

# **PRASA**

# **BUNDLE B**

# **EXHIBIT SS 3**COURT APPLICATIONS



# **EXHIBIT SS 3**

# COURT APPLICATIONS BUNDLE



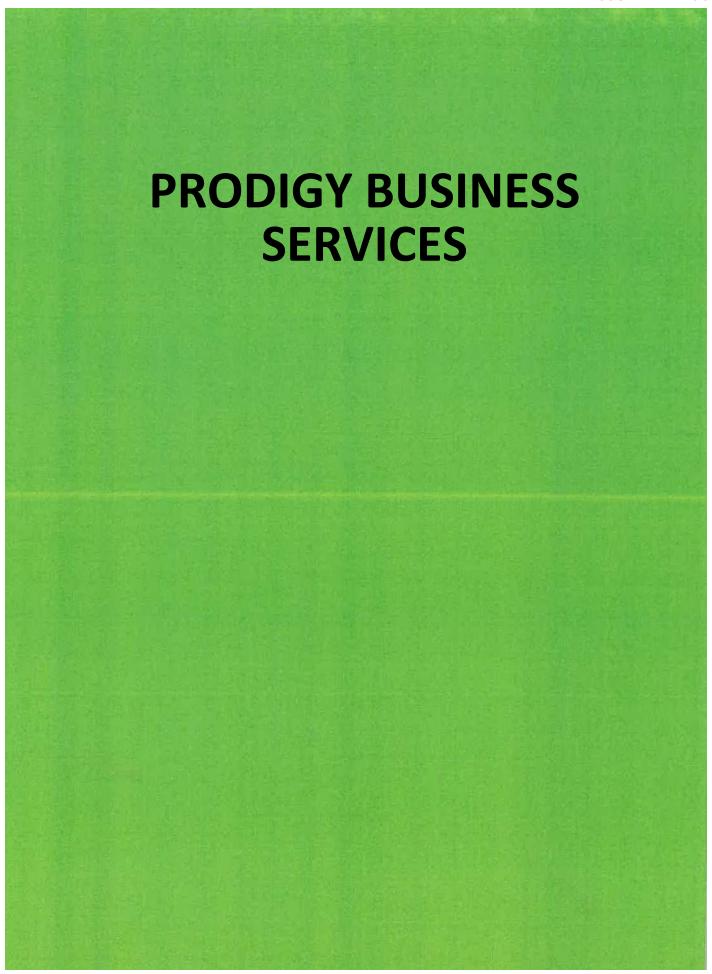
# JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

2<sup>nd</sup> floor, Hillside House 17 Empire Road, Parktown Johannesburg 2193 Tel: (010) 214 to 0651

Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

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# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NUMBER: 78035/16.

In the matter between:

PRODIGY BUSINESS SERVICES (P)
(REG NO. 2006/018844/07)

and

Respondent

PASSENGER RAIL AGENCY OF SOUTH AFRICA

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Dated at ROSEBANK on this the 4th day of October 2016.

BICCARI BOLLO MARIANO INC ATTORNEYS FOR THE APPLICANT

No.1 Parklands, 229 Bronkhorst Street

Muckleneuck Pretoria

TEL: 011 628 9300

FAX: 011 622 3622

cbollo@bbmlaw.co.za / dreddy@bbmlaw.co.za / acooper@bbmlaw.co.za REF: C'BOLLO / D REDDY / A COOPER / RP2018

TO:

1

THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA

AND TO:

PASSENGER RAIL AGENCY OF SOUTH AFRICA PRASA House 1040 Burnett Street

SERVICE VIA SHERIFF

Hatfleld

Pretoria



# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NUMBER: 78035/16.

In the matter between:

PRODIGY BUSINESS SERVICES (PTY) LTD (REG NO. 2006/018844/07)

and

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG LIVISION, PRETORIA PRIVATE DRAIPHINATION X67

PRIVATE DRAIPHINATION X67

PRETORIA 0901

L. P. M. BATISTA
REGISTRAR'S CLERK
GRIFFIER VAN DIE HO' HOF YAN
SUID-AFRIKA, GAUTENG AFDELING, MYETORIA

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that Application will be made to the above Honourable Court on the <u>25</u> to day of <u>CroBER</u> 2016 at 10:00 or so soon thereafter as the matter may be heard, by the Applicant, against the Respondent for an Order in the following terms:-

- Payment by the Respondent to the Applicant in the sum of R24 624 000,00 (twenty-four million, six hundred and twenty-four thousand rand);
- 2. Interest on the aforesaid sum at the rate of 10.50% a tempore morae to date of

payment;

- 3. Costs of the Application;
- 4. Further and/or alternative relief.

AND FURTHER TAKE NOTE THAT the Founding Affidavit of Nerishni Shunmugam and the annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER that the Applicant has appointed the offices of Biccari Bollo Mariano INC, No. 1 Parklands, 229 Bronkhorst Street, Muckleneuck, Pretoria, as the address where it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this Application, you are required to notify the Applicant's attorney, in writing, within 6 (five) days of your receipt of this Application, of your intention to Oppose and, if Notice of your intention to Oppose be given, to deliver, within 15 (fifteen) days thereafter, your Answering Affidavit, if any, and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

DATED at JOHANNESBURG on this the 4th day of October 2016.

