that you, Mr Gama, knew General Nyanda like you, Mr Oates, would know him because he's a public figure.

MR GAMA: Yes, I think precisely why I've apologised is because I adduced the inference to

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indicate that his relationship with me is nowhere close to the inference of friendship that they were indicating.

ADV P PRETORIUS SC: We know that General Nyanda called you when you were suspended. He called you to commiserate with you on the death of a family member. He in fact called you more than four times; he called you several times beyond 2007 and 2009. But in any event, Mr Gama, I'm not going to pursue this matter any further. You gave, at best for you, an incorrect and we will argue a false version to your counsel for which you've now apologised to the arbitrator.

MR GAMA: Yes, and I've given the reasons for that.

ADV P PRETORIUS SC: You've given the reasons, but the proposition you concede, subject to your reasons.

MR GAMA: That's correct. It was based on the inference.

ADV P PRETORIUS SC: We're going to submit in argument that the version that you give today is true. There was no reason why you couldn't have been honest with your counsel so that he could put a correct version.

MR GAMA: There wasn't anything on my

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that if that information was to be placed before the arbitrator it was up to your counsel to ask you and not for you to volunteer it in the face of what was put to Oates and Naicker?

MR GAMA: My counsel will also indicate that when he asked me whether I'd spoken to General Nyanda I did indicate without any hesitation that of course I do speak to him from time to time.

ADV P PRETORIUS SC: That was after the cell phone records had been produced, is that not so?

MR GAMA: I think it was around that time, ja.

ADV P PRETORIUS SC: It was after, Mr Gama?

MR GAMA: I can't remember whether he showed it to me or he asked me.

ADV P PRETORIUS SC: But it was at the time the cell phone records had been produced?

MR GAMA: Ja, but as I say, anybody could have asked me that, even without any cell phone records I would have indicated -

ADV P PRETORIUS SC: Mr Gama, please, if you would just listen to the proposition that I'm putting to you. Are you saying that it wasn't up to you to volunteer the information when the issue arose in

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part that said I do know him or I do not talk to him. You could have asked me and I would have indicated that I do talk to him. All that I have taken exception of was the seeming conclusion that there was an improper relationship or that inference that was being made.

ADV P PRETORIUS SC: Mr Gama, are you prepared to concede that if in fact your relationship with General Nyanda was an innocent relationship to which you testified this morning, there's absolutely no reason why you couldn't have told your counsel that?

MR GAMA: I'm indicating that there was at no stage when I withheld the information that I knew General Nyanda.

[14:42] ADV P PRETORIUS SC: I'm going to argue that you're not answering the question I put to you and I've put it to you perhaps too many times for anyone to be very patient with it. But let's move on. Mr Gama, are you saying to the arbitrator now that in the face of the evidence of Mr Naicker and in the face of the evidence by Mr Oates, given six days apart, it was up to your counsel to ask you whether you'd spoken on the phone and then you would have told him?

MR GAMA: It was not a matter that we really discussed.

ADV P PRETORIUS SC: Are you saying

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relation to Mr Oates and Naicker and a deliberately false version we will argue was put? But that it was up to your counsel to ask you?

MR GAMA: No, it was not something that I was thinking about in the context of all the things that we were thinking about.

ADV P PRETORIUS SC: So when the version was put on the 15th January and the version was put again on the 21st January you didn't give it much consideration?

MR GAMA: No, I didn't.

ADV P PRETORIUS SC: Mr Senamela was appointed on the 23rd July 2007 as a manager in Transnet Freight Rail.

MR GAMA: I wouldn't know the date.

ADV P PRETORIUS SC: Is that more or less correct?

MR GAMA: Probably.

ADV P PRETORIUS SC: And you testified that you at least had a hand in his appointment?

MR GAMA: Yes.

ADV P PRETORIUS SC: He was new in the job.

MR GAMA: Yes.

ADV P PRETORIUS SC: In the period from

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July 2007 for the next two months?

MR GAMA: Ja, normally we give three months' probation.

ADV P PRETORIUS SC: Yes, this was the time at which the tender process which you allege you knew nothing of was taking place? Correct?

MR GAMA: Yes.

ADV P PRETORIUS SC: You would, I presume, as a responsible chief executive officer, have kept an eye on his progress?

MR GAMA: Yes, I did get reports from time to time that since he had come in there seemed to be a lot of feedback and reporting in terms of security issues and the fact that he knew quite a lot of the other entities that had similar problems.

ADV P PRETORIUS SC: At the time cable theft was a very important issue for you.

MR GAMA: It was one of the issues.

ADV P PRETORIUS SC: That was one of his responsibilities?

MR GAMA: Yes.

ADV P PRETORIUS SC: Dealing with cable theft, was it?

MR GAMA: Yes.

ADV P PRETORIUS SC: You would

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ADV P PRETORIUS SC: And you say you would have discussed it if the occasion arose with him and a number of other senior managers within Transnet Freight Rail?

MR GAMA: Yes.

ADV P PRETORIUS SC: And in March 2007 you had instructed that a tender process be put in place to be concluded by 1 July 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: And are you still persisting in your evidence that neither with Senamela or any other senior manager you discussed the fact that a tender process was in place at the time to replace CPI?

MR GAMA: No, I've never discussed with anybody about tender processes.

ADV P PRETORIUS SC: Mr Beattie signed his termination agreement on 5 December 2007, that is the evidence.

MR GAMA: I think -

ADV P PRETORIUS SC: 6 December, rather. You signed, I'm sorry, on the 5th December 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: And you signed the confinement document on the same day and you say Mr Beattie attended.

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undoubtedly have discussed the matter with him after the 23rd July 2007, whilst he was as it were finding his feet in Transnet Freight Rail.

ARBITRATOR: Discussed what matter with him, cable theft?

ADV P PRETORIUS SC: Cable theft and how it was being dealt with.

MR GAMA: I don't recall whether I did but if there was a need for me to do so I would have but Mr Beattie was also seized with that particular issue as well as the Chief Operating Officer. It was a matter that everyone in operations was seized with.

ADV P PRETORIUS SC: You would have recalled that just a few months earlier you had instructed that a tender process be put in place, correct?

MR GAMA: I don't think I would have recalled or not recalled, I don't know the precise issues around that but it was not really a matter that I thought that people like Senamela would be dealing with. It's largely a procurement issue.

ADV P PRETORIUS SC: Certainly he would be concerned?

MR GAMA: About cable theft? We were all concerned.

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MR GAMA: Yes.

ADV P PRETORIUS SC: Why was Mr Beattie dismissed?

MR GAMA: Mr Beattie left because he - when we put it to him that he had been overwhelmed by the size of the problems that we had on the safety side at Transnet Freight Rail and we had indicated to him that we rather wanted him to deal with specific projects he then said he wanted to go home and think about it. When he came back he said no, he wanted to either do his full job as he was employed for or to leave so the only option really that we had was to then say to him let us rather then part ways because he didn't want to deal with it in the manner in which we were discussing and quite clearly to us it appeared that he was overwhelmed by the issues. But the entire organisation I think, you know, also understood that the issues were big, issues of safety.

ADV P PRETORIUS SC: In short, he was incapable of performing the tasks for which he was appointed?

MR GAMA: It was not incapacity. As I've indicated, Mr Beattie was a world-class safety expert but he had worked in environments where there were not as much discontinuities as we had and in terms of the methodology that he was using, which is a well-known



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safety methodology which is associated with behaviour and culture, he wanted to start things from this end and finish them and then go to the next one and we were seized with all of these issues where we had up to 18 hotspots throughout the country and we wanted to infuse the methodology, either through training or further John Beatties as it were so that we could have a faster impact.

ADV P PRETORIUS SC: It's clear from your evidence, Mr Gama, that Mr Beattie couldn't cope with the size and scope of the tasks that had been presented to him.

MR GAMA: Yes, I did indicate he was overwhelmed by it and the environment that he found himself in. He had worked largely in environments where the issues had not been too big, but also the geography, the size and geography of the Freight Rail, given his energy levels as well, was not – it was just too big for him. But he was not a fool or he was not somebody who didn't have the capacity to do the work but he couldn't do it within the time frame that the organisation expected him to do it.

ADV P PRETORIUS SC: So, on the 5th December, when on your version he presented the confinement document to you, his departure was imminent?

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He was due to depart in a day or so?

MR GAMA: At the time when we met with him he had not indicated in terms of what he was going to do. I think he would have indicated after he left with the document that his thought process was that he was leaving. But when he came in I had initially thought that he was coming in to discuss those issues, but I knew we were only meeting with him later on that afternoon.

ADV P PRETORIUS SC: The document signed on the 5th December 2007 and its contents must have been known to you before the 5th December 2007.

MR GAMA: Which document?

ADV P PRETORIUS SC: The document, the separation agreement.

MR GAMA: No, no, we only prepared that document – it's really a very standard document that the HR people have. We only prepared that document when he indicated to me that his thought process was he wasn't going to take a project role but he had decided that it was better for him to leave.

ADV P PRETORIUS SC: When was the agreement of 15 months' pay reached?

MR GAMA: It must have been reached on the afternoon of the 5th.

ADV P PRETORIUS SC: The 5th December?

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MR GAMA: Yes, yes.

ADV P PRETORIUS SC: So was that a negotiation that took place on the 5th December?

MR GAMA: Yes.

ADV P PRETORIUS SC: Are you saying that document in its entirety was prepared on the 5th December?

MR GAMA: Yes.

ADV P PRETORIUS SC: You must have known on the 5th December that his departure was under consideration.

MR GAMA: After I had met with him and he'd indicated that he had decided not to accept a project management role, I had then made a phone call to the Chief Operating Officer, to indicate that – the Chief Operating Officer was aware that we were having these discussions. I had then made a phone call to say John had indicated that if he leaves, because of his advanced age we needed to at least try and meet him somehow in terms of his pension because he was going on pension after a particular period. We then agreed with John that, when I spoke to him, I said, look, a maximum of 15 months because he wasn't taking the 12 months. He then agreed quite reluctantly. In fact, I think he had wanted to go 21 months. He had indicated what his, when his

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retirement would be. He was quite reluctant but at the same time he understood that we needed to move on.

ADV P PRETORIUS SC: These discussions must have begun prior to the 5th December 2007 is what I'm putting to you. It's quite inconceivable that all this was discussed on the 5th.

MR GAMA: No, no, I met him on the 4th December.

ADV P PRETORIUS SC: What was discussed on the 4th?

MR GAMA: On the 4th December is the proposition that I put to him, whether we reduce the scope of his responsibility or we part ways and he had to go home and sleep over it.

ADV P PRETORIUS SC: So on the 4th December his possible departure related to his inability to deal with the full scope of his mandated activities was under discussion?

MR GAMA: Yes.

ADV P PRETORIUS SC: And do you now have a clear recollection that on the afternoon of 5th December the package was finalised, when you signed the separation agreement.

MR GAMA: Yes, when I signed it it must have been finalised, yes.

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ADV P PRETORIUS SC: You say that Mr Beattie came to see you on the 5th December and he was waiting outside your office?

MR GAMA: Yes.

ADV P PRETORIUS SC: He said to you that your urgent attention was required.

MR GAMA: That's correct.

ADV P PRETORIUS SC: And you say you signed the document at page 120H of Bundle B1 and at the time you signed it you looked only at page 120H?

MR GAMA: In terms of the document that he brought relating to this.

ADV P PRETORIUS SC: This is the only document you looked at?

MR GAMA: Yes.

ADV P PRETORIUS SC: And you signed on the 5th December according to you.

MR GAMA: Yes.

ADV P PRETORIUS SC: Of course, this document does in fact say at the bottom of the page that it's a confinement document. Do you see that?

MR GAMA: Yes, it's in very small print.

ADV P PRETORIUS SC: Right. And if you look at the signatures on page 120H, Mr Lloyd Tobias was

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the matter comes before you. This is the only page you read. Did you even read this page?

MR GAMA: Well, in terms of the process, as I indicated earlier, I looked at the fact that it has gone to acquisition council, he showed me various processes in terms of it having gone up to tender and we had a general discussion – a short discussion about a few issues relating to the actual documents. I was satisfied from a process perspective and what he was telling me that it had gone up to tender and that the tender board had also dealt with the issue and the processes, so I don't think I would have of necessity paid too much attention to the actual dates, in terms of when people had signed it.

ADV P PRETORIUS SC: You were told on your version by Mr Beattie, that you had to sign there and then, the matter was urgent.

MR GAMA: Yes.

ADV P PRETORIUS SC: If you look at one page, page 128 and it shows that over a period of one month prior to that, the acquisition council had appended signatures to this document. Did you query – I'm asking you again – did you query why it was so urgent?

MR GAMA: I did not query why it was so urgent. When Mr Beattie indicated to me, when he came

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the last person to sign it before you. It looks like the 23rd November 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: Did you query why the matter was so urgent that it had to be done within the space of five to 10 minutes? When at least 12 days had elapsed between Mr Tobias' signature and yours and the first signature was on the 8th November 2007.

[15:02] MR GAMA: When John came to see me, he indicated that there was this matter that he had not been able to deal with. I think he had omitted to deal with it or he had been somewhere. Then he indicated to me about the urgency. We knew within the organisation about some of these issues and it's not inconceivable that even probably the night before there could have been cable theft that took place and he then indicated that this was urgent. So he was not indicating to me something that I was not familiar with. He was indicating to me something that I was familiar with, so there wasn't any reason for me to doubt anything that he was indicating to me, because it was the truth and we were just faced with some of those issues at the time.

ADV P PRETORIUS SC: Mr Gama, I'd ask you to look at the first signature on page 128. It's dated the 8th of November 2007. Nearly one month later

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with the document to me, the actual date of the acquisition council would have been a week or 10 days earlier, which is the 23rd, but when he came to me, he was indicating that look, here is a matter that is urgent that he had omitted to give to me and that, in fact, the contractors had to move on site and we needed to deal with it urgently and it was a matter that I was familiar with, the fact that we were having this particular problem.

ADV P PRETORIUS SC: But it was not so urgent that you could have spent half an hour to an hour with in that morning looking at the documents?

MR GAMA: Mr Beattie had not been scheduled to come and see me, that is why I found him sitting outside and at the time I was just walking out of my office and I saw him there, and I said, okay, here's the general manager wanting to see me, so I said, "Come in, let's talk, what is it that I need to do?" He had not precisely been scheduled to see me and my secretary was just on the phone and Mr Beattie and herself were looking at each other. Then I just asked him to come in, because I saw him sitting there, so that I could try and find out what he needed to do.

ADV P PRETORIUS SC: You had time to meet him later that afternoon?

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<p style="text-align: right;">Page 121</p> <p>MR GAMA: Yes, I had time to meet him that afternoon, but he came, on this particular instance, he came to try and deal with this particular issue. I think he was probably under pressure from his own department too.</p> <p>ADV P PRETORIUS SC: And you want to persuade Mr Arbitrator that your evidence is truthful when you say you signed a document without knowing in whose favour the document was, in other words to whom the contract was being granted?</p> <p>MR GAMA: That's true, I never really knew who the contract was being granted to. The key thing, after you've been on these tender processes, is that you can't really change any name and when people have –</p> <p>ADV P PRETORIUS SC: We'll come to that in a moment, but do you say this document without knowing to whom the contract was being granted?</p> <p>MR GAMA: No, I didn't know.</p> <p>ADV P PRETORIUS SC: You signed this contract without knowing at what cost the contract was being granted?</p> <p>MR GAMA: We discussed that with Mr Beattie briefly, but we talked about totals, we never went into the actual cost.</p>	<p style="text-align: right;">Page 123</p> <p>in a moment, I can assure you, but you say he would have given you page 120 A to 120 H?</p> <p>MR GAMA: Ja.</p> <p>ADV P PRETORIUS SC: Correct?</p> <p>MR GAMA: Ja, when we had agreed on the processes, then I said to him, "Okay, where's the document?" and then he then pulled out the document that I had to sign, because we'd agreed that okay, it looked fine, in terms of –</p> <p>ADV P PRETORIUS SC: The document he gave you was page 120 A to 120 H, it's not a difficult question, Mr Gama.</p> <p>MR GAMA: Ja, that is the document. That's what I said in the beginning, that 120 A to 120 H.</p> <p>ADV P PRETORIUS SC: And you didn't look, on your version, at anything other than 102 H, despite the fact that the whole document was given to you?</p> <p>MR GAMA: Ja, I didn't look, because we just wanted to sign and do the actual signature, so he just gave me the last page of this document to sign, the one that he turned around for me to sign.</p> <p>ADV P PRETORIUS SC: If I misunderstood your evidence, the record won't have. I understood you to say that Mr Beattie would have given you the whole of</p>
<p style="text-align: right;">Page 122</p> <p>ADV P PRETORIUS SC: The actual cost.</p> <p>MR GAMA: Ja, we didn't go into the monthly sort of costs. All we discussed was here was a national contract that was being entered into, we discussed that the tender board had satisfied itself, that the process was correct. I asked whether he had the money in his budget and he indicated that, yes, I think it was R10 million that was in the budget.</p> <p>ADV P PRETORIUS SC: Was he referring to a document when he did that? When he told him that?</p> <p>MR GAMA: Well, he had the file that he was carrying.</p> <p>ADV P PRETORIUS SC: And when you signed, did he take just one page out of the file and to give it to you or did he give you the bundle with the file?</p> <p>MR GAMA: No – no, he didn't give me the bundle. I think he would have had these sort of documents in his hands.</p> <p>ADV P PRETORIUS SC: Which sort of documents? The record won't pick up –</p> <p>MR GAMA: 120 A to 120 H, on the one side, but we spent more time with him explaining the processes that he'd followed in terms of –</p> <p>ADV P PRETORIUS SC: We'll come to that</p>	<p style="text-align: right;">Page 124</p> <p>the document at 120 A to 120 H. I specifically asked you whether he extracted 120 H and gave it to you, and you said no.</p> <p>MR GAMA: No – no, I said it's 120A, the document that he had on the file that needed to be signed was this, but when I signed we specifically looked at the last page and we signed that.</p> <p>ADV P PRETORIUS SC: I ask you once again, did he or did he not give you the document at page 120 A to 120 H?</p> <p>MR GAMA: No, he didn't give me – if you are asking if he gave me the whole document, no, he didn't give me the whole document, but he held it in his hand.</p> <p>ADV P PRETORIUS SC: Is there anything unclear about the word gave you?</p> <p>MR GAMA: He only gave me 120 H.</p> <p>ADV P PRETORIUS SC: So he gave you one page?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: He took out one page from the file or from a bundle of documents and he gave you page 120 H on its own?</p> <p>MR GAMA: He was holding 120 A to 120 H, separate from the file and we went through whatever he</p>

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had in the file, for him the key documents the you are looking for Salvation Army, was on 120 H.

ADV P PRETORIUS SC: You were sitting opposite the desk from him?

MR GAMA: Yes.

ADV P PRETORIUS SC: Now, when you signed this document it was no doubt in front of you, opposite him from the desk?

MR GAMA: Yes, at was at the end of our conversation, when –

ADV P PRETORIUS SC: Now, what did he give you 120 A to 120 H, or only 120 H?

MR GAMA: 120 H.

ADV P PRETORIUS SC: So he gave you a single page to sign?

MR GAMA: Yes – yes.

ADV P PRETORIUS SC: I put it to you that that's most improbable. Not only that he would give it to you like that, but that you would sign it like that.

MR GAMA: Well, I was there, and after we had had the discussion and I had satisfied myself about the key issues, I asked him to give me a document to sign and I signed it.

ADV P PRETORIUS SC: You satisfied

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yourself of nothing, Mr Gama. You were only in the knowledge that he had he had satisfied himself. You did nothing to satisfy yourself by reference to the document.

MR GAMA: Well, I never looked the documentation, but we talked about the process. The key thing for me was that you go out tender, you find the most suitable person and you sign. It didn't really matter to me who it was.

ADV P PRETORIUS SC: You're no doubt aware of the detailed procurement policy, which says that you must satisfy yourself, when you sign on your authority?

MR GAMA: Yes, I'm aware of it.

ADV P PRETORIUS SC: You didn't satisfy yourself by reference to the documents, you relied on the statement by Beattie that he was satisfied.

MR GAMA: He was satisfied and I asked him questions which satisfied me at the time.

ADV P PRETORIUS SC: But let's get back to this situation, you're sitting opposite Mr Beattie, who's is about to leave, a man who can't cope with his tasks, you are given page 120 H, and you sign it?

MR GAMA: Yes, I did.

ADV P PRETORIUS SC: You sign it without knowing in whose favour the contract has been

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granted?

MR GAMA: Yes, I did.

ADV P PRETORIUS SC: You sign it without knowing any detail with regard to costing?

MR GAMA: I had discussed the detail with him.

ADV P PRETORIUS SC: Well, you just said you didn't discuss the detail, you discussed it in general terms.

MR GAMA: No, I'm talking about what the costs was and –

ADV P PRETORIUS SC: You don't know for what period it is?

MR GAMA: In the course of the discussion, some of the things that would have come up, in my recollection, was the issues of KPIs, because I'd always asked are KPIs in place? Where he indicated that of course the KPIs have now been put into place and in that same discussion he had then indicated that there would be a trial period and that was consistent with what I wanted to see, so we left it at that.

ADV P PRETORIUS SC: In fact, without reference to any documentary evidence of any detail whatsoever, you signed a page of signatures? I put it to you that it is improbable that that evidence is correct.

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That you, as a Chief Executive Officer of Transnet Freight Rail, would simply in a five to 10 minute discussion, where acquisition is already a problem with Transnet Freight Rail, simply sign a page of signatures, with no information on it whatsoever.

MR GAMA: I had satisfied myself with what he was indicating that there was a tender process. I did see, I think the very first page on the file, was on the tender number and all of that, so I was clear that there was a tender process. I also relied on the fact that the tender board had looked at these issues. I wasn't for a second, and unfortunately we were both in a hurry, I wasn't for a second thinking that there would be anything untoward about this, especially after it had gone through him, he had signed it, the procurement, the acquisition council or the tender board had also looked at it and he had answered the questions that I'd asked him, to my satisfaction.

ADV P PRETORIUS SC: If your version is true, Mr Gama, I put it to you that your conduct was, at best, reckless.

MR GAMA: I just relied on the fact that the processes had been followed.

ADV P PRETORIUS SC: You were the last person in chain of authority, that approved this process,



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<p style="text-align: right;">Page 129</p> <p>correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: This was the final opportunity for the matter to be done properly and at that hurdle you simply signed a page of signatures. Correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And did Mr Beattie tell you that all the other had been given on condition that you also approved it, that's why you were requested to sign it?</p> <p>MR GAMA: No, we never had that discussion.</p> <p>ADV P PRETORIUS SC: Well, you would have known that if this was a tender process, it didn't require your signature at all.</p> <p>MR GAMA: Well, he just came in to ask me to sign.</p> <p>ADV P PRETORIUS SC: And he told you it was a tender process?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Why didn't you say to him, "Well, I don't need to sign if it's a tender process?"</p> <p>MR GAMA: Well, I had signed, on</p>	<p style="text-align: right;">Page 131</p> <p>to you that you believe that this is an open tender approval, you know that your signature and authority approval is not required if it's an open tender proposal.</p> <p>MR GAMA: It doesn't mean that it's not required completely.</p> <p>ADV P PRETORIUS SC: What do you mean not required completely? You knew, surely, that you were the final authority, you just told, Mr Arbitrator that.</p> <p>MR GAMA: No – no, I'm saying it doesn't mean that everything that goes out on tender, we don't sign for it.</p> <p>ADV P PRETORIUS SC: No, let's just clarify this, Mr Gama. You know that in terms of the procurement policy of Transnet, of which you would have made yourself aware as Chief Executive Officer, that your approval was not necessary if this was an open tender.</p> <p>MR GAMA: Ja, I think it was precisely in the context of the discussions that we were having with him, he was in my office, he wanted me to sign this. I never really put much thought to any of those particular issues, but I think, as I say, with the benefit of hindsight, if for instance this document had been put into my file and I had been alone on these issues, I would have sat down and gone through –</p> <p>ADV P PRETORIUS SC: Why would you have</p>
<p style="text-align: right;">Page 130</p> <p>occasion, on a tender process.</p> <p>ADV P PRETORIUS SC: No, I'm asking you, you were concerned about the proper procedures being followed, you'd instituted a whole campaign to ensure that proper procedure have been followed, you were told, on your version, that this is a tender process, you're signature is not necessary on a tender process, why didn't you ask, "Why is this coming to me to sign?"</p> <p>MR GAMA: John, when he came to me, we were, I knew that some of the general managers could probably sign on this, but he when he said R30 million, I never really thought that there would be any particular issue on it, so I probably just absentmindedly signed it, but there's was nothing untoward in terms of his request for me to sign.</p> <p>ADV P PRETORIUS SC: But it wasn't in accordance with Transnet procedures? That alone, I put it to you, should have alerted you to the fact that this required closer investigation.</p> <p>MR GAMA: We had not discussed that it was subject to my approval. He just came to me and I signed the document.</p> <p>ADV P PRETORIUS SC: Look, Mr Gama, I'm not putting to you that you ought to have discussed or that you did discuss with Mr Beattie, I'm putting a fact</p>	<p style="text-align: right;">Page 132</p> <p>done that?</p> <p>MR GAMA: - each of these documents.</p> <p>ADV P PRETORIUS SC: Why would you have done that?</p> <p>[15:22] MR GAMA: Because if you receive documents on your in tray, you're sitting there, the only thing that you have in front of you, is the document and so you sit and you go through it and I think, if you look at the CPI issues there, there was no one, it was a document which came into my in tray, I would then sit down, during my own time, go through the document. Here the reason I was sitting with him and questioning him on all of these issues, because he was in a hurry, I wasn't going to hamstring him, so there possibly, with the benefit of hindsight, issues that I could have asked him and that I probably didn't, because of the urgency with which he came –</p> <p>ADV P PRETORIUS SC: That urgency, Mr Gama, didn't relate to 5, 10, 15 minutes, it's not as if they were waiting to pass on a cable theft syndicate that very minute, you could have spent half an hour, an hour with him. It was not up to him to say I'm in a hurry, he's leaving.</p> <p>MR GAMA: No – no, I – he had not been scheduled to come and see me, so I had just seen him,</p>

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because I had seen one of my general managers waiting outside my office.

ADV P PRETORIUS SC: That doesn't absolve you of the responsibility, Mr Gama of doing your job properly.

MR GAMA: That's correct, as I indicated, there was an oversight on this particular -

ADV P PRETORIUS SC: Do you only do your job in scheduled appointments, as opposed to unscheduled appointments.

MR GAMA: No - no, here was a document where somebody wanted me to sign. I do both scheduled and unscheduled, but in the main, most of the unscheduled appointments are people who are coming to me for counselling on particular issues.

ADV P PRETORIUS SC: Mr Gama, your duty as Chief Executive Officer of TFR remain the same, whether you had exercised them in scheduled or unscheduled appointments, do you accept that?

MR GAMA: Definitely.

ADV P PRETORIUS SC: They remain the same whether or not people tell you they're in a hurry or not.

MR GAMA: I accept that.

ADV P PRETORIUS SC: And, in fact,

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particularly where acquisitions are concerned, it's up to you to satisfy yourself, at least that the document you're signing is the document you're signing, you didn't even know that.

MR GAMA: As I indicated I now know that the document was, in fact, a consignment and in my mind and in the discussion that I had and having seen the actual first document which appears on 9 saying "Tender", I had no reason at the time to believe that this was something other than a tender.

ADV P PRETORIUS SC: Mr Gama, do you concede now that you did not do your duties as you ought to have, with hindsight?

MR GAMA: Yes, I'm saying, with hindsight, based on the documentation, it was problematic and I ought probably have said to him, leave it and I will look at it, but he was in a hurry and the circumstances were such that I knew what to assist with and I was trying to assist.

ADV P PRETORIUS SC: I'll come to that in due course, but Mr Gama, why then when called to account in 2009, is your response to alleged conspiracy on the part of Transnet. Do you concede that there's merit to the allegation that you failed in your duties. Why not just concede that? Why allege a conspiracy?

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MR GAMA: When was I was called to in 2009?

ADV P PRETORIUS SC: You were called to account in 2009, we'll come to the detail in due course.

MR GAMA: When I was given documentation, as I indicate, I asked for documentation, which was a transparent request, I only received part documentation. By that time, my antenna was up, after Mr Dube had indicated to me and after I thought there was an unreasonableness on the part of Transnet in terms of merely giving me documents that would assist me to fully and concretely deal with the matter, where I felt that as Chief Executive of their biggest division, they could at least afford me the courtesy of giving me the documentation I required in order for me to answer the questions, so in my mind at the time, all of these issues, were no longer a coincidence.

ADV P PRETORIUS SC: Right, we'll come to that in a moment, but you concede now that it was substance, a degree to which there is substance and the degree of seriousness will no doubt be subject to the - but there were substance to the charges against you in regard to GMS.

MR GAMA: Mm, the big issue here, was that the processes within Transnet, where the CEO of the

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division gets informed about what happened and then gets given an opportunity to cure something of this nature, those processes which are Transnet processes, they were not followed, in this instance. All it would have taken was audit to come to me and say, "Look at this document, these are the issues that we are worried about," I would have then called upon the general manager concerned to say, "We need to go back to the procurement process, we need to investigate, essentially, three things, one, was this service rendered? Two, did we get value for it? Three, are we able to do a condonement on the steps taken?" So there's never been, in the history of Transnet, where the Chief Executive, does not get alerted to an issue of this nature and then he becomes and then it gets out that he deals with it, and if I had been alerted in terms of what the actual issues were, I would have been able to find them out, all that was happening is I was getting notes indicating that I must have been part of some manipulation of a process. So, basically, what I'm saying is that Transnet had not followed it's own process in terms of altering me, but instead of following the process, there had just been suspicions, which I think were not justified without giving the full information, so at that time when I looked at all of the coincidences, when I said, there is no CEO who has been



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charged with this type of things, without looking at the proper people who actually control these processes. Ja, my antenna was up.

ADV P PRETORIUS SC: Mr Gama, I understand your procedural complaints, and we will deal with them in due course. You don't accept them of course, but they will be subject to cross-examination later. I put it to you that you're on record during 2009, saying there's no substance to the charges, you've just conceded to Mr Arbitrator, that there is some substance to the charges.

MR GAMA: On record where?

ADV P PRETORIUS SC: I'll come to it in due course. You say you have never denied that there's any substance to the charges?

MR GAMA: What we indicated were that the charges, and we were talking largely around the fact that Transnet did not follow it's own processes, the charges were delayed, some of them would probably, especially on the issue of the security, I had been told that there was no substance to any investigation and then I found out later that I was being jeopardised, because there was now an investigation that was happening behind my back, so those comments would have been made in a particular context, but I have no recollection of this

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public thing of saying there's no substance, or I have actually never really commented on the actual –

ADV P PRETORIUS SC: Well, what are you saying? Are you saying you have never said that there's no substance to the charges against you, is that your position now as you give evidence? Is that your evidence? I have – I, Mr Gama, have never said that there's no substance to the charges?

MR GAMA: No, I'm saying I'm not sure about the context of what you are saying, I don't know which document you are referring to?

ADV P PRETORIUS SC: I'm asking you from your general recollection? We'll get there, Mr Gama. What Mr Beattie did, on your version, by persuading you that you were signing an open tender process, when I take it, you now concede that you weren't, was a complete fraud. Do you accept that?

MR GAMA: No, I accept that, I mean as I say, once you get all of the documentation, it becomes clearer what was happening.

ADV P PRETORIUS SC: What he did was to perpetrate a blatant fraud, by persuading you that you were signing an open tender process, where in fact you were signing a consignment. Correct?

MR GAMA: That's correct, ja.

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ADV P PRETORIUS SC: You yourself concede that had he informed you that it was a consignment, your response would have been quite different.

MR GAMA: Correct.

ADV P PRETORIUS SC: At least, at the time when you were interviewed by Mr Maddove, April 2009, you would have come to learn of this blatant fraud perpetrated on you.

ARBITRATOR: Sorry, just repeat that?

ADV P PRETORIUS SC: At least, as at the 8th of April 2009, at least, I emphasise, you would have become aware that a blatant fraud had been perpetrated by Mr Beattie on you, on your version?

MR GAMA: I did not immediately become aware, because I asked for the actual documentation. I was just shown all of this – but Mr Oates, who was to give me the documents, went away, but I then started to look for documents also myself. So much later, probably in May, when we were looking for the documents, then I had the opportunity to try and go through it.

ADV P PRETORIUS SC: I put it to you that you would have known, clearly, at the meeting in April, but let's assume for present purposes that you knew only in May, let's assume it only for present

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purposes. You would have had occasion to look at page 120 H again, is that correct?

MR GAMA: Yes I looked at that.

ADV P PRETORIUS SC: You would have seen there that Mr Beattie wasn't the only signatory, Mr Senamela and Mr Tobias were signatories as well.

MR GAMA: Yes.

ADV P PRETORIUS SC: It must have occurred to you that they may have been parties to this fraud?

MR GAMA: At that time I was really trying to just find out what is it. That was the subject of the complaint, so that I could deal with it, and that's why I kept asking Mr Maddove to give me the documents and to indicate clearly what it is that he was looking for.

ADV P PRETORIUS SC: We'll come to your interview with Mr Maddove, I promise you, and you'll have every opportunity to explain what happened there. The question, and I must interject here to say, I encourage you, ask you to answer the questions that I put to you, because to the extent that you fail to do so we're going to argue that your evidence should be called into question, so once again I invite you to listen to the question and answer it. It must have occurred to you,

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when you looked at the documentation, on your version, at least in May, that there may be other parties to this fraud perpetrated upon you, other than Mr Beattie – blatant fraud.

MR GAMA: Well, when I looked at the document, there were many people that signed the document, if that is what your question is.

ADV P PRETORIUS SC: And it's possible, it must have occurred to you, that if Mr Beattie had perpetrated this fraud on you, you may not have been alone. There may have been others, equally guilty of this fraud on you.

MR GAMA: That's correct.

ADV P PRETORIUS SC: What did you do about it?

MR GAMA: That is why I had the meeting on the 10th of July, to make an assessment of what is that was going on and to get the evidence in writing from people in terms of what it is that had actually taken place.

ADV P PRETORIUS SC: Did you not go immediately to internal audit and say I have been the victim of a blatant fraud, others could be involved, please investigate as a matter of urgency, when people are still working for Transnet Freight Rail.

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MR GAMA: No there was a technicality in terms of that. I didn't have the documents in my possession.

ADV P PRETORIUS SC: You had names.

MR GAMA: When I had the documents in May, I asked whether I could talk to different people within the entity, so that I can find out what the issues are – I mean in June, sorry – I asked. What I did not want to do immediately after April when I was trying to find out from the investigators, whether I was the subject of an investigation. Two, I did not want to hamper an investigation that was ongoing, so I couldn't when this investigation started to intervene and interfere, it would then look as if there's something that I had to hide and so that is the only reason I had not done anything from that period, because it had not been clarified to me and I left the meeting in April asking the question, what is it exactly that I'm supposed to look for.

ADV P PRETORIUS SC: But Mr Gama, it must have come as a shock to you that this fraud had been perpetrated on you. It must have come as an utter surprise and a shock that a man that you trusted to tell you the truth, had lied to you so blatantly and deceived you.

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MR GAMA: Of course in June, when I received some of the documentation, and when I started to draft my reply, I indicated that we needed to relook at these issues much more closer, and I needed time to investigate the issues, but yes. –

ADV P PRETORIUS SC: Mr Gama –

MR GAMA: At that time when I received the documents in June, it became clearer to me, in terms of what this scam was about.

ADV P PRETORIUS SC: Mr Gama, you earlier said you had the documents in May, but I'll come to that issue at a later stage. In your response of the 20th of July 2009, where you are invited to respond to, amongst others, these issues, there's not one mention of a fraud perpetrated on you.

[15.42] MR GAMA: What I did indicate in July, was that in the time that I had, because you will recall most of these things that had happened, were not, to my knowledge, I was trying on the one hand to do my normal work and on the other hand, to try and deal with this particular investigation. I indicated that I needed more time to do a thorough investigation into this matter and I think I'd said I need a period of three months to finalise everything but the response that I got were the charges. While I was waiting to find out what is the

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company response to my request, what I received where the actual charges.

ADV P PRETORIUS SC: Mr Gama, at the very latest we will submit to Mr Arbitrator, at the very latest, on the 8th April when you were interviewed by Mr Maddove on these issues, you should have realised that the most blatant fraud had been perpetrated on you by Mr Beattie and possibly by others still employed by Transnet Freight Rail. Let's accept for a moment that you knew in May when you said you got the documentation, or even in June. How much time does it take to say, when called to account, I have been the victim of a blatant fraud, it requires urgent investigation. How much time does it take to put that simple, stark fact on paper?

MR GAMA: I think as I've indicated that became circumstances within the whole scenario where I was being refused to be given the actual facts in terms of the Ernst & Young investigation. I had to try and figure out something that I didn't quite understand. There was the issue where I had met Dube and he'd indicated to me that, look, you are being singled out. I had to step back and say what is it that is happening and so I couldn't really sort of do all of the things that I would have normally done in a normal situation.

ADV P PRETORIUS SC: When did you see

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<p style="text-align: right;">Page 145</p> <p>the document at page 120A to 120H for the second time? You said you saw it on the 5th December. You didn't read it. When did you see it after that?</p> <p>ADV P PRETORIUS SC: Well, I saw it at that interview.</p> <p>MR GAMA: Correct, on the 8th April.</p> <p>ADV P PRETORIUS SC: How difficult was it for you to conclude that the document you actually signed was a confinement order?</p> <p>MR GAMA: The difficulty was a simple one, that the process – I had been very specific in that we ought to go out on tender for these kinds of things and so I was having difficulty in terms of being told that this was a confinement and that is why I then said I will actually go and ask the procurement people to give me all the documentation that related to this because I wasn't too sure which of these documents was which.</p> <p>ADV P PRETORIUS SC: Mr Gama, on the 8th April you knew that the document you signed was a confinement document.</p> <p>MR GAMA: That is what was being suggested and I-</p> <p>ADV P PRETORIUS SC: Shown to you.</p> <p>MR GAMA: All I was recalling is the discussion that I had with John. The document was not</p>	<p style="text-align: right;">Page 147</p> <p>and investigate.</p> <p>ADV P PRETORIUS SC: Well, didn't you immediately call for the document? Look at it immediately and take steps to deal with this blatant fraud that had been committed?</p> <p>MR GAMA: I called for the document.</p> <p>ADV G PRETORIUS SC: Sorry, Mr Chairman, the interview itself says that the interview was concluded on the basis that the documents would be handed in the morning so he did call for it immediately at the interview. In fact, he did it repeatedly.</p> <p>ADV P PRETORIUS SC: Why didn't you take immediate action in relation to the fraud that had been perpetrated once you had looked at the document?</p> <p>MR GAMA: I did not want to be seen to be interfering with any investigation. In my mind, there was now a formal investigation which was an investigation into me because I had then been informed that I was in fact the one who was being investigated. So when I'd been informed that I was the one who was being investigated, it becomes Very difficult to then say – I knew what steps I could take but it becomes very difficult to then say you want to do something because people will say you want to interfere into your own investigation and it is not in my person to try and</p>
<p style="text-align: right;">Page 146</p> <p>shown to me. I was given to say here it says confinement, here it says confinement.</p> <p>ARBITRATOR: So it wasn't shown to you on the 8th April are you talking now about the day you signed it?</p> <p>MR GAMA: No I'm saying it was not given to me on the 8th April. I was just being shown the document so all I'm saying, that I left that meeting with just disbelief that the document actually kept on saying confinement and that's why I said I needed to do my own investigation, find out whether there wasn't any other document elsewhere.</p> <p>ADV P PRETORIUS SC: We're going to submit and we'll put it to you later that you must have known that the document you signed was a confinement document on the 8th April at the very latest. But at least you had an indication on the 8th April that it might have been a confinement document but you were unsure.</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV P PRETORIUS SC: The possibility must have been clear to you at that stage that you were the subject matter of a fraud, victim of a fraud at the hands of Mr Beattie and possibly others. Correct?</p> <p>MR GAMA: That is what I wanted to go</p>	<p style="text-align: right;">Page 148</p> <p>interfere or intervene in an investigation. I didn't want to dirty that process. I wanted at least not myself to be seen to be trying to interfere with that process.</p> <p>ADV P PRETORIUS SC: We will deal with that in due course. Do you concede, Mr Gama, if on the 5th December you'd looked at the document at page 114 to 120, or let me put it to you differently. The 112A to 121 – you would have concluded that you were signing a confinement document?</p> <p>MR GAMA: Yes, I would have.</p> <p>ADV P PRETORIUS SC: Do you also concede that you would have concluded that you were signing a confinement document for a total contract period of one year? Page 120B, paragraph 4.</p> <p>MR GAMA: It would have been for the period up until April subject to the review. It indicates the performance review.</p> <p>ADV P PRETORIUS SC: It says very clearly on page 120B, paragraph 4, that the total contract period is 1 November 2007 to 31 October 2008.</p> <p>MR GAMA: Sorry, where are you? 120B?</p> <p>ADV P PRETORIUS SC: Paragraph 4.</p> <p>MR GAMA: I'm looking at 120B, paragraph 4.</p> <p>ADV P PRETORIUS SC: Yes, so am I. It</p>

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says there that there will be a performance review after five months but the total contract period is one year. In other words, if GNS pass the review they're entitled to insist on a contract period of one year.

MR GAMA: If they pass the review and if it was positive.

ADV P PRETORIUS SC: But what you are authorising here is a total contract period of one year.

MR GAMA: Well, in our general discussions there was just a trial period that would be dealt with.

ADV P PRETORIUS SC: Whatever Mr Beattie told you I'm putting this to you on the basis that, had you read this document, you would have understood that you were signing a confinement for the total period of one year.

MR GAMA: Yes, in terms of the total period, yes.

ADV P PRETORIUS SC: That was said also under paragraph 11. Total contract value 18 million, one year period.

MR GAMA: If the first line of No 4 was fulfilled positively, yes.

ADV P PRETORIUS SC: What it says in paragraph 11, that the tender price is R18,900,000 for a

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MR GAMA: Yes.

ARBITRATOR: Where are referring to there, on 114?

ADV P PRETORIUS SC: 114, the last sentence on paragraph, the boxed paragraph 2. Had you read it, no doubt you would have said but how can you say in the motivation that there's going to be a tender process early next year and then in the document you want me to sign, that the tender process will be followed after the confinement expires. That's a blatant contradiction that would have come to your attention.

MR GAMA: Yes.

ADV P PRETORIUS SC: And you would also have learned of the alleged termination of the prior CPI process, had you read the document. You would have seen that there was no open tender process but the open tender process which you had instructed had somehow been stopped. You would have seen that. Is that correct?

MR GAMA: Yes, I would have seen it.

ADV P PRETORIUS SC: You would have also seen on page 116 that one of the beneficiaries of the tender was General Siphiwe Nyanda, paragraph 16B. Am I correct.

MR GAMA: Yes, I would have.

ADV P PRETORIUS SC: You would have

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one year period. Am I correct?

MR GAMA: That's what it says, yes.

ADV P PRETORIUS SC: And you're no doubt aware of the principle where acquisitions are concerned that it's not permissible to split a contract up into pieces to bring it within a particular authority level. You've got to look at the whole contract. You're aware of that principle I take it?

MR GAMA: That's when people split it to different amounts so that - it's called coupling.

ADV P PRETORIUS SC: Yes. And that, had you looked at, as was put in cross-examination the motivation on page 113, under the head "Way Forward" at the bottom of the page, the Freight Rail Security Corporate Office will go out on open tender early next year before April to secure a complete specialised security package, you would have realised there's no sense in approving a confinement of one year.

MR GAMA: It would have been a confinement for the five months subject to the review.

ADV P PRETORIUS SC: And if you look at page 114 you would have seen, in the last line of paragraph 2, something completely different. You would have seen there the words, "an open tender process to be followed after confinement expired".

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been aware that you were at least an associate of his and that there was a potential conflict of interest. I'm instructed that acquaintance is a more appropriate word and there would be a potential conflict of interest. A cautious Chief Executive Officer would have said, I put it to you, let me take a step back here, refer it to someone else. I don't want any fingers pointed at Transnet Freight Rail.

MR GAMA: Yes.

ADV P PRETORIUS SC: You say that when you signed it you were aware, at least verbally, on information supplied to you by Mr Beattie, that there was a review process in the offing.

MR GAMA: When you say review process -

ADV P PRETORIUS SC: Mr Beattie -

MR GAMA: You're talking about the five months period. Yes.

ADV P PRETORIUS SC: Yes. Did you ever follow up as to why that process never took place, as I put to you it didn't?

MR GAMA: I was actually informed that, when I asked in July, I was actually informed that that review process had taken place and I was going to be furnished with documentation from the security department. They indicated to me that the review process



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did take place but that the review process had taken place internally within the security department and Mr Dingaan Senamela was at the, in July going to furnish me with a copy. That he had indicated to me. I don't know whether there is documentation to that effect or not because I left before I could be provided with that document.

ADV P PRETORIUS SC: And you say when you signed you didn't know how long this was for.

MR GAMA: No, when I signed all I knew was that there was going to be a five-month trial period.

ADV P PRETORIUS SC: You didn't know who was getting the contract?

MR GAMA: No.

ADV P PRETORIUS SC: Didn't you follow up? Didn't you even ask who's getting this contract?

MR GAMA: No, he showed me some names.

ADV P PRETORIUS SC: He showed you some names but didn't he say this is the company that's getting the contract? Surely he would have said that to you. I find it quite inexplicable that you would not have asked who's getting this contract.

MR GAMA: No, he'd showed me the names. As far as I was concerned it was people in the security fraternity. I don't know all of them. But he'd shown me

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three names, to say that these three names and we've had adjudication and after the adjudication we went to the Tender Board. The Tender Board concurred with the adjudicators.

ADV P PRETORIUS SC: We'll come to those issues on Friday. Mr Arbitrator, is that a convenient time?

ARBITRATOR: Yes. Paul, will we discuss dates on Friday. We'll resume at 10 o'clock on Friday. Alright, the matter's postponed until 10 o'clock on Friday. Mr Gama, we're busy under cross-examination. I just have to formally warn you, as Mr Pretorius did at lunch time, not to discuss the matter with your team. Alright, and dates you haven't resolved that, okay.

[HEARING ADJOURNED]

**"D"****IN THE DISCIPLINARY MATTER BETWEEN:****TRANSNET LIMITED**

The Employer

and

**S GAMA**

The Employee

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**FINDINGS IN DISCIPLINARY HEARING**

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**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



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,<sup>1</sup> 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

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<sup>1</sup> Charge 3 reads: *In the alternative, your conduct in relation to each of the matters deal 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."*

*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."*

### 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")<sup>2</sup> 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.

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<sup>2</sup> 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 response<sup>3</sup> 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

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<sup>3</sup> Bundle A1 pages 17-25



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

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.<sup>4</sup> 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,<sup>5</sup> 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.

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<sup>4</sup> Gama, page 65

<sup>5</sup> Bundle A1, page 20

## 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.<sup>6</sup> He denies further that he was aware of any irregularities in the procurement process of the award before the contract was concluded. He

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<sup>6</sup> Bundle A1, page 23

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.<sup>7</sup> 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."*<sup>8</sup> 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."*<sup>9</sup>
- 21 The conditions for the application of the exceptional circumstances under which the confinement process may be adopted are set out in the DPP

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<sup>7</sup> Clause 2.2 of the Policy

<sup>8</sup> Clause 2.2.1.6 of the DPP Policy

<sup>9</sup> 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

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.<sup>10</sup> 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"*.<sup>11</sup> 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*

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<sup>10</sup> Oates page 42

<sup>11</sup> Clause 6.2.1.2



*and administer the contract.*"<sup>12</sup> 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.<sup>13</sup>

The Transnet Delegation of Authority Framework<sup>14</sup> is also relevant. It provides for the delegation of power in detail. For present purposes what is relevant are the provisions which deal with procurement<sup>15</sup> 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)."*<sup>16</sup> (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

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<sup>12</sup> Clause 6.2.1.3

<sup>13</sup> Clause 8.1 of the DPP policy

<sup>14</sup> Edition approved on 30 October 2007

<sup>15</sup> Clause 5.4

<sup>16</sup> At page 19 of the Delegation of Authority Framework

relevant Acquisition Council.<sup>17</sup> 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.<sup>18</sup> 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 Oates<sup>19</sup> and was not disputed by Gama.
- 27 The document which Gama signed approving 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

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<sup>17</sup> Note 6 on page 19 of the Delegation of Authority Framework

<sup>18</sup> Clause 5.4.2 on page 20 of the Delegation of Authority Framework

<sup>19</sup> 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.<sup>20</sup> The budgeted amount is reflected as R13 million.<sup>21</sup> 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.

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<sup>20</sup> Bundle B1, page 115, paragraphs 11 and 4

<sup>21</sup> 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*").<sup>22</sup> 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.<sup>23</sup> 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

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<sup>22</sup> Bundle D, page 33, Madhav pages 58-59

<sup>23</sup> Bundle D1, pages 55 - 55

month period as Gama contended in his written response to the charges.<sup>24</sup> 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.<sup>25</sup> 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,

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<sup>24</sup> Oates page 89

<sup>25</sup> At page 129

which Gama knew involved a friend of his.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

- 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

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<sup>26</sup> At pages 131-2

<sup>27</sup> B1 page 120

<sup>28</sup> This is clear from Bundle B, page 120H



security function for TFR as head of security.<sup>29</sup> 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.<sup>30</sup> When he testified later Gama denied that he had been so informed by Oates at that meeting<sup>31</sup> 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*".<sup>32</sup> 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*

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<sup>29</sup> Page 108

<sup>30</sup> Oates, page 81

<sup>31</sup> Gama, page 59-60

<sup>32</sup> Oates page 52

*figure*" or words to the effect. Oates denied this.<sup>33</sup> 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

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<sup>33</sup> 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.<sup>34</sup> At this stage Gama entered against his signature approving the contract a note which read: *"Enter into a 6 month contract and reassess"*<sup>35</sup>

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<sup>34</sup> Madhav page 73; Bundle B1, 8B

<sup>35</sup> Bundle 1, page 8B

- 44 There were two further 6 month extensions to the CPI contract.<sup>36</sup> 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.<sup>37</sup> 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."<sup>38</sup> 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.<sup>39</sup> 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

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<sup>36</sup> Madhav, page 71

<sup>37</sup> Bundle B1, page 8H(i) replacement

<sup>38</sup> Bundle B, page 8L

<sup>39</sup> Madhav page 76

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.<sup>40</sup> 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.<sup>41</sup> 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 question<sup>42</sup> 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.<sup>43</sup> 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,

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<sup>40</sup> Bundle B, page 9

<sup>41</sup> Madhav page 81

<sup>42</sup> Bundle B, page 28

<sup>43</sup> Madhav page 83, Bundle B, page 20

investigations, arrests, prosecution and conviction of perpetrators.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> It is this document which contains the assessment of the previous business conducted from Spoomet 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 Dauglas 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

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<sup>44</sup> Bundle page 18

<sup>45</sup> Madhav page 85, Bundle B, page 24

<sup>46</sup> Bundle page 29



*"it is an INSTRUCTION from Transnet to place this process on hold".<sup>47</sup>*

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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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

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<sup>47</sup> Bundle B, page 32B, Madhav page 92

<sup>48</sup> Bundle B1 pages 32A- 32C

<sup>49</sup> Madhav page 92, Bundle B, 32A

<sup>50</sup> Madhav page 93

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.<sup>51</sup> 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.<sup>52</sup>
- 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 GNS<sup>53</sup> and is similarly the name of the contractor as defined in the body of formal written contract.<sup>54</sup> The cover sheet to the GNS contract however reflects a different company name, namely "*General Nyanda Security Advisory Services (Pty) Limited*",<sup>55</sup> but with the same company registration number. The investigation showed that only a company by the name of

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<sup>51</sup> Madhav page 95

<sup>52</sup> Madhav page 96

<sup>53</sup> Bundle B1, page 127 read with page 164

<sup>54</sup> Bundle B1, page 142 para 1.1.17

<sup>55</sup> Bundle B1, page 138

"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.<sup>56</sup> 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.<sup>57</sup> The fact remains however that the company General Nyanda Security Advisory Services (Pty) Limited was not registered with PSIRA on 4 June 2008.<sup>58</sup>

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<sup>56</sup> Bundle B1, page 36

<sup>57</sup> Madhav page 117

<sup>58</sup> Madhav page 118

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.<sup>59</sup> 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.<sup>60</sup> Any contract concluded which is inconsistent with these provisions is invalid to the extent of such inconsistency.<sup>61</sup> 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 2007<sup>62</sup> 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).<sup>63</sup> Madhav confirmed that this proposal was received

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<sup>59</sup> Section 20(1)(a)

<sup>60</sup> Section 20(2)(a) & (b)

<sup>61</sup> Section 20(3) of Act 56 of 2001

<sup>62</sup> Bundle B, page 52

<sup>63</sup> Bundle B, page 61

prior to the cancellation of the existing open tender process.<sup>64</sup> 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.<sup>65</sup> 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"*".<sup>66</sup> 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*",<sup>67</sup> 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.<sup>68</sup>

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

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<sup>64</sup> Madhav pages 102-103

<sup>65</sup> Madhav page 103

<sup>66</sup> Bundle B, page 70

<sup>67</sup> Bundle B, page 71

<sup>68</sup> Page 105

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.<sup>69</sup> 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.<sup>70</sup> 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,<sup>71</sup> 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.<sup>72</sup> 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

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<sup>69</sup> Pages 106-107

<sup>70</sup> Bundle B, page 83, Madhav pages 108 and 112

<sup>71</sup> Page 109

<sup>72</sup> 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 approach<sup>73</sup> 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.<sup>74</sup>

- 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

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<sup>73</sup> Paragraph 2.2

<sup>74</sup> Bundle page 94, Madhav pages 112-113

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"*.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup>

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<sup>75</sup> Bundle D1, page 44

<sup>76</sup> Madhav pages 119- 120

<sup>77</sup> 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.<sup>78</sup> 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

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<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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

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<sup>79</sup> Bundle B, page 111 A

<sup>80</sup> Page 121

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.<sup>81</sup>

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."*<sup>82</sup>

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

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<sup>81</sup> Page 124

<sup>82</sup> Bundle B, page 112

alarming increase was therefore simply inaccurate.<sup>83</sup> 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.

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<sup>83</sup> Page 126



- 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.<sup>84</sup>
- 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.<sup>85</sup> 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

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<sup>84</sup> Page 129

<sup>85</sup> Page 130

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.<sup>86</sup> 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.<sup>87</sup>

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<sup>86</sup> Page 132

<sup>87</sup> Page 134

- 76 The GNS proposal submitted to TFR contains the following statement under the heading "A world of experience"<sup>88</sup>: *"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.<sup>89</sup>
- 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 shocking<sup>90</sup> as it was far too high and he said that an investigation was taking place into this issue.

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<sup>88</sup> At page 66 and 97 of Bundle B

<sup>89</sup> Madhav page 3

<sup>90</sup> Page 29

- 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.<sup>91</sup> 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.<sup>92</sup> 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 record<sup>93</sup> 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.<sup>94</sup>
- 80 In terms of the GNS contract GNS was prohibited from sub-contracting any of their services without Transnet knowing of this fact.<sup>95</sup> Madhav said that in fact GNS did so contract as they had no personnel employed in any

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<sup>91</sup> Page 7

<sup>92</sup> Page 8

<sup>93</sup> Page 10

<sup>94</sup> Page 10

<sup>95</sup> 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.<sup>96</sup> 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

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<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup>

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.<sup>99</sup> Under the heading "Our Engagement" the letter states:

*"We refer to the above matter, in particular the telephonic conversation between your Mr. Sipho 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

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<sup>97</sup> Bundle B, pages 120 and 120H

<sup>98</sup> Page 25

<sup>99</sup> Bundle B, pages 122-3



said that when he asked Khanye about this letter where he told Mofokeng that GNS had been appointed, he simply got no response from Khayne.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> At a later stage on 4 June 2008 a formal contract was concluded between General Nyanda Security (Pty) Ltd<sup>104</sup> and Transnet Limited which was signed by Mr. Peter

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<sup>100</sup> Madhav page 133

<sup>101</sup> Bundle B, page 127, Madhav page 29

<sup>102</sup> Compare Bundle page 83 and following

<sup>103</sup> Bundle B, page 137

<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> 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.<sup>107</sup> 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*"<sup>108</sup> and

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<sup>105</sup> Bundle B, page 164

<sup>106</sup> Bundle B, page 158

<sup>107</sup> Bundle B127A(a), Madhav page 36

<sup>108</sup> 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.<sup>109</sup>

- 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.<sup>110</sup>
- 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.<sup>111</sup> 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.<sup>112</sup> 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

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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.

<sup>109</sup> Bundle B127Ba

<sup>110</sup> Madhav page 37

<sup>111</sup> Bundle B2, page 336

<sup>112</sup> Bundle B2, page 337

security manager and his team of investigators.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> 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.

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<sup>113</sup> Page 41

<sup>114</sup> Bundle B, page 115

<sup>115</sup> Bundle B, page 114, paragraph 2

### 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.<sup>116</sup> 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.

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<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> 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*

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<sup>117</sup> Madhav page 54

<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> 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

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<sup>119</sup> At Bundle B1, page 112

<sup>120</sup> 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.<sup>121</sup>

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 it <sup>122</sup> 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?"*<sup>123</sup> 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.<sup>124</sup> Madhav confirmed that towards the end of the interview Gama again stated that the document was not presented to him as a confinement but

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<sup>121</sup> Madhav page 60, Bundle D, page 86-87

<sup>122</sup> Madhav page 60

<sup>123</sup> Bundle D1 page 89

<sup>124</sup> Madhav page 62

was presented to him as the product of an open tender process.<sup>125</sup> 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".<sup>126</sup>

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 ...."<sup>127</sup> 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".<sup>128</sup> Madhav testified that this was not correct based on the documentation and that the contract signed by Gama clearly was a confinement.<sup>129</sup>

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

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<sup>125</sup> Bundle D1, page 94

<sup>126</sup> Bundle D1, page 94

<sup>127</sup> Bundle D1, page 96

<sup>128</sup> At D1, page 99

<sup>129</sup> Madhav page 64

months, at R7.5 million?"<sup>130</sup> 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."*<sup>131</sup> 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.

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<sup>130</sup> Bundle D1, page 99

<sup>131</sup> Bundle D1, page 101

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.<sup>132</sup> 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

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<sup>132</sup> Madhav page 127

tender process had been completed.<sup>133</sup> Gama said that the GNS confinement document was amongst those presented to him by Beattie during their discussion.<sup>134</sup> 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"*.<sup>135</sup> 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

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<sup>133</sup> Gama, page 15

<sup>134</sup> Gama, pages 16-17

<sup>135</sup> 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?"*<sup>136</sup>

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.<sup>137</sup>

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<sup>136</sup> Gama, page 26

<sup>137</sup> Gama, page 54

- 116 At the stage in July 2009 when Gama prepared his written response<sup>138</sup> 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."*<sup>139</sup> 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 recorded<sup>140</sup> 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.<sup>141</sup> 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

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<sup>138</sup> Bundle D2, page 1

<sup>139</sup> Bundle D2, page 18-19

<sup>140</sup> At paragraph 4.3

<sup>141</sup> Bundle D2, page 91

itself<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> 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

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<sup>142</sup> At paragraph 4, Bundle B, page 120B

<sup>143</sup> Bundle D2, page 20

<sup>144</sup> Gama, page 41

<sup>145</sup> Bundle D2, page 20 paragraph 5.2; Gama page 42

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.<sup>146</sup> 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

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<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup>

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

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<sup>147</sup> Madhav page 82

<sup>148</sup> Madhav page 84

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.<sup>149</sup> 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 policy<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> Madhav accepted that he left in the air his evidence about the timing of Beattie's leaving Transnet.<sup>153</sup>

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

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<sup>149</sup> Bundle B1, pages 127 - 137

<sup>150</sup> In clause 5.5. Note 1, Bundle A2, page 154

<sup>151</sup> Madhav pages 108 -1 09

<sup>152</sup> Madhav page 113

<sup>153</sup> Pages 113 -114



during his interview to produce the documents he was referring to. Gama said he would go and look for them.<sup>154</sup>

- 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.<sup>155</sup> 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

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<sup>154</sup> Madhav page 111

<sup>155</sup> Bundle D1, page 58; Madhav page 124

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.<sup>156</sup>

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.<sup>157</sup> 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.<sup>158</sup>

#### **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

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<sup>156</sup> Pages 135 - 136

<sup>157</sup> Page 136

<sup>158</sup> Page 137

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 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.<sup>159</sup> 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.<sup>160</sup>

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

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<sup>159</sup> Bundle B, pages 8A at 8B

<sup>160</sup> Gama, page 4, Bundle B 8H

months and then reassessed.<sup>161</sup> On 3 March 2007 when considering the extension to the CPI confinement contract he again read the tender board agenda item document presented to him<sup>162</sup> 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.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> In signing his approval of this confinement Gama said he had regard to and examined those reasons to decide whether a confinement was justified.<sup>166</sup> 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.<sup>167</sup>

- 143 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

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<sup>161</sup> Bundle B8B, Gama page 69

<sup>162</sup> Bundle B, page 8C-H

<sup>163</sup> Gama, pages 76-7

<sup>164</sup> Gama, page 76

<sup>165</sup> Bundle B, page 8H

<sup>166</sup> Gama page 74

<sup>167</sup> Pages 87-88

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.<sup>168</sup> 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.<sup>169</sup> Gama identified the copy of the GNS confinement document which was shown to him as the copy without handwritten markings thereon.<sup>170</sup> 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,

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<sup>168</sup> Bundle B, page 9

<sup>169</sup> Gama page 9

<sup>170</sup> 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.<sup>171</sup> 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

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<sup>171</sup> Gama, page 77-8

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.<sup>172</sup> 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.<sup>173</sup> 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.

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<sup>172</sup> Gama, pages 85-88

<sup>173</sup> Gama page 80

- 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 the 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.<sup>174</sup>
- 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.<sup>175</sup> 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

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<sup>174</sup> Gama, page 29

<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

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

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<sup>176</sup> Gama, page 97-9

<sup>177</sup> Gama, page 100

<sup>178</sup> Gama, page 100-106

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.<sup>179</sup> 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.<sup>180</sup> 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.

- 154 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

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<sup>179</sup> Gama, page 123-125

<sup>180</sup> Gama, page 121

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.<sup>181</sup>

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 fraud<sup>182</sup> 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.<sup>183</sup> 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.<sup>184</sup> 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

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<sup>181</sup> Gama, page 134 read with Bundle B, page 9

<sup>182</sup> Gama, page 138

<sup>183</sup> Gama, page 141

<sup>184</sup> Gama, page 148-149



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.<sup>185</sup> 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.<sup>186</sup> 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.

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<sup>185</sup> Gama, pages 29-30

<sup>186</sup> Gama, pages 30-32

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.<sup>187</sup> Later in the interview he repeated that Beattie *"would have shown the names of companies"*<sup>188</sup> and that *"He showed me three companies in this document to say: These are the companies that we have interviewed."*<sup>189</sup> 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."*<sup>190</sup>

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.<sup>191</sup> 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."*<sup>192</sup> 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"*

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<sup>187</sup> Gama, pages 33-35 and 40

<sup>188</sup> Bundle D1, page 84; Gama, page 46

<sup>189</sup> Bundle D1, page 85; Gama, page 47

<sup>190</sup> Bundle D1, page 85; Gama, page 47-8

<sup>191</sup> Gama, page 52

<sup>192</sup> Bundle D1, page 87

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.<sup>193</sup> 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.

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<sup>193</sup> Bundle D1, page 87; Gama, page 59-60

- 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.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup>
- 163 Gama accepted that when he referred in the interview to a tender process involving ten companies<sup>197</sup> 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.*"<sup>198</sup> 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

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<sup>194</sup> Bundle D1, pages 97 and 99; Gama, pages 77, 83,

<sup>195</sup> Gama, page 84 and 88-89

<sup>196</sup> Page 89

<sup>197</sup> Bundle D1, page 92

<sup>198</sup> Page 90; Bundle D1, at page 94

shown the name of GNS by Beattie in this way,<sup>199</sup> 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.

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<sup>199</sup> Page 90

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.<sup>200</sup> 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 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 Gama<sup>201</sup> to indicate what action

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<sup>200</sup> Gama, page 67-8

<sup>201</sup> 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.<sup>202</sup> 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

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<sup>202</sup> Page 105

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.<sup>203</sup> 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.<sup>204</sup>

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*

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<sup>203</sup> Page 112

<sup>204</sup> Bundle D2, at page 21

*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.<sup>205</sup> 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

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<sup>205</sup> 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

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*"<sup>208</sup> 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.

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<sup>208</sup> Bundle B1 page 114

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.<sup>207</sup> 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

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<sup>207</sup> 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.

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 managers within TFR security department and GNS. Such collusion was 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 TFR 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



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

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 he 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

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.<sup>208</sup> 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

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<sup>208</sup> 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.<sup>209</sup> 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 Naicker<sup>210</sup> (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*

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<sup>209</sup> Gama, pages 24-25

<sup>210</sup> 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.

*the way that it then looked like it was a confinement.*<sup>211</sup> 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.<sup>212</sup>

189 Gama's reference during the interview to the contact 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.<sup>213</sup> Later in the interview he repeated that Beattie *"would have shown the names of companies"*<sup>214</sup> and that *"He showed me three companies in this document*

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<sup>211</sup> Bundle D1, page 78; Gama page 24-28

<sup>212</sup> Gama, page 28

<sup>213</sup> Gama, pages 33-35 and 40

<sup>214</sup> Bundle D1, page 84; Gama, page 46



to say: *These are the companies that we have interviewed.*<sup>215</sup> 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."*<sup>216</sup> 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

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<sup>215</sup> Bundle D1, page 85;Gama, page 47

<sup>216</sup> Bundle D1, page 85;Gama, page 47-8

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 documentation<sup>217</sup> though he accepted that he "perused" the documents<sup>218</sup> 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

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<sup>217</sup> Gama, page 126

<sup>218</sup> 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*".<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup>

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.<sup>222</sup> 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

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<sup>219</sup> Gama, pages 133 and 130

<sup>220</sup> Gama, page 134

<sup>221</sup> Gama, page 43

<sup>222</sup> 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.<sup>223</sup>

- 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.<sup>224</sup> 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

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<sup>223</sup> Gama, pages 64-65

<sup>224</sup> Page 69

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



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*<sup>225</sup> 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

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<sup>225</sup> 1939 AD 188 at 202-3

another more or equally probable inference, the inference sought to be drawn cannot prevail.<sup>226</sup> 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

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<sup>226</sup> 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.

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.

**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.<sup>227</sup> 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.<sup>228</sup>

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.<sup>229</sup> Persons who signed in support of the proposal were Mr. Frederick Potgieter the General Manager Transwerk (TRE) Operations, Mr. Percival Mosweu General

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<sup>227</sup> Bundle C, page 2; Gama page 21

<sup>228</sup> Page 22

<sup>229</sup> 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.<sup>230</sup> 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"*.<sup>231</sup> 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

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<sup>230</sup> Bundle C, page 41

<sup>231</sup> 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 Policy<sup>232</sup> which is contained in and forms part of the DPP policy.<sup>233</sup> 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."*

212 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.<sup>234</sup> 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.

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<sup>232</sup> Clause 1.3.1.4(i) of the DPP Policy, Bundle A2 at page 46

<sup>233</sup> Clause 2.1 of the DPP Policy

<sup>234</sup> Page 73

213 Transnet Group Delegation of Authority Group Limits of Authority document applied at the time.<sup>235</sup> 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 unit<sup>236</sup> 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.<sup>237</sup>

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."*<sup>238</sup>

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

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<sup>235</sup> Bundle A2, page 173

<sup>236</sup> Clause 5.1.2 of the Framework document

<sup>237</sup> Page 31

<sup>238</sup> Bundle A2 page 154; page 21 of the Framework document

discussed by the board and a resolution taken.<sup>239</sup> 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 document<sup>240</sup> which at the end thereof was signed variously on 6 and 9 October 2006. All the signatures that appear

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<sup>239</sup> Bundle C, page 46

<sup>240</sup> 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..."*<sup>241</sup>.

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.<sup>242</sup>

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 emerged that STS was a parts distributor for EMD. The attitude of CAPEC was that it saw no reason why STS should be

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<sup>241</sup> Bundle C page 2, paragraphs 4 and 6

<sup>242</sup> Bundle C, page 6

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.<sup>243</sup>

- 221 The business case proposal document needed some amendments and then required to be signed by the Group CFO and Group CEO before the project

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<sup>243</sup> Page 16

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 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 STS<sup>244</sup> 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 2006<sup>245</sup> 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

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<sup>244</sup> Bundle C, page 43

<sup>245</sup> Bundle C, page 43

business case, containing the handwritten notes of van Niekerk, Wells and Ramos, served before the board.<sup>246</sup>

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.<sup>247</sup> 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

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<sup>246</sup> Bundle C, pages 11 – 42; page 25

<sup>247</sup> 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 knowledge<sup>248</sup> of the 13 February 2007 board resolution which excluded the involvement of STS. Mr. Mosweu was the Senior Engineer in TRE 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.<sup>249</sup>

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.<sup>250</sup> 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

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<sup>248</sup> Page 30

<sup>249</sup> Page 31

<sup>250</sup> Bundle C, page 2 paragraph 6

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."*<sup>251</sup>

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"*.<sup>252</sup> 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

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<sup>251</sup> Bundle C, page 39

<sup>252</sup> Bundle C, page 54A

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".<sup>253</sup>*

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

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<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> 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

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<sup>254</sup> Bundle C, pages 55 and 54K

<sup>255</sup> 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.<sup>256</sup>

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.<sup>257</sup> 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"*.<sup>258</sup> 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.<sup>259</sup> 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 embers a week prior to the board meeting. A discussion was held between Wells,

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<sup>256</sup> Page 41

<sup>257</sup> Bundle C, page 58

<sup>258</sup> Bundle C, page 59

<sup>259</sup> Page 42

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"*.<sup>260</sup> 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:<sup>261</sup>

*"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."*

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<sup>260</sup> Bundle C, page 61; page 48

<sup>261</sup> 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.<sup>262</sup>

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.<sup>263</sup> 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.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup>

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

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<sup>262</sup> Page 135

<sup>263</sup> Bundle C, pages 62 -129 at page 129

<sup>264</sup> Gama, page 29

<sup>265</sup> Page 51

<sup>266</sup> Bundle C, pages 62-129

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.<sup>267</sup> 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 action<sup>268</sup> 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

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<sup>267</sup> Bundle C, page 240

<sup>268</sup> 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.<sup>269</sup>

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.<sup>270</sup>

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

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<sup>269</sup> Page 59

<sup>270</sup> Pages 62 - 63

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.<sup>271</sup> 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.

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<sup>271</sup> 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.<sup>272</sup> 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

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<sup>272</sup> 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.<sup>273</sup>

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.<sup>274</sup> Gama responded in detail to those concerns on 26 July 2009.<sup>275</sup> 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

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<sup>273</sup> Page 75

<sup>274</sup> Bundle D1, page 134

<sup>275</sup> Bundle D2, page 1

executives informed, But if a review was required of a document that needed to be obtained in writing.<sup>276</sup> 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.<sup>277</sup> 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

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<sup>276</sup> Pages 25 - 26

<sup>277</sup> Record page 132

the board's intention, yet in his written response he criticised Wells<sup>278</sup> 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.<sup>279</sup> Further in the same document<sup>280</sup> 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 response<sup>281</sup> 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

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<sup>278</sup> paragraph 2.37, page 14

<sup>279</sup> Bundle D.2, page 15 paragraph 2.35

<sup>280</sup> At paragraph 2.37 on page 15

<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup>

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.<sup>284</sup> 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.<sup>285</sup>

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

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<sup>282</sup> Pages 97 - 99

<sup>283</sup> Pages 105 -107

<sup>284</sup> Pages 117 -118

<sup>285</sup> Page 117



with the board resolution, to TRE to deal with STS/ EMD joint venture as Gama explained in his written explanation.<sup>266</sup>

### **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.<sup>267</sup> 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

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<sup>266</sup> Bundle D.2, page 6, paragraph 2.13; Record page 137

<sup>267</sup> Bundle D, page 1

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.<sup>288</sup> 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.<sup>289</sup> The McMaster report recommended that action be taken against Gama as the relevant signatory who had concluded the contract with the supplier.<sup>290</sup> The report also recommended that the 50 like new agreement be rectified to fully reflect the resolution of the board.<sup>291</sup>

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 Spoorinet 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

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<sup>288</sup> Bundle D, page 28

<sup>289</sup> Bundle D, page 28

<sup>290</sup> Bundle D, page 32

<sup>291</sup> Bundle D, page 31

was therefore required of TRE to negotiate with STS as to its role in the execution of the 50 like new contract.<sup>292</sup>

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.<sup>293</sup> 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 TRE<sup>294</sup> and that while Gama did obtain legal advice he was not advised that he could sign the 50 like new agreement.<sup>295</sup>

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.<sup>296</sup>

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-

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<sup>292</sup> Bundle C, pages 72 and 81

<sup>293</sup> Oates, page 120

<sup>294</sup> Oates, page 118-120

<sup>295</sup> Oates, Page 118

<sup>296</sup> Bundle C, pages 62-129

mails containing drafts of the agreement being negotiated.<sup>297</sup> McMaster also said that Group Legal said they had never seen the contract before,<sup>298</sup> 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.<sup>299</sup> 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,<sup>300</sup> 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.<sup>301</sup>

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.<sup>302</sup>

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.<sup>303</sup> Pinkie Msoupye however knew about the board resolution and was intimately involved in drafting the

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<sup>297</sup> The evidence of the detailed content of those e-mails and to whom they were sent is canvassed later in this award

<sup>298</sup> McMaster page 130

<sup>299</sup> Page 130

<sup>300</sup> Page 109

<sup>301</sup> Page 109

<sup>302</sup> Page 122

<sup>303</sup> Page 132

agreement and liaised with Shiceka.<sup>304</sup> She told McMaster that she advised mostly on the TRE resolution and the EMD parent guarantee.<sup>305</sup> 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.<sup>306</sup> 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.<sup>307</sup>

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

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<sup>304</sup> Pages 132-3

<sup>305</sup> Page 133

<sup>306</sup> Page 83

<sup>307</sup> 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.<sup>308</sup> 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

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<sup>308</sup> There is a transcript of this meeting at Bundle C, page 240 with a large number of "inaudibles"



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.<sup>309</sup>

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.

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<sup>309</sup> Bundle D, page 20

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.<sup>310</sup>

#### **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.<sup>311</sup> 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.<sup>312</sup> 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

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<sup>310</sup> Bundle D.1, pages 31 -32

<sup>311</sup> Page 104

<sup>312</sup> Page 100

as reflected in the 13 February 2007 board resolution was that TRE do all the work.<sup>313</sup>)

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.<sup>314</sup>

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.

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<sup>313</sup> Page 127

<sup>314</sup> 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 letter<sup>315</sup>.
- 285 These e-mails refer to various drafts of the 50 like new contract and aspects of the contract then being prepared.<sup>316</sup> 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 Spoornet 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.<sup>317</sup> 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 Spoornet and Kabamba Muteba of Spoornet and again copied to Msoupye, Ngowe, Kahla, Volmink and also to Mandisa Mondie as well as to Nick Thomson both of Spoornet. 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.<sup>318</sup> He accepted that they were probably the parent guarantee clause, the board resolution in some form and the version of the

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<sup>315</sup> Bundle D2, page 1

<sup>316</sup> Bundle D.2, pages 140 - 149

<sup>317</sup> Pages 122 – 123; D2, page 140

<sup>318</sup> 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*".<sup>319</sup> 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.<sup>320</sup> 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 at stage that the schedule was missing. McMaster did not ask Marais what had happened to schedule 5.<sup>321</sup> Earlier the same day Mosoupye 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*

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<sup>319</sup> Bundle D.2, page 145; page 126

<sup>320</sup> Bundle D.2, page 148; page 128

<sup>321</sup> 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.*"<sup>322</sup>

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 or 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.<sup>323</sup>

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.<sup>324</sup> He accepted that the

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<sup>322</sup> Bundle D2, page 148

<sup>323</sup> Page 135

<sup>324</sup> 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.<sup>325</sup> McMaster said that it was only the implementation of the contract which had to be corrected.<sup>326</sup> 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.<sup>327</sup>

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.<sup>328</sup>

292 In a status report on 50 like new locomotives dated 25 March 2008 and prepared by Mr. Rheeders Matthys Project Manager of TRE<sup>329</sup> 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.<sup>330</sup>

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<sup>325</sup> Bundle D.2, page 64; page 139

<sup>326</sup> Page 139

<sup>327</sup> Page 137

<sup>328</sup> Page 138

<sup>329</sup> Bundle D.2, pages 135 - 138

<sup>330</sup> 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.<sup>331</sup> 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.<sup>332</sup>

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.<sup>333</sup> 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.<sup>334</sup> 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,<sup>335</sup> and that it further differed from the resolution proposed in Gama's memorandum dated 11 April 2007

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<sup>331</sup> Page 144

<sup>332</sup> Page 144

<sup>333</sup> Bundle C, pages 9-10

<sup>334</sup> See Bundle C, page 10

<sup>335</sup> Page 147

in which he recommended the amendment to the board resolution<sup>336</sup> 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.<sup>337</sup>
- 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.<sup>338</sup> 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.<sup>339</sup> 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.<sup>340</sup>

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<sup>336</sup> Bundle C, page 55 at pages 58 and 59

<sup>337</sup> Gama page 24

<sup>338</sup> Gama page 25

<sup>339</sup> Gama page 26

<sup>340</sup> 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.<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup>

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

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<sup>341</sup> Bundle C, pages 43 -44

<sup>342</sup> Gama pages 26 -28

<sup>343</sup> 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.<sup>344</sup> 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

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<sup>344</sup> 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 the 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.<sup>345</sup> 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.<sup>346</sup> He accepted that there was no guarantee that TRE would carry out any work as a matter of certainty.<sup>347</sup> 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.

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<sup>345</sup> Bundle D1, page 148

<sup>346</sup> Gama, pages 31-33

<sup>347</sup> Gama, page 26

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.<sup>348</sup> 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."*<sup>349</sup> (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.

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<sup>348</sup> Oates page 93

<sup>349</sup> 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

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.<sup>350</sup> 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

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<sup>350</sup> 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.<sup>351</sup> 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.

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<sup>351</sup> 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.<sup>352</sup> 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.<sup>353</sup> 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.<sup>354</sup> 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.<sup>355</sup> 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.<sup>356</sup>
- 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.<sup>357</sup>
- 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

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<sup>352</sup> Bundle A2 page 154; page 21 of the Framework document

<sup>353</sup> McMaster, page 108

<sup>354</sup> McMaster, page 109

<sup>355</sup> McMaster, page 132

<sup>356</sup> McMaster, page 132-3

<sup>357</sup> 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.<sup>358</sup> Mosweu has since been disciplined for his conflict of interests due to his interest in STS and resigned from Transnet during that process.<sup>359</sup>

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.<sup>360</sup> This Gama described this as what he understood was the “elegant way” provided by the legal advisors.<sup>361</sup> 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.<sup>362</sup> 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.”<sup>363</sup> 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

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<sup>358</sup> Bundle D2, page 11 paragraph 2.29

<sup>359</sup> Singh, page 43

<sup>360</sup> Gama, page 25-26

<sup>361</sup> Gama, page 27

<sup>362</sup> Gama, page 26-27

<sup>363</sup> 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.<sup>364</sup>

- 323 Gama maintained that he had no motive to change or interest in changing the board resolution,<sup>365</sup> 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 work<sup>366</sup> 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

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<sup>364</sup> Gama, page 27

<sup>365</sup> Gama, page 28

<sup>366</sup> 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.



**Charge 4 : UNWARRANTED CRITICISM OF TRANSNET EXECUTIVES**

332 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.

333 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.

334 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.<sup>366</sup> 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.

335 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.

336 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

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<sup>366</sup> Gama, page 48

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."<sup>367</sup>

337 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.

338 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.<sup>368</sup> Gama further alleged that the disciplinary

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<sup>367</sup> Bundle D1, page 101

<sup>368</sup> Record, page 45

action had been initiated specifically with the ulterior purpose of prejudicing his prospects as a candidate for GCE.

339 The High Court application was unsuccessful and the court found that there was no indication of any prejudicial behaviour by Wells against Gama.

340 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 Young<sup>369</sup> 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."*<sup>370</sup> 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...."*<sup>371</sup> Wells dismissed these allegations as nonsense.

341 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."*<sup>372</sup> 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

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<sup>369</sup> Bundle F, page 14

<sup>370</sup> Bundle F, page 15 paragraph 6

<sup>371</sup> Bundle F, page 15 paragraph 7

<sup>372</sup> 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.

342 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.

343 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."*<sup>373</sup> 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.

344 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."*<sup>374</sup> 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

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<sup>373</sup> Bundle F, page 20 paragraph 9

<sup>374</sup> Bundle F, page 23 paragraph 25

opinion as to the candidacy and his opinion would in any event have had no import.

345 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.*"<sup>375</sup> 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.

346 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...*".<sup>376</sup> 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.<sup>377</sup> 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

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<sup>375</sup> Bundle F, page 23 paragraph 26

<sup>376</sup> Bundle F, page 73 paragraph 1

<sup>377</sup> Bundle F, page 73

process and undermined Transnet, including the audit process, the integrity of its executive employees and ultimately the board.<sup>378</sup>

347 In a letter dated 8 December 2009 by attorney Langa to attorney Todd of Bowman Gilfillan<sup>379</sup> 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.*"<sup>380</sup> 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 opinion<sup>381</sup> which was not produced at the hearing.

348 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*".<sup>382</sup> 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.<sup>383</sup>

349 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*

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<sup>378</sup> Record page 57

<sup>379</sup> Bundle F, page 80

<sup>380</sup> Page 80, paragraph 2

<sup>381</sup> McMaster, page 137

<sup>382</sup> Page 80, paragraph 4

<sup>383</sup> Record page 59



*right to be treated fairly by Transnet*".<sup>384</sup> 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.

350 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*."<sup>385</sup> 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.

351 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.<sup>386</sup> 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.

352 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

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<sup>384</sup> Bundle F, page 81

<sup>385</sup> Bundle F, page 88 , paragraph 4

<sup>386</sup> Page 105

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.

353 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.<sup>387</sup>

354 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.<sup>388</sup> This contributed to the breakdown in the relationship according to Wells.

355 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 it these statements reflect a normal and understandable

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<sup>387</sup> Page 63

<sup>388</sup> Record page 65

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.<sup>389</sup> 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.

356 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.<sup>390</sup> 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

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<sup>389</sup> Pages 106-107

<sup>390</sup> Gama, page 69

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.<sup>391</sup> Gama said that what he stated in the court application papers was because he was under pressure and angry at what was going on.

357 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.

358 Gama conceded that the accusations which he made against Wells were serious.<sup>392</sup> He also accepted that he had never approached Wells to discuss the matter with him before accusing him in public of a serious conspiracy.<sup>393</sup> His explanation was that he felt he was being persecuted.<sup>394</sup> 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.<sup>395</sup>

359 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.<sup>396</sup> Mr Pradeep Maharaj, Group Executive Human Resources, was consequently called to testify about the incident which Dube overheard

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<sup>391</sup> Gama, pages 71-73

<sup>392</sup> Page 56

<sup>393</sup> Page 55

<sup>394</sup> Pages 56-7

<sup>395</sup> Page 58

<sup>396</sup> 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.<sup>397</sup>

360 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.

361 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.

362 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 Transnet<sup>398</sup> 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 refers<sup>399</sup> to Gama's criticisms having resulted in a situation of incompatibility between him and Transnet and its leadership. This charge

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<sup>397</sup> Pages 90-92

<sup>398</sup> In paragraph 4.3

<sup>399</sup> 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.<sup>400</sup> 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.

363 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.

364 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

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<sup>400</sup> 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.

365 For these reasons I find that Gama is guilty of misconduct under this charge.

#### **Transnet's delay in instituting the disciplinary proceedings**

366 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."*

367 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.

368 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

investigation in relation to both the 50 like new contract and the GNS security contract.

369 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.<sup>401</sup> 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.<sup>402</sup>

370 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

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<sup>401</sup> Oates page 57

<sup>402</sup> Oates page 108

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**

371 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.

372 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.<sup>403</sup> Ramos was away at time, Wells handed the document to the TIA team and asked them to investigate.

373 Oates testified<sup>404</sup> 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

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<sup>403</sup> Bundle D, pages 1 - 3

<sup>404</sup> Page 49

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.

374 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.

375 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.

- 376 At that stage STS declined to cooperate further and reversed its position as had been agreed on 10 April 2008 to support the rectification process. Transnet was at that stage advised by STS that it was not prepared to sign a termination agreement and would instead claim damages from Transnet for being in breach of 50 like new contract. It became clear that rectification would never be achieved as had previously been agreed by all the parties.<sup>405</sup>
- 377 Oates said that at the outset the investigators were given what they regarded as a plausible explanation as to how the 50 like new agreement had been constructed to take account of the condition in the board resolution. They did not argue the point at the time but focused their efforts and attentions on the rectification of the circumstance that the work was in fact being performed outside of TRE.
- 378 McMaster was the lead investigator on the 50 like new contract investigation. He testified that from February 2008 until June or July the efforts of the investigators were initially concentrated on the 212 locomotives investigation as there was a tender out for that contract which was about to be awarded and which was worth R6.5 billion. The 212 contract was similarly to be entered into between Transnet on the one hand and STS and EMD as a joint venture on the other. Because of the large amount of money involved in this transaction and the fact that the award of the tender was in process and appeared to have major flaws, this became the original and main focal point of the investigation as opposed to the 50 like new contract which was for the much smaller contract value of some R870 million and which had already been signed. The 212 locomotive contract was still in the process of negotiation. It could possibly have been an irregular contract. The 212 locomotive contract investigation was thus

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<sup>405</sup> Oates, page 114

given priority, although the investigation continued simultaneously to look at the 50 like new contract.

379 In the course of the investigation it was discovered that Mr. Percy Mosweu, as also his wife, had undisclosed company interests with STS the joint venture partner with EMD in the 50 like new contract. Disciplinary charges were brought against Mosweu in June.

380 Oates similarly testified that 212 locomotive contract investigation lasted from February 2008 until about June of that year when Mosweu the General Manager responsible for Engineering at TFR was charged and then later brought before a disciplinary hearing. The issue in that hearing was that Mosweu was the Chairman of the Adjudication Committee that adjudicated the 212 locomotives contract and the investigation had identified that he had joint shareholdings together with the individual that was proposing to perform the work for this contract, one Mr. Gustav Adams through the company STS. There had been an irregular share transfer during the closed period of the evaluation of the tender and this was one amongst other issues in what was an irregular process. There was also an incorrect scoring around the BEE requirements.<sup>406</sup> During the disciplinary process of Mosweu it was agreed that he would resign. His resignation was in late July 2008.

381 The TIA team then became involved in defending the interdict sought against Transnet in relation to the 212 locomotives contract at that time.<sup>407</sup> The TIA team was fully occupied in the defence of the 212 interdict from about mid-December 2008 through until probably mid-March 2009.

382 It was in the course of working with the legal team in support of the resistance to the interdict that Oates discussed the interpretation of the 50

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<sup>406</sup> Oates page 52

<sup>407</sup> Oates page 65



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.

383 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.<sup>408</sup> 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.<sup>409</sup>

384 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.

385 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

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<sup>408</sup> Oates page 115

<sup>409</sup> 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.

386 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.<sup>410</sup>

387 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

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<sup>410</sup> Oates page 66

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.<sup>411</sup> 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.

388 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.<sup>412</sup>

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<sup>411</sup> Page 79

<sup>412</sup> Page 88

389 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.<sup>413</sup> 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**

390 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.

391 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.<sup>414</sup> 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.

392 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

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<sup>413</sup> Record pages 109 -110

<sup>414</sup> Oates page 69; Bundle D1, pages 4 - 10

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.

- 393 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.
- 394 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.
- 395 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.

- 396 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.
- 397 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.
- 398 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



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.

399 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.

400 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 Petit<sup>415</sup> 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.<sup>416</sup> 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.<sup>417</sup> Madhav said that given that Gama was a very senior employee they had to be very sure of an allegation that he had breached

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<sup>415</sup> Reflected in his report at paragraph 4; Bundle D1, page 54

<sup>416</sup> Madhav page 122

<sup>417</sup> Pages 126-7

his authority on confinement before recommending that any steps be taken against him.

- 401 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.<sup>418</sup> (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.)
- 402 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.<sup>419</sup> His report on the GNS contract was handed to Oates who in turn handed it to Ramos on 12 February 2009.
- 403 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).
- 404 In March 2009 attorney Stewart Harrison of ENS who had been requested to provide an opinion on whether allegations of misconduct against Gama

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<sup>418</sup> Oates pages 6-7

<sup>419</sup> Page 85

warranted disciplinary action met with the two lead investigators. Harrison provided an opinion dated 26 March 2009.<sup>420</sup>

- 405 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.
- 406 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.
- 407 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).
- 408 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.<sup>421</sup> 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.

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<sup>420</sup> Oates, page 8

<sup>421</sup> Bundle D1, page 123

- 409 Oates met with Gama on 2 June 2009 and in the interim obviously Oates had various meeting with his investigative team.
- 410 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. .
- 411 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.
- 412 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.
- 413 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.
- 414 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.

- 415 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.<sup>422</sup>
- 416 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.<sup>423</sup>
- 417 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.<sup>424</sup> 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.

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<sup>422</sup> Madhav page 69

<sup>423</sup> Madhav page 68

<sup>424</sup> Madhav page 60

- 418 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.
- 419 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.<sup>425</sup>
- 420 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.
- 421 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

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<sup>425</sup> 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.

422 For completeness, the events which occurred after 12 February 2009 related to the instituting of disciplinary steps are summarised as follows:

422.1 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.

422.2 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.

422.3 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.

422.4 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.

422.5 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.

422.6 After considering Gama's written response a decision was then taken during August 2009 to charge Gama with misconduct.

422.7 Formal charges were drawn up and handed to Gama on 24 August 2009.

423 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.

424 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.

425 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.

426 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

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.

- 427 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.

428 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**

429 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 records 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.

430 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."*<sup>426</sup> 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.

431 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.

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<sup>426</sup> Bundle G, typed page 43; Singh: record page 50



432 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.<sup>427</sup>

433 I find that there is no merit in the argument of inconsistency.

### Conclusions and Summary of Findings

434 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.

435 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 Procedure<sup>428</sup> 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

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<sup>427</sup> 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)

<sup>428</sup> Clause 6.3.1

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IN THE DISCIPLINARY MATTER BETWEEN:

TRANSNET LIMITED

The Employer

and

S GAMA

The Employee

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FINDINGS ON SANCTION

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- 1 In this matter the employee Mr Gama has been found guilty of misconduct on three charges in terms of written findings handed down on 4 June 2010. A further hearing was held on 23 June 2010 at which the employer, Transnet, was represented by advocate P. Pretorius SC assisted by attorney K. Savage of Bowman Gilfillan Attorneys. The time of the hearing was after normal working hours and was arranged by agreement between the parties to suit the time constraints of Mr Gama's senior counsel, but in the event there was no appearance for Mr Gama and the hearing was

notified to this effect. There was no intimation of any application for a postponement of the hearing by Gama. Transnet wished to proceed with the hearing on sanction and consequently the hearing in relation to sanction continued in the absence of Mr Gama and his legal team.

- 2 Transnet proceeded to lead the evidence of a single witness in relation to sanction. In consequence of the absence of Gama and his legal team that evidence was not challenged. Transnet then made its submissions orally during the hearing. I was informed that it had been agreed that a copy of the record of the evidence led at the hearing on sanction would be forwarded to Gama's attorney Mr Langa and that Transnet's written submissions would also be made available to him and that he had undertaken that written submissions would be submitted on Gama's behalf on 24 June 2010. Transnet raised no objection to this procedure and in the event I did receive Gama's (undated) written submissions on an appropriate sanction which have been taken into account in the course of the preparation of these findings on sanction.
- 3 Transnet contends that the proper sanction for Gama is that he should be dismissed for the three charges of misconduct for which he has been found guilty.
- 4 For Mr Gama it is contended that the findings of misconduct do not support the sanction of dismissal and that he should receive a final written warning valid for three months in respect of the first and second charges. In respect

of the fourth charge it is suggested that Gama should have one month's salary docked off and that Mr Gama, Mr Maharaj and Mr Wells should be required to make a public statement wherein all three of them recognize that what has happened has happened, should be regarded as water under the bridge and that they all commit themselves to work for Transnet.

- 5 As disciplinary enquiry chairman I am empowered to make a recommendation on sanction to Transnet. My powers do not extend to making a recommendation of the nature requested in relation to the fourth charge. Messrs Maharaj and Wells were not themselves the subject of disciplinary proceedings before me and an order requiring them to perform any particular act is clearly outside of my powers of recommendation. Such an agreed settlement may be within the power of the Transnet board to request (though probably not require) of Messrs Maharaj and Wells, but is not the business of this disciplinary enquiry.
- 6 Transnet led the evidence of Mr Wells the Acting CEO of Transnet in relation to sanction. His evidence was uncontested and stands uncontradicted. There is no reason to reject his evidence. A bundle of documents was handed in during evidence on sanction and Wells testified to certain of the documents in the bundle. His evidence is set out below.

#### **Wells' evidence**

- 7 Wells testified that Gama is the CEO of TFR and as such reports directly to Mr. Wells the Acting CEO of the Transnet Group. Gama is also a member of the Transnet Executive Committee which is the CEO's committee which runs the company's operations. TFR is by far the largest division within Transnet and accounts for nearly two thirds of the revenue earned in the operations.
- 8 The Group CEO is authorised and mandated by the Transnet board and delegates that authority to the other senior executives as he sees appropriate in order to run the company's operations in their various areas of operation. Ultimately, the Group CEO is overall accountable and delegates all authority through his office. It is therefore fundamental that everybody to whom authority is delegated by the Group CEO enjoys the full trust of the board and of the Group CEO and also of the members of the Transnet Executive Committee which meets to plan and implement strategy and policy as laid down by the shareholder and the board. Wells testified that in consequence any executive who is a divisional CEO, such as Gama, needs to have very good relationship with his fellow executives at that level built on trust and on a belief that there are no hidden agendas.
- 9 Wells pointed out that inevitably in a large company there are disagreements between executives at this level and that it is important that there is mutual trust so that these differences are capable of being resolved as one would expect with experienced executives interacting in a mutually

co-operative way in order to find solutions. The absence of trust between executives undermines the position of those executives and their ability to perform their required roles.

- 10 It was further pointed out that Gama like all other employees, has an employment contract which requires the exercise of utmost good faith in relation to the employer. The employment contract also makes employees subject to the policies, procedures and disciplinary code as laid down by the company.
- 11 The CEO of a division is given a wide span of control and power as delegated to him through the office of the Group CEO to enable him to run the day-to-day business of that division without bureaucratic requirements constraining him. In relation to procurement in particular it is fundamentally important in relation to any business that it be well controlled. This is particularly important in the case of State owned entities such as Transnet which utilise public monies and where a high level of control is required for compliance with the PFMA and the Treasury Regulations. Accordingly, procurement policies are very clearly laid out and a CEO is required to adhere to these policies. It is through this process that their decision-making takes place and that a high degree of confidence is achieved in the procurement controls. Is therefore very important that the process of selecting any particular supplier of services complies with the procurement



policies which require a proper and independent tender process for the awarding of a tender.

- 12 Wells testified that the relationship of trust between Gama and himself as the Group CEO had completely broken down. He said that the trust relationship had broken down as to the functioning of Gama as the CEO of TFR. Wells said that similarly Gama's relationship with his fellow executives in the Transnet Executive Committee had also broken down, as had the relationship between the Transnet board and Gama.
- 13 As regards the negligent misconduct of which Gama has been found guilty Wells testified that this negligence was very serious. The 50 like new contract was an extremely important contract to Transnet and Gama's failure to carry out the board resolution has been damaging to Transnet's reputation which has had its name publicly damaged in the media. In addition, it has been extremely costly to Transnet to rectify the contractual position in order to ensure the assembly of these locomotives by TRE. In addition, there has been a significant delay in the delivery of these 50 locomotives which has had a very negative impact on the availability of locomotive traction power which is critical to TFR's delivery of its freight volumes. In addition, Wells maintained that Gama has to this day made no effort to be part of the solution in rectifying this problem in relation to a very significant and complex contract. (In this regard I would comment that evidence was led regarding this aspect of the dispute in the previous leg of

the hearing. These Gama maintained that there was nothing that he could have done once he was suspended and prior to his suspension but after he was implicated, he felt it inappropriate to intervene. Whilst that may be true to a degree, the evidence also established that at an earlier stage, and before there was any suggestion that Gama himself may have been implicated in this misconduct, he failed to shoulder responsibility for the failure to ensure that TRE perform the assembly work in accordance with the board resolution and Gama was certainly less than active in rectifying this problem.)

- 14 Wells pointed out that Gama has expressed absolutely no remorse over the situation which transpired. Whilst Wells accepted that mistakes do occur in business, when this happens it is necessary for those responsible to recognize their errors, express remorse and recognize the importance of what has gone wrong. In this case that has not happened at all. Instead Gama has himself (and also through his attorney) continued to trivialise the issues and problems which arose from not only the 50 new contract but also from the GNS contract. Wells testified that this showed that Gama exhibited no remorse. He maintained that were an executive is guilty of misconduct and fails to show remorse it is not possible to run a company and move forward if the executive is not prepared to admit the problem and be part of the solution and that one cannot trust such an executive in the future where that executive carries considerable responsibility delegated to him in a large corporate environment.

- 15 Wells referred to his evidence in the previous hearing in which he testified that Transnet would expect that a divisional CEO would investigate serious allegations of misconduct such as those in relation to the GNS security contract and the 50 like new contract and explore solutions and take action the moment there was any evidence of wrongdoing. Gama's failure to do this contributed to the breakdown in the relationship between him and Transnet. Wells testified that the whole area of security within TFR had been thrown into disarray and had remained in that state, whereas it could have been dealt with in a positive way to correct matters far more swiftly. At least two other officials in the security department had disciplinary action taken against them in relation irregularities related to the GNS contract.
- 16 Wells pointed out that and there was now a lack of trust in relation to Gama's technical ability to perform the tasks required of him as a divisional CEO given the findings in this enquiry in relation to the two contracts in question. He said there that in order to run a large corporate such as Transnet the executives knew full well that they were required to be very focused on governance and procedures, to honour required company processes, to remedy matters when they go wrong and to do so in a transparent and constructive way. Other executives at Transnet could see that Gama's conduct clearly demonstrated that he had by-passed what was required in this regard. In addition, he testified that Gama has made well-publicised statements containing false accusations against Wells and other executives as well as against the board. Wells stated that most of these

allegations had been demonstrated clearly to be false and were known to most of the executives to be totally false. This had the consequence that the relationship between Gama and those executives was totally broken down. This evidence confirmed the evidence which Wells gave in the previous hearing which was to the effect that the statements made by Gama in public had a profound affect on the relationship between Gama on the one hand and Transnet on the other with executives and the board losing trust in Gama who was trying to bring Transnet into disrepute and making false accusations against the board and against Wells as the Group CEO. Wells confirmed his earlier testimony that this had prompted the chairman of the board to ask TIA to review Gama's allegations, which they found to be without substance. This evidenced a total breakdown in the relationship between Transnet and Gama following his suspension. Wells further confirmed his previous testimony that it is highly unlikely that this relationship is 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 also TIA. Wells testified that this remains the position, the only subsequent developments being that Gama has continued to make media releases which have brought Transnet and certain executives into disrepute.

- 17 Well testified that the way Gama had acted since his suspension was as though he was outside the organisation and owed no allegiance to the company as an employee who was required to discharge his duties with the

utmost good faith in the protection of the reputation of Transnet. Wells pointed out that the disciplinary procedures and employment contract contained procedures which employees are required to adopt if there is a disagreement and no employee has the right to usurp that and make damaging statements in the public arena which are false. In the light of these facts, Wells testified that he does not believe that the relationship between Transnet and Gama can be restored.

- 18 Gama testified in the previous hearing that he was prepared to apologise to Wells personally and that he believed they could work together. Wells' attitude was that he would be prepared to accept such an apology on condition that Gama undid the harm which he has done in the form of making a public statement admitting that what he has said is false and by withdrawing those comments and accusations. Such steps would, according to Wells, deal only with their personal relationship however. What he considered not redeemable was the fact that Gama has gone on public record attempting to damage the reputation of Transnet, its board and the shareholder and a number of other executives within the company, and thus in effect had attempted to publicly undermine the very fabric of the company. Wells stated that even if what Gama had said in public was the truth, even that wouldn't be acceptable because of the fact that he had elected to make these statements in public. This was of course exacerbated by the fact that Gama's public statements were untrue.

- 19 As to the consequences of Gama's actions Wells testified that the most important and serious consequence was the whole undermining of the governance process of Transnet. In this respect Wells explained that Transnet had come from a past of what he described as "loose procurement practices" which needed to be tightened in order to reposition the company in the future to ensure compliance with the PFMA. Appropriate governance procedures therefore had the highest priority within Transnet which was attempting to achieve governance at a world-class level. In these endeavours Transnet had been severely frustrated by procurement irregularities within TFR and had tightened up the procurement procedures quite significantly to ensure that the improper awarding of contracts ceased. This he said was fundamental to the effective running of the business. Specifically, the procurement of locomotives had previously been plagued by improper procurement processes.
- 20 In relation to the question of security, cable theft has been crippling to Transnet and combating this had been prioritised right up to board level. This was a crucial focus in order to ensure a predictable and safe railway transport system. In consequence, the security contract had an extraordinarily high priority to ensure that the right people were involved in security with the right processes and the correct accountability to ensure that, to use the railway terminology, Transnet had "traction" on matters like cable theft and other theft from the business.



- 21 In relation to the consequences of Gama's failures in relation to the security contract and the 50 like new contract Wells testified that the consequences on the latter contract with very severe with big delays and additional costs incurred. Not only has there been damage to Transnet's reputation but the process of rectifying the situation according to the board resolution has been fraught with legal challenges with the STS/EMD joint-venture. To remedy the position the co-operation of both parties to the joint-venture was required and this proved extraordinarily difficult with STS requiring significant compensation way beyond commercial realities. This has entailed on going and costly processes. In addition the locomotives built in terms of the 50 like new contract had been assigned to deal with volumes for particular customers and the manufacture of those locomotives was delayed by at least a year which has had a major impact on the business of Transnet.
- 22 On the security side, the whole area of security was left in total disarray according to Wells. There have been on going High Court proceedings with GNS instituting High Court proceedings which have challenged the various findings that have been made in the internal disciplinary processes. Three people connected with the award of the GNS contract have been dismissed as a result of these events. In consequence the security contract and security within TFR has been a real mess. Wells pointed out again that proper management of security is critical to the proper running of rail services.

- 23 Two extracts from the Transnet Annual Report for the year ended 31 March 2010 were produced in evidence. The first reflected a report by the external auditors Deloitte and Touché to the Minister of Public enterprises which stated that the auditors had identified certain unlawful acts or omissions committed by persons responsible for the management of Transnet which constitute a reportable irregularity in terms of the Auditing Professions Act, 2005. This refers to the reportable irregularity described in the Report of the Directors which in turn refers to an irregularity relating to the conclusion of a locomotive contract amounting to R867 million by the Chief Executive of Freight Rail contrary to the terms and conditions determined by the board resolution applicable to that contract. Wells pointed out that this report brings Transnet into disrepute and is a document which is carefully examined by stakeholders including shareholders and funders. This Wells said went to the heart of the employment relationship with Gama as the CEO of TFR as it indicated that the external auditors had confirmed the belief of the board that these matters are serious, as has now been found in the previous stage of this disciplinary enquiry. Wells testified that despite the obvious seriousness of the misconduct, Gama continued to publicly trivialise the impact of his conduct.
- 24 A series of e-mails was handed in by Mr Wells. The e-mail correspondence is primarily between Gama's attorney Mr Langa and Transnet's attorney Mr Todd. Also handed in was a series of newspaper articles. Wells proceeded to summarise the essence of what was being contended on behalf of Gama

through his attorney and in many cases passed on to the media. Essentially, he pointed out that there were statements which were damaging to the reputation of Transnet executives, particularly Mr Maharaj who was accused of racism. Wells testified that this conduct goes to the heart of the breach of the employment relationship and the destruction of trust. (I am disinclined to have detailed regard to this evidence in aggravation of correspondence which occurred after the previous hearing. Gama was charged with unwarranted and unjustifiable criticism of Transnet executives and testimony was given in relation to his conduct in this regard in the first leg of this disciplinary enquiry. It is that conduct which constitutes the misconduct for purposes of this enquiry into sanction. Procedurally, I prefer to have regard to that conduct for purposes of determining an appropriate sanction in relation to the fourth charge. Realistically however I should however have regard to the subsequent correspondence and damaging public statements insofar as they illustrate that there has been no attempt on Gama's part to recant his criticisms and to apologise in circumstances where he has now been found guilty of misconduct, albeit that no finding of intentional misconduct was made on the available evidence on Charges 1 and 2. In respect of the fourth charge Gama's conduct (which he made no attempt to deny) was however clearly intentional. Gama's only explanation in the previous hearing was not to deny that he had made such statements but was an attempt to justify his position saying that he felt persecuted and would with hindsight have done

things differently. It should not be forgotten that Gama accepted that he had acted unfairly towards Wells by making public accusations against him. In light of this approach, I do not intend to examine in any detail the evidence presented regarding correspondence subsequent to any previous findings, particularly the evidence regarding statements made in the letter from attorney Langa to attorney Todd in the e-mail of 18 on June 2010.)

- 25 Wells stated in conclusion that like any other employee Gama, if he has a grievance, is obliged to follow the well-defined grievance procedures laid down by the company and is required to act in good faith towards the company. This he failed to do choosing rather to deliberately avoid these internal processes and act as though he is an outsider to the company. He has made statements about the person to whom he reports, namely Wells himself, about the board and about the shareholder which have been proven to be false and which have not been retracted. On the contrary his public accusatory statements have continued since the time of his suspension. All of this occurred outside the companies internal processes. Against this background Wells testified that it was not possible to restore the employment relationship because Gama had failed to take responsibility for the issues which led to his suspension. Wells stated that it would not be possible to run a corporation such as Transnet if employees behaved as though they were beyond company discipline and acted in any manner which they felt appropriate even where that is damaging to the company, and yet continue in their employment. That would make it very difficult for

the company in future to discipline any employee for serious misconduct if the company's relationship with Gama remained and he continued to be employed at Transnet.

26 Wells testified that in the way in which he had behaved throughout this process Gama had failed to meet the standards of a CEO. The procurement process has been one of great focus in Transnet because of poor practices in the past in this regard and the need to set matters right by insisting on high standards particularly within TFR where there had been poor practices in the past. Gama's failure to ensure that proper procurement processes were followed within TFR even after the huge focus and restructuring of those processes which had taken place in order to bring about proper standards of procurement goes to the heart of undermining what Transnet sought to do.

27 Finally, Wells testified that although there had been suggestions both in the press and in the letter of 18 June 2010 from Gama's attorney Mr Langa to Transnet's attorney that Gama intended to bring a court application in relation to placing these disciplinary proceedings in abeyance, nothing had in fact transpired in that regard as far as he was aware. Wells did not concede that there have been any procedural irregularities which would justify such an intervention and on the contrary he said that Transnet has been very careful to ensure that due process has been followed.

**Preliminary point : Allegations concerning bias**

28 In his written submissions Gama raised his "reservations about the appointment of the chairperson in this hearing" and expressed the view that Transnet has deliberately concealed knowledge about the "regular service" that I as the chairperson rendered to Transnet and Bowman Gilfillan in the immediate period prior to my appointment as chairperson of this hearing. Gama expressed his displeasure over the fact that I accepted a brief from attorneys Bowman Gilfillan to act as chairperson in another Transnet disciplinary hearing while the Gama hearing was part heard. On this basis I am asked to take these facts into account because, so it is averred, my independence (although not integrity) has been compromised by both Transnet and Bowman Gilfillan by their failure to disclose to Gama and his legal team that they have and continue to use my services regularly. It is contended that this concealment has created a reasonable perception of bias.

29 The onus of proving bias or a reasonable perception of bias rests on an applicant for the recusal. Before a party can succeed in a recusal application the evidence must satisfy the test formulated in the case of *The President of the Republic of South Africa and others v South African Rugby Football Union and others*<sup>1</sup> and show a reasonable apprehension that the presiding officer will be partial to the extent that the applicant for recusal will not get a fair hearing. The test for bias is therefore an objective test based

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<sup>1</sup> 1999 (4) SA 147 (CC) at 177 A-D



on what a reasonable person in possession of the correct information would consider as impartial. The reasons for that apprehension must be reasonable and not based on an unfounded or an unreasonable apprehension. The apprehension must be that of a reasonable person assessed in the light of the true facts which emerge from the recusal application.

- 30 It is not clear whether Mr Gama's allegations of a reasonable perception of bias amount to an application for my recusal. It would appear that they do not in that no evidence has been led in support of the allegation that Transnet and Bowman Gilfillan deliberately concealed the fact that I have done other work for Transnet. Indeed the only evidence I have before me in that regard is the evidence of Mr Wells who testified, in response to a general allegation in the correspondence, that he was satisfied that there were no irregularities which would justify judicial intervention in these proceedings - which would no doubt also cover an application to court to have me either interdicted from proceeding with the enquiry or ordered to recuse myself on account of the existence of a reasonable perception of bias on Gama's part. Articles which may have appeared in the press in this regard are hearsay do not constitute evidence before this enquiry of the facts alleged in relation to the alleged perception of bias, at least not unless and until they are referred to in evidence. I do not intend to scour those press articles which were handed in by Transnet for references relating to perception of bias. To rely on such evidence would be inappropriate and

procedurally unfair as Gama has not put up any such evidence before this enquiry in relation to which Transnet could then have had the opportunity to interrogate and if necessary answer the allegations.

- 31 In short, if Mr Gama believes that I should recuse myself from further conducting this hearing because of his reasonable perception of bias, then he ought to have approached this enquiry and presented his evidence and made his submissions based on that evidence as to why I should recuse myself. That he has failed to do, which is why, regard being had to the law as set out above, in the present circumstances where Mr Gama has made no attempt to present any evidence to discharge that onus, that there is no need for me to rule on the issue of my recusal. There is no proper application for my recusal before me which requires a ruling. However, even if I am to regard Gama's written submissions as constituting a recusal application, it is clear from what has been considered above that Gama has failed to discharge the onus which he bears in this regard.

#### **Deliberations on Sanction**

- 32 A few opening remarks about the assessment of sanction and the question of evidence in mitigation or aggravation is relevant. "Mitigation" is really a criminal law concept with no place in employment law. When an employer determines that an employee should be dismissed for misconduct that is not an expression of moral outrage and is certainly not an act of vengeance,

Rather it is, as has been pointed out by the Labour Appeal Court,<sup>2</sup> "... a sensible operational response to risk management in the particular enterprise. So for example supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise."

- 33 The Code of Good Practice on Dismissal in Schedule 8 to the LRA states in item 3(4) that: "Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable."
- 34 There is no specific reference to negligence in the examples of serious misconduct given in the code. Negligence can however where it is sufficiently serious, render a continued employment relationship intolerable.
- 35 Negligence in the performance of an employee's duties will usually constitute poor work performance. Negligent poor work performance may be no more than simple poor work performance. However, it may also constitute misconduct in certain circumstances. There is an overlap between negligence and poor performance and in certain circumstances it is permissible to treat both negligence and poor work performance as forms of misconduct.

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<sup>2</sup> De Beers Consolidated Mines Ltd v CCMA and others (2000) 21 ILJ 1051 (LAC) at para 22

36 The requirements for dismissal for negligence in the context of employment law are described by the author Grogan as the following:

36.1 that the employee failed to exercise the standard of care and skill that can be reasonably expected of him;

36.2 that the lack of care and skill manifested itself in an act or omission that did or could have caused loss to the employer;

36.3 that a loss or potential loss to the employer resulted or could have resulted from the employee's negligent act or omission; and

36.4 the negligence must be gross.<sup>3</sup>

37 The question is essentially whether these requirements are satisfied by Gama's conduct under charges 1 and 2 or, put otherwise, whether the negligent misconduct is so serious and of such gravity is to make the continued employment relationship intolerable. It was contended for Transnet that the negligence of which Gama has been found guilty amounts to gross insubordination which is one of the listed examples of serious misconduct in the code that may warrant dismissal for a first

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<sup>3</sup> Grogan , Dismissal, at page 122

offence. Transnet also submits that Gama's negligence amounts to a serious dereliction of duty.

- 38 **Charge 1** The negligence on Gama's part in signing the GNS confinement document is nevertheless particularly inexcusable as he is the authorised person with delegated authority on behalf of TFR who as such is the gatekeeper tasked with ensuring that contracts of that nature can only be concluded for a value of more than R 10 million if an open tender process has been undergone. He is the key person in the procurement process whose duty it was to ensure that because the value of the contract exceeded his delegated authority for confinement a contract of that nature it could not be authorised by him where the contract was to be concluded following a confinement process. The failure of the CEO as the gatekeeper to bother to read the document which constitutes the approval in that situation can fairly be described as gross negligence. Undermining this governance process is a serious internal adverse consequence for Transnet. Gama knew that security, and particularly security regarding cable theft, was a high priority and he should have taken particular care when authorising what he knew to be a security contract.

- 39 The consequences of the negligent misconduct in approving the GNS contract can also not be ignored. The consequences of Gama's failure to read the document placed before him by Beattie his General Manager meant that he failed to recognize that he was dealing with a confinement

process and moreover that he was dealing with the contract concluded with a company controlled by a friend of his. The ensuing consequences of Gama's negligent conduct in relation to the interests of Transnet were testified to by Wells as described above. The undermining of the governance process in respect of procurement is an important factor. This is all the more so where special efforts had been made within TFR to ensure that of the procurement processes were of a high standard and properly in place. Wells unchallenged evidence is that in consequence of what had occurred in relation to the security contract security within TFR was a real mess. There is in addition the consequence of the adverse publicity that has surrounded the GNS contract and consequent reputational damage to Transnet which is also a consequence of this negligence by Gama. There is no doubt that having regard to the *consequences* his negligent conduct that it must be regarded as serious.

- 40 Transnet is placed in a position where it can really not be confident once negligence of this nature has occurred that Gama will in future be sufficiently careful to ensure that he knows whether what he is signing is a confinement or an open tender contract. Gama is the CEO of the largest division in Transnet and in fairness the company cannot be expected to continue to employ him in this role while the company lives with the doubt as to whether or not he will again in future make an error of this nature. An organisation like Transnet creates policies and procedures precisely so that it does not spend all day looking over the shoulders of its senior employees



to ensure that they are properly fulfilling their tasks within those prescribed policies and procedures. As CEO Gama is a very senior guardian and keeper of this system and his failure to properly consider what he was signing in my view constitutes very serious negligence even though he relied on Beattie's guidance.

41 Taking all these factors into account the misconduct under this charge is of such gravity and seriousness in the case of such a senior employee that the appropriate sanction is dismissal, even on a first offence.

42 It was submitted for Gama in relation to the first charge that account should be taken of the fact that he was found only to have signed the confinement document negligently and not wilfully. It was further submitted that the findings were to the effect that he was not guilty of gross negligence. That is not so. The only question which arose at the stage of the previous findings was whether or not Gama was guilty of misconduct. For that purpose on the facts of the case as presented, it was only necessary to determine whether he was guilty of negligent misconduct or wilful misconduct. The question of the degree of or seriousness of his negligence is a question which was not at issue at that stage and which only now requires to be considered because it is the seriousness and gravity of the misconduct which is central to the determination of sanction. The issue of whether

Gama's negligence can be classified as gross negligence was accordingly not considered in the previous findings.

- 43 I was urged to take into account the fact that Gama has a good track record. In fact, he has been employed at Transnet since 1994 and there is no evidence of any previous misconduct on his part. In addition I am asked to take into account, as I do, the fact that Gama was misled by a senior General Manager whom he trusted.

#### Charge 2

- 44 In relation to the 50 like new contract the negligent conduct of which Gama has been found guilty is that he signed the contract without ensuring that the assembly work would be secured to TRE. This was the single condition of the delegation to him of authority to implement the contract. The 50 like new contract was for a very large amount of money in excess of R800 million. In relation to the second charge it was submitted for Gama that it must be taken into account that his legal department viewed the contract and assisted and advised him. It is in respect of assessing the seriousness of this negligence importance to understand the evidence surrounding Gama's testimony that the internal legal advisors were aware of and had applied their minds to the contract. The nub of the issue, as set out in paragraph 321 of the previous findings is that although the wording of the 50 like new contract had been considered by the legal team their focus had been on other aspects of the contract and Gama had not required them to focus

specifically on ensuring that the contract was worded so that TRE would secure all the work as required by the boards condition. The point really is that whilst Gama may have genuinely been under the impression that he had obtained the necessary legal advice, in fact he had not done so given that he was not pursuing that particular question with the legal advisors. This was ultimately his responsibility and is the reason why he was found guilty of negligent misconduct for having failed to ensure that the contract complied with the board resolution.

45 It is however further important to understand further that for a long period of time after it had been discovered that TRE was not performing the work many people within Transnet, including the investigators in TIA, held the view that the problem lay not with the wording of the formal contract but rather with the implementation thereof. This view only changed much later of the receipt of a legal opinion. This is important because it tends to show that Gama's acceptance of the contract with its "faulty" wording for want of a better description, was not so outrageous and significantly lessens the severity with which Gama's negligence must be viewed.

46 On the other hand the consequences of Gama's negligence in relation to the 50 new contract were certainly severe and serious. Remedying the situation in order to ensure that that TRE did the work was very costly for Transnet. The sunk (wasted) costs were in the order of R20 million. In addition, Transnet was put to the trouble of a large delegation of senior

executives having to proceed to the United States in order to explain to EMD what had occurred so as to ensure that Transnet's relationship with EMD was not damaged. Transnet's reputation was certainly not enhanced by the situation of having to deal with EMD, an important business partner and global player. In addition the consequence of Gama's failure to comply with the board resolution is that the third party with whom the contract was concluded is in the process of suing Transnet for damages. Wells' testimony at the sanction hearing was clearly to the effect that what has been demanded by STS is clearly beyond commercial reality. This enquiry has not investigated the merits of that action against Transnet and it is possible that Transnet will ultimately be found not to be liable for any damages in consequence of the failure to implement the board resolution – for which Gama was responsible. Nevertheless Transnet has been drawn into costly litigation pursuant to Gama's negligent failure to secure TFR's position in relation to the maintenance and assembly work under the 50 like new contract. These factors together with the fact that the 50 like new contract was for a large amount of money are all factors which weigh in favour of Gama's negligence being regarded as gross negligence

- 47 One must have regard to the fact that the board needs to be able to be confident that when it delegates authority to a divisional CEO subject to a particular condition, that he will take specific and reliable steps to ensure that that condition is complied with. In fairness to the Transnet board it would be a big ask for the board to be required to continue entrusting Gama

with large management projects when he has exhibited negligent failure of this nature and with these consequences. Bearing all these factors in mind, the misconduct under this charge viewed in isolation would probably be sufficiently grave to warrant a sanction as severe as dismissal on a first offence.

**Charge 4: Unwarranted criticism of Transnet and its executives**

48 In respect of this charge Gama submits that an appropriate sanction is not dismissal but that he should rather have one month's salary docked in respect of this charge and be required to make a public statement together with Messrs. Maharaj and Wells committing themselves to work for Transnet and burying the hatchet by regarding what has happened as constituting water under the bridge.

49 A CEO is employed to make the decisions necessary for the successful and profitable operation of area of the company under his control. He must independently recognise when decisions are to be made, make those decisions correctly and ensure their effective implementation. He is employed in the position of CEO precisely because he is thought to have the insight, ability and experience to do this. Our Courts recognise that because of the gravity of the responsibility which a senior executive such as a CEO bears, and the dire consequences which can follow if he fails to

properly discharge that duty, that the standard of conduct with which such an employee must comply is an exacting one.<sup>4</sup>

50 Our courts have recognised that employees in senior management positions are in a completely different position from more menial employees in that simple lack of confidence in the ability or willingness of that senior manager to perform the job the way that the owners or other senior executives require it to be performed could justify dismissal.<sup>5</sup>

51 In the context of this approach in our law, the evidence of Wells on sanction that the continued employment relationship remains intolerable cannot be doubted. Gama's public statements demonstrate without doubt that there has been a total breakdown in trust and confidence between the parties. His contention that he would be prepared to discuss matters with Wells and apologise to him really takes the matter no further as the destruction of relationship is far more wide ranging than merely the personal relationship between himself and Wells. In any event, although Wells testified that he would be prepared to accept such a personal apology, he would only do so in circumstances where Gama was prepared to admit that his public attacks on Transnet and its executives were made up of statements which were

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<sup>4</sup> Unreported case of *H. Brereton v Bateman Industrial Corporation Limited and other*, Case no. JA80/89 in the Labour Appeal Court, at para. 36

<sup>5</sup> *Brereton case (supra)* quoting the English authority of *E C Cook v Thomas Linnell and Sons* [1977] IRLP 132 at para. 42 of the *Brereton* judgment



untrue and that he was prepared to publically recognise this and recant such statements. Wells correctly points out that even if this were to now occur the damage has been done and it would not be practically possible to run an organisation and to maintain discipline therein if the CEO were permitted to conduct himself in this way with impunity in the sense that he was able to retain his employment.

- 52 In relation to the fourth charge it was submitted for Gama that he was incited or provoked into making the statements which he did because Transnet was alleging that his actions were intentional and wilful and thereby insinuated that he had acted fraudulently and that corruption could not be excluded. It is submitted that this was a normal reaction for anybody accused of corruption and that Transnet had insisted right up until closing argument in the enquiry that Gama's conduct was wilful. It was argued that this showed that Transnet had not acted objectively and that Gama had every reason to react in the way in which he did. This argument overlooks the fact that although the previous findings concluded that it was ultimately not shown that Gama had knowingly and intentionally granted to the GNS contract to his friend General Nyanda, there was nevertheless considerable evidence which showed various other irregularities in the tender process related to the GNS contract and in the TFR security department. These irregularities were shown in circumstances where the GNS contract was in fact granted to a company owned and controlled by a friend of Gama's. The argument which I am in effect now asked to accept would amount to saying

that Transnet should not have investigated these apparent irregularities and not viewed them as potentially wilful and corrupt. Clearly, an investigation was called for. Matters looked very suspicious and at least in respect of Mr Gama the investigation into the GNS contract was not complete up until the conclusion of the disciplinary enquiry. In the end much turned on the fact that there was no available witness who could testify about exactly what had happened in Gama's one-on-one meeting with Beattie. Transnet was constrained to argue that an adverse inference had to be drawn before a finding could be made on the probabilities that Gama had intentionally engaged in corrupt conduct. Ultimately, that inference could not be drawn. But it does not follow that there was not a substantial amount of circumstantial evidence to support Transnet's case that the conduct may have been intentional. Gama's conduct in making public statements of the nature which he did while the jury was still out was always going to be risky. Not only did he run the risk that Transnet might ultimately prove a case of wilful misconduct, but he also ran the risk that even if he was proved right, his conduct would severely damage if not destroy his relationship with his employer and the other senior executives within Transnet. That is in fact what happened.

- 53 It was contended that the first and second charges are an entirely new formulation at Transnet as it has never occurred in the history of that company that a CEO or senior executive for that matter has been held to have committed misconduct for activities and practices that are usually

automatically condoned and accepted by various mechanisms and committees within Transnet. Apart from the fact that there is no evidence to this effect, it seems to me that if the conduct in question amounts to misconduct and then it is misconduct quite regardless of what mechanisms and committees within Transnet may have to say about that. If this submission is an attempt to make out a case of inconsistency, then it is necessary to say no more than that I have already concluded in the previous findings that there is no merit in the case of alleged inconsistency.

54 It is further contended that I should take into account the fact that there were in the same financial year in which Gama committed his acts of misconduct some 42 incidents and transactions of corporate non-compliance or irregularities in respect of which nothing was done (presumably by way of taking disciplinary action). Is not clear to me to precisely what evidence reference was being made in this regard. However, insofar as it refers to the report of the tender process audit (Exhibit G), this is no more than a re-casting of the alleged inconsistency issue which has already been rejected in paragraphs 430-454 of the previous findings. In any event, even if there is other evidence to which reference is being made in this regard, it was certainly not established that the other incidents were of a similar factual nature or similarly committed by a senior executive.

55 Further I was urged to consider the fact that the charges were brought about as a measure to block Gama's interest in being considered for the

position of Group CEO at Transnet. This submission is contrary to the evidence and the previous findings where it was concluded that Gama had not shown that the charges are attributable to his having applied for the CEO position and others within Transnet having instituted these disciplinary proceedings as part of an orchestrated campaign to bar his way to becoming the new CEO.<sup>6</sup>

- 56 Then it was argued that as Gama's delegated authority in relation to the GNS contract was R 10 million and the contract value was R 18 million the amount for which he signed negligently in excess of his mandated authority was only R 8 million and that this was a "minute level of detail" when considered in the context of this being a R 20 billion turnover company and having regard to ordinary human frailty. This argument is breathtaking when one has regard to the fact that the R 8 million concerns public funds and was contracted for in breach of stipulated and well known procurement procedures. I venture to suggest that the vast majority of South Africans would not consider the unauthorised expenditure of R 8 million an a minute level of detail. This argument only lends credence to Transnet's submission that Gama has consistently trivialised his misconduct.

- 57 It was contended that the notion of an irretrievable breakdown in the relationship between an employer and employee should be viewed

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<sup>6</sup> previous findings para 428

differently were government employees are concerned as opposed to the private sector. This is a novel submission. So far as I am aware there are not two separate arenas in which employment law principles operate when it comes to assessing misconduct and appropriate disciplinary sanctions. What makes it even more strange is that this submission is immediately followed by a statement in the same paragraph to the effect that I should consider the fact that Gama as CEO of a division of Transnet *"has turned around and contributed immense profits to the Transnet group"* which strikes me as a notion far more closely associated with the profit driven private sector than with public sector enterprises. I would however comment that there is evidence to the effect that Gama was part of a team (and as the CEO no doubt an important part) which turned TFR around from a loss-making to a profit-making enterprise. This fact makes the fact that Transnet no longer wishes to employ Gama particularly tragic. The suggestion it seems is that because government is the shareholder of Transnet and only government can appoint the Group CEO of Transnet that relationships within the company are substantially "entangled and synchronised with those of the public sector". It was submitted that it was therefore not up to an individual or group of individuals (a handful of Transnet management) to contend that there had been a breakdown in relationships and that they could no longer work together. There is no principle in our law which permits a shareholder to intervene in a company's disciplinary functions and an employee could legitimately complain if a

shareholder did so. It seems to me that even if this is correct that only the government can determine the future of Transnet (which was not an aspect pertinently canvassed in evidence before this hearing) then "government" whatever that may entail in this context needs to take cognizance of the fact that the Acting Group CEO and other senior executives within Transnet no longer have a workable relationship with Mr Gama. If on that basis, government to achieve a workable organisation needs to make a choice between retaining Gama and other senior executives so be it, but that choice and the actions of government must nevertheless take place within the confines of the law which includes employment law. It is a principle of employment law that where the relationship between an employer and its employee has broken down it cannot be required of an employer to retain an employee in employment.

- 58 Transnet submits that no employment relationship can continue to exist in the circumstances of this public attack on its executives and on Transnet itself. In short, Wells' evidence on this aspect set out above is overwhelming and is un-contradicted. This charge goes to the heart of Transnet's loss of faith in Gama and there can be no doubt that dismissal is the only appropriate penalty for Gama's conduct under this fourth charge.

#### **The charges viewed together**

- 59 Finally, in considering whether or not dismissal is the appropriate sanction it would be artificial to ignore the fact Gama is guilty of all three charges.



Accordingly, it is necessary to acknowledge that were the the conclusion to be reached that he should not be dismissed, that would necessarily entail that he return to work in circumstances where the employer in the form of the Acting CEO, other senior executives and the board have all lost faith in Gama as a consequence of his misconduct in respect of all three charges. In this sense the misconduct with which Gama is charged is unavoidably to be viewed as cumulative. Obviously, viewed cumulatively there can only be one conclusion which is that dismissal is the appropriate sanction.

60 Due to personal reasons, I will not be able to work on these written findings for the next few weeks. At the hearing on sanction Transnet's counsel requested that if I was unable to finalise these written findings on sanction in a relatively short period of time I should consider simply issuing a recommendation and providing full reasons at a later stage. I have decided against issuing a simple recommendation without reasons and, despite the relatively little time available to me to complete these findings, decided to do so. In consequence, these written findings on sanction are fairly brief and have not addressed all the submissions made by Transnet in support of its contention that the only appropriate sanction his dismissal. The fact that in large measure I have not addressed the submissions made by Transnet is no disrespect to those submissions. But in the limited time available to me it was more important to consider the arguments of the losing party. If required fuller written findings on sanction could be prepared in due course..

That would however be a matter for Transnet to decide and is likely to prove unnecessary given the present findings and recommendation.

### Recommendations

- 61 In conclusion I am satisfied that the appropriate sanction in respect of each of the charges viewed in isolation is dismissal.
- 62 Moreover, having regard to the unavoidable situation where the question of whether Gama should be dismissed or not entails a recognition that he is guilty of all three charges and that by their nature the misconduct is therefore to be viewed cumulatively, this serves only to emphasise that dismissal is the appropriate sanction.
- 63 Accordingly, the sanction which I recommend to Transnet is that of summary dismissal of Mr Gama.



D.M. Antrobus SC

Disciplinary Enquiry Chairman

Sandton Chambers

28 June 2010

"F"

MPM5

CONFIDENTIAL

"F"

MINUTES OF MEETING NO. 11/5 OF THE CORPORATE GOVERNANCE AND NOMINATIONS COMMITTEE HELD ON 11 APRIL 2011 AT 09:00 IN BOARDROOM 4906, 49<sup>TH</sup> FLOOR, CARLTON CENTRE, JOHANNESBURG

For attention/  
Resolution No

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES, SIGNING OF ATTENDANCE REGISTER AND ADOPTION OF AGENDA**

1.1 **Present**

Mr ME Mkwana	Chairman
Ms T Mnyaka	Member
Mr IM Sharma	Member
Ms DLJ Tshepe	Member
Mr IB Skosana	Member

1.2 **In Attendance**

Mr SI Gama	Acting Group Chief Executive
Ms Z Stephen	Group Executive : Legal, Corporate and Public Affairs
Ms ANC Ceba	Group Company Secretary

1.3 **Partial attendance**

Ms N R Ntshingila	Non-Executive Director (Remuneration Committee member)
Mr HD Gazendam	Non-Executive Director (Remuneration Committee member)
Ms NBP Gcaba	Non-Executive Director (Remuneration Committee member)
Mr MP Malungani	Non-Executive Director (Remuneration Committee member)

1.4 **Apologies**

Mr B Molefe	Ex-officio Member
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1.5 **Welcome, Constitution of Meeting and Signing of Attendance Register**

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. The Attendance Register was circulated for signature. The Chairman noted the apologies from Mr Molefe who was out of the country on official business. He welcomed Mr Gama, who was acting in Mr Molefe's stead.

1.6 **Adoption of Agenda**

The agenda was adopted as tabled with the following amendments:

1. Withdrawal of Item 6.7; and
2. Addition of Item 7.2 on "Notification on claims received against the Company."

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures were conducted through the video system.

3 **DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

4 **APPROVAL AND NOTING OF THE MINUTES OF THE MEETING HELD ON 7 MARCH 2011**

The minutes of the meeting held on 7 March 2011 were approved without corrections.

*Ms Tshepe joined the meeting at 09:10.*

5 **MATTERS ARISING FROM THE MINUTES OF PREVIOUS MEETINGS HELD**

5.1 **More detail to be provided on the Company's plans to obtain operational efficiency in the medium-term**

The Chairman requested Management to prepare the document for deliberation at the next meeting. He indicated that the matter will be tabled once the Shareholder's Compact is finalised and signed.

Mr Molefe

## CONFIDENTIAL

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For attention/  
Resolution No

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1.1 **Present**

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Ms T Mnyaka	Member
Mr IM Sharma	Member
Ms DLJ Tshepe	Member
Mr IB Skosana	Member

1.2 **In Attendance**

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Ms Z Stephen	Group Executive : Legal, Corporate and Public Affairs
Ms ANC Ceba	Group Company Secretary

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Mr Molefe

**CONFIDENTIAL**For attention/  
Resolution No**5.2 Structural changes to Group Exco****5.2.1 The Company will approach the Board with a revised strategy for consideration**

Management informed the Committee that the matter is work-in-progress.

**5.2.2 A Group Exco break-away session to deliberate on operational efficiency will be organised**

The Chairman informed the Committee that the matter was finalised. Management had utilised the session to align the Group Exco activities. The Delegation of Authority Framework had been revised. The Committee will have sight of further sub-delegation to the Group Exco, once all the processes are finalised.

Mr Molefe

**5.2.2.1 The Chairman requested Management to give feedback on the Group Exco Break-away Session. Management gave the Committee feedback on the session and stated, amongst others, the following :**

- The session was convened in George from 4 to 6 April 2011, to review efficiency of structures, create synergies and manage inter-dependencies between functions;
- Management introduced a 100 Days Plan for the Company that will be monitored and measured every three months; and
- The focus will be on volume growth, operational efficiencies and best practice issues such as the newly introduced Scheduled Rail Maintenance programme.

**5.2.3 Engage Mr Morwe on the Commercial role****5.2.3.1 The Chairman stated that the matter had been finalised. The Committee was concerned that two different dates were communicated as effective dates for the reconstituted Group Exco structure. The Chairman informed the Committee that the administrative changes were effected from 22 March 2011, however, the new roles came into effect on 1 April 2011.****5.2.3.2 The Chairman advised the Committee that Mr Maharaj had resigned. In the short-term, the GCE will house the human resources function under Corporate, Legal and Public Affairs, and has requested Ms Stephen to table a proposal on the Company's human resources function going forward. The strategy and human resources functions had been separated.****5.2.3.3 Management also informed the Committee that the CFO of TFR, Mr Thomson, had resigned on 8 April 2011.****5.2.3.4 The matter was extensively deliberated upon. The Committee indicated that it is best practice to separate the corporate affairs function from the legal function. The Chairman indicated that the GCE will submit the final Group Exco structure for noting purposes to the Committee on completion thereof. The Committee indicated that the Group Exco structure was not gender representative, and further requested the GCE to address the matter.**

Mr Molefe

Mr Molefe

**5.2.3.5 The Committee advised the Company to determine the materiality of the issues before pursuing a possible disciplinary process against Mr Maharaj. The Chairman indicated that the proposed disciplinary process against Mr Maharaj will be deliberated upon further with Ms Stephen and the GCE.**Chairman/  
Mr Molefe/  
Ms Stephen**5.3 Investigation by Public Protector****5.3.1 Investigate the draft audit report that had been submitted by Nkonki and KPMG and provide feedback at the next meeting**

Management advised the Committee that all the progress reports were circulated with the pack, and these were extensively discussed under Item 5.3.2 below.

**5.3.2 Management to table a status report on other matters that were raised in the Public Protector's complaint****5.3.2.1 Management stated that the Public Protector had granted the Company an extension to 21 April 2011 to submit its response on Mr Gama's matter.**

AUC



## CONFIDENTIAL

For attention/  
Resolution No*Mr Gama recused himself from the meeting at 09:50.*

- 5.3.2.2 The matter was extensively deliberated upon. Management stated that the Public Protector had requested detail on Mr Gama's matter, irrespective of his re-instatement into the employ of the Company. The Committee was concerned that the Auditors had engaged Webber Wentzel to advice on legal issues that Deneys Reitz was also working on. Management indicated that the Auditors had obtained authority from the Chairman to engage Webber-Wentzel for legal services. Management indicated that Deneys Reitz had been engaged to "bring all the Public Protector matters together" and to respond to the Public Protector on behalf of the Company.

- 5.3.2.2 The Committee requested that the "legal briefs" be tabled to the Committee prior to issue. It also requested the original brief that was circulated to the Auditors (Nkonki and KPMG) when they were engaged in January 2011. Management undertook to circulate the requested information to the Committee.

Ms Stephen

Ms Stephen

*Mr Gama re-joined the meeting at 10:15.*

- 5.3.2.3 The Committee requested Management to address a memorandum to all the employees that were failing to provide the requested information to the Auditors, and issue a deadline of 15 April 2011 for submission of the requested documentation.

Mr Molefe

- 5.2.3.4 The Committee requested Management to make a presentation covering, amongst others, the following issues :

- What is a condonation process?
- Where does it originate from?
- Where does it get approved and regularised?

Mr Molefe

- 5.2.3.5 Management informed the Committee that the final report from the Auditors will be submitted before end of April 2011. It was agreed that the Committee will be availed the response on Mr Gama's matter before it is submitted Public Protector. Management was requested to arrange a meeting on the matter, if necessary.

Ms Stephen  
Ms Ceba

- 5.2.3.6 The Committee requested the Company to detail the costs emanating from the Public Protector process (legal costs and auditors' fees), and to further give detail on the costs that were incurred by the Company since Mr Gama's matter commenced in August 2009.

Ms Stephen

- 5.3.3 A meeting to discuss the Public Protector matter with Mr Molefe, Ms Stephen and Mr Mapoma

The matter was finalised.

- 5.3.4 Request an extension for submission to 30 April 2011

The matter was finalised.

- 5.4 Progress on the 2011/12FY Shareholder's Compact

- 5.4.1 Management will request DPE to exclude the Port of Ngqura on the ROTA consideration as it is currently not operating on its full capacity

- 5.4.1.1 The Chairman indicated that a meeting will be held with the Shareholder Minister on 20 April 2011 to discuss the three outstanding matters.

Mr Molefe

- 5.4.2 Management should consider the use of current technology in its operations, amongst others, on the signalling infrastructure

Mr Molefe

- 5.4.2.1 Management reported that at the April 2011 Group Exco Break-away session, each OD was requested to formulate and present plans on technology enhancements in July 2011. Management reported that TFR's technology requirements were assessed, and there are plans to boost some of the security issues that need improvement. Management further indicated that the Company still has to conduct an assessment exercise to determine whether

Mr Molefe



## CONFIDENTIAL

For attention/  
Resolution No

the technology that is being utilised by Class 1 Railways can be utilised locally.

**5.5 Group Chief Executive Performance Contract for the 2011/12FY**

**5.5.1 Proposed new weights for the GCE's SPOs to be circulated to the Committee for approval after the finalisation of the Shareholder's Compact for the 2011/12FY**

The Chairman stated that the matter was not finalised and it will be brought back to the Committee once the 2011/12FY Shareholder's Compact has been finalised. The Committee requested that the Group Exco SPOs be tabled to the Committee for noting as soon as they are finalised.

Mr Molefe

**5.5.2 Ensure that discussion documents are circulated on time and not in the meeting**

The matter was finalised.

**5.5.3 The Committee requested that issues from the NGP should be taken into consideration in the GCE's SPOs**

The matter was finalised.

**5.6 Appointment of the Group Chief Financial Officer**

**5.6.1 Circulate the appointment of Mr Skosana to the Corporate Governance and Nominations Committee through an urgent written resolution to the Board**

The matter was finalised.

**5.6.2 The Steering Committee should assist with procuring a suitable head-hunter for the Group CFO selection process**

The Chairman indicated that the matter is work-in-progress.

Steering  
Committee

**5.7 Damage to the Jet-Fuel Pipe**

**5.7.1 Explore the available technology to address security issues**

Management indicated that discussions will be held with Denel to seek a resolution to address the Company's security challenges.

Mr Molefe

**6 MATTERS FOR DISCUSSION**

**6.1 Appointment of a Trustee to the Transnet Retirement Fund**

**6.1.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was deliberated upon.**

**RESOLVED** that it recommends that the Board approves :

The appointment of Ms Zola Stephen as an Employer Trustee to the Board of Trustees of the Transnet Retirement Fund with immediate effect;

The appointment of Mr Gerhard Bierman as an alternative Trustee to the Board of Trustees of the Transnet Retirement Fund with immediate effect.

11/5/1

**6.2 Annual General Meeting : Arrangements and statutory authorisations applicable to some of the proposed agenda items**

**6.2.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon.**

**6.2.2 The Committee proposed that the Chairman of the Board Audit Committee should engage the GCE on the AGM preparations with regard to the re-appointment of the external auditors.**

Mr Molefe/  
Ms Ceba

**RESOLVED** that it recommends that the Board approves the Annual General Meeting: Arrangements and statutory authorisation applicable to some of the proposed agenda items.

11/5/2

**CONFIDENTIAL****For attention/  
Resolution No****6.3 Potential nominees for appointment at the Annual General Meeting of the Company as members of the Board Audit Committee**

6.3.1 Management took the Committee through the submission as contained in the pack under Item 6.2 above. The submission was taken as read.

**RESOLVED** that it recommends that the Board supports the following potential nominees for appointment at the Annual General Meeting of the Company as members of the Board Audit Committee:

- Mr MP Moyo (Chairman);
- Mr MA Fanucchi (Member);
- Ms T Mnyaka (Member);
- Mr IB Skosana (Member); and
- Ms E Tshabalala (Member).

11/5/3

**6.4 Shareholder's Compact for the 2011/12FY**

6.4.1 The Chairman informed the Committee that the matter is not yet finalised. A meeting will be held with the Shareholder Minister on 20 April 2011.

Chairman

The Committee noted the update.

**6.5 Draft Delegation of Authority Framework**

6.5.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon.

6.5.2 Management indicated that the final Delegation of Authority Framework, incorporating further delegations to the Group Exco and the HR delegations, will be tabled at the next Committee meeting for noting.

Mr Molefe/  
Ms Stephen

**RESOLVED** that it recommends that the Board approves the draft Delegation of Authority Framework.

11/5/4

*Members of the Remuneration Committee, but for Mr Malungani, joined the meeting at 10:59.*

**6.6 Legal opinion on the payment of the LTI Grant for the 2007/08FY**

6.6.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon.

6.6.2 The Chairman gave background to the matter. The Company is in possession of a legal opinion that advises against the suspension of the vesting of the LTI for the 2007/08FY. The only employee with a "NMPP KPI" in her SPOs is Ms Moses; however, there was no specific legal opinion that addresses the suspension of Ms Moses' LTI.

6.6.3 The Chairman opined that disciplinary action could be instituted against certain TCP employees that were engaged in the NMPP project due to :

- An element of incompetence in preparing the submission that was tabled to the Board in November 2009 (failed to do a baseline recalculation when reviewing the financial projections); and
- The draft Auditors' Report (Nkonki and KPMG) had highlighted poor financial controls in TCP governance systems.

*Mr Malungani joined the meeting at 11:07.*

6.6.4 The meeting highlighted discomfort on the bonus scheme that does not allow the Board to intervene in bonus-related matters, and was of the view that the Board should have overall discretionary powers in awarding performance bonuses, notwithstanding the legal issues involved.

6.6.5 The meeting recommended that the LTI Rules should be amended to reserve certain powers

**CONFIDENTIAL**For attention/  
Resolution No

to Remco and the Board going forward. The Chairman stated that going forward, Remco will review the annual LTI contracts when the LTI conditional grants are awarded.

- 6.6.6 The Chairman advised the meeting that the performance evaluations for Group Exco, specifically for three quarters of the 2010/11FY, had been concluded by Mr Wells. He indicated that the Company was in the process of formalising governance requirements so the Chairman may conduct performance evaluations for the Group Exco for the last quarter of the 2010/11FY.

The Committee noted the submission.

- 6.7 **Vesting of the full conditional awards in terms of the LTI Scheme for Mr Wells**

- 6.7.1 The matter was withdrawn from the Agenda. However, the Committee requested that the corporate governance elements that were being highlighted in the matter, be addressed by the Committee at some point.

Chairman

7 **GENERAL**

- 7.1 **Corporate Governance and Nominations Committee Mandate**

The Committee noted the Corporate Governance and Nominations Committee Mandate.

- 7.2 **Notification on claims received against the Company**

- 7.2.1 Management advised the Committee that the Company was served with two claims on 8 April 2011, and these were detailed as:

- Summons from Sibanye Trade & Services (Pty) Ltd ["STS"] against Transnet and its (STS') former Joint Venture partners, EMD and EMDLC, in which it is claiming damages in the sum of approximately R539m. This claim arises out of two locomotives procurement contracts which are the "50 Like New" claim and the "212 tender"; and
- In its recent correspondence addressed to the Chairman of the Board of Transnet, Abalozi through its attorneys, request the Board of Transnet to intervene in the litigation matters pending between the two parties, failing which they are threatening to file a damages counterclaim, in the amount of R250m for amongst others, loss of business and business opportunities and damage to reputation of its directors.

Management indicated that it will review the claims and advise the Committee accordingly. The Committee noted the update.

8 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 11:25.

*Ephraim Sanjani*  
CHAIRMAN  
Date: 11/4/28/2011

*AN Ceba*  
GROUP COMPANY SECRETARY  
Date: 12 AUGUST 2011

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**SECOND AFFIDAVIT**

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I, the undersigned,

**CHRISTOPHER FRANCIS NEALE TODD**

do hereby make oath and state that:

1. I am an adult male attorney and am a director of Bowman Gilfillan Inc. I have been a director of the firm since March 1998.
2. The facts deposed to in this affidavit are, save where otherwise stated or apparent from the context, within my personal knowledge and are, to the best of my belief, true and correct.
3. I depose to this second affidavit at the request of the Commission of Inquiry into State Capture ("**the Commission**"). The purpose of this second affidavit is to elaborate on certain matters dealt with in the affidavit I deposed to on 14 July 2020 ("**my first affidavit**").

**The initial procurement process**

4. I attach marked "I" a copy of the initial approval of the appointment of GNS, signed by Mr Gama on 5 December 2007. As is apparent from its terms, the document contained the reasons for following a single source procurement process (referred to



as a “confined tender” or “confinement”). It identified the party with whom Transnet would be contracting (General Nyanda Security), the directors of that company, and the main terms on which it would contract.

5. Mr Gama's approval of this appointment on confinement was one of the matters that led to disciplinary proceedings being brought against him and ultimately to his dismissal in June 2010.
6. I attach, marked “J” and “K” transcripts of that part of the disciplinary proceedings that took place on 10 February 2010 and 12 February 2010.
7. As is apparent from the transcripts, in the course of the disciplinary hearing –
  - a. Mr Gama initially claimed that he knew General Nyanda like any other member of the public would know him. Transnet witnesses were cross examined on the basis of this instruction given by Mr Gama to his counsel. (See for example Annexure “J” page 97.)
  - b. During the disciplinary hearing Mr Gama's cell phone records were produced. These showed certain phone calls between Mr Gama and General Nyanda in the period preceding the award of the contract. The most recent phone call between them had been on 1 December 2007, four days before Mr Gama signed the confinement document in favour of GNS. (See Annexure “J” page 93 - 94.)
  - c. Mr Gama then explained that he had given his counsel an incorrect instruction because he “wanted to put some distance between me and the General”. He admitted that this had been wrong, and apologized to the chairperson. He



3

stated that General Nyanda was not a close friend, but an acquaintance with whom he had played golf in the past, with whom he had spoken on the phone when there were family bereavements, and who had called him to commiserate when he had been suspended. (See Annexure "J" page 29, and page 94 – 105).

- d. In summary, Mr Gama stated in the disciplinary proceedings that (i) he had been asked to sign approval of the confinement document urgently by a Mr Beattie, who had subsequently left the employ of Transnet, (ii) he had been given a false explanation for the document, with Mr Beattie informing him that this was an appointment following an open tender process, when in fact he was being asked to approve a single source procurement by way of confinement on grounds of urgency; (iii) he had not been told who the party was (GNS) whose appointment he was approving, and he had not asked, although the official had "shown me three names" (Annexure "J" page 154) and had said "here is the one company that we are choosing" (Annexure "K" page 48); and (iv) he had not read any part of the document presented to him for signature, except the signature page, and the signature page was the only page of the document that had been shown to him by the official who presented it to him.
- e. Mr Gama stated that when he had later seen the confinement document after an investigation into the matter he had realized that there were quite a few gaps and loopholes, and he had begun to smell "something fishy" (Annexure "J" page 36); that if he had known that it was a confinement he would probably not have approved it (page 48); that it had been improper to stop an existing tender process when GNS came into the picture (page 89 - 91); that what the



4

official had done by representing to him that a tender process had been followed "was a complete fraud", and that "once you get all of the documentation, it becomes clearer what was happening" (page 138); and that at the time when he received all of the relevant documents in June 2009 "it became clearer to me, in terms of what this scam was about" (page 143).

f. When asked who he believed should be held responsible for the irregular procurement of the services of GNS, Mr Gama referred to a number of officials, including Mr Beattie, Mr Senamela and Mr Khanye (Annexure "K" page 94).

8. I point out that Mr Beattie had by then left Transnet's employ, and Mr Senamela and Mr Khanye had both been disciplined and dismissed for their respective roles in the matter. I attach, marked "L", a copy of the finding of the chairperson of that hearing. The finding describes many of the serious irregularities that had occurred, and points out, in addition, the serious misrepresentations that had been made by GNS, in collusion with Transnet officials, about GNS' experience and track record as a provider of security services. The chairperson found the contract to have been concluded irregularly in breach of mandatory procurement processes.

9. The conclusions of the respective chairpersons of both that hearing and of the Gama hearing provided the backdrop to the civil claim for repayment of the amount that Transnet had paid to GNS. Apart from the serious irregularities that had been found in the processes under which the services of GNS were procured, GNS had failed or refused, despite Transnet's requests, to provide any information or evidence that demonstrated that it had in fact deployed the physical resources for which it had charged Transnet. I refer in this regard to what I stated in paragraphs 37a to 37e of



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my first affidavit. This was at the heart of the litigation brought to recover the amounts that had been paid to GNS.

10. Before I refer further to the pleadings in that litigation, I describe in more detail how GNS charged Transnet for the services it claimed to have rendered.

**GNS charges as reflected on the invoices presented to Transnet**

The initial services

11. In paragraph 37a of my first affidavit I referred to the contract that regulated the relationship between GNS and Transnet, a copy of which was attached to that affidavit marked "G". In particular I referred to annexure "C" of that contract, which set out how the costs of the security services to be rendered to Transnet were to be calculated.
12. I now attach, marked "M", a copy of an invoice dated 21 April 2009, which shows how GNS charged Transnet for the services it rendered.
13. The invoice is in the amount of R1,798,646.40. I point out that the detail on the invoice corresponds exactly with the resources and the monthly cost thereof set out in annexure "C" to the contract.
14. From a SAP record provided to me by Transnet (referred to further below) an invoice in this amount, listing the resources set out in annexure "C" to the contract, was issued during each of the 26 months that the GNS appointment continued, from December 2007 until it was terminated in January 2010.

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The first extension of services

15. In paragraph 37b of my first affidavit I referred to the fact that soon after the appointment of GNS a significant extension was approved by a Senior Security Manager, and that other extensions followed.
16. The first such extension, which approximately doubled the number of resources and corresponding cost of resources to be supplied to Transnet, occurred during March 2008, some three or four months after the services had commenced.
17. The background to this is set out in a procurement document under which approval for the extension was later sought, after the event, a copy of which is attached marked "N".
18. I point out that on page 2 that document sets out a detailed cost breakdown of the additional resources that had been requested by TFR Security Management, the number of such resources that were to be provided on a monthly basis, the hours that they would work, and the rate per hour.
19. As a result of this extension of the scope of services, and from that month onwards, GNS rendered a second invoice each month in the amount of R1,781,683.20, and continued to do so each month until the contract was terminated in January 2010.

The second extension of services

20. The second extension of the scope of services to be provided by GNS occurred approximately a year later, in March 2009.



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21. The circumstances in which this arose are set out in an internal memorandum dated 12 May 2009, a copy of which is attached marked "O". I point out that two of the signatories who approved this extension were Mr Senamela (referred to earlier) and Mr Caesar Mtetwa (referred to further below).
22. The effect of this extension was that, as from March 2009, GNS was contracted to provide additional resources at an additional cost of R856,800 per month excluding VAT, or R976,752 including VAT.
23. I attach marked "P" the first such invoice, issued for these additional services in March 2009. As is apparent from the terms of that invoice, Transnet charged for the cost of an additional two supervisors and sixteen train crew monitors and rapid response.
24. A similar invoice was then issued each month thereafter until termination of the contract in January 2010.
25. In summary, following the second extension of the scope of services, Transnet was issued with three invoices by GNS each month, in the following amounts –
- a. R1,798,646.40 for the services initially procured;
  - b. R1,781,683.20 for the additional services procured under the first extension;
  - c. R976,752 for the additional services procured under the second extension.



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26. I have been provided by Transnet with an extract from its SAP system reflecting all invoices rendered by GNS, and payments made to GNS, a copy of which is attached marked "Q".
27. As appears from that document, the total amount of invoices rendered by the time the contract was terminated in January 2010 was R97,373,051,00 and the total amount paid was R95,591,367.80.
28. This is the amount which Transnet sought to recover in the action proceedings instituted on 27 October 2010 against GNS, which had by then changed its name to Abalozi Risk Advisory Services.

#### **The Abalozi plea and counter-claims**

29. In my first affidavit I set out, at paragraph 37 and its sub-paragraphs, some of the facts of which I have knowledge concerning the GNS matter.
- a. In paragraph 37e I referred to the Summons that was issued against GNS, which had by then changed its name to Abalozi Risk Advisory Services.
- b. I also referred to certain further pleadings that had been exchanged in that litigation, including a Plea and Counter-Claim, copies of which I did not have available at the time.
30. I now attach a copy of the Abalozi Special Pleas, Plea and Counterclaims, marked "R". As appears from that document -



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- a. The first point raised by Abalozi was a special plea of misjoinder or non-joinder. In essence Abalozi contended that it was not in fact the party with whom Transnet had contracted. Rather, it asserted, the party with whom Transnet had contracted was the "GNS Consortium".
- b. This was a surprising assertion, since a "consortium" is not a legal entity capable of contracting or of being sued. More importantly, there was no factual basis for the contention whatsoever when one has regard to the formal contractual arrangements concluded between the parties as reflected in (i) the confinement document submitted to Mr Gama for approval (annexure "I" to this affidavit), and (ii) the written agreement subsequently concluded between the parties (annexure "G" to my first affidavit).
- c. Nevertheless, Abalozi made this contention central to its defence, repeating it throughout its pleading.
- d. In response to paragraph 3.2 of the Particulars of Claim, which stated that at all material times Mr Gama had been employed by Transnet as Chief Executive Officer of TFR, until his dismissal on 29 June 2010, Abalozi pointed to Gama's subsequent reinstatement and pleaded that Gama *"who is alleged to have been dismissed by the Plaintiff and upon whose dismissal the Plaintiff seeks to justify its claims for restitution, is in the employ of the Plaintiff as a Chief Executive Officer and an Accounting Officer in terms of the PFMA"*. This was of course correct, since Gama had by then been reinstated.
- e. In support of Abalozi's contention that no written contract had ever been concluded between it and Transnet as alleged, Abalozi repeatedly asserted

Handwritten signature and initials, possibly "R" or "R" with a flourish.



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that the agreement that had been entered into was between Transnet and the "GNS Consortium" comprising GNS and two other entities. It identified these other entities in paragraph 10.3 of the Plea as being Revert Risk Management Solutions (Pty) Ltd and Nayle Outsourcing (Pty) Ltd.

- f. In paragraph 18, after re-iterating that no contract existed between Abalozi and Transnet, Abalozi re-iterated and specifically pleaded that *"all payments made to it by [Transnet] were payments to the GNS Consortium for services rendered by the GNS Consortium to [Transnet] and were received as such by [GNS] on behalf of the Consortium"*.

31. In paragraph 29.3, in the course of articulating a series of very substantial counter-claims which Abalozi brought against Transnet, the allegation was made that *"in servicing the agreement and honouring its obligations in terms of the agreement, [Abalozi], as part of the GNS Consortium, incurred the following expenses for the entire period of the contracts"*. Abalozi went on to state that it had incurred expenses on equipment in the amount of R60 million, personnel in the amount of R27 million and overheads in the amount of R1 million.

#### **Transnet's decision not to pursue the claim for repayment against Abalozi**

32. I am not aware of all of the details that led to the decision of the Transnet Board that Transnet would not pursue its claim against Abalozi.
33. I was, however, personally involved in various interactions with Transnet during this period, and I have also more recently been provided by Transnet with certain documents that reflect steps that were taken internally. Where I rely on documents

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provided to me by Transnet for this purpose I have no reason to doubt that these documents are what they purport to be.

34. On 13 April 2012 the Risk Committee of the Transnet Board held a meeting, as appears from an extract of the minute of that meeting attached marked "S"
35. The minute reflects that the management team informed members of the Risk Committee that they had *"uncovered information that had not been available in the past"*. Reference was made to a need to conduct a reconciliation of reports and invoices and that management was *"not in a position to determine if the company had a case or not"*.
36. On 27 September 2012, an employee of Transnet by the name of Mr Thabethe addressed an email to Mr Ndiphiwe Silinga, Transnet's General Manager, Legal Services attaching an updated schedule reflecting security reports that had been provided by GNS/ Abalozi and stating that *"all the months billed are now supported by a report of some form"*. I attach a copy of that e-mail, with its attachment, marked "T".
37. Mr Silinga instructed Bowman Gilfillan to seek counsel's opinion on the possible impact of this development on the prospects of success in the litigation. On 5 December 2012 Transnet's counsel in the litigation provided an opinion, a copy of which is attached marked "U".
38. On 10 December 2012, Mr Silinga, the General Manager, Legal Services, addressed a memorandum to Ms Nkuli Mabandla, the Group Executive: Legal Services,



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reporting on and attaching counsel's opinion. I attach a copy of that memorandum marked "V".

- a. The memorandum states, in paragraph 1 as follows: *"Having received various monthly reports which were intended to demonstrate that Abalozi did in fact render security services to TFR, Group Legal was requested to obtain a brief opinion from Counsel on whether or not the Report would be sufficient to demonstrate that Abalozi had indeed performed in terms of the agreement. If so, whether Transnet would be justified in withdrawing the action it had instituted against Abalozi."*

- b. The memorandum records that counsel's opinion had been to advise Transnet not to withdraw the action.

39. On 14 January 2013, Mr Caesar Mtetwa, the General Manager, Rail Network for Transnet Freight Rail addressed a memorandum to Ms Mabandla (Group Executive: Legal Services) and copied to Mr Gama, then Chief Executive of Transnet Freight Rail. A copy of that memorandum is attached marked "W". I point out that Mr Mtetwa had been the final approver of the second extension of the scope of services provided by GNS, referred to earlier and in annexure "O". This was for the appointment of train crew monitors and rapid response.

- a. The purpose of the memorandum as stated in paragraph 1 was to *"provide feedback on the performance of GNS Risk Advisory Services (GNS) and the cost of services they provided in comparison to the current service provider,*



*Combined Private Investigation / Analytical Risk Management Joint Venture (CPI/ARM)".*

b. In the memorandum Mr Mtetwa set out an analysis of the length of copper cable lost to theft on a monthly basis during the period for which GNS/ Abalozi was appointed and concluded, in effect, that this analysis served to *"refute the two claims made that GNS was overpaid and paid for work they did not perform"*.

c. I point out that the memorandum contains no comment on or consideration of the question whether the resources for which GNS had charged Transnet during this period had in fact been deployed at all, including those resources who were required to be deployed for completely different reasons, such as guarding train crew. It is clear that Mr Mtetwa's analysis was conceived not to verify that GNS had in fact deployed the resources for which it had charged Transnet, but rather to "refute" the claims that GNS had been overpaid and had been paid for work that it had not performed. Mr Mtetwa regarded the analysis of the length of copper cable stolen during the period under review to be a complete refutation of these claims.

40. On 5 February 2013 the Risk Committee of the Board held a further meeting, as appears from an extract of the minute of that meeting attached marked "X. At item 9.2 the minute records that "management" had informed the committee that there was *"a need to review the decision to litigate in the Transnet v Abalozi Risk Advisory Services"*. The minute records the Committee having agreed that a meeting should



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be convened to seek clarity from Transnet's lawyers on the cause of action and way forward.

41. The meeting contemplated in the minute did not occur immediately, but counsel was, in circumstances reflected in the terms of a further memorandum subsequently produced, instructed to advise on the impact of Mr Mtetwa's memorandum on the litigation against Abalozi. A copy of counsel's further memorandum, dated 15 March 2013, is attached marked "Y".
42. I was subsequently invited, together with one of my partners Mr Mandisi Rusa (who was the attorney of record in the litigation against Abalozi) and counsel to attend a meeting with the Group CEO, Mr Molefe. I prepared a note in anticipation of that meeting which briefly summarised the key messages that I intended to communicate to Mr Molefe at the meeting. I attach a copy of that note, marked "Z".
43. The meeting with Mr Molefe duly took place. Mr Molefe informed us that the litigation was sensitive, and that he had been receiving calls from a person he did not identify by name, but who I assumed from the context was General Nyanda, asking why Transnet was persisting with the litigation against Abalozi.
44. I communicated, as best I could in the circumstances, the points I had prepared to make, as summarized in annexure "Z".
45. Shortly before this meeting, it appears that Mr Silinga had addressed a memorandum to Mr Molefe in which he had motivated for and recommended the rescission of the decision that had previously been taken to exclude GNS/ Abalozi from doing further



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business with Transnet (referred to as "blacklisting"). I was not aware of this memorandum at the time, and have only recently been provided with a copy of it by Transnet. I attach a copy, marked "AA".

- a. The memorandum set out the background to the initial decision to exclude GNS/ Abalozi from doing business with Transnet, and as regards grounds for rescission, set out various contentions primarily arising from the memorandum of Mr Mtetwa.
- b. At paragraph 16 the memorandum recorded that *"TFR has since confirmed that Nayle and Revert were indeed Abalozi's joint venture partners and not mere sub-contractors and hence they took no issue with that"*.
- c. As regards the question of collusion with Transnet employees by GNS/ Abalozi, the memorandum concluded that there was a lack of evidence of this collusion and consequently that it would not be fair and just to continue with the blacklisting.
- d. As appears from its concluding page, the recommendation to rescind the relevant decision was compiled by Mr Silinga, supported by Ms Mabandla (Group Executive: Legal Services), and ultimately approved by Mr Molefe on 10 April 2013.

46. This decision was communicated to Abalozi in a letter from the Group Chief Financial Officer dated 18 April 2013, a copy of which is attached marked "BB".





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47. In a memorandum dated 8 October 2013, signed by Mr Gama on 22 October 2010, Mr Gama sought approval from Mr Molefe *“for TFR to present its responses to the Transnet Group Risk Committee to questions raised by the Committee in respect of GNS/ Abalozi.”* A copy of that memorandum is attached marked “CC”.

a. The background to this request, as explained in the memorandum, was that in January 2013 *“TFR was requested to respond to the performance of GNS Risk Advisory Services”* and *“the costs of the services they provided in comparison to the current service provider”*.

b. The memorandum stated that this had been done in January 2013. It seems clear that this referred to the analysis reflected in the memorandum of Mr Mtetwa dated 14 January 2013.

c. The memorandum went on to explain by way of background that in October 2013 TFR had been informed that the Risk Committee was not fully satisfied with the responses given, and had raised three specific questions namely (in summary):

- i. Whether the contractual agreement was adhered to in terms of the number of security personnel required on the sites that were to be covered;
- ii. The reports on the KPI's which were deliverables in terms of the contracts; and
- iii. Reports of the investigations conducted should be submitted.



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d. In the memorandum Mr Gama recorded that responses to these questions had been provided to the Group Executive, Legal Services (Ms Mabandla) on 3 October 2013.

e. In addition to those responses, the memorandum continued, the request was made that TFR should address these and any additional concerns that the Group Risk Committee may have at the earliest opportunity.

f. Consequently Mr Gama requested that the TFR General Manager Rail and Network (Mr Mtetwa) and the TFR General Counsel should be permitted to address the Risk Committee at the next sitting.

48. In October 2013, a presentation was prepared for the Risk Committee of the Transnet Board. From the terms of the presentation it appears that it was prepared by Mr Mtetwa. I attach a copy of that presentation marked "DD".

a. In response specifically to the question whether the contractual agreement was adhered to in terms of the number of security personnel acquired and the sites that were to be covered by the contract, the presentation to the Risk Committee records the following:

*"Specialised security contract different to traditional guarding contract.*

✓ *Performance/ outcomes focused, it based on a targeted reduction in theft incidents; length of cable stolen, arrests and convictions;*

✓ *Number and type of resources required are not prescribed to the service provider as with guarding contracts."*



- b. I point out that these statements are completely inconsistent with (i) the terms of the contractual arrangements concluded with GNS/ Abalozi, as extended on two occasions, and (ii) all invoices submitted by GNS/ Abalsozi, which specifically represent a cost per resource allocated to the project.
- c. I note further that the presentation to the Risk Committee continued by stating that *"investigation and forensic expertise does not exist within Transnet"*, and that the *"service provider deploys resources such as investigators, researchers and handlers at its discretion within the limits of the monthly budget and according to the change in crime patterns."*
- d. I point out, again, that these assertions are not borne out by the contractual arrangements between the parties or the invoices rendered for the services.

49. The presentation referred to above was duly made to the Risk Committee at a meeting on 7 November 2013, as appears from the minute of that meeting attached marked "EE".

- a. I note that in the minute of the meeting, at item 11.2.1, the management representatives are recorded as having informed the Committee *"that the intention of the exercise was to establish if there was value derived by the Company from the contract or not. The quantum of the value derived was set out in the monthly reports and matched by invoices. Management stated that the supplier was appointed to perform a data gathering function. Abalozi*




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*adhered to the contract. The Company did not have a KPI that required the service provider to provide a list of security personnel."*

- b. Following further detailed discussions, the minute records management having stated *"that the Company paid R95 million and value was received"*, and that *"management was comfortable with the work undertaken by Abalozi"*.
- c. The Committee nevertheless resolved that the matter should be referred to the Arbitration Foundation of Southern Africa for resolution, preceded by mediation.

50. On 18 December 2013, a memorandum of instruction was given to Mr Charles Nupen of the law firm Harris Nupen Ralebatsi ("**HNR**"), a copy of which is attached marked "**FF**". As appears from paragraph 17 of that memorandum of instruction, HNR was instructed *"to conduct an independent investigation with the purpose of advising Transnet whether, from the security services rendered by GNS/ Abalozi to TFR in terms of the agreement dated 4 June 2008 and subsequent extensions thereto, Transnet received value for money. In other words, considering the services that were allegedly rendered by GNS/ Abalozi, was the payment of the sum of R95,691,368.80 justified"*.

51. I was requested to meet with HNR, and did so. At that meeting, which to the best of my knowledge took place during January or February 2014, I explained what I understood by the contractual arrangements that had been concluded between GNS and Transnet, and the basis on which Transnet had been charged. I emphasized that Transnet had been charged and had paid for the deployment of a specified



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number of human resources on a monthly basis and not on a performance based contract of the kind claimed by Mr Mtetwa. I explained that as far as I was aware GNS had consistently failed or refused to provide evidence that they had in fact deployed the human resources for which Transnet had been charged.

52. On 31 March 2014 HNR addressed a letter to Werksmans, the firm of attorneys which had at all material times represented GNS/ Abalozi, requesting certain information. A copy of that letter is attached marked "GG".
53. On 9 April 2014, HNR briefed a security consultant, John Pearson, to render an opinion as a security expert on certain questions regarding the security services rendered by Abalozi. The questions are set out in the letter itself, a copy of which is attached marked "HH".
54. On 25 April 2014, Pearson provided a written report in response to those questions. A copy of that report is attached marked "II".
55. On 30 April 2014 HNR delivered its report. I attach a copy marked "JJ".
- a. The report makes it clear that HNR could establish no evidence that GNS or any of its subcontractors had in fact deployed the human resources for which Transnet had been charged. This appears very clearly from the analysis at page 12 of the report.



- b. It is equally clear (from the facts, including as those are represented in the HNR report) that Transnet was charged for deploying resources and not for results.
- c. Despite this, without any evidence that the resources charged for were in fact deployed, and despite the severe shortcomings identified by Pearson in the written reports that had been provided by GNS/ Abalozi, the HNR report concluded that Transnet had received "value for money".
- d. The primary basis on which this conclusion was reached, as far as can be determined from the report itself, was the information provided by TFR Management - in essence the approach adopted by Mr Mtetwa in his memorandum of 14 January 2013 - that results could be seen to have been achieved by an analysis of the length of copper cable stolen before and during the relevant period.
- e. Adopting this stance, it was unnecessary to establish that any of the resources charged for had in fact been deployed, and this proposition was ultimately accepted by HNR and carried through into all subsequent recommendations to the Board (referred to further below).

56. On 28 May 2014, the Risk Committee of the Transnet Board held a meeting. I attach a minute of that meeting marked "KK". As is apparent from the minute, the HNR team presented the findings in their report and answered questions. The Risk Committee resolved that the litigation against Abalozi should not be pursued.





57. The Board of Transnet met later on the same day, 28 May 2014. I attach a copy of the minute of that meeting marked "LL". The relevant item is at item 7.4.
58. Thereafter, as far as I am aware, Transnet itself conducted the negotiations leading up to the conclusion of the settlement agreement, ultimately concluded on 4 August 2014. A copy of the settlement agreement is attached marked "MM". I note that Transnet undertook to pay the costs not only of Abalozi but also of its directors and "co-founders", on a punitive scale. There were no grounds in law for Transnet to have agreed to pay legal costs of persons other than Abalozi, the party to the litigation. The terms on which the matter was settled were surprising and adverse to Transnet if weighed against the legal merits of the claim and the absence of legal merit in the counterclaims.
59. The conclusion of the settlement agreement and the undertaking by Transnet to pay "all the legal costs incurred by Abalozi, its Directors and the co-founders and Directors of GNS on an Attorney and Own client scale" appears to have led Abalozi to believe that it was entitled to much more than the costs incurred in the litigation. This appears from certain letters addressed to Transnet, purportedly by or on behalf of Abalozi, after the settlement agreement was concluded.
60. I refer in this regard to letters from Abalozi to Transnet dated 8 September 2014 and 16 October 2014, copies of which are attached marked "NN" and "OO" respectively. I have been provided with copies of these letters by Transnet, and so assume that they are what they purport to be. I note, however, that the letterhead used on behalf of Abalozi does not appear to reflect the directors of the company or other statutory registration details.



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61. What is clear from this correspondence is that Abalozi, or its representatives, sought to use Transnet's undertaking to pay legal costs on a punitive scale as a basis to recover substantial amounts of damages alleged to have been caused by Transnet.
62. I do not know what amount was ultimately arrived at to settle the undertaking to pay legal costs. I point out, however, that any amount paid in excess of what could reasonably have been taxed could not be said to have been in the financial interests of Transnet. What other interests of Transnet were being pursued would have to be explained by the officials responsible for authorizing or agreeing to make that payment.

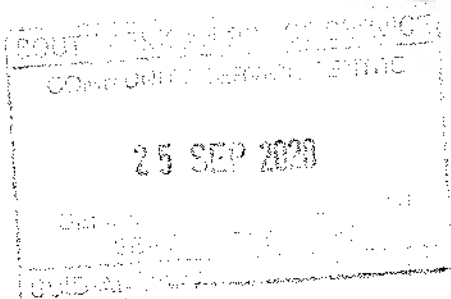


CHRISTOPHER FRANCIS NEALE TODD

I CERTIFY that this affidavit was signed and sworn to before me at CAPE TOWN on this the 25<sup>th</sup> day of **SEPTEMBER 2020**, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".



COMMISSIONER OF OATHS



Name: SAKUWUZI TEO ALA

Address: 40 Burg 1/2 Bill Pitas Rd Sea Point

Capacity: CSJ

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\* Kcis (with recommendation) Submitted to  
Head Office Acquisition Council for  
approval + CEO for final approval

TRANSNET

## TRANSNET FREIGHT RAIL ACQUISITION COUNCIL

CONFIDENTIAL. GNS confinement

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## AGENDA ITEM

Tender Number: S/SEC/02 2007	
Approved List Number:	
Title of Submission:	<u>Confinement</u> (Provision of a total specialized security package)
Department requesting approval:	Freight Rail Security Department (SOS)
1. Scope of Work:	Investigate, Apprehend and Assist in Prosecuting Suspects Responsible for Cable Theft and Criminal Activities Against Freight Rail Nationally and monitoring and evaluating of private security guards posted to protect the railway line and its freight en-route to their destinations.
2. Recommendation: <u>reasons for issuing a confined tender</u>	<p>CPI contract number SS4C/JHB 5/14/rt expired on the 31<sup>st</sup> August 2007. Efforts to go out on open tender as instructed by the Chief Executive Freight Rail were made as we went out on a Request For Proposal (RFP) process.</p> <p>The process was stopped based on the instruction from Transnet Group Executive (Mr. Virginia Duniwa) that Transnet Strategic Sourcing (TSS) have awarded business to one of the companies we short listed on the RFP process as per above i.e. (Group 4 Security) to audit private security companies that TSS has awarded tenders</p> <p>Based on the above cable theft has since increased to its peak and as we are approaching the festive season only the worse is anticipated.</p> <p>A research of potential companies was conducted and General Nyanda Security (GNS) was called in to do a presentation in a form of a proposal.</p> <p>GNS proposal was in content with our required solution and they are highly recommended based on their expertise, track record and National footprint in providing specialised security solutions.</p> <p>Refer to motivation attached for a list of all companies interviewed together with GNS and the results and our recommendations.</p> <p>A open tender process to be followed after confinement expired.</p>
3a. Specify budget amount:	R 13 M available for this specific project.
3b. Opex or Capex:	Opex (Contract 13674 GI Acc 02/02)
3c. If Capex – minute number from Spoornet Investment Committee and approved date:	N/A

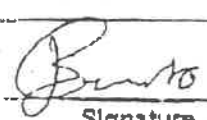

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## TRANSNET FREIGHT RAIL ACQUISITION COUNCIL

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4. Contract period:	From 01 <sup>st</sup> November 2007 to 30 <sup>th</sup> April 2008 (Five (05) months on a performance review period) Total contract period (one year 1) 01 November 2007 to 31 October 2008			
5. When were bids invited:	Confinement			
6. Closing date and venue:	Confinement			
7. Option (validity) date:	01 <sup>st</sup> November 2007			
8. Advertised in:	Confinement			
9. Number of bids received:	Confinement			
10. Number of tenderers/contenders:	Confinement			
11. Summary of tendered prices:				
Supplier	Tender Price (Excl. VAT)	BBBEE STATUS LEVEL	BBBEE RECOGNITION	Delivery / Completion
General Nyanda Security (Pty) Ltd.	R1 577 760,00. (Per month) R 18 333 120,00 (Estimated total contract value)	Not yet done	100%	On site 1 year period
12. Position of recommended Tenderer in relation to the others	Confinement			
13. Reasons for overlooking lower bids	Confinement			
14. Commercial evaluation:	Based on the information submitted by the firm and the savings achieved of R 692 025,60 (monthly) R 8 304 307,20 total year, it is agreed that the firm can sustain and deliver the required specialized service as requested by Freight Rail Security.  The methodology to be utilized provides for the total security package. The company consist of a proven track record in terms of security services.			
By whom:	Johan Chauke (TFR Security) Name Siphiso Gonye (TFR Security)  Signature 			




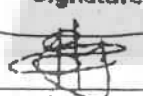
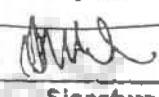
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## TRANSNET FREIGHT RAIL ACQUISITION COUNCIL

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	Douglas Martin (SCS) Name	 Signature
15. Technical evaluation:	<p>A cross functional sourcing team consisting of various roles players evaluated the firm in terms of its technical compatibility and ability.</p> <p>They do possess highly technical equipment such as night sights, tracking devices, cameras etc for ease of operations.</p> <p>Helicopters are also available on request and subject to affordability.</p> <p>They also consist of a highly technical skilled workforce which enhance the process of securing the rail network.</p>	
By whom:	<p><input checked="" type="checkbox"/> Kay Nanyager (TFR Technical Security) Name</p> <p> Signature</p> <p><input checked="" type="checkbox"/> Dingaan Senamela (TFR Security) (Senior Manager) Name</p> <p> Signature</p> <p>Sipho Khanya (TFR Security contracts) Name</p> <p> Signature</p> <p>Douglas Martin (SCS) Name</p> <p> Signature</p>	
16a. Recommended Tenderer and company/cc registration number:	General Nyanda Security (Pty) (Ltd. Reg. No. 1998/0122/0507	
16b. Directors of the recommended Tenderer:	<p>Sylvester Sithole 700016 5314085</p> <p>General Sipho Nyanda 500522 5880085</p>	
17. Post-tender negotiations:	Continued	
18. Negotiation Team:	Sipho Khanya, Douglas Martin, Jinah Chauke (Freight Rail Security and Supply Chain Services)	
19. Results of negotiations:	Estimated monthly cost was negotiated from R 1 991 040,00 to R1 577 750,00. (Saving R 4 969 360,00 total year)	
20. Post-tender communication:	N/A	
21. Details of Proposed amendment/s: (DPP 7.3)	N/A	
22. Report on efforts to involve BEE:	Continued	



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## TRANSNET FREIGHT RAIL ACQUISITION COUNCIL

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involve BEE:	
23. Advertisements: (Which additional media was utilised to attract BEE companies (DPP 1.2)	Confirmation
24. Actions: (How many BEE companies were made aware of this tender).	Confirmation
25. Sub-contracting: (What percentage of this contract will be subcontracted to BEE companies).	N/A
26. Targeting: (Can this procurement be targeted to BEE procurement. If not, please explain, in detail, why this would not be possible).	Yes
27. Percentage Black Ownership of recommended tenderer:	100% <i>CONFIRMED</i> 100% - BEE confirmed
28. Percentage Black Woman Ownership of recommended tenderer:	N/A
29. Percentage Disabled Ownership of recommended tenderer:	N/A
30. Is BBEE accreditation done? Date: <i>1/11/07</i>	<p><i>Not done yet As per Transnet 1 page.</i></p> <p>Abdooi Lutchka (BEE Department) Name</p> <p><i>[Signature]</i> Signature</p>
31. Particulars of items to be awarded:	<p>Provide nationally a complete security package for Transnet Freight Rail to curb and prevent copper theft with a pro active, reactive and active approach.</p> <ul style="list-style-type: none"> <li>Pro active by means of having informers and information about copper theft syndicates, using technical equipment such as tracking devices etc.</li> <li>Reactive by means of investigating copper theft cases and other related criminal activities to effect positive arrests and prosecution.</li> <li>Active approach in terms of awareness campaigns and visibility.</li> </ul>



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## TRANSNET FREIGHT RAIL ACQUISITION COUNCIL

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32. Assessment of previous business conducted with Freight Rail:	No business conducted previously with Freight Rail. Proven track record of similar services with other role players
33. Price basis:	Fixed
34. Foreign exchange implications:	N/A
35. Commodity linked pricing and implications:	Direct cost
36. Delivery basis:	On site (Nationally)
37. Particulars of penalties for late delivery/poor performance:	The service required and the contract is put come based on performance based and is subject to termination for non-performance.
38. Price certification:	The Financial Manager Freight Rail Security Mr. Jinah Chauke certifies that the negotiated price quoted as per confinement is fair and is in the best interest to Transnet Freight Rail.
39. Optimum value Certification:	The Financial Manager Freight Rail Security Mr. Jinah Chauke certifies that the negotiated price quoted as per confinement is fair and is in the best interest to Transnet Freight Rail. (savings achieved as per point 19 above)
40. Parcelling certification:	N/A
41. Particulars of items not awarded or which fall away, and reasons	N/A
42. Cross-functional evaluation team signoff:	<div style="display: flex; justify-content: space-between;"> <div> <p>Jinah Chauke (TFR Security) Name</p> <p>Signature</p> <p>Signature</p> <p>Douglas Martin (SCS) Name</p> <p>Signature</p> <p>Kay Mayagor (TFR Technical Security) Name</p> <p>Signature</p> <p>Oliver Deonela (TFR Security) (Senior Manager) Name</p> <p>Signature</p> </div> <div> <p>Signature</p> <p>Signature</p> <p>Signature</p> <p>Signature</p> <p>Signature</p> </div> </div>

Who says this?

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## TRANSNET FREIGHT RAIL ACQUISITION COUNCIL

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The matter is submitted to the Head Office Acquisition Council for consideration in terms of Detailed Procurement Procedure 6.3 (i)

Reference: S/SEC/02 2007

For any enquiries,  
contact:

Commercial : Mr. Sipho Khanye (011) 773-4997 / 083 389 3637  
Technical : Mr. Dingaan Senamela (011) 773-5027 / 083 709 4867  
: Mr. Kay Nayer (011) 773-5029 / 083 286 5154  
Administration : Mr. Douglas Martin (011) 308-1476

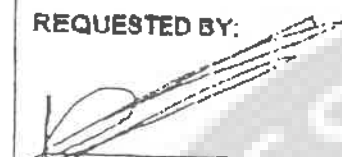
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## TRANSNET FREIGHT RAIL ACQUISITION COUNCIL

Page 7 of 7

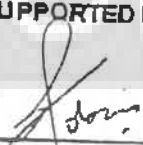
## REQUESTED BY:

  
Dingaan Senamela  
Senior Manager  
Freight Rail Security02 November 2007  
Date

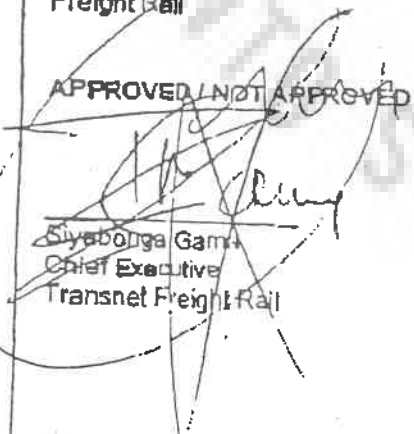
## RECOMMENDED BY:

  
John Beattie  
General Manager  
Safety and Compliance  
Freight Rail14 Nov 07  
Date

## SUPPORTED BY:

  
Lloyd Tobias  
Chairman  
Head Office Acquisition Council  
Freight Rail23 / 11 / 2007  
Date

## APPROVED / NOT APPROVED

  
Siyabonga Gamito  
Chief Executive  
Transnet Freight Rail5.12.2007  
Date



# *RealTime Transcriptions*

TRANSCRIPTION OF THE

## **DISCIPLINARY INQUIRY**

COMPANY:	<b>TRANSNET LIMITED</b>
REPRESENTED BY	ADV P PRETORIUS SC
INSTRUCTED BY:	BOWMAN GILFILLAN
<b>AND</b>	
EMPLOYEE:	<b>SIYABONGA GAMA</b>
REPRESENTED BY	ADV G PRETORIUS SC
INSTRUCTED BY:	LANGA ATTORNEYS
<b>BEFORE</b>	
CHAIRPERSON:	ADV M ANTROBUS SC

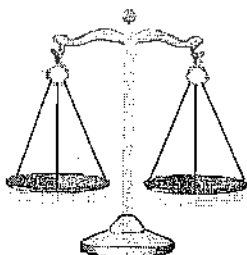
HELD ON

10 FEBRUARY 2010

PAGES 1 TO 154

HELD AT

BOWMAN GILFILLAN, 165 WEST STREET, SANDOWN, SANDTON



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10th February 2010

Transnet and Siyabonga Gama

Disciplinary Inquiry

[PROCEEDINGS ON 10 FEBRUARY 2010]

Page 1

[10:16] CHAIRPERSON: Alright, for purposes of the record, it's now the morning of the 10th of February 2010 and the hearing of Transnet Limited and Mr Gama resumes. The representation is as it was before. We were busy with Mr Gama still, his evidence in chief. Mr Gama, will you again swear that the evidence you are about to give will be the whole truth, nothing but the truth? Raise your right hand and say, so help me God.

MR GAMA: So help me God.

CHAIRPERSON: Thank you.

SIYABONGA GAMA: S.U.O.

EXAMINATION BY ADV G PRETORIUS: Thank you very much, Mr Chairman. Morning, Mr Gama. We are going to deal, Mr Gama, principally with the Exhibits B1 and D. So if you could get those two files close by? Now am I correct that you have not read the evidence that you gave in chief? You did not have a transcript available?

MR GAMA: No, I have not.

ADV G PRETORIUS: Alright. Could you then in Exhibit B1 please go to page 8A? What is the document that appears on page 8A and 8B?

MR GAMA: The document at 8A is a document relating to comprehensive security, the

Page 3  
ADV G PRETORIUS: There is no date next to Mr Mokoena or Mr Gama's signatures. And then the last one, the last signature has got a date, the 4th of November.

CHAIRPERSON: Hmm.

ADV G PRETORIUS: Now why did you make this manuscript note?

MR GAMA: The reason I made it was basically to make sure that the company performs and that we had some kind of process to assess the performance.

ADV G PRETORIUS: Then page 8H. And I am referring to the one, because we have a replacement, lets make sure we have the same document that has the inscription, "received by N Goosen 27/10/09", at the bottom. You seem to have the original?

MR GAMA: Ja, I have. Both.

ADV G PRETORIUS: Ja, there would be two, but I'm referring to the 8H.

MR GAMA: Ja.

ADV G PRETORIUS: With the inscription, "received by N Goosen". It would be the clearer one?

MR GAMA: Ja, ja.

ADV G PRETORIUS: Now this, there is an evaluation report on tenders according to the document, is that correct?

Page 2  
appointment of TTL.

ADV G PRETORIUS: And on 8B there are a number of signatures and yours appears on it as well, is it correct?

MR GAMA: Correct.

ADV G PRETORIUS: And what are the manuscript notes next to your signature?

MR GAMA: It says, "enter into assessment contract and reassess."

ADV G PRETORIUS: And the date of this document is in 205, is that correct?

MR GAMA: Yes, it is 2005.

ADV G PRETORIUS: According to Mr Van Staden, next to Mr Van Staden's signature it says 26 October and next to Nana Mohlala 4 November, there is no date next to your signature?

MR GAMA: That is correct.

CHAIRPERSON: Alright, just take me through that again. I did not get it properly.

ADV G PRETORIUS: Next to Mr Raymond van Staden, "requested by", that is the first signature.

CHAIRPERSON: Yes, yes?

ADV G PRETORIUS: The date is 26 or 28 October 2005.

CHAIRPERSON: Yes.

Page 4  
MR GAMA: That is correct.  
ADV G PRETORIUS: And it is dated March 2007?

MR GAMA: That is correct.

ADV G PRETORIUS: And it is approved by, there's a manuscript note on the right-hand side, next to your signature. Can you just read that out for the chairman?

MR GAMA: It says that: "Other than for January month I have not seen a reduction in cable theft. Let us extend this only to end of June. In the interim let us review whether these services are required. If so, let us go on a public tender process which will ensure we have a new contract from the 1st of July. The contract also appears very expensive. There is a need to have meaningful KPI's which will reduce the number of incidents and reduce costs to Spoomet." Signed 3rd of March 2007.

ADV G PRETORIUS: Ja. Then if you could please turn to page 9, which is some distance from page 8H. What is this document?

MR GAMA: This document is actually the document that was used to go out on tender.

ADV G PRETORIUS: And the issuing date?

MR GAMA: It says 17th of July.



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Disciplinary Inquiry

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ADV G PRETORIUS: And the closing date?

MR GAMA: 7th of August 2007.

ADV G PRETORIUS: And it's a request for a proposal to provide a complete security package service across various regions for a two-year period?

MR GAMA: That is correct.

ADV G PRETORIUS: Were you at the time aware of this tender?

MR GAMA: No, I was not personally aware of the actual tender.

ADV G PRETORIUS: Now what was your involvement in the appointment of GNS Security Services?

MR GAMA: My involvement was basically the discussion that I had with John on December 5.

ADV G PRETORIUS: And John is Mr John Beattie?

MR GAMA: John Beattie, yes.

ADV G PRETORIUS: Well your, you've been, there's a transcript of your interview that you had with Ernst &amp; Young to which we will come, but I won't read it to you. Can you tell the chairman what, how it came about that Mr Beattie came to see you about this appointment?

MR GAMA: Mr Beattie was the General Manager of Safety &amp; Security. So Safety &amp; Security was

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his responsibility. So he came to see me in order to get my formal approval for the security contract.

ADV G PRETORIUS: Now what time of did he come to see you?

MR GAMA: I, I wouldn't remember the exact time, but it was in the morning when I noticed him sitting outside my office, wanting to see me urgently.

ADV G PRETORIUS: Did he have an appointment with you?

MR GAMA: No, he did not.

ADV G PRETORIUS: And you saw him outside your office. Did you then invite him into your office?

MR GAMA: Yes, I did.

ADV G PRETORIUS: And after he was invited in, what then transpired?

MR GAMA: He came in with a stack of documents and -

ADV G PRETORIUS: Sorry, Mr Gama, if you say stack of documents, could you indicate roughly how high it was or?

MR GAMA: Ja, he came in with a file, a lever arch files like this and probably had maybe three-quarters.

ADV G PRETORIUS: So it was about

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three-quarters of an ordinary lever arch file?

MR GAMA: Ja.

ADV G PRETORIUS: Documents?

MR GAMA: Yes.

ADV G PRETORIUS: And what did he say to you?

MR GAMA: Well he basically indicated that we needed to approve the security contract and that, so I had asked him a few questions and he sat across from me and he showed that, a document which I would say is probably this document.

ADV G PRETORIUS: On page 9?

MR GAMA: On page 9, that showed that there was a tender. He then took me through the process. I asked him a few questions.

ADV G PRETORIUS: Sorry, the type of questions you asked him, could you just elaborate on that?

MR GAMA: The questions were basically around the process, I asked him questions as to whether it had been to the tender board. I asked him questions around the KPI in terms of whether or not they'd finalised KPI's, because that was always a big issue where we paid service providers and, and there were no penalties if we didn't think that they were not

Page 8

performing. And then we, we then proceeded to, he then showed me the document that needed to be signed. And basically all I really did was to look at the last page of that document. He'd satisfied me that it had gone into the tender board and on that document I could see that it had already been signed by the people in the tender board. So I signed for the contract. Then we just had a few general discussions around it. But it was something where he was indicating to me that it was urgent that we sign because we were experiencing a number of problems. I had been aware of these problems because we discussed these at our Monday sort of meetings. We had meetings every Monday. Operational meetings, where we discussed immediate problems that needed to be resolved.

ADV G PRETORIUS: Now when he said it had been to the tender board, what did he say about that process?

MR GAMA: Well he basically said everything had gone through a tender process and that the tender board had approved it, but also I could see on, on the, on the page that he indicated to me and it showed me also during the course of that, the companies that had tendered, it showed me a number of companies and it then showed me the last three or so I think that had gone

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Disciplinary Inquiry

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through a second stage of the tender process.

ADV G PRETORIUS: Could you please in Exhibit B, turn to page 114? Now on page 114 to 120, do you recognise that document?

MR GAMA: Yes.

ADV G PRETORIUS: Now if you look at page 120A to 120H, is a copy of the same document, but without the much of a handwriting and the other notes made on it. Can you recall which of these two documents you saw on 5 December 2007?

MR GAMA: It would probably be this, the second document with A to H.

ADV G PRETORIUS: Ja. Now you signed, if you go to page 120H, is that your signature? "Approved", with the date 5 December 2007, correct?

MR GAMA: That is correct.

ADV G PRETORIUS: Ja. Now have you subsequently ascertained what this document is?

MR GAMA: Yes, I have.

ADV G PRETORIUS: At the time that you signed it, what did you believe the document was?

MR GAMA: I believed that this was a document that indicated the tender process that had been gone through. I saw the different signatures, including that of Mr Pita himself as the General Manager concerned

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as well as the acquisition council, which basically safeguards the process in terms of tenders. So I believed that here was the document that indicated that the proper process had actually been followed, because it was always my contention that for security tenders there were many service providers out there and if we went through a process we would then find the appropriate one.

ADV G PRETORIUS: Now the evidence has been that on this document, if you go from the first page to the last, there are some 17 odd references to confinement? When did you first become aware that this document is not the approval of an open tender, but a document referring to the confinement of the tender or the supplier?

MR GAMA: I, I became aware of it some time in June when -

ADV G PRETORIUS: Which year?

MR GAMA: - June '09.

ADV G PRETORIUS: '09?

MR GAMA: '09. When Mr Oates gave me copies of this, of these documents.

ADV G PRETORIUS: Now after you signed it, what was your involvement with the appointment of the security company?

MR GAMA: No, there was no involvement.

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ADV G PRETORIUS: On page 127, which part of it is 127 DD in my volume. What is this document that appears on page 127 to 137?

CHAIRPERSON: 127A?

ADV G PRETORIUS: 127, no 127 -

CHAIRPERSON: Oh.

ADV G PRETORIUS: No, the A's are for the -

CHAIRPERSON: Okay, 127 itself, okay?

ADV G PRETORIUS: Ja, 127 itself to 137.

MR GAMA: I don't see it. Oh, it's at the back. This is a document that seems to have emanated from the procurement department, which is in charge of all processes related to tenders.

ADV G PRETORIUS: Who specific in the procurement department?

MR GAMA: This was signed by the chief procurement officer in our supply chain.

ADV G PRETORIUS: Mr Brian Fredericks?

MR GAMA: Mr Brian Fredericks, ja.

ADV G PRETORIUS: And the date of the document is 6 December 2007?

MR GAMA: That is correct.

ADV G PRETORIUS: And it is a

Page 12

appointment for a period of a year of the General Nyanda Security Pty Limited, correct?

MR GAMA: That is correct.

ADV G PRETORIUS: So when did you first become aware of this document?

MR GAMA: I first became aware of this particular document probably just as we got these packs, which is around December of '09.

ADV G PRETORIUS: Then page 138? Page 164 it goes on further, but the signature appears, signatures appear on page 164. What is this document?

[10:36] MR GAMA: This document is the actual contract that was entered into between Transnet Freight Rail, a division of Transnet, which generally under security risk advisory services.

ADV G PRETORIUS: When was this agreement concluded?

MR GAMA: 2 June 2008.

ADV G PRETORIUS: You find that on page 164?

MR GAMA: Yes.

ADV G PRETORIUS: Who signed on behalf of Transnet?

MR GAMA: It was signed on behalf of Transnet by the chief operating officer Mr Peter

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Fearnhead.

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ADV G PRETORIUS: Ja, when did you become aware of this document, first become aware of this document?

MR GAMA: I first became aware of this document round about November, December 2009.

ADV G PRETORIUS: Now early in 2009 Mr Oates had a discussion with you concerning the GNS Security contract, do you recall that?

MR GAMA: Yes, I recall that.

ADV G PRETORIUS: What did you tell him about the appointment of GNS, how it occurred?

MR GAMA: I had indicated to him that like any other security company it had gone out on a tender process.

ADV G PRETORIUS: So was that in 2009 or 2008 that you had the discussion with Mr Oates?

MR GAMA: It was in 2009.

ADV G PRETORIUS: 2009?

MR GAMA: Ja, I can't recall the date, it could have been around June or early July.

ADV G PRETORIUS: Well we know that you were interviewed by the internal audit department in April of 2009, and maybe we should now turn, that is in Exhibit D, to the transcript of that interview. We've

ADV G PRETORIUS: December, the breakfast meeting?

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MR GAMA: The breakfast meeting on the 10th of December 2008.

ADV G PRETORIUS: And then you say in the second line next to Mr Gama "as far as I'm aware, and as far as I'm concerned there was never any consignment on this particular matter. Even if somebody may have, for some reason then returned it to the manner and way that it looked like it was a consignment", why did you say that?

MR GAMA: Because my instruction as we saw on the previous matter that you asked me to read out, I had indicated quite clearly that there should be a tender process.

ADV G PRETORIUS: And what did Mr Beattie tell you?

MR GAMA: Mr Beattie had also indicated that the tender process had been done and it was now complete.

ADV G PRETORIUS: And at the bottom of page 78 you said "I came in at the tail end of this, basically John" and then over to 79 "Beattie, who was my general manager of safety and security, came to my office and said look, we need you to sign this, it is urgent,

dealt with it already, part of it when you testified earlier. If you got to page 78. Now you will see that there is discussion with the chairperson and then Kieran Maddove[?], and on page 78 in the middle of the page, we don't have line numbers, Kieran says "Sir, I am just going to take you back, sometime back, it was round about the end of 2007, what is your understanding of security contracts at that time, and in particular there was a contract called --" and it should be GNS, is that correct?

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MR GAMA: Ja, correct.

ADV G PRETORIUS: Now we have already established last time that you came into that meeting without any precognition or having seen any documents correct?

MR GAMA: That's correct, ja.

ADV G PRETORIUS: So he's asking you about something that happened at the end of 2007 and April 2009, and then you say "ja, I think we've discussed with -- you were not at that meeting. No, I was not, I think Michael was at that meeting where they briefed you", to what meeting were you referring there? You say the end of last year, that would be the end of 2008.

MR GAMA: I think that would have been the meeting that we had with Mr Viv Oates I think on the 10th of ...

and I sort of them asked him just verbally why is it urgent, what are the pertinent issues and he then he explained it", and you have testified about that. Then on the bottom of page 79 you said it is only John Beattie that is present, correct?

Page 16

MR GAMA: That's correct ja.

ADV G PRETORIUS: And Mr Maddove then asked you "what document was presented to you, do you recall it at that time, was it just one document or various documents", you say "well it's their motivation. These things, they come to you. The guy will come to you with a file and he sits with you and he says look here is my motivation, I need you to proof it. It's been to the tender board you know, I just need your formal approval. The tender board has approved it. We need you to sign it" is that correct?

MR GAMA: Ja, that's correct.

ADV G PRETORIUS: Ja, and you then, in the middle of the page say that the meeting lasted about five to ten minutes.

MR GAMA: Ja, five to 10 minutes at most, probably five.

ADV G PRETORIUS: Ja, and at the second last Mr Gama on a page said "we discussed the document", is that the document that appears at page 120A?

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MR GAMA: It was not the only document that was discussed. As I indicated in his motivation he had brought this lever arch file and he had shown me various things just to indicate the actual process that had taken place, and the document at 120A is the document that we had to actually sign on to do the formal approval.

ADV G PRETORIUS: Was there anything in the documents that you and Mr Beattie discussed on the 5th of December 2007 that indicated to you that it was a consignment?

MR GAMA: No, there wasn't anything that indicated it was a consignment. I think from looking at the actual document that showed there was a tender, because I was looking at it from the other side, I clearly believed at the time that they had in fact gone out on tender.

ADV G PRETORIUS: Well the evidence was that they did go out on tender. There was a tender that stopped, not formally, then on page 81 just below the middle of the page where the punched hole is of the ring binder, the second one, the bottom one, you say in the last sentence "because they'd gone through a process and he showed me that process", that process, what process did you believe at the time it was?

Page 18

MR GAMA: I believed that it had gone through the tender process.

ADV G PRETORIUS: Ja, then on page 82 the Chairman said that Kieran got the file here, sorry might have had the file that he had. At this stage had you seen any of the documents that he had in the file?

MR GAMA: No, I had not seen any of the documents that he had on the file. I had come in very cold in terms of what was going to be discussed.

ADV G PRETORIUS: And then again below the bottom ring binder Mr Maddove said "see, this is the document we are referring to", and if you look at the next inaudible, "this is a document that we are referring to". You say "yes, it would have been something coming from the acquisition counsel. Okay, what is it that you want me to look at". At this stage in the interrogation what was happening, what was Mr Maddove doing and what were you doing?

MR GAMA: I think all that he did was to show me a document to say this is the document, and all he could really probably see is just the headlines of it. And I was eager that he shows me the actual document so that I can see what it is that he's referring to. So he still kept it in his hand you know.

ADV G PRETORIUS: And then it says "I

Page 19

just want to confirm that this is your signature", and you respond "of course it's my signature". So he showed you the page on which your signature appears is that correct?

MR GAMA: Yes, he showed me the last page of that document.

ADV G PRETORIUS: Ja, then after confirming that you signed the document on page 83 he then asked you whether you read the document is that correct?

MR GAMA: That's correct.

ADV G PRETORIUS: Then you said there was a whole stack of things, and that is in the middle of the page "John sat on this side and I sat on that side and he took me through", and the last sentence "I do not think I would have gone into all the detail of this".

MR GAMA: That's correct.

ADV G PRETORIUS: Ja. Then you say Mr Gama "me, I see you marked certain things", what were you then commenting on?

MR GAMA: He was now on the front of the actual document.

ADV G PRETORIUS: Would that be page 114 if you go to Exhibit B1?

MR GAMA: Correct.

Page 20

ADV G PRETORIUS: Is that the document? On 114 there is certain things marked, on 120A there is nothing marked.

MR GAMA: Yes, it was this document, I think he had been working on this document.

ADV G PRETORIUS: Ja, so you then said, and I am going back to page 83 in EXHIBIT D1, "I see you marked certain things. The process was stopped, the contract expired. He mentioned -"

MR GAMA: Well, I was just reading from what the document said.

ADV G PRETORIUS: What the document said ja, and then you see efforts to go on open tenders and instructed by chief executive, you found that on the document?

MR GAMA: Yes.

ADV G PRETORIUS: Ja, and that was your instruction that there should be open tenders correct?

MR GAMA: That is correct.

ADV G PRETORIUS: And in fact there was an open tender.

MR GAMA: That's correct.

ADV G PRETORIUS: And then you said in the interview "so obviously I would have said that they must go out on open tender and for approval, what is the



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difference now", and then on page 84 you say in the first Mr Gama "I would not have, you know read this thing word for word" correct?

MR GAMA: That's correct.

ADV G PRETORIUS: Then again next to the bottom ring binder the chairperson asked you "did John" referring to Mr Beattie "actually alluded you to the fact that this was a consignment as stipulated in document here on the header", and then you said "no, no".

MR GAMA: That's correct ja.

ADV G PRETORIUS: At that stage, having now been confronted with this document for the first time since 2007 what was your belief, in the meeting when you were interrogated?

MR GAMA: My belief was that the procurement people had gone on an open tender process and that in fact that had been confirmed by John at the meeting when he requested me to approve this particular contract. So I didn't have any reason to believe otherwise.

ADV G PRETORIUS: And on page 85 you say in the second paragraph "this notion of a consignment in this contract is actually untrue", why did you say that?

MR GAMA: Because in the discussions

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that we had had with John, and in the stack of papers that he had showed me I had seen the words "tender", and I had also seen that it had actually also gone through the tender board. And in fact he had indicated to me that there had been an adjudication as well that had taken place, which had reduced the number of companies from I think 11 or 12 to a preferred three.

ADV G PRETORIUS: Then on page 85 Mr Maddove now shows a little bit more, he says that "Chairperson, can I just give you a bit of background" and you say "yes". And then he explains it and he says the process was stopped and then there was consignment.

[10:56] MR GAMA: The company was new to me. I just remembered that when John came to me he had shown me three names. So when I said this no, no, no it was because as we were proceeding with the interview. He kept pulling a document out of the hat, and I really didn't know where we were going with this. And I then indicated that it would be better for all of us if he gave me all the documents so that I could go and study them, because I just couldn't remember everything that had happened. It had been more than a year, probably close to 18 or 19 months, after I'd signed the document, and I just couldn't remember everything. But I was indicating that the notion of it was clearly new to me.

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ADV G PRETORIUS: And at the bottom of page 89 to Mr Gama in the third line can you explain how you perceived your role. You said, my role in this thing is to say to the GM who comes to me, do you have the funds to pay for this? Have you followed the processes? I've got a tender board and I can see the chairman of the tender board has signed this. So if somebody comes to me – and that's why I always say to people, I do not want to see any document until it has gone to the tender board and they've agreed. Why is that?

MR GAMA: The tender board serves a number of purposes in terms of the proper checks and balances. It would do all of the work in terms of making sure that proper processes are followed. The tender board would look at all of the requirements that Transnet requires and satisfy itself that all of those requirements have been met. So in essence once the document has been to the tender board you would then rely on the cleanliness of the process.

ADV G PRETORIUS: And then on page 90 after saying that – just above the bottom ring binder you say, "so I think they must suspend this discussion. Let me try and find all of the documents." Why did you want to suspend that discussion at that point in time?

MR GAMA: Well, I had been trying to

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suspend the discussion for some time. I think this was my third or fourth attempt. Because basically they kept – documents just kept flying out of a hat, and I was not familiar with all of the documents that he was showing me. And he had marked certain aspects, and he was just really showing me the aspects that he had marked. So I needed to re-familiarise myself with these documents because it had happened quite some time back.

ADV G PRETORIUS: And -

MR GAMA: But also he appeared to have a number of documents, but it didn't appear to me to amount to all of the documents that John had shown me, because the picture that I had in my mind was of a larger

ADV G PRETORIUS: About three quarters of a Lever Arch file.

MR GAMA: Ja.

ADV G PRETORIUS: Then on page 91 after discussing what your delegate authority was, and referring to the document and R4.9 million, which is a saving amount, at the bottom of the page you come back to your consistent stance in the interview that it was not a consignment.

MR GAMA: Yes.

ADV G PRETORIUS: And on page 92, the

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second and third lines, you said, "certainly when John and I had the discussion we were not discussing the consignment."

MR GAMA: That's correct.

ADV G PRETORIUS: And then at the bottom of the page you return to the instruction to go out on the open tender. And John had told you they had gone open a tender. They had three companies.

MR GAMA: Ja.

ADV G PRETORIUS: On page 93 after the second, third person, Mr Gama, "in terms of consignments my consignment limit is R10 million." Correct?

MR GAMA: That's correct, ja.

ADV G PRETORIUS: And then the bottom page, Mr Gama, I mean if I read the entire document – the last paragraph – I also said to them this is not a consignment in terms of what you just told me because you said to me we've gone out on tender.

MR GAMA: That's correct, ja.

ADV G PRETORIUS: Now at this stage you are now saying, well, had they told you – you read the entire document. Had you at that stage read the entire document in the interview process?

MR GAMA: No, I had not read the entire document, but we were looking at just pertinent aspects

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of it during the interview. And I was indicating that had I read that document I would have said to John that in terms of what he had told me around the tender process that it's a tender process, it's not a consignment. But if I had read the document and it said consignment then we would have to carefully go through it and say, why do you say it's a tender process if it's a consignment?

ADV G PRETORIUS: Ja. You deal with that on page 94 after the chairman said - when you said you have to go on an open tender that makes sense. That makes complete sense. You said if I actually read this thing line by line I would have said to them the wording here is wrong. Go back to the tender board and actually write it correctly because all that is now the issue here is whether I thought this was a consignment or not. It was not presented to me as a consignment. It was presented to me as a tender process. Correct?

MR GAMA: That's correct.

ADV G PRETORIUS: And then on page 94 the chairperson said, "if you could get some documentation it would be helpful. Kieran could collect it from you," what documentation was Mr Steenkamp referring to?

MR GAMA: It was all the documentation that related to the tender process. It would have been

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the document that had the tender number and all of the other documents that accompanied it.

ADV G PRETORIUS: Did you find Mr Beattie's file?

MR GAMA: Yes, I did ask the procurement people to find the file. They could not find Mr Beattie's file per se, but they found something that began to resemble the documentation that had been contained in this file.

ADV G PRETORIUS: On page 96 in the middle of the page against Mr Gama, "no, but I'm saying to you this is not true." Referring to the consignment. "Whatever they may have written in here is shown me my documents. Okay."

MR GAMA: It should be, "they have shown me documents."

ADV G PRETORIUS: Me documents. You know, and you said by the way this was a five month. Ja, this is also the other thing. This was a five month contract where they said okay. Now, where did the five months suddenly come in?

MR GAMA: The five months didn't suddenly come in. At our initial discussion you'll recall that I always had a problem with penalties and KPI. And when they came in to me they then indicated

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that look, we will do a five month contract. We'll review, and then if we're satisfied we'll then continue. So which meant that at the end of five months they would stand back, review the success of it and then decide whether or not they wanted to continue with this particular service. And if they wanted to continue with that service they would then have to go back to the tender board to indicate that they wanted to continue or not.

ADV G PRETORIUS: And then it goes on, and the end was that on this Mr Maddove agreed to give you a copy of his file. Is that correct? You undertook to give documents to them.

MR GAMA: Ja.

ADV G PRETORIUS: Now, you – both Mr Oates and Mr Naicker testified about what you said at the meeting of the 10th December when they discussed your relationship with General Nyanda. Do you recall that evidence?

MR GAMA: Yes, I do.

ADV G PRETORIUS: And do you recall that your instructions were put to him that you disputed that evidence to say that you knew General Nyanda as they would know other public figures or words to that effect.

MR GAMA: That's correct.



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ADV G PRETORIUS: What is your relationship with General Nyanda?

MR GAMA: I've known General Nyanda for some time. But when Vivant Naicker came here I noticed that they were beginning to infer that there might have been some improper relationship between me and General Nyanda, which I felt was not true. And when I instructed council I wanted to put some distance between me and the General. I think I was wrong in that respect in the sense that while he's not a friend or a close friend he is an acquaintance of mine. I've played golf with the General in the past. He has phoned me when we've had bereavements in our family when people have indicated to him – I know some people who know him, rather than me knowing him closely. And also he had phoned me when I got suspended to commiserate with me. I have on occasion spoken to him.