BICCARI BOLLO MARIANO INC ATTORNEYS FOR THE APPLICANT No.1 Parklands, 229 Bronkhorst Street

Muckleneuck Pretoria

TEL: 011 628 9300

FAX: 011 622 3622

cbollo@bbmlaw.co.za / dreddy@bbmlaw.co.za / acooper@bbmlaw.co.za

REF: C BOLLO / D REDDY / A COOPER / RP2018

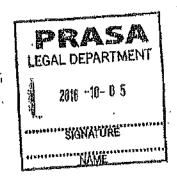
TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA

AND TO:

PASSENGER RAIL AGENCY OF SOUTH AFRICA PRASA House 1040 Burnett Street Hatfield Pretoria

SERVICE VIA SHERIFF



# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

	CASE NUMBER:	- high light and a significant
In the matter between	N	
PRODIGY BUSINESS SI (REG NO. 2006/018844/0		Applicant
and		
PASSENGER RAIL AGE	NCY OF SOUTH AFRICA	Respondent
A CONTRACTOR OF THE PARTY OF TH	FOUNDING AFFIDAVIT	
I, the undersigned		
	NERISHNI SHUNMUGAM	3
do hereby make oath and		

1. I am an adult businesswoman, residing at No.1 Acada Drive, Cedar Lakes

Estate, Fourways, I am the sole director of the Applicant and I am duly

authorized to depose to this affidavit on behalf of the Applicant. I annex hereto,

marked "NS1", a search emanating from the electronic database of the Commission of Intellectual Property and Companies, confirming same.

- Save where the context indicates otherwise, the facts herein contained are within my own personal knowledge and are, to the best of my knowledge and belief, both true and correct.
- 3. Where I make submissions of a legal nature, I do so on the advice of the Applicant's attorneys, whose advice the Applicant and I accept as correct.

# <u>PARTIES</u>

- 4. The Applicant is **PRODIGY BUSINESS SERVICES (PTY) LTD**, a private company with registration number 2006/018844/07, duly registered and incorporated in terms of the relevant laws of the Republic of South Africa, having its registered address situated at Fredman Towers Ground Floor, 13 Fredman Drive, Corner Bute Lane, Gauteng and its principal place of business at 51 Harrison Street Johannesburg.
- 5. The Respondent is the **PASSENGER RAIL AGENCY OF SOUTH AFRICA**, also known as PRASA, a company duly incorporated according to the provisions of the South African Transport Service Amendment Act No. 38 of 2008 ("the Act"), having its Head Office at Prasa House, 1040 Burnett Street, Hatfield, Pretoria, and its chosen domicillum citandi et executandi at Umjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg.



# **JURISDICTION**

6. The above Honourable Court has jurisdiction to entertain this matter by reason that the Respondent's principal place of business / Head Office is situated within the jurisdiction of the above Honourable Court.

# BACKGROUND

# PARTNERSHIP AGREEMENT

- 7. In and during October 2010, and at Braamfontein and Rivonia respectively, the Respondent, represented by its erstwhile Group CEO, Mr Tshepo Lucky Montana, and the Applicant, represented by me, entered into a Partnership Agreement ("the Partnership Agreement"). A copy of the Partnership Agreement is annexed hereto as "NS2".
- 8. In terms of "NS2", the Respondent appointed the Applicant, through a pilot project, to establish and pilot the PRASA Centre of Excellence Model and Learnership Implementation at PRASA and, in doing so the Applicant would avail 300 (three hundred) learnerships to the Respondent.
- The Applicant delivered the said 300 (three hundred) learnerships to the Respondent and created the PRASA Centre of Excellence.

# ADDENDUM TO PARTNERSHIP AGREEMENT AND ANNEXURE A OF ADDENDUM TO PARTNERSHIP AGREEMENT

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- 10. After the completion of the pilot phase, as aforesaid, on or about 30 August 2011, and at Kempton Park, the Respondent, represented by Mphefo Ramutioa, a duly authorized official, and the Applicant, represented by me, entered into an "Addendum to Partnership Agreement" ("the Addendum"). A copy of the Addendum is annexed hereto marked "NS3".
- 11. As is apparent from the Addendum, the purpose of concluding the Addendum, was to, Inter alia:-
  - 11.1 Promote the positive impact derived from the learnerships delivered in terms of the Partnership Agreement;
  - 11.2 Train employees of the Respondent in a phased manner, as set out in clause 2 of the Addendum, as follows:-
  - "1. Implementation of a PRASA customer service (PRASA MyStation) frontline worker programme; 3,000 employees: 5 days of training and 5 days of workplace mentorship and coaching. (emphasis added)
  - 2. Implementation of a PRASA customer service (PRASA MyStation) frontline worker programme: 6,000 employees: 5 days of training and 5 days of workplace coaching and mentorship,
  - 3. Continual Professional Development of 5 days of training for station and corridor management.

- 4. Autopax Contact Centre, Customer Service and Professional Driver Training: Budget and learner numbers to be discussed with Autopax or PRASA Group CEO or other representative."
- 12. In terms of clause 3, the Addendum would only be implemented once the Applicant had submitted a costing of the services to be provided as contemplated with clause 2, and once the Respondent had accepted same.
- 13. The Applicant submitted a costing, for the services to be implemented in terms of the Addendum, to the Respondents, and the Respondent, duly represented by Mr Tshepo Lucky Montana, the Respondent's Erstwhile Group CEO, accepted same on the 31<sup>st</sup> of October 2012 ("the Costing"). A copy of the Costing is annexed hereto marked "NS4" and was named "Annexure A of Addendum to Partnership Agreement" by the parties.
- 14. It is clear from the Costing, that the Costing sought to regularize and define the specific terms and conditions of the Addendum, in particular, with reference to:-
  - 1. "The timeframes for the 3 phase PRASA MyStation programme
  - 2. The per learner cost for the MyStation Programme for the first 3000 learners
  - 3. The monthly invoicing schedule for the first 3000 PRASA employees
  - 4. The cost of cancellation" (Emphasis added)
- 15. The relevant material and/or express and/or tacit and/or implied terms of the Addendum and the Costing were, inter alia that:-

- 15.1 The Applicant would provide a minimum of 3000 (three thousand) training interventions to the Respondent's employees, as part of phase 1 of the 3 phase PRASA MyStation Programme (clause 2 of the Costing);
- 15.2 The Applicant would develop customized PRASA MyStation Skills

  Programmes based on outputs from workshops; Presentation of
  customized material and sign-off by the Respondent; develop
  resources for the Respondent; provide quality assurance;
  submit daily attendance registers and attendance reconciliation
  to the Respondent; (clause 3 of the Costing) (Emphasis added);
- 15.3 The Respondent would pay the Applicant the sum of R24 000.00 (twenty-four thousand rand) per learner, excluding VAT. The total sum payable to the Applicant for providing 3000 (three thousand) training interventions to the Respondent, inclusive of VAT, was R82 080 000.00 (eighty-two million and eighty thousand rand); (clause 5 of the Costing);

)

15.4 The Respondent had 2 (two) days, after having received the Applicant's Invoices, to verify the respective invoices and, if no response was received from the Respondent, the Applicant's invoices were deemed to be accepted by the Respondent (clause 4 of the Costing);



- 15.5 The Applicant's invoices would be paid within 30 (thirty) days of the Respondent having accepted same (clause 4 of the Costing);
- 15.6 The training interventions were to begin in and during, or about September 2011, and were to conclude in and during March 2014 (clause 2 of the Costing).