ADV G PRETORIUS: Now, the implicit implication that was expressed – you're not charged with it – that somehow your relationship with General Nyanda in the end appeared to be an irregular appointment of a company had anything to do with you, what's your comment on that?

MR GAMA: My comment is that I would not have put myself in a position where there was an

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improper appointment. It's just not what I would do.

ADV G PRETORIUS: Now, if we could stay in exhibit D but go to D2. It's in the same file. What is the document that appears on page one of D2?

MR GAMA: This is my response to the letter of the 12th June on the 20th or 19th of June.

ADV G PRETORIUS: I'm not going to deal with what Mr Wells' letter is. We all know that and we've had it. And we've already dealt with parts of this letter dealing with the 50 Like New contract. So this is going to deal with the GNA security contract. You begin with referring to the letter of Mr Wells dated 18th June, and the first paragraph has response. And paragraph 1.1 says, "let me start by indicating that in October 2008 when the anonymous tip-off was received I had an opportunity to discuss its contents with the then Group Executive, Ms Maria Ramos, who dismissed them as baseless and utter rubbish."

MR GAMA: Correct.

ADV G PRETORIUS: Will we please then turn to D1? And the sequence is incorrect. Page D15 is the first page, which is also the same as D14. As I see it – you can just confirm it – the sequence should be D15, D17 and then D16. The pages have been – go to page 15. Go to page 15 and confirm that the sequence is 15,

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17 and then 16.

CHAIRPERSON: It seems to have been altered.

ADV G PRETORIUS: Oh, it's been altered. That's fine.

CHAIRPERSON: 15 is 15, and the 17 starts with the layman's terms.

ADV G PRETORIUS: All right then. That makes sense then. All right. Now, the anonymous tip-off that you referred to, is it this or another document?

MR GAMA: No, it is this document.

ADV G PRETORIUS: Now, this document on page 15 deals with fraud and corruption, a heading. And then allegations of rape, 10th March 2008. And then on page 16, renumbered 16, there is a heading GNS, and it says the following. "We were further made aware of the origin of this company which we need fully investigated for the investigation. In a nutshell, GNS is an abbreviation of General Nyanda Security. All in South Africa will confirm that we are right. This company was given special treatment because of its association with a famous former MK soldier and one of the most senior Luthuli House cadets. They did not go through proper tendering process like the rest. They were allegedly brought to Gauteng by Mr Siyabonga Gama." Page 17. "It

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is suspected that any contract that might have been given could only have been obtained by Transnet freight rail security back door in an underhanded manner." Next paragraph. "Mr Siyabonga Gama is also rumoured to be the co-owner of Enlightened Security Services." Is there any truth in that allegation?

MR GAMA: No, that's no true.

ADV G PRETORIUS: "This company is guarding Inanda House, Transnet's freight rail head office in Parktown." Is there any truth in that allegation?

MR GAMA: I wouldn't know whether they were or not guarding, that company. All I recall is that we had actually taken some legal action against this company at some point. But I don't think there is any truth to it.

ADV G PRETORIUS: Then it says, "This company is runned" – well, it's obviously someone that has the same difficulty with English as a second language as I have – "is runned by some ANC politicians for quite some time now. In light of the above we request that a very long leave be given to Mr Siyabonga Gama pending the outcome of the investigation." As far as you're aware, Ms Ramos' comment to you that the contents of the anonymous tip-off is baseless and utter rubbish, to what was she

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<p style="text-align: right;">Page 33</p> <p>referring from your perspective?</p> <p>MR GAMA: She was referring to the issues in this related to me, the allegation that I had brought this General Nyanda company to Gauteng, and also this notion around Enlightened Security Services and this issue that they had obtained a security contract in an underhanded manner. So those were the issues that I had discussed with her, because when I went to see her I already had a copy of this document, because you see it had also been given to my Chief Operating Officer.</p> <p>[11:16] ADV G PRETORIUS: Now, if you go to D2, your letter, page 16 paragraph 3, you deal in paragraph 3 with the CPI and the termination of its month to month contract. Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV G PRETORIUS: And you said the following. "The issues relating to the initiation, administration and management of security contracts falls within the ambit of the security department." Is that correct?</p> <p>MR GAMA: Where are you now?</p> <p>ADV G PRETORIUS: Page 16. Paragraph 3. CPI and the termination of its month to month contract.</p> <p>MR GAMA: Ja.</p>	<p style="text-align: right;">Page 35</p> <p>MR GAMA: Yes, I had an opportunity to look at the documents more carefully, but I still lacked quite a great number of other documents that I had requested, especially the investigation report so that I could satisfy myself in terms of what was happening. But I had begun to review, albeit not very fully, but I had started that process.</p> <p>ADV G PRETORIUS: At this stage were you still persuaded or of the view that it was – that the appointment of GNS was through an open tender process?</p> <p>MR GAMA: No, at this stage the documentation I had indicated that during the last days of that tender process there had been a new process and it had been altered.</p> <p>ADV G PRETORIUS: On page 17 your letter then continues. "I've conducted a preliminary interview with the security personnel and requested a written submission of the processes they followed." Their submission and relevant annexures is contained in annexure is contained in annexure SG4. Is that what appears on page 90 to 97?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: And on page 97 we see that it was compiled by Mr K. Naidoo and Mr Dingaan Senamela.</p>
<p style="text-align: right;">Page 34</p> <p>ADV G PRETORIUS: At this stage I'm going to deal with paragraph 3 and 4 which deals with CPI and the appointment of GNS. "The issues relating to the initiation, administration and management of security contracts fall within the ambit of the security department." Is that correct?</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV G PRETORIUS: "The process of calling out for tenders must necessarily be guided by the procurement department."</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: "I have no personal knowledge as to the initiation of these processes." Correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: "The common practise is that it will be dealt with by the acquisition council and the relevant general manager. If it's a particular amount it may then be referred to the Chief Executive." Then, "A similar process is followed by other departments in procuring services for the company." Correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: Now, at this stage this is July 2009. Did you have the opportunity at that stage to review the documents more carefully?</p>	<p style="text-align: right;">Page 36</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV G PRETORIUS: Back to your letter on D2 page 17. You said, "You will note that this work remains incomplete with certain documents still missing and will require some further enquiry."</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV G PRETORIUS: What was your view at that time regarding this matter? What would happen going forward?</p> <p>MR GAMA: My view was that there were certain documents that the security department had not given to me. There were some which they referred to which were not even in this document. But I was pressed for time in terms of answering to Chris' letter and I needed to continue this particular investigation. There did seem to me quite a few gaps and loopholes and something fishy I was beginning to smell in terms of this particular issue.</p> <p>ADV G PRETORIUS: What would the normal process have been in this case with an investigation? Who would have done the investigation?</p> <p>MR GAMA: In terms of the normal process I would have been informed that there were particular issues. I would have been given the total picture in terms of what it is that is suspected. I</p>

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would have then given – I would have then called in the general manager responsible for security, and I would have then said, here are the issues that are suspected. Go and do an investigation. If you need any further resources you can then come back to me, but I will need a periodical progress report in terms of where we are with the process so that we could then discover completely what the issues were. In this instance unfortunately I was trying to discover what was happening, but also myself learning what the processes were. I was not involved in trying to form an opinion in terms of what could have been happening.

ADV G PRETORIUS: If internal audit had investigated certain conduct what would normally have happened if they wanted you to take the process forward?

MR GAMA: Internal audit would have met with me and probably together with the GM or just by myself, and then indicated to me what they thought was happening. I would have then taken the matter further. I would have then found somebody to do a proper investigation, normally the head of that function or line department, and then gone on to take whatever steps that that particular investigation led us to.

ADV G PRETORIUS: Well, we know the evidence presented by the employer, Transnet, is that

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waiting for his reply to this letter when I was served with charges in August.

ADV G PRETORIUS: So the response to your suggestion that the matter be followed up and an investigation should be conducted was a charge against you and a suspension.

MR GAMA: That's correct.

ADV G PRETORIUS: In paragraph 4.2 you said that "I was never privy to the first security tender process that you refer to where G4 Security had to be withdrawn." Is that correct?

MR GAMA: That's correct.

ADV G PRETORIUS: "I could never therefore have been familiar with that process or the personalities involved as I do not get involved in this nitty-gritty of our organisation's work."

MR GAMA: That's correct.

ADV G PRETORIUS: And then you refer in paragraph 4.3 to the reasons why GNS was the preferred service provider. Where did you get that information from?

MR GAMA: It was on the letter that the security department had given me during the preliminary discussions that they had had. The letter that they had attached on 91.

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internal audit investigated the appointment of GNS – it's an ongoing investigation according to them – from about December 2008. As of July 2009 had internal audit given you any information relating to their investigation?

MR GAMA: No, they had not given me any information except those two or three documents that had been appended to the letter from Wells.

ADV G PRETORIUS: And then you deal further in paragraph 3, the sub-paragraphs with certain issues relating to CPI and certain subsequent matters. In paragraph 4 – is that correct?

MR GAMA: Yes.

ADV G PRETORIUS: In paragraph 4 you deal with the appointment of GNS. You're quite specific. In paragraph 4.1 you say, "I deny any involvement in any possible manipulation that you may be referring to relating to the GNS appointment." Is that correct?

MR GAMA: That's correct.

ADV G PRETORIUS: "If indeed there was any manipulation that you suspect by any party I would follow up on that matter and carry out an investigation."

MR GAMA: That's correct.

ADV G PRETORIUS: Did Mr Wells say to you, well please carry out the investigation?

MR GAMA: He did not. I was still

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ADV G PRETORIUS: So that's the memorandum. That's the document prepared by Mr Naicker and Mr Senamela.

MR GAMA: That's correct.

ADV G PRETORIUS: Then on page 20 you refer to the minutes of the tender board that stated that they supported the consignment subject to the CE approval.

MR GAMA: Yes.

ADV G PRETORIUS: And then you say the consignments were signed for a period of five months, 1st December 2007 till 30th April 2008 on a performance review period at R1.5 million, plus minus R7.8 million. Where did you get that information from?

MR GAMA: I got it from two sources. One was the people in the tender board itself who said they understood that it had been a consignment with a review period. But also on the document that we referred to as -

ADV G PRETORIUS: On page 120, capital something.

MR GAMA: Yes.

ADV G PRETORIUS: That's in B1. Page 120, capital B.

MR GAMA: It's 120, capital B, under

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point 4 where it says 1st November to 30th April. What had actually happened was that it was not 1st November but 1st December.

ADV G PRETORIUS: Page 120, capital B. It's in B1. Paragraph 4, contract period. So the statement in your letter that the consignment was signed for a period of five months, the source you said was conveyed to you by members of the acquisition council. Secondly, the document itself says that from 1st November to 30th April is the performance review period.

MR GAMA: Yes, which was actually not November but December.

ADV G PRETORIUS: Then paragraph 5 of the letter – we're back in D2 page 20 – delegation of authority for consignments. You in paragraph 5.1 state that your consignment authority is R10 million and on open tender it's R100 million.

MR GAMA: Correct.

ADV G PRETORIUS: Then you say if the consignment was for five months, and we know that Transnet said it was for a year and the contract was signed for a year, but if the consignment was for five months it fell within your delegated authority.

MR GAMA: That's correct.

ADV G PRETORIUS: Then in 5.2 you

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matter attests. It is sometimes impossible not to enter into short-term consigned contracts, for instance where operational problems such as cable theft is rampant. It would be similarly negligent not to support efforts to curb this practise." In 5.3, "You may be aware that from the last tender audit TFR did poorly on tender administrations." The last tender audit to which you refer, when would that have been if this letter was written in July 2009?

MR GAMA: The tender audit would have been in reference to the document dated October 2008 from Ernst & Young which I think would have been received by us around December 2008. And we started in the new year, 2009, to deal with the issues.

ADV G PRETORIUS: And then it goes on. Again I quote. "Together with my CFO" – that would be Mr Nick Thompson.

MR GAMA: That is Mr Nick Thompson.

ADV G PRETORIUS: "and CPO" – which is Mr Fredericks – "we have already implemented stringent actions to create hassle-free tender processes. In this instance we noted that what was supposed to be a five month trial period subject to a full review in April 2008 and then re-submitted to the tender board did not happen. The contract was issued as a one year contract, and no

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stated, and I quote, "It is clear to me from the document that it is written poorly and I will reinstruct the GM concerned to follow up on the pertinent aspects related to the quality of these submissions. I'm informed that both training intervention and enquiry on security submissions in general is underway." So the general manager that you refer to, who was he?

MR GAMA: It was now the new general manager responsible for network planning in the office of the Chief Operating Officer.

ADV G PRETORIUS: And who was he or she?

MR GAMA: His name is Siya Mtetwa.

ADV G PRETORIUS: Siya Mtetwa. Then further the CPO, what does CPO stand for?

MR GAMA: The Chief Procurement Officer, Mr -

ADV G PRETORIUS: Fredericks.

MR GAMA: Brian Fredericks.

ADV G PRETORIUS: "Has implemented a procurement and management process to ensure communication on tenders is dispatched to all parties that applied to participate in tenders. I've always had a belief that most security services can be obtained via the public tender process as the submission on the GNS

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mention was made that it would be subject to a probation period of April and would only be extended if the outcome of the assessment was positive." Then, "A recent incident when a security manager hired another security company as a pilot for eight months without obtaining any authority has pointed out that there's perhaps a need for a full review of the security area."

MR GAMA: Correct.

ADV G PRETORIUS: Did you envisage such a review?

MR GAMA: The review had started at the time when I was suspended. I don't know where that process – what that process led to, but I had indicated at the time that there must be disciplinary processes in terms of what we call maverick spend that was taking place.

ADV G PRETORIUS: "A new general manager responsible for security has been tasked by me to investigate this matter and to ensure together with the CPO that this matter is given urgent attention." That general manager responsible for security, who is he or she?

MR GAMA: That's Siya Mtetwa.

ADV G PRETORIUS: "It would be prudent that within the next three months such a review is



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<p style="text-align: right;">Page 45</p> <p>completed and any possible suspicions that our internal auditors have on any existing contracts be assessed and concluded." Did Transnet give you the opportunity of completing the review?</p> <p>MR GAMA: No, I did not get that opportunity. I asked for three months to finish everything and look at everything.</p> <p>ADV G PRETORIUS: And we know that -</p> <p>MR GAMA: I think one month later I was suspended.</p> <p>ADV G PRETORIUS: And we know that Transnet internal audit for their own reasons did not share their investigations with you.</p> <p>MR GAMA: That is correct.</p> <p>ADV G PRETORIUS: Then you refer to the sponsored golf day. In 6.1 you say, "It really baffles me why the General Nyanda golf day has been singled out in this case." And then you go on and deal with the particular golf day and the attendance of two people. Were you invited to that golf day?</p> <p>MR GAMA: Yes, I had been invited to that golf day.</p> <p>[11:36] ADV G PRETORIUS: Did you plan to attend the golf day?</p> <p>MR GAMA: I planned to attend the golf</p>	<p style="text-align: right;">Page 47</p> <p>ADV G PRETORIUS: I apologise.</p> <p>[11:55] ADV G PRETORIUS: Thank you very much, Mr Chairman. Then just to conclude Mr Gama, could you please go to Exhibit A. You can put the other files away now as well for the moment, I am sure my learned friend starts cross-examining you it will open again. Don't put them too far away. A1 is the notice to attend disciplinary hearing. Now the first charge where it is alleged that you authorised the conclusion of a contract for the provision of security services by General Nyanda Security Advisory Services on confinement in excess of your delegated authority, when you signed the document were you aware that it was a confinement?</p> <p>MR GAMA: No, I was not aware.</p> <p>ADV G PRETORIUS: Then in 1.2 it is alleged that when the irregularities in the process were brought to your attention, you failed to take appropriate steps either to investigate the irregularities, you have testified about that, is that allegation true?</p> <p>MR GAMA: No, it is not true.</p> <p>ADV G PRETORIUS: Or to implement any other appropriate measures to deal with the situation, is that equally not true?</p> <p>MR GAMA: Equally not true.</p> <p>ADV G PRETORIUS: And they say that -</p>
<p style="text-align: right;">Page 46</p> <p>day.</p> <p>ADV G PRETORIUS: Did you attend it?</p> <p>MR GAMA: No, I did not attend the golf day.</p> <p>ADV G PRETORIUS: Why not?</p> <p>MR GAMA: There was a bereavement in my family, so that particular week I had to take days off because I had to go and bury my aunt.</p> <p>ADV G PRETORIUS: Now, we then know that about a month after this you were suspended.</p> <p>MR GAMA: That's correct.</p> <p>ADV G PRETORIUS: Now, we have dealt with the court application and the correspondence and why you used some stringent language. I'm not going to revisit that again.</p> <p>CHAIRPERSON: Mr Pretorius, is there an appropriate moment to take a tea break?</p> <p>ADV G PRETORIUS: Yes.</p> <p>CHAIRPERSON: Are you nearly finished?</p> <p>ADV G PRETORIUS: I'm nearly finished.</p> <p>So it's an appropriate time, and then I can see whether there's anything - sorry, I didn't realise what the time was.</p> <p>CHAIRPERSON: Let's break for 10 minutes.</p>	<p style="text-align: right;">Page 48</p> <p>in 1.4 your conduct in approving the contract with GNS falls far short of the standard that they reasonable expected of a person in your position. If you had known, and you testified about that, that it was a confinement what would you have done?</p> <p>MR GAMA: If I had known that it was a confinement I probably would not have approved it in the first instance because I hold a very strong belief that these security contracts must just go out on open tender, there are numerous supplies of security services.</p> <p>ADV G PRETORIUS: And we have dealt with 50 Like New contract, and then on page 4 it is alleged that the conduct set out has irretrievably broken the relationship between you and Transnet. What is your comment on that?</p> <p>MR GAMA: I do not believe so.</p> <p>ADV G PRETORIUS: Thank you, Mr Chairman. Mr Gama just - we have dealt with in general the letters and your approach to it so I am not going into each individual letter to deal with it. If my learned friend thinks it is relevant he will deal with it in cross-examination. I have got no further questions thank you.</p> <p>CHAIRPERSON: Thank you, Mr Pretorius. Cross-examination, Mr Pretorius?</p>

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<p style="text-align: right;">Page 49</p> <p>CROSS-EXAMINATION BY ADV P PRETORIUS SC: Thank you. Mr Gama, you accept I presume, that in terms of your contract of employment you are bound by the provisions of the detailed procurement policy?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And you accept too that you are bound by the provisions of the delegation of authority framework?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And as chief executive officer of Transnet Freight Rail you would have made yourself aware of their contents, the contents of those two documents.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And that is because ultimately you would be accountable for their application and enforcement within your area of jurisdiction, that is Transnet Freight Rail.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: Your authority on confinement is R10 million, was at the time R10 million is that correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And as the evidence has shown your authority in relation to an open</p>	<p style="text-align: right;">Page 51</p> <p>ADV P PRETORIUS SC: So you are saying to Mr Arbitrator that because of the comment made by Ms Ramos in October 2008 you should not be called to account for your conduct in relation to the GNS matter, is that what you are saying?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So because Ms Ramos made a remark prior to any investigation of these issues raised, you say it is quite legitimate for a CEO to say I cannot be held to account at all for the issues raised in the first charge, is that what you are saying?</p> <p>MR GAMA: No, that's not what I am saying.</p> <p>ADV P PRETORIUS SC: What are you saying?</p> <p>MR GAMA: What I am saying is the issues were discussed at the time. Some of them were not the issues as they had been put in, and that once the issues were known, I should have been afforded the opportunity by internal audit to give me the actual issues so that I would then have been able to deal with it.</p> <p>ADV P PRETORIUS SC: Mr Gama, you are a CEO, you understand, or I thought you understood what appeared in paragraph 5. Would you take your time to</p>
<p style="text-align: right;">Page 50</p> <p>tender process is R100 million.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: It was at the time, and the reason is because confinement is a process which may be open to abuse, and that is why the authority levels are so much lower than the open tender limits am I correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And the internal procurement policy therefore provides in effect that one must be far more cautious when dealing with the confinement than one would be in dealing with an open tender process where other procedures have taken place is that correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Would you look at bundle A, page 19 please. The document begins at page 17 and it is the employee's response to the disciplinary charges, and if you look at page 19 under the heading B there are some preliminary objections raised, and it is contended under the heading in paragraph 5, that the first charge should be dismissed. Firstly do you persist with this preliminary objection?</p> <p>MR GAMA: Yes, on the basis that it was put in on this submission.</p>	<p style="text-align: right;">Page 52</p> <p>read it. You know what is said here, you obviously have considered this document, discussed it with your legal representatives. You have now had an opportunity to read the whole of paragraph 5 am I correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: Paragraph 5 states in effect that the first charge against you in relation to GNS Security should be dismissed does it not?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And it says so for the reasons set out in paragraph 5, not for any other reasons, correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: Let me put my question to you again. Are you saying to Mr Arbitrator that because of a remark made by Ms Ramos in October 2008, prior to any investigation having taken place, you as CEO of Transnet Freight Rail should not be called to account for your conduct in relation to the GNS charge at all?</p> <p>MR GAMA: What I am saying is that we discussed the matter. I was then given the assurance that it was utter rubbish and baseless. Then at a much later stage, without my knowledge, I found out that behind my back there had in fact been an investigation</p>



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when I myself had indicated earlier that if it needed to be investigated - was told by my superior officer that as it looked there was no need for it to be investigated any further.

ADV P PRETORIUS SC: Who told you that?

MR GAMA: Ms Ramos.

ADV P PRETORIUS SC: Are you saying there was another meeting later than the meeting in October 2008 or do I misunderstand your answer?

MR GAMA: I am not sure which part you do not understand.

ADV P PRETORIUS SC: Well let's look at what this document says at paragraph 5.1. You refer to a particular meeting in October 2008.

MR GAMA: Yes, I am referring to that meeting.

ADV P PRETORIUS SC: Right, you are referring to that meeting?

MR GAMA: Yes.

ADV P PRETORIUS SC: At that time no investigation at the hands of Transnet internal audit had yet taken place.

MR GAMA: That's correct.

ADV P PRETORIUS SC: At that meeting Ms Ramos said to you, on your version, that this was rubbish

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and you should not bother yourself with it. That's the contents of the document.

MR GAMA: That's correct.

ADV P PRETORIUS SC: Are you saying that on the basis of that comment by Ms Ramos, prior to any investigation taking place, it is legitimate for you as a CEO to contend that you should not be held accountable for your conduct in relation to the GNS Security contract at all, is that your version?

MR GAMA: No, I am not talking about the issue of whether I should be accountable or not. I am referring to the issue that the whole notion of even conducting an investigation had been thrown out by Ms Ramos at the time, and I had not been aware until quite some time later, which would have been in May 2009, that in fact an investigation into me was taking place.

ADV P PRETORIUS SC: Are you saying that it was not competent to initiate an investigation into the GNS Security matter?

MR GAMA: I'm saying that I was not informed.

ADV P PRETORIUS SC: That's a different matter.

MR GAMA: So this is what this charge relates to, to say at the point in time when the matter

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arose, which was in October, I was informed that there was no need for her to pursue anything related to this, and that I have never become aware until in May of 2009 that there was in fact an investigation against me.

ADV P PRETORIUS SC: So are you complaining here about your awareness of the investigation, because that is not what this says at all. It says nothing about your awareness of the investigation. It says nothing about delay. It says, look at 5.3 Mr Gama, and once again I put it to you that you clearly are capable of understanding this document, at 5.3 it says very clearly "when the employee inspected Ramos' letter it was identical to the one he had received. Then Ramos said this was rubbish, and that he should not bother himself with it. Her words were to the effect that those were flimsy accusations from nameless people, and that the company does not have to deal with such things as they were rubbish anyway." The next paragraph reads "from that the employee considered the matter closed." Are you saying firstly, as it is apparent from your answer, that it was incompetent of Transnet to initiate an investigation into those matters because of that remark that Ramos made?

MR GAMA: Yes, I'm saying that Transnet should not have persisted with it without informing me

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about it.

ADV P PRETORIUS SC: That is not what this complaint -

CHAIRPERSON: Please let the witness finish.

MR GAMA: I am saying that Transnet should not have persisted with it without informing me about it, and that it was really part of our values that if there was any such investigation after I'd been told that there would not be an investigation, that Transnet would have been frank with me but they were inconsistent in terms of applying our own values and code.

ADV P PRETORIUS SC: So had they informed you of the investigation would Transnet, in your view, have been entitled firstly to persist with the investigation?

MR GAMA: Yes, they would have been entitled.

ADV P PRETORIUS SC: In fact they would have been duty bound to do so not so.

MR GAMA: They would have been entitled to do so.

ADV P PRETORIUS SC: And duty bound to do so where allegations and irregularities are made within Transnet there is a duty to investigate them not

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so?

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MR GAMA: Ja, not when the chief executive has indicated that there appeared to be flimsy.

ADV P PRETORIUS SC: Anyway, you concede that they are entitled to persist with their investigation had they informed you.

MR GAMA: Yes.

ADV P PRETORIUS SC: And had they informed you of it, and those investigations revealed possible misconduct on your part, they would have been entitled to call you to account.

MR GAMA: Yes they would have been entitled to call me to account but also I would have wished, as I continued to do so, that I be given all of the information at the disposal of Transnet so that I could be in a position to deal with it comprehensively.

ADV P PRETORIUS SC: Alright, so your complaint is that you were not informed of the investigation, and your complaint is that you were not given sufficient documentation.

MR GAMA: That's correct.

ADV P PRETORIUS SC: Where in paragraph 5.1 to 5.5 does it say that?

[12:14] MR GAMA: This is not a comprehensive document that we enrolled in terms of answering this. We

issues where I was not the process controller and if I had been given the opportunity and given a full disclosure in terms of what the issues are, I would have been able myself - as the CEO - to also be in a position to prosecute the people that were involved in it.

ADV P PRETORIUS SC: Would you concede that those complaints were not raised in paragraph 5 that you've just given in your rather lengthy answer?

MR GAMA: Yes, they're not raised because it is not a comprehensive document.

ADV P PRETORIUS SC: Of course you were informed of the fact of an investigation on the 10th of December 2008 by Mr Oates.

MR GAMA: No, I was not. Mr Oates did not come to me to tell me about an investigation on myself. He came to inform me and to seek my cooperation in terms of getting certain of the sales team of the company to cooperate on an investigation relating to recruitment and selection of the LPO's and as well as an investigation into the rape allegation. Since my discussion with Ms Ramos, I had not been specifically informed that there was now an investigation also into me. So, that meeting of the 10th dealt completely with different issues.

ADV P PRETORIUS SC: Mr Oates' evidence

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basically gave just the -

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ADV P PRETORIUS SC: On the contrary, Mr Gama. The preliminary objection in paragraph 5 is quite clear, comprehensive and I'm going to argue that your answers are simply evasive.

MR GAMA: No they are not.

ADV P PRETORIUS SC: So, do I understand you correctly that the mere fact that Ramos said this was rubbish, on its own did not preclude calling you to face the charge on GNS. Do I understand your evidence now correctly? Without the delay and without the lack of information, the mere fact that Ramos says that the allegations and the communication were rubbish, would not preclude Transnet from calling you to account.

MR GAMA: You're correct in that it would not have precluded Transnet. I myself had discussed it with her on the basis that if there was a requirement to investigate, there should be an investigation but the process followed in terms of charging me was very different from the manner in which Transnet normally dealt with these kinds of issues in that I was never given the opportunity to look at what the actual issues are and - when I was charged - it became very clear to me that I was being charged on

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was clear that the meeting of the 10th of December 2008 he informed you that he was investigating the IPO matter, the rape matter and the GNS matter. That was not faced an issue in cross examination.

MR GAMA: No, he did not say to me there was any matter on the GNS - I think - on his own version. He indicated that the issues that were on the tip-offs he did not find them to be necessary. He even indicated that he knew that I was not an owner or a co-owner of Security and he also indicated that there was nothing else that he needed to follow up based on that particular anonymous tip-off.

ADV P PRETORIUS SC: The evidence will show that Mr Oates did inform you at the meeting of 10 December that he was investigating issues related to the appointment of GNS - that was never challenged in cross examination.

MR GAMA: Mr Oates merely asked me the question whether I knew General Nyanda - that was not to be inferred as to indicated that there was now an investigation into me on GNS.

ADV P PRETORIUS SC: Well of course at that stage your involvement in the GNS matter would not have been understood or known - it was still to be investigated. All they had was the complaint. Correct?

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<p style="text-align: right;">Page 61</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: If you look at the document that you say is the document that constituted the complaint – the evidence was that this document had paid 15 to 17 – was received some time in October 2008 by Transnet because if you look at the page – the new page 17 – it refers to the Group Chief Executive of Transnet, Maria Ramos was made aware by means of a letter on 12 September 2008 - so you had done nothing about this. This was the second tip-off clearly -</p> <p>MR GAMA: The document that they discussed actually with the Group Chief is the document on page 5 to 10.</p> <p>ADV P PRETORIUS SC: So it was incorrect evidence that you gave earlier that it was the document on pages 15 to 17.</p> <p>MR GAMA: Ja, they actually look exactly the same somehow -</p> <p>ADV P PRETORIUS SC: Although they are not the same.</p> <p>MR GAMA: - the document I was actually referring to – I'm sorry – is the document that we looked at</p> <p>ADV P PRETORIUS SC: Any explanation for the -</p>	<p style="text-align: right;">Page 63</p> <p>ADV P PRETORIUS SC: Why didn't you make sure that the documents that were presented to this Arbitration were correct, a meeting that you say now happened in September and not October and you can remember it clearly by reference to events that are present to your mind?</p> <p>MR GAMA: Because I had to ask people when was the actual – unfortunately I don't have access to my diary so that I can give you precise dates -</p> <p>ADV P PRETORIUS SC: Just give me precise dates.</p> <p>MR GAMA: A lot of these things happened some time ago and it is quite difficult for me to give you precise dates on most of the issues without me having access to my actual diary.</p> <p>ADV P PRETORIUS SC: Mr Gama, you've just given evidence - by reference to matters present to your mind - that this meeting with Ms Ramos now happened in September not October.</p> <p>MR GAMA: When it was in the same week, the very last days of September – 29, 30th, thereabout.</p> <p>ADV P PRETORIUS SC: Do you accept – as appears on page 4 – that on the 2nd of October 2008 Maria Ramos penned that note at the top of bundle B page 4.</p> <p>MR GAMA: Yes that's her handwriting.</p>
<p style="text-align: right;">Page 62</p> <p>CHAIRPERSON: On page 5.</p> <p>MR GAMA: Yes, and I think it has the same sort of issues.</p> <p>ADV P PRETORIUS SC: Well, it might have the same sort of issues but they are different documents Mr Gama. Is there any explanation for the confusion?</p> <p>MR GAMA: No, I was just asked to refer to the document. I think we may have just made a mistake in terms of which one is the actual document. That is the one that has marked up to 17 or 18.</p> <p>ADV P PRETORIUS SC: Let's look at the doc – are you saying now that the document at page 5 and following is the document that you received and the document that you discussed with Ms Ramos some time in October.</p> <p>MR GAMA: Yes, I think it was during the first week of October.</p> <p>ADV P PRETORIUS SC: Could it have been on the 2nd of October?</p> <p>MR GAMA: It would have been the end of September beginning of - the sense I get is, it was around 28, 29 September because of I remember some of the events related that I was going to the Drakensberg for a conference - actually at the end of September.</p>	<p style="text-align: right;">Page 64</p> <p>ADV P PRETORIUS SC: Do you accept that she instructed Chris to look into this as per the normal processes as would be her duty?</p> <p>MR GAMA: Ja. I accept it.</p> <p>ADV P PRETORIUS SC: If you look at the document at page 5 to page 10 - you are mentioned at the top of the page and you are referred to in the following manner – the document reads "The information is that the company is original from Durban and Mr Siyabonga Gama brought it up to Gauteng for one and other reasons known to him" - that is the allegation there.</p> <p>MR GAMA: Do you say I accept the allegation?</p> <p>ADV P PRETORIUS SC: No, I'm saying that "Do you accept that that is the allegation?"</p> <p>MR GAMA: Ja. That is the allegation.</p> <p>ADV P PRETORIUS SC: And the second time that you are mentioned is on page 10 which you suggested that you be interviewed together with two other persons.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So, the only allegation against you in this document is that you "brought the company from Durban to Gauteng for one and other reasons known to him" – that's the only allegation</p>

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<p style="text-align: right;">Page 65</p> <p>in this document. If you want time to read the document, please feel free to ask that which I presume you already –</p> <p>MR GAMA: On page 5 I'm not mentioned by name but there's this issue of direct access.</p> <p>ADV P PRETORIUS SC: Mr Simonelli having direct access to you? You're not charged for that, are you?</p> <p>MR GAMA: No. I'm not charged for that.</p> <p>ADV P PRETORIUS SC: And who are you charged with the allegation at the top of page 7?</p> <p>MR GAMA: Not correct.</p> <p>ADV P PRETORIUS SC: Ms Ramos didn't dismiss as utter rubbish any charge in relation to your signing a confinement beyond your authority, did she?</p> <p>MR GAMA: No, she did not. But neither did she inform me that there was any other investigation that would be conducted relating to any security contract.</p> <p>ADV P PRETORIUS SC: Would you have expected her to inform you of an investigation into your signing the confinement document at that stage?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: But she didn't</p>	<p style="text-align: right;">Page 67</p> <p>ADV P PRETORIUS SC: Do you accept that in the face of such allegations Transnet is entitled to investigate those issues?</p> <p>MR GAMA: I accept that Transnet is entitled to investigate in the face of that. The only issue that I raise on this matter is that - issues pertaining to my person – there was never any suggestion that I could be involved in any of this.</p> <p>ADV P PRETORIUS SC: I don't understand that answer. Let me put the question to you in this way. You accept – as I understand it – that Transnet is entitled to investigate these allegations concerning the award of the contract to GNS. Do you accept that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: If those investigations reveal misconduct on your part – if they do – misconduct not referred to in this tip-off – you accept – I take it – as the CEO of TFI that Transnet would be entitled to investigate and call to account in relation to that.</p> <p>MR GAMA: Transnet would be entitled to investigate. Transnet would also have to inform me that I am now formally under investigation and then they would investigate – they wouldn't be precluded from doing so.</p> <p>ADV P PRETORIUS SC: And of course if</p>
<p style="text-align: right;">Page 66</p> <p>know anything – how could you expect that?</p> <p>MR GAMA: No, I'm saying after she became aware.</p> <p>ADV P PRETORIUS SC: Well, that Mr Oates informed you of.</p> <p>MR GAMA: No, Mr Oates did not inform me.</p> <p>ADV P PRETORIUS SC: Well, that's a matter we will argue. And of course Maria Ramos only became aware of the implications pertaining to you in relation to your signing of the confinement document when she received the report in February.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: This document deals with serious matters, doesn't it?</p> <p>MR GAMA: It does.</p> <p>ADV P PRETORIUS SC: It suggests that there was underhand activity in relation to the award of the contract to GNS, doesn't it?</p> <p>MR GAMA: Yes. It talks about a number of different companies.</p> <p>ADV P PRETORIUS SC: Amongst other things it suggests that the award of the contract to GNS was underhanded.</p> <p>MR GAMA: Ja. That's what it suggests.</p>	<p style="text-align: right;">Page 68</p> <p>they're entitled to investigate, they're entitled to call to account. Provided they do so fairly in your view any misconduct which is revealed in that investigation.</p> <p>MR GAMA: Yes.</p> <p>[12:34] ADV P PRETORIUS SC: Look at the document please, at 8A and 8B. This is a document that was placed before you for your approval in 2005. Is that correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: Your signature appears on page 8B. It's undated but presumably it was between 26 October 2005 and 4 November 2005.</p> <p>MR GAMA: Probably after.</p> <p>ADV P PRETORIUS SC: But in 2005 presumably, or early 2006.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: It's not really important. Against your signature you make a note "enter into a six month contract and re-assess." Correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: You must have applied your mind to the contents of this document.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You must have read the document.</p>



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<p style="text-align: right;">Page 69</p> <p>MR GAMA: Yes, I read the document.</p> <p>ADV P PRETORIUS SC: And you applied your mind to the extent that you directed that the period of the contract be reduced to six months.</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: Then, if you look at page 8H, this is a document dated the 3rd March 2007.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Now, it was signed by Mr Tobias, the Chairman of the Spoornet Acquisition Council on the 19th January 2007. I presume you accept that.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And the note that he appends to it, he says, "extension reduced to one year instead of two years initially proposed – will test the market in the interim on alternative supplier". Do you see that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: He applied his mind and he decided no, this should be extended for two years as initially proposed but rather for one year. He must have considered the surrounding circumstances, the contract itself and the period and the appropriateness of a two-year contract. You nod your head, is that correct?</p>	<p style="text-align: right;">Page 71</p> <p>ADV P PRETORIUS SC: And then you say, "In the interim let us review whether these services are required. If so, let us go on a public tender process." In other words, you issue an instruction that matters should be closely monitored. Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And you say, "Which will ensure that we have a new contract from 1 July 2007."</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: In other words, present to your mind at this stage is that a new contract should be in place by 1 July 2007. Correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: These matters such as cable theft, acquisitions, I presume are discussed at your weekly meetings.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: You go on to say, "The contract appears very expensive." Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You must have given consideration to the costs and you must have applied your mind to the costs.</p> <p>MR GAMA: Correct.</p>
<p style="text-align: right;">Page 70</p> <p>MR GAMA: Ja, sorry.</p> <p>ADV P PRETORIUS SC: And then you sign on the 3rd March 2007. Do you see that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You append a long note. And you say, "Other than for January, I have not seen a reduction in cable theft". In signing this you must have had regard then to the month to month statistics in relation to cable theft.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And you must have considered them in relation to this request for approval put before you.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You say, "Let us extend this only to the end of June." I put it to you that you must have read this document, you must have seen that the proposal was originally for two years, reduced on Tobias' recommendation to one year but you, having considered all the relevant information, decided that this should only be done to the end of June.</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: And it would be your duty to give such consideration to these requests.</p> <p>MR GAMA: Yes.</p>	<p style="text-align: right;">Page 72</p> <p>ADV P PRETORIUS SC: And concluded that it was expensive. Correct?</p> <p>MR GAMA: I thought it appeared expensive, yes.</p> <p>ADV P PRETORIUS SC: You must have looked at the cost and passed a judgment on the cost. Correct?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: Then you say, "There's a need to have meaningful KPIs", which stands for key performance indicators. Correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So, not only did you consider all the other matters in your note; not only did you have regard to the detailed contents of the document being placed before you, but you also made a remark, gave an instruction in regard to the management of the contract going forward and its contents.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You say that – it says elsewhere in the documentation and I'll refer to it if necessary but you say the cable theft is a very important issue within Transnet.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: It delays trains,</p>

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<p style="text-align: right;">Page 73</p> <p>it affects service delivery?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You were involved in a turnaround strategy at the time?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: It was very important to you as CEO to have regard to and ensure that quite simply cable theft didn't happen.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And this would have been one of the items dealt with at your weekly meetings?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You would presumably have taken the trouble as CEO to discuss these matters too with your subordinates?</p> <p>MR GAMA: Yes, we discussed them regularly and also with our superiors as well.</p> <p>ADV P PRETORIUS SC: Now, this document, certainly at page 8A. Do you have page 8A in front of you?</p> <p>MR GAMA: Yes, I do.</p> <p>ADV P PRETORIUS SC: In the left-hand column, "Reasons for deviating from the prescribed procurement procedures", in other words, where a</p>	<p style="text-align: right;">Page 75</p> <p>ADV P PRETORIUS SC: Would it not concern you as a matter of general management to know that cable theft is being dealt with and how?</p> <p>MR GAMA: Sorry, I think maybe we're talking about two different issues.</p> <p>ADV P PRETORIUS SC: Alright. Let's just, let me be kind, be a bit more explicit and perhaps fairer to you. At least as at the time you read and signed this document you would have known CPI is the only known company that specialises in this field of work and they are already in possession of the relevant databases and information sources to assist Spoornet in curbing this crime.</p> <p>MR GAMA: Yes, that's what was being indicated.</p> <p>ADV P PRETORIUS SC: You would have accepted that surely?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You didn't query it?</p> <p>MR GAMA: The preceding paragraph would also indicate that they were also doing work for Eskom as well.</p> <p>ADV P PRETORIUS SC: Yes, and over the page, it is said in the second box, "CPI is the only</p>
<p style="text-align: right;">Page 74</p> <p>confinement is in issue the reasons for deviating from the prescribed procurement procedures, in other words, open tender procedures have to be fully explained?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You, in signing a consignment, would have to have regard to these reasons and examine them closely to justify a confinement?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And you would do so?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Third bullet states, "The CPI is the only known company that specialises in this field of work. They are already in possession of relevant databases and information sources to assist Spoornet in curbing this crime."</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: As part of your duties and activities as CEO of Transnet Freight Rail, you would have been aware of this information in any event, I presume.</p> <p>MR GAMA: No, it's not information that I would be aware of but the specialist, people who specialise in that would be the ones who would know about this kind of thing.</p>	<p style="text-align: right;">Page 76</p> <p>known company that offers this service."</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: So at the end of December 2005, you were in possession at least of that knowledge?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Then if one goes to page 8H, you've already told Mr Arbitrator that you read the document that you were signing and that you gave it the attention as evidenced by the comments on page 8H.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Were you aware of the fact that the award of the contract to CPI followed a pilot project involving CPI?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Now, we know now from the documents which you've just dealt with and particularly the documents at 8H that on the 3rd March 2007 you approved an extension of the CPI contract until the end of June 2007.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: You gave an instruction that a public tender process should be instituted and that that should be concluded by 1 July 2007?</p>



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<p style="text-align: right;">Page 77</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Is it your evidence that the next occasion on which you became aware of any contractual issues relating to specialised security services was on the 5th December 2007 when you signed the document put before you allegedly by Mr Beattie?</p> <p>MR GAMA: When you say contractual -</p> <p>ADV P PRETORIUS SC: Well, are you saying that the next time - well, you gave evidence, Mr Gama, that you didn't know of any tender process which followed. Do I understand your evidence correctly? And that the first you knew was when Mr Beattie allegedly spoke to you on the 5th December 2007?</p> <p>MR GAMA: Yes, I did not know of the nitty-gritty of the processes but I would have been aware that I had asked on tender, but I never dealt with anything relating to it until the 5th December.</p> <p>ADV P PRETORIUS SC: I don't really understand the words nitty-gritty in this context. They're very precise.</p> <p>MR GAMA: I'm talking about the actual tender processes.</p> <p>ADV P PRETORIUS SC: Did you know that there was a tender process taking place?</p>	<p style="text-align: right;">Page 79</p> <p>March 2007 and the 5th December 2007. It's quite improbable.</p> <p>MR GAMA: I don't find it extraordinary in the sense that I don't deal with tender processes. I don't even sit on these Tender Boards. There are people who are employed to deal with these issues. People would raise these issues with me if maybe operationally there was an issue that was happening and it was because there wasn't a contract, but if they didn't say it's because there's no contract I wouldn't know.</p> <p>ADV P PRETORIUS SC: You wouldn't know?</p> <p>MR GAMA: No, I wouldn't.</p> <p>ADV P PRETORIUS SC: You wouldn't discuss it at your weekly operational meetings?</p> <p>MR GAMA: Unless people actually volunteered to me that the reasons they're having problems is because they don't have contracts.</p> <p>ADV P PRETORIUS SC: You wouldn't ask? You wouldn't say I ordered on the 3rd March that there be a new contract in place on the 1st July 2007, is there? You wouldn't even bother to ask at your weekly operational meetings?</p> <p>MR GAMA: If I recalled it but there were so many things that we needed to deal with, that we were dealing with, so I wouldn't, unless people said to</p>
<p style="text-align: right;">Page 78</p> <p>MR GAMA: No, I was not aware that there was.</p> <p>ADV P PRETORIUS SC: So my proposition then, I put to you again, the next thing you knew of any tender process or any award of any contract was on the 5th December 2007?</p> <p>MR GAMA: Yes, I think though, if I had asked in March that they go out on tender, maybe remotely one would be aware that they should because the process, but I didn't know whether in fact they were conducting the process. I didn't know.</p> <p>ADV P PRETORIUS SC: Sorry, you're saying to Mr Arbitrator that once you had signed this document on the 3rd March 2007, commenting on the need to reduce cable theft, directing a public tender process, instructing meaningful KPIs to take place, you knew nothing of any tender process, you knew nothing of any award of any contract on whatever basis until the 5th December 2007?</p> <p>MR GAMA: Correct.</p> <p>ADV P PRETORIUS SC: I put it to you that that's an extraordinary piece of evidence, Mr Gama. That you as Chief Executive Officer would simply be ignorant of anything that happens in relation to tenders, of confinements, or whatever process, between the 3rd</p>	<p style="text-align: right;">Page 80</p> <p>me, look, the reason for the problem is that we don't have a contract. I wouldn't know. I would ask them why has this thing gone up and if people just said no, it's because of the criminal element that's gone up, which seems to be the issues that people were discussing that the criminals are moving from one area to the next. I wouldn't chase up on security contracts. There are general managers who deal with these issues and if it was a big issue they would come to me and say we have an issue here and then I would still have to ask them what is it that you are doing about it. Is there something that you need me to help with in order for you to execute? But they were, on the day to day issues relating to that, fell under the ambit of the Chief Operating Officer and the general managers concerned.</p> <p>[12:54] MR P PRETORIUS: Mr Gama, I presume you accept as a CEO of an operating division of Transnet, it is your duty proactively to deal with key issues under your jurisdiction such as cable theft and how it is dealt with?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And it is not sufficient for a Chief Executive Officer just to wait for people to raise issues with him? It is your duty to lead?</p>

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MR GAMA: That is correct. The issue of contracting was not one of the issues, but cable theft we dealt with quite actively.

ADV P PRETORIUS SC: So can we accept in addition that the instruction that you gave that a new contract should be placed in place on 1 July 2007, you never followed that issue up with those beneath you?

MR GAMA: No, I would not have derived it, because once I've asked them to do it, I would then have assumed that they started that process.

ADV P PRETORIUS SC: Were there problems in the procurement department at the time?

MR GAMA: Yes, there were many problems.

ADV P PRETORIUS SC: Was that an issue requiring attention?

MR GAMA: Yes, it was an issue that the CFO or I think the CPO was new -

ADV P PRETORIUS SC: It was priority issue?

MR GAMA: - At that time. So these were issues that they were faced with.

ADV P PRETORIUS SC: Procurement and the problems within procurement at the time were a priority issue within Transnet Freight Rail at the time?

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MR GAMA: Correct.

ADV P PRETORIUS SC: And you still say that you did not feel it necessary to follow up on an instruction you give that there should be an open tender process and a contract in place by 1 July 2007? I find that most improbable.

MR GAMA: No, I did not specifically follow up whether it was happening. I always knew that when you'd asked the right General Managers to deal with an issue, they'll deal with them. We had very senior people dealing with these issues at the level of the CFO and the CPO.

ADV P PRETORIUS SC: So you trusted them entirely?

MR GAMA: Yes, it is my style that once we have the correct people in a particular area, then I should indicate to them what our requirements are. I am not a control freak. I give them the space to act. I direct in terms of what it is that is required from them and then I expect of them to execute and then periodically in terms of whatever KPI that we've agreed with them, either at the end of the year or during our monthly meetings or at our half-year review, we would then have detailed discussions. And I always invite them that whenever you are having any difficulty, raise it

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with me.

ADV P PRETORIUS SC: Mr Gama, it is precisely because there were such problems with procurement within Transnet Freight Rail at the time that you couldn't rely absolutely on your managers.

MR GAMA: I don't think it is true to say you couldn't rely on the managers. They were there to actually execute the work. Procurement for instance we had a 24 month project called Operation Clean-up which we put into place. So we always knew that whatever the issues were, they were being diminished, but they wouldn't overnight disappear.

ADV P PRETORIUS SC: But it was necessary to have Operation Clean-up in procurement precisely because the system wasn't operating properly?

MR GAMA: That is correct. And that is why we brought in new people.

ADV P PRETORIUS SC: Would this be a convenient time?

CHAIRPERSON: you know that you can't discuss the matter now?

MR GAMA: Ja.

[HEARING ADJOURNS HEARING RESUMES]

[14:03] ADV P PRETORIUS SC: Mr Gama, further to the questions asked of you this morning, we know that

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on the 3rd of March 2007 you signed a procurement document authorising the extension of the CPI contract to the end of June 2007. Am I correct?

MR GAMA: Yes.

ADV P PRETORIUS SC: And we know that you instructed that a new contract pursuant to open tender be concluded before 1 July 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: Were you aware of the fact that after the end of June 2007 CPI continued to perform these services?

MR GAMA: Yes. I became aware of it when I did my investigations in July.

ADV P PRETORIUS SC: July of what year?

MR GAMA: 2009.

ADV P PRETORIUS SC: Were you aware - you had extended the contract or instructed the extension of the contracts to the end of June 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: Were you aware that after that CPI continued to do the services.

MR GAMA: Yes. I became aware that they had a month to month contract.

ADV P PRETORIUS SC: You became aware of that in July 2009.

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<p style="text-align: right;">Page 85</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: At the time in 2007 did you know who was doing the specialised security service contract? After June?</p> <p>MR GAMA: No. I didn't specifically know what – it is common practice in Transnet that if you haven't finalised tender processes wherever you have can continue subject to following certain procedures with the tender board.</p> <p>ADV P PRETORIUS SC: Oh you say you didn't specifically know. Did you know or didn't you know?</p> <p>MR GAMA: No. I didn't know.</p> <p>ADV P PRETORIUS SC: After June you didn't know who was performing the services.</p> <p>MR GAMA: No. I didn't know.</p> <p>ADV P PRETORIUS SC: And you already told Mr Arbitrator you didn't know whether any procurement process had been put in place.</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: So, you wouldn't have known that – it appears from B9, bundle B1 page 9 – you wouldn't know that this – according to your evidence – that this tender had ever been issued.</p> <p>MR GAMA: No. I wouldn't know.</p>	<p style="text-align: right;">Page 87</p> <p>Some of them I never even met. I don't know them.</p> <p>ADV P PRETORIUS SC: Well, Mr Senamela you certainly knew well.</p> <p>MR GAMA: Yes. I knew Mr Senamela, Naidoo and Nyanda.</p> <p>ADV P PRETORIUS SC: And you would have presumably kept an eye on Mr Senamela and his performance at the time.</p> <p>MR GAMA: Not really. He didn't report to me. Mr Senamela would only report to me if there were certain exceptions that had happened and these would be exceptions that needed my attention or exceptions which I needed to also report to Group – serious things that would –</p> <p>ADV P PRETORIUS SC: You would have met him at the weekly meetings.</p> <p>MR GAMA: No. Mr Senamela was not one of the people at the weekly meetings.</p> <p>ADV P PRETORIUS SC: Did Mr Nyanda attend the weekly meetings?</p> <p>MR GAMA: No.</p> <p>ADV P PRETORIUS SC: Who did?</p> <p>MR GAMA: Mr Beattie.</p> <p>ADV P PRETORIUS SC: Mr Beattie attended the weekly meetings?</p>
<p style="text-align: right;">Page 86</p> <p>ADV P PRETORIUS SC: At page 24 there is a list of names – Mr Nyanda, Mr Khanye, Mr Naidoo, Mr Motebe, Mr Martin and Mr Nxumalo – who followed you was Mr Senamela – do you see that?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: All these people worked underneath you in Transnet Freight Rail.</p> <p>MR GAMA: They work inside Transnet Freight Rail but not underneath me.</p> <p>ADV P PRETORIUS SC: But everyone at Transnet Freight Rail is underneath you.</p> <p>MR GAMA: Ultimately, yes.</p> <p>ADV P PRETORIUS SC: Yes. And all these people at least would have known.</p> <p>MR GAMA: Yes. They were dealing with the issues.</p> <p>ADV P PRETORIUS SC: None of them mentioned to you at the time that there was a procurement process under way.</p> <p>MR GAMA: No.</p> <p>ADV P PRETORIUS SC: And you didn't enquire.</p> <p>MR GAMA: Most of this people whom – they don't report directly to me. They will just talk to me by exception or if there was key issues to be raised.</p>	<p style="text-align: right;">Page 88</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: So you wouldn't have known on your evidence that on the 23rd of August 2007 four bidders were short-listed for the first tender.</p> <p>MR GAMA: No. I wouldn't have known.</p> <p>ADV P PRETORIUS SC: And you wouldn't have known on your evidence that those four short-listed bidders were invited to make presentations on the 31st of August 2007.</p> <p>MR GAMA: No. I wouldn't have known.</p> <p>ADV P PRETORIUS SC: That's according to your evidence. And at page 21 – sorry page 28 of bundle B1 – the head office acquisition counsel seeks authority to issue a confined tender to four short-listed companies who submitted proposals. That's the tender process which you say you were completely ignorant of.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And then you've heard evidence that somehow in October 2007 this whole process was stopped.</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: And the allegation is that the instruction came from Transnet at Group level. You know that now?</p> <p>MR GAMA: Yes. I know that now.</p>

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ADV P PRETORIUS SC: So it seems that Transnet at Group level must have known about this process. People under you knew about this process but you didn't.

MR GAMA: That's what people at Group level who were dealing specifically with the security contracts.

ADV P PRETORIUS SC: And the fact that this process was stopped when it was in your own words "nearing completion" never came to your knowledge.

MR GAMA: No. It never came to my knowledge.

ADV P PRETORIUS SC: And it appears from the evidence that at this time management underneath you in Transnet Freight Rail were communicating with GNS regarding the possibility of GNS becoming the institution to provide specialised security services. You know that now?

MR GAMA: Yes. I know that now.

ADV P PRETORIUS SC: Are you saying that –

CHAIRPERSON: When you say at this time

ADV P PRETORIUS SC: At the beginning of October – the first days of October 2007 – for example

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at page B61 it seems that Mr Sipho Kanye receives the profile of General Nyanda's Security Risk Advisory Services on the 3rd of October 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: So we know – if one looks at B32b – that as at 15 October 2007 there is in place a tender process for the supply of specialised security processes – services rather.

MR GAMA: Yes.

ADV P PRETORIUS SC: We know now from the communications – and it's clear on page 32B and 32C – that somehow or other this process is brought to a halt.

MR GAMA: Yes.

ADV P PRETORIUS SC: We know now – according to the documentation – that prior to that – prior to that process being stopped – GNS came onto the scene.

MR GAMA: Yes. I know that now.

ADV P PRETORIUS SC: And you say you didn't know anything about this at the time.

MR GAMA: No.

ADV P PRETORIUS SC: We know too, Mr Gama, that four bidders had been short-listed during the open tender process that took place in 2007. Is that correct?

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MR GAMA: Yes. That we now know.

ADV P PRETORIUS SC: We know that one of the bidders – G4 Security – had been instructed to audit security services within Transnet and that it could therefore not properly be considered. Correct?

MR GAMA: Yes.

ADV P PRETORIUS SC: We know that there was nothing to prevent that original tender process from reaching its conclusion however.

MR GAMA: No. Nothing could prevent it.

ADV P PRETORIUS SC: In fact, it was very strange that this process was brought to a halt – quite improper in fact.

MR GAMA: Yes. We now know that.

ADV P PRETORIUS SC: In fact, it wouldn't have been difficult at any stage to establish those facts upon enquiry because the documents must've been there. Persons underneath you must have known that there were four short-listed bidders – one disqualified – nothing to prevent that process from reaching its ordinary conclusion which was near conclusion as at October 2007. And you concede – as I understand it – that it's most irregular that it was indeed stopped.

MR GAMA: That's correct.

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ADV P PRETORIUS SC: You knew nothing of it?

MR GAMA: No. I didn't know anything about it.

ADV P PRETORIUS SC: And it was stopped shortly after GNS had started communicating with managers under your jurisdiction.

MR GAMA: Yes.

ADV P PRETORIUS SC: Now, shortly before that there had been – to your knowledge I understand – a sponsorship of a General Nyanda golf day.

MR GAMA: Yes.

ADV P PRETORIUS SC: And what was the sponsorship for?

CHAIRPERSON: That golf day – by the way – was scheduled for the 17th and 18th of August 2007.

ADV P PRETORIUS SC: Do you recall that?

MR GAMA: Yes. I think those were the dates ja.

ADV P PRETORIUS SC: And you were aware of that?

MR GAMA: I was aware of the golf day yes.

ADV P PRETORIUS SC: You were aware of



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General Nyanda's association with that?

MR GAMA: Yes.

ADV P PRETORIUS SC: Do you know what the sponsorship was?

MR GAMA: The sponsorship was basically for a Colchestershire Home - it's a charity home - an organisation that deals with children. That was my understanding.

ADV P PRETORIUS SC: Were you in exile in Swaziland.

MR GAMA: In exile?

ADV P PRETORIUS SC: Did you go to Swaziland prior to 1994?

MR GAMA: Yes. I was in Swaziland prior to 1994.

ADV P PRETORIUS SC: Was General Nyanda also in Swaziland prior to 1994?

MR GAMA: I believe so but I never met him.

ADV P PRETORIUS SC: Did you know that you attended the same school?

MR GAMA: No. I didn't know that.

ADV P PRETORIUS SC: According to the cell phone records which are admitted you were in telephonic communication with General Nyanda on the 6th

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of July 2007?

MR GAMA: Possibly yes.

ADV P PRETORIUS SC: On the 15th of July 2007?

MR GAMA: Possibly.

ADV P PRETORIUS SC: On the 27th of August 2007?

MR GAMA: Yes.

ADV P PRETORIUS SC: And on the 1st of December 2007?

MR GAMA: Yes.

[14:23] ADV P PRETORIUS SC: Certainly on the 1st of December 2007 you were about to sign a confinement document in favour of General Nyanda Security.

MR GAMA: Yes.

ADV P PRETORIUS SC: And as we understand your evidence this morning you gave an instruction to your counsel with the deliberate intention of distancing yourself from any acquaintance with General Nyanda.

MR GAMA: No, I didn't want to distance myself from any acquaintance with General Nyanda. What was being inferred was a close friendship which I know doesn't exist. In fact, he's simply not in the age range that he would become a close friend of mine.

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ADV P PRETORIUS SC: No evidence of given of a close friendship. Neither Mr Oates nor Mr Naicker gave any evidence of any close friendship.

MR GAMA: But they were inferring that there might have been some kind of an improper relationship and -

ADV P PRETORIUS SC: So you therefore gave an instruction to your counsel to distance yourself from General Nyanda, the effect of which was (a) untrue, and (b) was intended to distance yourself from General Nyanda. That was your evidence, Mr Gama.

MR GAMA: Ja, I was wrong in terms of what their interpretation of it was but my intention, I have never said that he is not my acquaintance. I have indicated even in the court documents that I know him.

ADV P PRETORIUS SC: So what was the incorrect instruction you gave to your counsel?

MR GAMA: No, there was the use of the word friendship which implied or implicated that we were very close friends, which I'm saying is untrue.

ADV P PRETORIUS SC: Well, no-one gave that evidence, Mr Gama.

MR GAMA: Well, it was an inference and an implication.

ADV P PRETORIUS SC: Nobody even made

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that inference. It was an inference made in your own mind, if at all.

MR GAMA: Well, that is the conclusion that I drew from what they were saying.

ADV P PRETORIUS SC: You drew that conclusion and then you deliberately gave your counsel a false instruction in that regard. Why?

MR GAMA: It was not a deliberate false instruction. All I intended to do at the time was to say there's an insinuation of a close friendship which doesn't exist.

ADV P PRETORIUS SC: You gave your counsel a version on the conversation with Mr Naicker and Mr Oates that was wrong and your counsel put that version very clearly in the same terms to two witnesses.

MR GAMA: It was not a wrong version. I made an interpretation in terms of an inference of close friendship. I do know a lot of people who hold very high positions. They could be chief executives of banks or people in corporate South Africa but I certainly don't hold them to be friends and therefore that is all I merely wanted to portray an indicate.

ADV P PRETORIUS SC: Mr Gama, I would ask you to listen to the question very carefully and if possible answer it directly. Your counsel put it not to

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one witness but to two witnesses, that you knew General Nyanda like any other member of the public would know him. Do you recall that proposition being put?

MR GAMA: That's correct, yes.

ADV P PRETORIUS SC: You revealed to Mr Arbitrator this morning that that version was put on your instruction.

MR GAMA: That's correct.

ADV P PRETORIUS SC: It was put not once, on the 15th January, but several days later too to Mr Naicker on the 21st January. The same version.

MR GAMA: I could not recall the use of the word friend.

ADV P PRETORIUS SC: Mr Gama, the version that you knew General Nyanda like any other member of the public would know him was put to Mr Oates on the 15th January, correct?

MR GAMA: That's correct, yes.

ADV P PRETORIUS SC: It was put in very clear terms in response to a contrary version given by Mr Oates, correct.

MR GAMA: That's correct, yes.

ADV P PRETORIUS SC: It was put to Mr Naicker six days later on the 21st January in the same terms in relation to the same evidence. Is that correct?

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MR GAMA: Yes, as I've indicated it was because I understood them to be inferring a relationship that was much closer than what actually exists.

ADV P PRETORIUS SC: The version that your counsel put on your admission this morning on your instructions was not correct.

MR GAMA: It was not correct and as I've indicated I apologise because I was wrong.

ADV P PRETORIUS SC: You apologise because - sorry.

MR GAMA: It was because of the inference that I thought they were making because it is just not possible that General Nyanda and myself would be close friends and also in terms of what you've quoted, friends don't speak three or four times a year on the phone. They probably speak on a weekly basis.

ADV P PRETORIUS SC: Mr Gama, you're quite entitled to explain your answers to questions. I can't stop you but I would ask you to answer the questions that I do ask. The version that your counsel put on the 15th January was put on your instructions.

MR GAMA: That's correct.

ADV P PRETORIUS SC: It was incorrect. So incorrect that it warrants an apology.

MR GAMA: That's correct.

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ADV P PRETORIUS SC: Between the 15th January and the 21st January if you'd had any doubts about the propriety or the appropriateness of putting an incorrect version or allowing an incorrect version to be put to a witness under oath you did not deem it fit to retract. It was put again on the 21st January.

MR GAMA: Ja, it was put on the basis that I could not recollect the use of the word friend and my interpretation of it was that they were putting him as a much closer friend than he actually is. To me he's basically an acquaintance, somebody I know, somebody I've played golf with in the past.

ADV P PRETORIUS SC: Do you concede that the version put by your counsel was incorrect and misleading?

MR GAMA: I concede that I was wrong in putting it that way. It was largely based on the inference that I saw.

ADV P PRETORIUS SC: And of course, the telephone transcripts showing that you had indeed had contact with General Nyanda were handed over on the 26th January to you and admitted by you. And it was only after that that the retraction came.

MR GAMA: Even without the transcripts, if it had been put to me I would not have said that I'd

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never spoken to him on the phone.

ADV P PRETORIUS SC: And I'm going to put it to you that the only reason the retraction came was because the cell phone records showed that your version put by your counsel was false. That's the only reasonable inference we can draw.

MR GAMA: That's not correct. Even if I'd been asked without any records I would have readily been able to volunteer that information that we talked on the phone.

ADV P PRETORIUS SC: And you say there's nothing untoward, no untoward inference that can be drawn from your actual relationship with General Nyanda?

MR GAMA: No, there's nothing untoward.

ADV P PRETORIUS SC: Then why not say that then? Why not say quite simply I've spoken to him a few times on the phone. I've played golf with him but that's the limit. Why not tell the truth, if the truth is innocent?

MR GAMA: No, no, look, my counsel was aware that I've spoken to the general, that was not the issue. It was really just around the inference that Mr Oates was making.

ADV P PRETORIUS SC: It's a serious



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matter when counsel puts to a witness that what you're saying under oath is not correct. You know that, don't you, Mr Gama?

MR GAMA: I think it was not an issue of trying to hide anything.

ADV P PRETORIUS SC: If you weren't trying to hide anything why not give your counsel the correct instruction?

MR GAMA: It was really just to say some of the words that were used and the inference that was being made to me sounded incorrect because it made an improper inference in my mind but as I've indicated I was wrong and I apologise for it.

ADV P PRETORIUS SC: Mr Gama, if your relationship with General Nyanda was entirely innocent, then I put it to you there's no reason why you couldn't have given your counsel the correct instruction.

MR GAMA: There wasn't, there is nothing that is not entirely innocent in my relationship with Mr Nyanda.

ADV P PRETORIUS SC: That's what I'm putting to you.

MR GAMA: All that I was indicating was that the inferences of both Mr Naicker and Mr Oates was that he was a close friend when in fact he's not.

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ADV P PRETORIUS SC: Let's make it clear once again. They didn't say so in their evidence. You heard their evidence.

MR GAMA: Yes, they said I'd said he was a friend and I couldn't recall that. They'd asked me whether I knew him and I said that I know him.

ADV P PRETORIUS SC: You said you knew him like any other member of the public. That's what your version was. But, Mr Gama, please listen to the question when I ask you and try and answer it. The question to you is that, if your relationship with General Nyanda was entirely innocent in fact, then there is absolutely no reason why you couldn't have told your counsel that and allowed him to put the correct version before the arbitrator. Am I correct?

MR GAMA: No, you are not correct. My relationship with Mr Nyanda is above board and there isn't anything untoward about it.

ADV P PRETORIUS SC: And if that is so, you could have told your counsel the correct version, am I not correct in that?

MR GAMA: It's just something that I never thought was a very important issue. I worked more on the inferences that they were making.

ADV P PRETORIUS SC: Mr Gama, by your

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own admission you thought it was so important to distance yourself from General Nyanda to allow your counsel to mislead, not once but twice, this arbitrator.

MR GAMA: I did not want my counsel to mislead anybody about anything.

ADV P PRETORIUS SC: You've just admitted that an incorrect version was put forward and you've apologised for that.

MR GAMA: Yes.

ADV P PRETORIUS SC: Now I'm going to put the question once more to you and I'm going to request you to answer it once more. If your relationship was in truth and in fact with General Nyanda an innocent one, there was nothing to prevent you from telling the truth to your counsel and allowing your counsel to put the true version, as you've put it today.

MR GAMA: It was just a matter of what I thought they were concluding, which I thought was untrue.

ADV P PRETORIUS SC: Today you were telling Mr Arbitrator that one cannot infer anything untoward in the relationship. One cannot infer a friendship, from what you now say is the correct version.

MR GAMA: Yes.

ADV P PRETORIUS SC: And I'm going to

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put it to you one last time, why couldn't you say that to your counsel?

MR GAMA: I did.

ADV P PRETORIUS SC: No, you didn't, Mr Gama. By your own admission you only told him after the cell phone records had been revealed.

MR GAMA: No, that's not correct. I've never said I do not know General Nyanda.

ADV P PRETORIUS SC: You said to your counsel that you knew General Nyanda as any other member of the public would know him. That's what you told your counsel. The precise proposition was you knew General Nyanda like you, Mr Naicker, would know him because he's a public figure. That was the proposition. That was an incorrect proposition based on incorrect information given to your counsel by you.

MR GAMA: I've never talked to Mr Naicker about General Nyanda. I only had a discussion in the presence of Mr Naicker with Mr Oates.

ADV P PRETORIUS SC: Well, then, let's not split hairs. The proposition put by your counsel was that you, Mr Gama, knew General Nyanda like you, Mr Oates, would know him because he's a public figure.

MR GAMA: Yes, I think precisely why I've apologised is because I adduced the inference to

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indicate that his relationship with me is nowhere close to the inference of friendship that they were indicating.

ADV P PRETORIUS SC: We know that General Nyanda called you when you were suspended. He called you to commiserate with you on the death of a family member. He in fact called you more than four times; he called you several times beyond 2007 and 2009. But in any event, Mr Gama, I'm not going to pursue this matter any further. You gave, at best for you, an incorrect and we will argue a false version to your counsel for which you've now apologised to the arbitrator.

MR GAMA: Yes, and I've given the reasons for that.

ADV P PRETORIUS SC: You've given the reasons, but the proposition you concede, subject to your reasons.

MR GAMA: That's correct. It was based on the inference.

ADV P PRETORIUS SC: We're going to submit in argument that the version that you give today is true. There was no reason why you couldn't have been honest with your counsel so that he could put a correct version.

MR GAMA: There wasn't anything on my

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that if that information was to be placed before the arbitrator it was up to your counsel to ask you and not for you to volunteer it in the face of what was put to Oates and Naicker?

MR GAMA: My counsel will also indicate that when he asked me whether I'd spoken to General Nyanda I did indicate without any hesitation that of course I do speak to him from time to time.

ADV P PRETORIUS SC: That was after the cell phone records had been produced, is that not so?

MR GAMA: I think it was around that time, ja.

ADV P PRETORIUS SC: It was after, Mr Gama?

MR GAMA: I can't remember whether he showed it to me or he asked me.

ADV P PRETORIUS SC: But it was at the time the cell phone records had been produced?

MR GAMA: Ja, but as I say, anybody could have asked me that, even without any cell phone records I would have indicated -

ADV P PRETORIUS SC: Mr Gama, please, if you would just listen to the proposition that I'm putting to you. Are you saying that it wasn't up to you to volunteer the information when the issue arose in

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part that said I do know him or I do not talk to him. You could have asked me and I would have indicated that I do talk to him. All that I have taken exception of was the seeming conclusion that there was an improper relationship or that inference that was being made.

ADV P PRETORIUS SC: Mr Gama, are you prepared to concede that if in fact your relationship with General Nyanda was an innocent relationship to which you testified this morning, there's absolutely no reason why you couldn't have told your counsel that?

MR GAMA: I'm indicating that there was at no stage when I withheld the information that I knew General Nyanda.

[14:42] ADV P PRETORIUS SC: I'm going to argue that you're not answering the question I put to you and I've put it to you perhaps too many times for anyone to be very patient with it. But let's move on. Mr Gama, are you saying to the arbitrator now that in the face of the evidence of Mr Naicker and in the face of the evidence by Mr Oates, given six days apart, it was up to your counsel to ask you whether you'd spoken on the phone and then you would have told him?

MR GAMA: It was not a matter that we really discussed.

ADV P PRETORIUS SC: Are you saying

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relation to Mr Oates and Naicker and a deliberately false version we will argue was put? But that it was up to your counsel to ask you?

MR GAMA: No, it was not something that I was thinking about in the context of all the things that we were thinking about.

ADV P PRETORIUS SC: So when the version was put on the 15th January and the version was put again on the 21st January you didn't give it much consideration?

MR GAMA: No, I didn't.

ADV P PRETORIUS SC: Mr Senamela was appointed on the 23rd July 2007 as a manager in Transnet Freight Rail.

MR GAMA: I wouldn't know the date.

ADV P PRETORIUS SC: Is that more or less correct?

MR GAMA: Probably.

ADV P PRETORIUS SC: And you testified that you at least had a hand in his appointment?

MR GAMA: Yes.

ADV P PRETORIUS SC: He was new in the job.

MR GAMA: Yes.

ADV P PRETORIUS SC: In the period from

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July 2007 for the next two months?

MR GAMA: Ja, normally we give three months' probation.

ADV P PRETORIUS SC: Yes, this was the time at which the tender process which you allege you knew nothing of was taking place? Correct?

MR GAMA: Yes.

ADV P PRETORIUS SC: You would, I presume, as a responsible chief executive officer, have kept an eye on his progress?

MR GAMA: Yes, I did get reports from time to time that since he had come in there seemed to be a lot of feedback and reporting in terms of security issues and the fact that he knew quite a lot of the other entities that had similar problems.

ADV P PRETORIUS SC: At the time cable theft was a very important issue for you.

MR GAMA: It was one of the issues.

ADV P PRETORIUS SC: That was one of his responsibilities?

MR GAMA: Yes.

ADV P PRETORIUS SC: Dealing with cable theft, was it?

MR GAMA: Yes.

ADV P PRETORIUS SC: You would

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undoubtedly have discussed the matter with him after the 23rd July 2007, whilst he was as it were finding his feet in Transnet Freight Rail.

ARBITRATOR: Discussed what matter with him, cable theft?

ADV P PRETORIUS SC: Cable theft and how it was being dealt with.

MR GAMA: I don't recall whether I did but if there was a need for me to do so I would have but Mr Beattie was also seized with that particular issue as well as the Chief Operating Officer. It was a matter that everyone in operations was seized with.

ADV P PRETORIUS SC: You would have recalled that just a few months earlier you had instructed that a tender process be put in place, correct?

MR GAMA: I don't think I would have recalled or not recalled, I don't know the precise issues around that but it was not really a matter that I thought that people like Senamela would be dealing with. It's largely a procurement issue.

ADV P PRETORIUS SC: Certainly he would be concerned?

MR GAMA: About cable theft? We were all concerned.

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ADV P PRETORIUS SC: And you say you would have discussed it if the occasion arose with him and a number of other senior managers within Transnet Freight Rail?

MR GAMA: Yes.

ADV P PRETORIUS SC: And in March 2007 you had instructed that a tender process be put in place to be concluded by 1 July 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: And are you still persisting in your evidence that neither with Senamela or any other senior manager you discussed the fact that a tender process was in place at the time to replace CPI?

MR GAMA: No, I've never discussed with anybody about tender processes.

ADV P PRETORIUS SC: Mr Beattie signed his termination agreement on 5 December 2007, that is the evidence.

MR GAMA: I think -

ADV P PRETORIUS SC: 6 December, rather. You signed, I'm sorry, on the 5th December 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: And you signed the confinement document on the same day and you say Mr Beattie attended.

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MR GAMA: Yes.

ADV P PRETORIUS SC: Why was Mr Beattie dismissed?

MR GAMA: Mr Beattie left because he - when we put it to him that he had been overwhelmed by the size of the problems that we had on the safety side at Transnet Freight Rail and we had indicated to him that we rather wanted him to deal with specific projects he then said he wanted to go home and think about it. When he came back he said no, he wanted to either do his full job as he was employed for or to leave so the only option really that we had was to then say to him let us rather then part ways because he didn't want to deal with it in the manner in which we were discussing and quite clearly to us it appeared that he was overwhelmed by the issues. But the entire organisation I think, you know, also understood that the issues were big, issues of safety.

ADV P PRETORIUS SC: In short, he was incapable of performing the tasks for which he was appointed?

MR GAMA: It was not incapacity. As I've indicated, Mr Beattie was a world-class safety expert but he had worked in environments where there were not as much discontinuities as we had and in terms of the methodology that he was using, which is a well-known

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safety methodology which is associated with behaviour and culture, he wanted to start things from this end and finish them and then go to the next one and we were seized with all of these issues where we had up to 18 hotspots throughout the country and we wanted to infuse the methodology, either through training or further John Beatties as it were so that we could have a faster impact.

ADV P PRETORIUS SC: It's clear from your evidence, Mr Gama, that Mr Beattie couldn't cope with the size and scope of the tasks that had been presented to him.

MR GAMA: Yes, I did indicate he was overwhelmed by it and the environment that he found himself in. He had worked largely in environments where the issues had not been too big, but also the geography, the size and geography of the Freight Rail, given his energy levels as well, was not – it was just too big for him. But he was not a fool or he was not somebody who didn't have the capacity to do the work but he couldn't do it within the time frame that the organisation expected him to do it.

ADV P PRETORIUS SC: So, on the 5th December, when on your version he presented the confinement document to you, his departure was imminent?

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He was due to depart in a day or so?

MR GAMA: At the time when we met with him he had not indicated in terms of what he was going to do. I think he would have indicated after he left with the document that his thought process was that he was leaving. But when he came in I had initially thought that he was coming in to discuss those issues, but I knew we were only meeting with him later on that afternoon.

ADV P PRETORIUS SC: The document signed on the 5th December 2007 and its contents must have been known to you before the 5th December 2007.

MR GAMA: Which document?

ADV P PRETORIUS SC: The document, the separation agreement.

MR GAMA: No, no, we only prepared that document – it's really a very standard document that the HR people have. We only prepared that document when he indicated to me that his thought process was he wasn't going to take a project role but he had decided that it was better for him to leave.

ADV P PRETORIUS SC: When was the agreement of 15 months' pay reached?

MR GAMA: It must have been reached on the afternoon of the 5th.

ADV P PRETORIUS SC: The 5th December?

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MR GAMA: Yes, yes.

ADV P PRETORIUS SC: So was that a negotiation that took place on the 5th December?

MR GAMA: Yes.

ADV P PRETORIUS SC: Are you saying that document in its entirety was prepared on the 5th December?

MR GAMA: Yes.

ADV P PRETORIUS SC: You must have known on the 5th December that his departure was under consideration.

MR GAMA: After I had met with him and he'd indicated that he had decided not to accept a project management role, I had then made a phone call to the Chief Operating Officer, to indicate that – the Chief Operating Officer was aware that we were having these discussions. I had then made a phone call to say John had indicated that if he leaves, because of his advanced age we needed to at least try and meet him somehow in terms of his pension because he was going on pension after a particular period. We then agreed with John that, when I spoke to him, I said, look, a maximum of 15 months because he wasn't taking the 12 months. He then agreed quite reluctantly. In fact, I think he had wanted to go 21 months. He had indicated what his, when his

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retirement would be. He was quite reluctant but at the same time he understood that we needed to move on.

ADV P PRETORIUS SC: These discussions must have begun prior to the 5th December 2007 is what I'm putting to you. It's quite inconceivable that all this was discussed on the 5th.

MR GAMA: No, no, I met him on the 4th December.

ADV P PRETORIUS SC: What was discussed on the 4th?

MR GAMA: On the 4th December is the proposition that I put to him, whether we reduce the scope of his responsibility or we part ways and he had to go home and sleep over it.

ADV P PRETORIUS SC: So on the 4th December his possible departure related to his inability to deal with the full scope of his mandated activities was under discussion?

MR GAMA: Yes.

ADV P PRETORIUS SC: And do you now have a clear recollection that on the afternoon of 5th December the package was finalised, when you signed the separation agreement.

MR GAMA: Yes, when I signed it it must have been finalised, yes.



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ADV P PRETORIUS SC: You say that Mr Beattie came to see you on the 5th December and he was waiting outside your office?

MR GAMA: Yes.

ADV P PRETORIUS SC: He said to you that your urgent attention was required.

MR GAMA: That's correct.

ADV P PRETORIUS SC: And you say you signed the document at page 120H of Bundle B1 and at the time you signed it you looked only at page 120H?

MR GAMA: In terms of the document that he brought relating to this.

ADV P PRETORIUS SC: This is the only document you looked at?

MR GAMA: Yes.

ADV P PRETORIUS SC: And you signed on the 5th December according to you.

MR GAMA: Yes.

ADV P PRETORIUS SC: Of course, this document does in fact say at the bottom of the page that it's a confinement document. Do you see that?

MR GAMA: Yes, it's in very small print.

ADV P PRETORIUS SC: Right. And if you look at the signatures on page 120H, Mr Lloyd Tobias was

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the matter comes before you. This is the only page you read. Did you even read this page?

MR GAMA: Well, in terms of the process, as I indicated earlier, I looked at the fact that it has gone to acquisition council, he showed me various processes in terms of it having gone up to tender and we had a general discussion – a short discussion about a few issues relating to the actual documents. I was satisfied from a process perspective and what he was telling me that it had gone up to tender and that the tender board had also dealt with the issue and the processes, so I don't think I would have of necessity paid too much attention to the actual dates, in terms of when people had signed it.

ADV P PRETORIUS SC: You were told on your version by Mr Beattie, that you had to sign there and then, the matter was urgent.

MR GAMA: Yes.

ADV P PRETORIUS SC: If you look at one page, page 128 and it shows that over a period of one month prior to that, the acquisition council had appended signatures to this document. Did you query – I'm asking you again – did you query why it was so urgent?

MR GAMA: I did not query why it was so urgent. When Mr Beattie indicated to me, when he came

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the last person to sign it before you. It looks like the 23rd November 2007.

MR GAMA: Yes.

ADV P PRETORIUS SC: Did you query why the matter was so urgent that it had to be done within the space of five to 10 minutes? When at least 12 days had elapsed between Mr Tobias' signature and yours and the first signature was on the 8th November 2007.

[15:02] MR GAMA: When John came to see me, he indicated that there was this matter that he had not been able to deal with. I think he had omitted to deal with it or he had been somewhere. Then he indicated to me about the urgency. We knew within the organisation about some of these issues and it's not inconceivable that even probably the night before there could have been cable theft that took place and he then indicated that this was urgent. So he was not indicating to me something that I was not familiar with. He was indicating to me something that I was familiar with, so there wasn't any reason for me to doubt anything that he was indicating to me, because it was the truth and we were just faced with some of those issues at the time.

ADV P PRETORIUS SC: Mr Gama, I'd ask you to look at the first signature on page 128. It's dated the 8th of November 2007. Nearly one month later

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with the document to me, the actual date of the acquisition council would have been a week or 10 days earlier, which is the 23rd, but when he came to me, he was indicating that look, here is a matter that is urgent that he had omitted to give to me and that, in fact, the contractors had to move on site and we needed to deal with it urgently and it was a matter that I was familiar with, the fact that we were having this particular problem.

ADV P PRETORIUS SC: But it was not so urgent that you could have spent half an hour to an hour with in that morning looking at the documents?

MR GAMA: Mr Beattie had not been scheduled to come and see me, that is why I found him sitting outside and at the time I was just walking out of my office and I saw him there, and I said, okay, here's the general manager wanting to see me, so I said, "Come in, let's talk, what is it that I need to do?" He had not precisely been scheduled to see me and my secretary was just on the phone and Mr Beattie and herself were looking at each other. Then I just asked him to come in, because I saw him sitting there, so that I could try and find out what he needed to do.

ADV P PRETORIUS SC: You had time to meet him later that afternoon?

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<p style="text-align: right;">Page 121</p> <p>MR GAMA: Yes, I had time to meet him that afternoon, but he came, on this particular instance, he came to try and deal with this particular issue. I think he was probably under pressure from his own department too.</p> <p>ADV P PRETORIUS SC: And you want to persuade Mr Arbitrator that your evidence is truthful when you say you signed a document without knowing in whose favour the document was, in other words to whom the contract was being granted?</p> <p>MR GAMA: That's true, I never really knew who the contract was being granted to. The key thing, after you've been on these tender processes, is that you can't really change any name and when people have –</p> <p>ADV P PRETORIUS SC: We'll come to that in a moment, but do you say this document without knowing to whom the contract was being granted?</p> <p>MR GAMA: No, I didn't know.</p> <p>ADV P PRETORIUS SC: You signed this contract without knowing at what cost the contract was being granted?</p> <p>MR GAMA: We discussed that with Mr Beattie briefly, but we talked about totals, we never went into the actual cost.</p>	<p style="text-align: right;">Page 123</p> <p>in a moment, I can assure you, but you say he would have given you page 120 A to 120 H?</p> <p>MR GAMA: Ja.</p> <p>ADV P PRETORIUS SC: Correct?</p> <p>MR GAMA: Ja, when we had agreed on the processes, then I said to him, "Okay, where's the document?" and then he then pulled out the document that I had to sign, because we'd agreed that okay, it looked fine, in terms of –</p> <p>ADV P PRETORIUS SC: The document he gave you was page 120 A to 120 H, it's not a difficult question, Mr Gama.</p> <p>MR GAMA: Ja, that is the document. That's what I said in the beginning, that 120 A to 120 H.</p> <p>ADV P PRETORIUS SC: And you didn't look, on your version, at anything other than 102 H, despite the fact that the whole document was given to you?</p> <p>MR GAMA: Ja, I didn't look, because we just wanted to sign and do the actual signature, so he just gave me the last page of this document to sign, the one that he turned around for me to sign.</p> <p>ADV P PRETORIUS SC: If I misunderstood your evidence, the record won't have. I understood you to say that Mr Beattie would have given you the whole of</p>
<p style="text-align: right;">Page 122</p> <p>ADV P PRETORIUS SC: The actual cost.</p> <p>MR GAMA: Ja, we didn't go into the monthly sort of costs. All we discussed was here was a national contract that was being entered into, we discussed that the tender board had satisfied itself, that the process was correct. I asked whether he had the money in his budget and he indicated that, yes, I think it was R10 million that was in the budget.</p> <p>ADV P PRETORIUS SC: Was he referring to a document when he did that? When he told him that?</p> <p>MR GAMA: Well, he had the file that he was carrying.</p> <p>ADV P PRETORIUS SC: And when you signed, did he take just one page out of the file and to give it to you or did he give you the bundle with the file?</p> <p>MR GAMA: No – no, he didn't give me the bundle. I think he would have had these sort of documents in his hands.</p> <p>ADV P PRETORIUS SC: Which sort of documents? The record won't pick up –</p> <p>MR GAMA: 120 A to 120 H, on the one side, but we spent more time with him explaining the processes that he'd followed in terms of –</p> <p>ADV P PRETORIUS SC: We'll come to that</p>	<p style="text-align: right;">Page 124</p> <p>the document at 120 A to 120 H. I specifically asked you whether he extracted 120 H and gave it to you, and you said no.</p> <p>MR GAMA: No – no, I said it's 120A, the document that he had on the file that needed to be signed was this, but when I signed we specifically looked at the last page and we signed that.</p> <p>ADV P PRETORIUS SC: I ask you once again, did he or did he not give you the document at page 120 A to 120 H?</p> <p>MR GAMA: No, he didn't give me – if you are asking if he gave me the whole document, no, he didn't give me the whole document, but he held it in his hand.</p> <p>ADV P PRETORIUS SC: Is there anything unclear about the word gave you?</p> <p>MR GAMA: He only gave me 120 H.</p> <p>ADV P PRETORIUS SC: So he gave you one page?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: He took out one page from the file or from a bundle of documents and he gave you page 120 H on its own?</p> <p>MR GAMA: He was holding 120 A to 120 H, separate from the file and we went through whatever he</p>



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had in the file, for him the key documents the you are looking for Salvation Army, was on 120 H.

ADV P PRETORIUS SC: You were sitting opposite the desk from him?

MR GAMA: Yes.

ADV P PRETORIUS SC: Now, when you signed this document it was no doubt in front of you, opposite him from the desk?

MR GAMA: Yes, at was at the end of our conversation, when –

ADV P PRETORIUS SC: Now, what did he give you 120 A to 120 H, or only 120 H?

MR GAMA: 120 H.

ADV P PRETORIUS SC: So he gave you a single page to sign?

MR GAMA: Yes – yes.

ADV P PRETORIUS SC: I put it to you that that's most improbable. Not only that he would give it to you like that, but that you would sign it like that.

MR GAMA: Well, I was there, and after we had had the discussion and I had satisfied myself about the key issues, I asked him to give me a document to sign and I signed it.

ADV P PRETORIUS SC: You satisfied

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yourself of nothing, Mr Gama. You were only in the knowledge that he had he had satisfied himself. You did nothing to satisfy yourself by reference to the document.

MR GAMA: Well, I never looked the documentation, but we talked about the process. The key thing for me was that you go out tender, you find the most suitable person and you sign. It didn't really matter to me who it was.

ADV P PRETORIUS SC: You're no doubt aware of the detailed procurement policy, which says that you must satisfy yourself, when you sign on your authority?

MR GAMA: Yes, I'm aware of it.

ADV P PRETORIUS SC: You didn't satisfy yourself by reference to the documents, you relied on the statement by Beattie that he was satisfied.

MR GAMA: He was satisfied and I asked him questions which satisfied me at the time.

ADV P PRETORIUS SC: But let's get back to this situation, you're sitting opposite Mr Beattie, who's is about to leave, a man who can't cope with his tasks, you are given page 120 H, and you sign it?

MR GAMA: Yes, I did.

ADV P PRETORIUS SC: You sign it without knowing in whose favour the contract has been

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granted?

MR GAMA: Yes, I did.

ADV P PRETORIUS SC: You sign it without knowing any detail with regard to costing?

MR GAMA: I had discussed the detail with him.

ADV P PRETORIUS SC: Well, you just said you didn't discuss the detail, you discussed it in general terms.

MR GAMA: No, I'm talking about what the costs was and –

ADV P PRETORIUS SC: You don't know for what period it is?

MR GAMA: In the course of the discussion, some of the things that would have come up, in my recollection, was the issues of KPIs, because I'd always asked are KPIs in place? Where he indicated that of course the KPIs have now been put into place and in that same discussion he had then indicated that there would be a trial period and that was consistent with what I wanted to see, so we left it at that.

ADV P PRETORIUS SC: In fact, without reference to any documentary evidence of any detail whatsoever, you signed a page of signatures? I put it to you that it is improbable that that evidence is correct.

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That you, as a Chief Executive Officer of Transnet Freight Rail, would simply in a five to 10 minute discussion, where acquisition is already a problem with Transnet Freight Rail, simply sign a page of signatures, with no information on it whatsoever.

MR GAMA: I had satisfied myself with what he was indicating that there was a tender process. I did see, I think the very first page on the file, was on the tender number and all of that, so I was clear that there was a tender process. I also relied on the fact that the tender board had looked at these issues. I wasn't for a second, and unfortunately we were both in a hurry, I wasn't for a second thinking that there would be anything untoward about this, especially after it had gone through him, he had signed it, the procurement, the acquisition council or the tender board had also looked at it and he had answered the questions that I'd asked him, to my satisfaction.

ADV P PRETORIUS SC: If your version is true, Mr Gama, I put it to you that your conduct was, at best, reckless.

MR GAMA: I just relied on the fact that the processes had been followed.

ADV P PRETORIUS SC: You were the last person in chain of authority, that approved this process,

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<p style="text-align: right;">Page 129</p> <p>correct?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: This was the final opportunity for the matter to be done properly and at that hurdle you simply signed a page of signatures. Correct?</p> <p>MR GAMA: That's correct.</p> <p>ADV P PRETORIUS SC: And did Mr Beattie tell you that all the other had been given on condition that you also approved it, that's why you were requested to sign it?</p> <p>MR GAMA: No, we never had that discussion.</p> <p>ADV P PRETORIUS SC: Well, you would have known that if this was a tender process, it didn't require your signature at all.</p> <p>MR GAMA: Well, he just came in to ask me to sign.</p> <p>ADV P PRETORIUS SC: And he told you it was a tender process?</p> <p>MR GAMA: Yes.</p> <p>ADV P PRETORIUS SC: Why didn't you say to him, "Well, I don't need to sign if it's a tender process?"</p> <p>MR GAMA: Well, I had signed, on</p>	<p style="text-align: right;">Page 131</p> <p>to you that you believe that this is an open tender approval, you know that your signature and authority approval is not required if it's an open tender proposal.</p> <p>MR GAMA: It doesn't mean that it's not required completely.</p> <p>ADV P PRETORIUS SC: What do you mean not required completely? You knew, surely, that you were the final authority, you just told, Mr Arbitrator that.</p> <p>MR GAMA: No – no, I'm saying it doesn't mean that everything that goes out on tender, we don't sign for it.</p> <p>ADV P PRETORIUS SC: No, let's just clarify this, Mr Gama. You know that in terms of the procurement policy of Transnet, of which you would have made yourself aware as Chief Executive Officer, that your approval was not necessary if this was an open tender.</p> <p>MR GAMA: Ja, I think it was precisely in the context of the discussions that we were having with him, he was in my office, he wanted me to sign this. I never really put much thought to any of those particular issues, but I think, as I say, with the benefit of hindsight, if for instance this document had been put into my file and I had been alone on these issues, I would have sat down and gone through –</p> <p>ADV P PRETORIUS SC: Why would you have</p>
<p style="text-align: right;">Page 130</p> <p>occasion, on a tender process.</p> <p>ADV P PRETORIUS SC: No, I'm asking you, you were concerned about the proper procedures being followed, you'd instituted a whole campaign to ensure that proper procedure have been followed, you were told, on your version, that this is a tender process, you're signature is not necessary on a tender process, why didn't you ask, "Why is this coming to me to sign?"</p> <p>MR GAMA: John, when he came to me, we were, I knew that some of the general managers could probably sign on this, but he when he said R30 million, I never really thought that there would be any particular issue on it, so I probably just absentmindedly signed it, but there's was nothing untoward in terms of his request for me to sign.</p> <p>ADV P PRETORIUS SC: But it wasn't in accordance with Transnet procedures? That alone, I put it to you, should have alerted you to the fact that this required closer investigation.</p> <p>MR GAMA: We had not discussed that it was subject to my approval. He just came to me and I signed the document.</p> <p>ADV P PRETORIUS SC: Look, Mr Gama, I'm not putting to you that you ought to have discussed or that you did discuss with Mr Beattie, I'm putting a fact</p>	<p style="text-align: right;">Page 132</p> <p>done that?</p> <p>MR GAMA: - each of these documents.</p> <p>ADV P PRETORIUS SC: Why would you have done that?</p> <p>[15:22] MR GAMA: Because if you receive documents on your in tray, you're sitting there, the only thing that you have in front of you, is the document and so you sit and you go through it and I think, if you look at the CPI issues there, there was no one, it was a document which came into my in tray, I would then sit down, during my own time, go through the document. Here the reason I was sitting with him and questioning him on all of these issues, because he was in a hurry, I wasn't going to hamstring him, so there possibly, with the benefit of hindsight, issues that I could have asked him and that I probably didn't, because of the urgency with which he came –</p> <p>ADV P PRETORIUS SC: That urgency, Mr Gama, didn't relate to 5, 10, 15 minutes, it's not as if they were waiting to pass on a cable theft syndicate that very minute, you could have spent half an hour, an hour with him. It was not up to him to say I'm in a hurry, he's leaving.</p> <p>MR GAMA: No – no, I – he had not been scheduled to come and see me, so I had just seen him,</p>

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because I had seen one of my general managers waiting outside my office.

ADV P PRETORIUS SC: That doesn't absolve you of the responsibility, Mr Gama of doing your job properly.

MR GAMA: That's correct, as I indicated, there was an oversight on this particular -

ADV P PRETORIUS SC: Do you only do your job in scheduled appointments, as opposed to unscheduled appointments.

MR GAMA: No - no, here was a document where somebody wanted me to sign. I do both scheduled and unscheduled, but in the main, most of the unscheduled appointments are people who are coming to me for counselling on particular issues.

ADV P PRETORIUS SC: Mr Gama, your duty as Chief Executive Officer of TFR remain the same, whether you had exercised them in scheduled or unscheduled appointments, do you accept that?

MR GAMA: Definitely.

ADV P PRETORIUS SC: They remain the same whether or not people tell you they're in a hurry or not.

MR GAMA: I accept that.

ADV P PRETORIUS SC: And, in fact,

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particularly where acquisitions are concerned, it's up to you to satisfy yourself, at least that the document you're signing is the document you're signing, you didn't even know that.

MR GAMA: As I indicated I now know that the document was, in fact, a consignment and in my mind and in the discussion that I had and having seen the actual first document which appears on 9 saying "Tender", I had no reason at the time to believe that this was something other than a tender.

ADV P PRETORIUS SC: Mr Gama, do you concede now that you did not do your duties as you ought to have, with hindsight?

MR GAMA: Yes, I'm saying, with hindsight, based on the documentation, it was problematic and I ought probably have said to him, leave it and I will look at it, but he was in a hurry and the circumstances were such that I knew what to assist with and I was trying to assist.

ADV P PRETORIUS SC: I'll come to that in due course, but Mr Gama, why then when called to account in 2009, is your response to alleged conspiracy on the part of Transnet. Do you concede that there's merit to the allegation that you failed in your duties. Why not just concede that? Why allege a conspiracy?

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MR GAMA: When was I was called to in 2009?

ADV P PRETORIUS SC: You were called to account in 2009, we'll come to the detail in due course.

MR GAMA: When I was given documentation, as I indicate, I asked for documentation, which was a transparent request, I only received part documentation. By that time, my antenna was up, after Mr Dube had indicated to me and after I thought there was an unreasonableness on the part of Transnet in terms of merely giving me documents that would assist me to fully and concretely deal with the matter, where I felt that as Chief Executive of their biggest division, they could at least afford me the courtesy of giving me the documentation I required in order for me to answer the questions, so in my mind at the time, all of these issues, were no longer a coincidence.

ADV P PRETORIUS SC: Right, we'll come to that in a moment, but you concede now that it was substance, a degree to which there is substance and the degree of seriousness will no doubt be subject to the - but there were substance to the charges against you in regard to GMS.

MR GAMA: Mm, the big issue here, was that the processes within Transnet, where the CEO of the

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division gets informed about what happened and then gets given an opportunity to cure something of this nature, those processes which are Transnet processes, they were not followed, in this instance. All it would have taken was audit to come to me and say, "Look at this document, these are the issues that we are worried about," I would have then called upon the general manager concerned to say, "We need to go back to the procurement process, we need to investigate, essentially, three things, one, was this service rendered? Two, did we get value for it? Three, are we able to do a condonement on the steps taken?" So there's never been, in the history of Transnet, where the Chief Executive, does not get alerted to an issue of this nature and then he becomes and then it gets out that he deals with it, and if I had been alerted in terms of what the actual issues were, I would have been able to find them out, all that was happening is I was getting notes indicating that I must have been part of some manipulation of a process. So, basically, what I'm saying is that Transnet had not followed it's own process in terms of altering me, but instead of following the process, there had just been suspicions, which I think were not justified without giving the full information, so at that time when I looked at all of the coincidences, when I said, there is no CEO who has been

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charged with this type of things, without looking at the proper people who actually control these processes. Ja, my antenna was up.

ADV P PRETORIUS SC: Mr Gama, I understand your procedural complaints, and we will deal with them in due course. You don't accept them of course, but they will be subject to cross-examination later. I put it to you that you're on record during 2009, saying there's no substance to the charges, you've just conceded to Mr Arbitrator, that there is some substance to the charges.

MR GAMA: On record where?

ADV P PRETORIUS SC: I'll come to it in due course. You say you have never denied that there's any substance to the charges?

MR GAMA: What we indicated were that the charges, and we were talking largely around the fact that Transnet did not follow it's own processes, the charges were delayed, some of them would probably, especially on the issue of the security, I had been told that there was no substance to any investigation and then I found out later that I was being jeopardised, because there was now an investigation that was happening behind my back, so those comments would have been made in a particular context, but I have no recollection of this

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public thing of saying there's no substance, or I have actually never really commented on the actual –

ADV P PRETORIUS SC: Well, what are you saying? Are you saying you have never said that there's no substance to the charges against you, is that your position now as you give evidence? Is that your evidence? I have – I, Mr Gama, have never said that there's no substance to the charges?

MR GAMA: No, I'm saying I'm not sure about the context of what you are saying, I don't know which document you are referring to?

ADV P PRETORIUS SC: I'm asking you from your general recollection? We'll get there, Mr Gama. What Mr Beattie did, on your version, by persuading you that you were signing an open tender process, when I take it, you now concede that you weren't, was a complete fraud. Do you accept that?

MR GAMA: No, I accept that, I mean as I say, once you get all of the documentation, it becomes clearer what was happening.

ADV P PRETORIUS SC: What he did was to perpetrate a blatant fraud, by persuading you that you were signing an open tender process, where in fact you were signing a consignment. Correct?

MR GAMA: That's correct, ja.

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ADV P PRETORIUS SC: You yourself concede that had he informed you that it was a consignment, your response would have been quite different.

MR GAMA: Correct.

ADV P PRETORIUS SC: At least, at the time when you were interviewed by Mr Maddove, April 2009, you would have come to learn of this blatant fraud perpetrated on you.

ARBITRATOR: Sorry, just repeat that?

ADV P PRETORIUS SC: At least, as at the 8th of April 2009, at least, I emphasise, you would have become aware that a blatant fraud had been perpetrated by Mr Beattie on you, on your version?

MR GAMA: I did not immediately become aware, because I asked for the actual documentation. I was just shown all of this – but Mr Oates, who was to give me the documents, went away, but I then started to look for documents also myself. So much later, probably in May, when we were looking for the documents, then I had the opportunity to try and go through it.

ADV P PRETORIUS SC: I put it to you that you would have known, clearly, at the meeting in April, but let's assume for present purposes that you knew only in May, let's assume it only for present

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purposes. You would have had occasion to look at page 120 H again, is that correct?

MR GAMA: Yes I looked at that.

ADV P PRETORIUS SC: You would have seen there that Mr Beattie wasn't the only signatory, Mr Senamela and Mr Tobias were signatories as well.

MR GAMA: Yes.

ADV P PRETORIUS SC: It must have occurred to you that they may have been parties to this fraud?

MR GAMA: At that time I was really trying to just find out what is it. That was the subject of the complaint, so that I could deal with it, and that's why I kept asking Mr Maddove to give me the documents and to indicate clearly what it is that he was looking for.

ADV P PRETORIUS SC: We'll come to your interview with Mr Maddove, I promise you, and you'll have every opportunity to explain what happened there. The question, and I must interject here to say, I encourage you, ask you to answer the questions that I put to you, because to the extent that you fail to do so we're going to argue that your evidence should be called into question, so once again I invite you to listen to the question and answer it. It must have occurred to you,



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when you looked at the documentation, on your version, at least in May, that there may be other parties to this fraud perpetrated upon you, other than Mr Beattie – blatant fraud.

MR GAMA: Well, when I looked at the document, there were many people that signed the document, if that is what your question is.

ADV P PRETORIUS SC: And it's possible, it must have occurred to you, that if Mr Beattie had perpetrated this fraud on you, you may not have been alone. There may have been others, equally guilty of this fraud on you.

MR GAMA: That's correct.

ADV P PRETORIUS SC: What did you do about it?

MR GAMA: That is why I had the meeting on the 10th of July, to make an assessment of what is that was going on and to get the evidence in writing from people in terms of what it is that had actually taken place.

ADV P PRETORIUS SC: Did you not go immediately to internal audit and say I have been the victim of a blatant fraud, others could be involved, please investigate as a matter of urgency, when people are still working for Transnet Freight Rail.

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MR GAMA: No there was a technicality in terms of that. I didn't have the documents in my possession.

ADV P PRETORIUS SC: You had names.

MR GAMA: When I had the documents in May, I asked whether I could talk to different people within the entity, so that I can find out what the issues are – I mean in June, sorry – I asked. What I did not want to do immediately after April when I was trying to find out from the investigators, whether I was the subject of an investigation. Two, I did not want to hamper an investigation that was ongoing, so I couldn't when this investigation started to intervene and interfere, it would then look as if there's something that I had to hide and so that is the only reason I had not done anything from that period, because it had not been clarified to me and I left the meeting in April asking the question, what is it exactly that I'm supposed to look for.

ADV P PRETORIUS SC: But Mr Gama, it must have come as a shock to you that this fraud had been perpetrated on you. It must have come as an utter surprise and a shock that a man that you trusted to tell you the truth, had lied to you so blatantly and deceived you.

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MR GAMA: Of course in June, when I received some of the documentation, and when I started to draft my reply, I indicated that we needed to relook at these issues much more closer, and I needed time to investigate the issues, but yes. –

ADV P PRETORIUS SC: Mr Gama –

MR GAMA: At that time when I received the documents in June, it became clearer to me, in terms of what this scam was about.

ADV P PRETORIUS SC: Mr Gama, you earlier said you had the documents in May, but I'll come to that issue at a later stage. In your response of the 20th of July 2009, where you are invited to respond to, amongst others, these issues, there's not one mention of a fraud perpetrated on you.

[15.42] MR GAMA: What I did indicate in July, was that in the time that I had, because you will recall most of these things that had happened, were not, to my knowledge, I was trying on the one hand to do my normal work and on the other hand, to try and deal with this particular investigation. I indicated that I needed more time to do a thorough investigation into this matter and I think I'd said I need a period of three months to finalise everything but the response that I got were the charges. While I was waiting to find out what is the

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company response to my request, what I received where the actual charges.

ADV P PRETORIUS SC: Mr Gama, at the very latest we will submit to Mr Arbitrator, at the very latest, on the 8th April when you were interviewed by Mr Maddove on these issues, you should have realised that the most blatant fraud had been perpetrated on you by Mr Beattie and possibly by others still employed by Transnet Freight Rail. Let's accept for a moment that you knew in May when you said you got the documentation, or even in June. How much time does it take to say, when called to account, I have been the victim of a blatant fraud, it requires urgent investigation. How much time does it take to put that simple, stark fact on paper?

MR GAMA: I think as I've indicated that became circumstances within the whole scenario where I was being refused to be given the actual facts in terms of the Ernst & Young investigation. I had to try and figure out something that I didn't quite understand. There was the issue where I had met Dube and he'd indicated to me that, look, you are being singled out. I had to step back and say what is it that is happening and so I couldn't really sort of do all of the things that I would have normally done in a normal situation.

ADV P PRETORIUS SC: When did you see

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<p style="text-align: right;">Page 145</p> <p>the document at page 120A to 120H for the second time? You said you saw it on the 5th December. You didn't read it. When did you see it after that?</p> <p>ADV P PRETORIUS SC: Well, I saw it at that interview.</p> <p>MR GAMA: Correct, on the 8th April.</p> <p>ADV P PRETORIUS SC: How difficult was it for you to conclude that the document you actually signed was a confinement order?</p> <p>MR GAMA: The difficulty was a simple one, that the process – I had been very specific in that we ought to go out on tender for these kinds of things and so I was having difficulty in terms of being told that this was a confinement and that is why I then said I will actually go and ask the procurement people to give me all the documentation that related to this because I wasn't too sure which of these documents was which.</p> <p>ADV P PRETORIUS SC: Mr Gama, on the 8th April you knew that the document you signed was a confinement document.</p> <p>MR GAMA: That is what was being suggested and I-</p> <p>ADV P PRETORIUS SC: Shown to you.</p> <p>MR GAMA: All I was recalling is the discussion that I had with John. The document was not</p>	<p style="text-align: right;">Page 147</p> <p>and investigate.</p> <p>ADV P PRETORIUS SC: Well, didn't you immediately call for the document? Look at it immediately and take steps to deal with this blatant fraud that had been committed?</p> <p>MR GAMA: I called for the document.</p> <p>ADV G PRETORIUS SC: Sorry, Mr Chairman, the interview itself says that the interview was concluded on the basis that the documents would be handed in the morning so he did call for it immediately at the interview. In fact, he did it repeatedly.</p> <p>ADV P PRETORIUS SC: Why didn't you take immediate action in relation to the fraud that had been perpetrated once you had looked at the document?</p> <p>MR GAMA: I did not want to be seen to be interfering with any investigation. In my mind, there was now a formal investigation which was an investigation into me because I had then been informed that I was in fact the one who was being investigated. So when I'd been informed that I was the one who was being investigated, it becomes Very difficult to then say – I knew what steps I could take but it becomes very difficult to then say you want to do something because people will say you want to interfere into your own investigation and it is not in my person to try and</p>
<p style="text-align: right;">Page 146</p> <p>shown to me. I was given to say here it says confinement, here it says confinement.</p> <p>ARBITRATOR: So it wasn't shown to you on the 8th April are you talking now about the day you signed it?</p> <p>MR GAMA: No I'm saying it was not given to me on the 8th April. I was just being shown the document so all I'm saying, that I left that meeting with just disbelief that the document actually kept on saying confinement and that's why I said I needed to do my own investigation, find out whether there wasn't any other document elsewhere.</p> <p>ADV P PRETORIUS SC: We're going to submit and we'll put it to you later that you must have known that the document you signed was a confinement document on the 8th April at the very latest. But at least you had an indication on the 8th April that it might have been a confinement document but you were unsure.</p> <p>MR GAMA: That's correct, yes.</p> <p>ADV P PRETORIUS SC: The possibility must have been clear to you at that stage that you were the subject matter of a fraud, victim of a fraud at the hands of Mr Beattie and possibly others. Correct?</p> <p>MR GAMA: That is what I wanted to go</p>	<p style="text-align: right;">Page 148</p> <p>interfere or intervene in an investigation. I didn't want to dirty that process. I wanted at least not myself to be seen to be trying to interfere with that process.</p> <p>ADV P PRETORIUS SC: We will deal with that in due course. Do you concede, Mr Gama, if on the 5th December you'd looked at the document at page 114 to 120, or let me put it to you differently. The 112A to 121 – you would have concluded that you were signing a confinement document?</p> <p>MR GAMA: Yes, I would have.</p> <p>ADV P PRETORIUS SC: Do you also concede that you would have concluded that you were signing a confinement document for a total contract period of one year? Page 120B, paragraph 4.</p> <p>MR GAMA: It would have been for the period up until April subject to the review. It indicates the performance review.</p> <p>ADV P PRETORIUS SC: It says very clearly on page 120B, paragraph 4, that the total contract period is 1 November 2007 to 31 October 2008.</p> <p>MR GAMA: Sorry, where are you? 120B?</p> <p>ADV P PRETORIUS SC: Paragraph 4.</p> <p>MR GAMA: I'm looking at 120B, paragraph 4.</p> <p>ADV P PRETORIUS SC: Yes, so am I. It</p>



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says there that there will be a performance review after five months but the total contract period is one year. In other words, if GNS pass the review they're entitled to insist on a contract period of one year.

MR GAMA: If they pass the review and if it was positive.

ADV P PRETORIUS SC: But what you are authorising here is a total contract period of one year.

MR GAMA: Well, in our general discussions there was just a trial period that would be dealt with.

ADV P PRETORIUS SC: Whatever Mr Beattie told you I'm putting this to you on the basis that, had you read this document, you would have understood that you were signing a confinement for the total period of one year.

MR GAMA: Yes, in terms of the total period, yes.

ADV P PRETORIUS SC: That was said also under paragraph 11. Total contract value 18 million, one year period.

MR GAMA: If the first line of No 4 was fulfilled positively, yes.

ADV P PRETORIUS SC: What it says in paragraph 11, that the tender price is R18,900,000 for a

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MR GAMA: Yes.

ARBITRATOR: Where are referring to there, on 114?

ADV P PRETORIUS SC: 114, the last sentence on paragraph, the boxed paragraph 2. Had you read it, no doubt you would have said but how can you say in the motivation that there's going to be a tender process early next year and then in the document you want me to sign, that the tender process will be followed after the confinement expires. That's a blatant contradiction that would have come to your attention.

MR GAMA: Yes.

ADV P PRETORIUS SC: And you would also have learned of the alleged termination of the prior CPI process, had you read the document. You would have seen that there was no open tender process but the open tender process which you had instructed had somehow been stopped. You would have seen that. Is that correct?

MR GAMA: Yes, I would have seen it.

ADV P PRETORIUS SC: You would have also seen on page 116 that one of the beneficiaries of the tender was General Siphiwe Nyanda, paragraph 16B. Am I correct.

MR GAMA: Yes, I would have.

ADV P PRETORIUS SC: You would have

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one year period. Am I correct?

MR GAMA: That's what it says, yes.

ADV P PRETORIUS SC: And you're no doubt aware of the principle where acquisitions are concerned that it's not permissible to split a contract up into pieces to bring it within a particular authority level. You've got to look at the whole contract. You're aware of that principle I take it?

MR GAMA: That's when people split it to different amounts so that - it's called coupling.

ADV P PRETORIUS SC: Yes. And that, had you looked at, as was put in cross-examination the motivation on page 113, under the head "Way Forward" at the bottom of the page, the Freight Rail Security Corporate Office will go out on open tender early next year before April to secure a complete specialised security package, you would have realised there's no sense in approving a confinement of one year.

MR GAMA: It would have been a confinement for the five months subject to the review.

ADV P PRETORIUS SC: And if you look at page 114 you would have seen, in the last line of paragraph 2, something completely different. You would have seen there the words, "an open tender process to be followed after confinement expired".

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been aware that you were at least an associate of his and that there was a potential conflict of interest. I'm instructed that acquaintance is a more appropriate word and there would be a potential conflict of interest. A cautious Chief Executive Officer would have said, I put it to you, let me take a step back here, refer it to someone else. I don't want any fingers pointed at Transnet Freight Rail.

MR GAMA: Yes.

ADV P PRETORIUS SC: You say that when you signed it you were aware, at least verbally, on information supplied to you by Mr Beattie, that there was a review process in the offing.

MR GAMA: When you say review process -

ADV P PRETORIUS SC: Mr Beattie -

MR GAMA: You're talking about the five months period. Yes.

ADV P PRETORIUS SC: Yes. Did you ever follow up as to why that process never took place, as I put to you it didn't?

MR GAMA: I was actually informed that, when I asked in July, I was actually informed that that review process had taken place and I was going to be furnished with documentation from the security department. They indicated to me that the review process

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did take place but that the review process had taken place internally within the security department and Mr Dingaan Senamela was at the, in July going to furnish me with a copy. That he had indicated to me. I don't know whether there is documentation to that effect or not because I left before I could be provided with that document.

ADV P PRETORIUS SC: And you say when you signed you didn't know how long this was for.

MR GAMA: No, when I signed all I knew was that there was going to be a five-month trial period.

ADV P PRETORIUS SC: You didn't know who was getting the contract?

MR GAMA: No.

ADV P PRETORIUS SC: Didn't you follow up? Didn't you even ask who's getting this contract?

MR GAMA: No, he showed me some names.

ADV P PRETORIUS SC: He showed you some names but didn't he say this is the company that's getting the contract? Surely he would have said that to you. I find it quite inexplicable that you would not have asked who's getting this contract.

MR GAMA: No, he'd showed me the names. As far as I was concerned it was people in the security fraternity. I don't know all of them. But he'd shown me

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three names, to say that these three names and we've had adjudication and after the adjudication we went to the Tender Board. The Tender Board concurred with the adjudicators.

ADV P PRETORIUS SC: We'll come to those issues on Friday. Mr Arbitrator, is that a convenient time?

ARBITRATOR: Yes. Paul, will we discuss dates on Friday. We'll resume at 10 o'clock on Friday. Alright, the matter's postponed until 10 o'clock on Friday. Mr Gama, we're busy under cross-examination. I just have to formally warn you, as Mr Pretorius did at lunch time, not to discuss the matter with your team. Alright, and dates you haven't resolved that, okay.

[HEARING ADJOURNED]

"K"

# RealTime Transcriptions

TRANSCRIPTION OF THE

## DISCIPLINARY INQUIRY

COMPANY:	TRANSNET LIMITED
REPRESENTED BY	ADV P PRETORIUS SC
INSTRUCTED BY:	BOWMAN GILFILLAN
AND	
EMPLOYEE:	SIYABONGA GAMA
REPRESENTED BY	ADV G PRETORIUS SC
INSTRUCTED BY:	LANGA ATTORNEYS
BEFORE	
CHAIRPERSON:	ADV M ANTROBUS SC

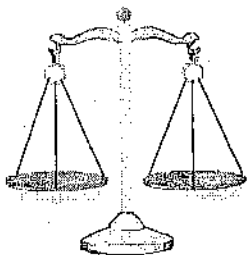
### HELD ON

12 FEBRUARY 2010

PAGES 1 TO 131

### HELD AT

BOWMAN GILFILLAN, 165 WEST STREET, SANDOWN, SANDTON



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<p style="text-align: right;">Page 1</p> <p>1 [PROCEEDINGS ON 12 FEBRUARY 2010].</p> <p>2 [10:12] CHAIRPERSON: For the purposes of the</p> <p>3 record, it is now the morning of Friday, the 12th of</p> <p>4 February 2010. This is the hearing of Transnet Limited and</p> <p>5 Mr Gama, and representation is as before. Mr Gama, will</p> <p>6 you then swear that the evidence you are about to give will</p> <p>7 be the truth, the whole truth and nothing but the truth,</p> <p>8 raise your right hand and say "so help me, God."</p> <p>9 SIYABONGA GAMA: d.s.s.</p> <p>10 CHAIRPERSON: Thank you, Mr Pretorius?</p> <p>11 ADV P PRETORIUS SC: Just give me a</p> <p>12 moment, please, Mr Arbitrator. Mr Gama, would you please</p> <p>13 look at bundle A2, at page 56. Paragraph 2.5 of this</p> <p>14 document, which is the detailed procurement procedures,</p> <p>15 dealings with confined enquiries for quotations invited or</p> <p>16 offers received, greater than R2 million. Do you see that?</p> <p>17 MR GAMA: Yes.</p> <p>18 ADV P PRETORIUS SC: Now, you have</p> <p>19 already told Mr Arbitrator that you were aware of this</p> <p>20 document, and that was part of your function duty as a</p> <p>21 chief executive officer, but I would just like to point out</p> <p>22 for the purposes of the arbitration, one or two of these</p> <p>23 clauses. Clause 2.5 itself says, "This mechanism is</p> <p>24 ideally suited for circumstances where, due to urgency or a</p> <p>25 restrictive market, it will not be possible, practical or</p>	<p style="text-align: right;">Page 3</p> <p>1 for some time.</p> <p>2 ADV P PRETORIUS SC: Yes, well, that is</p> <p>3 what I pointed out to you in cross-examination, but he</p> <p>4 requested you to participate in the process as a matter of</p> <p>5 urgency. He told you this is urgent, you must sign.</p> <p>6 MR GAMA: Ja, he was –</p> <p>7 ADV P PRETORIUS SC: That is what Mr</p> <p>8 Beattie said to you.</p> <p>9 MR GAMA: Yes, that is correct, he wanted</p> <p>10 to put the people on site.</p> <p>11 ADV P PRETORIUS SC: Well, weren't they</p> <p>12 already on site?</p> <p>13 MR GAMA: I don't know.</p> <p>14 ADV P PRETORIUS SC: Then if you look at</p> <p>15 paragraphs 2.5.1.1 and 2.5.1.2, you will see there that</p> <p>16 these paragraphs read firstly, paragraph 2.5.1.1, "If the</p> <p>17 purchase sale hiring of movable goods or service which must</p> <p>18 be rendered, or the offer received exceeds R2 million in</p> <p>19 value, and is of such a nature that it cannot be dealt with</p> <p>20 in terms of any of the prescribed procurement disposal</p> <p>21 mechanisms, the matter must be fully motivated in writing</p> <p>22 to the CEO."</p> <p>23 Do you see that?</p> <p>24 MR GAMA: Yes.</p> <p>25 ADV P PRETORIUS SC: And then the last</p>
<p style="text-align: right;">Page 2</p> <p>1 economically viable to invite open tenders." Do you see</p> <p>2 that?</p> <p>3 MR GAMA: Yes.</p> <p>4 ADV P PRETORIUS SC: When Mr Beattie saw</p> <p>5 you, on the version you gave in evidence in cross-</p> <p>6 examination, he did say that this matter was being dealt</p> <p>7 with on an urgent basis, when he saw you on the 5th of</p> <p>8 December.</p> <p>9 MR GAMA: The, it was not the matter</p> <p>10 itself, but it was the actual approval of the matter, that</p> <p>11 he wanted us to deal with urgently. He did admit to sign</p> <p>12 because he needed to put security people on site.</p> <p>13 ADV P PRETORIUS SC: As a matter of</p> <p>14 urgency?</p> <p>15 MR GAMA: He had to put them as a matter</p> <p>16 of urgency because he, as I indicated, he had had this</p> <p>17 thing with him for some time.</p> <p>18 ADV P PRETORIUS SC: Now –</p> <p>19 MR GAMA: So what was urgent –</p> <p>20 ADV P PRETORIUS SC: - of course at that</p> <p>21 stage GNS was already in office. I am sorry, I interrupted</p> <p>22 you, would you want to repeat that?</p> <p>23 MR GAMA: No, what I was indicating is</p> <p>24 that what was urgent at that time was that is that he</p> <p>25 needed me to sign the document but he had had the document</p>	<p style="text-align: right;">Page 4</p> <p>1 three lines, "If he/she, that is the CEO, agrees with the</p> <p>2 reasons advanced for the proposed confinement, the CEO may</p> <p>3 authorise the confinement of business to one or more</p> <p>4 contenders only."</p> <p>5 Do you see that?</p> <p>6 MR GAMA: Yes.</p> <p>7 ADV P PRETORIUS SC: Now there are a</p> <p>8 number of points that you would have been aware of, with</p> <p>9 your knowledge of these procedures. Firstly, that where a</p> <p>10 confinement is utilised as a procedure, there must be a</p> <p>11 full motivation to the CEO in writing. Do you see that?</p> <p>12 MR GAMA: Yes.</p> <p>13 ADV P PRETORIUS SC: And the section</p> <p>14 requires that the CEO then must agree or disagree with the</p> <p>15 reasons proposed for the advanced – or the reasons advanced</p> <p>16 for the proposed confinement, do you see that?</p> <p>17 MR GAMA: Yes.</p> <p>18 ADV P PRETORIUS SC: And it is only once</p> <p>19 that is done that the CEO may authorise, do you see that?</p> <p>20 MR GAMA: That is correct.</p> <p>21 ADV P PRETORIUS SC: In other words, what</p> <p>22 is manifest from this section is that there must be a</p> <p>23 detailed application of the CEO's mind to the motivation</p> <p>24 for the confinement. And what is also apparent is that a</p> <p>25 confinement may involve more than one contender. Correct?</p>

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<p style="text-align: right;">Page 5</p> <p>1 MR GAMA: Yes.</p> <p>2 ADV P PRETORIUS SC: In fact you would</p> <p>3 have known that because, was that not the case with CPI's</p> <p>4 appointment?</p> <p>5 MR GAMA: That was the case. I do need</p> <p>6 to point out to you -</p> <p>7 ADV P PRETORIUS SC: I am sorry, Mr Gama.</p> <p>8 MR GAMA: No problem. I think I do need</p> <p>9 to point out to you, if you look for instance at 2.5.1.1,</p> <p>10 that in practice we have even given contracts without</p> <p>11 having any full motivations or discussions because of the</p> <p>12 urgency of matters, and in practice, retrospectively having</p> <p>13 had to give authority for those, because of the nature of</p> <p>14 things as they would happen in operations.</p> <p>15 If I could give you an example, if a train</p> <p>16 derails, we have to clear that train in the shortest</p> <p>17 possible time. It may derail at night, or late in the</p> <p>18 evening. Our engineers would then call different</p> <p>19 contractors who repair track, different contractors who</p> <p>20 repair overhead wires and may exceed, sometimes it has gone</p> <p>21 to 40, 50 million, because of the number of wagons that</p> <p>22 derailed.</p> <p>23 So in practice, you then sit down and say, was it</p> <p>24 necessary? Was the cost reasonable in the circumstances?</p> <p>25 So it is not always that people when they confine, they</p>	<p style="text-align: right;">Page 7</p> <p>1 MR GAMA: Yes, it happens both ways,</p> <p>2 sometimes it is given prior, sometimes if it was urgent,</p> <p>3 people would then call for it, and then indicate that is</p> <p>4 the confinement and they would have to then motivate their</p> <p>5 reasons.</p> <p>6 ADV P PRETORIUS SC: Well, what is clear</p> <p>7 here, is that the standard procedure is that the</p> <p>8 confinement be authorised prior to the invitation of</p> <p>9 quotations or consideration of office, but you say that is</p> <p>10 subject to exceptions.</p> <p>11 MR GAMA: I am saying that is the</p> <p>12 preferable route, but in the ordinary course of business,</p> <p>13 it does not always happen like that.</p> <p>14 ADV P PRETORIUS SC: And what 2.5.1.2 of</p> <p>15 the detailed procurement procedures also states is that the</p> <p>16 CEO must form an opinion that it is in the best interests</p> <p>17 of Transnet.</p> <p>18 MR GAMA: Yes.</p> <p>19 ADV P PRETORIUS SC: And 2.5.1.3 says,</p> <p>20 also very clearly, "Should the rand value of the proposed</p> <p>21 confinement exceed that of the CEO, the matter should be</p> <p>22 escalated via the CEO to the general manager, strategy</p> <p>23 supply management." In other words, it still comes to the</p> <p>24 CEO, but then must be escalated higher up the chain. Do</p> <p>25 you see that?</p>
<p style="text-align: right;">Page 6</p> <p>1 will write to you. But as I indicated to you on Wednesday,</p> <p>2 the discussion that John and I were having was not a</p> <p>3 discussion about a confinement. We were discussing a</p> <p>4 tender process that they had gone through, and not a</p> <p>5 confinement process.</p> <p>6 ADV P PRETORIUS SC: Yes, we have heard</p> <p>7 that evidence. We have dealt with it in part, and we will</p> <p>8 deal with it again. For the moment, my questions at least</p> <p>9 are confined to the provisions of the detailed procurement</p> <p>10 procedures known to you at the time. In fact, a summary</p> <p>11 description of a confinement would be any process that is</p> <p>12 not a public tender process where one or more bidders are</p> <p>13 invited or make offers for the procurement of goods or</p> <p>14 services. Would that be a fair summary?</p> <p>15 MR GAMA: Yes, that would be a fair</p> <p>16 summary.</p> <p>17 ADV P PRETORIUS SC: If you look at</p> <p>18 paragraph 2.5.1.2, it states that "it is important to note</p> <p>19 that only the CEO," and I am going to skip two lines, "may</p> <p>20 grant prior written authority to invite quotations or to</p> <p>21 consider an offer, provided that in his/her opinion it is</p> <p>22 in the best interests of Transnet."</p> <p>23 Now again ordinarily, a confinement authorisation</p> <p>24 is given prior to the invitation of quotations or</p> <p>25 consideration of office. You would agree with that?</p>	<p style="text-align: right;">Page 8</p> <p>1 MR GAMA: Yes.</p> <p>2 ADV P PRETORIUS SC: And then, if you</p> <p>3 look at 2.5.2.3, there is a reference there to the</p> <p>4 exceptional circumstance. It reads, "It is accepted that</p> <p>5 in certain instances, derailments, wash-aways or a failure</p> <p>6 of critical equipment, such as an electric substation</p> <p>7 failure or instances where any delay will result in the</p> <p>8 loss of lives or loss of revenues, etcetera, it might be</p> <p>9 absolutely impossible to obtain the necessary prior</p> <p>10 authority to confine. In such an instance, the emergency</p> <p>11 work is performed and a full motivation only submitted</p> <p>12 afterwards in the normal manner, to obtain the necessary</p> <p>13 retrospective authority for confinement. The 'in</p> <p>14 exceptional circumstances' shall be applied judiciously and</p> <p>15 restrictively. Misuse of this concession as an excuse for</p> <p>16 bad planning, will be regarded a serious contravention and</p> <p>17 we will be dealt with severely."</p> <p>18 So there is the clause of the detailed</p> <p>19 procurement procedures which deals with what I put to you</p> <p>20 as the exceptional circumstance where a confinement may be</p> <p>21 approved after the fact, as it were.</p> <p>22 MR GAMA: Yes.</p> <p>23 ADV P PRETORIUS SC: Am I correct?</p> <p>24 MR GAMA: Yes.</p> <p>25 ADV P PRETORIUS SC: Now, there the</p>



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<p style="text-align: right;">Page 9</p> <p>1 clause also emphasises that there must be a very careful  2 application of the mind of whoever is authorising it. In  3 fact the words "judiciously and restrictively" are put in  4 there for the express purpose of emphasising that there  5 must be an extremely cautious consideration of the  6 motivation for the retrospective authority. Do you see  7 that?</p> <p>8 MR GAMA: Yes.</p> <p>9 ADV P PRETORIUS SC: You were aware of  10 these provisions when you exercised your duties as chief  11 executive officer.</p> <p>12 MR GAMA: Yes.</p> <p>13 ADV P PRETORIUS SC: Then if one looks at  14 paragraph 5.4 of the delegation of authority framework,  15 another of those documents with which you stated you were  16 acquainted, it is at page 134 of bundle A2, I want to refer  17 you to page 151, which deals expressly with confinements,  18 or with procurement rather. Do you have that before you?</p> <p>19 MR GAMA: Yes.</p> <p>20 ADV P PRETORIUS SC: The procurement  21 process is set out under note 1 and it states, all  22 procurement transactions must follow four steps, and step  23 2, the second bullet reads, "If requiring to approach only  24 selected potential suppliers close market approach, prior  25 written approval is needed, see confinement approval</p>	<p style="text-align: right;">Page 11</p> <p>1 look at the bottom of the page, note 6, the second  2 paragraph of note 6, "Any amendment exceeding 10% of the  3 original contract value should be approved by the relevant  4 acquisition council and the manager with the delegated  5 authority who signed the original contract." And the word  6 "and" is emphasised. Do you see that?</p> <p>7 MR GAMA: Yes.</p> <p>8 ADV P PRETORIUS SC: And then, your  9 particular authority in relation to confinements is on page  10 153, paragraph 5.4.2, and again, according to the heading,  11 "This authority applies to the approval to approach the  12 market for quotes/tenders, authorising the confinement of  13 tenders, also see note 5, and an operating unit CEO has  14 authority up to, but not exceeding R10 million." Do you  15 see that?</p> <p>16 MR GAMA: Yes.</p> <p>17 ADV P PRETORIUS SC: Now, once again, it  18 appears that the general rule is that a confinement must be  19 authorised prior to the process being implemented. Do you  20 agree that that is what the document says?</p> <p>21 MR GAMA: That is what the document says.</p> <p>22 ADV P PRETORIUS SC: And I think you have  23 already conceded in cross-examination that these provisions  24 are aimed at preventing what is potential an abuse of the  25 confinement process.</p>
<p style="text-align: right;">Page 10</p> <p>1 paragraph 5.4.1.1."</p> <p>2 In other words, as it stands there, the  3 delegation of authority framework stresses that where there  4 is a confined process, prior written approval is required  5 as a general rule. Do you see that?</p> <p>6 MR GAMA: Yes.</p> <p>7 ADV P PRETORIUS SC: And then, if you go  8 over to the page to page 152, note 5, "All confinement of  9 tenders are subject to prior approval by the relevant  10 official. See 5.4.2 below. Confinement of tenders above  11 R2 million should involve the obtaining of three quotes  12 from suppliers, failing which, it must be fully justified.  13 Also refer to section 8.1 and 8.2 of the detailed  14 procurement procedures." Do you see that?</p> <p>15 [10:32] MR GAMA: Yes.</p> <p>16 ADV P PRETORIUS SC: In other words, the  17 delegation of authority framework stipulates that in the  18 ordinary course, three quotes must be obtained from  19 suppliers in a confinement process, and if that rule is  20 deviated from, it must be fully justified.</p> <p>21 MR GAMA: Yes.</p> <p>22 ADV P PRETORIUS SC: You would have been  23 aware of that provision as well, as CEO?</p> <p>24 MR GAMA: Yes.</p> <p>25 ADV P PRETORIUS SC: And then, if you</p>	<p style="text-align: right;">Page 12</p> <p>1 MR GAMA: Yes.</p> <p>2 ADV P PRETORIUS SC: Now, I ask you  3 please, Mr Gama, to look at bundle D. The transcript of  4 the interview between Transnet internal audit, or Ernst &amp;  5 Young and yourself of the 8th of April 2009, appears at page  6 74 of bundle B1. May I refer you to page 78? You have  7 testified that prior to this interview, you had not  8 considered the confinement document and the motivation  9 therefore.</p> <p>10 MR GAMA: Yes.</p> <p>11 ADV P PRETORIUS SC: Would you look at  12 the bottom of the page, you are recorded as having said,  13 "Yes, we discussed this thing. It was at the end of last  14 year," that would have been at the end of December 2000 and  15 when? It would have been at the end of December 2007.</p> <p>16 CHAIRPERSON: It is 8.</p> <p>17 ADV P PRETORIUS SC: What are you  18 referring to there?</p> <p>19 MR GAMA: Let me just read the entire  20 page to get the context. 2008.</p> <p>21 ADV P PRETORIUS SC: Right, what meeting  22 are you referring to there?</p> <p>23 MR GAMA: I think it was the breakfast  24 discussion that we had with Reeve and Naicker - is it  25 Naicker?</p>



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<p style="text-align: right;">Page 13</p> <p>1 ADV P PRETORIUS SC: And it was at that</p> <p>2 meeting they told you they were conducting an</p> <p>3 investigation. Is that correct?</p> <p>4 MR GAMA: As I indicated, at that</p> <p>5 meeting, they had indicated they were conducting an</p> <p>6 investigation on the recruitment issues, and the rape</p> <p>7 allegation.</p> <p>8 ADV P PRETORIUS SC: Did they show you</p> <p>9 any documents at that meeting?</p> <p>10 MR GAMA: There was no document there.</p> <p>11 It was just a breakfast meeting.</p> <p>12 ADV P PRETORIUS SC: So insofar as there</p> <p>13 is reference to that meeting of December 2008, that is not</p> <p>14 a meeting at which any documentation was shared with you or</p> <p>15 -</p> <p>16 MR GAMA: No, it was a meeting when they</p> <p>17 met me at our offices and they served them with breakfast.</p> <p>18 That was all.</p> <p>19 ADV P PRETORIUS SC: Right, what you say</p> <p>20 at the bottom of page 78, is "As far as I am aware, and as</p> <p>21 far as I am concerned, there was never any confinement on</p> <p>22 this particular matter. Even if somebody may have, for</p> <p>23 some reason then returned it in a manner, the way that it</p> <p>24 then looked like it was a confinement."</p> <p>25 How did you know that it may have looked like a</p>	<p style="text-align: right;">Page 15</p> <p>1 before.</p> <p>2 ADV P PRETORIUS SC: So I would assume</p> <p>3 that you, in the ordinary course, would have been quite</p> <p>4 cautious when signing documents to make sure that the</p> <p>5 document you were signing, you knew what you were signing,</p> <p>6 as a matter of general practice.</p> <p>7 MR GAMA: As I indicated in this</p> <p>8 particular case, I had instructed that there should be a</p> <p>9 tender process. I never regarded security services as</p> <p>10 services that needed confinement, and I did not want us to</p> <p>11 confine any security services. It was my strongly held</p> <p>12 belief, and I still hold that belief that things like</p> <p>13 security are not services for which we should confine,</p> <p>14 those are services which where there is a proliferation of</p> <p>15 people that offers these type of services.</p> <p>16 ADV P PRETORIUS SC: Well, let's just</p> <p>17 deal with the general situation in Transnet Freight Rail at</p> <p>18 the time and I am referring to 2007. Your experience was</p> <p>19 that procurement processes were unreliable and there was a</p> <p>20 campaign to improve these. You have given that evidence.</p> <p>21 MR GAMA: Yes.</p> <p>22 ADV P PRETORIUS SC: Specifically you say</p> <p>23 documentation is incorrectly used in the procurement</p> <p>24 process. It is not uncommon for that to happen.</p> <p>25 MR GAMA: Sometimes it happened, yes.</p>
<p style="text-align: right;">Page 14</p> <p>1 confinement?</p> <p>2 MR GAMA: I did not know that this</p> <p>3 particular matter would have looked, would have been</p> <p>4 written, I think the way it says returned, probably it is</p> <p>5 written. I didn't know that this particular matter would</p> <p>6 have looked like a confinement. Viv just asked me in</p> <p>7 passing whether I knew whether it was a confinement or not,</p> <p>8 and I said, it was not a confinement. But it had happened</p> <p>9 in the past that because people have got, what do you call</p> <p>10 it, this pre-written documents.</p> <p>11 CHAIRPERSON: Standard forms?</p> <p>12 MR GAMA: Standard forms, where people in</p> <p>13 the past had used standard forms incorrectly, and said what</p> <p>14 they did not intend to say. What people would say, they</p> <p>15 were confining when in fact they have gone out on a tender.</p> <p>16 ADV P PRETORIUS SC: So you say that it</p> <p>17 is not an uncommon experience within Transnet Freight Rail</p> <p>18 for people to utilise documentation relating to one process</p> <p>19 for another process. In other words, to confuse processes.</p> <p>20 MR GAMA: It had happened before when</p> <p>21 people had said, they had actually, they would take a</p> <p>22 standard form, it would say "confinement". They would have</p> <p>23 a different name at the top and have another name at the</p> <p>24 bottom, and I would then say quite clearly, this was a cut</p> <p>25 and paste document, and then send it back. It had happened</p>	<p style="text-align: right;">Page 16</p> <p>1 ADV P PRETORIUS SC: And I am putting it</p> <p>2 to you that that would mean that when a person is</p> <p>3 exercising a delegated authority to approve a process,</p> <p>4 there would be even more reason to scrutinise more</p> <p>5 carefully the documentation, that is the subject matter of</p> <p>6 that authorisation. Do you accept that proposition as a</p> <p>7 general proposition?</p> <p>8 MR GAMA: Yes, as a general proposition.</p> <p>9 ADV P PRETORIUS SC: No, I come to - I am</p> <p>10 sorry, did you want to explain?</p> <p>11 MR GAMA: Yes. I said as a general</p> <p>12 proposition, but as I indicated to you, we had started to</p> <p>13 put into place processes such as the processes I referred</p> <p>14 to last time, known as "operation clean up". The chief</p> <p>15 financial officer and the chief procurement officer were</p> <p>16 seized with dealing with all of those issues at the time.</p> <p>17 So we were not going to then assume that that problem was</p> <p>18 going to persist forever, because there were interventions</p> <p>19 that were put in place to deal with issues.</p> <p>20 ADV P PRETORIUS SC: Did you champion</p> <p>21 that "operation clean up?"</p> <p>22 MR GAMA: No. I would have championed</p> <p>23 the "operation clean up."</p> <p>24 ADV P PRETORIUS SC: Did you support it?</p> <p>25 MR GAMA: I supported it but I was not</p>

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<p style="text-align: right;">Page 17</p> <p>1 the great response I asked and as other people within the  2 group had asked as I indicated to you when I first took  3 over Transnet Freight Rail, there were 27 000 call centres  4 in the business. So it was a problem of this "operation  5 clean up" that was well known. The chief financial officer  6 on whose area procurement falls under, was the actual  7 sponsor of that particular programme. I did open the first  8 seminar around it, to galvanise the organisation in terms  9 of the importance of that work, but there was a particular  10 person that was appointed to run the day to day issues  11 around that, but I couldn't have a CEO being the champion  12 of that project.</p> <p>13 ADV P PRETORIUS SC: Simply put, Mr Gama,  14 you were chief executive officer of a division of Transnet  15 within which division "operation clean up" was taking  16 place.</p> <p>17 MR GAMA: Yes.</p> <p>18 ADV P PRETORIUS SC: I put it to you that  19 it can be reasonably be expected of a CEO to give full  20 support to that campaign, and in addition to that, in his  21 own exercise of authority, to exercise that authority in  22 accordance with the laid down procedures and with caution.</p> <p>23 MR GAMA: In a big division such as  24 Transnet Freight Rail, there is not a single individual who  25 can claim to be able to run that entity and understand all</p>	<p style="text-align: right;">Page 19</p> <p>1 instance with the issue of safety. It was the foremost  2 thing at the top of my agenda, and it was well-known, in  3 terms of what were the key, I only had four or five key  4 issues that I was really focusing on.</p> <p>5 [10:52] It was customer service, it was safety and it was  6 growth of the business. It was issues of employee morale,  7 it was very important to me, that I communicated to the  8 employees, the morale – I mean the vision and the strategy  9 of the company, so that they could be galvanised to support  10 it. And fifthly, I also had external stakeholders that I  11 had to deal with, Transnet, government and regulators. So  12 everybody in the business knew that we had all of these  13 issues. The CEO was focusing on some of them, but there  14 were also other very senior executives that worked with me,  15 who were also specifically focusing on other issues. So I  16 could not take on the responsibility. I think if you  17 looked at our projects register and our programme register,  18 we had more than 42 issues that we were trying to deal  19 with, and we were saying to each general manager at the  20 time, that he should no more than seven that he was  21 specifically focusing on, if we are going to have any  22 impact in terms of what we were trying to do, and as we  23 normally used to say, we were trying to eat an elephant,  24 and the best way to eat it was in bite sized chunks.</p> <p>25 ADV P PRETORIUS SC: Mr Gama, the</p>
<p style="text-align: right;">Page 18</p> <p>1 of the details required in that entity alone, so therefore  2 leadership and controls were shared, which is why in the  3 KPIs of the CFO and the CPO they would have been seized  4 with this matter. But CEOs as you know, they would also,  5 yes, keep an eye on some of these issues, but CEOs also act  6 as the strategic level. You have also to think about what  7 the division is going to look like in five years' time.  8 You cannot then be seized on a day to day basis on the  9 operational matters only.</p> <p>10 ADV P PRETORIUS SC: Mr Gama, I am going  11 to submit that that is an evasive answer.</p> <p>12 MR GAMA: It is not an evasive answer.  13 It talks to the real issues on the ground. As I have  14 indicated to you, Transnet Freight Rail had 26 000  15 employees. Transnet Freight Rail at that time had revenue  16 of some R15 billion. It operated throughout the country.  17 As CEO I assembled an executive team which would try and  18 help me. I was not going to assume solely on my own the  19 mantra of saying I think I can run this organisation. The  20 reason I put these resources in place is because we could  21 share the burden and we could deal with all of the issues  22 that we were to deal with. So I could not, you know, just  23 focus on certain issues that there were already very, very  24 senior executives within TFR that were focusing on. As I  25 said, we were seized with many issues. I dealt, for</p>	<p style="text-align: right;">Page 20</p> <p>1 proposition is not a difficult one. Generally speaking,  2 when the procedures and processes, particularly the  3 delegation of authority framework and the detailed  4 procurement procedures, place a duty on the CEO, it can  5 reasonably be expected that that duty be exercised  6 properly. Do you accept that proposition at least?</p> <p>7 MR GAMA: I will have a problem with the  8 issue of "operation clean up," that I could not have  9 championed it, which you were thinking that I should have  10 championed it, and I should be in the forefront of it.</p> <p>11 ADV P PRETORIUS SC: I didn't say –</p> <p>12 MR GAMA: I was including that, yes, I  13 supported it but I could not have executed it.</p> <p>14 ADV P PRETORIUS SC: Well, the question,  15 would you like to answer the question that I put to you?</p> <p>16 MR GAMA: If you can ask the question  17 again.</p> <p>18 ADV P PRETORIUS SC: Where policies and  19 procedures of Transnet prescribe that the CEO should  20 conduct himself or herself in a particular way, it is  21 reasonable to expect that that task be executed properly.</p> <p>22 MR GAMA: Which task?</p> <p>23 ADV P PRETORIUS SC: The tasks, any tasks  24 that any policy or procedure gives to you, for example a  25 task in relation to procurement.</p>

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<p style="text-align: right;">Page 21</p> <p>1 MR GAMA: The task that is related to the</p> <p>2 CEO, yes.</p> <p>3 ADV P PRETORIUS SC: Does it matter</p> <p>4 whatever task? If the task is given to a particular</p> <p>5 official, including CEO, do you have a problem with the</p> <p>6 proposition that that must be executed properly? That is</p> <p>7 the duty of a CEO to execute his duty properly.</p> <p>8 MR GAMA: Yes, the --</p> <p>9 ADV P PRETORIUS SC: Do you accept that?</p> <p>10 MR GAMA: That is the duty of a CEO to --</p> <p>11 ADV P PRETORIUS SC: You have no</p> <p>12 difficulty with that proposition?</p> <p>13 MR GAMA: No.</p> <p>14 ADV P PRETORIUS SC: It is not a</p> <p>15 difficult proposition to concede, is it?</p> <p>16 MR GAMA: I think we have agreed on that.</p> <p>17 ADV P PRETORIUS SC: And the point I am</p> <p>18 making to you that with procurement, there would be an</p> <p>19 added consideration requiring a CEO to exercise his or her</p> <p>20 duties carefully. That is what I am saying, in the context</p> <p>21 of "operation clean up", in the context of procurement</p> <p>22 problems, there is an added consideration that would</p> <p>23 require careful attention to duties. That is the</p> <p>24 proposition I am putting to you.</p> <p>25 MR GAMA: Yes, I think that is your view.</p>	<p style="text-align: right;">Page 23</p> <p>1 ADV P PRETORIUS SC: And then you say, "I</p> <p>2 think we have discussed with, you were not at that</p> <p>3 meeting." So you seem to be saying there that that</p> <p>4 particular contract was indeed discussed at the meeting</p> <p>5 with Michael, Mike. Do you see that?</p> <p>6 MR GAMA: Yes, that is the reference as I</p> <p>7 indicated, that was made in passing by Viv, whether I</p> <p>8 thought it had been a confinement or not, but it was just a</p> <p>9 passing discussion that we had, yes.</p> <p>10 ADV P PRETORIUS SC: Well, it was raised</p> <p>11 then with you, at the meeting of December.</p> <p>12 MR GAMA: It was just a passing comment,</p> <p>13 it was not something that was -- if you have a discussion</p> <p>14 over breakfast where people come to see you to get your co-</p> <p>15 operation, to get some of your colleagues to assist them</p> <p>16 with an investigation, and they mention it in passing, it</p> <p>17 is not something that it then becomes something that you</p> <p>18 thought you are having a discussion. As I said, there were</p> <p>19 no papers. We had general discussions about lots of</p> <p>20 things.</p> <p>21 ADV P PRETORIUS SC: Well, that is not</p> <p>22 what is said on page 78. You say not once, you say it</p> <p>23 twice within the space of four lines, "we discussed this</p> <p>24 thing." Do you see that?</p> <p>25 MR GAMA: Yes.</p>
<p style="text-align: right;">Page 22</p> <p>1 What I have indicated is that I practised due care in the</p> <p>2 execution of my duties.</p> <p>3 ADV P PRETORIUS SC: And do you accept</p> <p>4 that it is incumbent upon a CEO to lead by example.</p> <p>5 MR GAMA: Correct.</p> <p>6 ADV P PRETORIUS SC: Now, let us get back</p> <p>7 to page 78, bottom of the page, and I am going to ask you</p> <p>8 once again, if I may. Where you say, "even if somebody may</p> <p>9 have for some reason then returned it in a manner and way</p> <p>10 that it then looked like it was a confinement," were you</p> <p>11 just guessing or speculating? Or how did you know that the</p> <p>12 GNS documentation may have looked like a confinement?</p> <p>13 MR GAMA: I was not referring to the GNS</p> <p>14 confinement. I was indicating in general, that there had</p> <p>15 been some circumstances or instances where some documents</p> <p>16 had indicated something that it was not, where people would</p> <p>17 say the confined things when they actually in fact had gone</p> <p>18 on tender process.</p> <p>19 ADV P PRETORIUS SC: Well, let us look at</p> <p>20 what Mr Madhav says in the middle of the page. He refers</p> <p>21 you to a particular document, or a particular process, he</p> <p>22 says, "and in particular, there was a contract or</p> <p>23 confinement to GNS."</p> <p>24 Do you see that?</p> <p>25 MR GAMA: Yes.</p>	<p style="text-align: right;">Page 24</p> <p>1 ADV P PRETORIUS SC: Then you go on to</p> <p>2 say, and it is correct that you have been at pains to</p> <p>3 emphasise to Mr Arbitrator that at that December meeting of</p> <p>4 2008, GNS was not discussed. Here you are saying exactly</p> <p>5 the opposite.</p> <p>6 MR GAMA: We were not having any</p> <p>7 discussion on GNS. What was discussed is a simple issue</p> <p>8 of, I was asked lastly around Senamela, who was the subject</p> <p>9 of the rape allegation. I was then asked what I thought of</p> <p>10 the performance in the security area and I had indicated</p> <p>11 that the report that I had received were quite positive,</p> <p>12 that we were beginning to catch criminals, and that they</p> <p>13 worked quite tirelessly because there was a question which</p> <p>14 at the time appeared to be an innocent question from Viv,</p> <p>15 where he indicated that he believes that Senamela sometimes</p> <p>16 comes late to work, and I indicated to him that it is</p> <p>17 possible that that might happen because I have heard that</p> <p>18 some of the operations that they took, happened late at</p> <p>19 night, and people might need to go and refresh or take a</p> <p>20 rest, but that I was very happy with the feedback that I</p> <p>21 was getting from Peter Fearnhead, his boss, in terms of the</p> <p>22 work that they were doing. So it was at that time that</p> <p>23 they then also indicated to me that was I aware that he was</p> <p>24 using a company called GNS, and I said, yes, I had become</p> <p>25 aware because they were between Peter Fearnhead and</p>



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<p style="text-align: right;">Page 25</p> <p>1 Senamela, they were indicating that GNS had helped them a 2 lot in terms of prosecutions. In fact earlier, they had 3 managed to indicate to me that for cable theft, we had been 4 able to get a 40 year prison sentence somewhere in 5 Kroonstad on some of these cable thieves, and so we were 6 pleased with some of the progress that was being made. 7 ADV P PRETORIUS SC: Well, we need to – 8 MR GAMA: So the discussion had not been 9 about GNS, it was really questions of saying, did I know, 10 and it was a follow up question to say, did I know that 11 General Nyanda owned GNS, and I said, yes, I had become 12 aware, and whether I knew Nyanda, and then we had gone on 13 to very briefly, discuss what, Viv just asked me whether I 14 knew that there had been confinement, or was it a 15 confinement or not? And I said, no, I don't think that it 16 would have been a confinement. And we had left it at that. 17 So it was not a very detailed discussion of the sort that 18 you allege. 19 ADV P PRETORIUS SC: Well, I am not I 20 alleged that firstly, and I am not sure secondly, that that 21 long answer is a direct answer to the question, but we need 22 to move on, so I would like to summarise. You said in 23 evidence to Mr Arbitrator that GNS was not discussed at the 24 meeting of December 2008, and you say here in your 25 interview with Mr Madhav, "I think we have discussed. We</p>	<p style="text-align: right;">Page 27</p> <p>1 that there must be tender process. 2 ADV P PRETORIUS SC: Well, Mr Gama, I am 3 afraid, that is not a satisfactory answer, because you say 4 at the bottom of page 78, "not in relation to general 5 practice," you say, "there was never any confinement on 6 this particular matter, even if somebody may have for some 7 reason then returned it in a manner and way that it then 8 looked like it was a confinement." That is a particular 9 reference to the subject of the discussion, the contract 10 and relation to GNS. It is not a general observation. 11 MR GAMA: As I have indicated to you, as 12 far as I was concerned at the time, there had been a tender 13 process. John Beattie had shown me the tender process, and 14 I had indicated that, all I was indicating is that even if 15 it said so, it would not have been so, because I was aware 16 that there was a tender process. 17 ADV P PRETORIUS SC: So you were 18 referring to the particular matter under discussion, at the 19 bottom of page 78, and not general practice? 20 MR GAMA: I am not sure if I am – 21 ADV P PRETORIUS SC: Well, look at what 22 you say, Mr Gama, at the bottom of page 78. "As far as I 23 am aware," you say, "and as far as I am concerned, there 24 was never any confinement on this particular matter, even 25 if somebody may have for some reason then returned it in a</p>
<p style="text-align: right;">Page 26</p> <p>1 discussed this thing." And this thing is the contractual 2 confinement to GNS. 3 MR GAMA: It depends what question was 4 being asked. If you could just go back, and ask what was 5 the question that was being asked at that time. 6 ADV P PRETORIUS SC: Well, we will argue 7 what we need to, but the thing you say that was discussed 8 concerned whether or not whether there was a confinement in 9 relation to this particular matter. That is what you say 10 at the bottom of page 78. And in addition to that, you go 11 into detail and you say at the bottom of page 78, "Even if 12 somebody may have for some reason then returned it in a 13 manner and a way that it then looked like a confinement." 14 Now I am putting it to you once more, please, Mr Gama, how 15 did you know that the process was made to look like a 16 confinement at this stage, when you said it on page 78? 17 MR GAMA: I think I have already answered 18 that question. 19 ADV P PRETORIUS SC: How did you know? 20 MR GAMA: Where I indicated to you that 21 in general, because of the standard forms, there had been 22 issues where people would write "confinement" on something 23 was not. As I indicated to you, security contract, I had 24 been quite clear, even as you asked, and you showed me the 25 written thing on the 3rd of March, I had clearly indicated</p>	<p style="text-align: right;">Page 28</p> <p>1 manner and way that it then looked like it was a 2 confinement." 3 MR GAMA: Yes, on this matter as well, I 4 was saying I don't think it was a confinement. That is 5 what – I have answered that question. 6 ADV P PRETORIUS SC: If you look at page 7 79, we will leave those answers for argument. You continue 8 to deal with the particular matter of the award of the 9 contract to GNS, and the process that preceded it, do you 10 see that? Not general matters, but particular matters. Do 11 you see that? 12 MR GAMA: Yes, this – here we are dealing 13 with a particular matter, yes. 14 ADV P PRETORIUS SC: And what you say 15 there, is that Mr Beattie came to you, you say he spoke 16 about the need to sign a document. It was urgent. Do you 17 see that? 18 MR GAMA: Yes. 19 ADV P PRETORIUS SC: You asked him about 20 the urgency, correct? 21 MR GAMA: Yes. 22 ADV P PRETORIUS SC: And he gave you an 23 explanation, and he mentioned that three companies, 24 according to you, he said three companies tendered for 25 that, do you see that? Three companies.</p>

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<p style="text-align: right;">Page 29</p> <p>1 MR GAMA: No, I was referring to the last</p> <p>2 three companies that he showed me, as I indicated to you</p> <p>3 there have been about 12 or 11 companies, I can't remember.</p> <p>4 ADV P PRETORIUS SC: We will come to that</p> <p>5 in a moment. And then, Mr Beattie had told you that the</p> <p>6 company that had worked there previously had had not had a</p> <p>7 good record of success, do you see that, in the middle of</p> <p>8 the page?</p> <p>9 MR GAMA: Yes, that is what he told me.</p> <p>10 ADV P PRETORIUS SC: Well, you know from</p> <p>11 a document you read and signed, that that wasn't the view</p> <p>12 of others within Transnet Freight Rail, the documents that</p> <p>13 were before you in March of 2007.</p> <p>14 MR GAMA: There were issues which were</p> <p>15 probably not in the documentation that John had raised with</p> <p>16 me, which related to investigations that he had to do, so</p> <p>17 there were those issues that John had raised to me, but</p> <p>18 they have not been raised in any correspondence anywhere</p> <p>19 here.</p> <p>20 ADV P PRETORIUS SC: In any even, Mr</p> <p>21 Gama, what is clear from your evidence today, is that when</p> <p>22 you were relating in this interview to Mr Madhav what had</p> <p>23 happened on 5th of December 2007, you were relying on your</p> <p>24 memory of what actually took place, and not on any</p> <p>25 documentation that you had seen or was given to you in the</p>	<p style="text-align: right;">Page 31</p> <p>1 skipped. There is these things they come with and there is</p> <p>2 something that is missing there, that it says, come to you</p> <p>3 with the file, it talks about a file.</p> <p>4 ADV P PRETORIUS SC: Well, let's</p> <p>5 continue. You concede no doubt, that it would be rather</p> <p>6 strange to call a file a motivation. There is a particular</p> <p>7 document that is called a motivation, a confinement</p> <p>8 motivation, which the procedures say –</p> <p>9 MR GAMA: No, I do not concede that a</p> <p>10 motivation is just a particular document. When I referred</p> <p>11 to motivation here, I was not being specific to any</p> <p>12 particular document. I was talking to a file, a motivation</p> <p>13 that he brought to me that indicated their process, the</p> <p>14 process that they had followed.</p> <p>15 ADV P PRETORIUS SC: You concede that in</p> <p>16 the documentation relating to the GNS process, there is a</p> <p>17 document called confinement motivation.</p> <p>18 MR GAMA: I have seen that document.</p> <p>19 ADV P PRETORIUS SC: In any even –</p> <p>20 MR GAMA: But that is not the document</p> <p>21 that I was referring to.</p> <p>22 ADV P PRETORIUS SC: Let me put it you</p> <p>23 once again. The question asked of you, is what document</p> <p>24 was presented to you? And you say, well, it is their</p> <p>25 motivation.</p>
<p style="text-align: right;">Page 30</p> <p>1 interim.</p> <p>2 MR GAMA: Yes.</p> <p>3 ADV P PRETORIUS SC: Relying purely on</p> <p>4 your memory of what had happened.</p> <p>5 MR GAMA: I was trying to recall all of</p> <p>6 the issues. I couldn't have recalled all of them.</p> <p>7 ADV P PRETORIUS SC: Sure. Then at the</p> <p>8 bottom of the page, Mr Madhav says, "What document was</p> <p>9 presented to you? Do you recall it at the time, was it</p> <p>10 just one documents, or various documents?" And you say,</p> <p>11 "Well, it is their motivation." Do you see that?</p> <p>12 MR GAMA: Yes. The motivation as I</p> <p>13 indicated was that about three-quarters of a lever arch</p> <p>14 file.</p> <p>15 ADV P PRETORIUS SC: Well, over the page</p> <p>16 you say, "Well, it is their motivation."</p> <p>17 [11:12] In answer to the question, "What document was</p> <p>18 presented to you?" you say, and in answer to the question</p> <p>19 "Was it just one document or various documents?" you say,</p> <p>20 "Well, it is their motivation." You say, "Look, here is my</p> <p>21 motivation. I need you to approve it." That is Beattie</p> <p>22 talking to you, according to your recollection. "The</p> <p>23 tender board has approved it. We just need you to sign."</p> <p>24 Do you see that?</p> <p>25 MR GAMA: Yes, there is the part that you</p>	<p style="text-align: right;">Page 32</p> <p>1 ADV G C PRETORIUS SC: No, just put it</p> <p>2 fairly, was it just one document or various documents?</p> <p>3 Chairman, sorry, I mean –</p> <p>4 CHAIRPERSON: That question was –</p> <p>5 ADV P PRETORIUS SC: I will move on –</p> <p>6 MR GAMA: No, it was not one document.</p> <p>7 As I have indicated, it was a file of documents.</p> <p>8 ADV P PRETORIUS SC: And if you look at</p> <p>9 the middle of the page, Mr Gama, you say, "So we just met</p> <p>10 in my office, probably five, 10 minutes, and he showed me</p> <p>11 all the document, and he had gone through, you know, some</p> <p>12 process." So, what you say on the 8th of April 2009, is</p> <p>13 that Mr Beattie, assuming it was Mr Beattie, showed you all</p> <p>14 the documentation. Correct?</p> <p>15 MR GAMA: Ja, he came with the file.</p> <p>16 ADV P PRETORIUS SC: No, no, he showed</p> <p>17 you all the document – not he came with the file, Mr Gama,</p> <p>18 you say, "He showed me all the documentation." The two are</p> <p>19 very different statements. I think you will understand,</p> <p>20 there is a difference between saying "he came with the</p> <p>21 file," and saying, "he showed me all the documentation," do</p> <p>22 you concede that, first of all?</p> <p>23 MR GAMA: No, the documents were in a</p> <p>24 file, Mr Chairman. The documents –</p> <p>25 ADV P PRETORIUS SC: Well, did he show</p>

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<p style="text-align: right;">Page 33</p> <p>1 you the documentation or did he not?</p> <p>2 MR GAMA: Well, he came with the</p> <p>3 documentation.</p> <p>4 ADV P PRETORIUS SC: No, Mr Gama, did he</p> <p>5 - please listen to the question and answer the question.</p> <p>6 Did he show you the documentation or did he not show you</p> <p>7 the documentation?</p> <p>8 MR GAMA: He showed me the relevant</p> <p>9 documentation, yes.</p> <p>10 ADV P PRETORIUS SC: Not all the</p> <p>11 documentation.</p> <p>12 MR GAMA: Well, we didn't go through it</p> <p>13 page by page, it was three-quarters of a lever arch file as</p> <p>14 I indicated.</p> <p>15 ADV P PRETORIUS SC: And he said, "And</p> <p>16 these were the guys that have been chosen," did he show you</p> <p>17 the document that contained that information, at least?</p> <p>18 MR GAMA: No, we were just talking in</p> <p>19 general terms. I think he showed me the three companies,</p> <p>20 to say out of the 11 or 12, or whatever, these were the</p> <p>21 ones that they have chosen and adjudicated.</p> <p>22 ADV P PRETORIUS SC: And he showed you</p> <p>23 the document on which those three companies appeared.</p> <p>24 MR GAMA: Ja, he just showed me names.</p> <p>25 ADV P PRETORIUS SC: He showed you names,</p>	<p style="text-align: right;">Page 35</p> <p>1 happened?</p> <p>2 MR GAMA: Yes, he did show me.</p> <p>3 ADV P PRETORIUS SC: And on page 81, you</p> <p>4 say in the middle of the page, "but what I do know is then,</p> <p>5 and I had a discussion with Viv, and I said to him, as far</p> <p>6 as I am aware, even if it is a written confinement it is</p> <p>7 not a confinement, because they have gone through a</p> <p>8 process, and he showed me that process."</p> <p>9 That is a reference to the meeting of December</p> <p>10 2008 with Viv Oates.</p> <p>11 MR GAMA: No, that is not the reference</p> <p>12 to it.</p> <p>13 ADV P PRETORIUS SC: Well, what is the</p> <p>14 discussion with Viv?</p> <p>15 MR GAMA: No, I had a telephone</p> <p>16 discussion with him.</p> <p>17 ADV P PRETORIUS SC: When?</p> <p>18 MR GAMA: I think when he was arranging</p> <p>19 the meeting, the meeting that was the subject of this</p> <p>20 interview.</p> <p>21 ADV P PRETORIUS SC: So he told you then</p> <p>22 that amongst the matters to be discussed at that meeting,</p> <p>23 was the issue of the confinement, and whether it was a</p> <p>24 confinement or not?</p> <p>25 MR GAMA: No, no, he didn't tell me what</p>
<p style="text-align: right;">Page 34</p> <p>1 in particular?</p> <p>2 MR GAMA: Ja, well, they didn't really</p> <p>3 mean much to me.</p> <p>4 ADV P PRETORIUS SC: Well, lower down on</p> <p>5 the page, you say again, "We discussed that document." You</p> <p>6 say, "And he told me the process, and he showed me, you</p> <p>7 know, names." Is that correct?</p> <p>8 MR GAMA: Well, I don't know whether in</p> <p>9 terms of the transcript I said "the document" or "the</p> <p>10 documents", I am not going to say which is which, but he</p> <p>11 showed me names, as I have indicated to you.</p> <p>12 ADV P PRETORIUS SC: Well, Mr Gama, it</p> <p>13 says very clearly here, "We discussed that document." Do</p> <p>14 you see that?</p> <p>15 MR GAMA: Ja, I am not going to be</p> <p>16 technical about that. I mean, if we started being</p> <p>17 technical on this document, for instance, when it says</p> <p>18 written, it says "returned" on page 78, so I really, I</p> <p>19 don't know what, but he showed me the names, I think that</p> <p>20 is factual.</p> <p>21 ADV P PRETORIUS SC: That is what is said</p> <p>22 in the next sentence, "He showed me, you know, names." Do</p> <p>23 you accept that that is what you said before Madhav?</p> <p>24 MR GAMA: Yes.</p> <p>25 ADV P PRETORIUS SC: And is that what</p>	<p style="text-align: right;">Page 36</p> <p>1 was going to be discussed. He just asked me in passing. I</p> <p>2 used to talk to him a lot about all kinds of things. He</p> <p>3 just asked me in that he said, do you know whether this</p> <p>4 thing was a confinement or not, and I said to him, "no, I</p> <p>5 don't really have a document." But if he wants me to find</p> <p>6 out, I can. And then he left it at that.</p> <p>7 ADV P PRETORIUS SC: Mr Gama, that is not</p> <p>8 what was said here, with respect. You said that this</p> <p>9 discussion referred to here took place with Viv Oates when</p> <p>10 the meeting of 8 April was being arranged.</p> <p>11 MR GAMA: No, there were two discussions.</p> <p>12 ADV P PRETORIUS SC: Well, Mr Gama, I am</p> <p>13 sorry, you have got to help us -</p> <p>14 MR GAMA: No, I am trying to help you</p> <p>15 with these discussions, so that you don't confuse my</p> <p>16 telephonic discussion with Viv -</p> <p>17 ADV P PRETORIUS SC: Oh.</p> <p>18 MR GAMA: - and the breakfast meeting</p> <p>19 that I had in December.</p> <p>20 ADV P PRETORIUS SC: Mr Gama, I am</p> <p>21 afraid, if there is any confusion, it is not being created</p> <p>22 by me. You gave express and detailed evidence in regard to</p> <p>23 this conversation on page 81. You said quite clearly that</p> <p>24 that conversation took place when the meeting of 8th of</p> <p>25 April was being arranged. You now want to say, well, there</p>



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<p style="text-align: right;">Page 37</p> <p>1 was another conversation.</p> <p>2 MR GAMA: Well, there were two</p> <p>3 conversations.</p> <p>4 ADV P PRETORIUS SC: Alright, let us just</p> <p>5 stick with the one that you are dealing with in your</p> <p>6 evidence. Let's not confuse the issue. Is your evidence</p> <p>7 correct –</p> <p>8 MR GAMA: Well, it doesn't really matter</p> <p>9 which of those conversations.</p> <p>10 ADV P PRETORIUS SC: It does actually,</p> <p>11 and we will deal with that in argument, but is your</p> <p>12 evidence correct that this conversation, which took place</p> <p>13 here, and you were referring to hear, take place in the</p> <p>14 context of the arrangement of the meeting of the 8th of</p> <p>15 April?</p> <p>16 MR GAMA: Sorry, can you just repeat that</p> <p>17 one?</p> <p>18 ADV P PRETORIUS SC: Let me just say, I</p> <p>19 ask you what discussion is being referred to here, and you</p> <p>20 said it was a telephonic discussion with Mr Oates, where</p> <p>21 the meeting of the 8th of April was being arranged.</p> <p>22 MR GAMA: Yes, well, I am –</p> <p>23 ADV P PRETORIUS SC: That is your</p> <p>24 evidence. Is that evidence correct or not?</p> <p>25 MR GAMA: This is what I am surmising</p>	<p style="text-align: right;">Page 39</p> <p>1 MR GAMA: No, that evidence is reliable.</p> <p>2 The previous one, when I asked whether Madhav was at the</p> <p>3 meeting, is because I was confusing him with Naicker -</p> <p>4 ADV P PRETORIUS SC: Well, we are now</p> <p>5 discussing –</p> <p>6 MR GAMA: - which is a different, which</p> <p>7 is a different discussion.</p> <p>8 ADV P PRETORIUS SC: Yes, I know it is a</p> <p>9 different discussion, and that is what you told Mr</p> <p>10 Arbitrator. We are now dealing, to avoid confusion, Mr</p> <p>11 Gama, the question was very clear, with the meeting on page</p> <p>12 81. Now, I am going to put it to you, if I may once again,</p> <p>13 that during the discussions with Mr Oates –</p> <p>14 MR GAMA: Yes.</p> <p>15 ADV P PRETORIUS SC: - concerning the</p> <p>16 meeting to be held on the 8th of April –</p> <p>17 MR GAMA: Mm.</p> <p>18 ADV P PRETORIUS SC: - the GNS process</p> <p>19 was discussed, and in particular, the issue of a</p> <p>20 confinement arose. Would you accept that proposition?</p> <p>21 MR GAMA: The issue that was discussed,</p> <p>22 Oates just in passing as usual, would say, "Do you remember</p> <p>23 whether it was a confinement, or not?"</p> <p>24 ADV P PRETORIUS SC: And did you say, "As</p> <p>25 far as I am aware, even if it is a written confinement, it</p>
<p style="text-align: right;">Page 38</p> <p>1 that, because this looked fresh, is that that's a</p> <p>2 discussion that I had with Viv. I told him that even if it</p> <p>3 was written confinement, it would not have been a</p> <p>4 confinement.</p> <p>5 ADV P PRETORIUS SC: Mr Gama, can we rely</p> <p>6 on your statement, that is all, can we rely on your</p> <p>7 evidence given a few minutes ago, that the discussion being</p> <p>8 referred to here was a discussion in which the meeting of</p> <p>9 the 8th of April was being arranged? Can we rely on that</p> <p>10 evidence, or can't we?</p> <p>11 MR GAMA: Well, you are saying I mustn't</p> <p>12 talk about the telephonic conversation.</p> <p>13 ADV P PRETORIUS SC: I am quite happy.</p> <p>14 MR GAMA: So that is fine, if it –</p> <p>15 ADV P PRETORIUS SC: Correct, so it was a</p> <p>16 telephonic conversation, but my question, let me put my</p> <p>17 question to you again, and I don't think it is a difficult</p> <p>18 question. You told Mr Arbitrator a few minutes ago, that</p> <p>19 the discussions referred to here, in the middle of page 81,</p> <p>20 was a telephonic discussion with Mr Oates, during the</p> <p>21 course of which the meeting of the 8th of April was being</p> <p>22 arranged.</p> <p>23 MR GAMA: Yes.</p> <p>24 ADV P PRETORIUS SC: Is that evidence</p> <p>25 reliable, or is it not reliable?</p>	<p style="text-align: right;">Page 40</p> <p>1 is not a confinement, because they have gone through a</p> <p>2 process, and he showed me that process?</p> <p>3 MR GAMA: Correct.</p> <p>4 ADV P PRETORIUS SC: So it was discussed,</p> <p>5 whether in passing or not, and you seem to use that phrase</p> <p>6 quite frequently, it was discussed in that conversation?</p> <p>7 MR GAMA: Ja, it was an information</p> <p>8 discussion to set up a meeting.</p> <p>9 ADV P PRETORIUS SC: And then once again,</p> <p>10 two-thirds down the way, page 81, "And he showed me the</p> <p>11 name of companies," that is a reference to your</p> <p>12 recollection at the time that Mr Beattie, on the 5th of</p> <p>13 December showed you the names of companies. It is a</p> <p>14 repeated reference so far in this interview.</p> <p>15 MR GAMA: Yes.</p> <p>16 ADV P PRETORIUS SC: And on page 82, the</p> <p>17 chairperson says, in the context of the GNS process, and</p> <p>18 whether it was a due processor not, he says to you, "Then</p> <p>19 secondly, in terms of the documentation as you have just</p> <p>20 mentioned that when presented to yourself, was it an order</p> <p>21 at that point of time?" and you say, "Yes, yes." Do you</p> <p>22 see that?</p> <p>23 MR GAMA: Mm.</p> <p>24 ADV P PRETORIUS SC: The point that the</p> <p>25 chairperson is making is that documentation was presented</p>

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<p style="text-align: right;">Page 41</p> <p>1 to you. "You say it was an order?" "Yes, yes." The</p> <p>2 documentation presented, do you see that?</p> <p>3 MR GAMA: Yes.</p> <p>4 ADV P PRETORIUS SC: And then at the</p> <p>5 bottom of the page, two-thirds down the way of the page,</p> <p>6 rather, Mr Madhav says, "See, this is the document we are</p> <p>7 referring to, and if you look at the next (and that is</p> <p>8 inaudible) this is the document that you are referring to,"</p> <p>9 and you say, "Ja, it would have been something coming from</p> <p>10 the acquisition council, okay, what is it you want me to</p> <p>11 look at?"</p> <p>12 It seems to me that there Mr Madhav is showing</p> <p>13 you a document.</p> <p>14 MR GAMA: Yes.</p> <p>15 ADV P PRETORIUS SC: And then if you go</p> <p>16 over the page, one-third down the way on page 83, Mr Madhav</p> <p>17 asks you, "Did you read this document when you were</p> <p>18 presented to sign it?" and you say in answer to that,</p> <p>19 "Well, there was a whole stack of things."</p> <p>20 Do you see that?</p> <p>21 MR GAMA: Ja, yes.</p> <p>22 ADV P PRETORIUS SC: You don't say there,</p> <p>23 "I just read one page."</p> <p>24 MR GAMA: I didn't read one page.</p> <p>25 ADV P PRETORIUS SC: Well --</p>	<p style="text-align: right;">Page 43</p> <p>1 at the meeting of the 5th December 2007, you only read one</p> <p>2 page. That is the page of signatures.</p> <p>3 MR GAMA: No, the page that I was given,</p> <p>4 I am talking about the page that I signed.</p> <p>5 ADV P PRETORIUS SC: Yes.</p> <p>6 MR GAMA: And the only page that I</p> <p>7 touched and took into my hand and signed, was that page.</p> <p>8 ADV P PRETORIUS SC: Did you read even</p> <p>9 that page?</p> <p>10 MR GAMA: Ja, well, I did see the fact</p> <p>11 that it had been to the tender board, and that it came from</p> <p>12 the acquisition council.</p> <p>13 ADV P PRETORIUS SC: Did you read the</p> <p>14 page? Did you read, did you pay particular attention to</p> <p>15 that particular page?</p> <p>16 MR GAMA: Well, I did indicate to you</p> <p>17 that I had glossed over the page, and I signed it.</p> <p>18 ADV P PRETORIUS SC: So the one page that</p> <p>19 was given to you, in your hands, you glossed over?</p> <p>20 MR GAMA: Ja, as we had been discussing</p> <p>21 it before I got the page, we discussed in detail with John,</p> <p>22 in terms of the process that had been followed, and how it</p> <p>23 came about that he needed approval.</p> <p>24 ADV P PRETORIUS SC: Two-thirds away down</p> <p>25 the page, you say, "I mean, I see your marked certain</p>
<p style="text-align: right;">Page 42</p> <p>1 MR GAMA: He showed me a whole stack of</p> <p>2 documents. As I indicated, one of them was the document</p> <p>3 that showed the tender number that -- so there was a number</p> <p>4 of documents that he showed me, in order for him to</p> <p>5 motivate the actual approval that he was looking.</p> <p>6 ADV P PRETORIUS SC: Let's just be a</p> <p>7 little more careful, Mr Gama. One-third down the page, the</p> <p>8 question is very specific, "Did you read this document when</p> <p>9 you were presented to sign it?" Do you see that? It is</p> <p>10 not difficult to understand that question. Did you read</p> <p>11 it? You don't answer that question.</p> <p>12 MR GAMA: No, wait, you said one-third</p> <p>13 down the page. I looked at the bottom, but I think it is</p> <p>14 up. Ja, it says, "Did you read the document?"</p> <p>15 ADV P PRETORIUS SC: Yes. You don't</p> <p>16 answer that question in the next few lines, do you see</p> <p>17 that? There is no record of you answering that question</p> <p>18 directly. Do you see that?</p> <p>19 MR GAMA: Ja.</p> <p>20 ADV P PRETORIUS SC: And certainly, there</p> <p>21 is no reference to any statement by yourself that, "I only</p> <p>22 read one page." There is nothing that says that here.</p> <p>23 MR GAMA: Not in this.</p> <p>24 ADV P PRETORIUS SC: In your evidence in</p> <p>25 cross-examination previously in this arbitration was that</p>	<p style="text-align: right;">Page 44</p> <p>1 things. The process was stopped, the contract expired."</p> <p>2 How did you know those facts?</p> <p>3 MR GAMA: I was reading the stuff that he</p> <p>4 was -- he was showing me much stuff, so I was just reading,</p> <p>5 I was just reading what he was showing me.</p> <p>6 ADV P PRETORIUS SC: So what process was</p> <p>7 stopped?</p> <p>8 MR GAMA: That's what I was reading from</p> <p>9 Madhav.</p> <p>10 ADV P PRETORIUS SC: Yes, no, what</p> <p>11 process that had been stopped were you referring to?</p> <p>12 MR GAMA: Well, as we now know, the, I</p> <p>13 think it was Nayager, he had gone to a meeting, and he came</p> <p>14 back and he said that the process had been stopped.</p> <p>15 ADV P PRETORIUS SC: You say this, prior</p> <p>16 to the meeting of the 8th of April, you hadn't seen any</p> <p>17 documentation, as you put it, correct?</p> <p>18 ADV G C PRETORIUS SC: Sorry, Mr</p> <p>19 Chairman, just to -- there may be a misunderstanding here.</p> <p>20 What Mr Gama testified and now repeatedly, he was reading</p> <p>21 from the document being shown to him, and relaying what he</p> <p>22 was reading on 8th of April from the document being shown to</p> <p>23 him, that is his evidence.</p> <p>24 ADV P PRETORIUS SC: That is precisely</p> <p>25 what I am asking Mr Gama to explain. What were you</p>

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<p style="text-align: right;">Page 45</p> <p>1 reading? How were you ascertaining that the process was 2 stopped?</p> <p>3 MR GAMA: Well –</p> <p>4 ADV P PRETORIUS SC: In other words, what 5 I am saying to you, Mr Gama, is that this information –</p> <p>6 MR GAMA: Mm. This is the thing that he 7 was showing me that he had marked in the document or 8 documents that he had, so I was just reading out to him 9 what he was telling me, what he was showing.</p> <p>10 ADV P PRETORIUS SC: You were paying 11 attention –</p> <p>12 MR GAMA: Yes.</p> <p>13 ADV P PRETORIUS SC: – as you explain 14 now, you were paying attention to the documentation, the 15 detail of the documentation that was being shown to you at 16 the time.</p> <p>17 MR GAMA: Yes, he showed me a highlighted 18 document, that is why I say, I say to him, "I see you have 19 marked certain things." So I am reading what he has 20 marked, and I am verbalising it. This is what this is.</p> <p>21 ADV P PRETORIUS SC: And then in the 22 middle of the page, of page 84, you say, "And he came with 23 a whole lot of things," that is again a reference to Mr 24 Beattie's arrival at your office on the 5th of December 25 2007, am I correct?</p>	<p style="text-align: right;">Page 47</p> <p>1 confinement, but that didn't matter, because people 2 sometimes call confinements – call processes confinements, 3 when they are not. That seems to be what you are saying 4 here.</p> <p>5 MR GAMA: Well, as I indicated to you, at 6 the top of his file was a tender document, a call for 7 proposals. So I couldn't then start thinking that the 8 tender process is a call for – is a confinement.</p> <p>9 ADV P PRETORIUS SC: Over the page, page 10 85, you say, again in reference to the 5th of December 11 meeting, 5th of December 2007 meeting, "He (meaning 12 Beattie) showed me three companies in his document to say, 13 these are the three companies that we have interviewed."</p> <p>14 MR GAMA: Yes.</p> <p>15 ADV P PRETORIUS SC: That is yet another 16 reference to you being shown three companies.</p> <p>17 MR GAMA: Well, it is still the same, the 18 fact that it is being referred to, I am indicating that he 19 did show me that there were three companies that they 20 adjudicated.</p> <p>21 ADV P PRETORIUS SC: And if you look at 22 the next sentence, "Here is the one company that we are 23 choosing." That is what he showed you, he pointed out the 24 specific company that was being selected. Did you turn 25 your back at that particular stage of the interview?</p>
<p style="text-align: right;">Page 46</p> <p>1 MR GAMA: Yes.</p> <p>2 [11:31] ADV P PRETORIUS SC: And you say, "Where 3 he would have shown me the names of companies for 4 instance," that is yet another reference to you being shown 5 the names of companies.</p> <p>6 MR GAMA: Yes.</p> <p>7 ADV P PRETORIUS SC: And I emphasise, you 8 were shown the names of companies, correct?</p> <p>9 MR GAMA: Ja.</p> <p>10 ADV P PRETORIUS SC: And then you were 11 asked, "Did John actually alluded you to the fact that this 12 was a confinement, as stipulated on the document here, on 13 the header?"</p> <p>14 And at the bottom of the page, after the number 15 of interruptions and inaudibles and interventions, you say, 16 "As I say, people sometimes could write all kinds of things 17 and say it is a confinement."</p> <p>18 And underneath that, "He came with documents that 19 indicated what processes that followed." Correct?</p> <p>20 MR GAMA: Yes.</p> <p>21 ADV P PRETORIUS SC: But it seems to me 22 what you may be saying here, I put it to you, as I ask for 23 your comment on this, on page 84 at the bottom, is that he 24 may well have shown you a document on which was written 25 "confinement" or that you indicated that it was a</p>	<p style="text-align: right;">Page 48</p> <p>1 MR GAMA: No.</p> <p>2 ADV P PRETORIUS SC: You paid attention 3 to what he was saying.</p> <p>4 MR GAMA: Yes.</p> <p>5 ADV P PRETORIUS SC: And he says to you, 6 here is the one company that we are choosing.</p> <p>7 MR GAMA: Yes.</p> <p>8 CHAIRPERSON: Is that an appropriate time 9 for a break?</p> <p>10 ADV P PRETORIUS SC: Sorry, thank you.</p> <p>11 Sorry, I didn't know we had –</p> <p>12 CHAIRPERSON: We will have a 10 minute 13 break.</p> <p>14 [HEARING ADJOURNS HEARING RESUMES]</p> <p>15 [11:56] ADV P PRETORIUS SC: Mr Gama, we were on 16 page 85 of bundle B1, if you would just go there please. 17 Go to page 86, Mr Gama, at the bottom of the page. The 18 conversation on page 85 and 86 relates to the open tender 19 process being stopped. What Mr Madhav explains to you by 20 way of background, on page 85, in relation to the first 21 paragraph, and that would be the first paragraph in bundle 22 B1, page 114, that would be the first paragraph, in 23 paragraph 2. So put this into its proper context which I 24 think is fair to you, I think we should go back to page 85, 25 where Kieran Madhav says two-thirds the way down the page,</p>

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<p style="text-align: right;">Page 49</p> <p>1 "Can I just give you a bit of background?" and you says,  2 "Yes." The first paragraph that mentions that went out on  3 open tender, you say, "Yes." He says, "That process was  4 actually stopped." And you say, "Yes." And then he said,  5 "And it was a non-award, and thereafter it was decided to  6 go to confinement, and to confinement to GNS." That is  7 what Mr Madhav says to you. Do you see that?  8 MR GAMA: Yes. Well, I was just looking  9 to him, yes.  10 ADV P PRETORIUS SC: And then he  11 elaborates. He says one-third down the page on page 86,  12 "Ja, according to the documents, it is based on some  13 instruction from Ms Dunjwa. That appears in the second  14 paragraph in the second box on page 114, do you see that?  15 It should be a reference to Dunjwa, D-u-n-j-w-a. Am I  16 correct?  17 MR GAMA: Yes.  18 ADV P PRETORIUS SC: And it goes on, he  19 says, "And that was relayed to a manager and security by  20 the name of Ken de Jager." Well, we know from your  21 evidence that that should be a reference to Mr Nayager, N-  22 a-y-a-g-e-r, correct?  23 MR GAMA: Nayager, that is the spelling.  24 ADV P PRETORIUS SC: Yes. And then, Mr  25 Madhav says to you, "It was placed on hold first, and then</p>	<p style="text-align: right;">Page 51</p> <p>1 eventually thereafter, it was stopped," referring to the  2 tender process, correct?  3 MR GAMA: Yes, that is what it says.  4 ADV P PRETORIUS SC: And then you say,  5 "But you are not answering my question, why was it  6 stopped?" "It was stopped, according to this, because one  7 of the companies that was involved there was now involved  8 in another process within Transnet." Madhav says, "Yes, we  9 understand that."  10 Is that what you would have said to Mr Madhav?  11 MR GAMA: Ja, that is he was – he was  12 showing me that as well, ja.  13 ADV P PRETORIUS SC: Well, he was showing  14 you at least what appeared on page 114, because that was  15 the document under discussion, correct, which says the  16 process was stopped on the instruction of Transnet group  17 executive.  18 MR GAMA: Mm.  19 ADV P PRETORIUS SC: Virginia Dunjwa.  20 MR GAMA: Mm.  21 ADV P PRETORIUS SC: That is the second  22 paragraph on the second box on page 114, bundle D1, sorry,  23 D2. I am sorry, I see you have got the wrong one, it is  24 bundle B1, page 114, and any reference to page 114 for the  25 record is a reference to bundle B1.</p>
<p style="text-align: right;">Page 50</p> <p>1 eventually thereafter it was stopped." That is the context  2 of your statement at the bottom of page 86, which says,  3 "Ja, ja, so they did not want, because I think from what I  4 understood at the time, they did not want the participation  5 of one company which was already looking at the entire  6 process." Do you see that?  7 MR GAMA: Yes.  8 ADV P PRETORIUS SC: You make reference  9 there to your understanding at some time in the past,  10 correct?  11 MR GAMA: Yes.  12 ADV P PRETORIUS SC: From your evidence,  13 that would only really be when Mr Beattie spoke to you.  14 MR GAMA: Yes.  15 ADV P PRETORIUS SC: So what Mr Beattie  16 told you was that a tender process was stopped because one  17 company was looking at the entire process. Do you see  18 that?  19 MR GAMA: I think, if you go to the  20 paragraph just before that, it was saying it was involved  21 in another process.  22 ADV P PRETORIUS SC: Well, you yourself  23 say in the paragraph before, Mr Madhav says to you two-  24 thirds the way down page 86, he says, "It was placed on  25 hold first (referring to the tender process) and then</p>	<p style="text-align: right;">Page 52</p> <p>1 But be that as it may, you say, and it's this  2 that I would like you to clarify for us please, Mr Gama,  3 you say in the last three lines of page 86, "From what I  4 understood at the time, they did not want the participation  5 of one company, which was already looking at the entire  6 process." So your understanding at a previous time must  7 have been that one company was disqualified because they  8 were looking at the entire process. That is a reference  9 clearly to G4, which had been appointed to audit the  10 security services within Transnet, not so?  11 MR GAMA: Yes.  12 ADV P PRETORIUS SC: So you had a prior  13 understanding of this situation before the 8th of April  14 2009.  15 MR GAMA: Well, as it says there, is that  16 I was recollecting, mm.  17 ADV P PRETORIUS SC: Yes, you recollected  18 this fact -  19 MR GAMA: Mm.  20 ADV P PRETORIUS SC: - that a process was  21 stopped because of the participation of one company which  22 was already looking at the entire process.  23 MR GAMA: Mm.  24 ADV P PRETORIUS SC: Correct?  25 MR GAMA: As you can see earlier, he was</p>



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<p style="text-align: right;">Page 53</p> <p>1 saying it was stopped, and I was saying, but why was it 2 stopped, because I wasn't too sure that it was stopped. I 3 knew that a company had dropped out, but I wasn't aware 4 that it was actually stopped. 5 ADV P PRETORIUS SC: So you did in fact 6 have prior knowledge. Was this prior knowledge something 7 that Mr Beattie had told you? 8 MR GAMA: I think he would – 9 ADV P PRETORIUS SC: In December. 10 MR GAMA: I think he would have mentioned 11 that there were initially four and then there were three. 12 ADV P PRETORIUS SC: We will come to 13 that, but did Mr Beattie tell you on the 5th of December, 14 that the open tender process had been stopped because of 15 the participation of one company which was already looking 16 at the entire process? 17 MR GAMA: No, he had not mentioned issues 18 of "stopped", he just mentioned that one company had been 19 dropped. 20 ADV P PRETORIUS SC: And so when you say 21 here, at the bottom of page 86, "I understood at the time," 22 you were referring to your understanding on the 5th of 23 December? 24 MR GAMA: Yes. 25 ADV P PRETORIUS SC: Not any other time?</p>	<p style="text-align: right;">Page 55</p> <p>1 for the first time that it was stopped. So it was merely a 2 reference to a subsequent process, because he was telling 3 me that it had been stopped. 4 ADV P PRETORIUS SC: Who was telling you? 5 MR GAMA: Kieran, in the middle of page 6 86, yes. 7 ADV P PRETORIUS SC: Let's go on, on page 8 87, one-third of the way down the page, you say, "Can you 9 just give me all the documents, so that, because what they 10 gave to me, it was a heap of documents." 11 Now, two things, that is a reference to the 12 meeting of the 5th of December, wasn't it? 13 MR GAMA: Yes. 14 ADV P PRETORIUS SC: You talk about 15 "they", is it not correct that several people came to you 16 on the 5th of December? 17 MR GAMA: No, it would just be a 18 semantically thing referring to John's department. It was 19 not people. 20 ADV P PRETORIUS SC: Because you also 21 said in your evidence-in-chief at one stage that they came 22 to you, do you recall that? 23 MR GAMA: Ja – no, I didn't mean it in 24 numerical – sorry. 25 ADV P PRETORIUS SC: But you say, "They</p>
<p style="text-align: right;">Page 54</p> <p>1 MR GAMA: No. 2 ADV P PRETORIUS SC: At the bottom of 3 page 86, you say, "But still, when John came to me, he had 4 a note of three companies that participated in the process, 5 in whatever that subsequent process was." Do you see that? 6 MR GAMA: Yes. 7 ADV P PRETORIUS SC: That appears to be a 8 reference, but to your knowledge there was a second 9 process. 10 MR GAMA: Yes, it was really merely 11 talking about the continuation of the processes as I 12 understood it then. 13 ADV P PRETORIUS SC: Ja, you are talking 14 about the subsequent process, does that not imply a second 15 process, another process? 16 MR GAMA: No, that is not what I would 17 have meant. 18 ADV P PRETORIUS SC: Well, I put it to 19 you, that the context, bottom of page 86, the top of page 20 87, clearly indicates that your understanding at the 21 previous time, and you say 5th of December 2007, was that 22 one process was stopped, and a subsequent process involved 23 the participation of three companies. 24 MR GAMA: Ja, I would not have asked 25 earlier as to why was it stopped, because he was telling me</p>	<p style="text-align: right;">Page 56</p> <p>1 gave to me a heap of documents." Is that correct, that 2 they gave to you a heap of documents? Because that is not 3 your evidence before this arbitration. 4 MR GAMA: No, it would have just been 5 meaning that they had this heap of documents. 6 ADV P PRETORIUS SC: Well, there is a 7 difference between giving you documents and having 8 documents, isn't there? 9 MR GAMA: Ja, there is, but I think it is 10 just in the manner of speak and speech, I wasn't being 11 precise. It is not, it is nothing untoward in terms of 12 that. I was just, it is not – it is like when I say they, 13 meaning the department, and I am not saying that they gave 14 me documents. I am talking about what I saw, that there 15 was a lot of documents. 16 ADV P PRETORIUS SC: Well, let us look at 17 the bottom of page 87. You say, "There was a tender 18 process, there were three companies that were approached, 19 okay." You are referring there to a process which you call 20 a tender process, which involved approaching three 21 companies. Do you see that? 22 MR GAMA: Oh, the last paragraph. 23 ADV P PRETORIUS SC: Yes. 24 MR GAMA: Ja, I meant the companies that 25 he indicated were adjudicated. There was an adjudication</p>

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<p style="text-align: right;">Page 57</p> <p>1 for that, I just never probably used the word</p> <p>2 "adjudication". But I understood that there had been an</p> <p>3 adjudication process of the final three companies.</p> <p>4 ADV P PRETORIUS SC: Well, we know now</p> <p>5 they agree that it is correct that three companies were</p> <p>6 approached in the subsequent confinement process. Is that</p> <p>7 correct?</p> <p>8 MR GAMA: Yes, we know that now.</p> <p>9 ADV P PRETORIUS SC: So if you say there</p> <p>10 was a tender process, there were three companies that were</p> <p>11 approached.</p> <p>12 MR GAMA: Mm.</p> <p>13 ADV P PRETORIUS SC: At least in respect</p> <p>14 of the fact that there were three companies that were</p> <p>15 approached, you would be correct. Isn't it probable that</p> <p>16 that is what you said, and that is what you meant?</p> <p>17 MR GAMA: That is what I said, but I was</p> <p>18 referring to the issue where they indicated to me that they</p> <p>19 had adjudicated.</p> <p>20 ADV P PRETORIUS SC: You didn't say</p> <p>21 "adjudicated", you said approached. It is very different</p> <p>22 again.</p> <p>23 MR GAMA: No, but that is not what it</p> <p>24 would mean. I mean, in the tender process, as I indicated,</p> <p>25 there were – I can't remember the number, but they didn't</p>	<p style="text-align: right;">Page 59</p> <p>1 have picked up that they began to write confinement."</p> <p>2 And the document that you are looking at here, is</p> <p>3 in fact the confinement document at page 114. In relation</p> <p>4 to this discussion with Mr Madhav, let me just put it a</p> <p>5 little more slowly. You were referring to, you said, to</p> <p>6 the document at page 114 and 115 previously, correct?</p> <p>7 MR GAMA: Ja, that is what he gave me to</p> <p>8 read.</p> <p>9 ADV P PRETORIUS SC: Yes, he gave you to</p> <p>10 read. And then on page 86, sorry, 87, Kieran Madhav says</p> <p>11 one-third down the page, "The only other document that we</p> <p>12 have in our possession that motivates the –" and then he</p> <p>13 says a little further down on page 2 there, and I put it to</p> <p>14 you that is the document at page 112 to 113, the</p> <p>15 confinement motivation.</p> <p>16 CHAIRPERSON: Look at the middle of the</p> <p>17 page on page 87, Mr Gama. That is the same document then.</p> <p>18 What Mr Pretorius said is that is the only other document.</p> <p>19 I think perhaps repeat that, I don't think Mr Gama could</p> <p>20 possibly –</p> <p>21 ADV P PRETORIUS SC: Sorry, Mr Gama.</p> <p>22 MR GAMA: I am looking for this page 2,</p> <p>23 but I am not too sure –</p> <p>24 ADV P PRETORIUS SC: I am sorry, Mr Gama,</p> <p>25 let me take it step by step. You have accepted that the</p>
<p style="text-align: right;">Page 58</p> <p>1 talk to all of the companies. My understanding was that</p> <p>2 they talked to – they pre-qualified others, and then they</p> <p>3 talked to –</p> <p>4 ADV P PRETORIUS SC: Well, we will come</p> <p>5 to that conclusion later. But I am going to put it to you,</p> <p>6 that you knew that three companies were approached, and you</p> <p>7 said it here on the 8th of April, and those three companies</p> <p>8 were approached in the course of a subsequent process after</p> <p>9 a process was stopped. You knew that at least on the 5th of</p> <p>10 December, and we will argue before that. Do you have an</p> <p>11 answer to that?</p> <p>12 MR GAMA: Well, I think to deal with this</p> <p>13 – what is the question?</p> <p>14 ADV P PRETORIUS SC: The proposition that</p> <p>15 I put to you, and you are free to comment, or not comment,</p> <p>16 as you wish. The proposition I put to you is that</p> <p>17 certainly as at the 8th of April, and at the 5th of</p> <p>18 December, you knew that three companies were approached as</p> <p>19 part of a subsequent process, after the original tender</p> <p>20 process had been –</p> <p>21 MR GAMA: No, I did not know, no.</p> <p>22 ADV P PRETORIUS SC: Then you go on to</p> <p>23 say, "I would not know what the exact process that they</p> <p>24 followed was, so in terms of the whole wording of this</p> <p>25 thing, it is in fact – in fact it is something I should</p>	<p style="text-align: right;">Page 60</p> <p>1 document that you and Mr Madhav was discussing, or that you</p> <p>2 were discussing rather, prior to your discussion on page</p> <p>3 87, was the document at page 114 and 115 of bundle D1.</p> <p>4 MR GAMA: Yes.</p> <p>5 ADV P PRETORIUS SC: The confinement.</p> <p>6 MR GAMA: Yes.</p> <p>7 ADV P PRETORIUS SC: Then, Mr Madhav says</p> <p>8 to you, there is another document that we have in our</p> <p>9 possession, you see at the top of page 87, there is a</p> <p>10 reference to three companies.</p> <p>11 MR GAMA: Ja.</p> <p>12 ADV P PRETORIUS SC: And then in relation</p> <p>13 to that discussion, Mr Madhav says, there is another</p> <p>14 document. He says, the only, that is the only other</p> <p>15 document that we have in our possession.</p> <p>16 MR GAMA: Yes.</p> <p>17 ADV P PRETORIUS SC: And the chairperson</p> <p>18 says, "And with three other companies, oh, it is in there."</p> <p>19 Do you see that? And I put it to you, that is the document</p> <p>20 at page 112 and on page 113, the second page of that</p> <p>21 document, the names of the three companies appear. Do you</p> <p>22 see that? Do you follow the question, or shall I explain</p> <p>23 it?</p> <p>24 MR GAMA: No, no. Ja, I see that, ja,</p> <p>25 113.</p>



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<p style="text-align: right;">Page 61</p> <p>1 ADV P PRETORIUS SC: The chairperson in 2 the middle of the page says, "And with three companies, oh, 3 it is in there." And Kieran says, "Let us just make sure 4 of it." Gama says, "Ja, I mean -"and Mr Madhav says, "On 5 page, yes." And you say, "Ja, my sense is that we have 6 here a tender process, then somebody decides to call it a 7 confinement." 8 MR GAMA: Ja. 9 [12:16] ADV P PRETORIUS SC: The bottom of the 10 page 87, you say, "There was a tender process. There were 11 three companies that were approached." We have dealt with 12 that. You say, "I would not know what the exact processes 13 that they followed was." And then you say, "In fact, it is 14 something that I should have picked up, that they began to 15 write a confinement." That is what you said. 16 MR GAMA: Mm. 17 ADV P PRETORIUS SC: And you have the 18 same view now? You should have picked that up. 19 MR GAMA: Yes, that is what I said, ja. 20 ADV P PRETORIUS SC: Go to page 89. At 21 the bottom of the page, after some more discussion, you say 22 in the last, second-last paragraph, the last three lines, 23 you say, "My role in this thing is to say to the GM who 24 comes to me, do you have the funds to pay for this, have 25 you followed the processes?"</p>	<p style="text-align: right;">Page 63</p> <p>1 is an acquisition in the tender process, "My role in this 2 thing is to say to the GM who comes to me, do you have the 3 funds to pay for this, have you followed the processes?" 4 Now, I put it to you, that where an acquisition 5 process, be it a tender or confinement, places a senior 6 executive position in a position where he his required to 7 authorise, you are a check point. It is your duty to 8 satisfy yourself by reference to the documents, to the 9 correctness of what you are authorising. And you cannot 10 just rely on the say-so of others, because then you are not 11 a check point. In other words, if a fox comes to you and 12 reports the loss of two chickens in the henhouse, and says, 13 I can assure you, it wasn't me, is that enough, when you 14 are responsible for the chickens in the henhouse? 15 MR GAMA: As I indicated before, I had 16 asked several questions around the process, and he had the 17 documentation and he was referring to the documentation. 18 The final thing that I had to check for was the funds, and 19 to make sure that the process was followed. So in terms of 20 the processes at the time, I believed that they had 21 followed the processes to the last, he had all of the 22 tender documents with him. I had no reason to believe that 23 there was anything otherwise. So I am talking about the 24 final, in the final analysis, but I had asked the 25 questions.</p>
<p style="text-align: right;">Page 62</p> <p>1 Now, I put it to you that whether this was a 2 tender or a – 3 MR GAMA: Where are you reading now? 4 ADV P PRETORIUS SC: At the bottom of 5 page 89, are you there? 6 MR GAMA: Yes. 7 ADV P PRETORIUS SC: It says, "Mr Gama," 8 and three lines down, you say, "My role in this thing is to 9 say to the GM who comes to me, do you have the funds to pay 10 for this, have you followed the processes?" 11 That is what you say, as being your role as the 12 CEO, correct? 13 MR GAMA: Yes. 14 ADV P PRETORIUS SC: I just want to put 15 it to you, that that is an extremely narrow and incorrect 16 definition of the role that you should play. Let me 17 explain why. 18 MR GAMA: No, sorry, I am just reading 19 the preceding paragraph, so that I can understand the 20 context. 21 ADV P PRETORIUS SC: Yes, sorry, take 22 your time. 23 MR GAMA: Okay, you can continue. 24 ADV P PRETORIUS SC: I just want to put 25 it to you, that when you say, "My role in this thing," that</p>	<p style="text-align: right;">Page 64</p> <p>1 ADV P PRETORIUS SC: But you hadn't 2 looked at the document you were signing, and you were 3 misled. And it is precisely to prevent you being misled 4 that it is your duty to check what you are signing. 5 MR GAMA: Ja, I would say I trusted all 6 of my GMs, that they would do the right thing, that they 7 would not come to me unless they were ready, and they'd 8 would make sure that everything had happened, and – but 9 that trust obviously, on this occasion, was misplaced. 10 ADV P PRETORIUS SC: Well, look over the 11 page at page 90, in the second paragraph you say, "If it 12 has been to the tender board, then I know that they are 13 satisfied with whatever the processes are." 14 The very point of the processes requiring you to 15 authorise and requiring you to apply your mind, so that you 16 bring an independent mind to bear. It is not enough for 17 you to be satisfied with what other people do. Correct? 18 MR GAMA: Ja, that is why in the tender 19 process, we also have outlined duties and we have outlined 20 terms of reference for the tender board, and the idea of 21 having those terms of reference for the tender board was to 22 make sure that all of the critical issues, they can also 23 deal with. 24 ADV P PRETORIUS SC: They must satisfy 25 themselves, and you must satisfy yourself. That is why you</p>

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<p style="text-align: right;">Page 65</p> <p>1 have various steps, various checkpoints along the way. If  2 a motor vehicle has to go through various checkpoints, the  3 most senior person at the last checkpoint can't phone the  4 first checkpoint and say, are you satisfied that there is  5 nothing untoward with this vehicle, you have got to check  6 yourself, not so?</p> <p>7 MR GAMA: Ja, I agree. I think that  8 narrowly that is what you had to do. As I indicated, in  9 this particular instance, I was really confronted with  10 somebody that came to see me, had not made an appointment.  11 We have not set aside time. I was in a hurry, and I guess,  12 there was that oversight that happened.</p> <p>13 ADV P PRETORIUS SC: Let's go to page 91,  14 there is a discussion about the price. I don't want to go  15 into that now. Mr Madhav says to you in line 3 of page 91,  16 it was 18 million, and you say here it says 4,9 million.  17 Now, you independently looked at the document, it was not  18 something that Mr Madhav drew to your attention, correct?</p> <p>19 MR GAMA: Well, he was showing me a  20 document where he had marked a lot of things.</p> <p>21 ADV P PRETORIUS SC: But you had an  22 opportunity to look at the document yourself and to point  23 out something that you noticed, not something that he  24 pointed out to you.</p> <p>25 MR GAMA: No, but he never gave me that</p>	<p style="text-align: right;">Page 67</p> <p>1 inference is that you had the document in front of you and  2 you were free to page through it.</p> <p>3 MR GAMA: Well, he was showing me the  4 document.</p> <p>5 ADV P PRETORIUS SC: Mr Gama, can we deal  6 with the proposition I am putting to you, he was referring  7 to an amount which appeared on page 115 of 18 million. Do  8 you see that, on page 115?</p> <p>9 MR GAMA: Ja, on the 11th.</p> <p>10 ADV P PRETORIUS SC: You were referring  11 to an amount on another page independently of his  12 statement, R4,9 million. So you must have had the document  13 in front of you to page to the next page.</p> <p>14 MR GAMA: Or he may have opened page 116  15 and he was indicating to me that it is 18 million, because  16 he knew he had read the document.</p> <p>17 ADV P PRETORIUS SC: No, I don't see 18  18 million on page 116, Mr Gama.</p> <p>19 MR GAMA: No, I am saying, 116 was where  20 the – where you say the 4 million is. So he may have  21 opened it there, but he was just talking to it. I don't  22 know. I don't remember all of this detail.</p> <p>23 ADV P PRETORIUS SC: Mr Gama, I don't  24 know why you are avoiding the inference that – Mr Madhav  25 refers to amounts of 18 million, on the top of the page</p>
<p style="text-align: right;">Page 66</p> <p>1 document at any point.</p> <p>2 ADV P PRETORIUS SC: You must have  3 yourself –</p> <p>4 MR GAMA: He was –</p> <p>5 ADV P PRETORIUS SC: - read the document,  6 you would notice –</p> <p>7 MR GAMA: He –</p> <p>8 ADV P PRETORIUS SC: - the amount of 4,9  9 million.</p> <p>10 MR GAMA: He was showing me the document,  11 he had marked certain things, so looking at those things  12 that he had marked. So I was talking to him, looking at  13 the document.</p> <p>14 ADV P PRETORIUS SC: Yes, the only point  15 I am making to you, Mr Gama, it is not an earth shattering  16 point, is that you yourself had the opportunity to notice  17 something independently from that which Mr Madhav was  18 referring to. He was referring to the 18 million and you  19 were referring to 4,9 million, and they are on different  20 pages of this. You see, page 115 of bundle B1 refers to  21 the amount of 18 million, in the middle of the page, that  22 is what Mr Madhav is presumably referring to, if he was  23 referring to a document at all. And over the page, results  24 of negotiations, paragraph 19, page 116 of  25 B1 is the amount of 4,9 million. So the</p>	<p style="text-align: right;">Page 68</p> <p>1 116, you quite independently then referred to, you say,  2 "here is 4,9 million."</p> <p>3 ADV G PRETORIUS SC: Mr Chairman, sorry –</p> <p>4 ADV P PRETORIUS SC: That is an  5 independent reference by yourself. Are you suggesting –  6 let me just finish – are you suggesting that Mr Madhav said  7 well, it says R18 million, and then offers you R4,9 million  8 on page 116, so that you can make that comment?</p> <p>9 ADV G C PRETORIUS SC: Sorry, Mr  10 Chairman, may I just –</p> <p>11 CHAIRPERSON: Sorry, you can object to  12 the question. Firstly, there are two bases for objection.  13 The witness quite clearly said that Madhav said 18 million  14 without referring to page 115 because he knew it was 18  15 million. And if one goes to the bottom of page 90, it is  16 Mr Gama that starts, with all of these new quotes that I  17 have, an authority, this thing was 4,9 million. So Mr  18 Madhav's reaction to Mr Gama saying it is 4,9 million, it  19 was 18 million. And then Mr Gama said, yes, it is 4,9  20 million. So the inference that they were on two different  21 pages is quite erroneous. It is an equal inference that  22 what was opened with respect to 116, Mr Gama picked up 4,9  23 million, and Mr Madhav says no, you are wrong, it is 18  24 million from his independent knowledge. So the basis for  25 the question is unfair.</p>

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<p>1 ADV P PRETORIUS SC: Well, let me put it</p> <p>2 another way. The only point I am making to you, Mr Gama,</p> <p>3 is that you had the opportunity to look independently at</p> <p>4 the document. It wasn't just what was pointed out to you</p> <p>5 by Mr Madhav. In other words, whatever page was open, you</p> <p>6 were able to scrutinise the document yourself, and to look</p> <p>7 at passages yourself, to raise issues arising out of a</p> <p>8 document yourself. That is all I am putting not you.</p> <p>9 MR GAMA: I would like to differ with</p> <p>10 that. We were having a discussion. There was a document</p> <p>11 that he was showing me, so I was talking at the same time,</p> <p>12 and at the same time looking at what he was showing me. So</p> <p>13 it is not the same as to say I was studying the document.</p> <p>14 ADV P PRETORIUS SC: I am not saying you</p> <p>15 were studying the document. Mr Gama, the only proposition</p> <p>16 I put to you, and I am going to put it to you once, and I</p> <p>17 don't know why it is so difficult to answer, that you had</p> <p>18 the opportunity yourself to peruse the document, to raise</p> <p>19 such points as you deemed necessary.</p> <p>20 MR GAMA: Perused, that is correct.</p> <p>21 ADV P PRETORIUS SC: The chairperson</p> <p>22 there says to you at the bottom of page 91, "What would</p> <p>23 that be amongst others, because I think the question here</p> <p>24 is, is this a confinement or not?" And you say, "No, you</p> <p>25 see, to me this was not a confinement. As I said to you,</p>	<p>1 Beattie, correct?</p> <p>2 MR GAMA: Yes.</p> <p>3 ADV P PRETORIUS SC: "- 'look, we have</p> <p>4 gone out on tender, I have three companies.' He did not</p> <p>5 say four, so I do not know anything about a fourth one. We</p> <p>6 had three companies, because there were two processes</p> <p>7 here," as you say, "there was the process where there were</p> <p>8 ten companies or whatever, I do not know the actual number,</p> <p>9 but I can find all of that. That process was then stopped</p> <p>10 because there were companies that should not participate in</p> <p>11 it, and then they went and did other processes, because I</p> <p>12 think they would have come to me at some point, if you can</p> <p>13 see here, they themselves write here, 'the chief executive</p> <p>14 instructed us to go out on open tender'."</p> <p>15 Now that is a reference to the discussion with Mr</p> <p>16 Beattie, is it not?</p> <p>17 MR GAMA: No, this is a reference to the</p> <p>18 discussion with, the earlier discussion with Madhav, when</p> <p>19 he indicates that he had - these things had been stopped.</p> <p>20 ADV P PRETORIUS SC: No, Mr Gama, I put</p> <p>21 it to you that that is an attempt to avoid the clear report</p> <p>22 of what was said here. Look at the first line in the</p> <p>23 second paragraph. "We were discussing something where he</p> <p>24 said, look, we have gone out on tender, I have three</p> <p>25 companies. He did not say four, so I do not know anything</p>
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<p>1 in terms of this document, these people would have written</p> <p>2 "confinement" and you say, somewhere he it says</p> <p>3 "confinement", somewhere here it says "open tender".</p> <p>4 Again, you have the opportunity to look at the document</p> <p>5 yourself, to raise such points as you wish to raise. It is</p> <p>6 not something that is being shown to you, correct?</p> <p>7 MR GAMA: No, it is being shown to me.</p> <p>8 It is not a document that is like in my hand. We started</p> <p>9 by saying, he had marked certain things, and he showed me</p> <p>10 the things that he had marked. But I don't know what the</p> <p>11 issue is. We were just glossing over a document.</p> <p>12 ADV P PRETORIUS SC: Well, all I am</p> <p>13 putting to you is that you had the opportunity, you weren't</p> <p>14 shown some here it says "confinement", someone here it says</p> <p>15 "open tender", that was you looking at the document.</p> <p>16 MR GAMA: Yes, I was looking at the</p> <p>17 document, yes.</p> <p>18 ADV P PRETORIUS SC: If you go to page</p> <p>19 92, you again refer to the discussion with John Beattie, do</p> <p>20 you see that? At the top of the page. "Certainly when</p> <p>21 John and I had the discussion, we were not discussing a</p> <p>22 confinement." Do you see that?</p> <p>23 MR GAMA: Yes.</p> <p>24 ADV P PRETORIUS SC: Then you say, "We</p> <p>25 were discussing something where he said -" that is Mr</p>	<p>1 about a fourth."</p> <p>2 MR GAMA: Yes.</p> <p>3 ADV P PRETORIUS SC: You are referring</p> <p>4 there to what Mr Beattie said to you, and what he did not</p> <p>5 say to you.</p> <p>6 MR GAMA: Yes.</p> <p>7 ADV P PRETORIUS SC: And you go on to</p> <p>8 say, "We had three companies," because there were two</p> <p>9 processes here, as you say. "There was the process where</p> <p>10 there were ten companies, or whatever, I do not know the</p> <p>11 actual number, but I can find out all of that."</p> <p>12 MR GAMA: Ja, can I explain to you,</p> <p>13 because it is not a simple yes or no?</p> <p>14 ADV P PRETORIUS SC: Alright. Of course</p> <p>15 you can, you are quite entitled.</p> <p>16 MR GAMA: Explanations, so that you can -</p> <p>17 during the course of the interview, I had been informed by</p> <p>18 Mr Madhav that the process was stopped. So as we have this</p> <p>19 discussion, it is not like a written discussion where you</p> <p>20 have to be precise, so we were talking, and having a</p> <p>21 discussion. What I was indicating here, if you start at</p> <p>22 that top paragraph, is we had gone out on tender, the</p> <p>23 company had gone out on tender, and there were this three</p> <p>24 companies that they adjudicated, and as I indicate there, I</p> <p>25 say, "It would seem to me, I am coming to a realisation</p>