# THE SERVICE LEVEL AGREEMENT

- 16. As aforesaid and in terms of the Addendum and the Costing, the first 3000 (three thousand) training interventions would have been completed by March 2014.
- 17. Notwithstanding this and during the currency of the Addendum, and for reasons unknown to the Applicant, there were various delays on the part of the Respondent in availing its employees for training and which led to a delay in the Applicant completing the training interventions by March 2014. In particular, delays were occasioned as a result of the finalization of the development of customized PRASA MyStation Skills Programmes for the Respondent's various subsidiaries.
- 18. As a result of the various delays, as aforesaid, the Applicant, again represented by me, and the Respondent, duly represented by, Ntlomo Koka, the General Manager of the Respondent's Learning and Development

Department, entered into a written Service Level Agreement ("the SLA"). A copy of the SLA is annexed hereto as "NS5".

- 19. The material terms of the SLA are, Inter alia, that:-
  - 19.1 The SLA was concluded "to ensure that a quality management system is in place for the period specified in the addendum as approved by the Group CEO in 2015, which conforms to Scope of Works requirements contained in the partnership agreement";
  - 19.2 The SLA is to outline the provisions of the MyStation Learning and Development Intervention for employees within the Respondent (ALL DIVISIONS AND SUBSIDIARIES) providing support for both the organization, its employees and unemployed youth (clause 2 of the SLA);
  - 19.3 The SLA alms to propagate sound working relationships between the respective parties as well as minimizing the impact of delays and or misunderstandings; (Emphasis added)(clause 2 of the SLA);
  - 19.4 The Applicant was tasked to assist the Respondent with crafting the most effective training strategies to ensure that it drives the Respondent's key strategic objectives of service excellence, ensuring that the Respondent's employees understand their individual contribution to the success of the organization (clause 2 of the SLA);

- 19.5 The Applicant's offering will be in line with the Partnership Agreement, to include station and corridor management development, frontline staff development, which includes customer service, protection service, operations and technical staff, and any other of the Respondent's staff that may require the Applicant's offering (clause 2 of the SLA);
- 20. The SLA contained a "Service Description" (clause 3), which inter alia stated that:-
  - 20.1 The Applicant would conduct training needs alignment for the Respondent's divisions, departments and subsidiaries;
  - 20.2 The Applicant would develop training material for the Respondent;
  - 20.3 The Applicant would develop an Implementation framework and plan for the MyStation program, allocate resources and keep to the Respondent's training schedules;
  - 20.4 The Respondent would communicate the training schedule to all parties;

: )

20.5 The Applicant would complete training schedules with the Respondent's operations, in particular, the "first cohort of identified MLPS employees for May 2015 to December 2015" (Emphasis added) (clause 3.2.1);

- 20.6 The Applicant would provide training to the Respondent's employees and unemployed youth nationally based on numbers supplied; confirm that training was planned, scheduled and confirmed in advance; and the Respondent would inform the service provider in advance (2 weeks) of cancellations (emphasis added) (clause 3.2.3).
- 21. Pursuant to the Addendum, the Costing and the SLA, the Applicant commenced the relevant training to deliver the training interventions contemplated by the Addendum, as read with the Costing and SLA.

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- 22. The training was performed on the Respondent's Mainline Passenger Services ("MLPS") from, inter alla, during July 2015, up to and including November 2015. I attach hereto marked "NS6", correspondence with the Executive manager of MLPS, Mr Mthuthuzell Swartz, dated 22 April 2015 to 23 April 2015, which evidences the development of the training material for the training interventions which were affected by the Applicant during the abovementioned period.
- 23. In accordance with the Costing, the Applicant rendered invoices to the Respondent for the services it rendered for the period July 2015 to November 2015. I annex hereto copies of the said invoices marked "NS7.1" to "NS7.14". To avoid undue prolixity, I do not annex the various attendance registers, duly completed by the Respondent's employees and approved by the Respondent, which demonstrate that the training was conducted, as agreed, to these papers. The rendering of services and attendance by the employees is

not, however, in dispute and the attendance registers will, if need be, be made available to the above Honourable Court at the hearing of this matter.

- 24. At no time during the period July 2015 to November 2015, or at any time thereafter, did the Respondent dispute any of the invoices submitted to it and, in accordance with clause 4 of the Costing, the Applicant's invoices are, accordingly, deemed to be correct and to have been accepted.
- 25. Moreover, and pursuant to various enquiries I had made as to when the Respondent would make payment, Ms Nonhlanhla Kondowe, the Head of Department for Human Capital Management, advised me that she was under the Impression that the Applicant had been paid for the services it rendered during 2015. I annex hereto, marked "NS8", the email I received from Kondowe to this effect. As the above Honourable Court will note from "NS8", there can be no doubt that the Applicant rendered the training in 2015 and that the payment was due to the Applicant.
- 26. Furthermore, and in accordance with clause 4 of the Costing, the Applicant's invoices are due, owing and payable within 30 (thirty) days of the Respondent having accepted them. As is evident from annexures "NS7.1" to "NS7.14", the Applicant's invoices are due, owing and payable and are now, indeed, well overdue.

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27. For the sake of completeness, I annex hereto a copy of the Applicant's Statement of Account, which encapsulates the amounts set-forth in "NS7.1"to



"NS7.14" which demonstrates that the Respondent is indebted to the Applicant in the sum of R24,624,000.00 (twenty four million six hundred and twenty four thousand rand). A copy of the Statement is annexed hereto marked "NS9".

- 28. The Applicant has complied with all of its obligations in terms of the Addendum, the Costing and the SLA.
- 29. In breach of the Addendum, the Costing and the SLA, the Respondent, without any just reason or explanation, fails, alternatively neglects, alternatively refuses to pay the sum of R24,624,000.00 (twenty four million six hundred and twenty four thousand rand), which sum is due, owing and payable by the Respondent to the Applicant.

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- 30. By virtue of the ongoing non-payment of the overdue invoices, I, on behalf of the Applicant, placed the Respondent in breach of the Agreement, in writing, and demanded payment from the Respondent on or about the 20<sup>th</sup> October 2015. A copy of the letter is annexed hereto marked "NS10".
- 31. Notwithstanding the lapse of a period of substantially more than 7 (seven) days from the date of the said demand (namely almost a full year), the Respondent falls, alternatively refuses, alternatively neglects to make payment and, accordingly, the Applicant is entitled to approach the above Honourable Court for an order directing the Respondent to make payment.

32. In all of the above circumstances and, in particular, where the Respondent has accepted the Applicant's invoices as being correct, the sums set out in Annexures "NS7.1" to "NS7.14" are due, owing and payable.

WHEREFORE I pray for an Order In terms of the Notice of Motion to which this Affidavit is annexed.

DEPONENT

The Deponent has acknowledged that he/she knows and understands the contents of this affirmation, which was signed and affirmed to before me at Shannes but on this the 4 day of October 2016 the regulations contained in Government Notice No.R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

**FULL NAMES:** 

ADDRESS:

IVAN KA-MBONANE

112 OXFORD ROAD HOUGHTON ESTATE
JOHANNESBURG
COMMISSIONER OF OATHS EX OFFICIO
PRACTISING ATTORNEY R.S.A.



# Company Report

Date requested

2016/09/29 11:08

Reference Information source

Companies and Intellectual Property Commission



This report is complied exclusively from the very latest data directly supplied to WinDeed by the Companies and Intellectual Property Commission (CIPC).

# GOMPANY SUMMARY

Name

PRODIGY BUSINESS SERVICES

Status

IN BUSINESS

Registration number

2006/018844/07

Registration date

2006/06/19

DIRECTOR AND OTHER SUMMARY			
Name	D Number	Туре	Status
SHUNMUGAM, NERISHNI	7009080163086	DIRECTOR	ACTIVE .
INACTIVE TO THE RESERVE TO THE RESER			Qintio
Name	1D Number 5402095117084	Type DIRECTOR	RESIGNED
MOODLEY, CHOCKALINGAM	5402095117064	Dividion	11-21-271

AUDITOR SUMMARY	
RAMATHE KZN	
R F GAGIANO	- Company of the contract of t
R F GAGIANO	The state of the s

# COMPANY INFORMATION

IN BUSINESS PRODIGY BUSINESS Status Enterprise name **SERVICES** PRIVATE COMPANY Enterprise type 2006/018844/07 Registration number 2006/06/19 Business start date 9493447842 Tax number 2006/06/19 Registration date Short name Financial year end Translated name 2006/06/19 Fin effective date Old reg. number CK date received Conv. company No CK date **GAUTENG** . Region 2006/08/19 Date of type UNKNOWN Country

lasued shares -

: Issued capital

Authorized shares

Printed: 2016/09/29 11:08

Country of origin

AN



Authorized capital

Industry code

Industry

PRIVATE HOUSEHOLDS, EXTERRITORIAL ORGANISATIONS, REPRESENTATIVES OF FOREIGN GOVERNMENTS AND OTHER ACTIVITIES NOT ADEQUATELY DEFINED

BUSINESS SERVICES

Principal business Registered address

FREDMAN TOWERS - GROUND FLOOR, 13 FREDMAN DRIVE, CNR BUTE LANE, GAUTENG,

2196

Postal address

P O BOX 781784, SANDTON, GAUTENG, 2146

SHUNMUGAM, NERISHNI			
Initials	<b>N</b> .	Status	ACTIVE
D/Passport number	7009080163086	Туре	DIRECTOR
Date of birth	1970/09/08	Appointment date	2006/06/19
Profession	BUSINESS OWNER	Resignation date	-
Country of residence	SOUTH AFRICA	Member size (%)	0.00
Residential address	1 ACACIA STREET, CEDAR LAKES, FOURWAYS, 2024	Member contribution (R)	00,0
Postal address	P O BOX 2136, RIVONIA. 2128		
MOODLEY, CHOCKALING	AM		
Initials	C .	Status	RESIGNED
ID/Passport number	5402095117084	Туре	DIRECTOR
Date of birth	1954/02/09	Appointment dête	2011/06/22
Profession	BUSINESS OWNER	Resignation date	2012/03/01
Country of residence	SOUTH AFRICA	Member size (%)	0.00
Residential address	39 WESSELS ROAD, RIVONIA, GAUTENG, 2128	Member contribution (R)	00.0
Postal address	P O BOX 2136, RIVONIA,		

# SECRETARY COMPANIES AND CCS (NONE)

BOTH DIRECTOR / OFFICERS (NONE)

ALTERNATIVE DIRECTORS (NONE)

OFFICIERS (NONE)