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<p style="text-align: right;">Page 73</p> <p>1 that there seems to have been two processes here," and that  2 is why I say, as you say. But I am then indicating that as  3 far as I was aware, there was an initial term, companies or  4 so, which is the document which is the tender document, the  5 call for proposals that John Beattie came to me with, and  6 it would indicate, I think 10, 11 or 12. I don't know what  7 is the actual number of companies. Previously in that  8 interview itself, he had told me that the process was  9 stopped, so I relayed to him, to say, okay, it looks like  10 the process was then stopped, because some of the companies  11 could not, and so they went and did another process. When  12 I talk about saying they would have come to me at some  13 point, I was indicating on the CTI process where I said to  14 them, they must actually go out on an open tender for  15 security, because I just never believed that with security  16 you need to confine.  17 [12:36] ADV P PRETORIUS SC: Well, we are going  18 to argue differently, Mr Gama, and I will tell you why  19 because in the third paragraph you say as a matter fact,  20 not something that Mr Madhav told you, you say that process  21 was then stopped because there were companies that should  22 not participate in it. They then went and did another  23 process because I think they would have come to me at some  24 point. If you can see here they, themselves write here the  25 chief executive instructed us to go out on open tender. So</p>	<p style="text-align: right;">Page 75</p> <p>1 tell you things that happened. You also pick up on the  2 conversation and begin to understand and try to create a  3 picture in terms of what it is that they are dealing with.  4 So, if you are sitting with people and you are listening to  5 what they are saying, then of course it would indicate that  6 – unfortunately something that is written and something  7 that is verbal the tone would not come out of this kind of  8 discussion.  9 ADV P PRETORIUS SC: I am not sure  10 entirely that it's a matter of tone, Mr Gama. I think it's  11 very clearly written here, "so they would have come to me  12 at some point and I would say go out on open tender on  13 these things." So, what you are saying there –  14 MR GAMA: I am just –  15 ADV P PRETORIUS SC: Let me just finish  16 the question, if I may, I am sorry, Mr Gama. In the  17 context of you recording the history of the matter in this  18 interview you referred to two processes, one process  19 involving ten companies which was stopped. Another process  20 involving three companies and you say in the context of the  21 one process being stopped they then went and did another  22 process because I think they would have come to me at some  23 point.  24 So, and you repeat, "so they would have come to  25 me at some point." It must refer to them coming to you when</p>
<p style="text-align: right;">Page 74</p> <p>1 they would have come to me at some point.  2 Now that must be a point between the 3rd March  3 2007 and the 5th December 2007. You say, "they would have  4 come to me because there was a change in process and I told  5 them go out on open tender." And then you refer to the  6 document.  7 MR GAMA: Yes, I told them to go out on  8 open tender.  9 ADV P PRETORIUS SC: When they came to  10 you when the process was stopped because of one company  11 that couldn't participate.  12 MR GAMA: No, I don't think it was at  13 that time, I don't remember anyone coming to me.  14 ADV P PRETORIUS SC: Well, you yourself  15 say here, Mr Gama, they would have come to me at some  16 point. That's in the context of the process being stopped  17 because a company should not participate and they then went  18 and did another process.  19 MR GAMA: Ja, if you go back, I don't  20 know to which page, I was the one who was asking why it had  21 been stopped.  22 ADV P PRETORIUS SC: No, I understand  23 that.  24 MR GAMA: So, in the process of  25 conversation with people and as they discussed and they</p>	<p style="text-align: right;">Page 76</p> <p>1 one process was stopped and another process was initiated?  2 MR GAMA: Yes, no it doesn't. I think my  3 only reference point on this is my written comment on the  4 CSI document that they should go out on tender. I am not  5 saying that they could not have come back to me in July or  6 whenever again to say, "we are going out on open tender,"  7 but it would have been a tautology because that's what I  8 wanted them to do.  9 ADV P PRETORIUS SC: Mr Gama, on the 3rd  10 of March 2007 you ordered a process to be initiated, not in  11 the context of a process being stopped and a new one taking  12 its place, but simply in the context of a process being  13 initiated. This is quite a different circumstance, I put  14 it to you.  15 MR GAMA: No, I don't think its different  16 circumstances, I think it's just probably language and  17 those kinds of things. It doesn't mean anything else to me  18 other than what I think it means.  19 ADV P PRETORIUS SC: Well, let's look at  20 paragraph 3, the fourth line of paragraph 3. You say,  21 after you have said, "because I think that they would have  22 come to me at some point," if you can see here, they  23 themselves write here. Now, I'll point out the document in  24 a moment. But that again seems to indicate that you had a  25 document with you and you were free to refer to the</p>



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<p style="text-align: right;">Page 77</p> <p>1 document at your instance. You draw their attention to a</p> <p>2 clause in the document, rather than them drawing your</p> <p>3 attention to it. You draw their attention to it.</p> <p>4 MR GAMA: Yes, it's a document that Mr</p> <p>5 Madhav was showing me.</p> <p>6 ADV P PRETORIUS SC: So, at several times</p> <p>7 during this interview you were able to refer to passages at</p> <p>8 your instance in the document. It must have been available</p> <p>9 to you for that purpose at least. Correct?</p> <p>10 MR GAMA: As I indicated I was able to gloss over</p> <p>11 it, yes.</p> <p>12 ADV P PRETORIUS SC: So, it's not a case</p> <p>13 of Mr Madhav choosing only to draw to your attention those</p> <p>14 things that he wished to draw to your attention, like a</p> <p>15 rabbit out of a hat. You had the opportunity independently</p> <p>16 to peruse or look at the document or to gloss over it,</p> <p>17 however you wish to term it, to deal with such issues as</p> <p>18 you wish to deal with.</p> <p>19 MR GAMA: Ja, but as I indicated what one</p> <p>20 would have preferred is to be given a document so that one</p> <p>21 can read the document instead of looking at what is marked,</p> <p>22 or glossing over a document because it doesn't give you the</p> <p>23 opportunity to try and understand and recall the exact</p> <p>24 circumstances of that.</p> <p>25 ADV P PRETORIUS SC: Mr Gama, I am afraid</p>	<p style="text-align: right;">Page 79</p> <p>1 you, you wouldn't remember anyway whether it was marked or</p> <p>2 not. What is clear from this transcript is that this</p> <p>3 document was available to you to look at during the course</p> <p>4 of the interview. It wasn't only things that were being</p> <p>5 shown to you as you put previously in evidence, trying to</p> <p>6 persuade Mr Arbitrator.</p> <p>7 MR GAMA: No well, I was just glossing</p> <p>8 over it, I was never given this document to read and I</p> <p>9 persist with that in my evidence.</p> <p>10 ADV P PRETORIUS SC: It must have been in</p> <p>11 front of you for you to point these things out?</p> <p>12 MR GAMA: Because Mr Madhav was next to</p> <p>13 me.</p> <p>14 ADV P PRETORIUS SC: So, it was in front</p> <p>15 of you? On page 93 at the bottom of the page there is</p> <p>16 another reference to Mr Beattie showing you documents and</p> <p>17 going through the file. Do you see that?</p> <p>18 MR GAMA: Must I start at the bottom of</p> <p>19 the page.</p> <p>20 ADV P PRETORIUS SC: Yes, six lines from</p> <p>21 the bottom of the page. Do you see that?</p> <p>22 MR GAMA: Ja.</p> <p>23 ADV P PRETORIUS SC: Then on page 94 you</p> <p>24 say in line 5, the first entry next to your name you say,</p> <p>25 "So, for me if I actually read this thing line by line,"</p>
<p style="text-align: right;">Page 78</p> <p>1 we can't except that answer because you refer to issues</p> <p>2 that weren't marked. For example, the amount of R4.9</p> <p>3 million, on page 116 of bundle B.</p> <p>4 MR GAMA: When you say I refer to issues</p> <p>5 that were not marked, are you saying this was the document</p> <p>6 that he showed me, or is it marked like this?</p> <p>7 ADV P PRETORIUS SC: No, I am saying that</p> <p>8 during the course of this interview you referred, for</p> <p>9 example, to the amount of R4.9 million which appears at</p> <p>10 page 116 in bundle B1. That wasn't marked by Mr Madhav.</p> <p>11 It wasn't marked at all.</p> <p>12 MR GAMA: But, how do you know that?</p> <p>13 ADV P PRETORIUS SC: The document is at</p> <p>14 page 116.</p> <p>15 MR GAMA: Because all I have is just</p> <p>16 copies here. I don't know what was marked and what wasn't</p> <p>17 marked.</p> <p>18 ADV P PRETORIUS SC: I am just going to</p> <p>19 put it to you once that the documents –</p> <p>20 MR GAMA: Well, –</p> <p>21 ADV P PRETORIUS SC: It were able to –</p> <p>22 MR GAMA: The marker that we were dealing</p> <p>23 with were these types of markers that are either yellow or</p> <p>24 pink. It doesn't –</p> <p>25 ADV P PRETORIUS SC: Mr Gama, I put it</p>	<p style="text-align: right;">Page 80</p> <p>1 that's a reference to the 5th December meeting I presume, "I</p> <p>2 would have said to them the wording here is wrong, go back</p> <p>3 to the tender board and actually write it correctly."</p> <p>4 So, had you read the document that's what you</p> <p>5 would have done in hindsight. Correct?</p> <p>6 MR GAMA: Ja.</p> <p>7 ADV P PRETORIUS SC: Then on page 96 you</p> <p>8 say in the context of your R1 million authority, you say,</p> <p>9 "in fact this thing here would not even have come to me in</p> <p>10 the first instance if John was not a new chap." Do you see</p> <p>11 that?</p> <p>12 MR GAMA: Ja.</p> <p>13 ADV P PRETORIUS SC: Well, of course the</p> <p>14 new chap was Mr Senamela, not John. Are you sure Mr</p> <p>15 Senamela wasn't there?</p> <p>16 MR GAMA: Mr Senamela wasn't –</p> <p>17 ADV P PRETORIUS SC: At the meeting of</p> <p>18 the 5th December.</p> <p>19 MR GAMA: No.</p> <p>20 ADV P PRETORIUS SC: He phoned you that</p> <p>21 morning, according to the telephone records, very early</p> <p>22 that morning.</p> <p>23 MR GAMA: I don't know what he would have</p> <p>24 called me for, but he was not there, I was with John.</p> <p>25 ADV P PRETORIUS SC: According to the</p>

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<p style="text-align: right;">Page 81</p> <p>1 records quarter past eight on the morning of the 5th.</p> <p>2 MR GAMA: Ja, but I was with John, I was</p> <p>3 not with anyone else.</p> <p>4 ADV P PRETORIUS SC: I am sorry?</p> <p>5 MR GAMA: I was with John, I was not with</p> <p>6 anyone else.</p> <p>7 ADV P PRETORIUS SC: But, he got through</p> <p>8 to you according to the records. He spoke to you.</p> <p>9 MR GAMA: And what might that mean?</p> <p>10 ADV P PRETORIUS SC: Well, that he had</p> <p>11 occasion to communicate with you on the 5th.</p> <p>12 MR GAMA: Right.</p> <p>13 ADV P PRETORIUS SC: The inference I am</p> <p>14 putting to you is that it dealt with this matter.</p> <p>15 MR GAMA: No, he was not – only Mr Peter</p> <p>16 came.</p> <p>17 ADV P PRETORIUS SC: Again on page 97,</p> <p>18 the first four lines, there is yet another reference to Mr</p> <p>19 Beattie actually showing you documents. So, this is not</p> <p>20 just a single slip of the tongue, single inaccurate</p> <p>21 statement. It's repeated several times during this</p> <p>22 interview with Mr Madhav, that Beattie showed you</p> <p>23 documents.</p> <p>24 MR GAMA: Yes, because Mr Beattie carried</p> <p>25 documents. If somebody sat across the table and showed you</p>	<p style="text-align: right;">Page 83</p> <p>1 ADV P PRETORIUS SC: You would have</p> <p>2 known, on your version at least, that what you had</p> <p>3 authorised was for five months. So, this was an</p> <p>4 irregularity pointed out to you, in your mind. Correct?</p> <p>5 MR GAMA: Yes, in my mind there was</p> <p>6 supposed to be a trial period.</p> <p>7 ADV P PRETORIUS SC: Then if you look – I</p> <p>8 am sorry, I didn't meant to interrupt you.</p> <p>9 MR GAMA: No, I am saying a trial period</p> <p>10 for review.</p> <p>11 ADV P PRETORIUS SC: Then at page 99, two</p> <p>12 thirds of the way down the page you say, "but that is not</p> <p>13 true because in my own analysis and in the documents that</p> <p>14 John gave to me very clearly we were not talking about a</p> <p>15 confinement." That is yet another reference to documents,</p> <p>16 this time being given to you and the documents showing</p> <p>17 something very clearly. Indicating, consistently with what</p> <p>18 we are putting to you, that you are not being entirely</p> <p>19 frank with this arbitration when you say that you only had</p> <p>20 one document. In fact you were shown, on the 5th December,</p> <p>21 a number of documents. They were given to you and you were</p> <p>22 able to comment on the very clear contents of those</p> <p>23 documents.</p> <p>24 MR GAMA: Ja. May I ask, Mr Chairman, I</p> <p>25 think there is a lot of semantics that I clear this</p>
<p style="text-align: right;">Page 82</p> <p>1 something you would see it.</p> <p>2 ADV P PRETORIUS SC: Then on page 98 Mr</p> <p>3 Madhav says to you, "the letter of acceptance that was sent</p> <p>4 out was for one year and I will show you that document if</p> <p>5 you need to. The contract value was for R18 million. R1.5</p> <p>6 million per month, so that comes to 18 million for the</p> <p>7 year." Then he says, "What you are looking at here on this</p> <p>8 page," and he refers to the saving of R4 million, "it was</p> <p>9 not a contract value."</p> <p>10 He is pointing out to you that what you are</p> <p>11 looking at on the page is not what you say it is. But,</p> <p>12 leave that aside for the moment. What Mr Madhav does say</p> <p>13 to you is that the letter of acceptance that was sent out</p> <p>14 was for one year. You know that, then on least on the 8th</p> <p>15 April 2009. Correct?</p> <p>16 MR GAMA: You say I know about the letter</p> <p>17 of acceptance?</p> <p>18 ADV P PRETORIUS SC: Yes, well Mr Madhav</p> <p>19 tells you, the letter of acceptance that was sent out was</p> <p>20 for one year and I will show you that document if you need</p> <p>21 to. He is telling as at the 8th April –</p> <p>22 MR GAMA: Ja, that's what he –</p> <p>23 ADV P PRETORIUS SC: That the letter of</p> <p>24 acceptance was a one year letter of acceptance.</p> <p>25 MR GAMA: That is what he was going to –</p>	<p style="text-align: right;">Page 84</p> <p>1 upfront. The issue here is around this whole notion of the</p> <p>2 confinement. The issue of documentation, when I say John</p> <p>3 gave me documents, I did not mean that I took possession of</p> <p>4 documents. But we saw the documents, we went through them,</p> <p>5 so there might be a semantic issue, but what I take strong</p> <p>6 exception to is an insinuation that maybe I am corrupt.</p> <p>7 Maybe I was doing this for some other reason other than for</p> <p>8 me in the pursuance of my duties. So, when I am being told</p> <p>9 that I am not being frank, when I am trying to relay what I</p> <p>10 can recall, especially things that happened a long time</p> <p>11 ago, I really am taking very strong exception to the</p> <p>12 insinuations that are being made.</p> <p>13 If I had known that this was a confinement I</p> <p>14 would have dealt with this thing very, very differently. I</p> <p>15 admit that the sense that I had up until that time was that</p> <p>16 we had gone out on tender and that I never looked at</p> <p>17 documents. Documents were there, he brought a file of</p> <p>18 documents, he was in possession of them and whenever I</p> <p>19 talked to him he could refer to a document. But, the</p> <p>20 insinuations that keep cropping up, I don't know maybe this</p> <p>21 is how you deal with these kinds of issues, but I take very</p> <p>22 strong exception to the insinuations that are being made</p> <p>23 about my conduct on this. I am not a corrupt person and I</p> <p>24 never will.</p> <p>25 ADV P PRETORIUS SC: Mr Gama, if I make</p>



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<p style="text-align: right;">Page 85</p> <p>1 an insinuation I will put it to you. At the moment I am  2 just saying, all I am saying at the moment is you are not  3 being frank with the arbitrator, we are going to argue in  4 relation to your knowledge of the process as at 5th  5 December, that's what I am saying to you.  6 [12:56] ADV P PRETORIUS SC: And we know that  7 where you fear that insinuations are being drawn that at  8 least on one occasion in this very arbitration you have  9 allowed incorrect evidence to be put before the arbitration  10 in order to distance yourself from insinuation. Is it not  11 the same case here, that you are trying to distance  12 yourself from what you knew occurred on the 5th of December?  13 MR GAMA: No.  14 ADV P PRETORIUS SC: Alright, perhaps  15 this is an appropriate time.  16 ARBITRATOR: How long shall we break for  17 what, for an hour?  18 ADV P PRETORIUS SC: Ja.  19 ARBITRATOR: Okay, can we resume at  20 14:00?  21 ADV G PRETORIUS SC: Ja.  22 CHAIRPERSON: Good.  23 [ARBITRATION ADJOURNS ARBITRATION RESUMES]  24 [14:03] ARBITRATOR: Okay, can we resume, Mr  25 Pretorius?</p>	<p style="text-align: right;">Page 87</p> <p>1 companies?  2 ADV P PRETORIUS SC: Yes.  3 MR GAMA: No, it was the tender process.  4 ADV P PRETORIUS SC: Just listen to the  5 question, if you will. I understood you to say that the  6 information contained in paragraphs two and three, on page  7 92 was information imparted to you in the interview by Mr  8 Madhav. What I want to put to you is that Mr Madhav didn't  9 in this interview, prior to this, impart to you any  10 information about a process involving ten companies.  11 MR GAMA: No, not about ten companies,  12 no.  13 ADV P PRETORIUS SC: This was information  14 that you had in your mind?  15 MR GAMA: Yes.  16 ADV P PRETORIUS SC: Then if I may go  17 onto another topic. On the 3rd of March 2007 you looked at  18 a document in a prior tender process involving CPI and do  19 you recall giving evidence about the note, the detailed  20 note, that you appended to your signature, do you recall  21 that evidence?  22 MR GAMA: Yes.  23 ADV P PRETORIUS SC: I just want to point  24 out in that case you didn't just rely on what your  25 acquisition personal told you, you looked at the matter in</p>
<p style="text-align: right;">Page 86</p> <p>1 ADV P PRETORIUS SC: Thank you, Mr  2 Arbitrator. Mr Gama, would you please look at bundle D2.  3 My apologies, bundle D1 page 92. You will recall being  4 asked questions about these passages this morning. Bundle  5 D1 page 92. Do you have that?  6 MR GAMA: Yes.  7 ADV P PRETORIUS SC: You will recall I  8 put it to you that the paragraphs on this page, principally  9 the second and third paragraphs, were matters that you  10 recalled rather than matters drawn to your attention by Mr  11 Madhav. We discussed that this morning and you gave your  12 answers. What I want to point out to you, if I may, is in  13 the second paragraph you say in the third line, "We had  14 three companies, because there were two processes here." as  15 you say. There was the process where there were ten  16 companies or whatever, I do not know the actual number but  17 I can find out all of that."  18 Now, I have had a look at the transcript and  19 there is, as far as I'm aware at least, no reference in  20 this transcript, at least, to a process involving ten  21 companies. So, what I want to put to you on that  22 observation is that what you were talking about here was  23 knowledge that you had, not knowledge imparted to by  24 Madhav.  25 MR GAMA: You mean when we talk about 10</p>	<p style="text-align: right;">Page 88</p> <p>1 sufficient detail to change the extension of the contract  2 from 12 months to 6 months, not so?  3 MR GAMA: Yes.  4 ADV P PRETORIUS SC: The tender board had  5 recommended a 12 month extension.  6 MR GAMA: No, not quite.  7 ADV P PRETORIUS SC: But a 12 month  8 extension had been recommended and you changed it to six  9 months. Correct?  10 MR GAMA: Yes.  11 ADV P PRETORIUS SC: You exercised your  12 own mind notwithstanding the different proposal that you  13 had received for signature, correct?  14 MR GAMA: Yes.  15 ADV P PRETORIUS SC: And you, in fact  16 added a comment regarding key performance indicators and  17 the other observations that you made. Is that so?  18 MR GAMA: Yes.  19 ADV P PRETORIUS SC: In other words, you  20 exercised an independent discretion, correct?  21 MR GAMA: That is correct.  22 ADV P PRETORIUS SC: Immediately prior to  23 the lunch adjournment, Mr Gama, you said in relation to the  24 meeting of the 5th December 2007, "we saw the documents and  25 we went through them." Did I record that correctly?</p>

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<p style="text-align: right;">Page 89</p> <p>1 MR GAMA: You mean – which documents?</p> <p>2 ADV P PRETORIUS SC: You and Mr Beattie.</p> <p>3 You said, in relation to that meeting, we saw the documents</p> <p>4 and we went through them. Immediately before lunch.</p> <p>5 MR GAMA: Me and Beattie saw the</p> <p>6 documents and went through them, ja. Well he had the</p> <p>7 documents, I saw them and we went through them. As I</p> <p>8 questioned him he would point out to a relevant page that</p> <p>9 indicated whatever questions I was asking him.</p> <p>10 ADV P PRETORIUS SC: And had you been</p> <p>11 through the documents, as he explained the process to you,</p> <p>12 and had you seen the documents you would have seen the</p> <p>13 words, confinement?</p> <p>14 MR GAMA: I would have seen the word</p> <p>15 confinement if I had actually read the documents, yes.</p> <p>16 ADV P PRETORIUS SC: Well, I am putting</p> <p>17 it to you that if you saw the documents and you went</p> <p>18 through them with Mr Beattie you would have seen the word</p> <p>19 confinement.</p> <p>20 MR GAMA: Ja, I would have seen the word.</p> <p>21 ADV P PRETORIUS SC: And you would have</p> <p>22 seen, had he explained by reference to the documentation,</p> <p>23 that there were two processes, one terminated and one</p> <p>24 replacing the terminated process?</p> <p>25 MR GAMA: There was never a discussion</p>	<p style="text-align: right;">Page 91</p> <p>1 signed a confinement did so in defiance of that</p> <p>2 instruction, correct? Not only that, but Mr Beattie, and</p> <p>3 quite possibly, as you have fairly conceded, the others too</p> <p>4 misled you into believing that you were authorising an open</p> <p>5 tender, correct?</p> <p>6 MR GAMA: Yes.</p> <p>7 ADV P PRETORIUS SC: You would have known</p> <p>8 that, we put it to you on the 8th April 2009 at least.</p> <p>9 MR GAMA: Yes, I knew that the document</p> <p>10 had confinement on it, yes.</p> <p>11 ADV P PRETORIUS SC: And if Mr Beattie</p> <p>12 had shown you documents relating to the whole process and</p> <p>13 had taken you through those documents and shown them to</p> <p>14 you, we will submit and I put it to you, that you should</p> <p>15 have known that as early as the 5th December 2007. what do</p> <p>16 you say to that?</p> <p>17 MR GAMA: That I should have known that</p> <p>18 it was a confinement?</p> <p>19 ADV P PRETORIUS SC: Well, that the</p> <p>20 people who signed the document – you would have known</p> <p>21 sufficient on the 5th December 2007 to alert you to the need</p> <p>22 to make an inquiry at least?</p> <p>23 MR GAMA: No, I was never alive to any</p> <p>24 confinement. I thought and I saw the document that Beattie</p> <p>25 gave to me, which showed the tender process and the request</p>
<p style="text-align: right;">Page 90</p> <p>1 about the process ever being terminated.</p> <p>2 ADV P PRETORIUS SC: Well, I have dealt</p> <p>3 with that issue, I am not going to revisit it. I just want</p> <p>4 to point out another reference that I didn't point out to</p> <p>5 you before. Line 12 on page 94 of B1. You say, in</p> <p>6 relation to the 5th of December and Mr Beattie, "he even</p> <p>7 showed me the names, I can go and find them, you know, he</p> <p>8 showed me the names and said these are the people." Do you</p> <p>9 see that?</p> <p>10 MR GAMA: Yes.</p> <p>11 ADV P PRETORIUS SC: And if you look at</p> <p>12 B1 113 the first half of that page, there are two lists of</p> <p>13 names and they are the same but number 3 on each list is</p> <p>14 GNS. Do you see that? General Nyanda Security.</p> <p>15 MR GAMA: Yes.</p> <p>16 ADV P PRETORIUS SC: This document is the</p> <p>17 confinement motivation that begins at page 112 of B1.</p> <p>18 Correct?</p> <p>19 MR GAMA: Ja.</p> <p>20 ADV P PRETORIUS SC: It was your clear</p> <p>21 instruction to managers in Transnet Freight Rail, that the</p> <p>22 open tender process was to be used, particularly where</p> <p>23 security services were concerned?</p> <p>24 MR GAMA: Yes.</p> <p>25 ADV P PRETORIUS SC: All the persons who</p>	<p style="text-align: right;">Page 92</p> <p>1 for tenders.</p> <p>2 ADV P PRETORIUS SC: That's what we will</p> <p>3 argue and in fairness, I put it to you. But let's go back</p> <p>4 to the knowledge you had and you concede you had on the 8th</p> <p>5 April. The relevant documentation you gave two versions in</p> <p>6 previous evidence in this arbitration, first that you got</p> <p>7 the documentation in May and then you got the documentation</p> <p>8 in June. But, that documentation was available to you</p> <p>9 within Transnet Freight Rail at all times while you were</p> <p>10 there. You were the head of Transnet Freight Rail you</p> <p>11 would have called for any documentation you liked.</p> <p>12 Correct?</p> <p>13 MR GAMA: I went looking for the</p> <p>14 documentation after the meeting of the 8th –</p> <p>15 ADV P PRETORIUS SC: Yes, in fact and</p> <p>16 during the course of that meeting they actually asked you</p> <p>17 to go and look for documentation, the internal audit</p> <p>18 personal, not so? In that meeting they asked you.</p> <p>19 MR GAMA: Yes, I asked the procurement</p> <p>20 people to please obtain the documentation for me.</p> <p>21 ADV P PRETORIUS SC: With the knowledge</p> <p>22 that you – in addition to that your counsel put it to Mr</p> <p>23 Oates and I am not sure whether it was put to Mr Wells as</p> <p>24 well – Well, let me put it more gently, your counsel asked</p> <p>25 whether a number of people had been investigated, implying</p>

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<p style="text-align: right;">Page 93</p> <p>1 and this is our own gloss, implying that they ought to have 2 investigated in relation to the GNS contact. He mentioned 3 Mr Tobias and I think you also mentioned Mr Fredericks and 4 Mr Fearnhead at the very least. Do you recall that line of 5 question?</p> <p>6 MR GAMA: Well –</p> <p>7 ADV P PRETORIUS SC: Where you said to Mr 8 Oates, have you investigated these people, in addition to 9 investigating Mr Gama?</p> <p>10 MR GAMA: Yes.</p> <p>11 ADV P PRETORIUS SC: Now, with the 12 knowledge you have – and I presume you understood the 13 import of those questions, that the finger of culpability 14 or accountability pointed not only to you but to other 15 people as well and in fairness they should all be covered 16 by the same mantel. Correct? You understood it that way?</p> <p>17 MR GAMA: Ja.</p> <p>18 ADV P PRETORIUS SC: With your knowledge 19 now who do you think should be called to account or should 20 have been called to account in relation to the GNS saga? 21 Given the knowledge that you have now?</p> <p>22 MR GAMA: In terms of what I have and all 23 the information that is now in my possession first and 24 foremost Mr Beattie as the person who came and explained 25 the process to me I would want to call him to order and to</p>	<p style="text-align: right;">Page 95</p> <p>1 the procurement department, and they all knew that I had 2 asked that we go out on tender.</p> <p>3 So, there would be a number of people that I 4 would have given the opportunity, that I would have been 5 able to deal with and obviously there are also people like 6 the chief procurement officer who would have wanted to 7 understand the basis of the letter of acceptance which 8 didn't have any reference to even the review period.</p> <p>9 [14:23] MR GAMA: But, I think for me all in all 10 there were a number of people, both in security as well as 11 in the procurement area because when they stopped the 12 process they ought to have written a note. They ought to 13 have gotten permission to say we are now stopping process 14 and we are now going to do something else because then we 15 would have known that we are no longer dealing with a 16 tender process, they now have started a very different 17 process which was not authorised by the company.</p> <p>18 ADV P PRETORIUS SC: Firstly, at least on 19 one version that we will submit appears, from at least the 20 8th April interview Mr Beattie told you of the process 21 involving ten and then a new process involving three – the 22 termination of one process its replacement by another. 23 There was sufficient information there, I put it to you, 24 for you to be alerted to the need to make inquiry and 25 investigation these issues. Call all these people to</p>
<p style="text-align: right;">Page 94</p> <p>1 investigate further how he would have believed that this 2 was a tender process, given what I have seen. I would then 3 go further – sorry?</p> <p>4 ADV P PRETORIUS SC: No, no I am sorry 5 for interrupting, I should not have. Yes, you would go 6 further.</p> <p>7 MR GAMA: I would then go further as I 8 have indicated in my letter to Mr Wells to re-look at the 9 roles played by both the procurement people, as well as the 10 roles played by the security people. In terms of security 11 three people, Mr Khanye, Mr Nyanda and Mr Senamela. I 12 would need to closely and even probably charge those people 13 in terms of not following a tender process as was indicated 14 and changing the tender process midway and making it a 15 confinement.</p> <p>16 But also, then leaving the three short listed 17 companies and putting in another three different companies 18 from the ones that were in the tender process. So, I think 19 they would have a case to answer in terms of that. I would 20 then also talk to the procurement people in terms of their 21 own roles because the line department in terms of following 22 process they are not solely responsible for their own 23 process. You can't be the judge, the jury and the 24 executioner. There were names of people in procurement 25 that appeared, Mr Martin, Mr Lutsk and they all worked in</p>	<p style="text-align: right;">Page 96</p> <p>1 account. Do you have any comment?</p> <p>2 MR GAMA: When I had called for the files 3 after the meeting with the auditors it was precisely for me 4 to make a comparison in terms of what the auditors had and 5 what the people in procurement had. So, I was in that 6 process of looking at all of those issues when Mr Wells 7 then came to me to tell me that there were allegations 8 against me.</p> <p>9 It was at that time that I then saw fit that I 10 should not interfere with a formal process that the company 11 had already started. So, I did get both sets of documents 12 from the auditors and I did get another set of documents 13 from the procurement department. I was comparing them and 14 looking at what needed to be done, when I was told that in 15 fact it was myself that was being investigated around these 16 issues. That is when I then wrote the letter to Mr Wells, 17 indicating that I need to then have copies of whatever 18 documentation and investigation reports that he had.</p> <p>19 ADV P PRETORIUS SC: Mr Gama, at least on 20 the 8th April 2009 you had sufficient information to act and 21 you did not act immediately?</p> <p>22 MR GAMA: No, I did not have sufficient 23 information, as I indicated to you they had showed me two 24 or three documents and at the end of that interview I was 25 still saying but you have a stack of documents there can</p>

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<p style="text-align: right;">Page 97</p> <p>1 you give it to me and they said they would copy it. So, I  2 said okay I will also go back to the office and find the  3 other documents. But I was proceeding on leave, as I had  4 indicated also at that time.</p> <p>5 ADV P PRETORIUS SC: Mr Gama, you knew,  6 firstly as at the 8th April at least that you were the  7 victim of a fraud at the hands of Mr Beattie and possibly  8 others too and you knew, secondly that your managers and  9 procurement people had signed a confinement in defiance of  10 your instructions. I put it to you that was sufficient for  11 you to take urgent action to call people to account. To  12 call the particular individuals you have mentioned now in  13 evidence, to account.</p> <p>14 MR GAMA: Ja, as indicated I think  15 immediately after those – that cross-examination I had  16 taken steps to ask the procurement people to compile a file  17 for me, but I was going on leave. I had not been on leave,  18 I think was going on leave for three weeks.</p> <p>19 ADV P PRETORIUS SC: Yes, but Mr Gama, as  20 I put it to you, you can't when it's the very procurement  21 people and the security management that are potentially  22 guilty of not only defying your instructions but acting  23 grossly improperly and fraudulently, in those circumstances  24 you can't tel them to investigate themselves?</p> <p>25 MR GAMA: Well –</p>	<p style="text-align: right;">Page 99</p> <p>1 a confusing role and they were no longer acting as my  2 internal auditors because I clearly needed that report in  3 order for me to know what it is that I should be alerted  4 to. I would have then investigated and charged the  5 responsible people, but further there have been many  6 instances when an oversight has happened where people have  7 signed or authorised transactions, either an administrative  8 oversight or other oversight where you find transactions  9 and found that it was not what we thought it was.</p> <p>10 I would have then also applied or a condonation  11 of the actions taken, I would also have then been in a  12 position to understand whether the money spent had been  13 spent wisely or not. And to also find out exactly who were  14 the officers that were malicious in this instance because  15 these were officers who were three of four levels below me.  16 So, I needed to go back and understand the actual process  17 in order to find out the personalities that had been  18 involved because unfortunately I had not been involved.</p> <p>19 But I would then have applied for condonation and  20 also I sought advice in terms of whether or not the  21 contract itself needed to continue. What I did find out  22 when I did the work in July was that the contract had in  23 fact expire and they were now just on a month to month  24 basis and there was a tender that was being adjudicated.  25 So, there was nothing that I could do then with it at that</p>
<p style="text-align: right;">Page 98</p> <p>1 ADV P PRETORIUS SC: If you ask the fox  2 what is happening in the hen house.</p> <p>3 MR GAMA: No, but if I asked the chief  4 procurement officer who did not, at the time appear to have  5 been involved in any way in this, to say please can you  6 compile a file for me in terms of this entire process.</p> <p>7 ADV P PRETORIUS SC: I thought you had  8 mentioned his name in your list of people. But be that as  9 it may.</p> <p>10 MR GAMA: Well, we know now that there  11 was a document that he signed but at the time I did not  12 have that document in my possession.</p> <p>13 ADV P PRETORIUS SC: And as you say in  14 your evidence to conclude by the end of July only, nearly  15 three months, three and a half months later that there was,  16 "something fishy," is completely inadequate.</p> <p>17 MR GAMA: I had immediately stopped after  18 I had met Mr Wells, when Mr Wells indicated that I was also  19 the subject of the investigation because then I would start  20 to investigate myself. Within Freight Rail and within the  21 Transnet Group in terms of those issues some of the things  22 that I would have done if I was not now also the subject of  23 the investigation was 1, to ask for the Ernst &amp; Young  24 report.</p> <p>25 Unfortunately, in this instance Ernst &amp; Young had</p>	<p style="text-align: right;">Page 100</p> <p>1 time. But I did come to the conclusion that the company  2 itself may not have been aware of the processes and that  3 the people who had broken the processes were people inside  4 of TFR.</p> <p>5 So, those are the kinds of things that I was  6 going to do, but instead it was myself who was being  7 charged for it instead of getting the investigation report  8 so that I could finalise my own examination of the issues.</p> <p>9 ADV P PRETORIUS SC: Mr Gama, we are  10 going to submit that, that it entirely an inadequate  11 response. You could, on the 9th April, or in the days  12 following the 8th April, called your procurement to you  13 saying bring me all the documents. You could have gone  14 through them one by one. Had you done that in April, in  15 the days following the 8th April you would discover, I put  16 it to you, you would have discovered a string of gross  17 irregularities attached to the GNS contract.</p> <p>18 MR GAMA: On the days following the 8th  19 April I had gone on leave, I had already asked for the  20 documents.</p> <p>21 ADV P PRETORIUS SC: When did you come  22 back from leave?</p> <p>23 MR GAMA: I am not sure, I would need to  24 go and check.</p> <p>25 ADV P PRETORIUS SC: But, Mr Gama, I am</p>



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<p style="text-align: right;">Page 101</p> <p>1 not sure that, that is a satisfactory answer. But be that  2 as it may, on the next working day in the light of this  3 blatant fraud that had been perpetrated upon you, you now  4 realise. You could have called your procurement person or  5 persons.  6 MR GAMA: I called the procurement person  7 on the day I left the –  8 ADV P PRETORIUS SC: Let me finish the  9 question if I may.  10 MR-GAMA: You could have said bring all  11 the documents to me, you could have gone through each  12 document page by page, it would have taken a few hours and  13 you would have concluded, I put it to you, a series of  14 gross irregularities relating to the GNS contract. Now, I  15 can put those irregularities to you but I understood the  16 way in which you were questioned in chief there to a  17 concession that there were irregularities. Many  18 irregularities attaching to the GNS contract and its  19 execution.  20 MR GAMA: Can I answer the question?  21 ADV P PRETORIUS SC: Yes.  22 MR GAMA: Immediately after the – what do  23 you call it, interrogation or interview that had come out  24 of, I had called the chief procurement officer to indicate  25 that I was looking for documentation related to this</p>	<p style="text-align: right;">Page 103</p> <p>1 MR GAMA: So, I had gone on leave  2 probably for two or three weeks, I am not sure I would have  3 to check that. But, when I came back I had then started to  4 go through the documents.  5 ADV P PRETORIUS SC: The proposition I am  6 putting to you, I know it is late and we are both, I am  7 sure, looking forward to the end of the day, but the  8 proposition I am putting to you is this. Would you concede  9 that an examination of the documents relating to the grant  10 of the confinement authority on the 5th December and  11 relating to the execution of the subsequent contract with  12 GNS, an examination of those documents would have revealed  13 a number of serious irregularities in relation to the  14 conclusion and execution of the GNS contract. Would you  15 concede that at least? Without any reference to timing.  16 MR GAMA: Ja, with all the documents  17 taking together if one had all of the documents it would  18 have been clear, because I think the break in this is  19 around the 15th, 12th October process when new names are  20 substituted.  21 ADV P PRETORIUS SC: I put it to you, Mr  22 Gama, that all you needed to begin to call people to  23 account were the documents at page 112 to 119 of bundle B1.  24 But we have been through that and we have been through  25 their content. There is plenty of information there that</p>
<p style="text-align: right;">Page 102</p> <p>1 contract. He had indicated to me at the time that he is  2 also trying to find all of the relevant documentation  3 related to this contract. He indicated to me that the  4 auditors were in fact looking for documents and so  5 therefore he was in the process of compiling a file and he  6 also indicated to me that some of the documents that I was  7 looking for were actually with the auditors and they didn't  8 have copies, but he would try and get for me because I said  9 to him I want to see documentation related to this from  10 cradle to grave. So that one can understand what had  11 happened and he had said to me he thinks that if I give him  12 a few days he will try and get all the documents and obtain  13 even from the auditors some of the documents that had been  14 given to them. So, I did do that at the time.  15 ADV P PRETORIUS SC: Well, do you concede  16 the proposition that an examination of the documents  17 leading up to the confinement approval by yourself in  18 December 2007 and the execution of the contract thereafter  19 would have revealed not one but a number of gross  20 irregularities. Would you concede that at least?  21 MR GAMA: Ja, I am just dealing with the  22 timing issue. I am saying it was going to take him a week  23 to find me all the documents.  24 ADV P PRETORIUS SC: I am not dealing  25 with the timing issues.</p>	<p style="text-align: right;">Page 104</p> <p>1 tells you the first process was stopped and the second  2 process was a confinement process.  3 MR GAMA: As I said I do concede that one  4 would have found, but some of these documents were not  5 there. In order for you to create a full picture you need  6 to get all of the documentation that was there because I  7 had always understood and I had seen a tender document and  8 therefore one needed to be able to link all of these things  9 together.  10 ADV P PRETORIUS SC: Would you look, Mr  11 Gama, at file D, bundle D page 141. This is the ninth page  12 of the letter sent to you on or about the 18th of June by Mr  13 Chris Wells in which he raises concerns arising from the  14 Transnet internal audit investigations. The letter begins  15 at page 113 and I just want to refer you to paragraph 8 on  16 page 131. There Mr Wells, specifically invites you to  17 indicate what actions you consider appropriate to resolve  18 the concerns he raises in relation to the GNS contract. He  19 asks you to say what corrective steps you recommend should  20 be taken from a management point of view to deal with the  21 GNS appointment.  22 He specifically says to you, "tell me what you  23 think should be done. Tell me what corrective steps should  24 be taken." And I put it to you that, that invitation was  25 not taken up, at least not adequately taken up in your</p>

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<p style="text-align: right;">Page 105</p> <p>1 response of 20 July. None of what you said now about who 2 should be called to account was dealt with you and it is no 3 excuse to say you were under investigation. You 4 specifically asked what must be done. I put it to you 5 again, none of what you now said should have been done as 6 mentioned in your letter of the 20th July. Or not to the 7 extent at least, that you say now.</p> <p>8 MR GAMA: As I said, at the time when I 9 got the documentation I never really got all of the 10 documentation. It's very clear when you have all of the 11 documents in terms of what steps that one would have taken. 12 [14:42] MR GAMA: As I also indicated earlier 13 there were also certain circumstances that had taken place 14 by the time I was trying to deal with this issue in May. 15 For instance the issue, as I indicated where Mr Pule had 16 indicated to me that he had come across certain discussions 17 and if you look at point 8 within the context of that it 18 was no longer clear to me whether these were genuine 19 approaches being made by Mr Wells or not. So, I did have a 20 sense of trepidation, if I may call it, in terms of what 21 was the actual and the real intent of this particular 22 document that he had sent to me.</p> <p>23 I would have been, at the time, a man who clearly 24 saw a gun being pointed at him and the pulling of the 25 trigger looked imminent.</p>	<p style="text-align: right;">Page 107</p> <p>1 could not deal with.</p> <p>2 But here was a situation where I was now being 3 asked personally to deal with issues and actions that were 4 not in my personal knowledge. Actions where employees 5 below the - and in fact two levels below my direct reports 6 had done certain things but it was myself who was now being 7 probed for it without giving me the opportunity to probe 8 them so that I could get into the actual issue of what was 9 happening.</p> <p>10 It was something that had never happened before 11 in Transnet. Auditors would come to me as the CEO and say, 12 "here is an issue that we have seen, we want to alert you 13 to it. Here is the relevant documentation that we have and 14 please give it some attention and indicate to us what steps 15 have been taken."</p> <p>16 So, in this instance instead of auditors giving 17 me the documents and saying here is what we believe should 18 have happened, I was in fact, being the one from whom the 19 information was being hidden. I was being given documents 20 in a selective manner. So, it became very clear to me that 21 we were no longer applying the same standards and the same 22 conduct and the same practises that we ourselves in 23 Transnet were used to and these are practices that I have 24 grown accustomed to over a long period of time.</p> <p>25 ADV P PRETORIUS SC: Mr Gama, at the 8th</p>
<p style="text-align: right;">Page 106</p> <p>1 ADV P PRETORIUS SC: Mr Gama, do I 2 understand you correctly to be saying - we will deal with 3 your allegations and ulterior motive and conspiracy in due 4 course. Do I understand you to be saying that the 5 conclusion you reached that you were a victim of acts 6 motivated by ulterior concerns, the victim of a conspiracy, 7 that that absolved you of your responsibilities as a CEO to 8 call people to account?</p> <p>9 MR GAMA: It did not absolve me of my 10 responsibility as a CEP to call people to account. But, I 11 think you need to understand it within the context of the 12 abnormality where I asked very politely that I should be 13 given the investigation report so that I can deal with this 14 whole issue in its entirety. The things that I was asking 15 for were not difficult things to provide to me.</p> <p>16 Ernst &amp; Young I had taken them as our internal 17 auditors, but the refusal to give me all of those 18 documents, taken together with all of the other 19 observations that I had made, it was becoming clearer to me 20 that there must be some substance to the issues raised. 21 So, I have never shied away from any responsibility. I 22 have spent 15 and half years in the company and anything 23 that was a challenge I have dealt with it and I have never 24 been - I have never lacked the courage to deal with 25 anything and I don't believe that there is any issue that I</p>	<p style="text-align: right;">Page 108</p> <p>1 of April Transnet internal audit were asking you for 2 documents. You said you would get them, do you recall that 3 exchange? I can show you the passages if you like.</p> <p>4 MR GAMA: They were asking me for 5 documents that they already had and they were just 6 selectively pulling them back.</p> <p>7 ADV P PRETORIUS SC: Mr Gama, that is not 8 correct. Must I show you the passages. They were asking 9 you for documentation, clearly that they didn't have and 10 you promised to go and get it. Do you want to see the 11 passage?</p> <p>12 MR GAMA: I will also show you the 13 passage where at the end as I was leaving I said but you 14 have another file and they said they would make me a copy.</p> <p>15 ADV P PRETORIUS SC: Leave aside the 16 other reference, you can talk about that if you wish, but 17 do you accept that they asked you for documents and you 18 promised to get them, in relation to the GNS matter? Do 19 you accept that, yes or no?</p> <p>20 MR GAMA: We all - we both asked each 21 other for documents. I promised to give them documents and 22 to find out more documents.</p> <p>23 ADV P PRETORIUS SC: They asked you for 24 documents. Do you accept that?</p> <p>25 MR GAMA: I also asked them for</p>



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<p style="text-align: right;">Page 109</p> <p>1 documents.</p> <p>2 ADV P PRETORIUS SC: You were still CEO</p> <p>3 of Transnet Freight Rail at that stage vested with all the</p> <p>4 powers and duties that you had, had all along as at the 8th</p> <p>5 of April, correct?</p> <p>6 MR GAMA: Court.</p> <p>7 ADV P PRETORIUS SC: You had power to</p> <p>8 call people to account, you had power to call for</p> <p>9 documents. Correct?</p> <p>10 MR GAMA: Correct.</p> <p>11 ADV P PRETORIUS SC: You were given</p> <p>12 everything save the report in the Transnet internal audit</p> <p>13 file. That evidence is not here.</p> <p>14 MR GAMA: I was not given on the 8th.</p> <p>15 ADV P PRETORIUS SC: Shortly thereafter.</p> <p>16 MR GAMA: On the 8th I went to start</p> <p>17 looking for documents.</p> <p>18 ADV G PRETORIUS SC: Sorry, Mr Chairman,</p> <p>19 just a clarification there. Not everything that they had</p> <p>20 because they had interview notes and the like. It's</p> <p>21 documents unspecified. If the suggestion is that</p> <p>22 everything in those files, you haven't seen it and this</p> <p>23 inquiry hasn't seen everything in the files.</p> <p>24 ADV P PRETORIUS SC: But, what I fail to</p> <p>25 understand, Mr Gama, is this, why you say you need someone</p>	<p style="text-align: right;">Page 111</p> <p>1 that a file be prepared for me by the department so that I</p> <p>2 could acclimatise myself to all of these issues that were</p> <p>3 being raised. So, it was not that I couldn't but it was</p> <p>4 the practise that the auditors, whenever they'd come up</p> <p>5 with information because the auditors, internal audit they</p> <p>6 are the eyes and ears of management. It has always been</p> <p>7 them who would in the course of doing their assurance they</p> <p>8 would alert me to these issues. So, my expectation that if</p> <p>9 there is any document that they have they should give it to</p> <p>10 me it was not abnormal at all. It was in the ordinary</p> <p>11 course of the work that we did with them. I never saw them</p> <p>12 as a foe, they were actually there to assist management to</p> <p>13 improve. But in this instance they were not providing me</p> <p>14 with the documents that they had.</p> <p>15 Mr Chairman, can I take one minute.</p> <p>16 CHAIRPERSON: Yes –</p> <p>17 MR GAMA: Ja, please.</p> <p>18 [ARBITRATION ADJOURNS ARBITRATION RESUMES]</p> <p>19 [14:58] CHAIRPERSON: Mr Pretorius.</p> <p>20 ADV P PRETORIUS SC: Yes, Mr Gama, I just</p> <p>21 want to put to you a passage of the evidence given by Mr</p> <p>22 Madhav on the 18th January, it appears at page 159 of the</p> <p>23 transcript of that day. Mr Madhav was asked by myself,</p> <p>24 "did Mr Gama at any stage look I have been taken by</p> <p>25 surprise I would time to look at these documents? Did he</p>
<p style="text-align: right;">Page 110</p> <p>1 else's investigation when you have a responsibility to do</p> <p>2 your own investigation in relation to persons under your</p> <p>3 command and control and in relation to documentation in</p> <p>4 your division. I find that quite inexplicable that you</p> <p>5 have to rely on an opinion of Transnet internal audit. You</p> <p>6 could have done this and should have done it yourself and</p> <p>7 your failure to do so is culpable.</p> <p>8 MR GAMA: It is very simple, it is, was,</p> <p>9 and probably continues to be the practise in Transnet where</p> <p>10 the internal auditors if there was anything that they had</p> <p>11 that they wanted to alert you to – they had come to me on</p> <p>12 several occasions whenever there had been issues to say</p> <p>13 here is an issue that your division needs to look at. We</p> <p>14 had sat across the table, they would give me whatever</p> <p>15 documentation that they have and then we would look at it</p> <p>16 and if we needed any further capacity in order for us to</p> <p>17 execute that task we would.</p> <p>18 What was different this time is that they had</p> <p>19 documents, they were not giving me the documents, they were</p> <p>20 being very selective in terms of which documents to give</p> <p>21 me. Even as I left that interview I had been shown maybe</p> <p>22 two or three documents and I was then told that the rest of</p> <p>23 the files a copy would be made and that copy would be sent</p> <p>24 to me.</p> <p>25 So, at that time as I have indicated I did ask</p>	<p style="text-align: right;">Page 112</p> <p>1 express any doubt as to his memory." Madhav said, "he</p> <p>2 didn't express any doubt but he did make a request for</p> <p>3 documents towards the end of the discussion." I then asked,</p> <p>4 "did you give him those document?" Madhav replied, "I did</p> <p>5 make available a copy of those documents." I asked, "when?"</p> <p>6 And he said, "probably a week later after the discussion."</p> <p>7 I then asked, "did he ever come back to you and</p> <p>8 say look I have now read the documents, I have to correct</p> <p>9 what I said to you?" Madhav said, "no, we had no response."</p> <p>10 Now, I don't recall that evidence being</p> <p>11 challenged. But what I want to put to you is this, is that</p> <p>12 on the 8th April on your version as the – and in the weeks</p> <p>13 thereafter and I stress weeks thereafter, if not days</p> <p>14 thereafter you, as chief executive officer of Transnet</p> <p>15 Freight Rail, had sufficient information or at the very</p> <p>16 least had available to you sufficient information to call</p> <p>17 all those people to account that you related and answered</p> <p>18 to the question I put to you earlier this afternoon. That</p> <p>19 is manifest on the evidence.</p> <p>20 MR GAMA: As I indicated to you the chief</p> <p>21 procurement officer had indicated that some of the</p> <p>22 documents I was looking for were with the auditors. That</p> <p>23 he would compiled a file for me. I was proceeding on leave</p> <p>24 and unfortunately now I can't, but I think it was my annual</p> <p>25 leave because I don't take leave in December, which could</p>

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<p style="text-align: right;">Page 113</p> <p>1 have been two to three weeks. By the time I came back and  2 as I was dealing with these issues of comparing the notes  3 and I did have two files I was then met with the meeting  4 that I had on the 11th May with Mr Wells.  5 You would see also in my letter to Mr Wells, I  6 had said to him that I don't know how he would say he's got  7 legal opinions and investigation reports when in fact the  8 discussions that we were having with internal audit had not  9 been completed. And specifically Mr Oates and myself had  10 agreed to have a discussion.  11 ADV P PRETORIUS SC: Mr Gama, I put it to  12 you quite simply that whatever your apprehensions or  13 suspicions of a conspiracy against you might have been and  14 we will deal with that and contest that they were real  15 apprehensions, justified apprehensions, nothing of that any  16 absolved you of your responsibilities as CEO, particularly  17 in relation to the GNS matters. You remained CEO with all  18 your responsibilities and you were asked in the letter of  19 18th June by Mr Wells, to tell Transnet how you were going  20 to execute your responsibilities. Do you have a comment on  21 this?  22 MR GAMA: I have already commented that  23 it put a lot of pressure on me to hear that I was actually  24 the one who was being investigated. So, I did not want at  25 the time to then be seen either to be covering up or to</p>	<p style="text-align: right;">Page 115</p> <p>1 put yourself into that space and touch the things that you  2 are being investigated for, lest you are trying to hide  3 something and I am not the sort of person who would want to  4 hide something. So, I concentrated on other aspects of the  5 business because as Mr Wells left me on the 11th May he had  6 indicated that very soon he is going to come and put  7 allegations to me that I needed to answer to.  8 So, and at that time it had become clear what  9 those issues are. So, I couldn't then after that continue  10 with the investigation that I was just starting.  11 ADV P PRETORIUS SC: Mr Gama, I fail to  12 understand how uncovering the full extent of the  13 irregularities associated with the GNS contract could lead  14 to any reasonable conclusion that you were covering up.  15 Quite the contrary.  16 MR GAMA: But, I was now the one who was  17 subject of the investigation and not the people who had  18 actually been involved in the process. That was the chief  19 difference.  20 ADV P PRETORIUS SC: The passage I put to  21 you in Mr Wells' letter is clear but I am not going to go  22 back there. What is interesting about your answers today,  23 Mr Gama, is that when you finally do put pen to paper on  24 the 20th July 2009 very little if anything at all of the  25 accountabilities that you have now raised in evidence</p>
<p style="text-align: right;">Page 114</p> <p>1 interfere in an investigation of which I was now formally  2 notified that I am actually the one that is being  3 investigated. It's not because I did not want to do  4 anything, actually far from the truth. But I started  5 having that kind of apprehension.  6 I did not believe that if I started to do  7 anything around these particular issues that people would  8 not begin to think that I was trying to cover up. For  9 instance, as I indicated once a matter has been brought to  10 your attention by the auditors and they have indicated what  11 the matter is. I had ample time to cure, I could have  12 applied for a condonation, I chose not to because I was now  13 in a space, in a realm where I found that it was actually  14 myself that was under investigation. So, all of these  15 things would in time come out in the open.  16 ADV P PRETORIUS SC: In summary, Mr Gama,  17 you had the authority to investigate and call to account.  18 You had the time and you had quite sufficient documentation  19 to investigate and call to account and you were asked what  20 you were going to do. Are you saying that one of the  21 reasons you didn't do that was because you would be  22 suspected of a cover up?  23 MR GAMA: Very clearly, after you are  24 informed that you are the subject of an investigation and  25 it is indicated to you what the issues are you can't then</p>	<p style="text-align: right;">Page 116</p> <p>1 appear in that letter. In fact, it is an exceedingly weak  2 and inappropriate response in your letter of the 20th July,  3 given what was known to you at the time.  4 MR GAMA: In terms of my letter of July  5 if all of the correspondence that took place almost every  6 three to four days between myself and Mr Wells were here it  7 would indicate to you that I was looking for information.  8 I worked on some of the information that I had. I did not  9 have all of the information that I required, for me to have  10 a conclusive response in terms of the issues that had been  11 raised. I did indicate in my letter that certain things I  12 needed more time and more information.  13 During the period when I was writing this letter,  14 I mean, this response I have even occasion to write to the  15 chairman of Transnet in terms of saying, "give me a  16 complete picture here so that I am able to deal with these  17 issues." Again, information that I requested for was  18 refused.  19 ADV P PRETORIUS SC: I have already asked  20 you why that should preclude you from obtaining the  21 documents under your control. So, I am not going to go  22 back there. But, Mr Gama, by the end of July on your own  23 version you had the information that led you to the  24 conclusion that there was something untoward, as you  25 describe it, at issue. None of the time excuses that you</p>

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<p style="text-align: right;">Page 117</p> <p>1 have offered to the arbitrator for inaction applied at the 2 end of July.</p> <p>3 But what you say on page 18 and 19 of bundle D2 4 in relation to the appointment of GNS, you say, "I deny any 5 involvement in any possible manipulation that you may be 6 referring to relating to the GNS appointment."</p> <p>7 Then you say, and we submit this is quite 8 extraordinary, "if there was any manipulation that you 9 suspect by any party we would follow up on that matter and 10 carry out an investigation."</p> <p>11 So, as at the 20th July what you are saying, "you 12 tell me if there is any manipulation and then we will 13 investigate."</p> <p>14 Now, I put it to you that against your evidence 15 of the complete fraud that had been perpetrated by Mr 16 Beattie and possibly by others and in the face of all the 17 other known irregularities that is the most extraordinary 18 and inappropriate statement to make. Do you have a 19 comment?</p> <p>20 MR GAMA: His letter was around my 21 involvement. So, I think there I was dealing with that, 22 but you will see that subsequent to that particular passage 23 I went on and indicated the steps that we wanted to take. 24 I indicated that we needed more time to deal with all of 25 these issues and in fact I had then instructed the general</p>	<p style="text-align: right;">Page 119</p> <p>1 understand what it is exactly that was being looked for and 2 as I said when I prefaced my response a lot of the issues 3 that I was being asked were issues that I did not deal with 4 on a daily basis. There were issues which were not in my 5 personal knowledge, I had to call in people and interview 6 people and I did that.</p> <p>7 ADV P PRETORIUS SC: Mr Gama, in a 8 nutshell your response of the 20th July apart from glossing 9 over or explaining away the irregularity was quite simply a 10 statement that you tell me what's wrong and if you tell me 11 that anything is wrong then I will investigate. That's - I 12 put it to you a fair summary, we will argue, of your 13 response of 20 July. But, let me put to you that the 14 letter of Mr Wells, for example, at page 140 of bundle D1 15 is very specific in alerting you to the issues of concern 16 in relation to the GNS contract. From paragraph 7.16.1, 17 and I am not going to read them all, to paragraph 17.4 is a 18 litany, a detailed litany of complaints relating to the GNS 19 matter with supporting documents attached.</p> <p>20 The only allegation made against you is in 21 paragraph 7.18 which says, "these facts give rise to a 22 serious concern that your conduct in approving the 23 confinement was maybe negligent." Now, your statement that 24 the letter was rather vague in what was at issue is 25 completely incorrect. On the contrary it was detailed,</p>
<p style="text-align: right;">Page 118</p> <p>1 manager responsible for that area to start assisting me in 2 terms of dealing with that.</p> <p>3 In fact, before I left there had been a final 4 warning letter that had been given to one of the manager as 5 a result of investigations that we had started around the 6 entire security area. But what I had also indicated was 7 that it was not only this that I wanted to look at it was 8 also to look at everything else that was there to make sure 9 that we are not being hoodwinked, as a company, on any of 10 these issues.</p> <p>11 ADV P PRETORIUS SC: Well, again I put it 12 to you that that's totally an inadequate response for a 13 CEO. That so many months later after being alerted to the 14 issues, even on your own version, you were in the process 15 of commencing investigations as at the 20th July.</p> <p>16 MR GAMA: As at the 20th July I still 17 asked in terms of certain things that we wanted to do. I 18 had expected also a reply to my letter and the reply to my 19 letter was nothing more than a charge sheet that I 20 received. But I had done some of the work that I needed to 21 do although it wasn't complete and as I say when I replied 22 in July I still didn't have all of the documentation that I 23 needed.</p> <p>24 The letter of Wells that was written to me on 25 certain aspects it was very broad in terms of trying to</p>	<p style="text-align: right;">Page 120</p> <p>1 comprehensive and specific.</p> <p>2 MR GAMA: As I indicated these were 3 issues that I had to go and ascertain and deal with because 4 these are not issues that were in my normal daily scope of 5 work. So I had to talk to people to indeed confirm some of 6 this which is why I had asked for more time to deal in some 7 greater detail with all of the issues.</p> <p>8 ADV P PRETORIUS SC: What is more 9 remarkable, well, I don't know that it could be more 10 remarkable, what is also remarkable about your response of 11 the 20th July is there is not one mention there of the fraud 12 committed upon you by Mr Beattie and of the possible 13 involvement of others underneath you in that. We find that 14 quite extraordinary as well.</p> <p>15 [15:18] MR GAMA: My response was written under 16 very tight timelines. I would have needed much more time 17 to deal with all of these issues because I had to interview 18 people and some of them could not be available in the times 19 that I was available and when they were available I was not 20 available. So, there were those kinds of issues that also 21 took place. So, there was a lot of tremendous timelines 22 that I was trying to deal with this issue.</p> <p>23 ADV P PRETORIUS SC: Mr Gama, you had 24 over a month to answer the letter, correct?</p> <p>25 MR GAMA: That is correct, but it does</p>



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<p style="text-align: right;">Page 121</p> <p>1 not mean that was the only thing that I had to do during 2 that time.</p> <p>3 ADV P PRETORIUS SC: You spent, if I may 4 just refer you to it –</p> <p>5 MR GAMA: In fact, I could not even give 6 the letter on the date that had been asked I had to ask to 7 send it in the morning and I wrote this letter at 3 o'clock 8 clock in the morning. Some of the issues that I thought I 9 had raised I realised much later that there were other 10 versions of my draft where certain things got lost.</p> <p>11 ADV P PRETORIUS SC: Mr Gama, one thing 12 stands out starkly from, at least, one of the versions 13 before Mr Arbitrator in relation to the meeting of the 5th 14 December, and that is that you were the victim of a blatant 15 direct fraud at the hands of Mr Beattie. We will argue 16 that Mr Arbitrator will recognise that as one of the single 17 most remarkable part of your evidence, striking part of 18 your evidence.</p> <p>19 Now, against that background how many lines of 20 writing would it take simply to record that? Three or four 21 lines?</p> <p>22 MR GAMA: By the time I wrote this, 23 unfortunately as I indicated, Mr Beattie had already left 24 and this was also one of the things, maybe I should have 25 just recorded it. But this was one of the things where I</p>	<p style="text-align: right;">Page 123</p> <p>1 MR GAMA: Yes.</p> <p>2 ADV P PRETORIUS SC: If you look at page 3 137 of bundle D1.</p> <p>4 MR GAMA: D1?</p> <p>5 ADV P PRETORIUS SC: B1, sorry page 138 6 and following. No, I am sorry, page 137 the letter of 7 appointment. The last page of the letter of appointment, 8 bundle B1 of GNS signed by Brian Fredericks. Do you see 9 that? One to five months under the head contract 10 performance, a 25% reduction, thereafter a 50% reduction. 11 On your evidence that was one of the most important issues 12 for you as a chief executive officer. Did you follow that 13 up?</p> <p>14 MR GAMA: Yes, I did.</p> <p>15 ADV P PRETORIUS SC: Was that performance 16 achieved?</p> <p>17 MR GAMA: I had wanted to make sure that 18 it is in the contract and that if it was not being done 19 that there was penalties. All that I ensured was that they 20 make sure that it is in the contract itself.</p> <p>21 ADV P PRETORIUS SC: But surely, Mr Gama, 22 you would have, as a chief executive with that particular 23 prominent concern, followed up at your weekly meeting 24 saying "is our service provider, our unknown service 25 provider providing the services which they have contracted</p>
<p style="text-align: right;">Page 122</p> <p>1 did not know what recourse I would have and I was told that 2 Mr Beattie had actually left the country.</p> <p>3 ADV P PRETORIUS SC: And in seven pages 4 of your response of 20 July there is no room for a few 5 lines saying I was the victim of a direct fraud on the 20th 6 July, I was misled. Not only by Beattie but possibly by 7 others as well, they need to be called to account. It 8 doesn't take long to say that, the single most striking 9 fact that arises out of the interview the 5th December on 10 your version. In fact you explain it in a completely 11 different way over seven pages.</p> <p>12 MR GAMA: I think as I indicated you must 13 take into account the context of the circumstances and the 14 issues that I found myself in at that time and especially 15 the fact that I was being asked about things that I should 16 not have been asked about. I should have been given 17 reports to enable me to go and find the exact person who 18 had committed certain things.</p> <p>19 ADV P PRETORIUS SC: The nub of the 20 explanation, Mr Gama, given on the 20th July is that you 21 were entitled to and did approve confinement. If you would 22 give me a moment, Mr Arbitrator. - you did raise on your 23 version with Mr Beattie on the 5th December was the issue of 24 performance standards or key performance indicators, 25 correct?</p>	<p style="text-align: right;">Page 124</p> <p>1 and been appointed?"</p> <p>2 MR GAMA: No –</p> <p>3 ADV P PRETORIUS SC: Are they meeting the 4 key performance indicators?</p> <p>5 MR GAMA: There are people in the company 6 who would follow up the specifics in terms of the actual 7 contract –</p> <p>8 ADV P PRETORIUS SC: And you wouldn't?</p> <p>9 MR GAMA: What I was constantly being 10 told was that we were making a lot of progress. But in 11 terms of the actual contract we have contract compliance 12 officers that would deal those issues when they confront 13 the actual contract and those people would be in 14 procurement and in the security department. So, I couldn't 15 tell you whether there was a reduction of 50 or 15, or 16 whether there was an increase but they would have had to 17 make sure that they deal with that issue.</p> <p>18 ADV P PRETORIUS SC: I want to put it to 19 you, Mr Gama, that the reason why on the 20th July you 20 didn't call anybody to account is because you knew far more 21 about the irregularities and procedural defects - and note 22 for the present I confinement my question to knowledge of 23 irregularities and procedural defects - than you have cared 24 to reveal to Mr Arbitrator.</p> <p>25 MR GAMA: When you say I knew far more?</p>

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<p style="text-align: right;">Page 125</p> <p>1 ADV P PRETORIUS SC: Well, you knew of</p> <p>2 the irregularities at the time, that's why you couldn't</p> <p>3 call anybody to account, because they would just point the</p> <p>4 finger straight back at you.</p> <p>5 MR GAMA: No, they wouldn't.</p> <p>6 ADV P PRETORIUS SC: And I want to put it</p> <p>7 to you that it's clear from the transcript of the 8th April,</p> <p>8 and we will submit, that at the meeting of the 5th December</p> <p>9 you had far more information in relation to what you were</p> <p>10 doing and what you were authorising than the version you</p> <p>11 have given in this arbitration.</p> <p>12 MR GAMA: No, that's not true.</p> <p>13 ADV P PRETORIUS SC: And that, you</p> <p>14 would've know on the 5th December that a tender processed</p> <p>15 had been stopped. You would have known that GNS was the</p> <p>16 party that was being favoured by your authorisation and</p> <p>17 those issues and that knowledge should have caused you to</p> <p>18 make further inquiry.</p> <p>19 MR GAMA: Not true.</p> <p>20 ADV P PRETORIUS SC: At the very least,</p> <p>21 Mr Gama, you should have read the document you were</p> <p>22 signing?</p> <p>23 MR GAMA: I think we've dealt with that</p> <p>24 issue.</p> <p>25 ADV P PRETORIUS SC: More particularly in</p>	<p style="text-align: right;">Page 127</p> <p>1 MR GAMA: I think there were many.</p> <p>2 ADV P PRETORIUS SC: I put it to you that</p> <p>3 it is clear from the transcript of the 8th April that you</p> <p>4 had when you authorised the confinement on the 8th April</p> <p>5 enough information to alert you to the need to make further</p> <p>6 inquiry, would you like to comment on that?</p> <p>7 MR GAMA: On the 8th April.</p> <p>8 ADV P PRETORIUS SC: I'm saying it's</p> <p>9 clear – I am sorry, let me put it again. It is clear from</p> <p>10 the transcript of the 8th April meeting with Ernst &amp; Young</p> <p>11 that on the 5th December you had sufficient information to</p> <p>12 alert you to the need to make further inquiry before you</p> <p>13 signed the authorisation on confinement.</p> <p>14 MR GAMA: No, I didn't.</p> <p>15 ADV P PRETORIUS SC: And that your</p> <p>16 failure to make inquiry before signing the confinement was</p> <p>17 grossly negligent on your part.</p> <p>18 MR GAMA: As I indicated I trusted that</p> <p>19 there had been a process and that the process had been</p> <p>20 followed to the letter and that there had been adjudication</p> <p>21 committees and a tender board that had gone through the</p> <p>22 issues. I had no reason at the time to suspect that there</p> <p>23 was something untoward on this matter.</p> <p>24 ADV P PRETORIUS SC: Further, your</p> <p>25 failure to satisfy yourself by reference to the</p>
<p style="text-align: right;">Page 126</p> <p>1 the light of the knowledge that you had on the 5th December</p> <p>2 you should have read the document you were signing. If on</p> <p>3 the other hand the version you gave in this arbitration</p> <p>4 that you merely looked at one page of a document that was</p> <p>5 separated from the document that you were in fact signing,</p> <p>6 and you looked at a page of signatures, that is equally</p> <p>7 culpable and negligent on your part. Whatever version, if</p> <p>8 you had knowledge you should have investigated and you were</p> <p>9 negligent in not doing so, you were negligent in not</p> <p>10 reading the contract, whichever version the arbitrator is</p> <p>11 inclined to see. We, however accept neither version.</p> <p>12 MR GAMA: Was there a question in that?</p> <p>13 ADV P PRETORIUS SC: What we are going to</p> <p>14 submit to Mr Arbitrator, do you want me to put it again?</p> <p>15 Perhaps I rolled up the question and that's not entirely</p> <p>16 fair to you. Shall I break it up?</p> <p>17 MR GAMA: No, I heard all of the points</p> <p>18 you were making, I was saying was that a question at the</p> <p>19 end. I missed the last four words?</p> <p>20 ADV P PRETORIUS SC: Yes, it's an</p> <p>21 invitation to comment, it's a proposition that I'm putting</p> <p>22 to you. Firstly, shall I go through it – I will repeat the</p> <p>23 proposition.</p> <p>24 ADV G PRETORIUS SC: It wasn't one</p> <p>25 proposition.</p>	<p style="text-align: right;">Page 128</p> <p>1 documentation that you were in fact signing what you were</p> <p>2 told you were signing is a third breach of the provisions</p> <p>3 of the delegation of authority framework and the</p> <p>4 procurement processes, detailed procurement procedures</p> <p>5 document.</p> <p>6 MR GAMA: Ja, I was not on inquiry</p> <p>7 largely because as I understood it and as I saw the</p> <p>8 documentation there had been a tender process that had been</p> <p>9 followed and I thought that we had enough checks and</p> <p>10 balances to deal with everything before it came to me.</p> <p>11 ADV P PRETORIUS SC: I put it to you that</p> <p>12 on the 5th December you knew that GNS was being favoured</p> <p>13 with an appointment in terms of a process which replaced</p> <p>14 the earlier open tender process and that should have</p> <p>15 alerted you to make further inquiry before signing.</p> <p>16 MR GAMA: No, I did not know who was</p> <p>17 getting any contractor –</p> <p>18 ADV P PRETORIUS SC: There is ample</p> <p>19 evidence that GNS was actually pointed out to you. The</p> <p>20 successful party was actually pointed out to you by Mr</p> <p>21 Beattie. I think you have conceded as much. But be that</p> <p>22 as it may. That your failure, under whatever</p> <p>23 circumstances, to read the documents that you signed was</p> <p>24 grossly negligent on your part.</p> <p>25 MR GAMA: Ja, as I indicated earlier it</p>

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<p style="text-align: right;">Page 129</p> <p>1 was really circumstances in which Beattie had come to my  2 office, the short timeframe, as I indicated if it had been  3 in my in tray and had given me enough time to go through it  4 probably none of this could have proceeded.  5 ADV P PRETORIUS SC: How long, Mr Gama,  6 would it have taken you to read a five or seven page  7 document that you were signing? The notion that you didn't  8 have enough time to read the document that you were  9 signing, I put it to you is indicative of an extraordinary  10 lapse in your duties.  11 [15:38] ADV P PRETORIUS SC: It was simply  12 unacceptable.  13 MR GAMA: Having trusted in the process I  14 had at least believed that I was assisting to deal with a  15 matter that the department was ceased with, which was cable  16 theft. It has not occurred at that time that there could  17 be anyone trying to pull the wool over my eyes.  18 ADV P PRETORIUS SC: And in fact you make  19 a good point, Mr Gama, of course it doesn't absolve you of  20 your duties because your duties are clear you must exercise  21 your duties not anybody else. That's why you are CEO. But  22 why on earth would Mr Beattie want to mislead you?  23 MR GAMA: That's what I wouldn't be able  24 to answer until now it's just not clear to me what the  25 issues were. At the time I did not suspect it, I did not</p>	<p style="text-align: right;">Page 131</p> <p>1 MR GAMA: That is correct.  2 ADV P PRETORIUS SC: Sir, if it's a  3 convenient time.  4 ADV G PRETORIUS SC: For a long, long  5 adjournment.  6 ARBITRATOR: Ja, I would agree.  7 [ARBITRATION ADJOURNED]  8 .  9 .  10 .  11 .  12 .  13 .  14 .  15 .  16 .  17 .  18 .  19 .  20 .  21 .  22 .  23 .  24 .  25 .</p>
<p style="text-align: right;">Page 130</p> <p>1 think that he himself would have willingly done so and I  2 would want to go beyond that because the sense that one  3 gets is maybe he was telling me things that he himself had  4 been told.  5 ADV P PRETORIUS SC: Precisely, that  6 there were others possibly involved. But, Mr Gama, a  7 person occupies the position of CEO because he is trusted  8 by his board himself to perform the duties which he is  9 visited precisely to avoid the type of consequences that  10 have occurred in this case. Do you accept that  11 proposition?  12 MR GAMA: As I indicated with the benefit  13 of hindsight I should not have allowed him to come and talk  14 to me on the document, I should have actually asked him the  15 leave the document or to take more time to deal with it.  16 Maybe I should not have allowed him to come in at all, I  17 should have asked him maybe to come later. But, I think,  18 what happened was, here was one of my GMs waiting for me  19 and he said, "look five minutes we just need to deal with  20 an urgent matter." I would not ordinarily –  21 ADV P PRETORIUS SC: That's why boards  22 place their trust in chief executor officers to run  23 divisions for turnovers of many billions of rand because  24 they trust, they are entitled to trust that you will do  25 your duties. Not so?</p>	



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**IN THE DISCIPLINARY HEARING  
HELD AT JOHANNESBURG**

In the matter between:

**TRANSNET**

Employer

and

**MR DINGAAN SENAMELA**

First Employee

**MR SIPHO KHANYE**

Second Employee

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**FINDINGS**

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**Introduction**

1. Mr Dingaen Senamela ("Senamela") and Mr Sipho Khanye ("Khanye") have been charged with serious misconduct, which is substantially similar in nature, in one disciplinary hearing. The charges of misconduct levelled against Senamela are to be found at pages 1-4 of the bundle. These are three charges and there are four charges preferred against Khanye which are to be found at pages 5-8 of the bundle.<sup>1</sup>

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<sup>1</sup> The employers bundle comprises 616 pages.

2. Ms Kate Savage of Bowman Gilfillan Attorneys presented the case on behalf of the employer and the employees were ably represented by Advocate Sam Cohen instructed Attorney Larry Marks. Ms Savage and Advocate Cohen dealt with this matter professionally, efficiently and comprehensively. I am grateful for their assistance. The written submissions filed on behalf of both parties are of the highest quality and competence.
3. I sit as the chairperson of a domestic internal disciplinary hearing. My findings of fact are binding on the employer and the sanction, if any, which I recommend is a recommendation. I appreciate that I, in my capacity as chairperson, and the employer cannot, in law, procure evidence outside the domain of that which an employer can reasonably procure. As such, I must do the best with the material available and that which is reasonably procurable.
4. Senamela was appointed as Senior Manager: Security at Transnet Freight Rail ("TFR") on 23 July 2007. Khanya was employed by Transnet in 1994 and at the date of his suspension was employed in the position of Manager: Contracts and Administration at TFR. Both employees have been suspended on full pay since approximately 11 November 2009 and the finalization of this hearing was delayed arising from a number of factors including the illness of Senamela. It is imperative that the matter be finalized in the interest of all concerned rather sooner than later. Any unnecessary delay is not conducive to

efficiency. In this context, fairness must take into account the interests of the employer, the employees and the public at large.

5. Transnet is a public entity and its sole shareholder is the Government of the Republic of South Africa. As such, all South Africans have a stake in the efficient operations of Transnet, in that any wasteful expenditure inevitably prejudices the people of this country.

#### Tender law

6. Section 217 of the Constitution of the Republic of South Africa guarantees fair, equitable, transparent, competitive and cost-effective procurement processes. Fairness is inherent in the tender procedure. "It's very essence is to ensure that, before government, national or provincial purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and other facts mentioned in Section 217 permeate the procedure for awarding or refusing tenders. (see: *Logbro Properties CC v Bedderson N.O. & Others* 2003 (2) SA 460 SCA; *Steenkamp N.O. v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 CC).<sup>2</sup>

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<sup>2</sup> *Mthiyane JA in Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 at 443B-C

**The award of contracts to General Nyanda Security (GNS) at Transnet Freight Rail ("TFR")**

7. As I understand the position, TFR is a division of Transnet Limited and at all material times its CEO was and remains Mr Gama.
8. In the following paragraphs, I have borrowed extensively from the opening statement of Ms Savage to record common cause facts.
9. On 17 July 2007 tender number: 1030 98739 was issued by Transnet. It constituted a request for proposal ("RFP1") to provide a complete security package across various regions for a two year period. The closing date for the tender was 10h00 on 7 August 2007.
10. The request for proposal at part 3 of the tender documents contained a problem statement which identified that:
  - 10.1. well organized syndicates in Gauteng, KZN and Mpumalanga steal copper and aluminium cables; and
  - 10.2. the task of securing the rail infrastructure is the task of the company's in-house security and service providers.

11. The request for proposal required solutions that would deliver the following outcomes:

11.1. Prevention of cable theft and theft of other related rail infrastructure alongside the rail network;

11.2. Visible 'policing/securing';

11.3. Rapid response to crime incidents on the rail network;

11.4. Investigations, arrests, prosecution and conviction of perpetrators for the theft of cable and other associated infrastructure;

11.5. Any other focus areas that aim at eradicating such crimes.

12. The request for proposal specified that all personnel would have to undergo training and that deployment and/or implementation would be focused on the central and eastern regions, as defined.

13. By 7 August 2007 eleven offers were received in response to RFP1. It was agreed at a meeting on 23 August 2007 that four companies were shortlisted and would be requested to make a presentation in respect of their proposals. Presentations were made on 31 August 2007.
14. The Head Office Acquisition Council evaluation report proposed that a confined tender be issued limited to the shortlisted bidders.
15. By 2 October 2007 the award of the tender was being finalized with a view to presenting the matter to the Transnet Freight Rail Acquisition Council ("TFRAC").
16. This tender process, however, came to an abrupt halt on 15 October 2007. The reason for this proffered by Khanye in an email of 15 October 2007, is that one of the companies shortlisted in the request for proposal had already been awarded business by Transnet to audit companies. According to Khanye, the decision to stop the process is that of Virginia Dunzwa ("Dunzwa") from Transnet's head office.



17. If, indeed, this is a proper reason to disqualify one of the four shortlisted in terms of the tender process, I would have thought that the best qualified candidate from the remaining shortlisted tenderers would then qualify to be awarded the tender.
18. This, however, does not happen. Moreover and significantly, it is not TFRAC that puts the process on hold – in terms of Transnet's Detailed Procurement Policy ("DPP") it is TRFAC that cancels the tender process and not any particular individual. Dunzwa has no authority to cancel or halt the tender process.
19. The tender is then awarded to General Nyanda Security ("GNS"). This is done contrary to tender law principles and I now analyze, to the extent that it is necessary, to demonstrate that this was an irregular tender.

#### **The contracts awarded to GNS**

20. I propose to record common cause facts and to this extent, I have repeated extracts of Ms Savage's opening address which are incontrovertible.

21. The justification for the award of a contract to GNS was that this was "on confinement" the inference being that it was an emergency matter where the normal process of tender could not be adhered to.
22. The scope of work in the confinement was to *"investigate, apprehend and assist in prosecuting suspects responsible for cable theft and criminal activities against Freight Rail Nationally and evaluate private security guards posted to protect the railway line and its freight en-route to their destinations"*.
23. The reasons for recommending a confined tender were stated to be that:
- 23.1. The contract with the previous service provider had expired on 31 August 2007;
- 23.2. The RFP process was stopped based on an instruction from Virginia Dunjwa given that business had been awarded by Transnet to one of the four companies short-listed for the RFP;
- 23.3. Cable theft has increased to its peak and is anticipated to get worse as the festive season approaches;

23.4. Research of potential companies was conducted and GNS was asked to make a presentation in the form of a proposal;

23.5. The GNS proposal contained the required solution and GNS is highly recommended based on its expertise, track record and national footprint in providing specialized security solutions; and

23.6. An open tender process will be followed after the confinement has expired.

#### Further common cause facts

24. A budget of R13 million was available for the project. The estimated total contract value awarded to GNS was R18,933,120 (or R1,577,760 per month). The total contract period was one year with a performance review undertaken after five months.

25. The other companies researched were ARM which provides physical security and limited intelligence and Circle 7 which specializes in VIP protection and body guarding.

26. The Directors of General Nyanda Security (Pty) Ltd were recorded as Sylvester Sithole and General Sphiwe Nyanda, although General Nyanda was not registered as a director with PSIRA.
27. In terms of the confinement, GNS was to provide nationally a complete security package to curb and prevent copper theft with a "proactive, reactive and active approach" through informers, investigations, awareness campaigns and visibility.
28. On or about 8 November 2007, Khanye and Senamela were amongst those members of the cross-functional evaluation team who signed off on the confinement. On the same date Senamela signed the request that the confinement be awarded. On 5 December 2007 Siyabonga Gama, the chief executive approved the award of the confinement.
29. On 7 November 2007, the Head office Acquisition Council (HOAC) supported the confinement subject to final approval from the chief executive, Mr Gama.
30. In a letter emailed on 23 November 2007 to Khanye and Jaco van Wyk from Nayle Outsourcing, a copy of which was found on Khanye's computer, Redibile Mofokeng from GNS confirms a telephone conversation held on 22 November 2007 with Khanye in which:

30.1. GNS was advised that it had been appointed to render services as per its quotation dated 12 October 2007;

30.2. GNS was advised as a matter of urgency to deploy agents in the field to begin the assignment; and

30.3. GNS will receive the appointment letter in due course;

30.4. Agents will be at TFR offices on 23 November 2007.

31. By way of letter dated 6 December 2007, TFR informed GNS that it was awarded a comprehensive total security packaged to be supplied to TFR.<sup>3</sup> Prior to this, however, Khanye informs GNS that GNS has the contract in a manner of speaking "in the bag".

#### The first contract

32. Thus GNS was awarded a contract the value whereof was R18,933,120 (or R1,577,760 per month) which excluded VAT. The contract period was 1 December 2007 to 1 December 2008.

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<sup>3</sup> Bundle – pages 129-137

### The second contract

33. As from 1 April 2008, the contract awarded to GNS in confinement was doubled.<sup>4</sup>

### The third contract

34. On 13 August 2008, the TRFAC condoned the increase of the contract value to GNS from R13,943,040 to R32,876,160 on condition that a detailed progress report on investigation is forwarded to the council by latest before the end of October 2008. The council also resolved that the contract period should not exceed November 2008.

35. I was informed by Ms Savage that this third contract has been cancelled, *inter alia*, because the conditions imposed by the council *apropos* the third contract were not met.

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<sup>4</sup> Bundle – pages 129-137



**The difficulties or criticisms of the award of the contracts to GNSI**

36. A considerable portion of the time spent in the hearing before me sought to demonstrate that the award of contracts to GNS were irregular. I do not propose to be exhaustive in summarizing the objective facts supported by documents to demonstrate that the award of contracts to GNS was irregular in material respects.

37. For purposes of these findings, I also do not need to make any findings on whether there was fraud or corrupt practices in that my function is to evaluate the conduct of the two employees in relation to the contracts awarded to GNS, bearing in mind the irregular features surrounding these transactions and the role of the two employees, if any, as to whether their conduct in the allocation and implementation of the contracts is tainted with improper behaviour.

38. The following common cause facts demonstrate, in my view, that the award of the contracts to GNS was irregular in material respects.

38.1. The first contract was awarded to General Nyanda Security (Pty) Limited ("GNS company") which was not registered with the Private Security Industry Regulating Authority

("PSIRA") when the initial contract was awarded to it. Such registration is imperative, or put differently, a peremptory requirement of the PSIRA Act, 56 of 2001, in order for the GNS company to render the services in respect of which it was awarded the initial contract.

38.2. The General Nyanda Security Advisory Services (Pty) Limited (not GNS company) applied for PSIRA registration on 6 June 2008 and was registered on 9 June 2008. The first contract was for the period 1 December 2007 to 31 December 2008 with GNS company which was not licensed to provide the services in respect of which it was handsomely rewarded, nor is there any indication to this date that GNS company could lawfully have entered into the first contract.

38.3. Contrary to its contractual obligations, the GNS company could not, without prior written approval of Transnet, sub-contract or transfer responsibility for the performance of the whole or any part of the services for which it had contracted. In reality, GNS were using sub-contractors to perform the work it had undertaken to perform.

38.4. Whilst I appreciate that in our new found democracy the interest of black entrepreneurs must be promoted arising from past injustices, I am not prepared to accept that GNS, in whatever form it existed, should be the recipient of a contract and then sub-contracts its responsibilities, in this case, to Revert and in the process earn a massive profit – this is not black empowerment but simply opportunism which cannot be tolerated as it leads to a situation where a government entity in this case, Transnet, pays money for no value received to a black company without the comfort that the black company is in fact being empowered in its skills and know-how. Self-enrichment, on its own, is not good enough.

38.5. The second contract was signed on 4 June 2008 with General Nyanda Security Risk Advisory Services (Pty) Limited which, however, acquired registration status on 5 June 2008.

38.6. The price paid to GNS was excessive. The tender process which was aborted sought to replace the services which were then rendered by a service provider known as CPI on a monthly basis. CPI was paid approximately R500,000 per month and in its place GNS was paid some R1,7 million per month in terms of the first contract. If there was a *bona fide* reason to fill the gap, then the question arises as to why the contract of CPI, which was on a monthly basis, was not extended for a further defined limited period or on a monthly basis whilst the tender process was once again used to obtain the services of a service provider; instead GNS is preferred and awarded a contract for 12 months and which, in the end, endures for almost two years.

38.7. In summary, I am not persuaded that good and acceptable reasons existed to deviate from the requirements of tender law and fair processes in awarding contracts to GNS. The objective evidence before me demonstrated that this was not the kind of emergency which warranted a deviation from the employer's procurement procedures.<sup>5</sup>

<sup>5</sup> See: Transnet's Detailed Procurement Procedures and Contracting Procedures Manual for TFR, bundle – pages 497-616 which seeks to give effect to section 51(1)(3) of the PFMA, 1 of 1999

**The contracts awarded to GNS is fraught with irregularities**

39. The public tender process was wrongfully cancelled or put on hold. No explanation has been tendered as to why the open tender process (which had progressed to final stages) could not have been continued with the remaining three bidders in the public process.
40. The apparent reason proffered for the emergency, namely that during the festive season, there is an alarming increase in copper theft justifying the appointment of GNS is not supported by the research – the stats show that there is, during this period, a decline. In any event, this should have resulted in the extension of CPI's contract for a limited duration of say three months or the award to an alternative service provider for this limited period. Instead GNS, as the facts reveal, was given effectively speaking a long term contract lasting for almost two years.
41. GNS, disguised in whatever legal form, seized the opportunity to make money. It had no registration status with the regulating authority to engage in the activity as a security service provider. It had no history, nationally or locally of a track record in providing the service for which it was awarded handsome contracts.
-

42. GNS had no employees. Its status with the South African Revenue Service proved that it did not have the employee body (with the apparent expertise) to render the services it purported it was eminently qualified to do.
43. The beneficial owners of GNS at the material time were General Siphile Nyanda, then a politician and presently a Minister in the Government of the Republic of South Africa and Sylvester Sithole, then a practicing attorney. Mr Sithole features in allegations of wrongdoing in the highly publicized abuse of State funds at SABC.
44. In the event the value received by the employer from GNS is minuscule compared to the price it paid. This is the unchallenged evidence of Keeran Madhav ("Madhav") who conducted a forensic investigation concerning the allocation of the contracts to GNS on behalf of Transnet. Nayager, at the material time, intimately involved in the operations of the contracts awarded to GNS testified that during his night time check on GNS, (a spot check properly organized) – it was ascertained that GNS was not rendering the services in respect whereof it was paid and contractually bound to render services.



45. The unchallenged evidence before me demonstrates that GNS was paid too much and did not have the expertise it held out that it had. In short, no proper value was received for the monies paid to GNS.
46. The proposal submitted by GNS is lacking in authenticity. It is designed to create the impression that it has the capabilities to serve as a problem solver for TRF.<sup>6</sup>
47. The proposal of GNS was probably prepared in conjunction with an "insider", i.e. an employee of TRF versed in TRF's requirements *apropos* the contract/s awarded to GNS. The detail contained in the proposals, dated from 4 October 2007 and then revised in various drafts dated 12 October 2007, all of which Madhav testified were found in Senamela's office, indicated GNS's in-depth knowledge of the requirements of the contract. I agree with Ms Savage that such knowledge could only have come about if GNS received information directly from TFR security. Madhav's testimony was that "no one could have prepared this without liaising or communicating with someone from security" must, in the circumstances, be correct.

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<sup>6</sup> Bundle – pages 43-60, 83-109

48. The proposal also has the hallmarks of extracting the kind of expertise rendered by experts in this field from other material. Thus for instance, in the profile of GNS sent to Khanye on behalf of GNS on 3 October 2007; the activities of GNS is described as follows:

*"For past cases, GNS has not only established key facts, but exposed jury tampering, bogus "expert witnesses", counterfeit venues and conspiracies. Recent investigations have dealt with bankruptcies, anti-trust fact finding ..."*

49. It is clear that GNS provided a profile which is a sham. It copied this profile on the probabilities from the profile of an American service provider because we do not have juries in this country in criminal matters. In the USA they do have. It must follow that to the ordinary reader the profile of GNS is a bogus and to the discerning enquirer GNS is not puffing but being untruthful in describing its executive overview. In real terms, it has no history or experience in the field and has no track record.

**The contracts awarded to GNS is wrongful**

50. In my view, the contracts awarded to GNS constitute a fraud on the employer. The shareholder and indirectly the taxpayer have been prejudiced because no proper value has been received for the services in respect of which GNS was paid. The contracts were thus irregularly awarded and resulted in wasteful expenditure.

51. This came about because of a conspiracy by a number of people in the employment of the employer who facilitated this transaction. On the facts before me, the CEO was instrumental in this wrongful and unlawful transaction.

52. South Africa has legislated and developed a sophisticated system whereby tenders by government are meant to be administered. In simple terms, the procedure is based on common sense principles that proper value must be received for payment made to a service provider. Within the realm of this structure is a fair process so that all South Africans can compete and have an opportunity to share in the wealth of the nation. In turn, proper value must be received for such services. The structure also accommodates the aspirations of black empowerment because in granting a tender, it is imperative to examine

to what extent the tenderer represents black aspirations and provides a framework for skills transformation. Thus for instance, an organ of State can legitimately award a tender to a service provider that is not necessarily the most cost-effective provided fair value is received and this particular tenderer meets the requirements of BBBEE.

53. I have no doubt that a number of individuals in the employment of the employer behaved dishonourably in favouring GNS. I was informed that disciplinary action has commenced against the CEO and others. It is my task, however, to determine to what extent Senamela and Khanye are implicated in dishonest behaviour or misconduct arising from the award of tenders to GNS. I am not required to determine whether the employer is consistent in its treatment of others who may or may not be culpable inasmuch as the process of carrying out investigations and disciplinary hearings is incomplete.

#### Senamela

54. Senamela was one the most senior person among whom the responsibilities rested in the allocation process of the contracts to GNS.

55. I find that this individual not only failed to take any measures to alert the board of Transnet of wrongdoing *apropos* GNS, but instead actively participated in promoting the interest of GNS to be the recipient of the contracts.
56. Senamela signed the motivation that a contract be awarded on confinement to GNS. I have considered the recommendation that Senamela made in this motivation and in my view he knowingly promoted the interest of GNS with the knowledge that it did not have the specialized investigators it held out to have. This motivation, to be found at pages 112 and 113 of the bundle, contains a host of false statements. Thus for instance, Senamela does not question the reason why the open tender process was stopped – not by the TFR Acquisitions Council, but apparently by one or two individuals.
57. The more damning evidence against Senamela is the unchallenged evidence of Nayager who testified that Senamela told him and Khanye that a decision had been taken, prior to the confinement, to use GNS and that it had been approved by the chief executive, referring to Mr Gama. Senamela did not give evidence to rebut this and I must accept that he was content to go along with Gama in awarding the contracts to GNS in contravention of the law.

58. Nayager further testified that Senamela threatened him with suspension had he not gone along with the scope extension, i.e. the second contract awarded to GNS, on the basis that Gama had approved the scope extension. Nayager explained to me how Senamela victimized him because he, Nayager, was unhappy with GNS as a service provider to the extent that Nayager was not given any work to do, but frustrated arising from having no work to do and this led Nayager to apply for a position with Eskom. Having succeeded in his endeavours to find alternative employment, Transnet offered him an alternative position to work on a project which he had a personal passion to do and is accordingly presently in the employment of Transnet, but not at TFR. The point being that Senamela victimized Nayager who was dissatisfied with the performance of GNS. There is no doubt that Senamela was promoting the interests of GNS and on the probabilities may well have an interest albeit indirectly in GNS.

59. Senamela did not testify. He did not take me into his confidence. It is not his case that he carried out instructions. On the contrary, he facilitated the entry and continuation of GNS in the employer's business.



60. Senamela took no steps whatsoever to monitor the performance of GNS. Senamela also took no steps to obtain alternative quotations which could serve as a comparison to the cost of the services quoted for by GNS. Senamela allowed the entering into the first contract which exceeded the level of the CEO's delegated authority, namely R10 million.
61. Senamela allowed payment to GNS on an average of 20 days whereas the previous service provider, CPI, had been paid on 60 days. Senamela doubled the contract value awarded on confinement to GNS within 4 months of the approval of the award of the initial contract by Gama. Thus, Senamela ensured that from 1 April 2008, GNS was paid double that which was payable in terms of the first contract which was for a period of 12 months.
62. Senamela allowed the approval of the scope extension in contravention of the DAF and his own delegated authority and I must infer that he was aware of this and yet took a decision to the prejudice of his employer and in the interest of GNS.

63. On 19 May 2009, Senamela recommended that the GNS' services continue to run on a month to month basis and that payment for March 2009 be approved. Senamela approved payment of invoices dated 7 May 2009 and 28 May 2009 with the knowledge or at least deemed knowledge that this was in breach of his employer's procurement policies and procedures.
64. Thus, Senamela brought about the situation to grant the first contract to GNS. This contract terminated at the end of December 2008 and again Senamela then facilitated the continuation of services to be rendered on a month to month basis for the most part of 2009, but at a price far in excess of the price which would otherwise have been payable for the services required.
65. Senamela did not deny the evidence of Nayager that he was the kind of person who would victimize employees who did not carry out his instructions.
66. I am satisfied that Senamela behaved dishonestly in promoting the interest of GNS to the prejudice of his employer.

**Khanye**

67. It is not Khanye's case that he carried out the instructions of Senamela. He testified under oath and I found him to be an unimpressive witness because the responses he gave to me sought to conceal or wish away his bad conduct in this entire matter.
68. If he was an innocent party or, on his version, an inexperienced individual and put in a position where matters were beyond his comprehension, he took no steps to bring this to the attention of his employer. On the contrary, he facilitated the scam perpetrated on his employer.
69. By 2 October 2007, the open tender was in the process of being finalized. On 15 October 2007, the tender is brought to an abrupt halt. I have already pointed out that detailed proposals dated 4 October 2007 and revised versions thereof dated 12 October 2007 were found in Senamela's office. On 3 October 2007, the profile of GNS is emailed to Khanye from Charlene Jongwe (bundle – page 61). A company profile of GNS was thus received by Khanye prior to any suggestion that the open tender process should be placed on hold and should not proceed.

70. I am unpersuaded that Khanye carried out any proper investigation to ascertain the legal status of GNS as a service provider. It was his function to do so, but he did not do so because he also facilitated, in my view, the award of the contract and later extension thereof to GNS.
71. Khanye also signed the motivation that the contract be awarded on confinement to GNS in circumstances in which he should not have done so. This was the first step in the manipulation of the process to avoid an open public tender and to unlawfully prefer GNS.
72. Khanye admitted knowledge of his employer's detailed procurement policy and the DAF and yet allowed the contract to be awarded to GNS in breach thereof.
73. Khanye deliberately lied in the motivation in stating that in the festive season there is an alarming increase in copper theft to justify the grant of the contract to GNS when the scientific evidence indicates that during the festive season, this particular crime is down.

74. Khanye took no steps to compare other prices. Khanye took no steps to investigate whether GNS had a national footprint as it suggested or that it had any experience in this field. Khanye allowed excessive charging and, contrary to his job duties, was indifferent as to whether GNS was performing or not.
75. GNS received notification that it had been granted the first contract before it was formally notified by TFR. This was probably the doings of Senamela and Khanye who were in close contact with the people from GNS and in fact assisting GNS to meet, on paper at least, the requirements of TFR.
76. Khanye knew that GNS had subcontracted its functions to Revert who were in fact providing the personnel to do the work and GNS added on a considerable profit on the charges levied by Revert for such functions. Khanye knew that the GNS contract was, in the circumstances, unjustified and yet facilitated this process.
77. I am satisfied, on a balance of probability, that Khanye behaved dishonestly and misconducted himself in relation to his duties as an employee of TFR.

78. I do not consider it necessary to analyse each and every one of the charges separately as set out in the disciplinary notices addressed to both employees. I am satisfied, as a whole that both employees misconducted themselves in material respects deliberately or alternatively recklessly in the manner in which they carried out their duties.

#### Findings

79. I find Senamela guilty on all three charges which he faces.

80. I find Khanye guilty of all four charges which he faces.

81. In respect of both employees, I find them guilty of misconduct in that in breach of their contractual obligations of good faith, they carried out their functions to unlawfully promote the interests of GNS to the prejudice of their employer.


#### Appropriate sanction

82. I have carefully considered the mitigation submitted on behalf of both employees by their legal representatives. This was done in writing and attached to my findings as "A" and "B".



83. I accept that both individuals have families to support. In the case of Senamela, I accept that he has struggle credentials. I cannot agree with the argument that if they are dismissed, it would be too severe a sanction because jobs are hard to find. In my view, employees must not believe, in particular State employees, that they have a job for life. They have to render proper services to maintain their positions. They must behave appropriately in executing their functions. In this case, in my view, the employer has a good reason to dismiss them and in my view they have had a fair opportunity of putting their case before me. This employer cannot be expected to put up with the kind of misconduct these employees have committed. In the least, this employer cannot be expected to put up with the kind of behaviour these employees have associated themselves with.
84. In this case, they have behaved abominably. Their behaviour is not only dishonest but prejudices the welfare and wellbeing of our country. They deliberately set on a course to bypass the strictures of tender process. If this goes unabated, we will be a bankrupt country to the detriment of all our people.

85. No employer can be expected to put up with the conduct of these two employees. They have breached the trust and good faith required in the employment relationship.
86. In my view, it is not only desirable but imperative that both Senamela and Khanye be summarily dismissed. Justice must not only be done, but must be seen to be done. All right thinking employees must be comforted by the reality that delinquent employees cannot profit or be rewarded for their wrongdoing. All South Africans are entitled to believe that our legal system is fair and just and does not favour the wrongdoer.
87. In my view, summary dismissal of both Dingaan Senamela and Sipho Handsome Khanye would, in the circumstances, be fair and just.