RAMATHE KZN			
rofession code	THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS	Status	CURRENT
rofession number	919179E	Profession	AUDITOR
Reg, entry date	<b>n</b>	Start date	<b>u</b>
Explry date		End date	-
Reference number	•	CM31 completed	-
Fine letter	r	CM31 received	•
Physical address	SUITE 104, LUPIN HOUSE, 1	) 1 DR.R.D. NAIDU DRIVE, A	SHERVILLE, 4091
Postal address	P O BOX 37324, OVERPORT		
R F GAGIANO			
Profession code	CHARTERED ACCOUNTS	Status	NAME CHANGE
Profession number	-	Profession	AUDITOR
Reg, entry date	n	Start date	•
Explry date	<b>*</b>	End date	2008/03/10
Reference number		CM31 completed	₩
Fine letter	н	CM31 received	D
Physical address	GROUND FLOOR, FREDMA	I TOWERS, 13 FREDMAN D	DRIVE, BUTE LANE, 2196
Postal address	P O BOX 781784, SANDTON	2146	
R F GAGIANO			
Profession code	CHARTERED ACCOUNTS	Status	RESIGN
Profession number	925114	Profession	AUDITOR
Reg. entry date	2008/03/10	Start date	2008/03/10
Expiry date		End date	2015/05/25
Reference number	**	CM31 completed	- 2008/03/10
Fine letter	-	CM31 received	2008/03/10
Physical address	2196		DRIVE, CNR BUTE LANE, SANDOV
Postal address	P O BOX 781784, SANDTON	η <b>ΑΙΤ</b> Ψ	

CAPITAL INFORMATIO	N. Committee of the com			
Type	No of Shares	Parri Value	Capital Amount (R)	Capital Premium
AUTHORIZED ORDINARY	0	0	1,00	0

Effective Date	Change Type
2016/08/28	CO/CC ANNUAL RETURN (COMPANY / CLOSE CORPORATION AR FILING - WEB SERVICES : REF NO. : 536504440)
2015/08/11	AUDITORIACO OFFICER CHANGE (NOTICE OF CHANGE OF AUDITOR AND IR F GAGIANO - RESIGNED)
2015/08/11	AUDITOR/ACC OFFICER CHANGE (CHANGE RECORDNAME : = RAMATHE KZNSTATUS : = CURRENT)
2015/06/26	RE-INSTATE APPLICATION (COMPANY / CLOSE CORPORATION AR FILING - WEB SERVICES; REF NO.: 527533594)

W N



2015/05/20	AR IN DEREGISTRATION (ANNUAL RETURN NON COMPLIANCE - IN PROCESS OF DEREGISTRATION LAST PAYMENT FOR AR YEAR/MONTH IS 2012/6.)
2015/05/20	AR IN DEREGISTRATION  (ANNUAL RETURN NON COMPLIANCE - IN PROCESS OF DEREGISTRATION LAST PAYMENT FOR AR YEAR/MONTH IS 2012/6.)
2013/03/12	DIRECTOR/MEMBER/SECRETARY/TRUST/BOTH DIRECTOR AND OFFICER (CHANGE RECORDSURNAME = MOODLEYFIRST NAMES = CHOCKALINGAMSTATUS = RESIGNED)
2013/03/12	DIRECTOR/MEMBER/SECRETARY/TRUST/BOTH DIRECTOR AND OFFICER (CHANGE RECORDSURNAME = SHUNMUGAMFIRST NAMES = NERISHNISTATUS = ACTIVE)
2013/03/04	RE-INSTATE APPLICATION (NO INFORMATION TO DISPLAY)
2013/01/11	AR IN DEREGISTRATION  (ANNUAL RETURN NON COMPLIANCE - IN PROCESS OF DEREGISTRATION LAST PAYMENT FOR AR YEAR/MONTH IS 2009/6.)
2011/06/22	DIRECTOR/MEMBER/SECRETARY/TRUST/BOTH DIRECTOR AND OFFICER (NEW RECORD SURNAME = MOODLEYFIRST NAMES = CHOCKALINGAMSTATUS = ACTIVE)
2010/02/19	RE-INSTATE APPLICATION (ANNUAL RETURN NON COMPLIANCE - CANCELLATION OF DEREGISTRATION)
2009/11/13	AR IN DEREGISTRATION (ANNUAL RETURN NON COMPLIANCE - DEREGISTRATIONREGISTRATION DATE: 19/06/2008AR DUE DATE: 01/06/2007AR LATE DATE: 01/08/2007DEREGISTRATION COMMENCE DATE: 01/02/2008DEREGISTRATION ACTION DATE: 13/11/2009)
2008/03/31	POSTAL ADDRESS CHANGE (P O BOX 781784SANDTON2146)
2008/03/31	REGISTERED ADDRESS CHANGE (FREDMAN TOWERS - GROUND FLOOR13 FREDMAN DRIVECUR BUTE LANESANDOWN2196)
2008/03/10	AUDITORIACO OFFICER CHANGE (R F GAGIANOFREDMAN TOWERS - GROUND FLOOR13 FREDMAN DRIVEONR BUTE LANESANDOWN2196P O BOX 781784SANDTON2146STATUS : NAME CHANGE)
2008/03/10	AUDITORIACO OFFICER CHANGE (FREDMAN TOWERS - GROUND FLOOR13 FREDMAN DRIVECUR BUTE LANESANDOWN2196P O
2006/08/19	DIRECTOR/MEMBER/SECRETARY/TRUST/BOTH DIRECTOR AND OFFICER (CHANGED RECORD SURNAME = SHUNMUGAMFIRST NAMES = NERISHNISTATUS = ACTIVE)

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ANY



# PARTNERSHIP AGREEMENT

# MADE AND ENTERED INTO BY AND BETWEEN

PASSENGER RAIL AGENCY OF SOUTH AFRICA (hereinafter referred to as "PRASA" and herein represented by TSHEPO LUCKY MONTANA being duly authorized hereto)

# AND

# PRODICY BUSINESS SERVICES (Pty) Ltd.

Registration No. 2006/018844/07

Accreditation No. 1520

(hereinafter referred to as "The Provider" and herein represented by NERISHNI SHUNMUGAM being duly authorized hereto)

For

- The provision of Grant (Bursary) Funding valued at R10.8 million for 300 Learnerships to PRASA, which Prodigy has secured from the Services Sector Education and Training Authority(SSETA);
- PRASA to appoint Prodigy to Pilot the Centre of Excellence Model and Learnership Implementation at PRASA.

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### 1 PARTIES

The parties to this agreement are the following:

## 1.1 PRASA

Passenger Rall Agency of South Africa

### 1.2 The Provider

Prodiay Business Services (Pty) Ltd

## 2 PURPOSE OF THE CONTRACT

A Partnership agreement between PRASA and Prodigy Business Services (PTY) LTD whereby Prodigy avails (Grant) Bussary Funding valued at R10.800.360.00 for 300 Learnerships to PRASA, which Prodigy has secured from the Services Sector Education and Training Authority (SSETA), and PRASA appoints Prodigy to Pilot the Centre of Excellence Model and Learnership Implementation at PRASA.

#### 2 PAYMENTS

The cost of the services provided in terms of this agreement is calculated at Ten Million, Eight Hundred Thousand Three Hundred and Sixty Rands only (R10,800,360.00) (VAT inclusive).

- 3.1 Any variation on the contract price must be agreed to by all parties in writing and signed before such additional expenses are incurred.
- 3.2 For the Services provided to PRASA by the Provider, PRASA will pay the Provider the fees set out in Annexure A of this Agreement within 10 (ten) days of the payment due date.
- 3.3. The Provider will submit to PRASA a value-added tax invoice in the prescribed format, and containing the particulars, required by law for all requests for payments.
- 3.4 Payment in respect of the products and / or services provided by the Provider in terms of this agreement shall be made in terms of the relevant clauses in contained in Annexure A and attached hereto.

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3.5 All payments made in terms of this agreement shall be paid directly into the nominated bank account viz:

Account Name: Prodigy Business Services (Pty) Ltd

Bank: Standard Bank Branch: Kingsmead

Account number: 050 798 774

Branch Code: 041 026

- 3.6 PRASA only pays VAT to VAT registered companies. Should the company be de- registered for VAT, or fail to provide proof of registration, VAT will be deducted from the relevant contract amount.
- 3.7 Payments will be based on appropriate accounting practice, as specified in Annexure A. Miscalculations in the budget attached will be rectified through this process.

#### 4 DURATION OF THE PROJECT

- 4.1 This project shall commence on the signing of this contract and will terminate/expire by 30<sup>th</sup> June 2011. The duration will be in accordance with Annexure A that will form part of this contract.
- 4.2 The duration and scope of the project may be extended by mutual agreement between the parties in writing.

# 5 OBLIGATIONS

## 5.1 Obligations of the Provider

Prodigy shall avail the 300 learnerships which it has been awarded by the Services SETA to PRASA. These learnerships are within the ambit of the Services SETA.

During the currency of this Agreement, the Provider shall provide the Services to the PRASA in accordance with: -

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- 5.1.1 Products and/or services to PRASA as specified in Armexure A hereto and initialted by the parties for identification purposes.
- 5.1.2 the provisions of relevant legislation governing the activities of public entities;
- 5.1.3 the Constitution of the PRASA;
- 5,1.4 the terms and conditions of this Agreement;
- 5.1.5 The Public Finance Management Act; and
- 5.1.6 The Preferential Policy Procurement Framework Act

Should the Provider encounter any problem or identify any trend in relation to any of the Services it provides in terms of this Agreement to PRASA or any component thereof, it must report such matter to PRASA in writing without delay. Thereafter, the Parties will agree on corrective measures to be taken to address or pre-empt the problem, as the case may be

# 5.2 Obligations of PRASA

- 5.2.1 PRASA shall appoint Prodigy to pliot the Centre of Excellence at PRASA and learnership Implementation at PRASA.
- 5.2.2 PRASA shall in terms of Annexure A hereto make payment of amounts due to The Provider in accordance with this agreement. The Provider will undertake to invoice PRASA according to the dates as per Annexure A.
- 5.2.3 In order to enable the Provider to provide the Services, PRASA shall allow the Provider reasonable access to all necessary PRASA data and documentation.
- 5.2.4 PRASA shall ensure that any party over which it has direct control performs its duties and functions as may be reasonably required by The Provider to enable The Provider to comply with its obligation to provide the Services as detailed in Annexure A.
- 5.2.5 Without derogating from the generality of clauses 5.2.1 and 5.2.2, PRASA shall provide The Provider with all assistance reasonably

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required by The Provider from time to time to enable The Provider to comply with its obligations in terms of this Agreement.

If requested by The Provider, but without absolving The Provider from any of its Service provision obligations, PRASA will utilise its best efforts to facilitate compliance and/or co-operation from other 3rd (third) parties with whom The Provider need to interact in order to deliver the required contracted Services.

- 8.2.6 Make available to the Provider premises that are suitable for the establishment of a Centre of Excellence. The premises needs to be in a reasonable condition and in working order as no funds have been allocated for building repair or maintenance. Where building repair or maintenance (including electrical and plumbing work) is required, the PRASA will be responsible for these costs.
- 5.2.7 The Provider will as part of this contract source a variety of assets for the Centre of Excellence with prior written consent and approval of PRASA. The PRASA will add these assets to its asset register and will be responsible for the insurance and maintenance thereof

# 5.3 Obligations to the Employer (PRASA)

- 5.3.1 The Employer must comply with its duties of the Act and all applicable legislation including:
  - · Basic Conditions of Employment Act (No.75 of 1997)
  - Labour Relations Act (No.66 of 1999)
  - . Employment Equity Act (N0.55 of 1998)
  - Occupational Health and Safety Act (No.85 of 1993)
  - Compensation for Occupational injuries and Diseases Act (No.130 of 1993)
- 5.3.2 Provide the Learner with appropriate training in the work environment to achieve the relevant outcomes required by the learnership
- 5.3.3 The Employer must provide the Learner with adequate supervision at work
- 5.3.4 The Employer must release the Learner during normal working hours to attend off-the-job education and training required by the learnership

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- 5.3.5 Keep up to date the records of learning and periodically discuss progress with the learner
- **5.3.8** The Employer must apply the same disciplinary, grievance and dispute resolution procedures to the learner as to other employees

## 6 AUDITS

- 6.1 The Provider will provide the internal auditors of PRASA with all necessary support, facilities and access to information pertaining to PRASA and these Services in accordance with legislative requirements. Appropriate assurances, will on request be provided to PRASA's internal auditors regarding the controls instituted in respect of The Provider systems, which provide Services to or interface with PRASA.
- 6.2 If any audit results in a finding that The Provider is not, insofar as it is applicable, rendering the Services in terms of GAAP and the Public Finance Management Act, The Provider shall, at its cost and expense, promptly take all actions required to achieve such compliance, and any resultant audit costs incurred by the PRASA in this regard shall be paid by The Provider.