  
NA CASSIM SC  
Chairperson

Chambers, Sandton  
5 March 2010

"M"



245

GNS

## TAX INVOICE

Client's Details:
Accounts Department
Transnet Freight Rail, JHB Supply Chain Services
Carlton Centre, 33rd Floor
150 Commissioner Street
VAT NO: 4720103177
TEL: 011 429 3638

GRV - 5000065125  
PO - 4501448756  
ENTRY - 7000041979

Invoice Details:	
Invoice Number:	INV0148
DATE:	21 APRIL 2009
SIRA no:	1608687
Vat no:	4400230530
VENDOR NUMBER:	72063890

DESCRIPTION	AMOUNT
Project Director	R 40,000.00
Project Coordinator	R 25,000.00
Investigation:	R 562,600.00
Monitoring & Evaluation	R 455,080.00
Intelligence	R 455,080.00
Standard Bank	
Eloff Street	SUBTOTAL R 1,577,760.00
Branch Code: 001305	
Acc No: 000865575	VAT @ 14% R 220,886.40

THANK YOU FOR YOUR BUSINESS.	TOTAL	R 1,798,646.40
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Signature

Dingaan Samanda S.M 09/04/4

"N"

TRANSNET

<b>ACQUISITION COUNCIL</b>	
CONFIDENTIAL: EVALUATION REPORT ON TENDERS	Page 1 of 6

AGENDA ITEM		
EXTENSION OF SCOPE	EXTENSION OF SCOPE	EXTENSION OF SCOPE
		x

	Date	Date	Date
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Tender Number:	S/SEC/02 2007
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Contract Number:	S/SEC/02 2007
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Approved List Number:	N/A
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Title of Submission:	Extension of scope of current contract awarded to General Nyanda Security (GNS).
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Department requesting approval and project manager:	Supply Chain Services
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1. Scope of Work:	Investigate, Apprehend and Assist in Prosecuting Suspects Responsible for Cable Theft and Criminal Activities Against Freight Rail Nationally and monitoring and evaluating of private security guards posted to protect the railway line and its freight en-route to their destinations.
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2. Recommendation: <u>reasons for extending the scope of work</u>	<p>Due to theft irregularities at Kaserne yard an urgent and appropriate decision was taken by TFR security management to suspend TFR Security personnel at Kaserne Yard and the contractor on site (Singobile Equestrian Security services).</p> <p>On the 14<sup>th</sup> February 2008 a container was found outside Kaserne yard without the relevant authority. The incident led to the dismissal and the suspension as mentioned above. Both the contractor and TFR security employees were implicated in thefts out containers at Kaserne based on a long and an intense investigation by GNS.</p> <p>An urgent need to secure the yard was eminent following the suspension of TFR security and the dismissal of Singobile security, due to an emergency GNS was instructed by TFR Security corporate office management to add extra resources</p> <p>The extra GNS resources will also be used for the following</p> <ol style="list-style-type: none"> <li>1. Conclusion of the investigation for suspended TFR security employees after the internal disciplinary process</li> <li>2. Execute security operational functions that were previously done by then now suspended TFR Security employees i.e Crime prevention, contract management and responding to incidents and train driver call outs</li> <li>3. Escort and protect train drivers</li> </ol> <p>Cost break down of resources as requested by TFR security management</p>
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HOAC

FINAL AS APPROVED

REVIEW 18 OCTOBER 2008



ACQUISITION COUNCIL		SPOORNET
CONFIDENTIAL: EVALUATION REPORT ON TENDERS		Page 2 of 6
	<p>1. Sixteen (16) resources @ R 1 50.00 / hour, Total R 864 000.00 / month (and R 6 912 000.00 for the remaining eight (8) months)</p> <p>(Secure the yard and escort and protect train drivers)</p> <p>NB. Resources work 12 hours for 30 days a month</p> <p>2. Seven (7) Investigators @ R 3 20.00 / hour Total R 376 320.00 / month (i.e. R 3 010 560.00 for the remaining eight (8) months)</p> <p>( Deployed nationally to investigate cable theft incidents linked to syndicates and to conclude the investigation lead following collusion between employees, contractors and syndicates)</p> <p>NB. Investigators work 8 hours for 21 days a month</p> <p>3. Six (6) Investigators @ R 3 20.00 / hour Total R 322 560.00 / month (i.e. R 2 580 480.00 for the remaining eight (8) months)</p> <p>(Permanent dedicated to Kaserne and Kazcorn yard due to vastness of the area)</p> <p>NB. Investigators work 8 hours for 21 days a month</p> <p>4. One (1) resource @ R 1 50.00 / hour, Total R 108 000.00 / month (i.e. R 1 440 000.00 for the remaining eight (8) months)</p> <p>(Will be deployed at electrical control room to monitor the call out and reporting of incidents)</p> <p>NB. This resource will be deployed for 24 hours for 30 days though there will be a change of shift and a reliever.</p> <p><b>Total increase per month R 1 670 880.00</b></p> <p><b>Total increase for the remaining eight (8) months R 13 943 040.00</b> (from 01<sup>st</sup> April 2008 to 30<sup>th</sup> November 2008)</p> <p>The resources deployment is managed and controlled by TFR Security corporate office on a direct cost basis as and when the need arise and will not exceed the above for the remaining duration of the contract period</p>	
3a. Specify budget amount:	<p>R 222 548 735.00</p> <p>GL: 92902</p> <p>Cost Centre: G012509</p>	
3b. Opex or Capex:	Opex	
3c. If Capex – minute number from Freight Rail Investment Committee and	N/A	

ACQUISITION COUNCIL		SPOORNET	
CONFIDENTIAL: EVALUATION REPORT ON TENDERS			
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approved date:			
4. Contract period:	From 01 <sup>st</sup> December 2007 to 30 <sup>th</sup> November 2008 (twelve (12) months as per confinement)		
4. a Current Contract expiry date	30 <sup>th</sup> November 2008		
5. When were bids invited:	Confinement		
6. Closing date and venue:	Confinement		
7. Option (validity) date:	Confinement		
8. Advertised in:	Confinement		
9. Number of bids received:	Confinement		
10. Number of Tenderers/ contenders:	Confinement		
11. Summary of tendered prices:			
Supplier	Tender Price (Excl. VAT)	BBBEE STATUS LEVEL	Delivery / Completion date
General Nyanda Security	As per confinement	Level 3	
12. Position of recommended Tenderer in relation to the others	Confinement		
13. Reasons for overlooking lower bids (Cancellation)	Confinement		
14. Commercial evaluation:	As per confinement		
By whom:	As per confinement Kelth London Name		Signature
15. Technical evaluation:	As per confinement		
By whom:	Sipho Khanye Name		Signature
16a. Recommended Tenderer and company/cc registration number/; (with ID numbers)	General Nyanda Security (Pty) Ltd  Reg. No. 1998/0122/0507		
16b. Directors of the recommended	Sylvester Sithole 7008165314085		



ACQUISITION COUNCIL	
CONFIDENTIAL: EVALUATION REPORT ON TENDERS	
recommended Tenderer:	General Siphwe Nyanda 5005225680085
16c. Current Tax Clearance date	As per confinement
17. Post-tender negotiations:	As per confinement
18. Negotiation Team:	As per confinement
19. Results of negotiations:	As per confinement
20. Post-tender communication:	As per confinement
21. Details of communication:	As per confinement
22. Report on efforts to involve BEE:	As per confinement
23. Advertisements: (Which additional media was utilised to attract BEE companies (DPP 1.2))	As per confinement
24. Actions: (How many BEE companies were made aware of this tender).	As per confinement
25. Sub-contracting: (What percentage of this contract will be subcontracted to BEE companies).	N/A
26. Targeting: (Can this procurement be targeted to BEE procurement. If not, please explain, in detail, why this would not be possible).	N/A
27. Percentage Black Ownership of recommended tenderer: (attached BBEE certificate)	Level 3
28. Percentage Black Woman Ownership of recommended tenderer:	N/A
29. Percentage Disabled Ownership of recommended	N/A

ACQUISITION COUNCIL		SPORNET	
CONFIDENTIAL: EVALUATION REPORT ON TENDERS		Page 5 of 6	
tenderer:			
30. Is BBBEE accreditation done?	Yes		
Date:			
	Name	Signature	
31. Particulars of items to be awarded:	N/A		
32. Assessment of previous business conducted with Freight Rail:	Number of contracts awarded	Total Value	Total accumulative terms
	N/A		
33. Price basis including escalations indices :	N/A		
34. Applicable/proposed Foreign exchange rates:	N/A		
35. Commodity linked price fluctuations \Volatility:	N/A		
36. Price certification:	Previous Price	Current Price	
36.a Optimum value Certification:	N/A		
37. Parcelling certification:	N/A		
38. Particulars of items not awarded or which fall away, and reasons	N/A		
39. Cross-functional evaluation team signoff:	N/A		
The matter is submitted to the Head Office Acquisition Council for consideration in terms of Detailed Procurement Procedure 8.1.3.1			
Reference:	S/SEC/02 2007		
For any enquiries, contact:	Keith London: 011 308-2796		

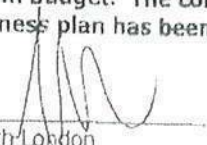
## ACQUISITION COUNCIL

CONFIDENTIAL: EVALUATION REPORT ON TENDERS




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There is a need for the purchase, the procurement of the goods are adequately budgeted and within budget. The conclusion will be in the best interest of Transnet and an appropriate business plan has been developed and inline with the delegated authority levels.

  
Keith Lokton  
Senior Commodity Manager  
Supply Chain Services  
(Strategic Sourcing)

Date

31 July 2006

  
Arthur Branford  
Senior Manager  
Supply Chain Services  
(Strategic Sourcing)

Date

2008/08/04



Mr. Dinga Senamela  
Senior Manager  
Security  
Room 324, 96 Rissik Street  
Johannesburg  
2001

Mr. Danie Barnard  
A / General Manager  
Network Planning  
Table 1  
3<sup>rd</sup> Floor  
Inyanda House

Tel: +27 11 544 9324  
Fax: +27 11 544 9318

Mr. Nick Thomson  
Chief Financial Officer  
Finance  
Workstation 1  
Inyanda House

Tel: +27 11 544 9564  
Fax: +27 11 544 9605

Mr. Logan Naidoo  
A/ Regional Security Manager (Central)  
Security,  
Tel: +27 11 773 6311  
Fax: +27 11 774 4499  
Logan.Naidoo@Transnet.net

Date: 12/05/2009

Ref: Train crew escort payment 1

Dear Mr. Senamela,

MOTIVATION FOR PAYMENT OF UNFORSEEN EXPENSES TO BE LATER RECOVERED FROM THE CLIENT

#### General background

On the 28<sup>th</sup> February 2009 an urgent message was received via the office of Mr. Hebert Msagala about TFR train crew driver who went missing with a company official vehicle without a trace.

The above mentioned threat and risk resulted in train crew management to request TFR security to bolster security to involve train crew personnel escort duties.

Due to an emergency the service provider within the vicinity could not provide such services on short notice except for our specialised security services contractor (GNS) who was willing and able to render the required services as of the 28<sup>th</sup> February 2009 on ad-hoc basis as per the clients needs.

On the 19<sup>th</sup> March 2009 a follow up meeting was held with the client Mr. Msagala to clarify the following:

1. Duration of the services
2. Train crew operations and their threats nationally
3. Exact requirements (Nationally)
4. Payments for services rendered





The outcome of the meeting was that the services will be required on a month to month basis and will be spread nationally should a need arise however the focus area will be Gauteng and any other national requests will be attended to as and when required.

The required resources are armed vehicles escort officials and security to give train crew management a proposal of different options for the client to decide

It was also agreed from a budget perspective that TFR security will pay for any services rendered and recover the same from train crew budget.

**Current status quo**

GNS has since rendered the services as option one of the recommendation sent to train crew management copy also attached.

Train crew has not yet reverted to security with the option they would like to pursue following our recommendation

We owe currently to GNS a total amount of R 856 800, 00 excluding VAT for the month of March 2009 copy of invoice also attached.

**The services are running on a month to month basis and approval is sought to continue with the services until a contract is in place.**

Your recommendation is hereby sought to pay the amount due to GNS and recover from train crew

Yours truly,

A handwritten signature in black ink, appearing to be "L. Naidoo".

L. Naidoo  
A / REGIONAL SECURITY MANAGER CENTRAL

19/05/2009  
Date

Recommend / Not Recommend

A handwritten signature in black ink, appearing to be "D. Sanamela".

D. Sanamela  
SENIOR MANAGER (TFR SECURITY)

19/05/2009  
Date

Supported / Not Supported


  
H. Msagala  
GENERAL MANAGER (RESOURCE MANAGEMENT)

The cost is too high. Review cost and budget for security of couriers.

26 MAY 2009

Date

Approved / Not Approved

  
C. Mtetwa  
GENERAL MANAGER (NETWORK PLANNING)

26 May 2009

Date



"P"

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## TAX INVOICE

Client's Details:	
Accounts Department	
Transnet Freight Rail, JHB Supply Chain Services	
Carlton Centre, 33rd Floor	
150 Commissioner Street	
VAT NO: 4720103177	
TEL: 011 429 3638	

Invoice Details:	
Invoice Number:	INV0130
DATE:	25 MARCH 2009
SIRA no:	1608687
Vat no:	4400230530
VENDOR NUMBER:	72063890

DESCRIPTION	AMOUNT
2 Supervisors	R 108,000.00
16 Train crew monitors and rapid response	R 748,800.00
Standard Bank	
Elton Street	SUB TOTAL R 856,800.00
Branch Code: 061305	
Acc No: 000865575	VAT @ 11% R 94,248.00
	R 951,048.00

THANK YOU FOR YOUR BUSINESS.	TOTAL	R 975,752.00
------------------------------	-------	--------------

APPROVED  
02/04/2009

Signature

6124  
BY [Signature]

I ATTACH MY APPROVAL SIGNATURE  
BASED ON A TELEPHONIC REQUEST  
BY A/23M MR. LOGAN NAIKOO  
WHO IS CURRENTLY ON LEAVE.

02/04/2009 12:00:00  
02/04/2009 12:00:00  
02/04/2009 12:00:00





**"R"**PKMVJ  
GNSR12756.8  
#904345v1**PH344****IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG****(REPUBLIC OF SOUTH AFRICA)****CASE NO. 10/43494**

In the matter between :

**TRANSNET LIMITED**

Plaintiff

and

**ABALOZI RISK ADVISORY SERVICES (PTY) LTD**

Defendant

---

**DEFENDANT'S SPECIAL PLEAS, PLEA AND COUNTERCLAIMS**

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**SPECIAL PLEA****1 Mis-joinder and/or non-joinder**

- 1.1 The Plaintiff in its particulars of claim cites the Defendant as Abalozi Risk Advisory Services (Pty) Limited.
- 1.2 To the knowledge of the Plaintiff, the Defendant is not the party to which it awarded the contracts alleged by the Plaintiff in paragraphs 10 and 13 of its Particulars of Claim.

#914345v1

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1.3 To the knowledge of the Plaintiff, the Defendant was approached by the Plaintiff to submit a proposal for rendering a comprehensive total security package to the Plaintiff. Having considered the Plaintiff's requirements, the Defendant submitted such a proposal as part of a consortium with 2 (two) other companies, Revert Risk Management Solutions (Pty) Ltd and Nayle Outsourcing (Pty) Ltd, known as "the GNS Consortium".

1.4 The submission was followed by a presentation by the GNS Consortium, at the request of the Plaintiff. Quotations were called upon by the Plaintiff from the GNS Consortium and same were negotiated and agreed upon.

1.5 On the 22 November 2007, the GNS Consortium was advised by the Plaintiff that it had been appointed to render the services as per the consortium's submissions, presentation and the quotation agreed upon and furnished to the Plaintiff.

1.6 *The contract was entered into with General Appender Security Risk Advisory Services and not with GNS Consortium*  
Subsequent to that, the GNS Consortium and the Plaintiff through their duly authorised officials concluded a binding security services agreement.

This agreement was extended from time to time by the parties through their representatives who had the necessary capacity and authority to bind the parties.

1.7 On these basis, the GNS Consortium followed all the necessary procedures and processes which it was required to follow as represented and made known to it through the Plaintiff's duly authorised officials.



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1.8 As a result, the Plaintiff has failed to join and/or sue the correct party. In addition, the Plaintiff, in these proceedings, is suing and/or seeking relief against an incorrect Defendant.

1.9 On this point alone, the Plaintiff's claim must be dismissed with costs as the Defendant did not conclude any agreements with the Plaintiff.

## 2 Estoppel

2.1 The Defendant persist that Gama, Senamela and Khanye possessed the necessary authority and capacity when awarding contracts to the GNS Consortium and/or when extending the said contracts.

2.2 In the event, however, that this Honourable Court finds that the above three (3) mentioned officials of the Plaintiff were not duly authorised and/or lacked the capacity and/or authority to award and/or extend the contracts to the GNS Consortium, the Defendant then pleads that the Plaintiff is estopped from denying their authority for the following reasons:-

2.2.1 Gama, who is alleged to have conducted himself without the necessary authority, is a Chief Executive Officer and an Accounting Officer in terms of the PFMA in the employ of the Plaintiff which are positions of authority, and acts on behalf of the Plaintiff with the necessary authority and capacity to bind it. The



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Plaintiff has at all times held him out to be an authorised person to act on its behalf.

2.2.2

Senamela, who is alleged to have conducted himself without the necessary authority, was a Senior Manager in the employ of the Plaintiff, which is a position of authority, and acted on behalf of the Plaintiff with the necessary authority and capacity to bind it. The Plaintiff has at all times held him out to be an authorised person to act on its behalf.

2.2.3

Khanye, who is alleged to have conducted himself without the necessary authority, was a Contracts Manager in the employ of the Plaintiff, which is a position of authority, and acts on behalf of the Plaintiff with the necessary authority and capacity to bind it. The Plaintiff has at all times held him out to be an authorised person to act on its behalf.

2.2.4

The alleged decisions by Gama, Senamela and Khanye are binding administrative actions taken by the Plaintiff, they have not been set aside and/or reviewed and thus remain valid and binding against the Plaintiff.

*is this  
required*

2.2.5

The GNS Consortium rendered its services to the Plaintiff from December 2007 to January 2010, a period of more than 2 (two)

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years without the Plaintiff alleging that the said 3 (three) officials acted without any authority and/or capacity to bind it.

2.2.6 The Plaintiff, with the knowledge of its Board, approved and made payments to the GNS Consortium for services rendered to it under the agreements in question over a period of more than 2 (two) years, which payments were made without any allegations being made that such payments were made pursuant to acts of officials who did not possess the necessary authority and/or capacity to do so.

2.2.7 The services which were rendered by the GNS Consortium were rendered over a period of approximately 2 (two) years to the knowledge of the senior officials of the Plaintiff and its board members who, at no stage, prior to the institution of these proceedings had intimated that the contract and/or extensions thereto were concluded by officials who lacked the necessary authority and/or capacity to bind the Plaintiff and/or were contrary to the Constitution, PFMA and the DPP Policy of the Plaintiff.

2.2.8 Gama, Senamela and Khanye acted within the course and scope of their employment with the Plaintiff, the Plaintiff having represented to the GNS Consortium that they had the necessary authority and/or capacity to bind the Plaintiff, such representations

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were not at any stage refused and/or denied by the Plaintiff and the GNS Consortium relied thereon in its dealings with the Plaintiff.

2.3 Acting on the belief of the correctness of the representations made by the Plaintiff, the GNS Consortium, to its detriment, entered into the alleged agreements with the Plaintiff.

2.4 Accordingly, the Plaintiff is estopped from denying the authority of Gama, Senamela and Khanye, its senior employees.

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#### DEFENDANT'S PLEA

---

#### 3 AD PARAGRAPHS 1 AND 2

3.1 The Plaintiff has cited an incorrect party and/or is seeking relief against a wrong party in these proceedings.

3.2 The Defendant did not enter into any agreement with the Plaintiff. The agreement upon which the Plaintiff premises its claims was entered into by the Plaintiff and the GNS Consortium, as represented by the Defendant. *See the 'Markman' letter-dated 13/03/2011 to the Chairman*

3.3 To the extent that the Plaintiff seeks any relief based on the agreement annexed to its Particulars of Claim, or the agreements alleged in paragraphs 10 and 13 of its Particulars of Claim, such relief should be directed at the GNS Consortium and not the Defendant.

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3.4 Save as aforesaid, the Defendant admits the remaining allegations in these paragraphs.

4 AD PARAGRAPH 3.1

The allegations contained therein are admitted.

5 AD PARAGRAPH 3.2

5.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

5.2 The Defendant specifically pleads that Siyabonga Gama who is alleged to have been dismissed by the Plaintiff and upon whose dismissal the Plaintiff seeks to justify its claims for restitution, is in the employ of the Plaintiff as a Chief Executive Officer and an Accounting Officer in terms of the PFMA.

6 AD PARAGRAPHS 3.3 TO 3.4

Save to admit that Senamela was the Plaintiff's Manager: Security and Khanye was the Plaintiff's Contracts Manager: Security, the Defendant has no knowledge of the remaining allegations, does not admit them and puts the Plaintiff to the proof thereof.

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7 AD PARAGRAPHS 3.5, 3.6 AND 3.7

The allegations contained therein are admitted.

8 AD PARAGRAPHS 3.8 AND 3.9

8.1 The allegations contained therein are admitted.

8.2 The Defendant pleads further that the award of the contract to the GNS Consortium by the Plaintiff which was made on confinement was awarded in line with the provisions of the Constitution of the Republic of South Africa ("the Constitution"), the Treasury Regulations and the Plaintiff's DPP Policy.

9 AD PARAGRAPHS 3.10 AND 3.11

The Plaintiff has failed to annex the said DPP Policy and Gama's Special Delegation of Authority to its Particulars of Claim, accordingly, the Defendant has no knowledge of the allegations contained therein, does not admit them and puts the Plaintiff to the proof thereof.

10 AD PARAGRAPH 4

10.1 The allegations contained therein are denied as is specifically traversed and the Plaintiff is put to the proof thereof.

10.2 On 3 October 2007 the Defendant submitted its profile to the Plaintiff introducing its services in general.

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10.3 To the knowledge of the Plaintiff, the Defendant was approached by the Plaintiff to submit a proposal for rendering a comprehensive total security package to the Plaintiff. Having considered the Plaintiff's requirements, the Defendant submitted such a proposal as part of a consortium with 2 (two) other companies, Revert Risk Management Solutions (Pty) Ltd and Nayle Outsourcing (Pty) Ltd, known as the "GNS Consortium".

10.4 The submission was followed by a presentation by the GNS Consortium, which was at the request of the Plaintiff. Quotations were called upon by the Plaintiff from the consortium and same were negotiated and agreed upon.

10.5 The Defendant was the lead member of the GNS Consortium, as was requested by the Plaintiff.

11 AD PARAGRAPHS 5

The allegations contained therein are admitted.

12 AD PARAGRAPH 6

The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

13 AD PARAGRAPHS 7 AND 8

The allegations contained therein are unknown to the Defendant and are thus noted.



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14 AD PARAGRAPH 9

14.1 Save as stated in paragraph 14.2 below, the allegations contained therein are not within the Defendant's knowledge and are thus denied and the Plaintiff is put to the proof thereof.

14.2 The Defendant specifically pleads that the GNS Consortium was awarded the contract on confinement which is allowed by the Constitution, the Treasury Regulations and the Plaintiff's DPP Policy.

14.3 The Defendant specifically denies that the award was not in compliance with the Plaintiff's DPP Policy. From the Plaintiff's Particulars of Claim, it is clear that:

14.3.1 the contract was awarded on confinement;

14.3.2 the award was approved by the Transnet Freight Rail Acquisition Council, which acts as a Tender Board;

14.3.3 the award was approved by Gama, being the Chief Executive Officer in the employ of the Plaintiff.

14.4 The Defendant specifically denies further that the Plaintiff was obliged to follow an open tender process.

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15 AD PARAGRAPH 10

15.1 The allegations therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

15.2 The Defendant specifically pleads that no written contract either in the form of Annexure "A" to the Plaintiff's Particulars of Claim or at all was concluded between it and the Plaintiff as alleged.

15.3 Annexure "A" is an Agreement entered into between the Plaintiff and the GNS Consortium, represented as alleged.

*In their correspondence they refer to Abaloji GNS Risk Reten. Serv. (now known as Abaloji). Also see their court application to set aside party of Cosumir - findings*

16 AD PARAGRAPH 11

16.1 Save to deny that Senamela acted without authority, the remaining allegations are unknown to the Defendant, are thus denied and the Plaintiff is out to the proof thereof.

16.2 The Defendant specifically pleads that the Plaintiff is estopped from alleging that Senamela acted without authority. Senamela, who is alleged to have conducted himself without the necessary authority, was a Senior Manager in the employ of the Plaintiff which is a position of authority, and acted on behalf of the Plaintiff with the necessary authority and capacity to bind it. The Plaintiff has at all times held him out to be an authorised person to act on its behalf.

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16.3 The scope extension was requested and approved by the Plaintiff's officials who the Plaintiff held out to be the persons authorised to enter into contracts on its behalf and upon which the GNS Consortium relied in agreeing to the scope extensions.

17 AD PARAGRAPH 12

17.1 The Defendant has no knowledge of the allegations contained therein, thus does not admit them and puts the Plaintiff to the proof thereof.

17.2 The Plaintiff fails to attach the said resolution to its Particulars of Claim.

18 AD PARAGRAPHS 13 TO 17

18.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

18.2 The Defendant specifically pleads that no contracts exist between it and the Plaintiff either as alleged or at all.

18.3 The Defendant specifically pleads that all payments made to it by the Plaintiff were payments to the GNS Consortium for services rendered by the GNS Consortium to the Plaintiff and were received as such by the Defendant on behalf of the consortium.

18.4 At no stage during the subsistence of the agreement between the consortium and the Plaintiff did the Plaintiff allege any defective

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performance from the members of the consortium which was not  
remedied. The services were diligently, professionally and with the  
utmost skill provided to the Plaintiff and that is why payment was made by  
the Plaintiff therefor.

*This is no  
Plaintiff's  
cost*

19 **AD PARAGRAPH 18**

All allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

20 **AD PARAGRAPHS 18.1 TO 18.3**

20.1 The allegations contained therein are denied as if specifically traversed  
and the Plaintiff is put to the proof hereof.

20.2 The Defendant specifically pleads that:

20.2.1 the Plaintiff followed a confined procurement process which is in  
line with the provisions of the Constitution and the DPP Policy in  
awarding the contract to the GNS Consortium;

20.2.2 the award was approved by the Transnet Freight Rail Acquisition  
Council, which acts as a Tender Board;

20.2.3 the award was approved by Gama, being the Chief Executive  
Officer in the employ of the Plaintiff.

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**21     AD PARAGRAPH 18.4**

21.1         The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

21.2         The Transnet Board never delegated any powers to the Defendant or the GNS Consortium.

**22     AD PARAGRAPH 18.5 TO 18.7**

22.1         The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

22.2         The GNS Consortium rendered services to the Plaintiff, the said services were accepted by the Plaintiff and the Plaintiff duly remunerated the GNS Consortium as it was required in law to do so.

22.3         Gama is employed by the Plaintiff which continues to hold him out as a person with authority to act on its behalf and thereby representing that all the conduct which the Plaintiff complains of about him is ratified by it, him being an Accounting Officer in terms of the PFMA.

22.4         The Defendant specifically denies that the conclusion of the agreement between the Plaintiff and the consortium was in any manner irregular and/or payment thereof constitutes an irregular and/or fruitless and/or wasteful expenditure.

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**23 AD PARAGRAPH 18.8 TO 18.10**

23.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

23.2 The Defendant specifically pleads that it never rendered any services to the Plaintiff for its own account either as alleged or at all.

23.3 At all material times, the Plaintiff was aware that the services which were required in terms of the agreements were to be rendered by the GNS Consortium and not the Defendant.

23.4 The GNS Consortium consisted of members, some of whom were duly registered as security services providers at the time of contract.

**24 AD PARAGRAPHS 18.11 TO 18.13**

24.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

24.2 The Defendant made the representations in paragraph 5 of the Plaintiff's Particulars of Claim but denies that these were misrepresentations.

24.3 The agreements between the GNS Consortium and the Plaintiff were entered based on the representations made by the consortium to the Plaintiff in relation to services which the consortium executed for the Plaintiff.



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24.4 The Defendant specifically pleads further that there was no misrepresentation, material or otherwise, which was made by the Defendant which induced the Plaintiff to enter into the agreement between it and the GNS Consortium.

25 **AD PARAGRAPH 19**

25.1 The Defendant denies that the Plaintiff is entitled to restitution in the sum alleged from the Defendant and the Plaintiff is put to the proof thereof.

25.2 The Defendant specifically pleads that the Plaintiff is not entitled to claim restitution against the GNS Consortium either.

25.3 The Plaintiff has, in any event, failed to tender the expenses incurred by the GNS Consortium in the rendering of the services under the agreement.

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs.

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**DEFENDANT'S COUNTERCLAIMS**

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26 The Defendant in convention is the Plaintiff in reconvention.

27 The Plaintiff in convention is the Defendant in reconvention.

28 CLAIM 1 (Underlying facts)

28.1 During the course of 2009, the Defendant instituted disciplinary enquiries against Gama, Senamela and Khanye.

28.2 Advocate Nazeer Cassim SC ("Cassim") was appointed by the Defendant to Chair the disciplinary proceedings initiated by the Defendant against Khanye and Senamela.

28.3 On or about the 5<sup>th</sup> March 2010, Cassim dispatched his findings to the Defendant.

28.4 The findings of Cassim were brought to the attention of the Plaintiff. *How*

28.5 The Plaintiff after having perused Cassim's award realised that the award contained unfounded, false and unsubstantiated allegations of a damaging and defamatory nature towards the reputation, goodwill and character of the Plaintiff and its officials.

28.6 On the 9<sup>th</sup> March 2010, the Plaintiff dispatched a letter to the Defendant's attorneys seeking an undertaking that the said findings should not be publicised, in the light of the false, unsubstantiated, damaging and defamatory allegations made therein against the Plaintiff and its officials. Annexed hereto marked "A1", is a copy of the said letter.

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28.7 On the 10<sup>th</sup> March 2010, the Defendant responded through its attorneys and undertook not to publicise the findings but only to use the findings for its own internal purposes. Annexed hereto marked "A2" is a copy of the said letter.

28.8 On the 12<sup>th</sup> of March 2010, the Defendant through its attorneys dispatched a letter to the Plaintiff wherein the Defendant withdrew its undertaking not to publish the findings outside Transnet. *best a copy*

28.9 On or about 1 April 2010, the Defendant who was in custody of Cassim's findings, caused the said findings to be published in the Mail & Guardian newspaper of 1 April 2010 and in the IOL News Portal on 4 April 2010. Copies of the published articles are annexed hereto marked "A3" and "A4". *GNE as already in possession through either Khan or Simamela*

28.10 The Mail & Guardian newspaper is a paper widely distributed in South Africa and the IOL News portal is widely read by the general public.

28.11 The said articles quoted extensively from the findings of Cassim, as appears from the annexures hereto.

28.12 The said quotations from the findings, in the context of the articles, are wrongful, false and defamatory of the Plaintiff in that they were intended and were understood by the readers of the said newspaper and portal to mean that the Plaintiff and its officials are dishonest, corrupt and involved

in acts which contravene the law in order to obtain unfair advantages in their dealing and in tender processes.

28.13 At the time when these allegations were caused to be published by the Defendant, the Plaintiff was engaged in the following contracts:-

**Contract A (The Mpumalanga Provincial Government in its Department of Co-operative Governance and Traditional Affairs)**

28.14 The duration of this agreement was for a period of 3 (three) years from 15 November 2009 to 14 November 2012.

28.15 In terms of this agreement, the Plaintiff was to conduct Risk Management and to provide overall Risk Advisory Services for the Mkhondo, Mbombela and Thaba Chweu local municipalities.

28.16 The Plaintiff honoured its obligation and rendered its services as envisaged in the agreement.

28.17 The value of the said contract for the duration of the contract, was an amount of R51,033,240.00.

28.18 As a result of the wrongful conduct by the Defendant in causing Cassim's findings to be publicised, negative publicity about the Plaintiff circulated

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as a result of which the Mpumalanga Provincial Government terminated this agreement in May 2010.

28.19 As a result of the termination of the said agreement, the Plaintiff suffered damages in the sum of R45,362,880.00 being an amount which the Plaintiff would have been entitled to, but for the untimely cancellation of the agreement as a result of the negative publicity instigated by the Defendant.

Contract B (The Department of Public Transport, Roads and Works (G-Fleet) and General Nyanda Risk Security)

28.20 The duration of this agreement was for a period of 3 (three) years from 1 June 2009 to 31 May 2012.

28.21 In terms of this agreement, the Plaintiff was to provide an integrated Security and Risk Management System including strategic support to the Department of Public Transport Roads and Works.

28.22 The Plaintiff honoured its obligation and rendered its services as envisaged in the agreement.

28.23 The contract amount agreed upon to be paid for the duration of the contract, was an amount of R60,000,000.00.

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28.24 As a result of the wrongful conduct by the Defendant in causing Cassim's findings to be publicised, negative publicity about the Plaintiff circulated as a result of which the Department of Transport Roads & Works terminated this agreement 2 (two) years prematurely.

28.25 As a result of the termination of the agreement, the Plaintiff suffered damages to the amount of R40,000,000.00 being an amount which the Plaintiff would have been entitled to, but for the untimely cancellation of the agreement as a result of the negative publicity instigated by the Defendant.

**Contract C (The Department of Public Transport, Roads and Works Urban Transport Fund and GNS Risk Advisory Services)**

28.26 The duration of this agreement was for a period of 2 (two) years from 1 February 2010 to 31 January 2012.

28.27 In terms of this agreement, the Plaintiff was to provide security consulting and advisory services to the Department of Public Transport, Roads and Works and its Urban Transport Fund in relation to the implementation of the Intelligent Number Plates (iNP) Project.

28.28 The Plaintiff honoured its obligation and rendered its services as envisaged in the agreement.



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28.29 The contract amount agreed upon to be paid for the duration of the contract, was an amount of R10,508,800.00.

28.30 As a result of the wrongful conduct by the Defendant in causing Cassim's findings to be publicised, negative publicity about the Plaintiff circulated as a result of which the Department of Public Transport, Roads and Works terminated this agreement 19 months prematurely.

28.31 As a result of the termination of the agreement, the Plaintiff suffered damages to the amount of R8,319,466.50 being an amount which the Plaintiff would have been entitled to, but for the untimely cancellation of the agreement as a result of the negative publicity instigated by the Defendant.

29 **CLAIM 2**

29.1 The Defendant in reconvention has instituted action against the Plaintiff in reconvention.

29.2 In that claim, the Defendant is seeking restitution and to be paid all the money it paid to the GNS Consortium, being the amount of R95,691,368.80.

29.3 In servicing the agreement and honouring its obligations in terms of the agreement, the Plaintiff, as part of the GNS Consortium, incurred the following expenses for the entire period of the contracts:

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- 29.3.1 equipment in the amount of R60,000,000.00;
- 29.3.2 personnel in the amount of R27,000,000.00;
- 29.3.3 overheads in the amount of R1,000,000.00.

29.4 In the event that the above Honourable Court finds for the Plaintiff in convention, then the Plaintiff in convention will be unduly enriched and benefited from the performance and services rendered to it under the alleged void agreements.

29.5 Accordingly, in the event that this Honourable Court finds that the agreements between the Plaintiff in convention and the Defendant in convention and/or the GNS Consortium are void then the Plaintiff in reconvention and/or GNS Consortium is entitled to be reimbursed in the amount of R88,000,000.00 it incurred as necessary expenses in the rendering of services to the Defendant in reconvention.

30 **CLAIM 3**

30.1 On or about 1 April 2010, the Defendant who was in custodian of Cassim's award, caused the said award to be published in the Mail & Guardian newspaper of 1 April 2010 and in the IOL News of 4 April 2010. Copies of the published articles are annexed hereto marked "A3" and "A4".

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30.2 The Mail & Guardian newspaper is a paper widely distributed in South Africa and the IOL News portal is widely read by the general public.

30.3 The said articles quoted extensively from the findings of Cassim, as appears from the annexures hereto.

30.4 The said quotations from the findings in the context of the articles, are wrongful, false and defamatory of the Plaintiff in that they were intended and were understood by the readers of the said newspaper and portal to mean that the Plaintiff and its officials are dishonest, corrupt and involved in acts which contravene the law in order to obtain unfair advantages in their dealing and in tender processes.

30.5 As a result of the said defamation, the Plaintiff has been damaged in its reputation, goodwill and character in the amount of R6,000,000.00 (six million rands).

31 **CLAIM 4**

31.1 During the period October 2010 to December 2010, the Defendant dispatched a blacklisting letter to the Plaintiff and other companies it called entities associated with the Plaintiff and/or its officials.

31.2 In the aforesaid letter, the Defendant stated that the Plaintiff and its associates will be blacklisted for a period of 5 years, including their Directors in their personal capacities and all other companies in which

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their Directors may have an interest as well as any future companies which may be created by such Directors. Annexed hereto marked "A5" is a copy of the aforesaid letter.

31.3 The said letter was dispatched, in bad faith, by the Defendant to other Government institutions and departments in order to ensure that none of those entities engage in further business with the Plaintiff.

*was it done*

31.4 As a result of the Defendant's *mala fide* conduct, all the State departments and/or entities which were intending to conduct business with the Plaintiff ceased from considering the Plaintiff as a preferred service provider.

31.5 As a result of the Defendant's conduct, the Plaintiff lost business opportunities and potential profit it could have gained, but for the conduct of the Defendant.

31.6 As a result of the Defendant's conduct, the Plaintiff suffered damages in respect of lost business, lost potential business, lost potential profits and profits estimated at R300,000,000.00 (three hundred million rands). This amount represents a globular figure and a much more certain figure will be computed through the Plaintiff's experts and, if necessary, an amendment will be sought.

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Signed: P K MABASO

**WERKSMANS ATTORNEYS**

Defendant's Attorneys

155 - 5<sup>th</sup> Street

Sandton

Tel: +27 (0)11 535 8475

Ref: Ms PK Mabaso/GNSR12756.9

c/o Suite 1714,

17<sup>th</sup> Floor, Marble Towers

208-212 Jeppe Street

JOHANNESBURG

TO:

THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT  
JOHANNESBURG

AND TO:

**BOWMAN GILFILLAN INC.**

Attorneys for the Plaintiff

165 West Street

SANDTON

Tel: 011 669 9000

Ref: G Higgins/ 1198618

Copy hereof received on this

day of JUNE 2011

For: Defendant's Attorneys

F. J. MABASO	
ACCEPTED WITHOUT PREJUDICE.	
Signed	<i>N. M. M. M. M.</i>
Name	Nandipha
Date	02.06.11
Time	17:45

"S"

"S"

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**CONFIDENTIAL AND PRIVILEGED**

MINUTES OF MEETING NO. 12/3 OF THE BOARD RISK COMMITTEE OF TRANSNET SOC LTD HELD ON 13 APRIL 2012 AT 10:00 IN TPT EXECUTIVE BOARDROOM, 4<sup>TH</sup> FLOOR, KINGSMEAD OFFICE PARK, DURBAN

Resolution No/  
For Attention

1 **CONSTITUTION OF MEETING AND APOLOGIES**

1.1 **Present**

Ms T Mnyaka	Chairman
Mr BD Mkhwanazi	Member
Ms N Moola	Member
Mr MP Moyo	Member ( <i>Acting Chairman – Partial</i> )

1.2 **In attendance**

Mr ME Mkwana	Non-Executive Director
Ms Y Forbes	Non-Executive Director
Ms VD Dunjwa	Chief Risk Officer
Mr A Singh	Acting Group Chief Financial Officer
Mr M Mkhwanazi	Head: Enterprise Information Management Services
Mr R Wolfenden	Chief Audit Executive (Ernst & Young)
Mr R Toka	General Manager: Security Management
Ms P Difeto	General Manager: Office of the Group Chief Executive
Ms N Khumalo	Deputy Group Company Secretary

1.3 **Partial Attendance**

Mr N Silinga	Acting General Manager: Group Legal
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1.4 **Apologies**

Mr B Molefe	Group Chief Executive
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1.5 **Welcome and Signing of Attendance Register**

The Acting Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. The Attendance Register was circulated for signature. There was an extensive debate on the recordal of Mr Malungani's attendance, and it was resolved that the Committee had to note the resignation submitted to the Group Company Secretary with effect from 1 April 2012.

1.6 **Adoption of Agenda**

The agenda was adopted as tabled with the following amendments:

- Item 6.1 - Litigation Report (Dashboard) was deferred.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures were presented by the Safety Officer, Ms Ndlovu.

3 **DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature. Mr Moyo declared interest of his Non-Executive Directorship at Willis SA.

4 **APPROVAL OF THE PREVIOUS MINUTES OF THE MEETINGS HELD ON 07 AND 15 FEBRUARY 2012, RESPECTIVELY**

4.1 The minutes of the meeting held on 7 February 2012 were approved with the following amendments:

4.1.1 – Item 5/13 Correction to include an abbreviation next to the word "Business Continuity Management (BCM)".

4.1.2 – Item 6.10.2.3 Correction to include an abbreviation next to the word Enterprise Risk



## PRIVILEGED AND CONFIDENTIAL

2

Resolution No  
For Attention

3

Management.

4.1.3 – Item 6.10.2.7 "Due to regulatory risks, the Company is currently developing financial models looking at the possible financial impact that could result from a rail Regulatory regime".

4.1.4 – Item 6.10.2.7 Prefix the sentence with "If the" ICM is fully promulgated therefore environmental compliance will be an essential activity for the Company.

4.1.5 – Item 6.10.2.8 Add: "Safety, Health, Environment and Quality" in between General Manager and SHEQ Management.

4.1.6 – Item 6.10.3.4 Add a full description of NOSA as "National Occupational Safety Association".

4.1.7 – Item 6.10.3.7 Add a full description of SPO "Strategic Performance Objective".

*The Chairman joined the meeting at 10:00*

4.1.8 – Item 6.10.6.7 Delete the sentence, starting with "a few..."

4.1.9 – Item 6.10.6.9 Delete the second sentence, starting with "The Chairman..."

4.1.10 – Item 6.10.7 ensure a distinction between Mr Mkhwanazi and Mr Mkwanzazi.

4.1.11 – Item 6.10.7.3 is deleted except for the first sentence.

*Mr Mkhwanazi joined the meeting at 10:36*

4.1.12 – Item 6.10.7.8 correction of the sentence: "If the Company adopts the hybrid security strategy, the existing number of external security personnel will be reduced".

4.1.13 – Item 6.10.7.9 to 6.10.7.11 is deleted.

4.1.14 – Item 6.10.11.2 Correction of the sentence, to read, "The Committee suggested a review of the allocation to take into account the needs of emerging miners"

4.1.15 – Item 12.2 Add a full description of SCM is "Supply Chain Management."

4.1.16 – Item 7.4 the sentence is deleted. The tapes were not clear.

4.2

The minutes of the meeting held on 15 February 2012 were approved as tabled.

5

## MATTERS ARISING FROM MINUTES OF THE MEETING HELD ON 7 FEBRUARY 2012

*The Chairman took over from the Acting Chairman at 10:48*

5.1

**Recent television footage on cable theft to be obtained:** Footage was submitted to the Committee.

The matter has been finalised.

5.2

**Adoption of the Agenda:** The Committee relies on timeous submission of information to perform its fiduciary duties effectively. Management undertook to distribute documentation to the Committee 4 working days prior to the meeting, in terms of the Mandate.

The matter has been finalised.

5.3

**TPL: Servitude Management**

## PRIVILEGED AND CONFIDENTIAL

7

Resolution No  
For Attention

12.3 Ms Forbes had a concern that there was no level of comfort when trying to map out the end-to-end procurement stages into MDS. There was no evidence of sound project management principles. The people management process was lacking and there was no indication of capacity. There was no integration of procurement processes between the OD/SUs and the Corporate Centre. The Committee registered a discomfort in relation to procurement management.

12.4 Mr Mkwanazi informed the Committee about the Procurement Policy that was in its developmental stage and he recommended that it should be submitted to the Committee for information purposes.

Mr Singh

8 **ERNST & YOUNG'S REPORTBACK ON OPERATIONAL AUDITS**

The Committee noted the Report as contained in the pack.

9 **SECURITY REPORT**

The Committee noted the Report as contained in the pack.

10 **ICT MANAGEMENT REPORT**

The Committee noted the Report as contained in the pack.

11 **LITIGATION REPORT (DASHBOARD)**

*Mr Silinga joined the meeting at 13:21*

11.1 The Committee noted the Report as contained in the pack.  
Management provided feedback in relation to **the Southernport Development (Pty) vs Transnet SOC Ltd** matter. It was tabled as part of the Litigation Report.

11.1.1 In terms of the National Ports Act, there was no compliance according to the alienation of land process that is outlined in the Act. The Company's procurement processes were not adhered to. The Committee stated that a commercial decision had to be taken by the Committee whether to proceed with the litigation or not. The Committee enquired on the Company's prospects of success. Management said only the court process would determine whether the matter was worth pursuing.

11.1.2 The Committee enquired if the Company could in future protect itself against unscrupulous companies. Management advised that a database was created to list the companies which have a bad record with Transnet so as to reduce the possibility of engaging them in the future.

11.2 The Committee enquired if there was any progress report on the **Abalozi Risk Advisory Services** matter. Management reported that it had uncovered information that had not been available in the past. The question was whether the information obtained was substantive for the Company to succeed in court. The reconciliation of reports and invoices had to be carried out. Management is not in a position to determine if the Company had a case or not.

11.2.2 The Committee requested Management to table litigation costs as they relate to all the open cases, per OD/SU. Management undertook to table the Report that was requested at the previous meeting of 7 February 2012, at the next meeting.

Mssrs  
Molefe/Silinga13 **CLOSE OF MEETING**

There being no further business to conduct, the meeting was declared closed at 13:45.

CHAIRMAN

DATE: 15 October 2012

DEPUTY GROUP COMPANY SECRETARY

DATE: 15/10/2012

"T"

**Nkuli Mabandla    Transnet Corporate    JHB**

---

**From:** Karthi Naicker                      Corporate    JHB  
**Sent:** 09 January 2013 02:52 PM  
**To:** Nkuli Mabandla    Transnet Corporate    JHB  
**Subject:** Fwd: Abalozi\_GNS summary reports updated\_25 Sep 2012\_Paul.xlsx  
**Attachments:** image001.gif; ATT00001.htm; image002.gif; ATT00002.htm; image003.gif; ATT00003.htm; image004.gif; ATT00004.htm; image005.gif; ATT00005.htm; Abalozi\_GNS summary reports updated\_25 Sep 2012\_Paul.xlsx; ATT00006.htm

FYI

Sent from my iPhone

Begin forwarded message:

**From:** "Paul Thabethe    Transnet Corporate    JHB" <[Paul.Thabethe@transnet.net](mailto:Paul.Thabethe@transnet.net)>  
**Date:** 09 January 2013 2:44:41 PM SAST  
**To:** "Karthi Naicker                      Corporate    JHB" <[Karthi.Naicker@transnet.net](mailto:Karthi.Naicker@transnet.net)>  
**Subject:** FW: Abalozi\_GNS summary reports updated\_25 Sep 2012\_Paul.xlsx

FYI

**From:** Paul Thabethe Transnet Corporate JHB  
**Sent:** 27 September 2012 04:18 PM  
**To:** Ndiphiwe Silinga Transnet Corporate JHB  
**Cc:** Karthi Naicker Corporate JHB  
**Subject:** Abalozi\_GNS summary reports updated\_25 Sep 2012\_Paul.xlsx

Hi Ndiphiwe

Attached is the updated schedule reflecting the security reports for GNS's (Abalozi) "Project Rova ne Simba (Hit Hard)".

All the months billed are now supported by a report of some form.

I will bring the GNS security reports in my custody back to you ASAP.

Kind regards

## ABALOZI MATTER - SUMMARY OF PROJECT ROVA NE SIMBA (HIT HARD) REPORT

Period	Consolidated monthly report Project Rova Ne Simba (Hit Hard)	Security Assessment (TRA) Report	Security Assessment & Compliance Monitoring Report	Screening of security guards Report	Intelligence Report	Hotspot Report	Site Assessment Report	Monitoring and Evaluation Report
20 December 2007	Project Rova Ne Simba (Hit Hard) - Summary of findings - Plans for the next period							
January 2008	Project Rova Ne Simba (Hit Hard) - Detailed findings - Plans for the next period							
February 2008	Project Rova Ne Simba (Hit Hard) - Desktop research - Work done to date - Plans for next period							
March 2008	Project Rova Ne Simba (Hit Hard) - Work done to date (Investigations / undercover operations) - Plans for the next period						Project Rova Ne Simba (Hit Hard) - Security Risk Assessment	
April 2008	Project Rova Ne Simba (Hit Hard) - Investigations and analysis - Intelligence - Monitoring and evaluation of different stations							
May 2008	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Monitoring and evaluation of different stations		Project Rova Ne Simba (Hit Hard) - Monitoring and evaluation for different Province / Station					
June 2008	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Monitoring and security evaluation		Project Rova Ne Simba (Hit Hard) - Physical security assessment on different stations	Project Rova Ne Simba (Hit Hard) - Findings - Analysis	Project Rova Ne Simba (Hit Hard) - Copper theft syndicates		Project Rova Ne Simba (Hit Hard) - Physical security assessment - Monitoring of the security service provider	
July 2008			Project Rova Ne Simba - Findings - Analysis					
August 2008			Rova Ne Simba (August 2008) - Findings on different stations Rova Ne Simba (28 Aug - 04 Sept 2008) - Findings on different stations					



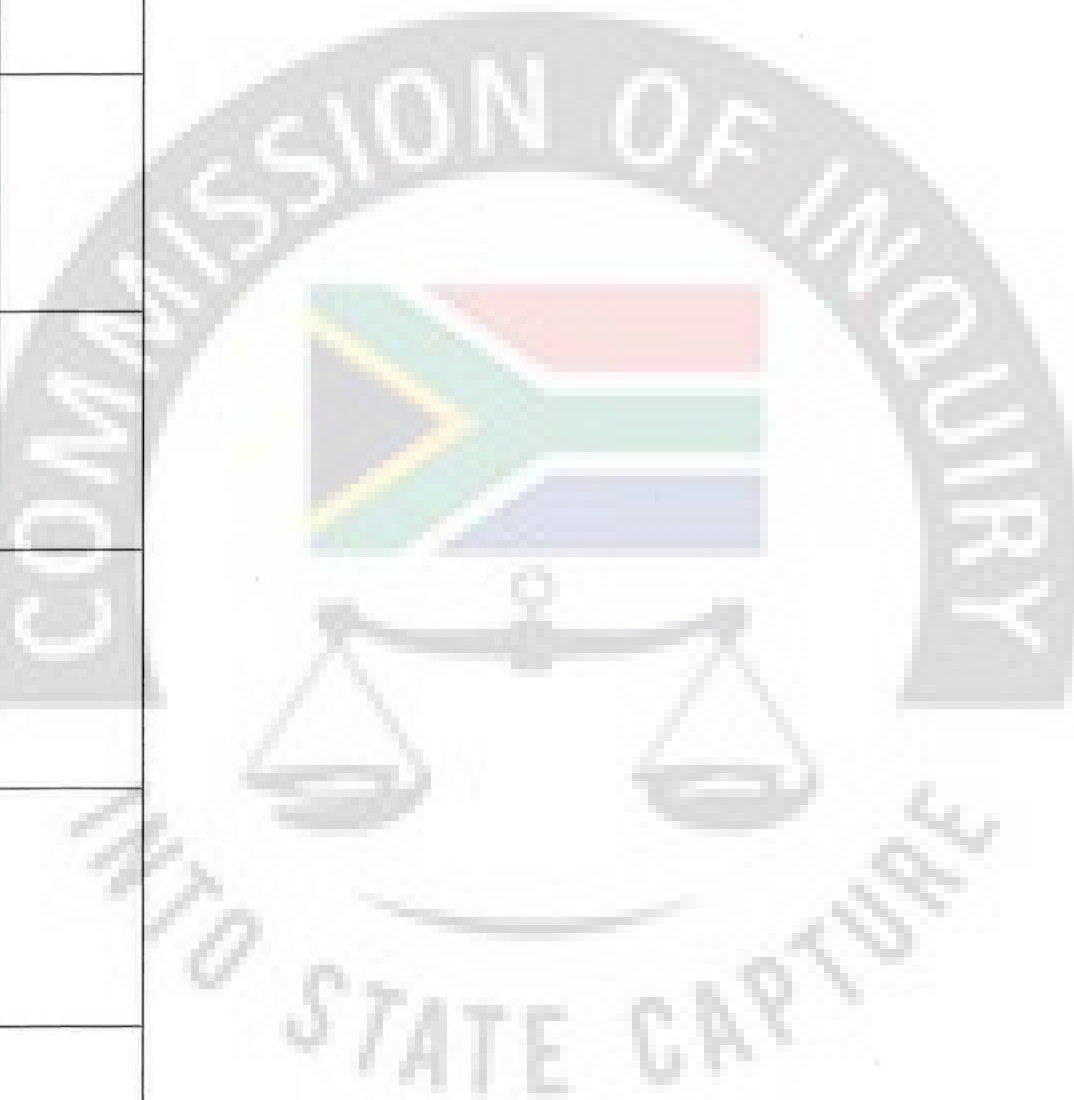
Period	Consolidated monthly report Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - List of arrests - Evaluation	Security Assessment (TRA) Report	Security Assessment & compliance Monitoring Report	Screening of security guards Report	Intelligence Report	Hotspot Report	Site Assessment Report	Monitoring and Evaluation Report
September 2008			Project Rova Ne Simba (Hit Hard) - Findings (Part A: Northern Cape) (Part B: Limpopo)					
October 2008			Project Rova Ne Simba (Hit Hard) - Findings Physical security assessment on different stations			Project Rova Ne Simba (Hit Hard) - Findings - Physical security assessment on different Stations - Monitoring of the security service provider compliance		
November 2008	Project Rova Ne Simba (Hit Hard) - Investigatin - proactive project - driven reportage - Information gathering - Incidents - reactive ongoing event driven reportage - Evaluation							
December 2008	Project Rova Ne Simba (Hit Hard) - Investigatin - proactive project - driven reportage - Information gathering - Incidents - reactive ongoing event driven reportage - Evaluation							
January 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation							
February 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation							
March 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Monitoring and Evaluation							
April 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Service Provider Compliance Monitoring - Evaluation							

Period	Consolidated monthly report Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation	Security Assessment (TRA) Report	Security Assessment & compliance Monitoring Report	Screening of security guards Report	Intelligence Report	Hotspot Report	Site Assessment Report	Monitoring and Evaluation Report
May 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation	Security Assessment (TRA) - Crime trends - Personnel security	Project Rova Ne Simba (Hit Hard) - Findings Monitoring of security service provider compliance					Project Rova Ne Simba (Hit Hard) - KZN Findings - Gauteng Findings Project Rova Ne Simba (Hit Hard) - Findings - Physical security assessment from: - North West to Northern Cape - Mpumalanga to KZN
June 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation							Project Rova Ne Simba (Hit Hard) - Service provider compliance monitoring - Physical security assessment - Findings (Northern Cape & Johannesburg West)
July 2009			Project Rova Ne Simba (Hit Hard) - Findings (Northern Cape & Johannesburg West)					Monitoring and Evaluation report: - Mpumalanga to KZN route - Johannesburg to Port Elizabeth route - Physical security assessment on different Stations - Project Rova ne Simba (Hit Hard) - Physical security assessment (Johannesburg West Region)
August 2009								
September 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation		Project Rova Ne Simba (Hit Hard) - Compliance monitoring and evaluation (Northwest - Free State) - Project security assessment on different areas					
October 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation							
November 2009	Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation							



Period	Consolidated monthly report Project Rova Ne Simba (Hit Hard) - Intelligence - proactive project - driven reportage - Incidents - reactive ongoing event driven reportage - Evaluation	Security Assessment (TRA) Report	Security Assessment & compliance Monitoring Report	Screening of security guards Report	Intelligence Report	Hotspot Report	Site Assessment Report	Monitoring and Evaluation Report
December 2009								

\*Additional documents  
received on 25 Sept 2012



"U"

2012 12 05 opinion.doc

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURGREPUBLIC OF SOUTH AFRICACASE NO: 43494/2010

In the matter between:

**TRANSNET LIMITED** ("Transnet")

Plaintiff

and

**ABALOZI RISK ADVISORY  
SERVICES (PTY) LTD** ("Abalozi")

Defendant

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**OPINION**

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1 My instructing attorneys, Bowman Gilfillan Inc, have requested me to provide an opinion regarding the above matter. I quote the second and third paragraphs of my letter of instruction:

"2. Our instructions are that during the course of this year, Transnet Ltd ("our client") received various monthly reports from the officials of its subsidiary, Transnet Freight Rail ("TFR") to demonstrate that Abalozi Risk Advisory Services (Pty) Ltd ("Abalozi") did in fact render security services to TFR. Our client's Group Forensics conducted a verification process of these reports and could not conclude whether any services purportedly rendered justified the payments to Abalozi by our client.

3. In light of the above, we are instructed to request you to furnish us with a brief opinion on whether or not the reports would be sufficient evidence to demonstrate that Abalozi had performed in terms of the contract, which led in payments being made to Abalozi by our client. If so, would this be a valid reason to justify a withdrawal of the action instituted by our client against Abalozi?

- 2 -

- 2 I previously, on 31 January 2012, provided a memorandum to my instructing attorneys in terms of which I stated, amongst other things, that:

"5. Apart from the costs there are other considerations to consider. Transnet's claim is, strictly, an enrichment action in the form of the *condictio ob turpem vel injustam causam*. Insofar as Abalozi rendered services, it subcontracted these to others. Payments made to the subcontractors did not enrich Abalozi and will have to be subtracted from the claim. It is unlikely that these costs amounted to the R88 million alleged in paragraph 29 of Abalozi's counterclaim, but the costs of engaging subcontractors might, nevertheless, have been substantial and would operate to reduce Transnet's claim concomitantly.

6. Transnet will be able to fall back on the reasonable value of the services that Transnet received in terms of the void contracts with Abalozi, insofar as that might be less than the cost that Abalozi actually bore. However, Transnet might not be able to do so because of the difficulties attaching to establishing a value for the services, some of which did have value. The essential problem is that Transnet does not know exactly what Abalozi's subcontractors did do and to what extent they did or did not render services. It would be well-nigh impossible to establish a reasonable value for those services in a sum that would be less than whatever Abalozi's expenses of the subcontractors were."

- 3 I have now concluded that my statement in the memorandum that "Transnet's claim is, strictly, an enrichment action in the form of the *condictio ob turpem vel injustam causa*" was wrong. Transnet's claim is for *restitutio in integrum* i.e. for restoration of the status that pertained prior to the relevant agreements with Abalozi being concluded. Although the principles relating to *restitutio in integrum* are, in a broad sense, governed by the equitable principle that no person should be enriched at the expense of another, a claim for *restitutio in integrum* is not an enrichment action, properly so called.

- 3 -

- 4 The basis for Transnet's claim for repayment of all the payments made to Abalozi is set out clearly in Transnet's particulars of claim.<sup>1</sup> Transnet avers that the irregularities and misrepresentations that occurred in relation to the tender process and the awarding of the relevant security services contract to Abalozi, rendered the agreement invalid or void, and that the same applies to the irregular extensions of the scope of the agreement that occurred after the contract had been awarded to Abalozi.
- 5 Transnet's averments that the irregularities and misrepresentations that occurred rendered the security services agreement and its extensions invalid/void are legally sound.<sup>2</sup>
- 6 Transnet now seeks a return to the financial status that pertained prior to its performing in terms of the void/invalid security services agreement and the void/invalid scope extensions thereof. It, accordingly, seeks to recover its entire performance over the relevant period of time, i.e. all payments made to Abalozi.
- 7 Ordinarily a party who seeks *restitutio in integrum* arising from having performed in terms of a contract that is invalid or has been rescinded, has to tender return of what he has received under the contract. However, a tender to return what has been received, and, concomitantly, the ability to effect return, is not an absolute prerequisite for a claim for *restitutio in integrum*. If the claimant is not to blame for his inability to restore what he has received, and justice requires it, the ordinary principle that the claimant has to restore what he had

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<sup>1</sup> Pleadings par 18 pp 10 - 13

<sup>2</sup> **Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd** 2001 (4) SA 142 (SCA) at par [7] – [9];  
**Municipal Manager: Gaukeni v FV General Trading** 2010 (1) SA 356 (SCA) at [11] – [16];

- 4 -

received is departed from.<sup>3</sup> In allowing a departure, the court exercises an equitable discretion that might include attributing a monetary value to the performance that a party had received, that he is unable to restore.<sup>4</sup>

8 | Because of the nature of the security services agreement with Abalozi, its being  
a contract for the rendering of services, Transnet is obviously unable to restore  
anything that its division, Transnet Freight Rail ("TFR"), received in terms of the  
security services agreement and its scope extensions. Transnet/TFR is not to  
blame for this fact and there is no just reason why it should be debarred from  
recovering what it had performed in terms of the invalid agreement(s).

9 | The fact that Abalozi might actually have rendered some services in terms of  
the invalid security services agreement and its irregular scope extensions,  
accordingly, does not prevent Transnet from obtaining the relief that it is entitled  
to and that it is seeking in terms of the action.

10 | Arising from my prior involvement with this matter (pertaining to proceedings  
before the Transnet Bargaining Council relating to the dismissal of the late Mr  
Senamela) I am able to record that it did come to the fore during consultations  
with witnesses that Abalozi, via its subcontractors, did to some extent provide  
security services that had some value for Transnet. The value was, however,  
mostly totally unrelated to the original reason why Abalozi was employed, i.e.

<sup>3</sup> Hall-Thermotank Natal (Pty) Ltd v Hardman, 1968 (4) SA 818 (D) at 834 A - D,  
Van Heerden v Sentrale Kunsmiskorporasie (Edms) Bpk, 1973 (1) SA 17 (A) at 31 H -32 D,  
Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd, 1999 (2) SA 719 (SCA) at 730 H,  
North West Provincial Government v Tswaing Consulting CC, 2007 (4) SA 452 (SCA) at [16]  
- [22]

<sup>4</sup> North West Provincial Government v Tswaing Consulting CC, 2007 (4) SA 452 (SCA) at [16]  
- [22]

- 5 -

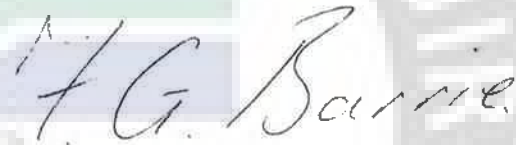
for prevention of cable theft. The value did not arise from whatever Abalozi did to enable it to compile the reports referred to in paragraph 3 of my letter of instruction, as quoted above. In particular auditing the state of physical security that pertained at various train stations and TFR workplaces was not part of what Abalozi was supposed to do. The value that TFR did receive related rather to conventional guarding and security services that Abalozi's subcontractors rendered pursuant to the unauthorised scope extensions of the original security services agreement. The value of these services was miniscule in relation to the overall remuneration that was paid to Abalozi.

- 11 Insofar as Abalozi's actions pursuant to the invalid security services agreement and its irregular scope extensions might have had some value for Transnet and might have carried an expense for Abalozi (in relation to what it might have paid subcontractors who rendered the service), Abalozi is not without a remedy. It potentially has an enrichment action against Transnet. Its claim would be for the lesser of either Transnet's enrichment or its own impoverishment.
- 12 Abalozi is, in fact, pursuing an enrichment action in terms of its second counterclaim in the above proceedings.
- 13 Abalozi's counterclaim is not free of legal complication and it will have to rely on extension of the recognised enrichment actions to be successful. Furthermore, the onus will be on Abalozi to prove to the court what exactly the services were that it, in fact, rendered to TFR and that those services enriched Transnet. To prove that Transnet was enriched, it would have to show that the services actually rendered had real value for Transnet, i.e. value that can be expressed in monetary terms.



- 6 -

- 14 It will be difficult for Abalozi to establish that any services that it actually rendered in terms of the void/invalid security services agreement and its extensions carried objective monetary value or benefit for Transnet. Any objective value or benefit that it would be able to establish in this regard will, in any event, bear no relationship with the aggregate value of the payments it received.
- 15 For the reasons set out above, my opinion is that the mere fact that Abalozi might have rendered some services in terms of the irregular security services agreement and its irregular scope extensions does not justify a withdrawal of the action that Transnet has instituted against Abalozi.

**F.G. BARRIE S.C.**

Chambers  
Group 21  
Sandown Village  
Sandton  
5 December 2012

"V"

TRANSNET

**Ms N. Mabandla**

Group Executive : Legal Services

Transnet SOC Ltd

**SUBJECT****TRANSNET /ABALOZI RISK ADVISORY SERVICES (PTY) LTD****COMMENTS / NOTES***Noted.**Collette, please file.**Walt 11/02/2013***From: Ndiphiwe Silinga**  
**10 DECEMBER 2012**

Transnet SOC Ltd  
Registration  
Number  
1990/000900/30

Carlton Centre  
150 Commissioner  
Str. Johannesburg  
2001

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Parkview  
South Africa, 2122  
T +27 11 308 3962/2350  
F +27 11 308 2348

**MEMORANDUM**

www.transnet.net

**To :** Ms Nkuli Mabandla  
Group Executive : Legal Services

**From :** Ndiphiwe Silinga, General Manager, Legal Services

**Date :** 10 December 2012

**SUBJECT: TRANSNET/ABALOZI RISK ADVISORY SERVICES (PTY) LTD**

1. Having received various monthly reports which were intended to demonstrate that Abalozi did in fact render security services to TFR, Group Legal was requested to obtain a brief opinion from Counsel on whether or not the report, would be sufficient to demonstrate that Abalozi had indeed performed in terms of the agreement. If so, whether Transnet would be justified in withdrawing the action it instituted against Abalozi.
2. Advocate F.G. Barrie SC, who is acting on behalf of Transnet in this matter, has since furnished us with his opinion in which he advises Transnet not to withdraw the action against Abalozi, for reasons fully set out in his opinion.
3. Advocate Barrie SC's opinion is enclosed herewith.

A handwritten signature in black ink, appearing to be "Ndiphiwe Silinga", is written over the printed name.

**Ndiphiwe Silinga**

Transnet SOC Ltd.  
Registration  
Number  
1990/000900/30

13 Gorton Road,  
Parktown  
2193

Private Bag X47  
Johannesburg  
2000  
Tel: 011 584 0682  
Fax: 011 774 9978



## MEMORANDUM

www.transnet.net

**TO** : Ms. Nkuli Mabanda, Transnet Group Executive, Legal Services  
**CC** : Mr. Siyabonga Gama, Chief Executive, Transnet Freight Rail  
**FROM** : Mr. Caesar Mtetwa, General Manager Rail Network, Transnet Freight Rail  
**DATE** : 14 January 2013  
**SUBJECT** : **ABALOZI RISK ADVISORY SERVICES (PTY) LTD (FORMERLY GNS RISK ADVISORY SERVICES (PTY) LTD**

### PURPOSE

1. The purpose of the submission is to;
  - 1.1. Provide feedback on the performance of GNS Risk Advisory Services (GNS) and the cost of services they provided in comparison to the current service provider, Combined Private Investigation / Analytical Risk Management Joint Venture (CPI/ARM).

### BACKGROUND

2. As General Manager Rail Network, part of my responsibility includes the development and implementation of the TFR security strategy, which entails the management and deployment of both internal and outsourced security personnel. I have had this responsibility since my appointment to TFR in April 2009.
3. TFR deploys specialised security services in its crime combating strategy to ward off crime syndicates targeting its rail network for theft of copper and other metal components.
4. The specialised security service entails the gathering of intelligence and profiling of criminal syndicates, and scrap metal dealers colluding with these criminal syndicates; the conducting of sting operations with task teams aimed at arresting the suspects and building case dockets; linking arrestees to other cases and working with the prosecuting authorities in order to effect convictions and meaningful sentences.
5. The deployment of this category of security services, which is proactive in nature, has proven effective in reducing the number incidents and the length of copper cable stolen over an extended period.

A handwritten signature in black ink, appearing to be 'C. Mtetwa', is located at the bottom right of the page.

6. One of the key measurements that I introduced on my appointment in 2009 was the measurement of the length of copper cable stolen monthly, as this gives a good indication of direct losses suffered and material on hand required to do remedial work.

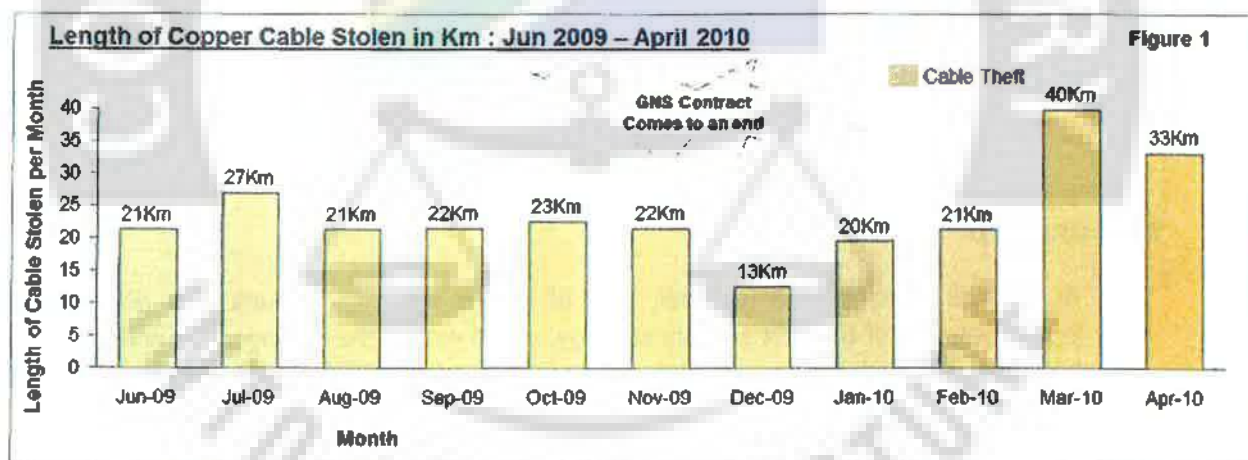
#### DISCUSSION:

7. GNS rendered specialized security services from December 2007 to January 2010. The resources deployed included the following;

- Project Director
- Project Coordinator
- Investigations Manager
- Investigators
- Manager: Monitoring & Evaluation
- Researchers
- Manager: Intelligence
- Handlers

The cost incurred was mainly in relation to these resources.

8. The performance of GNS for the period June 2009 to January 2010 is captured in figure 1 below.



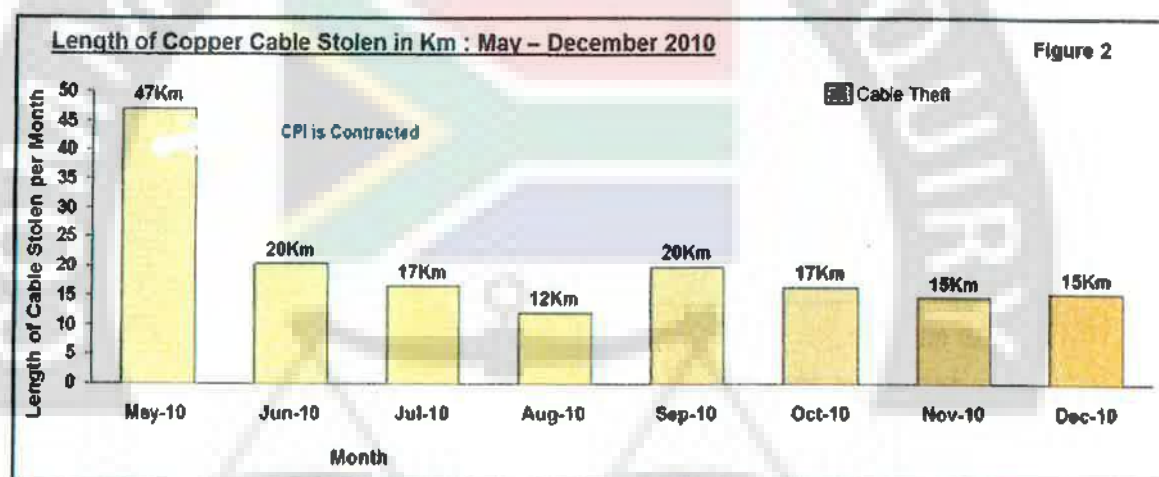
9. For the period of June 2009 to January 2010 the average length of copper cable stolen during the tenure of GNS amounted to 21.3km per month.

10. During the period of February 2010 to April 2010, there was no specialized security service provider deployed at the TFR network, the monthly average of copper theft deteriorated to 31.3km, with a record theft of 47km experienced in May 2010.

11. The CPI / ARM JV consortium was appointed in May 2010, with the performance target of reducing cable theft by a minimum of 33% year on year. The resources deployed included the following:

- Project Director
- Project coordinators
- Project Managers
- Informers
- Investigators
- Support Staff
- Intelligence operators
- Aerial surveillance in the form of a R44 helicopter with night sight capabilities

12. The performance of the CPI/ARM JV for the period May to December 2010 is captured in figure 2 below.



13. The average monthly loss during the period May – December 2010 amounted to 20.4km and was further reduced in the 2011 calendar year to a monthly average of 13.25km.

14. The monthly costs for the services rendered have both a fixed and a variable component. The fixed nature being the rate per hour for the service and the variability being the number of hours worked or kilometers travelled. The monthly budget is however capped and the service provider works within this budget.

15. For the GNS contract the monthly average costs for the full contract period amounted to **R3.5mil**, with the average cost in the last 12 months of the contract being **R4.4mil**.

16. For the CPI/ARM contract the monthly average costs for the contract period to date amounts to **R6.4mil**, with the average costs in the last 12 months of the contract being **R7.4mil**

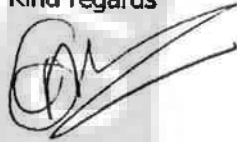


17. It must be noted that the quantity and type of resources utilized on the respective contracts varied.

### CONCLUSION

18. It is evident from the performance statistics that the use of specialized security service produced positive results in combating copper cable theft, the period at which TFR did not have this service being provided resulted in copper theft deteriorating significantly ( period between Feb and April 2010). The cost comparison reveals that CPI/ARM is being paid almost twice what GNS was paid monthly. The aforementioned facts refute the two claims made that GNS was overpaid and paid for work they did not perform. Lastly, as the General Manager that was accountable for TFR security at the time (and still is), I would have asserted these facts had I've been asked during the investigations, unfortunately I was never made part of the investigations nor told of the claims.

Kind regards



Caesar Mtetwa

Date: 14 January 2013

**APPENDIX 1 – JOB OUTPUTS FOR THE GNS CONTRACT****PROJECT DIRECTOR**

- Based at TFR
- Deal with three arms of the project
- Facilitate relevant project planning meetings
- Ensure deadlines are met
- Ensure accountability of all involved in the project
- Manage the relationship with the client

**PROJECT COORDINATOR**

- Based at TFR
- Coordinate the three arms of the project
- Report to Project Director
- Brief and debrief managers
- Provide overall project management
- Liaise with the relevant stakeholders to ensure smooth running of project

**INVESTIGATIONS MANAGER**

- Coordinate and manage all investigators
- Collate reports from investigators and other sources of information
- Delegate tasks to investigators
- Verify information from investigators

**INVESTIGATORS**

- Physically conduct the investigations
- Liaise with the relevant law enforcement agencies
- Compile and submit weekly reports to the manager

**Manager: Monitoring and Evaluation**

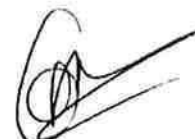
- Provide overall monitoring and evaluation guidance
- Develop a concept a concept document and project implementation plan for the project
- Coordinate and participate in meetings with client

**Researchers**

- Conduct regular site visits to all Transnet Freight Rail sites
- Collate information from subcontractors
- Monitor the database of all the subcontractors

**Manager: Intelligence**

- Collate information and verify accuracy
- Compile and submit weekly reports
- Liaison with the relevant law enforcement agencies
- Protect the confidentiality of handlers



**Handlers**

- Gather information directly from source
- Compile a list of sources and maintain the list
- Collate information from the source and report to the manager

**APPENDIX 2 – JOB OUTPUTS FOR THE CPI/ARM CONTRACT****PROJECT DIRECTOR**

- Oversee planning and implementation of projects and strategies.
- Manage the different resources such as Managers, Investigators, Legal Advisors, etc.
- Manage intelligence gathered and statistics of the project.
- Liaise with partners which include Transnet Freight Rail Managers.

**PROJECT COORDINATOR**

- Planning and implementation of project.
- Creates and executes project work plans and revises to meet changing needs and requirements.
- Identifies resources needed and assigns individual responsibilities.
- Manages day-to-day operational aspects of a project and scope.
- Monitoring and reporting on progress of the project to all stakeholders.
- Manage project budget.

**PROJECT MANAGER**

- Implementing business objectives and as part of a management team, to proactively address security threats.
- Implementing policies and procedures that will ensure successful execution of strategies.
- Developing a supportive Customer Service Strategy, as well as good customer relations, effective communication and feedback according to customer requirements.
- Deciding on manpower numbers, with regards to grades and recruitment.
- Managing Area Managers, Investigators, Support staff and provide a personal coaching and counselling service and encourage innovation.
- Deciding on appropriate resources and procurement thereof.

**INVESTIGATORS**

- Gathering and analysing information to determine trends and tendencies with regards to criminal activities.
- Assess the hot spot areas and deploy their task teams in the areas identified.
- Liaising with Law Enforcement Agencies to verify and validate criminal information.
- Providing comprehensive reports on criminal activities to enable informed business decisions whereby risk is minimized.
- To follow up all relevant information, recruit informants; deploy support staff and recruit informants.
- To affect arrests in the areas deploy and to attend all crime scenes, gather all possible information and look for evidence, exhibits, determine the modus operandi and to submit a final report.
- To testify during court cases and to secure convictions in conjunction with the legal department.
- To keep track on all cases at court and to obtain all relevant statements before trial.



**INTELLIGENCE OPERATORS**

- Effective control over Transnet site in line with the Site Security Plan, Site Instructions and Company directives.
- Regular patrols of the Transnet Railway line, protection of Transnet property such as overhead cables.
- Prevention of loss and/or damage to Transnet property or life.
- Proper record-keeping and administration of security related matters pertaining to the Transnet project.
- Maintenance of an effective and professional service to Transnet and maintenance of specific Transnet site requirements.
- Access control of Transnet sites / premises.
- Roving patrols of all areas indicated by the security procedures in line with specific Transnet site requirements.
- Accurate record keeping facilitating in successful investigations.

**SUPPORT STAFF**

- Provision of professional observation. Responsible for patrolling the assigned area to safeguard the client, personnel, assets and information within the responsible area.
- Monitor any theft or suspicious activity on the premises where duty has been assigned to. Observation of the area as identified by Senior Investigators and reporting of all incidents and activities within the area. They are all trained and will keep observation on recovered cables and arrest the perpetrators who return to collect their stolen goods and they need to testify in court during court hearings. They get deployed to hide in hot spot areas to spot the suspect and to monitor the activities of criminals in order to have them arrested.

**INFORMERS**

- Sourcing information from scrap dealer operations
- Sourcing information from informal settlements
- Identifying syndicates and obtaining as much as possible information on the members
- Infiltrating syndicates and sourcing information of past and future crimes
- Report all information and activities to the investigators handling them
- Deploy them as temporarily employees at scrap dealers yards
- Drop them off at places to keep surveillance at specific places

**COMMUNICATION SYSTEM**

- National Trunking two-way radio system, which include base stations, mobile radios and handheld radios
- Aviation radio communication – two way radio system
- Mobile phones
- Calls made from landlines (National Operation Centre) to members and to Transnet Nerve Centre





"X"

## CONFIDENTIAL AND PRIVILEGED

MINUTES OF THE MEETING NO. 13/1 OF THE BOARD RISK COMMITTEE OF TRANSNET SOC LTD HELD ON 5 FEBRUARY 2013 AT 09:00 IN BOARDROOM 4703, CARLTON CENTRE, 150 COMMISSIONER STREET, JOHANNESBURG



Resolution No/  
For Attention

## 1 CONSTITUTION OF MEETING AND APOLOGIES

## 1.1 Present

Ms DLJ Tshepe	Chairman
Ms Y Forbes	Member
Mr HD Gazendam	Member
Ms N Moola	Member (tele-conference)
Mr IB Skosana	Member

## 1.2 In attendance

Mr ME Mkwana	Non-Executive Director
Mr B Molefe	Group Chief Executive
Ms DC Moephuli	Chief Risk Officer
Mr A Singh	Group Chief Financial Officer
Mr E Lindeque	General Manager: Enterprise Risk Management
Mr R Wolfenden	Chief Audit Executive (Ernst & Young)
Mr R Toka	General Manager: Security Management
Ms P Difeto	General Manager: Office of the Group Chief Executive
Mr N Silinga	General Manager: Legal
Ms N Khumalo	Deputy Group Company Secretary

## 1.3 Partial Attendance

Ms Sue Lund	General Manager: Public Policy and Sustainability
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## 1.4 Apologies

None

## 1.5 Welcome and Signing of Attendance Register

The Chairman welcomed all members and congratulated Ms DC Moephuli on her appointment as Chief Risk Officer, and extended a special welcome to her inaugural meeting. She extended a word of welcome to the attendees present and having noted that there was a quorum, declared the meeting duly constituted. The Attendance Register was circulated for signature.

## 1.6 Adoption of Agenda

The agenda was adopted as tabled.

## 2 SAFETY BRIEFING AND EVACUATION PROCEDURE

The safety briefing and evacuation procedures were conducted by Mr V Linda.

## 3 DECLARATION OF INTERESTS

The Declaration of Interests Register was circulated to all members and attendees for signature. Mr Skosana declared a potential conflict of interest on Item 4.4: Assets All Insurance Renewal 2013/14FY. Mr Mkwana declared a potential conflict of interest on Item 4.6: Sustainability Report.

## 4 MATTERS FOR DISCUSSION/APPROVAL

## 4.1 Budget for the Security Strategy 2012/13FY

## 4.1.1 Management took the Committee through the submission as contained in the pack. The



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## CONFIDENTIAL AND PRIVILEGED

7

Resolution No  
For Attention

## 4.6 Report on Sustainability Development (Energy and Climate Change)

*Ms Lund joined the meeting at 12:58.*

4.6.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The Risk profile was on energy supply, price and climate change.

4.6.2 Management informed the Committee about a study conducted by Wits University in the creation of an electronic application that will be used to calculate the carbon footprint effect of freight migration from road to rail. The presentation outlined the over-reliance of the Company's processes on coal-generated energy. Management advised that Mozambique has a gas source of supply that can be considered for the Company's energy needs. Management will present several proposals to Group Exco and to Board for consideration. The mitigation of carbon emissions will be presented to Group Exco on May 2013.

4.6.3 Management informed the Committee that plans were underway to implement a smart grid solution as a measure of enhancing the Company's Carbon Footprint profile. Furthermore, employees have undertaken training with UNIDO to support the re-generation initiatives. An Independent Power Producer registration will be finalised soon as a result of a 10% energy saving that the Company managed to return to the Eskom Grid.

The Committee noted the report.

*Ms Lund was excused from the meeting at 13:25*

## 6 ERNST &amp; YOUNG'S REPORT-BACK ON OPERATIONAL AUDITS

6.1 TIA took the Committee through the submission as contained in the pack. The submission was taken as read.

6.2 TIA informed the Committee that in the previous audits, both the Neotel and T-Systems reviews were rated unsatisfactory. This year the Neotel review improved to "requires improvement". While significant improvement on T-Systems was observed, it was not sufficient to avoid the "unsatisfactory" rating. Previously control design adequacy was a major issue; this has largely been addressed and operating effectiveness is where the focus now lies. Both companies have undertaken to remedy the Level 1 and Level 2 findings by 30 March 2013. TIA will conduct a follow-up audit thereafter.

6.3 TIA commended Management on its approach to the resolution of outstanding audit findings and cautioned Management to ensure that the supervisory level of management remains a focus to enhance "tone in the middle" and control consciousness.

The Committee noted the report.

## 7 SECURITY REPORT

7.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. Management provided an update on the highlights and lowlights, year-to-date.

The Committee noted the report.

## 9 LITIGATION REPORT

9.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. Ms Forbes recommended that Management should extract lessons learnt from the Litigation Report for the enhancement of the forth coming contract management policy. Mr Skosana required assurance that there was adequate provision for the *Transnet Ltd vs Choice Technologies* matter in the 2012/13 FY budget. The matter

Mr Singh/

## CONFIDENTIAL AND PRIVILEGED

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Resolution No  
For Attention

Ms Khumalo

was referred to the Audit Committee for consideration.

- 9.2 Management informed the Committee that there was a need to review the decision to litigate in the **Transnet vs Abalozi Risk Advisory Services**. The Company blacklisted the supplier in 2010 due to an alleged non-performance. The supplier was contracted to perform for a twenty-two month period and the Company paid R95m as per the contract.

- 9.3 The Committee **agreed** that a meeting will be convened to seek clarity from the lawyers on the cause of action and way forward prior to the Board meeting of 15 February 2013. The Chairman and Mr Gazendam were mandated to meet with Management and the lawyers.

Ms Mabandla

- 9.4 Mr Skosana cautioned against litigation expenses that could amount to a PFMA contravention if not properly managed. The Chairman requested Management to ensure that in instances where a Committee seeks detailed feedback on a matter, such feedback should be submitted to the Committee in a submission format.

The Committee noted the report.

## 10 APPROVAL OF THE MINUTES OF THE MEETING HELD ON 29 NOVEMBER 2012

The Minutes were approved as tabled.

## 11 MATTERS ARISING

- 11/1 **Board Committee Evaluation Report:** Mr Mkwanazi suggested that the Committee needed a re-induction by an external service provider

Ms Moephuli/ Ms  
Khumalo

The matter is in-progress.

## 11/2 Induction:

The Chairman indicated that the contract management policy should be submitted to Board Acquisitions and Disposals Committee for discussion purposes. The draft contract management policy will be tabled at the Board Acquisitions and Disposals Committee on 27 February 2013

Ms Mabandla

The matter is in-progress.

11/3 **Group Risk Report:**

Mr Mkwanazi enquired if Unmanned Aerial Vehicles (UAVs) were available at Denel and suggested that they could be used as a trial

Mr Toka

Denel has UAVs that require permission from the Civil Aviation Authority (CAA) every time they fly, and they can only be flown by a licenced pilot. Denel advised that they are in a process of developing a UAV called Hungwe that will not require permission to fly as it will not be classified in the same category as normal aeroplanes. This project is expected to be completed by March/April 2013. Transnet is also engaging CSIR, Kenga Solutions and other companies that are in the business of UAVs to explore possible solutions.

- 11/4 **Matters Arising:** Management informed the Committee that a policy on Classification of Information was approved but could not be implemented as the procedural standards were still being compiled. Once finalised, the documentation will be brought to the Committee for information

Mr Toka

The matter is in-progress.

- 11/5 **PWC Benchmarking Report:** The Group Risk Office provides assurance that all the risks are taken care of, thereafter, it cannot be tasked with sourcing of insurance. The Committee agreed that the proposed recommendations from the PWC Report were for implementation by Management

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER : 43494/2010

In the matter between :

TRANSNET LIMITED ("Transnet")

Plaintiff

and

ABALOZI RISK ADVISORY SERVICES (PTY) LIMITED "(Abalozi")

Defendant

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**MEMORANDUM TO ATTORNEY**

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1. During our consultation on Tuesday, 26 February 2013, with Messrs Ndiphiwe Silinga, he provided us with a copy of a memorandum, dated 14 January 2013, addressed by Mr Caesar Mtetwa, General Manager : Rail Network of Transnet Freight Rail, to Ms Nkuli Mabanda, Transnet's Group Executive, Legal Services.
2. In terms of the memorandum Mr Mtetwa conveys that the remuneration that had been paid to Abalozi under the security contract and its extensions that are the subject of the above litigation ("the security contract"), was fair remuneration in terms of the objective value of the services rendered and received. Mr Mtetwa produces some statistics to back-up his assertions in this regard.

- 2 -

3. In the opinion, dated 5 December 2012, that I gave regarding this matter I referred to the fact that Abalozi is pursuing a conditional counterclaim for enrichment against Transnet. The claim is conditional upon Abalozi's being ordered to repay to Transnet what it had received in terms of the security services contract. In formulating that claim, Abalozi relies on expenditure that it had allegedly incurred in connection with providing the security services under the security contract. In other words, Abalozi is relying on its alleged impoverishment that would result if it were to have to restore what it had received.
4. Abalozi's claim in this regard is suspect, insofar as it relies on rather improbable round figures. However, Abalozi did use the services of security service sub-contractors and it did employ staff on the contract. It would, presumably, be able to substantiate payments to these subcontractors and employees at the trial of the matter.
5. The mere fact that Abalozi might have undertaken expenses in connection with the security contract does, however, not provide the basis for an enrichment claim or, of its own, for derailing Transnet's claim for restitution.
6. As I have stated before, Transnet's remedy is for *restitutio in integrum*. That remedy is derived from equitable considerations, also based on the principle

- 3 -

that a party claiming restitution should not be unjustly enriched by recovering what he had parted with and keeping or not restoring what he had in turn received.

7. The real question before the court will, accordingly, be whether Transnet would be unjustly advantaged if Abalozi were to have to repay the remuneration that it had received, i.e. would Transnet be put into a position where it would have received value from the services rendered, without having had to pay for it. The concomitant question would be, if value did attach to the services rendered, to what extent did that value match-up with or fall short of the money that Abalozi had been paid.
8. In **North-West Provincial Government v Tswaing Consulting CC 2007 (4) SA 452 (SCA)** the Supreme Court of Appeal came to the conclusion that in seeking the remedy of *restitution in integrum* (arising from fraud that had induced the conclusion of a contract for the rendering of services), once the claimant had established the fraud and its entitlement to rescind the contract, in the absence of evidence affording a basis for a finding that restitution would be unjust, the claimant was entitled to repayment of the money paid to the contractor.

- 4 -

9. In the **Tswaing** case the court also dealt with a contract for the rendering of services to a governmental institution. Albeit that the provincial government did concede that it had received some value from the services rendered, the court concluded that, if the contractor wanted to show that it would be unjust for it to have to repay all the money it had received, it was for the contractor to set out the work it did, its expenditures, the value delivered and the services rendered under the contract. The contractor in the **Tswaing** case failed to do so and was, accordingly, ordered to repay all the money it had received.
10. The **Tswaing** case dealt with the matter on the basis of contractual principles alone. However, there is also an overlay of administrative and constitutional law that pertains to contracts with organs of state that arise from tender irregularities, as is the case here. Such contract are inconsistent with section 217 of the Constitution and the courts are in terms of section 172(1)(a) of the Constitution compelled to declare them invalid. Section 172(1)(b) of the Constitution, however, then provides that the court has a discretion regarding what relief to provide arising from such invalidity, stating, amongst other things, that the court may make an order that is "just and equitable"..
11. The Constitutional Court has commented on the court's discretion to fashion a remedy that is just and equitable as follows:



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*"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law."<sup>1</sup>*

(underlining added)

12. Our law regarding the remedy of *restitutio in integrum* resonates with the underlined dictum. Accordingly, considerations that have been identified in our case law regarding the courts' fashioning a remedy when the tainted awarding of a governmental tender had given rise to an invalid contract, would also be potentially relevant in the context of the relief that should be accorded to Transnet arising from the invalid contract awarded to Abalozi.
13. The considerations that our courts take into account regarding what would be just and equitable in given circumstances are open-ended. They include whether the unlawful awarding of the tender was tainted by fraud or corruption, but also considerations such as the demands of pragmatism and practicality, the consequences of the effluxion of time and intervening events, whether the invalidly concluded contract was near completion (or, by extension, had been

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<sup>1</sup> Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para 29

- 6 -

completed), the interests of the parties, the public interest; and whether the nature of the contract is/was such that it could be undone.

14. Abalozi has in terms of its discovery affidavit discovered numerous documents that, on the face of things (but judged merely from the descriptions in the discovery affidavit), would tend to substantiate that Abalozi did render crime prevention and other security services in terms of its engagement under the security contract. These include "Minutes of crime prevention meetings" (±55), "Monthly Time sheets" (for a relatively short period, though) (±14), "Employment files" (that relate to security officers that it apparently employed on the job) (±62), "Source control registers" (that apparently relate to informers that it utilised) (±52), "Investigation Diaries", written reports of various description (±43), including, mostly, monthly reports regarding the so-called "Project Rova Ne Simba") and also "Daily Rosters" and "Daily Lists".
15. One can assume that if the trial of this matter proceeds, Abalozi will seek to establish that it delivered fair value for the remuneration that it had received under the security contract, and that it would, accordingly, be unjust for it to have to repay what it had been paid.
16. In that context, Mr Mtetwa's memorandum impacts on the litigation against Abalozi.

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FIRST ISSUE: WHAT IS THE STATUS OF THE MEMORANDUM?

17. The memorandum comes from a person in a very senior position with Transnet. It has now been transmitted to you, the attorneys charged with pursuing the litigation against Abalozi. The question is whether this is an instruction from Transnet to the effect that Transnet does no longer deny that, if Abalozi were to be ordered to repay the money it had received under the contract, Transnet would be enriched to the full extent of the money that has to be repaid. Or, putting it differently, does Transnet now concede that, because the money that had been paid to Abalozi is a fair reflection of the value that Transnet had received, it would be unjust for Abalozi to be ordered to repay the money.
18. If the memorandum is to be construed as an instruction from Transnet as set out in the previous paragraph, it would, essentially, be the end of the matter – Transnet cannot be advised to proceed with a claim for repayment of money that would, to put it colloquially, be a claim for “the money and the box”. Such a claim is incompatible with the equitable remedy of *restitutio in integrum* and will not be successful.
19. We have, for present purposes, to assume that it is not such an instruction. At this time, on my understanding, Transnet’s board of directors have to make a decision whether Transnet should continue with the litigation and are seeking

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our advice on that score. Mr Mtetwa's memorandum is new information, and the issue is whether the memorandum should simply be accepted on face value.

SECOND ISSUE: WHAT EVIDENCE IS AVAILABLE TO CONTRADICT THE MEMORANDUM?

20. Arising from the contents of Mr Mtetwa's memorandum, the question is whether Transnet will be able to produce any witnesses who would be able positively to state that, despite the existence of documents that might suggest that services were appropriately rendered in terms of the security contract, Abalozi did not render the services it was engaged for properly or at all, and that Transnet did not receive fair value for its monetary outlay.
21. As regards this issue, quite apart from what Mr Mtetwa states, a further complicating fact relates to the intangible nature of the bulk of the services that had to be provided in terms of the security contract. The nature of the core service that Abalozi had to provide, the combating of cable theft, was such that provision or non-provision of the services, and the quality, or lack thereof, of what had been provided, are inherently difficult to establish or quantify. This is even more so where the principal actors to whom Abalozi would, notionally, have reported on a person to person basis regarding their intelligence work and

- 9 -

cable theft combating efforts, are no longer alive, or may no longer be in Transnet's employ or may no longer be available or willing to testify.

22. I was not involved in the matter when the particulars of claim were drafted. My involvement with the case arose from the proceedings before the Transnet Bargaining Council regarding the dismissal of Messrs Senamela and Khanye. In those proceeding the question whether Transnet had received value for money from the security contract with Abalozi was only tangentially relevant.
23. During preparation for the trial of the arbitration, statements were made by potential witnesses that were interviewed that the work ostensibly performed had little objective value and did, to a large degree, not relate to the core work for which Abalozi had been engaged. As I recall, there were also a couple of occasions when Abalozi was "caught out" because it did not have personnel on the ground available for whose services it was being remunerated. However, much of what was stated did not arise from the actual personal knowledge of the witnesses and a problem that arose even then was that potential witnesses had become unavailable for various reasons including dismissals and resignations. Furthermore, the perception that Abalozi's crime intelligence gathering was largely ineffectual and was not concretely reported and put to use could, possibly, have been gainsaid by the security manager, Mr Senamela, in particular, on the basis that reports of intelligence work were also made to him

- 10 -

in person and that he authorised what ancillary work had to be carried out under the contract. Also, some of the witnesses did confirm that in regard to some aspects, Abalozi's subcontractors did render services and did seem to know what they were talking about.

24. Accepting that the onus to prove the objective value of its work will rest with Abalozi, the issue that arises is, how will any evidence that Abalozi will tender about the work that it had done and the alleged value thereof be countered?
25. It will serve some purpose to revisit the statements that were taken from witnesses in preparation for the trial of the arbitration relating to Messrs Senamela and Khanye. The upshot is, however, that unless Transnet has witnesses available who are willing and able to contradict Mr Mtetwa's assertions that Transnet received fair value for the money expended, and who can do so on firm grounds, pursuing the case further would be wasteful.

DATED AT JOHANNESBURG ON THIS 15<sup>th</sup> DAY OF MARCH 2013.

FRANS BARRIE SC

VILLAGE CHAMBERS  
SANDTON

TO:  
BOWMAN GILFILLAN INC  
REF: MR MANDISI RUSA



"Z"

preparation for meeting 18 03 13



1. The material facts:

- 1.1 The contract was invalid, the product of "a scam".
- 1.2 Equity might warrant reduction of the claim by the amount of proven resources provided under the contract.
- 1.3 Counsel's written advice of last week does not address this question (of what resources GNS appears able to prove that it provided under the contract) at all.

2. On the prospects of success:

- 2.1 In general, we require co-operation from the Transnet executive and a commitment to pursuing Transnet's interests in the litigation. To date, this has not been forthcoming. The memorandum from Mtetwa suggests an executive that is opposed to litigation irrespective of the merits. But of course, we have not yet consulted with him, or with any other members of the executive who might put us in a position to assess what resources were in fact provided under the contract. The executive appears to demonstrate agreement (without a known foundation) with the approach of GNS/ Abalozi.
- 2.2 Without co-operation, and in fact with an executive that favours withdrawing the case, it will be difficult for us to run the litigation successfully, and we are hamstrung by the limited instructions and by limited access to information and instructions on the facts where necessary.
- 2.3 In summary, we can only give a proper assessment of prospects of success after a fuller investigation and on being given access to and consulting with a number of key executives who might be able to shed light on the matter.
- 2.4 Absent that, Transnet is entitled to (an in our view should) simply put GNS to the proof of its claims that it provided resources under the contract, and be prepared to discount its claims by the contractual price of the resources so proven.

"AA"

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TRANSNET

**MEMORANDUM**

www.transnet.net

**To :** Mr Brian Molefe, Group Chief Executive

**From :** Ndiphiwe Silinga, GM Group Legal

**Date :** 14 March 2013

**SUBJECT: RESCISSION OF THE DECISION TO BLACKLIST ABALOZI SECURITY RISK ADVISORY SERVICES (PTY) LTD, ITS DIRECTORS AND ASSOCIATED GROUP OF COMPANIES**

**PURPOSE:**

1. The purpose of this submission is to motivate and recommend to the Group Chief Executive for the rescission of the decision to blacklist Abalozi Security Risk Advisory Services (Pty) Ltd ("Abalozi"), formerly trading as General Nyanda Security Risk Advisory Services (Pty) Ltd ("GNS") from doing further business with Transnet SOC Ltd until 30 June 2015.

**BACKGROUND:**

2. On 1 July 2010 Transnet took a decision to place Abalozi, its directors in their personal capacity, as well as any associated companies owned or managed by those directors, on the Transnet List of Excluded Tenderers for a period of 5 years, which period is due to expire on 30 June 2015.
3. This decision was taken in accordance with the provisions of the Transnet Procurement Procedures Manual ("PPM").
4. On 6 December 2007 Transnet Freight Rail ("TFR") awarded a contract to GNS for the provision of certain specialised security services for a period of 12 months. The contract was then extended from time to time until it was terminated with effect from 31 January 2010.
5. Based on evidence placed before it, Transnet believed that GNS had acted in bad faith in entering into and/or execution of the aforementioned contract.
6. The investigation conducted by Transnet Internal Audit ("TIA") had revealed that; GNS
  - 6.1. had misrepresented its capacity, resources and experience to execute the contract,

Page 2



- 6.2. had colluded with Transnet employees in the award of, and various extensions of the contract without following laid-down policies and procedures,
- 6.3. had carried out the contract in an unsatisfactory manner, and when called upon to verify whether services invoiced and paid had in fact been rendered it chose not to co-operate.

Attached hereto is a copy of the memorandum dated 1 July 2010 seeking approval to place GNS on the Transnet List of Excluded Tenderers, marked "A".

#### **GROUND FOR RESCISSION :**

7. There has been further developments and or new information that has come to the fore, since the decision to blacklist Abalozi was taken, which was not known to Transnet at the time of the decision.
8. During 2012, in preparation for the civil case pending between Transnet and Abalozi arising out of the same contract, TFR furnished Group Legal with reports on security services rendered by Abalozi to Transnet from the date of inception of the contract to the date of its termination. The purpose of these reports was to prove that Abalozi did render the required security services to Transnet at the time and did provide monthly reports to TFR.
9. Furthermore TFR as the beneficiaries of the services rendered by Abalozi, never complained about the nature of services rendered to them. On the contrary TFR has expressly indicated that they were happy with the services rendered by Abalozi, as will be shown below.

#### **POOR PERFORMANCE OR CARRYING OUT THE CONTRACT IN AN UNSATISFACTORY MANNER:**

10. One of the grounds for blacklisting Abalozi was poor performance or carrying out the contract in an unsatisfactory manner.
11. On 14 January 2013 the Group Executive : Legal Services received a memorandum from the General Manager : Rail Network, TFR, Mr Caesar Mtetwa, the purpose of which was to provide a feedback on the performance of GNS and the cost of services they provided in comparison to the current service provider.

Attached hereto is a copy of Mr C. Mtetwa's memorandum marked "B"

12. Paragraphs 8-9 of that memo demonstrate the extent to which cable theft had significantly declined during the period Abalozi was contracted to Transnet.
13. Paragraphs 14, 15 and 16 of the memo demonstrate that the GNS contract monthly average costs amounted to R3.5 million when in fact for their



successors CPI/ARM JV consortium the average costs per month amounts to R6.4 million, which is almost double that of Abalozi.

14. Under paragraph 18 of the memo a point is made that, **the aforementioned facts refute the two claims that Abalozi was overpaid and paid for work they did not perform.**

#### **ABALOZI HAD MISREPRESENTED ITS CAPACITY AND RESOURCES TO EXECUTE THE CONTRACT:**

15. Evidence presented to Transnet at the time revealed that as a result of their lack of capacity and resources to execute the contract, Abalozi apparently sub-contracted the contract without TFR's prior approval as was required by the contract.
16. Abalozi contends that when it was negotiating the contract, it made it clear it was in a joint venture with NAIL and Revert. TFR has since confirmed that NAIL and Revert were indeed Abalozi's joint venture partners and not mere sub-contractors and hence they took no issue with that.

#### **ABALOZI COLLUDED WITH TRANSNET COMPLYEES IN THE AWARD OF THE CONTRACT AND EXTENSIONS:**

17. The TIA investigation also revealed a number of tender and contract irregularities committed by Transnet employees in confining this tender to Abalozi and in contracting with, as well as extending the contract with Abalozi. These were as a result of numerous failures to follow Transnet procurement procedures and policies. As a result of those irregularities disciplinary action was taken against Transnet employees who were alleged to have committed those irregularities.
18. Whilst it was suspected that Abalozi may have colluded with some Transnet employees in order to be awarded the contract, however, there is no direct evidence to corroborate those suspicions. As a result of lack of such evidence Abalozi deserves the benefit of innocence until proven otherwise.
19. In light of the new information stated above, which turn to refute the reasons which were presented for blacklisting Abalozi, it will not be fair and just to continue blacklisting Abalozi, its Directors and associated group of companies.

#### **AUTHORITY TO RESCIND A DECISION TO BLACKLIST**

20. Clause 23.8 of the Transnet Procurement Procedures Manuals ("PPM") dated 6 September 2012 provides;

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**"THE TRANSNET GROUP CHIEF FINANCIAL OFFICER OR HIS DULY AUTHORISED DELEGATE MAY AT ANY TIME, ON GOOD CAUSE SHOWN, RESCIND A DECISION TAKEN OR REDUCE THE PERIOD OF EXCLUSION AS INITIALLY DETERMINED."**

Attached hereto is the relevant page of PPM for ease of reference, marked "C".

21. As is evident from annexure "A" the decision to place Abalozi on the Transnet List of Excluded Tenderers was approved by the Acting Group Chief Executive. It is therefore advisable that the decision to rescind that blacklisting be approved the Group Chief Executive.
22. It is my submission that, considering what is stated above as new facts that have come to light since the decision to blacklist was taken, there are good reasons in favour of the rescission of the decision to blacklist Abalozi.

**RECOMMENDATION :**

23. It is recommended that the Group Chief Executive, rescind the decision of the 1<sup>st</sup> July 2010 to place on the Transnet List of Excluded Tenderers,

- (a) GNS /Abalozi,
- (b) its director(s) in their personal capacity, and
- (c) any associated companies owned or managed by the same director(s)

for a period of 5 years.

**Compiled by:**

**Ndiphiwe Silinga**

General Manager: Legal Services

Date: 14 March 2013

**Recommended/ ~~Not Recommended~~ by:**

**Nkuli Mabandla**

Group Executive: Legal Services

Date: 8/04/2013

**Approved/ ~~Not Approved~~**

**Brian Molefe**

Group Chief Executive

Date: 10/4/2013



"BB"

TRANSNET



Anoj Singh : Group Chief Financial Officer

**The Director**

Abalozi Risk Advisory Services  
61 Boundary Road  
Rotandale Ext 1  
Randburg

Fax No : (011) 880 9723

Email : abaloloji@mics.co.za

Dear Sir

**RESCISSION OF BLACKLISTING OF ABALOZI RISK ADVISORY SERVICES  
(PTY LTD ("Abalozi")), ITS DIRECTORS AND ASSOCIATED GROUP OF  
COMPANIES**

Please be advised that Transnet's decision of 1 July 2010, to exclude Abalozi/GNS, its director(s) in their personal capacity and any associated group of companies owned or managed by those directors, for a period of 5 years, is hereby rescinded and/or set aside forthwith.

Yours faithfully

**Anoj Singh**

Group Chief Financial Officer

Date: 18/04/13.

**Transnet SOC Ltd**  
Registration Number  
1990/000900/30

Carlton Centre  
150 Commissioner  
Street  
Johannesburg  
2001

P.O. Box 72501  
Parkview, Johannesburg  
South Africa, 2122  
T +27 11 308 2350/3962  
F +27 11 308 2348

**Directors:** ME Mkwana (Chairman) B Molefe\* (Group Chief Executive) NK Choubey\*\* MA Fanucchi Y Forbes HD Gazendam NP Mnxasana N Moola NR Njeke IM Sharma  
JB Skosana F Tshabalala DLJ Tshepe A Singh\* (Group Chief Financial Officer)  
\*Executive \*\*Indian

Group Company Secretary: ANC Ceba

www.transnet.net



**"CC"**

Transnet SOC Ltd.  
Registration  
Number  
1990/000900/30

13 Girtton Road.  
Parktown  
2193

Private Bag X47  
Johannesburg  
2000  
Tel: 011 584 0682  
Fax: 011 774 9978

TRANSNET

**MEMORANDUM**

---

**TO** : Mr. Brian Molefe, Transnet Group Chief Executive  
**FROM** : Mr. Siyabonga Gama, Transnet Freight Rail Chief Executive  
**DATE** : 08 October 2013  
**SUBJECT** : **ABALOZI RISK ADVISORY SERVICES (PTY) LTD (FORMERLY GNS RISK ADVISORY SERVICES (PTY) LTD)**

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**PURPOSE**

1. The purpose of the submission is to;
  - 1.1. Request approval from the GCE for TFR to present its responses to the Transnet Group Risk Committee to questions raised by the Committee in respect of Abalozi Risk Advisory Services (PTY) LTD .

**BACKGROUND**

2. In January 2013, TFR was requested to respond to the performance of GNS Risk Advisory Services (GNS) and the costs of the services they provided in comparison to the current service provider. This was done in January 2013.
3. In October 2013, TFR was informed that the Transnet Board Risk Committee was not fully satisfied with the responses and raised the following three specific questions;
  - 3.1. *"Ascertain whether the contractual agreement was adhered to in terms of the number of security personnel required and the sites that were to be covered by the contract?"*
  - 3.2. *"Report on the KPIs which were deliverables in terms of the contract (Report on KPIs in relation to job outputs"*
  - 3.3. *"Reports of the investigations conducted during the contract period should be submitted to the Committee"*

A handwritten signature, possibly reading "O-81", located at the bottom right of the page.

4. Responses to these questions were furnished to the Group Executive, Legal Services, on the 3<sup>rd</sup> October 2013. In addition to the responses it was requested that TFR addresses these and any additional concerns that the Group Risk Committee may have at the earliest opportunity.