# 7 PARTY REPRESENTATIVES

- 7.1 For the duration of this agreement, the parties shall each nominate and maintain at least 1 (one) representative, as the single point of contact between the parties, to regulate and control the implementation and performance of the parties under this agreement. Such nominated representative may be changed by the party appointing him or her by giving at least 7 (seven) days prior written notice to the other party.
- 7.2 The nominated representatives shall meet as regularly as may be agreed between the parties.

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#### INDEPENDENT CONTRACTORS 8

The parties shall act as independent contractors for all purposes under this agreement. Nothing contained herein shall be deemed to constitute either party as an agent or representative of the other party, or both parties as joint ventures or partners for any purpose. Save as expressly stated herein to the contrary, neither party shall be responsible for the acts or omissions of the other party, and neither party shall have authority to speak for, represent or obligate the other party in any way without the prior written approval of the other party.

#### Ð INTELLECTUAL PROPERTY RIGHTS

- 9.1 All intellectual property resulting from the execution of this contract as described in Annexure A shall be the sole and exclusive property of the Provider. The Provider shall be entitled to register copy right in respect of such intellectual property.
- 9.2 Nothing in this agreement or Annexure A hereto shall restrict The Providers use of ideas, concepts, know-how, methods or techniques developed in relation to the services or products referred to in this agreement or Annexure A hereto.
- 9.3 The above provisions:
- 9.3.1 Excludes intellectual property that currently exists and has been developed by the Provider prior to the commencement of this contract. The ownership of such. intellectual property will remain with the Provider.
- 9.3.2 Intellectual property developed exclusively for PRASA, the ownership of such Intellectual property shall reside with PRASA.
- 9.3.3 Intellectual property that currently exists and has been developed by PRASA prior to the commencement of this agreement, the ownership of such intellectual property will remain with PRASA.

#### SECURITY, BACK-UP & DISASTER RECOVERY 10

In respect of any IT systems provided by the Provider, the Provider shall comply with the security, back-up and disaster recovery requirements as set out in

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Annexure B, including the provision of the necessary security, backup, offsite storage and disaster recovery services and testing.

#### 1.1 COPYRIGHT

- 11.1 The parties acknowledge that the copyright and exclusive right of use of all materials specifically supplied by either party with regard to the product or service in terms of this agreement is the sole property of the supplying party or sole property of the third party from Which either party/supplying party has obtained usage rights;
- 11.2 Future copyright and exclusive right of use of all materials created in terms of this agreement is the sole property of The Provider except the copyright and exclusive right of use of all materials created in terms of this agreement for PRASA such shall be the sole property of PRASA. The Provider must procure from all contractors and sub-contractors (as specifically allowed by this contract) used by it in terms of this agreement, an easignment of copyright and exclusive right of use of materials created by those contractors and subcontractors.
- 11.3 The Provider warrants that to the best of its knowledge the materials that are created in terms of this agreement and the services that are provided in terms hereof shall not constitute an infringement of any copyright.

#### 1,2 TRADEMARKS, TRADE NAMES AND PUBLICITY

- 12.1 The Provider shall not, without the prior written consent of PRASA, use, remove or cover the names, services marks, trademarks, logos or other corporate identifications of PRASA or its ficensors.
- 12.2 The Provider shall not publicise the contents of this agreement or its existence Without the prior Written consent of PRASA first having been received which consent shall not be unreasonably withheld,

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#### CONFIDENTIALITY AND NON-DISCLOSURE 13

- 13.1 For the purpose of this clause 13, "receiving party" shall mean that party receiving the other's confidential information and "disclosing party" shall mean that party disclosing its confidential information to the other,
- The receiving party may disclose the confidential information only to its officers and employees and then only such officers and employees to whom such disclosure is reasonably necessary; provided that the receiving party shall ensure compliance by such officers and employees to whom such disclosure has been made, with the terms of this agreement and in particular the provisions of this clause 13.

# 13.3 The receiving party agrees:

- not to disclose the confidential information to any third party for any 13.3.1 reason or purpose whatsoever without the prior written consent of the disclosing party, save in accordance with the provisions of this agreement.
- not to utilise, employ, exploit or in any other manner whatsoever use 13.3.2 the confidential information disclosed pursuant to the provisions of this agreement for any purpose whatsoever other than strictly in relation to this agreement and Annexure A hereto.
- that the unauthorised or unlawful use or disclosure of the confidential 13.3.3 information may cause irreparable loss, harm and damage to the disclosing party. Accordingly, the receiving party indemnifies and holds the disclosing party harmless against any loss, action, expense, claim, harm or damage, of whatsoever nature, suffered or sustained by the disclosing party pursuant to a breach by the receiving party or any of its officers or employees to whom disclosure is made in terms of this agreement of the provisions of this agreement.
- 13.4 The receiving party agrees to protect the confidential information of the disclosing party by using the same standard of care used to safeguard its own information of a confidential nature and by taking all reasonable steps to prevent any unauthorised disclosure of such confidential information.