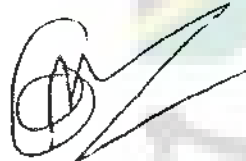
**DISCUSSION:**

5. In an attempt to bring this matter to finality, it is our request that the TFR General Manager Rail Network, within whose portfolio security services resides, and the TFR General Counsel addressed the Committee in order to explain the background to the problem which the service aims to solve, the context and the nature of this specialised security service.
6. It is anticipated that such discussion will add to resolving and moving the matter to closure.

**CONCLUSION**

7. It is recommended that the GCE approves the request to have TFR address the Board Risk Committee on this matter at its next sitting.

Complied by:

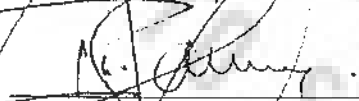


Caesar Mtetwa

General Manager: Rail Network

Date: 08 October 2013

Recommended by:



Siyabonga Gama

TFR Chief/Executive

Date: 08/10/2013

Approved by:

---

Brian Molefe

Transnet Group Chief Executive

Date:



# BOARD RISK COMMITTEE – OCTOBER 2013

## ABALOZI RISK ADVISORY MATTER (FORMERLY GNS RISK ADVISORY)

Caesar Mtetwa  
General Manager  
Rail Network

## BACKGROUND & CONTEXT

### Rail Infrastructure

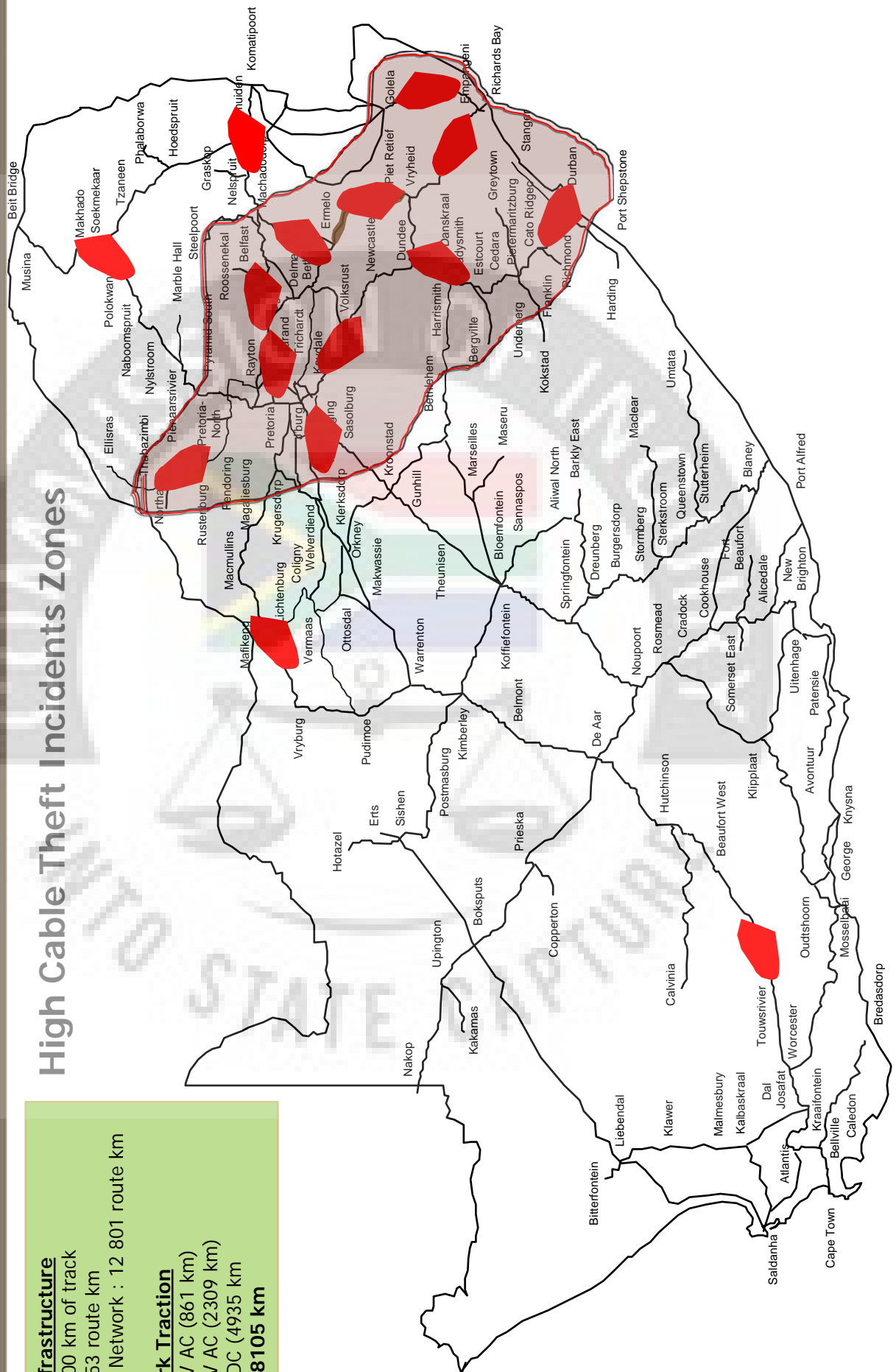
- 30 400 km of track
- 20 953 route km
- Core Network : 12 801 route km

### Network Traction

- 50 kV AC (861 km)
- 25 kV AC (2309 km)
- 3kV DC (4935 km)

**Total : 8105 km**

## High Cable Theft Incidents Zones



## BACKGROUND & CONTEXT



### ❑ Organised International Copper Criminal Syndicates

- Targeting all copper installations (“mining above ground”);
- Well resourced;
  - ✓ Operate a full time network of contracted criminal “runners” doing the stealing;
  - ✓ Own factories that melt stolen copper cables into unidentifiable form;
  - ✓ Supply network of hundreds of legal & illegal scrap metal dealers.
- Markets – Primarily exported to the East Asian countries.

### ❑ The Victims of Copper Theft

- Government entities (SOCs) such as Eskom, City Power, Telkom, Transnet and numerous municipalities.
- Crime Combating Forums constituted by SOCs, Business and Law Enforcement Agencies e.g. SACCI Copper Theft Forum & Non Ferrous Metal Crime Combating Committee.
- Purpose of forums to share information, statistics, tactics and methods to effectively combat this crime.
- Consensus that traditional guarding security measures are ineffective in arresting the problem.
- Agreed approach based on an integrated security strategy with information gathering, forensic investigation, profiling and disruptive operations forming the cornerstone.

### ❑ Transnet

- In December 2007, GNS is appointed based on its expertise and skill set.
- This type of security contract is new to Transnet personnel in terms of management and measurement;
- Many lessons learnt and improvements made in managing specialised security contracts.



## BOARD RISK COMMITTEE QUESTIONS



**Ascertain if the contractual agreement was adhered to in terms of the number of security personnel required and the sites that were to be covered by the contract?**

- Specialised Security contract different to traditional guarding contract.
  - ✓ Performance / Outcomes focused, is based on a targeted reduction in theft incidents; length of cable stolen, arrests & convictions;
  - ✓ Number & type of resources required are not prescribed to the Service Provider, as with guarding contracts.
- Investigation and forensic expertise does not exist within Transnet;
- Monthly project budget is determined by the proposal received, which is reviewed and evaluated by TFR, and the negotiated contract price approved by the delegated authority; The same procurement method is presently used.
- Service Provider deploys resources such as Investigators, Researchers and Handlers at its discretion within the limits of the monthly budget and according to the changing crime patterns;
- Where additional resources are required, these must be motivated for and approved by the delegated authority;
- Geographic areas covered by GNS
  - ✓ TFR Central Region (Gauteng, North West, Limpopo & Northern KZN)
  - ✓ TFR Eastern Region (Mpumalanga)

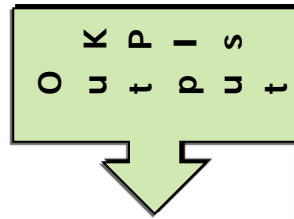
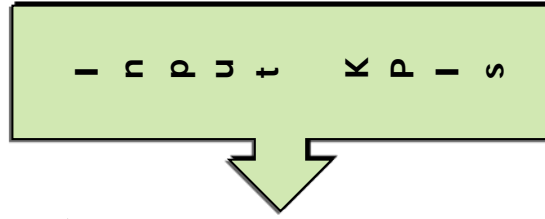


# BOARD RISK COMMITTEE QUESTIONS



## Report on the KPIs which were deliverables in terms of the contract (Reports on KPIs in relation to job outputs)?

- Project Scope:
  1. Information Gathering & Analysis ("Intelligence")
  2. Investigation & Analysis
  3. Monitoring & Evaluation
- KPIs:
  1. Criminal Syndicate identification & Profiling including:
    - ✓ Suspects identified and profiled, including photographs, identity numbers, physical addresses & cell numbers
    - ✓ Identification of syndicate leaders
    - ✓ Vehicles utilised
    - ✓ Colluding scrap metal dealers
  2. Number of disruptive operations at scrap metal dealers
    - ✓ In collaboration with SAPS, TFR Security
    - ✓ Inspection of sales registers
    - ✓ Inspection of yards for TFR material
    - ✓ Arrests made
  3. Monitoring and evaluation of the compliance of TFR guarding contractors on site.
- Detailed monthly comparative reporting and measurement matrix introduced in June 2009;
  - ✓ Train slots cancelled due to security incidents
  - ✓ Length of cable stolen
  - ✓ No. of theft incidents
  - ✓ No. Arrests and convictions
  - ✓ Trend & Hotspot mapping

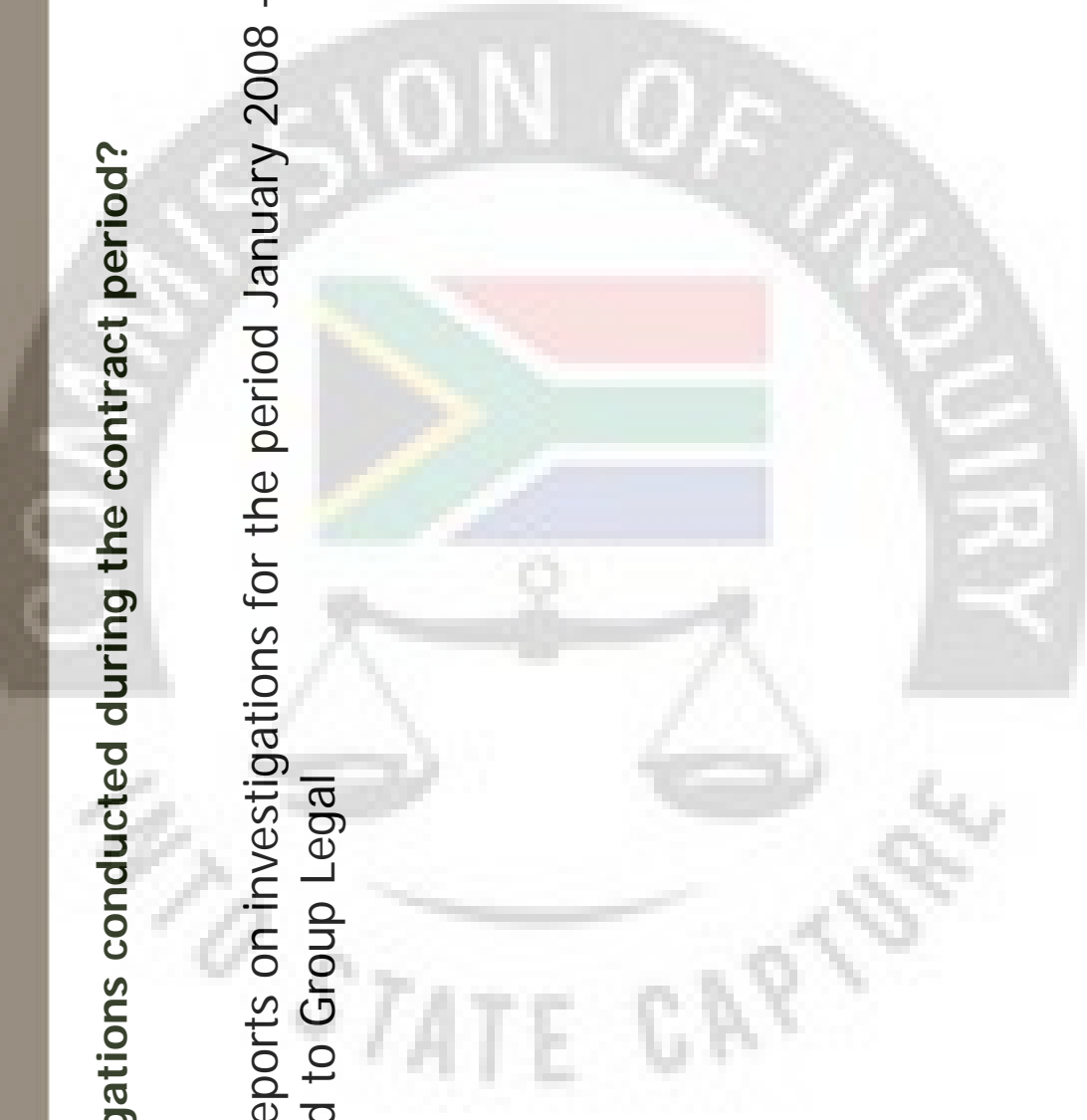


## BOARD RISK COMMITTEE QUESTIONS



### **Reports of Investigations conducted during the contract period?**

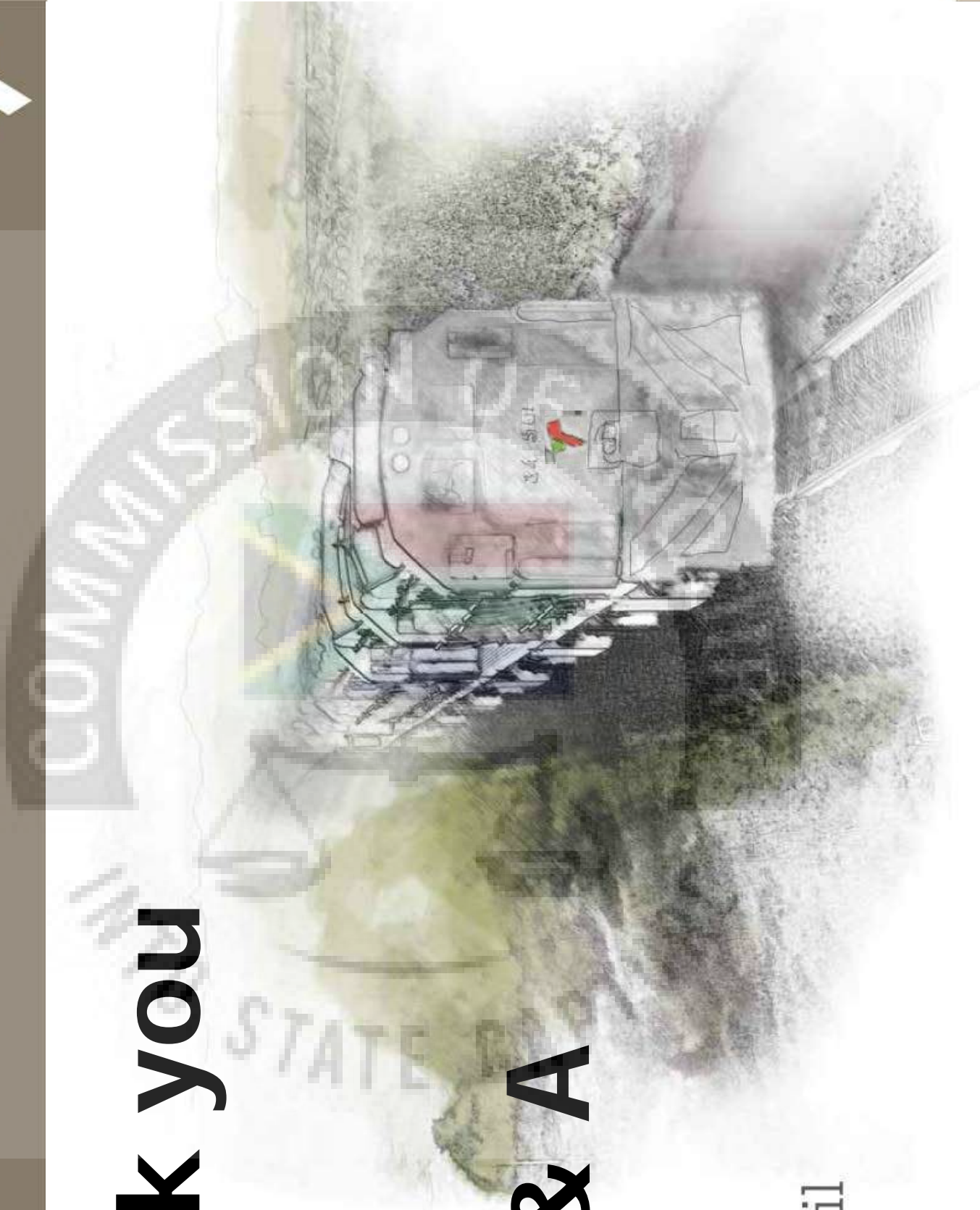
- Detailed monthly reports on investigations for the period January 2008 – January 2010 have been provided to Group Legal





# Thank you Q & A

Transnet  
Freight Rail



**"EE"****CONFIDENTIAL**

MINUTES OF THE MEETING NO. 13/5 OF THE BOARD RISK COMMITTEE OF TRANSNET SOC LTD HELD ON 7 NOVEMBER 2013 AT 09:00 IN BOARDROOM 4902, CARLTON CENTRE, 150 COMMISSIONER STREET, JOHANNESBURG

Resolution No/  
For Attention

1 **CONSTITUTION OF MEETING AND APOLOGIES**

1.1 **Present**

Ms DLJ Tshepe	Chairperson
Ms Y Forbes	Member
Mr HD Gazendam	Member
Ms N Moola	Member (videoconference)
Mr IB Skosana	Member

1.2 **In attendance**

Mr B Molefe	Group Chief Executive
Ms DC Moephuli	Chief Risk Officer
Ms P Difeto	General Manager: Office of the Group Chief Executive
Ms M Matooane	Group Executive: EIMS
Ms NJ Mabandla	Group Executive: Group Legal Services
Ms M Sukati	Chief Audit Executive
Mr T Lebelo	General Manager: Group Financial Planning
Mr E Lindeque	General Manager: Enterprise Risk Management
Mr R Toka	General Manager: Security Management
Ms N Khumalo	Deputy Group Company Secretary

1.3 **Partial Attendance**

Mr ME Mkwana	Non-Executive Director
Ms N Sishi	Group Executive: Human Resources
Mr C Mtetwa	General Manager, Infrastructure: Transnet Freight Rail

1.4 **Apologies**

Mr A Singh	Group Chief Financial Officer
------------	-------------------------------

1.5 **Welcome and Signing of Attendance Register**

The Chairperson welcomed all members and attendees present at the meeting. She welcomed Ms Matooane to her inaugural Committee meeting and wished her well. Having noted that there was a quorum, the Chairperson declared the meeting duly constituted. The Attendance Register was circulated for signature.

1.6 **Adoption of Agenda**

The agenda was adopted as tabled with the following amendments:

- Items 4.1 and 10 were merged.
- Item 13.4 as "Announcement of the ZAR Bond issue by Transnet SOC LTD" was added to the Agenda.
- Item 15 was deferred to the next meeting.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures were conducted by Management.

3 **DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

*The Chairperson requested that Items 13.3, 4, 11.2, 5, 4.2, 4.4, 4.3, 4.5, 14, 13, 4.6, 4.7, 11.1, 12, 6, 7, 8, 9, 10, 15, 16 and 17 be dealt with next. These minutes reflect the order of the meeting.*





## CONFIDENTIAL

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Resolution No  
For Attention

## 13 GENERAL

## 13.4 Announcement of the ZAR Bond issued by Transnet SOC Ltd

13.4.1 Management informed the Committee that the Company issued a historic ZAR bond of R5bn, and it was the first in the African continent. Ms Moola raised concern on the manner in which the bankers handled the transaction in relation to communication flow. Her colleagues informed her that they did not receive the closing indicative price and were not asked to firm up their pricing at any point. It appeared as if the bankers had no control over the book. She was of the view that proper communication and banker's firmness on pricing would have ensured better participation. She further informed the Committee that the perception was that the Company could not raise the required funding in South Africa therefore opted to issue the bond in overseas markets.

13.4.2 Mr Skosana needed comfort from Management on the process to be followed in addressing the matter, going forward. Management stated that the comparison of this global bond cannot be with a ZAR bond issued in the domestic market but rather with a US\$ bond issued in the global market to the same investors. On the issue of pricing, there had to be flexibility on the price to accommodate the investors who were not in the deal at 9.25%. Relative to the dollar price, the Company saved 200 basis points to register a rand bond internationally instead of a dollar bond that would have carried swap costs.

The Committee **agreed** that the transaction was a landmark issue for the Company. The Chairperson recommended that Management should ensure that there will be improved communication and the fundraising processes will be refined. The Committee congratulated Management on the successful issuance of the R5bn bond in the international markets.

## 4 MATTERS FOR DISCUSSION/APPROVAL

*Items 4.1 and 10 were merged.*

## 4.1 Review of the EIMS Framework and Associated Risks

4.1.1 Management took the Committee through the submission as contained in the meeting pack. The submission was taken as read. The purpose of the submission was to table the review of the EIMS Framework and associated risks. Management was currently tracking primarily three key risks Company-wide. Opex spend was lagging since EIMS is behind in terms of capital spend.

4.1.2 Management informed the Committee that the implementation of the EIMS Framework was on track. The areas of concern were the following:

- a) ICT Software Licencing;
- b) Availability of services; and
- c) Risk Mitigation initiatives with an audit finding on resourcing and capacity.

4.1.3 Mr Gazendam enquired if the Company has considered Cloud-based infrastructure rather than desktop licensing. Management informed the Committee that existing bandwidth for the country presented a constraint. Further, Management has not included a significant part of Cloud into the ICT strategy. However, there was a need to consider the costs of Cloud strategy on licensing vs. use of licensing software. The Company's infrastructure does not contain significant Cloud functionality. At this stage it is likely that the bandwidth costs will override any significant licensing costs. The Company was utilising R12m worth of Microsoft software without licensing. The Company has a huge licensing liability. Ms Forbes was concerned that there was a huge legal risk flowing from failure to ensure that the IT software is adequately licensed. She informed the Committee that Oracle took action against a number of big conglomerates in the past for such, and she was concerned as the Company uses Oracle database as a database of choice. She suggested an expedition of the resolution to the problem once adequately quantified. Management was advised that it was essential to aim for integration of all the important aspects, e.g Human Resources, Enterprise Information Management systems, etc. As a preventative measure there will be unreserved

## CONFIDENTIAL

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Resolution No  
For Attention

licences to avoid wasteful expenditure. Management stated that there were deadlines set on the completion of the overall licensing requirements in the business and the matter will be submitted to the Committee for consideration when ready. There was a process of creating a procurement framework for amongst others, *Adobe* and *IBM* in the current financial year. The rest will be dealt with in 2014. Management is in the process of formulating the contract and control measures to ensure that there will be effective use of licence software. There was a need to identify software users and create a rotation of licence users. There were savings in the use of *Semantec* services. Ms Forbes was of the view that the licensing penalty should be paid by *T-Systems* in terms of its SLA with the Company. Mr Skosana was concerned that there was no clarity on the third party's responsibility in the use of licensing software which was the responsibility of *T-Systems*. Management undertook to ascertain if the SLA clearly allocated the licensing responsibility to *T-Systems*. Legal advice will be sourced on *T-System's* failure to monitor licence usage and the possible breach that has resulted to the Company's financial loss.

Ms Matooane/  
Ms Mabandla

- 4.1.4 Mr Gazendam cautioned Management that licensing corporations were perpetuating the issue of user licences due to its lucrativeness. However, he was of the view that Cloud-based ICT infrastructure would make economic sense. He requested to have an offline discussion with Management on the matter. Management informed the Committee that the affected companies were aware of the licence breach and Management plans to communicate transparently with all stakeholders on the matter and advise accordingly. Going forward, Management will ensure that the procedures for approval to install licences are widely communicated and adhered to. The related procedures and tracking of enterprise agreements should be a responsibility of an internal resource. The Chairperson advised Management to ensure that there is a properly defined sourcing strategy which determines the status of each the role in licensing activities.

Ms Matooane

- 4.1.5 Management informed the Committee that taking into consideration the recent testing activities and its impact on the business, Management, might have significantly understated the focus areas. There have been two major disruptions in network services. One took place at TE on 4 October 2013 and the system was interrupted for a week. The second incident was minor as Management was able to recover overnight without invoking Disaster Recovery. The root cause analysis and complete report on both incidents will be compiled.

- 4.1.6 Mr Skosana indicated that planning and identification of key governance structures was essential for an effective EIMS environment. TIA can conduct verification that will provide assurance to the Board that all the control measures, systems and processes were adequate. Management advised that there was coordination on level 1 incidents. Management advised the Committee that it will investigate the root cause for the router's failure. Management advised that in some instances where there were contracts and SLAs, the responsibility allocation between the service provider and Transnet was unclear. The Company needs to improve on the management of the SLAs to ensure proper monitoring of the service providers. Ms Forbes was of the view that contract management was a huge problem and it exposes the Company in various respects. She stated that the redundancy in the router was at an unacceptable level. The architecture needs to be reviewed to ensure that there is redundancy for the Company's crucial services. Management informed the Committee that there will be improvements going forward with the approval of the Contract Management Policy and the initiatives undertaken to review some of the contracts and reduce risks. Mr Skosana urged Management to ensure that there is emphasis on changing the *status quo*. The Committee will receive periodical reports on the progress made in this regard.

Ms Matooane

- 4.1.7 Management informed the Committee that the entire ICT platform was taken out in 2009. Some of the desired changes will take a while to implement. The proposal dealing with the expiry of the *T-Systems* contracts will include four options; one of the options being non-renewal of the *T-Systems* contract. Building the required skills is paramount on the list of next steps. Mr Skosana suggested a special meeting to consider the risks associated with the *T-Systems* contract renewal, be scheduled.

The Committee **agreed** that the *T-Systems* Contract which will expire on 31<sup>st</sup> December



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Resolution No  
For Attention

2014 be tabled at the joint seating of the Board Risk Committee and the Board Acquisitions and Disposal Committee meeting scheduled for 21 November 2013. Management will table the various options on the matter for the Committees' consideration. The documentation will be submitted to the members of the Committee on or before 13 November 2013.

Ms Khumalo

Ms Matooane

The Committee noted the Report.

## 11 LITIGATION REPORT

## 11.2 Abalozi Risk Advisory Services Report

*Mr Mletwa joined the meeting at 10:28*

11.2.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The purpose of the submission was to provide the Committee with responses to questions raised during the meeting of 6 August 2013. A memorandum from the GCE's Office was circulated at the meeting. Management informed the Committee that the intention of the exercise was to establish if there was value derived by the Company from the contract or not. The quantum of the value derived was set out in the monthly reports and matched by invoices. Management stated that the supplier was appointed to perform a data gathering function. **Abalozi** adhered to the contract. The Company did not have a KPI that required the service provider to provide a list of security personnel. The Chairperson enquired if there was a request from the Company that the service provider provides additional guards to protect train drivers. They provided data gathering services which is the advance form of securing assets, ie. An advanced form of gathering evidence against suspects and working closely with SAPS crime intelligence, the cable theft improved under their watch. Management will provide the statistics to demonstrate the improvement achieved to the Committee for information purposes

Mr Molefe

11.2.2 Management stated that the initiated forensic investigation was not finalised. After obtaining documents from TFR, Mr Naicker conducted a verification of the information. He confirmed that monthly reports and invoices were aligned. Mr Mkwanazi requested that the investigation be finalised; commencing with the finalisation of the forensic investigation, thereafter refer the matter for arbitration. The arbitration process will give the Company assurance that the matter was dealt with expediently and in adherence to governance rules. The matter appears to have amounted to governance breaches. A fact finding mission is possible by the Arbitration Foundation of Southern Africa (AFSA) if parties want to finalise the issue from a governance perspective other than arbitration. Mr Skosana sought clarity on the Committee's objective in finalising the matter using a third party when parties can discuss any outstanding monies that need to be settled. Mr Gazendam stated that the money was expended, and approximately 5 years later, the Company has not provided satisfactory answers as to the nature of the contract and the quality of services rendered. The Board was exposed. Mr Gazendam was supportive of a governance process to implement an arbitration process. Management stated that the Company paid R95m and value was received. Management was comfortable with the work undertaken by **Abalozi**. Mr Mkwanazi was of the view that due to the counterclaim, the engagement of the services of AFSA will assist the Company to decide whether to pursue the court process or consider other options.

After extensive deliberations, the Committee **agreed** that the matter will be referred to the Arbitration Foundation of Southern Africa ("AFSA") for resolution, preceded by mediation.

Ms Mabandla

The Committee noted the Report.

*Mr Mletwa was excused from the meeting at 11:08*

*Mr Mkwanazi was excused from the meeting at 11:10*

## 5 Human Capital Risks Report

*Ms Sishi joined the meeting at 11:15*

5.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The purpose of the submission was for the Committee to

"FF"

Ndiphiwe Silinga, General Manager, Legal Services



**Mr Charles Nupen**  
Harris Nupen Molebatsi  
First Floor, 25 Rudd Road  
Illovo

cc. Ms Basetsana Molebatsi

### MEMORANDUM OF INSTRUCTIONS

**RE: ABALOZI RISK ADVISORY SERVICES (PTY) LTD, FORMERLY KNOWN AS  
GENERAL NYANDA SECURITY RISK ADVISORY SERVICES (PTY) LTD**

#### Background:

1. During 2008, a number of anonymous hotline call reports, an anonymous letter and an anonymous e-mail were received by Transnet making allegations about Transnet, its employees and service providers. One of the allegations concerned a security company known as General Nyanda Security Risk Advisory Services (Pty) Ltd ("GNS")
2. The allegation was that GNS was favoured in the award of a security services contract by Transnet Freight Rail ("TFR") a division of Transnet SOC Ltd. The value of the contract awarded to GNS was initially R18, 933, 120.00 for a period of 12 months, commencing on 1 November 2007 to 31 October 2008.
3. The said contract was extended from time to time and was finally terminated on or about 10 January 2010 at the instance of Transnet.
4. As at the date of termination Transnet had paid R95, 691, 368.80 to GNS for security services provided in terms of the agreement and its extensions.
5. It is worth noting that GNS later became known as Abalozi Risk Advisory Services (Pty) Limited ("Abalozi"). Therefore GNS and Abalozi is one and the same company.
6. Due to the seriousness of the allegations made regarding the GNS contract, Transnet instructed its internal auditors Ernst and Young to conduct an investigation into the allegations.



Ndiphiwe Silinga, General Manager, Legal Services



7. The Ernst and Young investigation found reasonable cause to believe that GNS had misrepresented its capacity, available resources, experience and services undertaken by it for Transnet. The investigation also found reason to believe that there was collusion and fraud by GNS and some TFR employees.

**A copy of the Ernst and Young ("E & Y") report is enclosed herewith marked "A".**

**The Civil Claim:**

8. As a result of the investigation conducted by E & Y some TFR employees went through disciplinary processes and were found guilty of various transgressions relating to their respective roles in the GNS security contract and some were dismissed.
9. Transnet was advised to institute a civil claim against GNS for the restitution of the sums paid to the latter in the sum of R95, 691, 368.80 on the grounds of, inter alia, misrepresentation, breach of Public Finance Management Act in awarding the contract and of non-compliance with the Private Security Industry Regulation Act.
10. Summons was issued in October 2010 in the South Gauteng High Court under case number 43494/10 and pleadings have since closed, however no application for the allocation of a trial has been lodged yet.
11. GNS/Abalozi also filed a counterclaim in the sum of R487, 682, 346.00, based on various causes of action.

**Pleadings in that matter are contained in the enclosed lever-arch file. To plaintiff's Particulars of Claim is annexed a copy of the Agreement between Transnet and GNS as well as the parties' Discovery Affidavits.**

**Further Documentation:**

12. The following documentation is also handed over for consideration;
  - 12.1 Two store-away cases containing the Defendant's (GNS/Abalozi) Discovered Documents marked Files 1 to 13; and
  - 12.2 Two store-away cases containing Plaintiff's (Transnet) Discovered Documents (from items 1-130)
13. Please note that neither Transnet nor its attorneys of record in the civil matter is keeping copies of these documents. Therefore whatever has been handed over should be kept safe as same may be used in the further conduct of this litigation.

Ndiphiwe Silinga, General Manager, Legal Services



### **Recent Developments:**

14. During January 2013, Mr Caesar Mtetwa, the General Manager Rail Network, Transnet Freight Rail wrote a memorandum to Ms Nkuli Mabandla, the Transnet Group Executive, Legal Services, advising of the performance by GNS in rendering security services to Transnet and about the reasonableness of their costs thereof.

**A copy of aforesaid memorandum is enclosed herewith marked "B".**

15. You will notice that the memorandum by Mtetwa marked "B" totally contradicts the report by Ernst and Young marked "A" in so far as the value received by Transnet from the services rendered by GNS is concerned and the reasonableness of the cost thereof.
16. As a result of the seriousness of the contradictions between the two reports Transnet found itself in a situation where it is unable to take a decision on the way forward.

### **Instructions:**

17. You are hereby instructed to conduct an independent investigation with the purpose of advising Transnet whether, from the security services rendered by GNS/Abalozi to TFR in terms of the Agreement dated 04 June 2008 and subsequent extensions thereto, Transnet received value for money. In other words considering the services that were allegedly rendered by GNS/Abalozi, was the payment of the sum of R95. 691, 368.80 justified.
18. Your investigation should not be limited to the documentation you have been instructed with, but shall include;
- 18.1 Asking for any further information, documentation or material that you may deem relevant for purposes of your investigation; and
- 18.2 Interviewing any of the persons and/or Transnet employees that may have been involved at any stage of this contract including though not limited to those who were involved in the investigations following anonymous tip-offs.

### **Conclusion:**

19. Please acknowledge receipt of these instructions and advise whether you accept same. If so, please proceed as instructed.

Ndiphiwe Silinga, General Manager, Legal Services



20. Do not hesitate to contact the writer hereof should you seek clarity or a need arise.

Kind Regards

A handwritten signature in black ink, appearing to read "Ndiphiwe Silinga".

**Ndiphiwe Silinga**

General Manager: Group Legal

47<sup>th</sup> floor, Carlton Centre

Tel: 011 308 2350

Date: 18/12/2013





**"GG"**

HARRIS  
NUPEN  
MOLEBATSI

1st Floor, 25 Rudd Road, Illovo, Johannesburg, 2196  
P.O. Box 411268, Craighall, Johannesburg, 2024  
info@hnmattorneys.co.za | www.hnmattorneys.co.za  
Tel +27 [0] 11 017 3100 | Fax +27 [0] 86 684 9837

Your Reference: Ms PK Mabaso/vj/#2899334v1

Our Reference: Ms Molebatsi/ Mr Charles Nupen

31 March 2014

Ms P Mabaso  
Werksmans Attorneys  
155 5<sup>th</sup> Street  
Sandton 2196

Dear Ms. Mabaso,

**Abalozi Risk Advisory Services/Transnet**

Your letter dated 4 March 2014 addressed to Ms Molebatsi and Mr Nupen has reference.

The writer has since receipt of said letter left several messages at your office requesting that you contact him in order to set up a meeting to address its contents. We were of the view that the issues raised by you could best be addressed through a face to face engagement than through formal correspondence.

On one occasion when the writer sought to contact you he was informed by your assistant that you were overseas and that he should approach you by email which he duly did.

The messages left by the writer and his email to you have gone unanswered, and we are at a loss to understand the reason for this.

Nevertheless, in the circumstances, we have decided to address the queries raised in your letter through this correspondence.

The brief we have received from Group Legal Transnet enjoins us to investigate whether Transnet received value for money in relation to the discharge by your client of its obligations in terms of the Agreement dated 4 June 2008 and subsequent extensions thereto. The ambit of our investigation does not include whether the said Agreement was lawful or valid, which we understand is at issue in the pending litigation proceedings to which you refer. Whether the outcome of the investigation will have a bearing on the litigation will be for Transnet to decide.



We seek the following information from your client:

- Its modus operandi in rendering services to Transnet with particular reference to the roles and responsibilities undertaken by GNS Risk Advisory Services, Nayle Outsourcing and Revert Risk Management Solutions.
- For services subcontracted by your clients to other service providers in delivering on its contract to Transnet:
  - Details of the period for which these sub-contractors were engaged to provide services
  - Details of the nature of the services provided by these subcontractors
  - Copies of reports submitted by these subcontractors to substantiate their invoices
  - Copies of the invoices received by your client for services provided by these sub-contractors
  - Details of the number, functions and qualifications of personnel employed by these subcontractors that were deployed in rendering services, under your client's contract, to Transnet.
  - The specific sites to which such personnel were deployed and with what responsibility
  - The timesheets for the personnel so deployed by the subcontractor
- For services rendered directly by your clients own employees:
  - The number, functions and qualifications of personnel deployed in rendering services to Transnet
  - Copies of the employees ID documents
  - Copies of the employees employment contracts
  - Copies of the employees registration status with any security services regulatory organisations
  - Copies of the employees IRP 5 tax certificates for the years that they were employed and deployed to provide services on the Transnet contract. The specific sites to which such personnel were deployed and with what responsibility. The timesheets and proof of monthly payments to each of the personnel so deployed
- Your client's own assessment of the impact it made on combating crime, including reducing cable theft during the period it rendered service to Transnet, backed up by documentary evidence and

- Details of any offenders brought to trial where evidence gathered and investigative work done by your client was used by the state in the prosecution and details of the success rate of prosecution of these offenders. (Please provide the case numbers of each instance)

We can confirm that Transnet has made available to us pleadings in the pending litigation as well as the documents discovered by both parties to the litigation. We might add that certain documentation that we consider necessary to pursue our investigation and which is alluded to above, does not form part of the discovered documents.

The report we understand is to be made available to, and considered by, the Transnet Board.

We can confirm that at no stage have we sought direct contact with your client nor do we intend to do so.

We look forward to hearing from you in relation to our request at your earliest convenience.

Yours faithfully

**Charles Nupen**

**HNM Attorneys**

*This letter has been electronically transmitted with no signature*



"HH"



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John Pearson

John Pearson and Associates (Pty) Ltd

142 Smit Street

Fairland 2195

Johannesburg.

9 April 2014

Dear Sir,

**Re: Abalozi Risk Advisory Services (Pty) Ltd Formerly known as General Nyanda Security Risk Advisory Services (Pty) Ltd. (GNS/Abalozi)**

Our meeting this morning has reference.

Please find accompanying this brief, copies of the following documents:

1. Letter of Instruction to Charles Nupen from Transnet;
2. Internal Audit Report from Ernst and Young;
3. Contract between GNS/Abalozi and Transnet and extensions thereto;
4. A representative sample of monthly and special reports submitted by GNS/ Abalozi to Transnet; and
5. A memo from Mr. Caesar Mtetwa General Manager Rail Network Transnet Freight Rail.

You are hereby requested to study the reports referred to in Clause 4 above, and render an opinion, from a security expert perspective, whether such reports, which purport to represent work undertaken pursuant to the contracts, referred to above, have the ring of authenticity about them.

We would ask that in your assessment of the content of the reports, and on the basis of the information presented to you whether they reflect, as monthly or special reports to client, an account of work which they contracted to undertake with reference to the following:

1. Do the reports reflect that services were provided?
2. Would the services as set out in the reports, represent in your opinion what one might expect to have been provided given the mandate?

3. Would the level of reporting in terms of the detail of information provided represent in your opinion what one might expect to have been provided in reports of this nature? If not please elaborate.
4. Do the reports reflect an account of services which, if rendered, would represent in your opinion contractual compliance? If not please elaborate.
5. On the basis of the content of the reports, can you identify any apparent material gaps in the services that the service provider was mandated to provide? If so please elaborate.
6. Would you please render an opinion representing an overall assessment of the services rendered based on the content of the reports?

You will note from the way in which the questions above have been framed, we cannot and do not expect you to pass opinion on whether the services were actually rendered as you are clearly not in a position to do so. Your opinion will assume that the work as reflected in the reports was undertaken unless the content can reasonably be interpreted otherwise.

We also ask that you confine your opinion to the content of the reports in relation to the mandate given to the service provider. All other documentation provided to you is for information purposes only.

Please also find attached a confidentiality and non-disclosure agreement that we ask you to sign and return to us.

We would anticipate at least a progress report by close of business on Friday. We would be happy if this were to take the form of a meeting with us.

We confirm also that the hourly rates quoted to us namely R1450 and R850 per hour for yourself and your colleague is acceptable and that you will render the service under your associate company Peritus.

Yours faithfully,



Charles Nupen



"I"

*Without Prejudice of Rights*

25 April 2014  
P0137/14  
J Pearson/RN/as

Harris Nupen Molebatsi Inc.  
1<sup>st</sup> Floor  
25 Rudd Road  
Illovo  
Johannesburg  
2196

Charles Nupen

E-mail Address: [Charles@hnmattorneys.co.za](mailto:Charles@hnmattorneys.co.za)

Dear Sir,

**RE: Transnet / Abalozi Risk Advisory Services (Pty) Ltd formerly known as General Nyanda Security Risk Advisory Services (Pty) Ltd (GNS/Abalozi)**

We received instructions to conduct an assessment of the content of various reports compiled by Abalozi Risk Advisory Services (Pty) Ltd, formerly known as General Nyanda Security Risk Advisory Services (Pty) Ltd (hereafter referred to as GNS/Abalozi) regarding Transnet security.

#### **ASSESSMENT**

We received and perused the following electronic batch of documents:

- Transnet Letter of introduction to Charles Nupen

- Internal Audit Report from Ernst & Young
- Contract between GNS/Abalozi and Transnet and extensions thereto
- The following representative samples of monthly and special reports submitted by GNS/Abalozi to Transnet
  - Monthly Report – March 2008
  - Monthly Report – April 2008
  - Consolidated Monthly Report – May 2008
  - Screening Report – June 2008
  - Research Report – July 2008
  - Research Report – August 2008
  - Monthly Report – August 2008
  - Monthly Report – September 2008
  - Monitoring and Evaluation Report – October 2008
  - Hotspot Report: 18 – 21 November 2008
  - Hotspot Monitoring Consolidated Report – November 2008
  - Monthly Report – November 2008
  - Monthly Report – December 2008
  - Monthly Report – January 2009
  - Monthly Report - February 2009
  - Monthly Report – March 2009
  - Monthly Report - April 2009
  - Monthly Report – May 2009
  - Monthly Report – June 2009
  - Monthly Report – July 2009
  - Monthly Report – August 2009
  - Monitoring and Compliance Report – August 2009
  - Monthly Report – September 2009
  - Monthly Report – October 2009
  - Monthly Report – November 2009
  - Monthly Report – December 2009
- A memo from Mr. Caesar Mtetwa, General Manager Rail Network Transnet Freight Rail
- List of arrests.



We have studied and perused the contents of the above mentioned reports and are now in a position to render the following opinion:

#### GENERAL FINDINGS

- The format of the reports includes an "Introductory Overview" paragraph 1 with a sub-paragraph 1.1 "Background to the Project". We have conducted a plagiarise test (refer [www.grammarly.com](http://www.grammarly.com)) which indicated that the contents were plagiarised from an unknown source.
- It was noted that screening and vetting was only conducted twice as reported in the GNS June 2008 and July 2008 reports. No screening and vetting of service providers were conducted after July 2008 and none conducted for 2009.
- There were only two (2) research reports submitted, one in July 2008 and the other in August 2008. Both these reports indicated that research was not conducted correctly. This was not an exact, accurate and precise examination. See our comments on pages 4, 5 and 6 of this report.
- The March 2008 report makes mention of high level Transnet employees involved in container and cable theft and that they form part of a syndicate. There are no facts in the report supporting their findings and no mention of or on what basis the employees are linked to the syndicate. None of the subsequent reports dealt with this statement again. There is no follow up on this statement. It appears that this was not dealt with ever again.
- Compliance Monitoring of Security Service Providers was not conducted efficiently. It is not clear whether service providers complied with service level agreements and their contractual obligations were unclear.
- Reports contained unsubstantiated findings and conjecture.
- There were no follow up reports on Court cases and the list of arrests simply stated that cases were ongoing. It is therefore unknown whether GNS investigators assisted in the prosecution of arrested suspects as contractually obliged to do. The reporting on criminal cases and arrests are poor.
- Most reports indicated that the investigators acted on information which they received from telephone calls from Transnet alerting them to an incident.

- There is no indication in the reports that GNS investigated incidents separately and thoroughly, and there was no detailed report on each and every incident.
- Each incident should have been investigated along the following lines.
  - Notification of Loss
  - Open File and allocate reference
  - Contact Regional Manager to arrange meeting.
  - Proceed to premises and obtain background information on the loss
  - Arrange to be taken to the site of the incident
  - Locate witnesses and record statements
  - Record photographs
  - Obtain CCTV footage if available (compare and analyse with data base)
  - Conduct enquiries in the area to see if anyone witnessed the incident
  - Activate informers
  - Where identifiable equipment is involved, circulate information to try and get a recovery
  - Establish if the case was reported to the police
  - Obtain details of police station and case reference as well as contact information for the Investigation Officer
  - Proceed to the Police Station and obtain a copy of the police docket.
  - Peruse statements and compare them to those recorded from witnesses to ensure that the facts are the same.
  - Determine who was on site and conduct criminal backgrounds checks as well as a Consumer Trace which will provide information on financial status.
  - Follow up any leads that could result in arrests and recoveries being made
  - If arrests were made interview the suspects to identify the group and where they have disposed of the stolen property
  - Arrange to visit the receivers premises with the police to try and affect a recovery
  - Assist with the preparation of the docket for presentation to the Public Prosecutor and in turn the court to gain a conviction
  - Look at security arrangements on site and report on steps that can be taken to improve the security

- Compile a report and submit it to management for further instructions.
- The Monitoring and Evaluation Reports did not provide Transnet with security objectives and no new procedures were introduced. It is unknown how and to what level GNS engaged with the different Security Providers.
- Throughout the 2008 / 2009 reports, the same issues were addressed and reported on and there is no indication that service levels improved.
- This was a National Contract and it is clear from reading the reports that GNS mainly focused their investigations in the Gauteng area.
- There is no mention made in the reports to the Eastern Cape Province. There is no information on the investigations in the Eastern Cape area. The monthly arrest reports do not reflect any cases or arrests for Eastern Cape Province, Free State, Northern Cape, Limpopo or Mpumalanga. During the 2008 period only one (1) case was reported in another province, which was in Newcastle. In 2009 only three (3) cases were reported for the Western Province.
- There is no indication in any of the reports that Syndicates or its members have been identified in other provinces. There is no profiling of these syndicates or their members.
- Reports stated that information has been analysed based on information received from sources and investigators and therefore GNS can make certain assumptions. We can safely assume ourselves that no formal analysis has been conducted. There is no form of analysis required for making assumptions, which comes down to general knowledge.

#### **ASSESSMENT OF REPORTS - 2008**

##### **Monthly Report – March 2008**

- Page 11 & 12: When compared with the List of Arrests, dates and names do not correspond. The List of Arrests refers to 06/03/2006 while the report refers to 05/03/2008. According to the report a total of five (5) arrests were made. The List of Arrests only refers to three (3) arrests. Although the report makes mention of a bribery case which was also registered, the List of Arrests do not reflect this.
- Page 13 & 36: The address is mentioned on two (2) different pages. The facts do not correspond. Different owners of the property are mentioned and different scrap metal



owners are mentioned. It is unknown which part of the information is factually correct.

- Page 19: It is unknown if the suspect was criminally charged although a CAS number is mentioned. The suspect mentioned does not appear on the List of Arrests and the CAS number is not recorded on the List of Arrest either.
- Page 31: The CAS number mentioned is an OB number and not a Case Number.
- Page 37; 38 and 39: The visiting and reporting on the scrapyards identified does not contribute to anything and when reading the report it appears to be a fruitless operation with not much achieved. It is simply the identification of scrapyards' names and addresses.
- Page 43 and 44: This section deals with high-level Transnet employees involved in Container and Cable Theft. The report further makes mention that these employees are part of a syndicate and explains at length how syndicates operate. There are no facts in the report supporting these allegations and no mention on what basis the employees are linked to the syndicate. It is noted that the subsequent reports do not deal with this issue again and do not state whether this syndicate was infiltrated successfully.
- Page 53 – 73: This section of the report deals with monitoring and evaluation of the Redan Station. Page 62 again deals with the same house as mentioned on pages 13 and 36. It is a contradiction of the facts mentioned on page 13. The report makes mention of different issues, which are not linked to those mentioned on pages 13 and 36.

#### Monthly Report – April 2008

- Par 2.1 Page 9: This paragraph deals with incidents at City Deep during April 2008 and describes various daily incidents where containers were opened and contents stolen. There is no mention of any Police Case Numbers relating to these incidents.
- Par 4: This paragraph deals with Monitoring and Evaluation at various stations in the Gauteng and North West areas. It is unclear how GNS verified and confirmed PSIRA and grading of the guards as there is no mention made of this in the reports. Where guards were armed, no mention was made of their Firearm Licenses and whether these firearms were recorded and signed for in a Firearm Register as required.

In general this report was good and GNS admitted and noted in their report their own weaknesses relating to reporting, operational context and intelligence gathering. In this report GNS committed

themselves to streamline the reporting process and to increase their efforts.

#### **Consolidated Monthly Report – May 2008**

Par 4.2.1, Page 33; 34 - Train Robbery at Rondebult: The names of the arrested suspects differ from those recorded on the List of Arrests. The report does not mention the Police Case Number. The SAP 13 number recorded on the report does not appear on the List of Arrests. The recovered exhibits are not recorded on the List of Arrests.

Par 4.2.2, Page 34 – Train Robbery near Balfour: There is no Police Case Number reported. This is similar to pages 36; 37 and 38.

This report also deals with a detailed assessment of risk, threats and other problems Transnet faced. According to the report a physical assessment was conducted at stations situated in KZN, North West and Limpopo Provinces.

When reading the report, we noted the following which is of concern:

- We got the distinct impression that the photographs attached to the report and relating to the various stations reported to have been inspected, were taken from a moving vehicle, suggesting that they were not physically visited.
- The photographs were taken from a distance and in one of the photographs; we clearly noticed the side view mirror of the vehicle from which the photographs were taken. See page 92.
- We are of the opinion that a physical security assessment could not have been conducted. There are no substantiating photographs where, for example, a description is given of the substation. See Page 96. Photographs are clearly taken from a distance and the angle clearly reflects this.

#### **Screening Report – June 2008**

The report deals with the screening of Security Guards.

- There is no proof of cross-border checks being carried out.
- PSIRA checks can be done on-line at no cost and this is public information. We are therefore of the opinion that this exercise could have been conducted on a monthly basis. Only 52 guards were checked nationally, mostly from the Gauteng area and the reporting on the guards' financial status and criminal records were meaningless. A criminal case being withdrawn against an individual does not constitute a criminal record.
- A procedure should have been in place whereby GNS, by means of Transnet and the Security Provider contracted by Transnet, had access to data pertaining to the security guards. This would mean that GNS could have verified data of guards in a cost-effective manner.
- This is also the first report covering the screening of guards. This should have been conducted on a regular and ongoing basis.
- The Analysis conducted in Par 3 is pure conjecture and baseless. The same argument could be presented that all domestic workers are underpaid and are therefore thieves.

#### **Research Report – July 2008**

The level of report writing is poor and not what one would expect from reports of this nature. Sentences are poorly phrased and it is difficult to establish the gist of the report. The writer of the report gave too much information about the location of informal settlements and this is not relevant. Unverified comments are made in the report and subjects are not identified. It cannot be established if informers exist, as there is little follow up on what they were tasked to do.

#### **Research Report – August 2008**

The report is written in a similar style as the Research Report of June 2008. Sentences are poorly phrased.

The information provided on pages 6 and 7 are baseless and purely speculation. The follow up is poor and the Police Case Number reported does not exist.

There is no purpose to the mentioning of Shebeens. One of the photographs attached on page 34



of the report is that of a group of European females and males sitting at a table and drinking beer. We cannot establish if the writer of the report is insinuating that European people consuming alcohol are also involved in cable theft or whether this will lead to their involvement in cable theft.

The Research Reports for July 2008 and August 2008 cannot be regarded as an exact, accurate and precise examination. According to the July 2008 report trained Researchers were involved. The speculation and baseless information provided indicated that this was not the case. The intentions of the reports were supposed to provide Transnet Management with enough information to make informed decisions.

#### **Monthly Report- August 2008**

On the List of Arrests pertaining to Benoni CAS 471/08/2008, six (6) suspects were recorded as the accused on 2008/08/28.

- By conducting checks we have established that this Case Reference Number relates to a shoplifting incident on the SAPS CAS system, and not one of possession of stolen property as recorded on the list.
- We further established that the case was withdrawn on 2008-10-02.
- The Case details reported by GNS are false.
- We noted that the August report does not make mention of this case or any update on this case.

#### **Monthly Report – September 2008**

Par 3.1 deals with Project Ndaba and describes arrests and recoveries made on container theft.

- Page 10 and 11 provides details on the SAPS Case Number and arrested suspects. By conducting a check, we have established that Alberton CAS 1073/10/2008 as referred to on the List of Arrests does not exist on the Police CAS system and is a false Case Number. The report lists the Case Number as Alberton CAS 1073/09/2008.
- The report is therefore not authentic.

Pages 16 and 17 deals with the arrest of five (5) suspects. The Case Number is reported as Springs CAS 973/09/2008. We have established that the Case Number reported by GNS is false and this is actually a Contempt of Court case registered with the SAPS. The List of Arrests for this period does not mention what type of case was registered with the SAPS, but from reading the report the suspects were allegedly found in possession of equipment used when stealing / cutting cables.

We further noted on the List of Arrests that two (2) Case numbers were provided as Brackendowns CAS 431/09/2008 and Brackendowns CAS 432/09/2008. The case details were provided as Possession of Stolen Property and 102 kg of Aluminium and 28 kg of catenary cable were recovered respectively. The report however makes no mention of this arrest or recovery. We established that these two (2) cases do not exist on the SAPS CAS system and are false. We further established that over the period of this report, Brackendowns SAPS did not record such a high monthly case load.

#### **Monitoring and Evaluation Report – October 2008**

This report deals with the monitoring and evaluation of stations in the Free State Province. The report is inconsistent and the assessments conducted are poor.

- The photographs attached to the report are taken from a distance and some are unclear (See comments made relating to May 2008 on page 2 of this report).
- In instances where deficiencies are described relating to fencing and signage, no photographs were attached.
- Comments made relating to vegetation where the station is clearly non-operational added no value to the report (see page 12).
- Again the writer speculated when referring to scrap metal dealers and the comments made were baseless and unfounded. See pages 19; 22; 25; 50 and 51.
- We can safely assume from the contents of the report that some of the stations were not physically inspected. Photographs attached clearly prove this.

**Hotspot Report: 18 – 21 November 2008**

Selected Stations (21) between Mpumalanga and Gauteng were inspected and the report stated that the purpose of the assessment was to provide Transnet with a detailed risk and threat analysis. This objective was clearly not achieved by submitting a report of this poor quality.

- The report is watered down. In most instances stations were described in three line sentences.
- The assessments were poor.
- No photographs were attached (see the monitoring and evaluation reports conducted for May 2008 and October 2008). Surely the readers of this report would need to look at photographic evidence to form an opinion on the state of the stations; fencing; lighting; building maintenance, etc. There is no supporting evidence for their claims.

**Hotspot Monitoring Consolidated Report – November 2008**

- 161 Stations were visited between Mpumalanga and Gauteng with the same objectives as mentioned in the Hotspot Report dated 18 – 21 November 2008.
- Only 18 photographs were attached to the report.
- This report did not achieve the objectives and neither is it detailed enough for anyone to make decisive decisions relating to risk and threat.
- There is a lack of supporting evidence.

**Monthly Report – November 2008**

Paragraph 4 of the report deals with Information Gathering. Pages 4 to 32 provide the reader with names and details of alleged syndicate members.

- None of the information is verified.
- There is no indication of any follow up being done.
- As the report is submitted to the client, no information should be withheld due to its “sensitive” nature.



- There should at least be an indication of the positive identification of the vehicles mentioned, as well as the suspects' names, ID numbers, profiles of suspects and their vehicles. This should have been provided to the client.

Paragraph 7: The heading states that this is Polygraph Test Results.

- The examiners reports were copied and pasted into the report.
- These are Voice Stress Tests and not Polygraph Examinations.
- There is no explanation as to why the tests were conducted, to which incident it pertains and what the final outcome of the investigation was.
- There is no indication what action was taken against those who have failed the tests.

#### **Monthly Report – December 2008**

Par 4.1.3, pages 29 – 30 deals with an Intelligence Report and the Identification of Syndicates in Gauteng.

- This is a repeat of the information provided in the November 2008 Monthly Report. See Par 4, page 4- 32.
- No follow up on the information has been conducted.

There is no follow up mentioned relating to the Voice Stress Tests that were conducted in November 2008.

It was noted that reports for 2008 includes a heading "Assumptions" and that information received from sources and investigators have been "analysed".

- The assumptions made are all conjecture.
- There is no form of analysis required for making assumptions or general knowledge.

**ASSESSMENT OF REPORTS - 2009**

The **January; February; March and April 2009** reports are easily readable and understandable and it was noted that the contents of these reports indicated good successes. The quality of the reports improved from those provided for 2008. New clamping methods were also introduced to decrease container theft. Reporting on Service Provider Monitoring improved. The reports are what one would expect from a Service Provider given the mandate. They have a ring of authenticity about them.

**Monthly Report – May 2009**

This report deals with Compliance Monitoring. Security Service Providers were visited at various Transnet facilities to establish compliance. The reporting format on Compliance Monitoring differs from the previous two months' reporting and written in a different format.

- Although PSIRA and grading are mentioned in the report there is no indication how PSIRA registration and grading was verified. No documentation is attached to the report.
- There are no photographs attached to the report of the guards and where deficiencies were identified, photographs should have been attached to indicate that the guards are not adequately equipped.
- By reading this report it is unclear if the relevant service providers complied. There is no mention of the service level agreements and contracts. It is unknown if the different security companies employed armed guards and whether it is part of the contract that these guards should be armed.
- Where guards were armed, firearm licenses were not checked and verified. There is no mention of a firearm register and if the firearms were being signed out.
- The deficiencies identified did not concur with the security equipment with which the guards were issued.

**Monthly Report – June 2009**

This report deals with various scrap metal dealerships that were identified as dealing in stolen

Transnet cables / copper. The report is detailed and photographs were attached.

#### **Monthly Report - July 2009**

This report deals with Compliance Monitoring. Security Service Providers were visited at various Transnet facilities to establish compliance.

- This report is similar to the report submitted in May 2009.
- The report is more detailed and photographs attached.
- On page 15 of the report there is no mention made of the Case Number reported or OB reference number. There is no mention made of the security company's Incident Report.
- Conclusions and recommendations made do not tie up or relate to each other.
- As there is no mention made of the Service Level Agreements between Transnet and the different Security Companies, it is unknown to the reader of the report whether these service providers complied with the Service Level Agreements.

#### **Monthly Report – August 2009**

The report is informative and the reader of this report gets the impression that a lot of work has been done and good successes were achieved. However, page 51 and page 52 of the report contains a criminal profile and criminal record which are both official SAPS documents from the SAPS Criminal Record Centre. There is no explanation in the report why this has been scanned in to the report and whose criminal record and profile this relates too.

#### **Monitoring and Compliance Report: August – 2009**

The report deals with Monitoring and Compliance of Service Providers in the Northern Cape and the western Johannesburg area.

It is the first report of this nature where guards' firearms and permits have been properly inspected and commented on.



**Monthly Report – September 2009**

The report deals mostly with search operations at various scrap metal dealers in the De Wildt and Western Cape Area.

The SAPS CAS numbers provided on pages 35 – 42 and pages 45; 47; 48 and 40 are insufficient as there is no indication at which Police Stations the cases are registered at.

**Monthly Report – October 2009**

The report mainly deals with search operations at scrap metal dealers in the Western Cape; Gauteng; Mpumalanga and North West Province.

**Monthly Report – November 2009**

Par 3.4.9 of this report deals with methods utilised by GNS investigators when searching crime scenes involving cable theft and included documentation and pro-forma statements to be utilised by the investigators. Offences in terms of the Second Hand Goods Act were also copied into the report as a guideline to GNS investigators.

The Pro-Forma Statement to be utilised by the GNS investigators had the SAPS logo copied and pasted on to the first page of the statement. This does not make it an official Police document and is illegal in terms of the Police Act. It follows that reference is made on what to include in a standard affidavit, whereas the standard statement should contain the elements of who; what; where; when and why. Reading an affidavit in the manner GNS have instructed their investigators to follow, would be confusing to anyone reading the contents.

The logo of the SAPS was registered on 31 October 1995 at the Bureau of Heraldry. In terms of Section 5 (a) of the Act on Heraldry, Act 18 of 1962, written permission must be obtained from the National Commissioner of the SAPS to use the logo.

**Monthly Report – December 2009**

This report deals with Operation Clamp Down and according to the report it was focused on the western Johannesburg area (Page 12).

- The report actually deals with the Brits, Pretoria and East Rand area. Only two (2) scrap metal dealers in Vredefort and Mayfair are mentioned.
- Page 14; 15: No CAS Numbers are mentioned.
- Page 26, par.3.2.7: There is no evidence that this incident took place. Two (2) photographs of an unidentified scrap metal dealership are attached. There is no mention of the registration number or photographs of the TFR LDV entering the premises and no feedback again on this operation. The operation was conducted poorly and all indications are that this was not properly planned and executed.
- Page 32: Par 3.2.9 deals with the arrest of the owner of a scrap metal dealership situated in Brits. Brits CAS 231/12/2009 refers. There is no postponement date, and neither is there any feedback on the outcome of this case. We established that the case never went to Court and was withdrawn by Prosecutor.
- Page 20: Heilbron CAS 31/12/2009 was withdrawn. As there is no further feedback on the outcome of the case by GNS, it is unknown what happened with the confiscated vehicles and if the Asset Forfeiture Unit was indeed successful in their application to forfeit the confiscated vehicles to the State. What happened to the syndicate leader? No feedback regarding whether the syndicate was ever infiltrated and leaders charged was given.

**POLICE CASE REFERENCE NUMBERS**

We randomly checked and verified the following CAS Numbers and arrests:

- Dawn Park CAS 157/08/2008: Withdrawn
- Dawn Park CAS 158/08/2008: Withdrawn
- Column 40 page 40; column 41; 42; 43 Page 41: Case Numbers incomplete – no station provided.
- Benoni CAS 471/ 08/2008: Shoplifting and not related to a Transnet incident.

- Crystal Park CAS 268/09/2008: Withdrawn. Arrested suspect mentioned on list differs from suspect on SAPS CAS system.
- Brackendown CAS 431/09/2008: CAS number false. (In 2008 this Station did not have cases this high reported on their system)
- Brackendown CAS 432/09/2008: CAS number false. ( In 2008 this Station did not have cases this high reported in their system)
- Springs CAS 973/09/2008: CAS number false. Contempt of Court and not related to a Transnet incident.
- Alberton CAS 1073/10/2008: CAS number false. This CAS number does not exist on the system for Alberton SAPS.

Having made an assessment on the contents of the reports and on the basis of the information presented to us, we are in a position to address the questions as requested in your brief dated 9 April 2014 as follows:

1. Do the reports reflect that services were provided?

Yes, partly. Monthly reports reflect that Security Service Providers as well as Transnet sites were visited, monitored, evaluated and assessed by GNS investigators. Photographs that were attached to the reports reflected that GNS must have visited these Transnet stations, which enabled GNS to obtain photographic evidence. However, in the consolidated monthly report dated May 2008, the report stated that a physical assessment was conducted at stations situated in KZN, North West and Limpopo provinces. The photographs attached to the report were a clear indication that a physical security assessment could not have been conducted. Photographs were taken from a distance out of a moving vehicle. The side view mirror of the moving vehicle reflects in one of the photographs on page 92 of the mentioned report.

Criminal Case Numbers and arrested suspects' details were provided in the monthly reports. However, we could not find evidence that GNS cases were investigated in a manner one would have normally expected, neither could we find any evidence that Prosecutors were assisted in the investigation of these cases. The monthly reports and List



of Arrests does not provide feedback on the status of the criminal cases and whether they were indeed finalised. In the consolidated monthly report dated May 2008, the names of the arrested suspects on pages 33 and 34 differ from those names recorded on the List of Arrests and no SAPS Case Number is mentioned. Recovered exhibits are also not recorded on the List of Arrest.

Although screening of security guards were conducted as per June 2008 screening report, there was no evidence or documentation attached to the report that cross-border checks were done. It is further common knowledge that PSIRA grading can be checked online and is public information. Screening and vetting was only conducted twice in 2008 and according to the reports at our disposal, there was no screening and vetting conducted by GNS for the period of 2009.

Research reports were submitted by GNS for July 2008 and August 2008. There were no research reports available for any other period in 2008 and none for 2009. Based on the contents of the research reports, research was not conducted in an accurate, exact and precise manner and it would not be possible to define trends and tendencies on this information alone. Both reports were poorly phrased and speculative, baseless information was provided.

The contents of the 2008/2009 reports indicated that GNS focused their efforts in the Gauteng Province and neglected other provinces. This is clear when the List of Arrests and Case Numbers were perused.

Analysis provided were pure conjecture, speculation and baseless. The June 2008 Screening report, Par 3, is a good example of this.

**2. Would the services as set out in the reports, represent in your opinion what one might expect to have been provided given the mandates?**

No. The reports of 2008 and 2009 had similar content and the same issues were addressed. There was no feedback or progress provided on outstanding cases. The Monitoring and Evaluation Reports were inconsistent throughout 2008 / 2009 and these

reports made no mention of any new procedures introduced and whether Service Providers complied with service level agreements between themselves and Transnet.

Reports were non-specific and other reports were vague. We could not find evidence that internal involvement of Transnet employees were adequately addressed, although a March 2008 report made mention of Transnet employees who formed part of a syndicate involved in container and cable theft. In none of the subsequent reports was the matter ever raised again.

The contents of the reports were more often than not conjectured with baseless opinions. There was never any indication in the reports that any of the intelligence based information given was properly profiled. There was also no profiling on any of the suspects provided in the reports.

**3. Would the level of reporting in terms of the detail of information provided represent in your opinion what one might expect to have been provided in reports of this nature? If not please elaborate**

No. The Monitoring and Evaluation Reports did not contain security objectives and the contents of these reports did not reflect new procedures that were introduced by GNS.

The level of analysis was poor and based on information received from investigators and sources. GNS stated in reports that they made assumptions based on this information, which, in our opinion, do not require a formal analysis.

The quality of photographs that were attached to the reports was poor. This was clearly evident in the May 2008 Consolidated Monthly Report, page 92. The October 2008 Monitoring and Evaluation Report relevant to the Free State Province had no photographs attached relating to fencing and signage deficiencies. Comments made of scrap metal dealers were baseless and unfounded.

The level of reporting in the Hotspot Report dated 18 – 21 November 2008 and the Hotspot Monitoring Consolidated Report dated November 2008 were extremely poor. In our opinion, Transnet would not have been able to form a detailed risk and threat analysis based on the contents of these two reports. Descriptions were provided in three line sentences with no photographs attached in the first Hotspot Report dated 18 -22 November 2008. Out of 161 Stations visited in the second report, only 18 photographs were made available. These reports did not achieve the objective, which was to enable Transnet to make decisive decisions relating to risk and threat nationally.

The Research Report of July 2008 was poorly written and phrased. It was difficult to establish the gist of this report. Unverified comments were made.

We were unable to establish through the reports whether informers did exist, as there was little follow-up in the reports on what the informers were tasked to do.

The November 2008 Monthly Report contained Polygraph Test results in Paragraph 7 of the report. This was in fact Voice Stress Analysis and the examiners' reports were copied and pasted into the report. The report further did not provide any explanation into the reason for the examinations or the steps taken against those individuals who failed the examination.

We noted that the level of reporting improved for the period of January 2009 until April 2009. It was also the first time we noted that GNS made an attempt to introduce new clamping procedures to decrease container theft. The Reporting on Service Provider Monitoring improved and the reports indicated good successes.

The Monthly Report dated June 2009 on scrap metal dealers was detailed and the August 2009 Monthly Report was interesting and informative to read, however pages 51 and 52 lacked an explanation as to why the official SAPS documentation were scanned into the report.



4. Do the reports reflect an account of services, which if rendered, would represent in your opinion contractual compliance?

No. We have perused the agreement between Transnet Limited and General Nyanda Security Risk Advisory Services and in our opinion, the contents of the GNS reports for the period 2008 / 2009 did not represent contractual compliance.

- This was a National Agreement and the contents of the reports reflected that GNS mostly concentrated their efforts in the Gauteng Province. The List of Arrests is clearly a reflection of this.
- The contents of the reports did not reflect assistance in prosecution, which was part of the scope of GNS work. This was also highlighted in a Transnet confidential evaluation report on Tenders.
- The 2008 reports reflected analysis based on assumptions and not in-depth research. We found many assumptions and baseless statements without any facts or evidence substantiating these statements made in the reports.
- We could not find evidence of any profiling, status or progress reports and monthly reports were merely a summary of the month's work. We could not find any evidence that there were incident reports for each incident nationally, as there were no referrals made to these.
- The reports further do not make mention of an Occurrence Book number and daily activity reports (see page 9, par 5, sub-par 5.1.2 of the Agreement).
- We could not find any evidence in the reports that new procedures were developed and introduced when Service Providers at Transnet Stations were evaluated.
- GNS did not take all measures necessary to comply with laws and regulations. The South African Police logo was copied and pasted into a document, which is in contradiction of the Act on Heraldry (Act 18 of 1962). Case numbers were reported falsely.

5. On the basis of the content of the reports, can you identify any apparent material gaps in services that the service provider was mandated to provide?

Yes. Police CAS numbers were falsely reported and did not exist. There was no feedback on criminal cases.

Action plans were not defined. The reports merely stated what the service providers' future plans were. There were no indication on how these plans were finalised and the effect these plans had on the crime statistics.

Where it was reported that scrap metal dealers paid an Acknowledgement of Debt by means of a J534, no case numbers were reported. This information could thus not be verified.

The reports did not provide any detail on surveillance conducted on Transnet's assets. There is no mention made of internal fraud or any suspicions of internal fraud. There are also no cases of this nature listed on the List of Arrests. This was a requirement in Par 4, sub-paragraph 4.1.5 of the Agreement between the Service Provider and Transnet Limited.

Security objectives and procedures were not evident in the reports. The reports assessed by us were monthly reports and did not reflect status feedback.

6. Would you render an opinion representing an overall assessment of the services rendered based on the contents of the reports?

- The level of report writing was poor. Specific mention should be made of the July 2008 Research Report and the August 2008 Research Report. Sentences were poorly phrased.
- In some instances it was difficult to understand the gist of the reports.
- Much of the contents of the reports were unverified, baseless comments and conjecture.
- Names and details of alleged syndicate members were not verified and information was withheld from the client. Profiles of the suspects were not provided to the

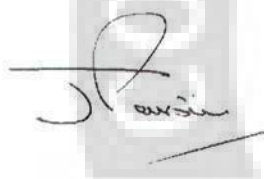
client.

- In our overall assessment of the 2008 and 2009 reports, we are of the opinion that GNS did not render a service according to the contractual agreement between themselves and Transnet Limited.
- We further could not find any evidence that cases and arrests reported by GNS lead to meaningful convictions, as none of the reports reflected this. Based on the contents of the reports no feedback was provided by GNS to Transnet on the outcome of criminal matters.

#### CONCLUSION

We now submit our report for your attention.

Yours faithfully,



**John Pearson**  
**MANAGING DIRECTOR**



"JJ"

**TRANSNET**



**REPORT TO TRANSNET SOC LIMITED  
("Transnet")**

**OUTCOMES OF AN INDEPENDENT INVESTIGATION INTO WHETHER  
TRANSNET RECEIVED VALUE FOR MONEY FROM SERVICES  
PROVIDED BY ABALOZI RISK ADVISORY SERVICES (PTY) LTD  
(ABALOZI) FORMERLY KNOWN AS GENERAL NYANDA SECURITY  
RISK ADVISORY SERVICES (PTY) LTD (GNS).  
(GNS/ABALOZI)**

**Submitted by**

**hm** HARRIS  
NUPEN  
MOLEBATSI

**30 April 2014**





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## 1. Executive Summary

### 1.1 The Brief

The brief instructed Charles Nupen of Harris Nupen Molebatsi Inc. (HNM) to conduct an independent investigation with the purpose of advising Transnet whether, from the services rendered by GNS/Abalozi to TFR in terms of an Agreement dated 04 June 2008, and subsequent extensions thereto, Transnet received value for money.

Charles Nupen constituted an investigation team of three lawyers from HNM including Basetsana Molebatsi and Thabiso Mhlanga.

In executing this brief we consulted with 17 people, read all the relevant documentation that we could access, and contracted with Auditpro and Peritus Commercial Forensic Specialists (Pty) Ltd to complement the legal team.

### 1.2 Definition of Value for Money

The definition of value for money we used is as follows: Value for money is achieved where the benefits of the outcomes resulting from goods and services delivered is greater than the input costs of those goods and services.

### 1.3 Three lines of Investigation

In answering the brief we pursued three lines of investigation:

- The degree of contractual compliance by GNS/Abalozi evident
- How do GNS/Abalozi costs compare to those of Combined Private Investigations cc (CPI)
- The impact of the services rendered by GNS/Abalozi

In summation our findings in relation to each of the above lines of investigation are as follows:

**Firstly**, based upon the findings of Peritus relating to the reports provided by GNS/Abalozi and other factors referred to in the body of the report we concluded that it had not rendered value for money when assessed against contractual compliance. However, accountability for such gaps in compliance cannot be laid entirely at the door of one of the contracting parties, as TFR security must bear some responsibility for its failure to manage the contract effectively.



**Secondly**, due to the differences in the geographical scope of the contracts, the services rendered, the levels of investment in the services provided for in the contracts, and differences in the management of the contracts pertaining to the two service providers we could not proffer an opinion in relation to cost comparison.

**Thirdly**, In relation to impact and effectiveness we concluded differently on the disaggregated services. On cable theft we concluded that value for money was rendered. On investigation of theft of customer goods at depots we could not proffer an opinion due to an inability to assess value for money from incidents of theft. With regard to security of train crew we concluded that in respect of the 2008 deployment of 16 resources by GNS/Abalozi there is no evidence to suggest that value for money was given. However, in relation to the 2009 deployment of 16 additional resources we concluded that value for money was given. On overall impact, bearing in mind the significance of both actual loss and consequential loss being averted in the area of cable theft as a result of GNS/Abalozi's intervention, we conclude that GNS/Abalozi, on balance, rendered value for money.

#### 1.4 Overall Conclusion

In terms of our definition of "value for money" our overall conclusion is that whilst value for money was obtained, on balance, through the impact of the services of GNS/Abalozi such value would have been enhanced if contractual compliance had been assured.





## 2. The brief

The brief is contained in a letter, annexed marked A, addressed to Charles Nupen of HNM from Ndiphiwe Silinga, General Manager Group Legal Transnet. The letter provides background, and details of a civil claim instituted by Transnet against GNS/Abalozi for restitution of monies paid to the latter pursuant to a contract to provide security services, and details of a counter claim by GNS/Abalozi against Transnet. It references reports by Ernst and Young, at the relevant time the internal auditors to Transnet, and from Caesar Mtetwa, the General Manager Rail Network Transnet Freight Rail (TFR), which draw different conclusions in relation to the services rendered by GNS/Abalozi.

We were instructed to conduct an independent investigation with the purpose of advising Transnet whether, from the services rendered by GNS/Abalozi to TFR in terms of an Agreement dated 04 June 2008, and subsequent extensions thereto, Transnet received value for money. In other words considering the services that were allegedly rendered by GNS/Abalozi, was the payment of the sum of R95, 691,368.80 justified.

It was made clear to us that our brief did not require from us a consideration of the lawfulness or validity of the contract entered into between Transnet and GNS/Abalozi or issues of alleged misrepresentation, collusion, non compliance with procurement policies and procedures, breaches of Transnet's Code of Ethics, corruption or breaches of statute, as these issues would if needs be, be the subject of determination in pending litigation between the parties.

## 3. The investigation team

The investigation team comprised:

Charles Nupen	Team leader and Director HNM
Basetsana Molebatsi	Director HNM
Thabiso Mhlanga	Candidate attorney HNM

The team retained the services of Mohammed Bhamjee a chartered accountant and data analyst from Auditpro, and Peritus Commercial Forensic Specialists (Pty) Ltd an independent security company. Their contributions will become apparent during the course of this report.



4. Persons consulted and documentation perused

Ms Doris Tsepe	Transnet Board Member
Mr Harry Gazendam	Transnet Board Member
Mr Anoj Singh	Transnet Group CFO
Ms Nkuli Mabandla	Transnet Group Executive: Legal Services
Mr Ndiphiwe Silinga	Transnet Group Legal Manager
Mr Karthi Naicker	Transnet Group Forensic Manager
Mr Herbert Msagala	Transnet National Ports Authority General Manager Operations (COO) (previously Executive Manager Crew Resource Management)
Mr Siyabonga Gama	TFR CEO
Mr Kenneth Diedricks	TFR General Counsel
Mr Caesar Mtetwa	TFR General Manager Rail Network
General (Ret) Tebogo Jonas Rakau	TFR Executive Security Manager
Mr Sherwin Thomas	TFR Senior Manager: Contract Management
Mr. Keeran Madhav	Ernst and Young (E&Y) Project Leader: Investigation into allegations relating to TFR Security Department
Mr Chris Todd	Bowman Gilfillan Attorneys Director
Mr Naph Ntheo	E&Y Account Leader Transnet Internal Audit
Mr Roy Robertson	Combined Private Investigations (CPI) Director
Mr Tshepo Malakoane	CPI Director
Mr Neville Pillay	TFR Former National Investigation Manager

TFR and E&Y personnel who would have been of assistance in the investigation but were unable to be consulted:

Mr Sipho Khanye	former Contracts Manager: TFR (refused)
Mr Dinga Senamela	former General Manager Security TFR (deceased)
Mr Subash Chetty	former junior investigator and part of E&Y internal Audit team at Transnet

Documents which have been perused by us during the course of the investigation

Documents discovered in the civil claim:

- Plaintiff’s discovered documents: Files 1 – 9





- Defendant's discovered documents: Files 1 – 13

Evidence packs in relation to Disciplinary proceedings against senior TFR personnel, held by Bowman Gilfillan Attorneys

Documents pertaining to the investigation conducted by Ernst & Young: Boxes 1 – 18, held by Transnet

Agreement entered into between CPI and Transnet for the provision of security services, 2006

Agreement entered into between GNS/Abalozi and Transnet for the provision of security services 2008

Agreement entered into between CPI and Transnet for the provision of security services, 2010

Agreement entered into between CPI and Transnet for the provision of security services, 2013

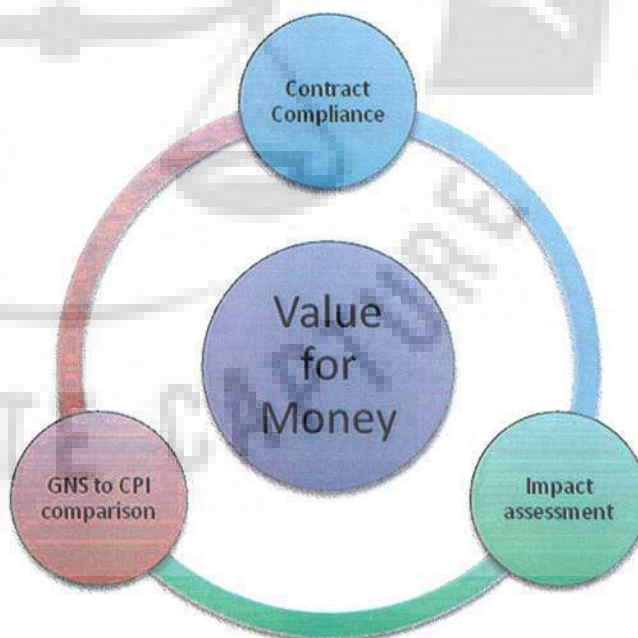
## 5. The concept of value for money unpacked

Value for money is achieved where the benefits of the outcomes resulting from goods and services delivered is greater than the input costs of those goods and services.

## 6. Three lines of investigation

In assessing whether GNS/Abalozi rendered value for money, we will attempt not only to measure the cost of services, but also take into account

- compliance with its contractual obligations,
- a comparison with Combined Private Investigations cc (CPI), TFR's current security service provider, on the cost of the services, and
- the impact of the services it rendered





Elements that need to be evaluated to reach conclusions on each of the assessment criteria may be difficult to measure, and intangible, and we will therefore be required to exercise a judgment on the best available evidence when considering whether value for money has been achieved or not.

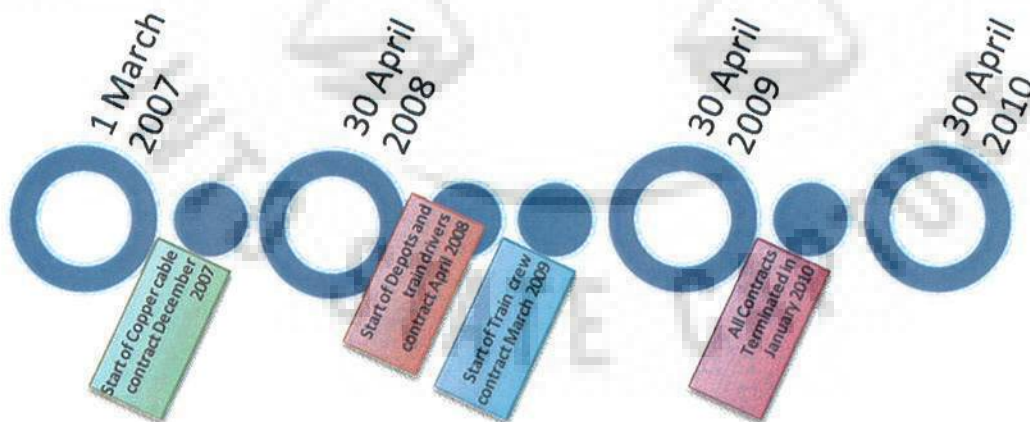
### 6.1 Was there contractual compliance?

Contractual compliance in this context refers to whether the work done and the fees charged were in accordance with the terms of the contract and extensions thereto.

#### 6.1.1 Three distinct elements to the contractual arrangements

Based on an analysis of the contracts as well as the fees charged and the timing of invoices by GNS/Abalozi we were able to break down the security services provided into three distinct elements:

- Intelligence and investigations undertaken pursuant to providing a comprehensive security service but primarily directed at curbing national copper cable theft
- Security guarding and escorts for train drivers and additional investigators to curb container theft at 3 depots in the central region and to address cable theft nationally
- Security escorts for train crew

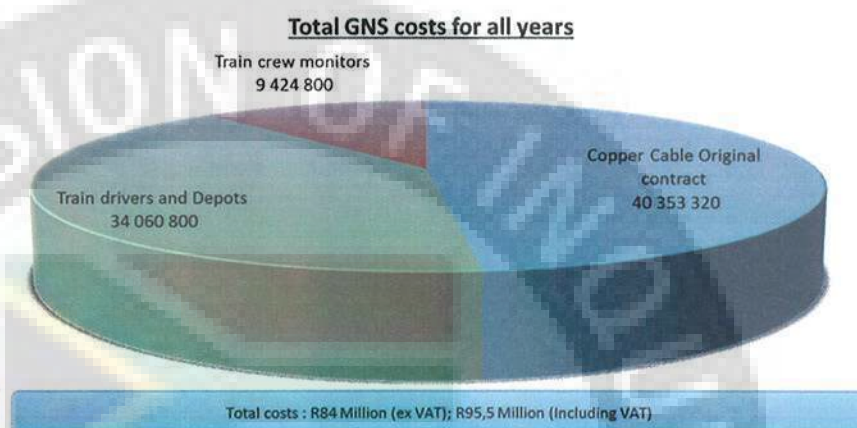






#### 6.1.1.1 Monies paid in respect of each element and over what period of time.

In total GNS/Abalozi was paid R95,5 million (incl.) VAT spanning Dec 2007 to Jan 2010. During this period, the changes in scope meant that as additional work was contracted to GNS/Abalozi, the contracts ran in parallel. Invoices were raised by GNS separately as each of the scope changes was invoiced as a separate service.



#### 6.1.1.2 How would specific services be reported on and is there evidence available to support the delivery of those services?

The specific services contracted and the reporting requirements are readily ascertainable from the terms of agreement entered into between Transnet and GNS/Abalozi dated 2 June 2008 and from the terms of extensions thereto, and do not bear repeating in the body of this report. The original agreement and evidence of extensions are annexed marked B

Suffice to draw attention to certain pertinent aspects. The agreement provides that services would involve the investigation, apprehension and assistance in the prosecution of individuals and/or syndicates found to be responsible for cable theft and other criminal activities affecting TFR nationally (clause 3).

The agreement stipulates that the service provider should provide a list of all personnel to be deployed for the service including the list of their qualifications or certificates issued in terms of the legislation that governs security and investigation professionals (clause 3.4). We have despite investigation been unable to locate such a list from any of the documentation made available to us, and are unable to verify whether the information was indeed furnished by GNS/Abalozi to Transnet.

The agreement further stipulates that in the implementation of the service, the service provider shall do so in terms of agreed performance indicators as set out in Annexure B to



the agreement. No such indicators are apparent in Annexure B, and we could not find any evidence to suggest that performance indicators were agreed under the contract. The only reference to performance indicators that we could ascertain is in a letter dated 6 December 2007 from Brian Fredericks Chief Procurement Officer Supply Chain Services at TFR to GNS/Abalozi advising the latter of its appointment to provide a comprehensive security package nationally for a one year period. That letter states that, as agreed between the parties, over the first five months of the contract, there would be a 25% reduction in cable theft to be visible and monitored through Freight Rail's security statistics. In addition there would be a fifty percent reduction in cable theft for the remaining contract period. Interestingly, these performance indicators were not incorporated into the main agreement between GNS/Abalozi and Transnet.

Although we were given access to TFRs database we could not establish what the base level of cable theft at the time of the commencement of the contract was, from which we could measure any future performance, nor was there any indication as to what the criteria would be by which any improvement would be judged. Would it for example be a reduction in the number of incidents of cable theft, or a reduction in the length of copper cable stolen? The absence of clarity in this regard renders it, in our view, well nigh impossible to judge performance by GNS/Abalozi as contemplated in the Fredericks' letter.

Our considered view is that until such time as a clear KPI was established by Caesar Mtetwa, General Manager Rail Network in 2009 and a specific instruction was given by him to measure performance in terms of that KPI, namely on the basis of the length of copper cable stolen, it was not feasible to properly assess the performance of GNS/Abalozi in relation to reducing copper cable theft.

Accountability for this must be laid at the door of the persons responsible for managing the contract with GNS/ Abalozi at the time, and Dingaan Senamela, who was the most senior official responsible in security, must be held ultimately accountable.

Although our investigation has revealed that the agreement with GNS/Abalozi was managed poorly from the side of TFR we have also concluded that the shortcomings emanate from the broad and open ended terms of the agreement and the lack of clear performance indicators for the service provider.

Our interview with Neville Pillay, at the time acting investigations manager at TFR, indicates that he refused to sign off on invoices from GNS/Abalozi when requested by Senamela as





there was no supporting documentation and he had seen no reports from the service provider.

The record in the disciplinary proceedings against Sipho Khanye who was eventually dismissed from his position as contracts manager security, indicates that Ria Vermaak whom Senamela appointed to manage the contract with GNS/Abalozi, expressed dissatisfaction that there was not much intelligence coming from GNS and that she was not receiving reports from GNS. She also complained that she was not privy to invoices from GNS. She emailed Senamela stating that it was impossible to do her work in this situation.

One of the key concerns expressed by Neville Pillay was whether GNS/Abalozi was actually deploying warm bodies into the field in accordance with its contractual obligations. This was a key concern of the Group CFO Transnet, Anoj Singh who in a letter to GNS/Abalozi dated 2 December 2009 called for all documents in GNS's possession that would enable Transnet to confirm the services that had been rendered from December 2007 to date. These documents were to include at least the following: a list of all staff deployed to perform services for Transnet since December 2007 to date together with personal details, identity numbers and the Private Security Regulatory Authority (PSIRA) registration numbers; the nature of the services rendered by these staff; their time and attendance records reflecting work performed for Transnet; all supporting invoices from any other entity or 'platform' that had provided staff or services to GNS/Abalozi for which Transnet had been invoiced.

Although it was apparent that GNS/Abalozi had entered into subcontracting arrangements with two other service providers, namely Revert Risk (Pty) Ltd and Nayle Outsourcing (Pty) Ltd, the requested information remained outstanding.

In the light thereof it would be fair to conclude that GNS/Abalozi's failure to comply with Anoj Singh's request to provide the requested information as proof of the provision of services was one of the material factors in Transnet's decision to terminate its agreement with GNS/Abalozi.

As part of this investigation we have sought much the same information from GNS/Abalozi and refer to our letter to Werksmans, GNS/Abalozi's attorneys dated 31 March 2014 annexed marked C. Ms Peggy Mabaso, the attorney acting for GNS/Abalozi has indicated to us in writing that she is taking instructions from her client in response to our request. As this process has taken the better part of a month, we do not anticipate that the information requested will be forthcoming.



What we do know is that pursuant to their obligations under the contract GNS/ Abalozi submitted monthly reports and certain special reports and invoiced in accordance with the contract and extensions thereto.

As the reports were the only documentary evidence available to us to assess whether the work was undertaken, we briefed a firm of security experts, Peritus Commercial Forensic Specialists (Pty) Ltd to study the reports and to render an opinion, from a security expert perspective, whether such reports, which purport to represent work undertaken, have the ring of authenticity about them.

Our brief to Peritus is annexed marked D and its full report is annexed marked E. The credentials of the experts who undertook the assessment are set out in their CVs, marked F and G respectively.

We posed six questions to Peritus, and its opinion in relation to each question, drawn from the body of its report, is set out hereunder.

**1. Do the reports reflect that services were provided?**

*Yes, partly. Monthly reports reflect that Security Service Providers as well as Transnet sites were visited, monitored, evaluated and assessed by GNS investigators. Photographs that were attached to the reports reflected that GNS must have visited these Transnet stations, which enabled GNS to obtain photographic evidence. However, in the consolidated monthly report dated May 2008, the report stated that a physical assessment was conducted at stations situated in KZN, North West and Limpopo provinces. The photographs attached to the report were a clear indication that a physical security assessment could not have been conducted. Photographs were taken from a distance out of a moving vehicle. The side view mirror of the moving vehicle reflects in one of the photographs on page 92 of the mentioned report.*

*Criminal Case Numbers and arrested suspects' details were provided in the monthly reports. However, we could not find evidence that GNS cases were investigated in a manner one would have normally expected, neither could we find any evidence that Prosecutors were assisted in the investigation of these cases. The monthly reports and List of Arrests does not provide feedback on the status of the criminal cases and whether they were indeed finalized.*





*In the consolidated monthly report dated May 2008, the names of the arrested suspects on pages 33 and 34 differ from those names recorded on the List of Arrests and no SAPS Case Number is mentioned. Recovered exhibits are also not recorded on the List of Arrest. Although screening of security guards were conducted as per June 2008 screening report, there was no evidence or documentation attached to the report that cross-border checks were done. It is further common knowledge that PSIRA grading can be checked online and is public information. Screening and vetting was only conducted twice in 2008 and according to the reports at our disposal, there was no screening and vetting conducted by GNS for the period of 2009.*

*Research reports were submitted by GNS for July 2008 and August 2008. There were no research reports available for any other period in 2008 and none for 2009. Based on the contents of the research reports, research was not conducted in an accurate, exact and precise manner and it would not be possible to define trends and tendencies on this information alone. Both reports were poorly phrased and speculative, baseless information was provided.*

*The contents of the 2008/2009 reports indicated that GNS focused their efforts in the Gauteng Province and neglected other provinces. This is clear when the List of Arrests and Case Numbers were perused. Analysis provided were pure conjecture, speculation and baseless. The June 2008 Screening report, Par 3, is a good example of this.*

***2. Would the services as set out in the reports, represent in your opinion what one might expect to have been provided given the mandates?***

*No. The reports of 2008 and 2009 had similar content and the same issues were addressed. There was no feedback or progress provided on outstanding cases. The Monitoring and Evaluation Reports were inconsistent throughout 2008 / 2009 and these reports made no mention of any new procedures introduced and whether Service Providers complied with service level agreements between themselves and Transnet.*

*Reports were non-specific and other reports were vague. We could not find evidence that internal involvement of Transnet employees were adequately addressed, although a March 2008 report made mention of Transnet employees who formed part of a syndicate involved in container and cable theft. In none of the subsequent reports was the matter ever raised again.*



*The contents of the reports were more often than not conjectured with baseless opinions. There was never any indication in the reports that any of the intelligence based information given was properly profiled. There was also no profiling on any of the suspects provided in the reports.*

**3. Would the level of reporting in terms of the detail of information provided represent in your opinion what one might expect to have been provided in reports of this nature? If not please elaborate**

*No. The Monitoring and Evaluation Reports did not contain security objectives and the contents of these reports did not reflect new procedures that were introduced by GNS. The level of analysis was poor and based on information received from investigators and sources. GNS stated in reports that they made assumptions based on this information, which, in our opinion, do not require a formal analysis.*

*The quality of photographs that were attached to the reports was poor. This was clearly evident in the May 2008 Consolidated Monthly Report, page 92. The October 2008 Monitoring and Evaluation Report relevant to the Free State Province had no photographs attached relating to fencing and signage deficiencies. Comments made of scrap metal dealers were baseless and unfounded.*

*The level of reporting in the Hotspot Report dated 18 – 21 November 2008 and the Hotspot Monitoring Consolidated Report dated November 2008 were extremely poor. In our opinion, Transnet would not have been able to form a detailed risk and threat analysis based on the contents of these two reports. Descriptions were provided in three line sentences with no photographs attached in the first Hotspot Report dated 18 -22 November 2008. Out of 161 Stations visited in the second report, only 18 photographs were made available. These reports did not achieve the objective, which was to enable Transnet to make decisive decisions relating to risk and threat nationally.*

*The Research Report of July 2008 was poorly written and phrased. It was difficult to establish the gist of this report. Unverified comments were made. We were unable to establish through the reports whether informers did exist, as there was little follow-up in the reports on what the informers were tasked to do. The November 2008 Monthly Report contained Polygraph Test results in Paragraph 7 of the report. This was in fact Voice Stress Analysis and the examiners' reports were copied and pasted into the report. The report further did not*





*provide any explanation into the reason for the examinations or the steps taken against those individuals who failed the examination.*

*We noted that the level of reporting improved for the period of January 2009 until April 2009. It was also the first time we noted that GNS made an attempt to introduce new clamping procedures to decrease container theft. The Reporting on Service Provider Monitoring improved and the reports indicated good successes.*

*The Monthly Report dated June 2009 on scrap metal dealers was detailed and the August 2009 Monthly Report was interesting and informative to read, however pages 51 and 52 lacked an explanation as to why the official SAPS documentation were scanned into the report.*

***4. Do the reports reflect an account of services, which if rendered, would represent in your opinion contractual compliance?***

*No. We have perused the agreement between Transnet Limited and General Nyanda Security Risk Advisory Services and in our opinion, the contents of the GNS reports for the period 2008 / 2009 did not represent contractual compliance.*

- This was a National Agreement and the contents of the reports reflected that GNS mostly concentrated their efforts in the Gauteng Province. The List of Arrests is clearly a reflection of this.*
- The contents of the reports did not reflect assistance in prosecution, which was part of the scope of GNS work. This was also highlighted in a Transnet confidential evaluation report on Tenders.*
- The 2008 reports reflected analysis based on assumptions and not in-depth research. We found many assumptions and baseless statements without any facts or evidence substantiating these statements made in the reports.*
- We could not find evidence of any profiling, status or progress reports and monthly reports were merely a summary of the month's work. We could not find any evidence that there were incident reports for each incident nationally, as there were no referrals made to these.*
- The reports further do not make mention of an Occurrence Book number and daily activity reports (see page 9, par 5, sub-par 5.1.2 of the Agreement).*
- We could not find any evidence in the reports that new procedures were developed and introduced when Service Providers at Transnet Stations were evaluated.*
- GNS did not take all measures necessary to comply with laws and regulations. The South African Police logo was copied and pasted into a document, which is in*



*contradiction of the Act on Heraldry (Act 18 of 1962). Case numbers were reported falsely.*

**5. On the basis of the content of the reports, can you identify any apparent material gaps in services that the service provider was mandated to provide?**

*Yes. Police CAS numbers were falsely reported and did not exist. There was no feedback on criminal cases.*

*Action plans were not defined. The reports merely stated what the service providers' future plans were. There were no indication on how these plans were finalised and the effect these plans had on the crime statistics.*

*Where it was reported that scrap metal dealers paid an Acknowledgement of Debt by means of a J534, no case numbers were reported. This information could thus not be verified. The reports did not provide any detail on surveillance conducted on Transnet's assets. There is no mention made of internal fraud or any suspicions of internal fraud. There are also no cases of this nature listed on the List of Arrests. This was a requirement in Par 4, sub-paragraph 4.1.5 of the Agreement between the Service Provider and Transnet Limited. Security objectives and procedures were not evident in the reports. The reports assessed by us were monthly reports and did not reflect status feedback.*

**6. Would you render an opinion representing an overall assessment of the services rendered based on the contents of the reports?**

- The level of report writing was poor. Specific mention should be made of the July 2008 Research Report and the August 2008 Research Report. Sentences were poorly phrased.*
- In some instances it was difficult to understand the gist of the reports.*
- Much of the contents of the reports were unverified, baseless comments and conjecture.*
- Names and details of alleged syndicate members were not verified and information was withheld from the client. Profiles of the suspects were not provided to the client.*
- In our overall assessment of the 2008 and 2009 reports, we are of the opinion that GNS did not render a service according to the contractual agreement between themselves and Transnet Limited.*
- We further could not find any evidence that cases and arrests reported by GNS lead to meaningful convictions, as none of the reports reflected this. Based on the*





*contents of the reports no feedback was provided by GNS to Transnet on the outcome of criminal matters.*

#### **6.1.1.3 Our own lay person's analysis as to whether services were rendered?**

We conducted the following tests on the monthly reports that were submitted by GNS/Abalozi:

- We selected a sample of reports spanning the contract period and including monthly reports and special reports
- We perused reports for:
  - evidence of documented work that matched the contract brief
  - evidence that the different scope extensions and nature of services were documented
    - Copper theft
    - Container theft
    - Train driver and crew security

Our results were:

- There is enough detail and specific reference to documented work, to suggest that work was done.
- The pictures taken in the reports appeared authentic and also suggest that work was done.
- We found mostly documented instances of copper cable and container related theft, investigations and intelligence, but could not locate documented evidence of train driver and crew related security services.



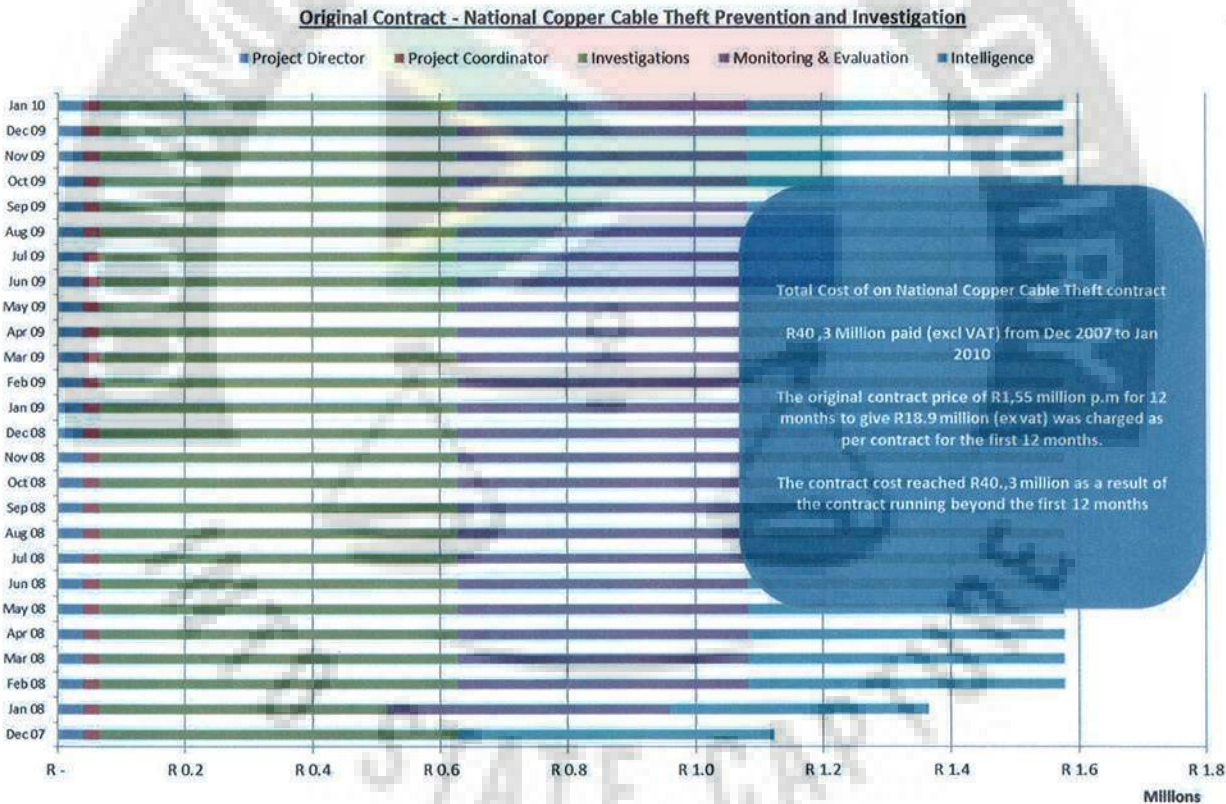
6.1.1.4 What was the contract price in respect of each element and was invoicing aligned with price? Any overcharging?

Contract description: Investigation and Gathering of High Level Information on Cable and Goods Theft and Reduction of Risk Exposure at Transnet Freight Rail

Price charged per month (exclusive of VAT): R1, 55 million

Period for which the contract was active: December 2007 to January 2010

Total amount charged on contract: (exclusive of VAT): R 40,3 million



The monthly amounts charged were in line with the contract. The final price exceeded that of the initial contract because of extensions to the contract and not because of the fees charged.





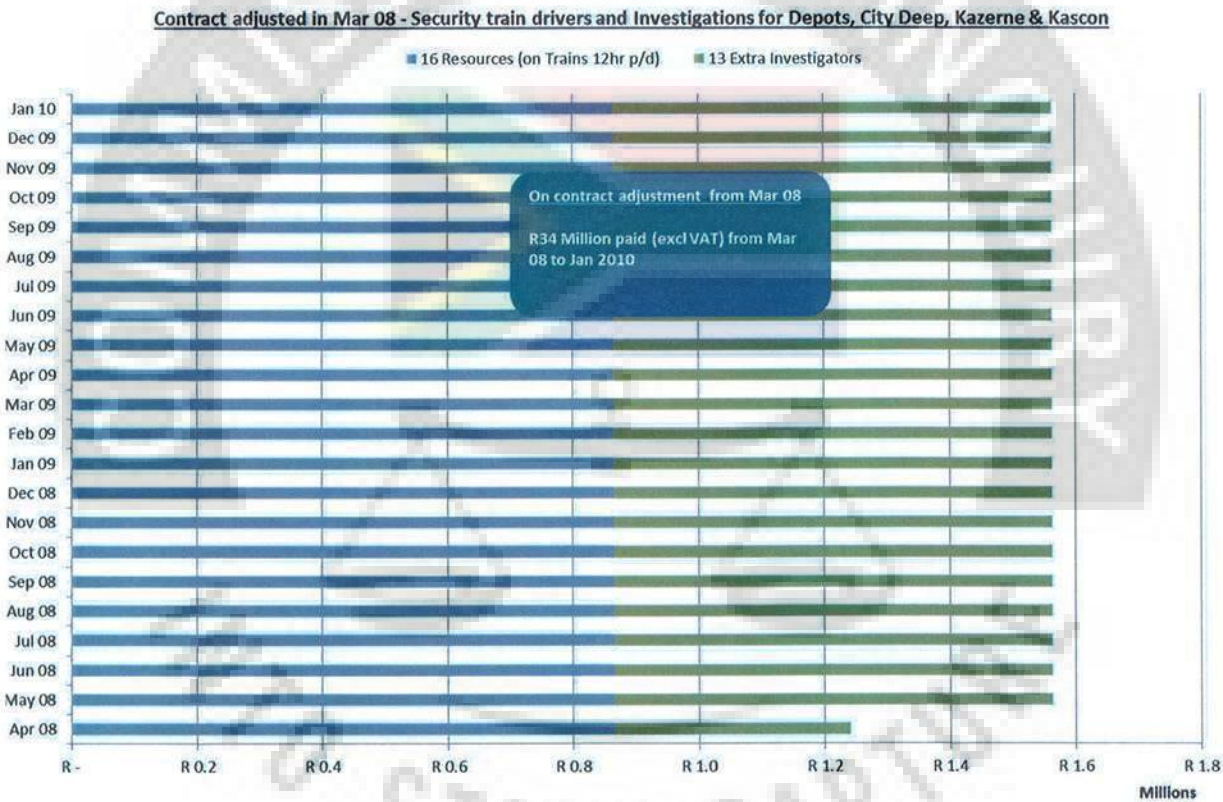
Value For Money Evaluation for Services rendered to TFR by GNS/Abalozi  
Confidential

Contract description: **Extension of scope (Prevention and investigation of Theft of customer goods at depots City Deep, Kaserne & Kazcon, Train Driver protection and investigation of cable theft nationally)**

Price charged per month, save for April 2008 (exclusive of VAT): **R1, 562 880**

Period for which the contract was active: **April 2008 to January 2010**

Total amount charged on contract: (exclusive of VAT): **R 34,060,000**



Based on the contract extension<sup>i</sup> GNS/Abalozi was to provide services to contain container theft at Depots in the Central Region, deploy additional investigators to investigate cable copper theft nationally, as well as escort & protect train drivers and investigate TFR employees implicated in theft. It should be noted in relation to this extension that the terms of the original agreement between GNS/Abalozi and Transnet provided for a comprehensive national security service and begs the question as to why the specific services contemplated in the extension were not regarded as being covered by the terms of the original agreement.

Nevertheless, the amounts agreed were:





- 16 Resources to protect yard and train drivers R864 000
- 7 Investigators copper cable theft nationally R376 320
- 6 Investigators dedicated to Kaserne and Kazcon R322 560
- 1 Resource deployed to electrical control room R108 000
- Total R1 670 880 (ex vat)

In actuality they charged the 16 resources and the 13 investigators but did not charge the 1 resource at R108 000. (See similarities on the next contract) so amounts charged were within the contract price

Contract description: Security escorts for train crew

Price charged per month (exclusive of VAT): R 856 800

Period for which the contract was active: March 2009 to January 2010

Total amount charged on contract: (exclusive of VAT): R 9, 4 million.



GNS/Abalozi charged:

- 16 resources for train crew security and rapid response R 748 800
- 2 Supervisors R 108 000<sup>ii</sup>
- Total R 856 800

The fees levied were in accordance with the contract.



Value For Money Evaluation for Services rendered to TFR by GNS/Abalozi  
**Confidential**

It is interesting to note that from March 2009 till January 2010, 32 resources were charged for train driver and crew related security at a total cost of R 1,6 million per month.

#### 6.1.1.5 Conclusion on contractual compliance

On the issue of contractual compliance our conclusion is that the fees charged by GNS/Abalozi were in accordance with its agreement with Transnet and subsequent extensions thereto and there is no evidence of overcharging.

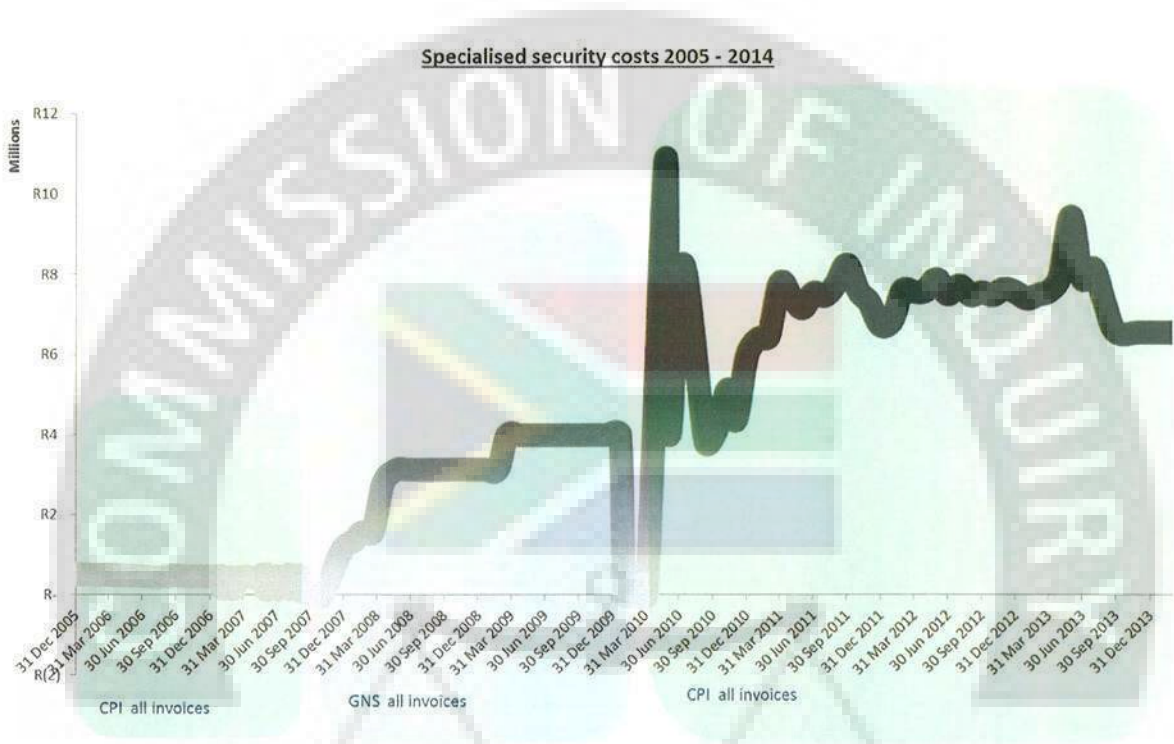
In relation to work done the available evidence from reports submitted leads to the conclusion that although work was done, GNS/Abalozi failed satisfactorily to comply with the terms of the agreement.

In relation to this line of investigation therefore it cannot be reasonably concluded that GNS/Abalozi provided value for money.



6.2 GNS/Abalozi cost compared to CPI.

6.2.1 Cost of specialized security assessed



Above is an analysis of all invoices charged by security companies from Dec 2005 to Jan 2014<sup>iii</sup>. The evolution of the costs of specialized security can clearly be seen with the costs approximating R500 000 under CPI each month in 2006/2007; Increasing from R1,1million to R4 million per month during the GNS/Abalozi tenure; increasing to R7-8 Million under CPI by the beginning of 2011 and remaining at those levels to date.





Value For Money Evaluation for Services rendered to TFR by GNS/Abalozi  
Confidential

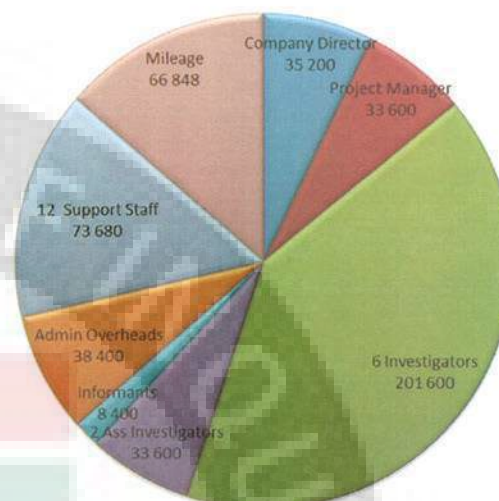
### Suite of services offered, geographic areas covered and costing

An analysis of the type of items on the invoices that the service providers would normally charge at 3 points in time follows:

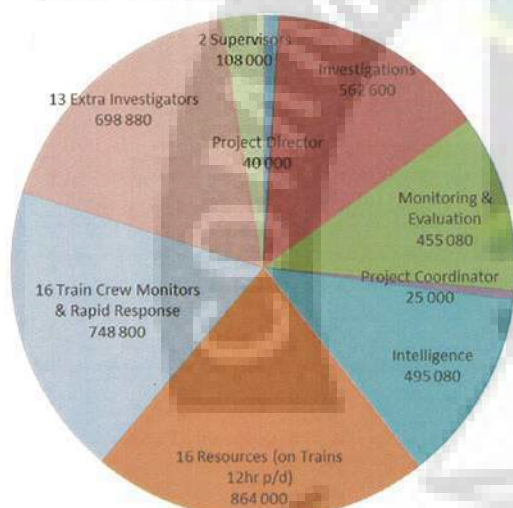
- CPI in May 2006
- GNS at Dec 2010
- CPI in July 2013

CPI provided a service that only concentrated on “hotspots” of crime in Central region and was a reaction service.<sup>iv</sup>

Typical CPI invoice (May 2006) for R491 000 (ex vat)



Typical GNS invoice (Dec 2010) for R4 million (ex vat)



GNS/Abalozi was a national copper cable theft and other criminal activity proactive intelligence and investigation service

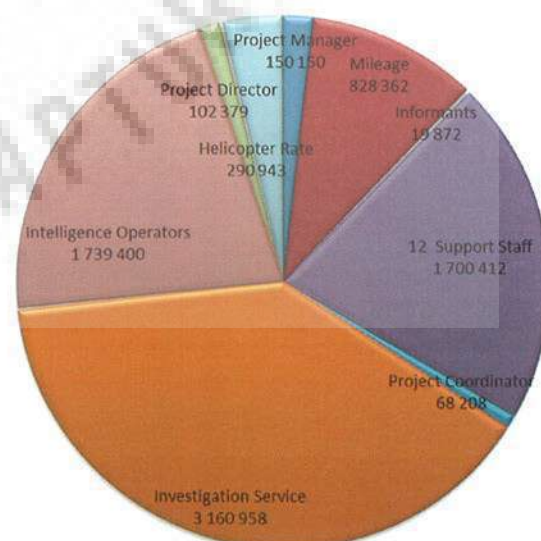
By Dec 2009 GNS/Abalozi was charging:

- R1,6 million for security related to train crew
- R2.4 million for intelligence and investigation services related to copper cable nationally and

container goods theft at central depots.

CPI's current charges are predominantly for Intelligence, Investigation, support staff and helicopter use. Their suite of services is national. They have offices countrywide. In executing their services they employ attorneys, advocates and a helicopter pilot with ATP accreditation in addition to the investigators and intelligence operatives. Their current contract differs markedly from the GNS/Abalozi contract and reflects the evolution of the security intelligence function and the active security management presently at Transnet.

Typical CPI invoice (Jul2013) for R8 million (ex vat)





There are clear reasons why a comparison both in cost and performance between CPIs first and second set of contracts with those of GNS/Abalozi cannot fairly be made

In the first instance, the geographic scope of the contracts differed. CPI's 2006/2007 contract focused on hotspots in the central region. Its 2010 contract was also confined to the central region, and it was only in 2013 that the geographic scope extended nationally. GNS/Abalozi's contract and extensions always had a national geographic focus.

In the second instance the nature of the services rendered differ. The CPI 2006 /2007 contract was essentially reactive in the sense of being a rapid response service to criminal activity. The GNS/Abalozi contracts and the CPI contracts 2010 going forward had a broadly similar focus, requiring pro active intelligence and investigation work primarily, but not only, in relation to reducing cable theft and apprehending and supporting the prosecution of criminals. But the similarities end there. It is noteworthy that in the CPI contracts no specific provision is made for train crew guarding and escorting whereas in the GNS/Abalozi contract a significant proportion of its charges were in relation to resources deployed for that purpose. The infrastructure and support services (offices, a helicopter, legal support) currently deployed by CPI are more comprehensive and sophisticated than those deployed by GNS/Abalozi. The performance requirements and measures in place for CPI currently are clear and detailed and performance is consistently measured. The performance requirements for GNS/Abalozi, if they ever existed, were unclear and were not measured until Caesar Mtetwa introduced his KPI measure in 2009.

In the third instance the financial resources deployed by Transnet in respect of the CPI and GNS/Abalozi contracts differ markedly. The monthly fees levied by CPI in terms of its current contract are virtually double those of GNS/Abalozi at its highest fee earning period.

In the fourth instance, the current CPI contract is actively managed through General Rakau's office at TFR whereas the management of the GNS/Abalozi contract was found wanting.

We are therefore unable to proffer an opinion as to whether value for money was rendered by GNS/Abalozi by seeking to compare its contract costings with those of CPI.

What we are able to conclude is that Transnet has seen value in an exponential increase in its investment in crime prevention and security risk reduction over the better part of the last





decade and we confidently assume that it has done so because it believed the returns on such investment justified such increases.

This then leads us logically to our third line of investigation. What have the returns on that investment been with particular reference to GNS/Abalozi? How effective have its services been and what impact has it made on crime prevention?

### 6.3 The impact and effectiveness of the services rendered by GNS/Abalozi:

In assessing the impact and effectiveness of the services, we attempted to:

- Identify performance indicators that could be measured to assess the impact of the services that GNS/Abalozi rendered.
- Obtain statistics relating to these performance indicators over a period of time that spanned prior to the start of the GNS/Abalozi contract to after its termination
- Analyze the statistics and draw conclusions

#### 6.3.1 Difficulties associated with assessing impact

##### 6.3.1.1 Quality of available data for the period under review

Our investigation has revealed that the quality of the statistics at TFR for measuring losses of copper cable and other items has evolved over a period of the last few years. During the time that the GNS/Abalozi contract ran and prior, the quality of available statistics over the whole period is not considered to be reliable.<sup>v</sup> We have extracted certain statistics and subjected them to analysis, although these statistics start at April 2009 well into the GNS/Abalozi contract.<sup>vi</sup>

##### 6.3.1.2 Identifying and accessing credible data

GNS/Abalozi ultimately provided services which varied from:

- Intelligence and investigation around copper cable theft.
- Security for the train crew and drivers
- Intelligence and investigation for container theft at depots

It would be inappropriate to use incidents of copper cable theft or kms of copper cable theft to measure the effectiveness of the train crew security or the prevention of container theft from depots.



In some cases there are no tangible or objective performance indicators to measure services such as train crew escorting and guarding.

#### **6.3.1.3 Lack of information to quantify loss**

The broad categories of theft that Transnet experiences in its rail network and depots include:

- Copper cable (Signal, overhead and coaxial)
- Steel fittings and other related components that are part of the rail tracks
- Losses from containers
- Vehicle hijackings

According to Mr Gama the challenge of quantifying losses is that while the price of copper cable is known and the actual cost of replacements can be measured, the consequential loss suffered by Transnet occasioned by a train that is stopped or derailed is difficult to measure. It results in loss of confidence in Transnet's ability to deliver goods on time, cost of delays in delivery and resultant cost of penalties and customers switching to the road networks due to reliability. Steel fittings and other related components that are part of the rail tracks can also be measured and may be relatively inconsequential in cost but the theft of these can result in stoppages and derailments resulting in huge consequential losses. Container losses occasion in addition to the loss of goods stolen, the consequential loss of customer confidence in the rail network as a safe, reliable method of goods transportation.

#### **6.3.1.4 Internal assessment reports**

Apart from the Caesar Mtetwa memo and to some extent the Ernst and Young Internal Audit Assessment we could not identify any other TFR internal assessment reports upon which we could rely to measure the impact and effectiveness of the services supplied by GNS/Abalozi.

##### **6.3.1.4.1 The Caesar Mtetwa memo**

Mr. Mtetwa instituted a KPI based on the length of copper cable stolen and performed an analysis of copper cable stolen in kms for the period June 2009 to December 2010. He compared the fees charged by GNS/Abalozi to those charged by CPI and the levels of cable theft during their respective tenures across this review period.





Our view is that kms of copper cable stolen is the best available performance indicator to measure the impact and effectiveness of the security service, however:

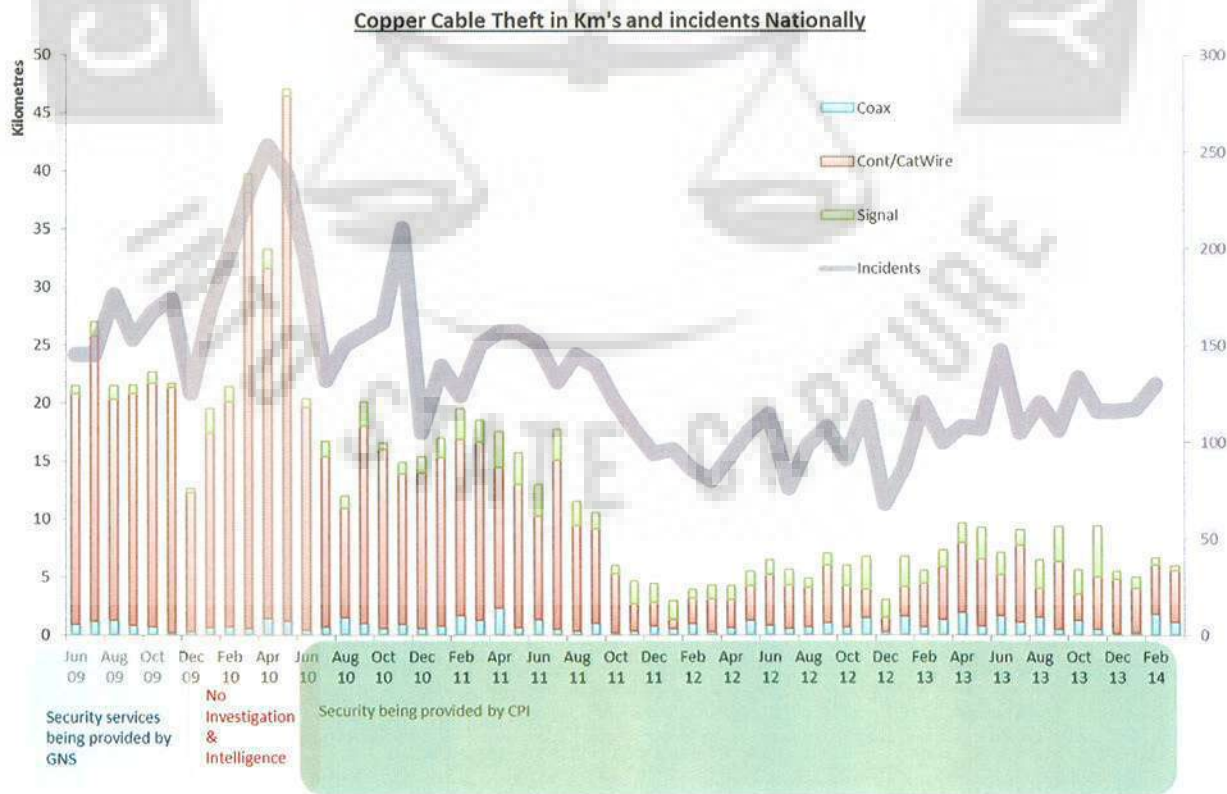
- The ideal analysis period should span from prior to the GNS/Abalozi contract until after its termination
- Certain elements of the GNS/Abalozi contract should not be measured against copper cable losses, such as:
  - Amounts charged for investigation and intelligence on losses of customer goods from containers in Central Region depots
  - Amounts charged for security provided for train crew and drivers.

6.3.2 Our own assessment of GNS/Abalozi’s impact and effectiveness

Our assessment is done for each of the services separately:

6.3.2.1 Copper cable theft

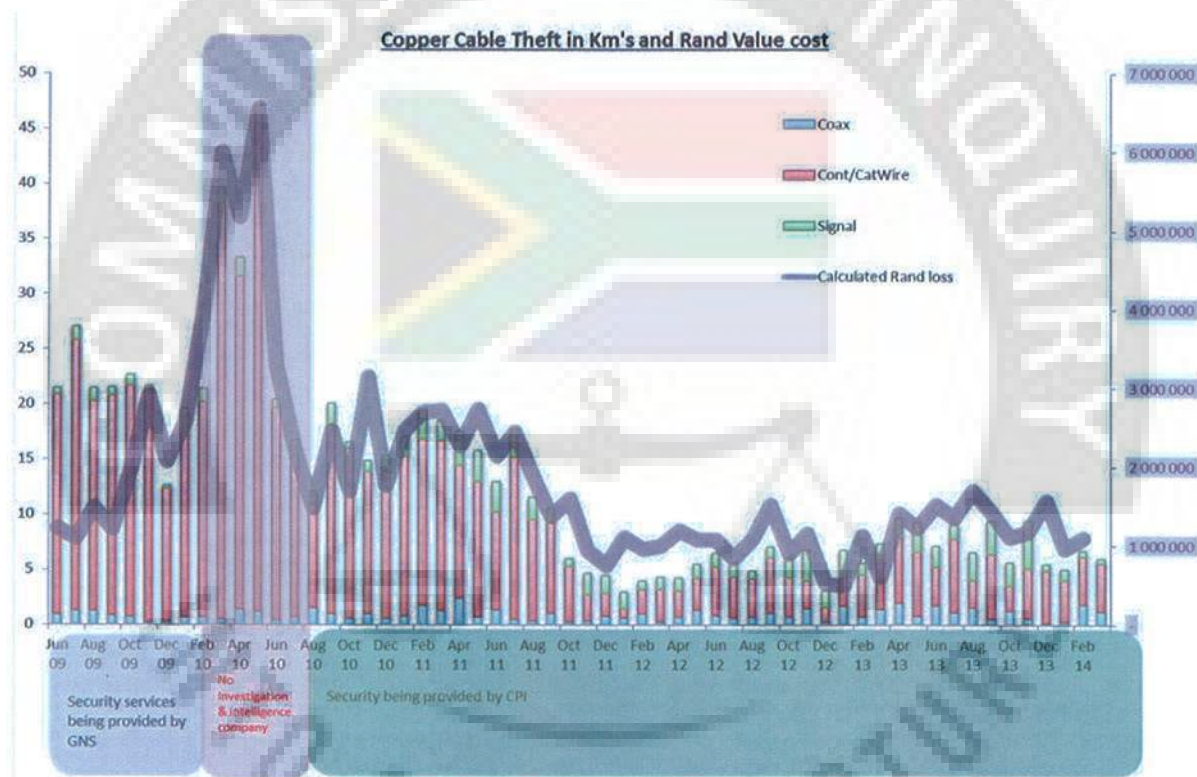
Prevention and investigation of Copper Cable Theft





The chart<sup>vii</sup> shows that in both incidents<sup>viii</sup> as well as kms of cable stolen, there was a significant increase in theft during the time that there was no security service in place. As there are no reliable stats available prior to 2009, we can only assess the impact that GNS/Abalozi had over a limited period.

As indicated previously, we are not comparing the relative costs of the service between CPI and GNS/Abalozi as we believe that that there are significant differences in the GNS/Abalozi and CPI contracts that make comparison inappropriate.



The cable theft losses in rand value give an indication of the direct losses suffered as a result of cable theft. This chart shows an expected relationship between the kms lost and the cost, giving further credibility to the stats used. Our view, as previously stated, is that the impact of the services cannot be measured against the saving in copper cable alone as the consequential losses are far greater but difficult to quantify. This view was articulated to us by Mr Gama, the CEO TFR and confirmed by the CFO Transnet, Mr Anoj Singh, who also confirmed that at this point in time Transnet does not track the rand value of consequential losses suffered.



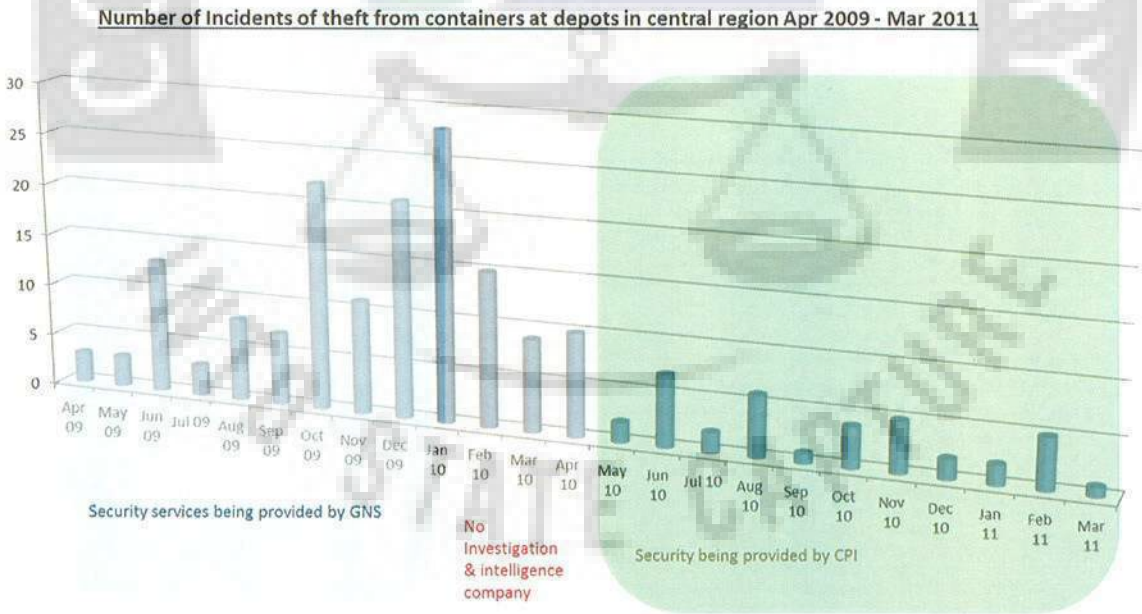


6.3.2.2 Conclusion

Measured against the period when no security services were in place, the impact of GNS/Abalozi in reducing the extent of cable theft was significant over the period when the level of such theft could be measured. Although it is not possible to measure the full impact in Rand value over that period, bearing in mind the issue of consequential loss, it is not inconceivable that savings to Transnet exceeded the monies paid to GNS/Abalozi for this particular portion of the contract and could conceivably have exceeded the total amount of money paid to it under the contract and its extensions.

In our view, on the basis of the ascertainable evidence, value for money was rendered by GNS/Abalozi in respect of savings generated by reducing cable theft.

6.3.2.3 Prevention and investigation of Theft of customer goods at depots City Deep, Kaserne & Kazcon and Train Driver protection



From the Transnet Database incident reports<sup>ix</sup>, we filtered all incidents for the period April 2009 to March 2011 to arrive at incidents for the Central Region only. We reviewed the data and filtered for only documented incidents of theft from containers. It is evident from





these stats that there was increased documented container theft during the December/January period in 2009/10. A similar trend of increase in container theft is not experienced in 2010/11 December/January period. There is an evident decline in incidents from May 2010 onwards.

It is of note that GNS/Abalozi was coming into an environment at the depots where TFR staff and security companies were implicated in theft incidents. GNS/Abalozi started providing specific investigations for depots in April 2008. We cannot fully assess the impact that GNS/Abalozi had, as we would need to know the losses prior to the GNS/Abalozi contract to do this. However its impact over the period measured is arguably no better or worse than when no security services were in place. But one has to bear in mind that incidents of theft do not necessarily correlate with the extent of theft and rand value of goods stolen, which makes it exceedingly difficult to determine impact.

#### 6.3.2.3.1 Conclusion

Our view is that we cannot proffer an opinion on whether value for money was delivered in regard to security services at depots in the central region.

#### 6.3.2.4 Security for train crew

There is no statistical data to indicate the impact which GNS/Abalozi had in respect of its service in escorting and protecting train drivers and crew. In respect of the first deployment of 16 Resources in April 2008 until Jan 2010 to secure the yard and provide security for train drivers there is no information on impact. However the fact that Mr Herbert Msagala, then Managing Executive for Crew Resource Management, raised the alarm early in 2009 regarding incidents of hijacking of vehicles containing train crew begs the question about the impact that these resources were having. An incident which resulted in the disappearance of a service driver and his vehicle, both never to be found and the driver presumed dead, precipitated a request on his part for a dedicated deployment of security details to escort vehicles carrying train crew .

Mr. Msagala noted that subsequent to GNS/Abalozi escorts providing security services for crew in response to his request, there were fewer hijackings and no further loss of life.



#### 6.3.2.4.1 Conclusion

Based on our discussion with Mr. Msagala, the services provided by GNS/Abalozi did have a positive impact on the security of train drivers and crew. Highjackings reduced significantly and there was no further loss of life. A threat to boycott night duty by train drivers was averted. However, in assessing value for money in relation to this service one has to balance this positive result against the fact that there was no information regarding the impact of the 16 resources that had been contracted to provide the service from April 2008. In relation to the impact of these initial 16 resources on hijackings, no conclusive opinion can be drawn, except to record that hijackings were occurring at a rate which attracted the intervention of Mr Msagala and his request for resources to deal with the problem in 2009. In these circumstances it would be difficult to argue that in respect of the 2008 deployment value for money was rendered.

In relation to the additional 16 Resources deployed in 2009 at a total cost of R9.4 million a concern was raised by Mr Msagala at the cost. There was an alternative proposal on the table at a significantly lower cost. At the end of the day what price do you place on human life? The fact that this service had a positive impact renders the cost in our view value for money.

### 7. Overall Conclusion

Of the three lines of investigation we pursued to determine whether GNS/Abalozi had rendered value for money, we found that it could not be reasonably concluded that it had done so when assessed against contractual compliance. We could not proffer an opinion in relation to cost comparison. In relation to impact and effectiveness we concluded differently on the disaggregated services.

On overall impact, bearing in mind the significance of both actual loss and consequential loss being averted in the area of cable theft as a result of GNS/Abalozi's intervention, we conclude that GNS/Abalozi, on balance, rendered value for money.

In terms of our definition of "value for money" our overall conclusion is that whilst value for money was, on balance, obtained through the impact of the services of GNS/Abalozi such value would have been enhanced if contractual compliance had been assured.





## Notes

<sup>i</sup> Document from discovered files, resolution authorising contract extension and acquisition evaluation signed by K London & A Brandford

<sup>ii</sup> This is coincidentally the same amount that was not charged in the Depots and train drivers scope extension contract .

<sup>iii</sup> Invoices were plotted from copies of invoices retrieved from discovered files in the GNS litigation as well as from TFR Supply Chain Services Contract Manager Leslie Richards. In instances where companies generated multiple invoices for services rendered in the same month, these were consolidated to arrive at the monthly cost which was plotted.

<sup>iv</sup> Interview with CPI Directors

<sup>v</sup> This was borne out by several TFR security management staff

<sup>vi</sup> The statistics of cable theft in metres was introduced by Caesar Mtetwa (GM: TFR Infrastructure) who is still currently at TFR and in that position. All other responsible people for TFR statistics during prior periods were not available for interview.

<sup>vii</sup> The data was provided by Transnet Freight Rail's General Rakau's office assistant Ms Phiona Skefu. There is no collated data for the period prior to June 2009, however km's of copper cable theft and incidents of copper cable theft are documented in the master raw data incident reports. It is possible to extract this data going as far back as 2006 from these reports, however the accuracy of the data is questionable based on General Rakau's assessment. We noted that E&Y in their assessment used different data to the ones that were extracted from the Transnet systems by us. The source of their data was from imaged laptops of employees that were suspended pending disciplinary actions after the GNS contract was cancelled.

<sup>viii</sup> Although there is skepticism about the accuracy of the incident data when taken together over the same period, the incidents mirror the km's stolen. This trend lends some credibility to the accuracy of the statistics in general on copper cable theft.

<sup>ix</sup> We met with General Rakau at Transnet Freight Rail and received the data from Ms Phiona Skefu. Both of these Transnet employees were not in their current positions at the time these stats were prepared and they were not responsible for the preparation of the stats. General Rakau noted that there is some doubt over the accuracy of incident report stats during the period under review.

"KK"

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## CONFIDENTIAL

MINUTES OF SPECIAL MEETING NO. 14/3 OF THE BOARD RISK COMMITTEE OF TRANSNET SOC LTD HELD ON 28 MAY 2014 AT 08:05 IN BOARDROOM 4902, 49<sup>TH</sup> FLOOR, CARLTON CENTRE, 150 COMMISSIONER STREET, JOHANNESBURG

Resolution No/  
For Attention

"KK"

# 1 CONSTITUTION OF MEETING AND APOLOGIES

## 1.1 Present

Ms DLJ Tshepe	Chairperson
Ms Y Forbes	Member
Mr HD Gazendam	Member (Partial Acting Chairperson)
Ms N Moola	Member (teleconference)
Mr IB Skosana	Member

## 1.2 In attendance

Mr ME Mkwana	Non-Executive Director
Mr B Molefe	Group Chief Executive
Ms NJ Mabandla	Group Executive: Legal and Compliance
Ms M Matooane	Group Executive: Enterprise Information Management Systems
Ms DC Moephuli	Chief Risk Officer
Mr A Singh	Group Chief Financial Officer
Mr R Toka	General Manager: Security Management
Ms ANC Ceba	Group Company Secretary
Ms B Ndlovu	Company Secretary

## 1.3 Partial Attendance

Mr C Nupen	Consultant: Harris Nupen Molebatsi Inc.
Ms B Molebatsi	Consultant: Harris Nupen Molebatsi Inc.
Mr M Bhamjee	Consultant: Advisory Services to Harris Nupen Molebatsi Inc.
Mr T Mhlanga	Consultant: Harris Nupen Molebatsi Inc.

## 1.4 Apologies

Ms MA Sukati	Chief Audit Executive
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## 1.5 Welcome and Signing of Attendance Register

1.5.1 The Company Secretary reported that the Chairperson was delayed. In the absence of the Chairperson the Committee **agreed** that Mr Gazendam be appointed as Acting Chairperson.

The Acting Chairperson welcomed all members and attendees present at the meeting. Having noted that there was a quorum, the Acting Chairperson declared the meeting duly constituted.

1.5.2 The Attendance Register was circulated for signature.

## 1.6 Adoption of Agenda

1.6.1 The Agenda was adopted as tabled.

## 2 SAFETY BRIEFING AND EVACUATION PROCEDURE

2.1 The Safety Briefing and Evacuation Procedure was conducted by Company Secretariat.

## 3 DECLARATION OF INTERESTS

3.1 The Declaration of Interests Register was circulated to all members and attendees for signature.

*The Chairperson joined the meeting at 08:10 and took over the Chairpersonship from Mr Gazendam.*

## 4 MATTERS FOR DISCUSSION/APPROVAL/RECOMMENDATION

4.1 Presentation by **Harris Nupen Molebatsi Inc.**, on the outcome of the independent investigation on whether Transnet received value for money from services rendered by

*[Signature]*

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## CONFIDENTIAL

2

Resolution No/  
For Attention**Abalozi Risk Advisory Service (Pty) Ltd (GNS/Abalozi)**

- 4.1.1 Management confirmed that the presentation tabled at the meeting had taken cognisance of the further request made by the Committee as communicated through Ms Mabandla.
- 4.1.2 Mr Nupen introduced the Team from *Harris Nupen Molebatsi Inc. ("HNM")*, and proceeded with the presentation as circulated in the meeting. The presentation was noted. The purpose of the presentation was to provide the Committee with the outcome of the independent investigation on whether the Company had received value for money on the services rendered by *Abalozi Risk Advisory Service (Pty) Ltd ("Abalozi")*, previously known as *General Nyanda Security Risk Advisory Service (Pty) Ltd ("GNS")* ("*GNS/Abalozi*").
- 4.1.3 The Committee noted the following exclusions from the investigation which would be dealt with in the event that litigation was pursued, based on HNM's mandate by the Company:
- Lawfulness or validity of the contract;
  - Issues of misrepresentation, collusion, supply chain irregularities, corruption; and
  - Potential breaches of Statutes.
- 4.1.4 The Committee noted the 3-pronged approach embarked upon by HNM, namely, :
- *Whether GNS/Abalozi* had delivered the goods and services as provided for in the contract and whether they had adequately charged the Company.
  - A cost comparison between *GNS/Abalozi* and *Combined Private Investigations (CPI)*. *CPI* had provided similar services to Transnet both prior and after *GNS/Abalozi*; and
  - The impact of the services rendered by *GNS/Abalozi* during the entire contract period.
- 4.1.5 Mr Nupen indicated that the 3 distinct elements had been identified during the review of the Contract as follows:
- **The Original Contract:** For intelligence and investigation towards providing a comprehensive security service, primarily for curbing national copper cable theft. The highlighted anomaly related to the Contract being signed post *GNS/Abalozi* having commenced the provision of service to the Company.
  - **A contract for scope extension:** This contract had 2 elements to it, namely, security guarding and escorting of train drivers and additional investigators to curb container theft and cable theft. The HNM team highlighted a "possible duplication" of services between the original contract and the scope extension. Of note was the increase in the cost of services.
  - **A further scope extension:** Security escorts for the train crew. The scope extension was informed by the increasing security concerns at that time.
- 4.1.6 Mr Nupen assured the Committee that data received from Mr Mthethwa, General Manager: Rail Network at TFR, had been considered but that HNM had undertaken its own research and assessments. The following findings were noted:
- There had been no irregularities in the payments that were made to *GNS/Abalozi*. The payments were effected according to the provisions of the Contract and were based on issued invoices.
  - There was no performance criteria set out in the Contract, nor did the Company assess the performance of *GNS/Abalozi*.
  - No evidence could be found on the number of personnel deployed in accordance with the Contract. HNM could therefore not conclude that *GNS/Abalozi* had provided value for money in this regard.
  - A cost comparison to assess value for money could not be drawn between *GNS/Abalozi* and *CPI* due to the differences in the nature of the actual services provided and the contractual values, which were significant.
  - It had been noted that pursuant to the termination of the *GNS/Abalozi* Contract, and the appointment of *CPI*, the monthly costs for *GNS/Abalozi*'s services which had previously grown appreciatively to R4m a month, had immediately doubled.
- 4.1.7 Mr Nupen stated that the results of the impact assessment had reflected as follows:
- 4.1.7.1 **Cable theft:** There was value for money for the aggregated services rendered by *GNS/Abalozi*, based on 2 factors namely,:



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## CONFIDENTIAL

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Resolution No/  
For Attention

- The actual cost of cables lost during GNS/Abalozi's service compared to the cables lost when there was inadequate security. The consequential losses and the ripple effect arising from copper cable theft in the form of disruptions which resulted in customer dissatisfaction due to cancellations, train derailment or loss of goods and the resultant reputational risk was highlighted.
- The security incidents had declined significantly when the security services were put in place.

4.1.7.2 There was no evidence on the guards deployed to escort the train crew during 2008, therefore no value for money service had been rendered. However, from 2009, after intervention by Mr Mthethwa, reports on these activities were prepared. Those reports had been made available and provided evidence of services rendered. It could be proven that value for money service was provided after 2009.

4.1.8 Management referred to the lack of evidence, or proof of payment from GNS/Abalozi on the individuals that were deployed which was viewed as not having rendered a value for money service, and commented that the copper cable theft and the incidents pertaining to the train crew members had declined significantly during the period. Ms Molebatsi confirmed that GNS/Abalozi had provided the names and costs of the officials e.g. project managers and researchers who were not directly involved in the covert operations.

4.1.9 The Chairperson stated that in light of a performance criteria not being set, nor any performance assessment being carried out in the duration of the Contract, it was a challenge to ascertain value for money based on the performance received. However, it could be agreed that some level of performance was achieved, based on subsequent reports by GNS/Abalozi and the reduction in cable theft incidents.

4.1.10 Mr Skosana sought clarity on whether the Contract provided for the level of the required disclosure. Mr Nupen indicated that this had not been established. However, from an accounting perspective, an invoice that is issued should be accompanied by appropriate details to substantiate the invoice.

4.1.11 In response to the concerns raised by the Committee on the lack of details from GNS/Abalozi, Management reiterated that the details required would pose a risk on the lives of the individuals that had participated in the covert operation. Anonymity was critical and Management was comfortable that the reduced number of incidents sufficed as a level of proof that service was rendered.

4.1.12 Mr Bhamjee added that during the investigation, reports had been provided by GNS/Abalozi, which reflected performance on the part of the Service Provider. The reports contained the scope of work covered and pictures of areas where investigations had been performed. Validation of the reports had been done, and the details contained in the Report validated performance over a period of time. Furthermore, the said Reports were discussed with Management prior to issuance. Management had accepted the level of detail contained in the Reports, which could possibly be due to the limited contract management skills within the Company.

4.1.13 The Chairperson thanked the HNM Team for the work undertaken within the applicable timelines.

*Messrs Nupen, Bhamjee and Mhlanga and Ms Molebatsi were excused from the meeting at 08:56.*

4.1.14 The Chairperson noted the contents of the Report as circulated, the discussions by the *ad hoc Committee* mandated by the Board Risk Committee to finalise the matter at hand, and the comments from Management. She summarised as follows:

- Although the impact of the services rendered by GNS/Abalozi could be identified, it could not be proven with certainty that all the contractual obligations had been met.
- There had been no performance criteria set out at the inception of the contract and Management did not perform any assessments on the services rendered during the duration of the Contract.
- It could also not be ascertained whether the cost paid by the Company was

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## CONFIDENTIAL

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For Attention

commensurate with the output. The contents of the Report reflected a certain level of performance on the part of *GNS/Abalozi*.

4.1.15 The Chairperson recommended that the outcome of the independent investigation be accepted, and the litigation process not be pursued as it would be a challenge to prove non-performance without the basis of performance criteria. The Committee unanimously supported the recommendation of the Chairperson alluding to the discussions held above, and further lauded the *ad hoc* Committee for the commendable work it had undertaken in finalising this matter. Management acknowledged that the Company had been found lacking in Contract Management.

4.1.16 Management informed the Committee that notification had since been received that the National Director of Public Prosecutions had withdrawn the *Abalozi* criminal case due to lack of evidence.

4.1.17 Mr Mkwanazi requested Management to prepare a briefing note on the Lessons Learnt from the *GNS/Abalozi Contract* in relation to contract management. Ms Forbes stated that future contracts should clearly reflect improved contract and supplier performance management.

Mr Molefe

4.1.18 Management confirmed that the internal consequence management processes were adhered to and action taken against transgressors in the matter.

**RESOLVED** that the Committee:

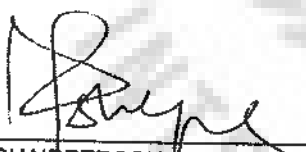
- Noted and accepted the Independent Report on the Outcome of the Independent Investigation on whether the Company received value for money from services rendered by *Abalozi Risk Advisory Service (Pty) Ltd (GNS/Abalozi)*.
- That based on the outcome of the investigation, the Company's litigation process against *Abalozi* will not be pursued as objectives of the contract had been met and the Company had derived value for money, despite clearly visible proof of performance due to the non-availability of a performance criteria agreed to between the Company and *Abalozi Risk Advisory Service (Pty) Ltd (GNS/Abalozi)*.

14/3/1

4.2

**CLOSE OF MEETING**

There being no further business to conduct, the Chairperson declared the meeting closed at 09:05



CHAIRPERSON

DATE: 2014 108/15



COMPANY SECRETARY

DATE: 2014 108/18

"LL"

"LL"

MINUTES OF THE BOARD OF DIRECTORS OF TRANSNET SOC LTD MEETING NO. 14/3 HELD ON 28 MAY 2014 AT 09:15 IN BOARDROOM 4901, CARLTON CENTRE OFFICE TOWERS, 150 COMMISSIONER STREET, JOHANNESBURG

Resolution No/ For Attention

# 1 CONSTITUTION OF MEETING AND APOLOGIES

## 1.1 Present

Mr ME Mkwana	Chairperson
Mr MA Fanucchi	Non-Executive Director
Ms Y Forbes	Non-Executive Director
Mr HD Gazendam	Non-Executive Director
Ms NP Mnxasana	Non-Executive Director
Mr B Molefe	Group Chief Executive
Ms N Moola	Non-Executive Director (video-conference)
Ms NR Njeke	Non-Executive Director (Partial attendance)
Mr IM Sharma	Non-Executive Director (Partial attendance)
Mr IB Skosana	Non-Executive Director
Mr A Singh	Group Chief Financial Officer
Ms ZE Tshabalala	Non-Executive Director
Ms DLJ Tshepe	Non-Executive Director (Partial attendance)

## 1.2 In attendance

Ms NJ Mabandla	Group Executive: Legal and Compliance
Ms KL Mosia	Company Secretary
Ms ANC Ceba	Group Company Secretary

## 1.3 Partial Attendance

Ms P Bezuidenhout	Consultant: KPMG
Ms L Govender	Manager: Talent Management
Mr M Gregg-Macdonald	Group Executive: Planning and Sustainability
Ms R Lepule	Group Executive: Results Management Office
Ms M Matooane	Group Executive: Enterprise Information Management Systems
Ms DC Moephuli	Chief Risk Officer
Mr R Narsai	Consultant: KPMG
Mr DZ Nkonki	Consultant: Nkonki
Ms S Qaringe	General Manager, Monitoring: Results Management Office
Ms A van der Merwe	Consultant: iThemba Governance and Statutory Solutions

## 1.3 Apologies

There were no apologies

## 7.4 Board Risk Committee

7.4.1 Ms Forbes took the Board through the Resolutions Registers as contained in the meeting pack. She indicated that the Committee considered, amongst others, the Overview of the NMPP Construction Progress (operations and associated risks).

7.4.2 Mr Gazendam gave the Board background on the Abalozi matter, and highlighted the formation of an *ad hoc* Committee to bring the matter to finality. He advised that an Independent Mediator was appointed to work on the matter for 3 months. He highlighted, amongst others, the following findings from the Independent Mediator Report:

- There had been no irregularities in the payments that were made to GNS/Abalozi. The payments were effected according to the provisions of the Contract and were based on issued invoices.
- There was no performance criteria set out in the Contract, nor did the Company assess the performance of GNS/Abalozi.
- No evidence could be found on the number of personnel deployed in accordance with the Contract. HMM could therefore not conclude that GNS/Abalozi had provided value for money in this regard.
- A cost comparison to assess value for money could not be drawn between GNS/Abalozi and CPI due to the differences in the nature of the actual services provided and the contractual values, which were significant.
- It had been noted that pursuant to the termination of the GNS/Abalozi Contract, and the appointment of CPI, the monthly costs for GNS/Abalozi's services which had previously grown appreciatively to R4m a month, had immediately doubled.

7.4.3 Mr Gazendam indicated that the Committee had approved the finalisation of the Abalozi matter based on the findings from the Independent Mediator. Moreover, Management had also informed the

- 11/12      **Compliance Report:** The lawyers will seek to prove that there was a corrupt relationship between *Abalozi* and a deceased employee, Mr Senamela. The lawyers will allege criminal conduct on the *Abalozi* matter. The Chairperson requested that the matter be deliberated at the Board Risk Committee
- 11/12/1      The matter has been finalised.

- 15      **CLOSE**
- 15.1      There being no further business to conduct, the Chairperson declared the meeting as closed at 15:40.

*U Ekhiksony*  
CHAIRPERSON  
DATE: *11/09/2014*  
Group Company Secretary – Confidential

*AN Ceba*  
GROUP COMPANY SECRETARY  
DATE: 11 SEPTEMBER 2014  
Board of Directors 14:28 May 2014



**"MM"**

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

**CASE NO. 10/43494**

In the matter between:

**TRANSNET LIMITED**

Plaintiff

And

**ABALOZI RISK ADVISORY SERVICES (PTY) LIMITED**

Defendant

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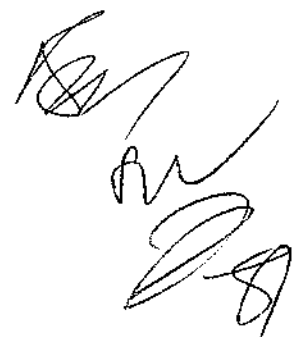
**DEED OF SETTLEMENT**

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**WHEREAS** Transnet SOC Ltd ("Transnet") issued a summons against Abalozi Risk Advisory Services (PTY) Limited ("Abalozi"), previously known as General Nyanda Security Risk Advisory Services (PTY) Limited ("GNS") in connection with Security Services rendered to Transnet by GNS in the period 2007 to 2009 ("the service"); and

**WHEREAS** Abalozi issued a counter claim against Transnet in connection with the services;

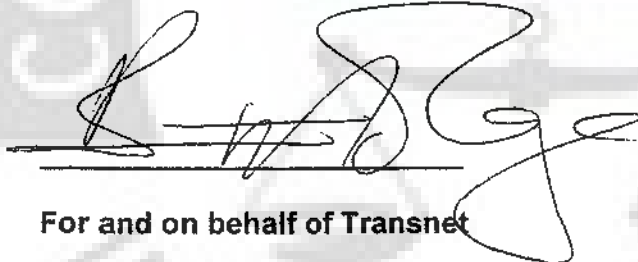
**NOW THEREFORE**, Transnet and Abalozi have agreed to settle all disputes between them in this litigation on the following terms:



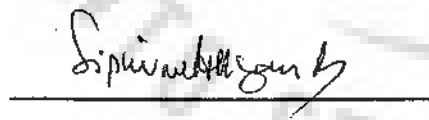


1. Transnet hereby withdraws its action against Abalozi;
2. Abalozi hereby withdraws its counter claim against Transnet;
3. Transnet will, upon signature hereof, issue a media statement in the form as agreed, and attached hereto marked "A";
4. Transnet will pay all the legal costs incurred by Abalozi, its Directors and the co-founders and Directors of GNS on an Attorney and Own client scale.
5. The terms of this settlement agreement are confidential and shall not be disclosed by any one of the parties to any third party.

Dated at Johannesburg on this 4<sup>th</sup> day of August 2014

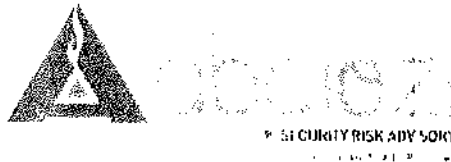


For and on behalf of Transnet



For and on behalf of Abalozi

**"NN"**



Our Ref: Mr S. Mahlangu/ M Kamuche  
Your Ref: Mr Brian Molefe

**"Without Prejudice"**

8 September 2014

**Dear Brian**

**RE:ABALOZI RISK ADVISORY SERVICES / TRANSNET**

- 1 We refer to our letter of 20 August 2014.
- 2 The following should be taken into account in finalising the lump sum payable to Abalozi in full and final settlement of Abalozi's legal costs in the action instituted by Transnet and damages claimable in connection with:
  - 2.1 the pending Review Application; and
  - 2.2 the pending defamation claim.
- 3 Our view is that an amount of R40,000,000.00 (forty million rands) will be reasonable compensation to Abalozi in this regard.
- 4 As this matter has been dragging on for too long, we need your response within 7 (seven) days from today's date failing which we will have no choice but to ask our lawyers to issue the Bill of Costs and proceed with the pending claims.
- 5 Should our proposed settlement amount be acceptable, it should be deposited into our attorneys trust account as follows:

<b>Name</b>	Werksmans Inc.
<b>Bank</b>	Standard Bank
<b>Branch</b>	Sandton
<b>Branch Code</b>	01 92 05
<b>Account Number</b>	02 268 7882
<b>Reference</b>	GNSR12756.9

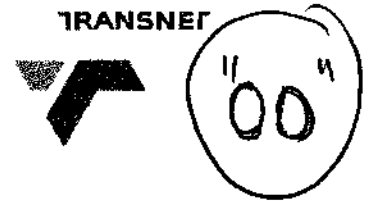
- 6 We await to hear from you.

**Yours faithfully**

**Abalozi Risk Advisory Services**

**Pearlberg**  
800-972-1111

"OO"



Mr Brian Molefe  
Group Chief Executive  
Transnet SOC Ltd

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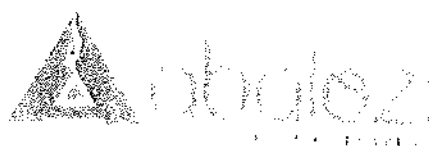
**SUBJECT**

18178 L.m

**TRANSNET SOC LTD / ABALOZI RISK ADVISORY SERVICES ("ABALOZI")***For your attention, please***COMMENTS / NOTES:***Ndiphive**Can we discuss please**[Signature]**25-10-14*

18178/2014

**FROM: Abalozi Security Risk Advisory***[Signature]*  
*21/10/14*



Our Ref: Mr S Mahlangu/ Miss M Kamuche

Your Ref: Mr Brian Molefe

**"WITHOUT PREJUDICE"**

16 October 2014

**RE: Transnet/ Abalozi Risk Advisory Services**

Dear Brian

Your letter dated 29 September 2014 refers.

1. In reference to our letter dated 8 September 2014 we have indicated that we would request our attorney to issue the bill of cost and proceed with the review application, the defamation claims and the directors/ employees pain and suffering claims should our proposed settlement not be acceptable.
2. As this matter has been dragging for so long, our consideration was that a lump sum would eliminate any further legal processes and thus swiftly conclude this matter.
3. In light of Transnets' own admissions after appointing an external law firm which conducted a vigorous and exhaustive investigation and concluded that we were unjustly persecuted.
4. Restitution and compensation would be a due remedy for the defamation of Abalozi, its employees and directors.
5. It should also be noted that prejudice was also carried over to companies which had the directors of Abalozi as members or directors in their companies. As all those companies were placed on Transnets' list of excluded tenderers. This could pose further litigation against Transnet.
6. The consequences of Transnets' actions, including the criminal charges have caused irreversible effects which Abalozi and its directors have suffered in the business arena. Reputations of its directors and officials were severely tainted, rendering them unemployable and not trustworthy in the sphere of security services; the nature of the companies' core services requires integrity and honesty.

7. The following were taken into account when considering the proposed amount, and exclude the counterclaims that were subject to the settlement agreement signed on the 4<sup>th</sup> of August 2014;

- Loss of revenue on the TFR contract as the contract was on a month to month basis until a tender process would appoint a winning bidder. It is our belief that we were in good standing to be awarded the contract after the adjudication processes were fulfilled, but we were unjustly prejudiced. We are also of the understanding that the services we were rendering were subsequently granted to another company on a month to month basis. We would have continued to render the said services as per our month to month contract stipulated. The said services are currently being done on a confinement basis. Thus leaving us to believe that we would still be rendering such services to Transnet considering that Transnet was deriving full benefit from all contracts with Abalozi. The revenue generated over the four years would have been no less than R 250 million. See attached "Annexure A".
- At that time Abalozi was also contracted to render services to the South African Secret Services (now known as the State Security Agency). This contract was terminated partly due to the negative publicity arising out of the dispute between Abalozi and Transnet. The value of this contract was no less than R 387 million. See attached "Annexure B".
- G Fleet had also contracted Abalozi and subsequently terminated the services after the above mentioned accusations. The value of the losses is estimated at R 82 million. See attached "Annexure C".
- After calculating the value of defamation claims and pain and suffering claims, the globular estimates amount to over R 700 million.

8. The R 40 million proposal of settlement was believed to be a fair restitution and compensation inclusive of the legal costs incurred in all matters with Transnet. Given the extra information required by Transnet in response (letter dated 29 September 2014) and the detail of lost revenue provided in this communication, we think that a settlement of R 60 million would be justifiable. It would be prudent to have this matter concluded expeditiously so as to avoid any further legal and consequential costs.

9. We await to hear from you.

Yours faithfully

Abalozi Risk Advisory Services

**Note our new telephone number: 011 477 0035**

**Fax: 011 477 0147**

Abalozi  
9723 E-mail  
Abalozi  
1 880  
Fax: +27



TRANSNET PREDICTED INCOME

	2010	2011	2012	2013	2014	TOTAL
January	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 18 161 913.60
February	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
March	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
April	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
May	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
June	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
July	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
August	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
September	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
October	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
November	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 18 161 913.60
December	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 18 161 913.60
TOTAL	R 49 945 262.40	R 54 485 740.80	R 54 485 740.80	R 54 485 740.80	R 40 864 305.60	R 254 266 790.40

ANNEXURE A

PROJECT ROUNDOABOUT PREDICTED INCOME

Predicted Income	
2011	R 96 000 000.00
2012	R 102 000 000.00
2013	R 108 000 000.00
2014 (January - September)	R 81 000 000.00
TOTAL	R 387 000 000.00

ANNEXURE B



G-FLEET PREDICTED INCOME

	2010	2011	2012	2013	2014	TOTAL
January		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
February		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
March		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
April		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
May		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
June	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
July	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
August	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
September	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
October	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
November	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00		R 6 384 000.00
December	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00		R 6 384 000.00
TOTAL	R 11 172 000.00	R 19 152 000.00	R 19 152 000.00	R 19 152 000.00	R 14 364 000.00	R 82 992 000.00

ANNEXURE C

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**FURTHER AFFIDAVIT**

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I, the undersigned,

**CHRISTOPHER FRANCIS NEALE TODD**

do hereby make oath and state that:

1. I am an adult male attorney and am a director of Bowman Gilfillan Inc. I have been a director of the firm since March 1998.
2. The facts deposed to in this affidavit are, save where otherwise stated or apparent from the context, within my personal knowledge and are, to the best of my belief, true and correct.
3. I depose to this further affidavit at the request of the Commission of Inquiry into State Capture. The purpose of this further affidavit is to supplement what I stated in paragraph 62 of the affidavit which I deposed to on 25 September 2020 ("**my second affidavit**"),
4. In that paragraph I stated that I did not know what amount was ultimately arrived at to settle the undertaking to pay the legal costs of Abalozi.
5. Since I deposed to that affidavit I have been provided with certain documents by Transnet, whose authenticity I have no reason to doubt, which indicate that Transnet ultimately agreed to pay an amount of R20 million rand to Abalozi.
6. In this regard, I attach –
  - a. marked "**PP**", a copy of a memorandum dated 30 January 2015, addressed by the Group Executive, Legal and Compliance, to the Group Chief Financial Officer,



ACF.

requesting payment of that amount, together with its annexures B and C. (Annexure A to that memorandum was the letter from Abalozi dated 16 October 2014, a copy of which was attached as Annexure "OO" to my second affidavit.

- b. marked "QQ", a copy of a document indicating payment of that amount into the trust account of apparently newly appointed attorneys to Abalozi, Tim Sukazi Inc.

7. The deed of settlement concluded between Transnet and Abalozi dated 4 August 2014, attached as Annexure "MM" to my second affidavit, contemplated the settlement of all disputes between the parties under case number 10/43494.

- a. Under paragraph 2 of the deed of settlement, Abalozi withdrew its counterclaim in that litigation. On any reasonable assumption, the deed of settlement compromised each of the elements of the counterclaim that were set out in paragraphs 26 to 31 of the Abalozi plea and counterclaim (Annexure "R" to my second affidavit).

- b. Under paragraph 4 of the deed of settlement, Transnet undertook to pay legal costs on the terms set out there.

8. In my view, on reasonable assumptions, the taxed costs of Abalozi in that litigation would not have exceeded R1 million. They would probably have been significantly less than R1 million.

9. In these circumstances, the sum of R20 million paid by Transnet to Abalozi constituted either an absurdly inflated assessment of legal costs due to Abalozi, or alternatively was paid to settle claims by Abalozi that had already been compromised or, to the extent that any of those claims had not been compromised (if it were to have been contended that they were new claims that had not been included in Abalozi's counterclaim that had been settled), any such claims would certainly, by January 2015, have prescribed.



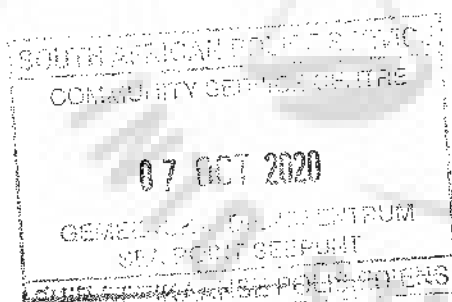
ACF.




10. The memorandum motivating for the payment of the amount of R20 million provides no explanation for Transnet's decision to conclude an agreement (by exchange of letters) to pay that amount to Abalozi. I respectfully state, on the strength of the evidence that has been made available to me by Transnet, that there was no legitimate commercial rationale for concluding that agreement or paying that amount.

  
CHRISTOPHER FRANCIS NEALE TODD

I CERTIFY that this affidavit was signed and sworn to before me at SAPS Seapoint on this the 07<sup>th</sup> day of **OCTOBER 2020**, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".



 AC Fish  
7217048-4

COMMISSIONER OF OATHS

Name: AC. Fish

Address: Corner of Bay Road & Bill Peter's Dr.  
Moullie Point.

Capacity: Constable

Transnet SOC Ltd  
Registration  
Number  
1999/000900/06

Carlton Cent  
150 Commissioner  
Stg. Johannesburg  
2001

P.O. Box 72501  
Parkview  
South Africa, 2120  
T +27 11 308 2250  
F +27 11 308 1269

**"PP"**

TRANSNET



www.transnet.net

**MEMORANDUM**

**To :** Mr. Anoj Singh: Group Chief Financial Officer

**From :** Mr. Ndiphiwe Silinga: Group Executive, Legal and Compliance

**Date :** 30 January 2015

**SUBJECT :** **TRANSNET SOC LTD / ABALOZI RISK ADVISORY SERVICES (ABALOZI)**

**PURPOSE:**

1. The purpose of this submission is to request the Group Chief Financial Officer ("GCFO") to authorize the payment of an amount of R20 million (Twenty Million Rand) in full and final settlement of the legal disputes between Transnet and Abalozi.

**BACKGROUND**

2. During 2011 Abalozi sued Transnet for damages of R487 682 346,00 arising out of various claims including loss of business, loss of profit, defamation of character and others.
3. During 2014 the parties engaged in settlement negotiations, which resulted in Abalozi offering to accept an amount of R60 million in full and final settlement of all its claims and legal costs against Transnet, per letter dated 16 October 2014.

**A copy of the aforesaid letter is enclosed herewith, marked "A".**

4. Transnet made a counter offer of R20 million, per letter dated 16/01/2015.

**A copy of the aforesaid letter is enclosed herewith, marked "B".**

5. Abalozi have since accepted the counter-offer of R20million per letter dated 22/01/2015.

**A copy of the aforesaid letter is enclosed herewith, marked "C".**

19-124169

TRANSNET

**DISCUSSION**

6. The offered and accepted amount of R20 million is now due for payment, the effect of which will be to settle all legal disputes between the parties that were pending before the South Gauteng High Court, including costs.
7. Such payment should be made into the bank account provided in Annexure "C" hereto.

**FINANCIAL IMPLICATIONS**

8. Transnet will pay an amount of R20 million in full and final settlement.

**BUDGET IMPLICATIONS**

9. The settlement amount was not budgeted for, but payment thereof will be made from a Corporate Cost Centre. *AND will be funded from overall cost savings.*

**RECOMMENDATIONS**

10. It is recommended that the GCFO approves and authorizes the payment of the aforesaid amount.

Recommended by

  
**Ndiphiwe Silinga**

Group Executive: Legal &amp; Compliance

Date: 30/01/2015

Approved by

  
**Mr. Anoj Singh**

Group Chief Financial Officer

Date: 30/01/15

**TRANSNET  
PAID**

19-124169

Brian Molefe, Group Chief Executive

"B"

TRANSNET



Our Ref No: BM/18178  
Your Ref: Mr S Mahiangu / Miss M Kamuche

Abalozi Risk Advisory Services  
61 Boundary Road  
Robindale, Ext 1  
**RANDBURG**

Fax Number: (011) 880 9723

"Without Prejudice"

Dear Sirs

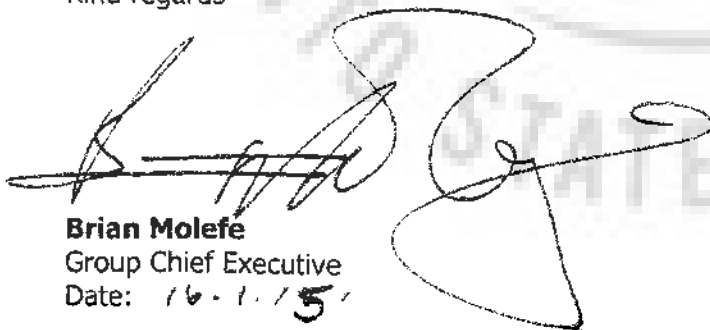
**TRANSNET / ABALOZI RISK ADVISORY SERVICES**

Your letter dated 16 October 2014 herein refers.

Without admission of liability Transnet SOC Ltd hereby offers you an amount of R20 million in full and final settlement of all legal claims and costs against the Company.

We would be pleased to receive your response to the aforementioned offer within seven days of receipt hereof.

Kind regards

  
**Brian Molefe**  
Group Chief Executive  
Date: 16.1.15

**TRANSNET  
PAID**

14-124164

**Transnet SOC Ltd**  
Registration Number  
1990/000900/30

Carlton Centre  
150 Commissioner  
Street  
Johannesburg  
2001

P.O. Box 72501  
Parkview, Johannesburg  
South Africa, 2122  
T +27 11 308 2309  
F +27 11 308 2315

**Directors:** LC Mabaso (Chairperson) B Molefe\* (Group Chief Executive) Y Forbes GJ Mahalela PEB Mathokga N Moola ZA Nagdee VM Nkonyane MR Seleke SD Shane  
BG Stagman PG Williams A Singh\* (Group Chief Financial Officer)  
\*Executive

Group Company Secretary: ANC Ceba

www.transnet.net



"C"



Our Ref: Mr S Mahlangu/ Miss M Kamuche  
Your Ref: Mr Brian Molefe

"WITHOUT PREJUDICE"

Transnet  
Per email: [Komilla.Moodley@transnet.net](mailto:Komilla.Moodley@transnet.net)

22 January 2015

Dear Sirs,

**TRANSNET / ABALOZI RISK ADVISORY SERVICES**

We refer to the above matter and in particular to your letter dated 16 January 2015. We confirm our acceptance of your offer of R20 000 000.00 (Twenty million rands) in full and final settlement of all legal claims and costs by our company.

Kindly please deposit the said amount into the following account number mentioned below within 7 (seven) days of receipt of this letter and we further attach a letter from the bank to confirm the account number.

Account Name: Tim Sukazi Incorporated Trust Account  
Account Number: 021560293  
Bank: Standard Bank  
Branch Name: Sandton City  
Branch Code: 018105  
Reference Number: ABALOZI /001/2015

We await to hear from you.

Yours faithfully

Abalozi Risk Advisory Services  
Tel: 011 477 0035  
Fax: 011 4770146

**TRANSNET  
PAID**



19-124169







Sandton City Branch

Tim Sukazi Inc

Business Banking

16 May 2013

Tim Sukazi Inc  
2013/068075/21  
Attorneys Trust Account  
021 660 293

To whom this concerns

We confirm that the above business has been conducting an account with us since 16 May 2013.  
The above account is controlled at Sandton City - 018105.

Yours faithfully

*Lebohlang Jan*  
Lebohlang Jan  
Business Manager  
011 805 8090



**TRANSNET  
PAID**

19-12-2013

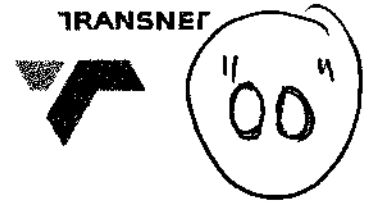
Sandton City Shopping Centre Shop 25 Level 5 Banking Mall Chr Rivonia and Fifth Streets Sandton 2146  
PO Box 78066 Sandton 2146 SWIFT address: SBZA 7A JJ www.standardbank.co.za  
Tel: 0860 101 341 Fax: 011 883 8623

The Standard Bank of South Africa Limited (Reg. No. 1962/000738/06) An authorised financial services and registered credit provider (NCRCP15)

Directors: T M F Phaswana (Chairman), S K Thababala\* (Chief Executive), D D B Band, R M W Dunne\*, T S Gcabashe, X P Kalyan, S J Macozoma, J H Masee\*,  
Adv K O Moroka, A C Nissen, M C Ramaphosa, S P Ridley\*, M J D Ruck, Liza Smith of Kabin, Kc\*, E M Woods  
Secretary: L Willschön \*Executive Director #BriKoh 13/04/2012



"OO"



Mr Brian Molefe  
Group Chief Executive  
Transnet SOC Ltd

6

**SUBJECT**

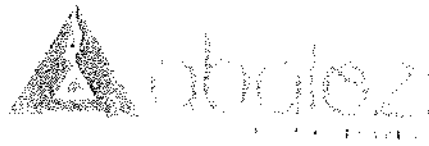
18178 L.m

**TRANSNET SOC LTD / ABALOZI RISK ADVISORY SERVICES ("ABALOZI")***For your attention, please***COMMENTS / NOTES:***Adiphiwe**Can we discuss please**[Signature]**25-10-14*

18178/2014

**FROM: Abalozi Security Risk Advisory**

*[Handwritten signature]*  
*21/10/14*



Our Ref: Mr S Mahlangu/ Miss M Kamuche

Your Ref: Mr Brian Molefe

**"WITHOUT PREJUDICE"**

16 October 2014

**RE: Transnet/ Abalozi Risk Advisory Services**

Dear Brian

Your letter dated 29 September 2014 refers.

1. In reference to our letter dated 8 September 2014 we have indicated that we would request our attorney to issue the bill of cost and proceed with the review application, the defamation claims and the directors/ employees pain and suffering claims should our proposed settlement not be acceptable.
2. As this matter has been dragging for so long, our consideration was that a lump sum would eliminate any further legal processes and thus swiftly conclude this matter.
3. In light of Transnets' own admissions after appointing an external law firm which conducted a vigorous and exhaustive investigation and concluded that we were unjustly persecuted.
4. Restitution and compensation would be a due remedy for the defamation of Abalozi, its employees and directors.
5. It should also be noted that prejudice was also carried over to companies which had the directors of Abalozi as members or directors in their companies. As all those companies were placed on Transnets' list of excluded tenderers. This could pose further litigation against Transnet.
6. The consequences of Transnets' actions, including the criminal charges have caused irreversible effects which Abalozi and its directors have suffered in the business arena. Reputations of its directors and officials were severely tainted, rendering them unemployable and not trustworthy in the sphere of security services; the nature of the companies' core services requires integrity and honesty.

7. The following were taken into account when considering the proposed amount, and exclude the counterclaims that were subject to the settlement agreement signed on the 4<sup>th</sup> of August 2014;
- Loss of revenue on the TFR contract as the contract was on a month to month basis until a tender process would appoint a winning bidder. It is our belief that we were in good standing to be awarded the contract after the adjudication processes were fulfilled, but we were unjustly prejudiced. We are also of the understanding that the services we were rendering were subsequently granted to another company on a month to month basis. We would have continued to render the said services as per our month to month contract stipulated. The said services are currently being done on a confinement basis. Thus leaving us to believe that we would still be rendering such services to Transnet considering that Transnet was deriving full benefit from all contracts with Abalozi. The revenue generated over the four years would have been no less than R 250 million. See attached "Annexure A".
  - At that time Abalozi was also contracted to render services to the South African Secret Services (now known as the State Security Agency). This contract was terminated partly due to the negative publicity arising out of the dispute between Abalozi and Transnet. The value of this contract was no less than R 387 million. See attached "Annexure B".
  - G Fleet had also contracted Abalozi and subsequently terminated the services after the above mentioned accusations. The value of the losses is estimated at R 82 million. See attached "Annexure C".
  - After calculating the value of defamation claims and pain and suffering claims, the globular estimates amount to over R 700 million.
8. The R 40 million proposal of settlement was believed to be a fair restitution and compensation inclusive of the legal costs incurred in all matters with Transnet. Given the extra information required by Transnet in response (letter dated 29 September 2014) and the detail of lost revenue provided in this communication, we think that a settlement of R 60 million would be justifiable. It would be prudent to have this matter concluded expeditiously so as to avoid any further legal and consequential costs.
9. We await to hear from you.

Yours faithfully

Abalozi Risk Advisory Services

**Note our new telephone number: 011 477 0035**

**Fax: 011 477 0147**

Abalozi  
4723 E-mail  
Abalozi  
1 880  
Fax: +27  
Abalozi

TRANSNET PREDICTED INCOME

	2010	2011	2012	2013	2014	TOTAL
January	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 18 161 913.60
February	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
March	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
April	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
May	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
June	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
July	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
August	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
September	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
October	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 22 702 392.00
November	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 18 161 913.60
December	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 4 540 478.40	R 18 161 913.60
TOTAL	R 49 945 262.40	R 54 485 740.80	R 54 485 740.80	R 54 485 740.80	R 40 864 305.60	R 254 266 790.40

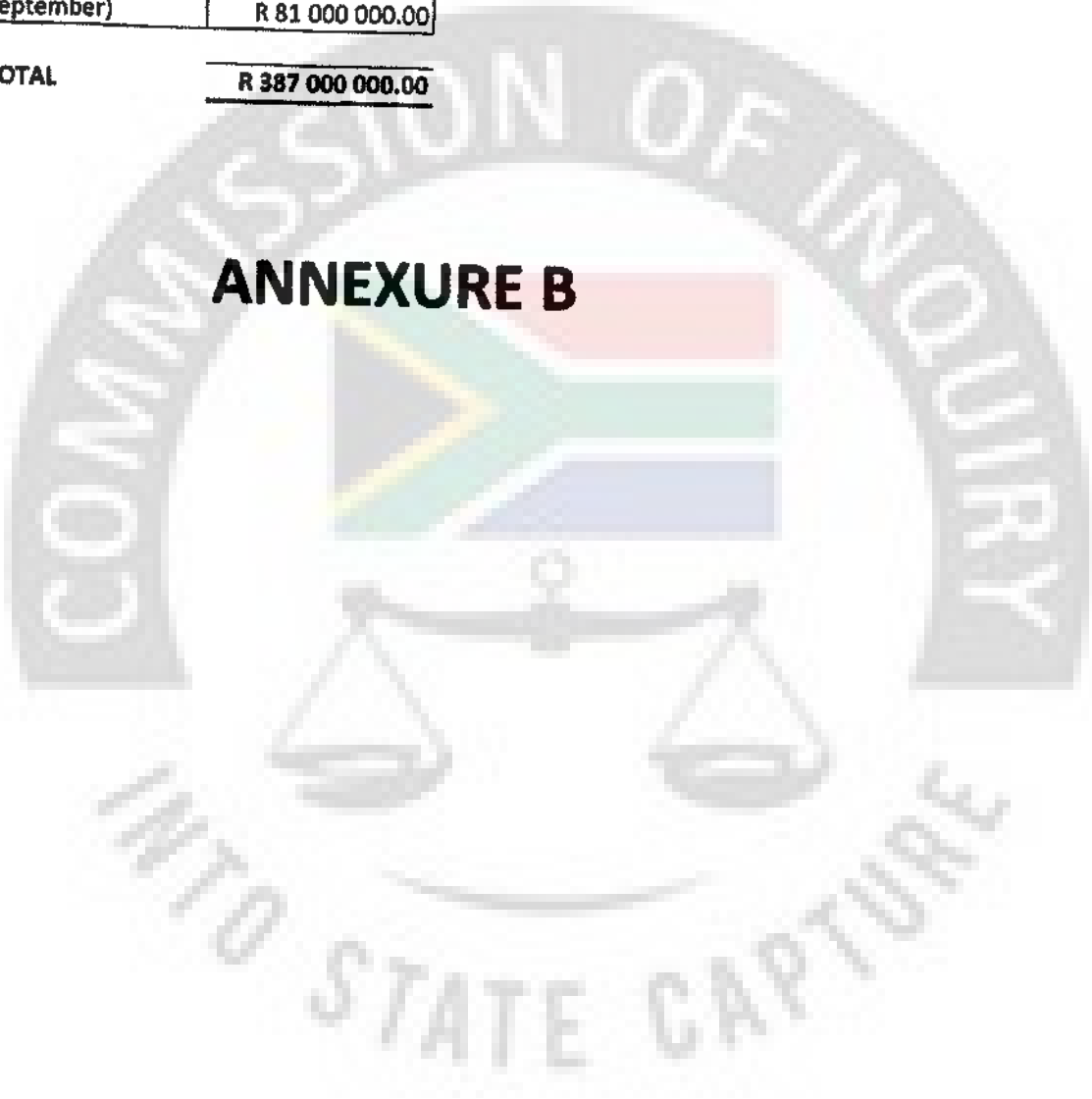
ANNEXURE A



PROJECT ROUNDOABOUT PREDICTED INCOME

Predicted Income	
2011	R 96 000 000.00
2012	R 102 000 000.00
2013	R 108 000 000.00
2014 (January - September)	R 81 000 000.00
TOTAL	R 387 000 000.00

ANNEXURE B



G-FLEET PREDICTED INCOME

	2010	2011	2012	2013	2014	TOTAL
January		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
February		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
March		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
April		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
May		R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 6 384 000.00
June	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
July	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
August	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
September	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
October	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 7 980 000.00
November	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00		R 6 384 000.00
December	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00	R 1 596 000.00		R 6 384 000.00
TOTAL	R 11 172 000.00	R 19 152 000.00	R 19 152 000.00	R 19 152 000.00	R 14 364 000.00	R 82 992 000.00

ANNEXURE C

"QQ"

"QQ"

TRANSNET



Payee:

Tim Sukazi Incorporated Trust  
Account

40 61 Boundary Road

Robihdale Est 1

Randburg

Date : 2015-01-30

Description	Invoice no.	Date	R	C
Transnet SOC Ltd / Abalozi Risk Advisory	Ref: ABALOZI/001/2015	22/01/2015	20 000 000	00
Services settlement				
			20 000 000	00
			20 000 000	00

**TRANSNET  
PAID**

Post/Per hand: EFT Tel. No.: 2374

Ref.: Group Taxation

Compiled by:

Approved:

Account

X1 HEAD 03200

Depot

General ledger

c

1 0 0 3 0 1 3 6 9 0 0 0 2 20 000 000 00

VAT

Account

Depot

General Ledger

FOR OFFICE USE

Verified:

Approved:

Vendor No:

TB 01 No.:

TB 05 No.:

Date:

Cheque No.:

2005294

1900124169  
2015-02-03

**"MM"**

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

**CASE NO. 10/43494**

In the matter between:

**TRANSNET LIMITED**

Plaintiff

And

**ABALOZI RISK ADVISORY SERVICES (PTY) LIMITED**

Defendant

---

**DEED OF SETTLEMENT**

---

**WHEREAS** Transnet SOC Ltd ("Transnet") issued a summons against Abalozi Risk Advisory Services (PTY) Limited ("Abalozi"), previously known as General Nyanda Security Risk Advisory Services (PTY) Limited ("GNS") in connection with Security Services rendered to Transnet by GNS in the period 2007 to 2009 ("the service"); and

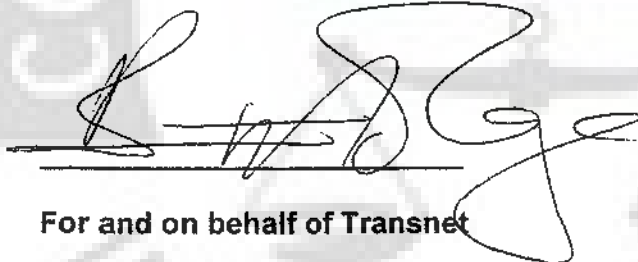
**WHEREAS** Abalozi issued a counter claim against Transnet in connection with the services;

**NOW THEREFORE**, Transnet and Abalozi have agreed to settle all disputes between them in this litigation on the following terms:

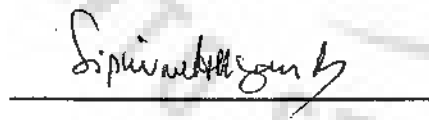


1. Transnet hereby withdraws its action against Abalozi;
2. Abalozi hereby withdraws its counter claim against Transnet;
3. Transnet will, upon signature hereof, issue a media statement in the form as agreed, and attached hereto marked "A";
4. Transnet will pay all the legal costs incurred by Abalozi, its Directors and the co-founders and Directors of GNS on an Attorney and Own client scale.
5. The terms of this settlement agreement are confidential and shall not be disclosed by any one of the parties to any third party.

Dated at Johannesburg on this 4<sup>th</sup> day of August 2014



For and on behalf of Transnet



For and on behalf of Abalozi



"R"

PKMVJ  
GNSR12756.8  
#904345v1

PH344

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

CASE NO. 10/43494

In the matter between :

**TRANSNET LIMITED**

Plaintiff

and

**ABALOZI RISK ADVISORY SERVICES (PTY) LTD**

Defendant

---

**DEFENDANT'S SPECIAL PLEAS, PLEA AND COUNTERCLAIMS**

---

**SPECIAL PLEA****1 Mis-joinder and/or non-joinder**

- 1.1 The Plaintiff in its particulars of claim cites the Defendant as Abalozi Risk Advisory Services (Pty) Limited.
- 1.2 To the knowledge of the Plaintiff, the Defendant is not the party to which it awarded the contracts alleged by the Plaintiff in paragraphs 10 and 13 of its Particulars of Claim.

#914345v1

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1.3 To the knowledge of the Plaintiff, the Defendant was approached by the Plaintiff to submit a proposal for rendering a comprehensive total security package to the Plaintiff. Having considered the Plaintiff's requirements, the Defendant submitted such a proposal as part of a consortium with 2 (two) other companies, Revert Risk Management Solutions (Pty) Ltd and Nayle Outsourcing (Pty) Ltd, known as "the GNS Consortium".

1.4 The submission was followed by a presentation by the GNS Consortium, at the request of the Plaintiff. Quotations were called upon by the Plaintiff from the GNS Consortium and same were negotiated and agreed upon.

1.5 On the 22 November 2007, the GNS Consortium was advised by the Plaintiff that it had been appointed to render the services as per the consortium's submissions, presentation and the quotation agreed upon and furnished to the Plaintiff.

1.6 *The contract was entered into with General Appender Security Risk Advisory Services and not with GNS Consortium*  
Subsequent to that, the GNS Consortium and the Plaintiff through their duly authorised officials concluded a binding security services agreement.

This agreement was extended from time to time by the parties through their representatives who had the necessary capacity and authority to bind the parties.

1.7 On these basis, the GNS Consortium followed all the necessary procedures and processes which it was required to follow as represented and made known to it through the Plaintiff's duly authorised officials.

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1.8 As a result, the Plaintiff has failed to join and/or sue the correct party. In addition, the Plaintiff, in these proceedings, is suing and/or seeking relief against an incorrect Defendant.

1.9 On this point alone, the Plaintiff's claim must be dismissed with costs as the Defendant did not conclude any agreements with the Plaintiff.

## 2 Estoppel

2.1 The Defendant persist that Gama, Senamela and Khanye possessed the necessary authority and capacity when awarding contracts to the GNS Consortium and/or when extending the said contracts.

2.2 In the event, however, that this Honourable Court finds that the above three (3) mentioned officials of the Plaintiff were not duly authorised and/or lacked the capacity and/or authority to award and/or extend the contracts to the GNS Consortium, the Defendant then pleads that the Plaintiff is estopped from denying their authority for the following reasons:-

2.2.1 Gama, who is alleged to have conducted himself without the necessary authority, is a Chief Executive Officer and an Accounting Officer in terms of the PFMA in the employ of the Plaintiff which are positions of authority, and acts on behalf of the Plaintiff with the necessary authority and capacity to bind it. The

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Plaintiff has at all times held him out to be an authorised person to act on its behalf.

2.2.2

Senamela, who is alleged to have conducted himself without the necessary authority, was a Senior Manager in the employ of the Plaintiff, which is a position of authority, and acted on behalf of the Plaintiff with the necessary authority and capacity to bind it. The Plaintiff has at all times held him out to be an authorised person to act on its behalf.

2.2.3

Khanye, who is alleged to have conducted himself without the necessary authority, was a Contracts Manager in the employ of the Plaintiff, which is a position of authority, and acts on behalf of the Plaintiff with the necessary authority and capacity to bind it. The Plaintiff has at all times held him out to be an authorised person to act on its behalf.

2.2.4

The alleged decisions by Gama, Senamela and Khanye are binding administrative actions taken by the Plaintiff, they have not been set aside and/or reviewed and thus remain valid and binding against the Plaintiff.

*is this e  
requirement*

2.2.5

The GNS Consortium rendered its services to the Plaintiff from December 2007 to January 2010, a period of more than 2 (two)

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years without the Plaintiff alleging that the said 3 (three) officials acted without any authority and/or capacity to bind it.

2.2.6 The Plaintiff, with the knowledge of its Board, approved and made payments to the GNS Consortium for services rendered to it under the agreements in question over a period of more than 2 (two) years, which payments were made without any allegations being made that such payments were made pursuant to acts of officials who did not possess the necessary authority and/or capacity to do so.

2.2.7 The services which were rendered by the GNS Consortium were rendered over a period of approximately 2 (two) years to the knowledge of the senior officials of the Plaintiff and its board members who, at no stage, prior to the institution of these proceedings had intimated that the contract and/or extensions thereto were concluded by officials who lacked the necessary authority and/or capacity to bind the Plaintiff and/or were contrary to the Constitution, PFMA and the DPP Policy of the Plaintiff.

2.2.8 Gama, Senamela and Khanye acted within the course and scope of their employment with the Plaintiff, the Plaintiff having represented to the GNS Consortium that they had the necessary authority and/or capacity to bind the Plaintiff, such representations



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were not at any stage refused and/or denied by the Plaintiff and the GNS Consortium relied thereon in its dealings with the Plaintiff.

2.3 Acting on the belief of the correctness of the representations made by the Plaintiff, the GNS Consortium, to its detriment, entered into the alleged agreements with the Plaintiff.

2.4 Accordingly, the Plaintiff is estopped from denying the authority of Gama, Senamela and Khanye, its senior employees.

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#### DEFENDANT'S PLEA

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#### 3 AD PARAGRAPHS 1 AND 2

3.1 The Plaintiff has cited an incorrect party and/or is seeking relief against a wrong party in these proceedings.

3.2 The Defendant did not enter into any agreement with the Plaintiff. The agreement upon which the Plaintiff premises its claims was entered into by the Plaintiff and the GNS Consortium, as represented by the Defendant. *See the 'Markman' letter dd 13/03/2011 to Transnet Chairman*

3.3 To the extent that the Plaintiff seeks any relief based on the agreement annexed to its Particulars of Claim, or the agreements alleged in paragraphs 10 and 13 of its Particulars of Claim, such relief should be directed at the GNS Consortium and not the Defendant.

#904345v1

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3.4 Save as aforesaid, the Defendant admits the remaining allegations in these paragraphs.

4 AD PARAGRAPH 3.1

The allegations contained therein are admitted.

5 AD PARAGRAPH 3.2

5.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

5.2 The Defendant specifically pleads that Siyabonga Gama who is alleged to have been dismissed by the Plaintiff and upon whose dismissal the Plaintiff seeks to justify its claims for restitution, is in the employ of the Plaintiff as a Chief Executive Officer and an Accounting Officer in terms of the PFMA.

6 AD PARAGRAPHS 3.3 TO 3.4

Save to admit that Senamela was the Plaintiff's Manager: Security and Khanye was the Plaintiff's Contracts Manager: Security, the Defendant has no knowledge of the remaining allegations, does not admit them and puts the Plaintiff to the proof thereof.

#904316v1

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7 AD PARAGRAPHS 3.5, 3.6 AND 3.7

The allegations contained therein are admitted.

8 AD PARAGRAPHS 3.8 AND 3.9

8.1 The allegations contained therein are admitted.

8.2 The Defendant pleads further that the award of the contract to the GNS Consortium by the Plaintiff which was made on confinement was awarded in line with the provisions of the Constitution of the Republic of South Africa ("the Constitution"), the Treasury Regulations and the Plaintiff's DPP Policy.

9 AD PARAGRAPHS 3.10 AND 3.11

The Plaintiff has failed to annex the said DPP Policy and Gama's Special Delegation of Authority to its Particulars of Claim, accordingly, the Defendant has no knowledge of the allegations contained therein, does not admit them and puts the Plaintiff to the proof thereof.

10 AD PARAGRAPH 4

10.1 The allegations contained therein are denied as is specifically traversed and the Plaintiff is put to the proof thereof.

10.2 On 3 October 2007 the Defendant submitted its profile to the Plaintiff introducing its services in general.

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10.3 To the knowledge of the Plaintiff, the Defendant was approached by the Plaintiff to submit a proposal for rendering a comprehensive total security package to the Plaintiff. Having considered the Plaintiff's requirements, the Defendant submitted such a proposal as part of a consortium with 2 (two) other companies, Revert Risk Management Solutions (Pty) Ltd and Nayle Outsourcing (Pty) Ltd, known as the "GNS Consortium".

10.4 The submission was followed by a presentation by the GNS Consortium, which was at the request of the Plaintiff. Quotations were called upon by the Plaintiff from the consortium and same were negotiated and agreed upon.

10.5 The Defendant was the lead member of the GNS Consortium, as was requested by the Plaintiff.

11 AD PARAGRAPHS 5

The allegations contained therein are admitted.

12 AD PARAGRAPH 6

The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

13 AD PARAGRAPHS 7 AND 8

The allegations contained therein are unknown to the Defendant and are thus noted.

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14 AD PARAGRAPH 9

14.1 Save as stated in paragraph 14.2 below, the allegations contained therein are not within the Defendant's knowledge and are thus denied and the Plaintiff is put to the proof thereof.

14.2 The Defendant specifically pleads that the GNS Consortium was awarded the contract on confinement which is allowed by the Constitution, the Treasury Regulations and the Plaintiff's DPP Policy.

14.3 The Defendant specifically denies that the award was not in compliance with the Plaintiff's DPP Policy. From the Plaintiff's Particulars of Claim, it is clear that:

14.3.1 the contract was awarded on confinement;

14.3.2 the award was approved by the Transnet Freight Rail Acquisition Council, which acts as a Tender Board;

14.3.3 the award was approved by Gama, being the Chief Executive Officer in the employ of the Plaintiff.

14.4 The Defendant specifically denies further that the Plaintiff was obliged to follow an open tender process.



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**15 AD PARAGRAPH 10**

15.1 The allegations therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

15.2 The Defendant specifically pleads that no written contract either in the form of Annexure "A" to the Plaintiff's Particulars of Claim or at all was concluded between it and the Plaintiff as alleged.

15.3 Annexure "A" is an Agreement entered into between the Plaintiff and the GNS Consortium, represented as alleged.

*In their correspondence they refer to Abaloji GNS Risk Reten. Serv. (now known as Abaloji). Also see their court application to set aside party of Cosumir - findings*

**16 AD PARAGRAPH 11**

16.1 Save to deny that Senamela acted without authority, the remaining allegations are unknown to the Defendant, are thus denied and the Plaintiff is out to the proof thereof.

16.2 The Defendant specifically pleads that the Plaintiff is estopped from alleging that Senamela acted without authority. Senamela, who is alleged to have conducted himself without the necessary authority, was a Senior Manager in the employ of the Plaintiff which is a position of authority, and acted on behalf of the Plaintiff with the necessary authority and capacity to bind it. The Plaintiff has at all times held him out to be an authorised person to act on its behalf.

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16.3 The scope extension was requested and approved by the Plaintiff's officials who the Plaintiff held out to be the persons authorised to enter into contracts on its behalf and upon which the GNS Consortium relied in agreeing to the scope extensions.

17 AD PARAGRAPH 12

17.1 The Defendant has no knowledge of the allegations contained therein, thus does not admit them and puts the Plaintiff to the proof thereof.

17.2 The Plaintiff fails to attach the said resolution to its Particulars of Claim.

18 AD PARAGRAPHS 13 TO 17

18.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

18.2 The Defendant specifically pleads that no contracts exist between it and the Plaintiff either as alleged or at all.

18.3 The Defendant specifically pleads that all payments made to it by the Plaintiff were payments to the GNS Consortium for services rendered by the GNS Consortium to the Plaintiff and were received as such by the Defendant on behalf of the consortium.

18.4 At no stage during the subsistence of the agreement between the consortium and the Plaintiff did the Plaintiff allege any defective

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performance from the members of the consortium which was not  
remedied. The services were diligently, professionally and with the  
utmost skill provided to the Plaintiff and that is why payment was made by  
the Plaintiff therefor.

*This is no  
Plaintiff's  
cost*

19 **AD PARAGRAPH 18**

All allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

20 **AD PARAGRAPHS 18.1 TO 18.3**

20.1 The allegations contained therein are denied as if specifically traversed  
and the Plaintiff is put to the proof hereof.

20.2 The Defendant specifically pleads that:

20.2.1 the Plaintiff followed a confined procurement process which is in  
line with the provisions of the Constitution and the DPP Policy in  
awarding the contract to the GNS Consortium;

20.2.2 the award was approved by the Transnet Freight Rail Acquisition  
Council, which acts as a Tender Board;

20.2.3 the award was approved by Gama, being the Chief Executive  
Officer in the employ of the Plaintiff.

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**21 AD PARAGRAPH 18.4**

21.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

21.2 The Transnet Board never delegated any powers to the Defendant or the GNS Consortium.

**22 AD PARAGRAPH 18.5 TO 18.7**

22.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

22.2 The GNS Consortium rendered services to the Plaintiff, the said services were accepted by the Plaintiff and the Plaintiff duly remunerated the GNS Consortium as it was required in law to do so.

22.3 Gama is employed by the Plaintiff which continues to hold him out as a person with authority to act on its behalf and thereby representing that all the conduct which the Plaintiff complains of about him is ratified by it, him being an Accounting Officer in terms of the PFMA.

22.4 The Defendant specifically denies that the conclusion of the agreement between the Plaintiff and the consortium was in any manner irregular and/or payment thereof constitutes an irregular and/or fruitless and/or wasteful expenditure.

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**23 AD PARAGRAPH 18.8 TO 18.10**

23.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

23.2 The Defendant specifically pleads that it never rendered any services to the Plaintiff for its own account either as alleged or at all.

23.3 At all material times, the Plaintiff was aware that the services which were required in terms of the agreements were to be rendered by the GNS Consortium and not the Defendant.

23.4 The GNS Consortium consisted of members, some of whom were duly registered as security services providers at the time of contract.

**24 AD PARAGRAPHS 18.11 TO 18.13**

24.1 The allegations contained therein are denied as if specifically traversed and the Plaintiff is put to the proof thereof.

24.2 The Defendant made the representations in paragraph 5 of the Plaintiff's Particulars of Claim but denies that these were misrepresentations.

24.3 The agreements between the GNS Consortium and the Plaintiff were entered based on the representations made by the consortium to the Plaintiff in relation to services which the consortium executed for the Plaintiff.



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24.4 The Defendant specifically pleads further that there was no misrepresentation, material or otherwise, which was made by the Defendant which induced the Plaintiff to enter into the agreement between it and the GNS Consortium.

25 **AD PARAGRAPH 19**

25.1 The Defendant denies that the Plaintiff is entitled to restitution in the sum alleged from the Defendant and the Plaintiff is put to the proof thereof.

25.2 The Defendant specifically pleads that the Plaintiff is not entitled to claim restitution against the GNS Consortium either.

25.3 The Plaintiff has, in any event, failed to tender the expenses incurred by the GNS Consortium in the rendering of the services under the agreement.

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs.

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**DEFENDANT'S COUNTERCLAIMS**

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26 The Defendant in convention is the Plaintiff in reconvention.

27 The Plaintiff in convention is the Defendant in reconvention.

28 CLAIM 1 (Underlying facts)

28.1 During the course of 2009, the Defendant instituted disciplinary enquiries against Gama, Senamela and Khanye.

28.2 Advocate Nazeer Cassim SC ("Cassim") was appointed by the Defendant to Chair the disciplinary proceedings initiated by the Defendant against Khanye and Senamela.

28.3 On or about the 5<sup>th</sup> March 2010, Cassim dispatched his findings to the Defendant.

28.4 The findings of Cassim were brought to the attention of the Plaintiff. *How*

28.5 The Plaintiff after having perused Cassim's award realised that the award contained unfounded, false and unsubstantiated allegations of a damaging and defamatory nature towards the reputation, goodwill and character of the Plaintiff and its officials.

28.6 On the 9<sup>th</sup> March 2010, the Plaintiff dispatched a letter to the Defendant's attorneys seeking an undertaking that the said findings should not be publicised, in the light of the false, unsubstantiated, damaging and defamatory allegations made therein against the Plaintiff and its officials. Annexed hereto marked "A1", is a copy of the said letter.

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28.7 On the 10<sup>th</sup> March 2010, the Defendant responded through its attorneys and undertook not to publicise the findings but only to use the findings for its own internal purposes. Annexed hereto marked "A2" is a copy of the said letter.

28.8 On the 12<sup>th</sup> of March 2010, the Defendant through its attorneys dispatched a letter to the Plaintiff wherein the Defendant withdrew its undertaking not to publish the findings outside Transnet. *best a copy*

28.9 On or about 1 April 2010, the Defendant who was in custody of Cassim's findings, caused the said findings to be published in the Mail & Guardian newspaper of 1 April 2010 and in the IOL News Portal on 4 April 2010. Copies of the published articles are annexed hereto marked "A3" and "A4". *GNE as already in possession through either Khan or Simamela*

28.10 The Mail & Guardian newspaper is a paper widely distributed in South Africa and the IOL News portal is widely read by the general public.

28.11 The said articles quoted extensively from the findings of Cassim, as appears from the annexures hereto.

28.12 The said quotations from the findings, in the context of the articles, are wrongful, false and defamatory of the Plaintiff in that they were intended and were understood by the readers of the said newspaper and portal to mean that the Plaintiff and its officials are dishonest, corrupt and involved

in acts which contravene the law in order to obtain unfair advantages in their dealing and in tender processes.

- 28.13 At the time when these allegations were caused to be published by the Defendant, the Plaintiff was engaged in the following contracts:-

**Contract A (The Mpumalanga Provincial Government in its Department of Co-operative Governance and Traditional Affairs)**

- 28.14 The duration of this agreement was for a period of 3 (three) years from 15 November 2009 to 14 November 2012.
- 28.15 In terms of this agreement, the Plaintiff was to conduct Risk Management and to provide overall Risk Advisory Services for the Mkhondo, Mbombela and Thaba Chweu local municipalities.
- 28.16 The Plaintiff honoured its obligation and rendered its services as envisaged in the agreement.
- 28.17 The value of the said contract for the duration of the contract, was an amount of R51,033,240.00.
- 28.18 As a result of the wrongful conduct by the Defendant in causing Cassim's findings to be publicised, negative publicity about the Plaintiff circulated

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as a result of which the Mpumalanga Provincial Government terminated this agreement in May 2010.

28.19 As a result of the termination of the said agreement, the Plaintiff suffered damages in the sum of R45,362,880.00 being an amount which the Plaintiff would have been entitled to, but for the untimely cancellation of the agreement as a result of the negative publicity instigated by the Defendant.

Contract B (The Department of Public Transport, Roads and Works (G-Fleet) and General Nyanda Risk Security)

28.20 The duration of this agreement was for a period of 3 (three) years from 1 June 2009 to 31 May 2012.

28.21 In terms of this agreement, the Plaintiff was to provide an integrated Security and Risk Management System including strategic support to the Department of Public Transport Roads and Works.

28.22 The Plaintiff honoured its obligation and rendered its services as envisaged in the agreement.

28.23 The contract amount agreed upon to be paid for the duration of the contract, was an amount of R60,000,000.00.



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28.24 As a result of the wrongful conduct by the Defendant in causing Cassim's findings to be publicised, negative publicity about the Plaintiff circulated as a result of which the Department of Transport Roads & Works terminated this agreement 2 (two) years prematurely.

28.25 As a result of the termination of the agreement, the Plaintiff suffered damages to the amount of R40,000,000.00 being an amount which the Plaintiff would have been entitled to, but for the untimely cancellation of the agreement as a result of the negative publicity instigated by the Defendant.

**Contract C (The Department of Public Transport, Roads and Works Urban Transport Fund and GNS Risk Advisory Services)**

28.26 The duration of this agreement was for a period of 2 (two) years from 1 February 2010 to 31 January 2012.

28.27 In terms of this agreement, the Plaintiff was to provide security consulting and advisory services to the Department of Public Transport, Roads and Works and its Urban Transport Fund in relation to the implementation of the Intelligent Number Plates (iNP) Project.

28.28 The Plaintiff honoured its obligation and rendered its services as envisaged in the agreement.

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28.29 The contract amount agreed upon to be paid for the duration of the contract, was an amount of R10,508,800.00.

28.30 As a result of the wrongful conduct by the Defendant in causing Cassim's findings to be publicised, negative publicity about the Plaintiff circulated as a result of which the Department of Public Transport, Roads and Works terminated this agreement 19 months prematurely.

28.31 As a result of the termination of the agreement, the Plaintiff suffered damages to the amount of R8,319,466.50 being an amount which the Plaintiff would have been entitled to, but for the untimely cancellation of the agreement as a result of the negative publicity instigated by the Defendant.

29 **CLAIM 2**

29.1 The Defendant in reconvention has instituted action against the Plaintiff in reconvention.

29.2 In that claim, the Defendant is seeking restitution and to be paid all the money it paid to the GNS Consortium, being the amount of R95,691,368.80.

29.3 In servicing the agreement and honouring its obligations in terms of the agreement, the Plaintiff, as part of the GNS Consortium, incurred the following expenses for the entire period of the contracts:

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- 29.3.1 equipment in the amount of R60,000,000.00;
- 29.3.2 personnel in the amount of R27,000,000.00;
- 29.3.3 overheads in the amount of R1,000,000.00.

29.4 In the event that the above Honourable Court finds for the Plaintiff in convention, then the Plaintiff in convention will be unduly enriched and benefited from the performance and services rendered to it under the alleged void agreements.

29.5 Accordingly, in the event that this Honourable Court finds that the agreements between the Plaintiff in convention and the Defendant in convention and/or the GNS Consortium are void then the Plaintiff in reconvention and/or GNS Consortium is entitled to be reimbursed in the amount of R88,000,000.00 it incurred as necessary expenses in the rendering of services to the Defendant in reconvention.

30 **CLAIM 3**

30.1 On or about 1 April 2010, the Defendant who was in custodian of Cassim's award, caused the said award to be published in the Mail & Guardian newspaper of 1 April 2010 and in the IOL News of 4 April 2010. Copies of the published articles are annexed hereto marked "A3" and "A4".

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30.2 The Mail & Guardian newspaper is a paper widely distributed in South Africa and the IOL News portal is widely read by the general public.

30.3 The said articles quoted extensively from the findings of Cassim, as appears from the annexures hereto.

30.4 The said quotations from the findings in the context of the articles, are wrongful, false and defamatory of the Plaintiff in that they were intended and were understood by the readers of the said newspaper and portal to mean that the Plaintiff and its officials are dishonest, corrupt and involved in acts which contravene the law in order to obtain unfair advantages in their dealing and in tender processes.

30.5 As a result of the said defamation, the Plaintiff has been damaged in its reputation, goodwill and character in the amount of R6,000,000.00 (six million rands).

31 **CLAIM 4**

31.1 During the period October 2010 to December 2010, the Defendant dispatched a blacklisting letter to the Plaintiff and other companies it called entities associated with the Plaintiff and/or its officials.

31.2 In the aforesaid letter, the Defendant stated that the Plaintiff and its associates will be blacklisted for a period of 5 years, including their Directors in their personal capacities and all other companies in which

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their Directors may have an interest as well as any future companies which may be created by such Directors. Annexed hereto marked "A5" is a copy of the aforesaid letter.

31.3 The said letter was dispatched, in bad faith, by the Defendant to other Government institutions and departments in order to ensure that none of those entities engage in further business with the Plaintiff.

*was it done*

31.4 As a result of the Defendant's *mala fide* conduct, all the State departments and/or entities which were intending to conduct business with the Plaintiff ceased from considering the Plaintiff as a preferred service provider.

31.5 As a result of the Defendant's conduct, the Plaintiff lost business opportunities and potential profit it could have gained, but for the conduct of the Defendant.

31.6 As a result of the Defendant's conduct, the Plaintiff suffered damages in respect of lost business, lost potential business, lost potential profits and profits estimated at R300,000,000.00 (three hundred million rands). This amount represents a globular figure and a much more certain figure will be computed through the Plaintiff's experts and, if necessary, an amendment will be sought.



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Signed: P K MABASO

**WERKSMANS ATTORNEYS**

Defendant's Attorneys

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Sandton

Tel: +27 (0)11 535 8475

Ref: Ms PK Mabaso/GNSR12756.9

c/o Suite 1714,

17<sup>th</sup> Floor, Marble Towers

208-212 Jeppe Street

JOHANNESBURG

TO:  
THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT  
JOHANNESBURG

AND TO:  
**BOWMAN GILFILLAN INC.**  
Attorneys for the Plaintiff  
165 West Street  
SANDTON  
Tel: 011 669 9000  
Ref: G Higgins/ 1198618

Copy hereof received on this                      day of JUNE 2011

For: Defendant's Attorneys

F. J. MABASO	
ACCEPTED WITHOUT PREJUDICE.	
Signed	<i>N. M. M. M. M.</i>
Name	Nandipha
Date	02.06.11
Time	17:45