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- 13.5 The disclosing party may, at any time by way of written notice to the receiving party, require the receiving party to return or destroy any material containing, pertaining to or relating to confidential information and to expunge such confidential information from any word processor, computer or other similar device into which it was entered or programmed, and may, in addition, require the receiving party to furnish a written statement (certified as correct by a director of the receiving party) to the effect that, upon such return, the receiving party has not retained in its possession, or under its control, either directly or indirectly, any such material. The receiving party shall comply with all requirements in terms of this clause 13 within 7 (seven) days of receipt of written notice thereof.
- 13.6 The obligations of the receiving party pursuant to the provisions of this agreement shall not apply to any information that:
  - 13.6.1Is known to or in the possession of the receiving party prior to disclosure thereof by the disclosing party;
  - 13.6.2|s or becomes publicly known, otherwise than pursuant to a breach of this agreement by the receiving party;
  - 13.6.3Is acquired or developed independently of the disclosing party by the receiving party in circumstances that do not amount to a breach of the provisions of this agreement;
  - 13.6.4is disclosed by the receiving party to satisfy the order of a Court of competent jurisdiction or to comply with provisions of any law or regulations in force from time to time, provided that in these circumstances, the receiving party shall advise the disclosing party in writing prior to such disclosure to enable the disclosing party to take whatever steps it deems necessary to protect its interest in this regard: Provided further that the receiving party shall disclose only that portion of the information which it is legally required to disclose and the receiving party shall use its reasonable endeavours to protect

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the confidentiality of such information to the widest extent possible in the circumstances;

13.6.5 is disclosed to a third party pursuant to the prior written authorisation from the disclosing party.

## 14 BLACK ECONOMIC EMPOWERMENT AND EMPLOYMENT EQUITY POLICY

- 14.1 PRASA and The Provider agree that it is an express material term of this Contract that The Provider is a Black Economic Empowered entity at the time of the conclusion of this agreement and shall be so at all times material hereto, more particularly throughout the duration or any extension of this agreement. The definition of a Black Economic Empowered entity is a company that has more than 26% of BEE equity. Any breach of this express material term shall entitle PRASA, notwithstanding the provisions of clause 15 hereof, to immediately cancel this agreement without notice and without prejudice to any of its rights under this agreement or at law.
- 14.2 The Provider expressly warrants that it is Black Economic Empowered entity and undertakes to furnish PRASA with the necessary proof in this regard.
- 14.3 Should the BEE status of The Provider change and the BEE equity ownership fall below 26% at any time in the duration or extension of this Agreement or at any time material hereto, The Provider shall immediately in writing notify PRASA who, notwithstanding the provisions of Clause 15 hereof, shall be entitled at its sole option and discretion to immediately terminate this agreement without prejudice to its rights under this agreement or at law.
- 14.4 As a necessary corollary to clauses 14.1 and 14.2 above the Provider represents and warrants that it shall have, maintain and implement a sultable employment equity policy, at all times during the term of this agreement.
- 14.5 PRASA shall be entitled to audit The Provider in order to ensure compliance by The Provider with the Provider's BEE policy and Employment Equity Policy.

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- 16.2 Referral of disputes to a joint committee of the parties. Any dispute which arises shall be referred to a joint committee consisting of at least the Chief Executive Officer of PRASA plus one other nominated by the Chief Executive Officer of the PRASA and the Lead Partner from the Provider plus one nominated by the Lead Partner from the Provider, who will endeavour to resolve the dispute within 10 (ten) days of the dispute having been referred to them.
- 16.3 Should the Joint committee fall to resolve the dispute; either party to the dispute will be entitled to refer the dispute to be adjudicated by a competent Court of law within the Republic.

### 17 IMPLEMENTATION

- 17.1 The parties hereby bind themselves to pass all such resolutions and to perform all such acts as may be necessary to give effect to the provisions of this agreement.
- 17.2 The provider shall at all times, possess and have appropriate knowledge, skills in terms of this agreement. The provider is further obliged to use and adopt reasonable, professional techniques and standards and provide the services with due care, skill and delegation.

### 18 WAIVER

- 18.1 No walver of any of the terms or conditions of this agreement shall be binding for any purpose unless expressed in writing and signed by the party giving the same and any such walver shall be effective only in the specific instance and for the purpose given.
- 18.2 No failure or delay on the part of a party in exercising any right, power or privilege shall operate as a waiver, nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

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## 19 WHOLE AGREEMENT

This Agreement, together with Annexure A and B hereto, constitutes the whole and entire agreement between the parties with regard to the subject matter hereof and there are no agreements, representations or warranties between the parties other than those specifically set forth herein.

## 20 DOMICILIA AND NOTICES

20.1 The parties choose as their nominated addresses for all purposes under this Agreement, whether in respect of court processes, notices or other documents or communications of whatever nature, the following addresses:

### PRASA

Physical Address: Umjantshi House

30 Wolmarans Street

Braamfontein

Johannesburg

Postni Address:

Private Bag X101

Breamfontein

2017

Tel:

011 773 1600

Fax No:

011 774 6299

E-mail:

lmontana@prasa.com

## THE PROVIDER

# PRODIGY BUSINESS SERVICES (PTV) Ltd.

Physical Address:

39 Wessels Road

Rivonia

2128

Postal Address:

P.O. Box 2136

Rivonia

2128

Tel:

(011) 234 9730/1

Facsimile No:

0866 131 309

Email:

nerlsbni@skillsmatters.com

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- 20.2 Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing.
- 20.3 Any party may by notice to the other party, change its nominated address to another physical address in South Africa, provided that the change shall become effective on the seventh day after the date of receipt of the notice by the other party.
- 20.4 Any notice given by one party to the other in terms of this agreement must be given by hand, or given by pre-paid registered post or by facsimile to the domicile chosen by the addressee in terms of clause 20.1 and shall be presumed, until the contrary has been proved, to have been received by the addressee on the date on which the same was delivered, if delivered by hand; on the seventh (7th) day after the date of posting, if sent by pre-paid registered post; or on the first business day following the date of despatch, if sent to the addressee's facsimile number.

### 21 SEVERABILITY

Should any part of this Agreement for any reason be declared invalid or unenforceable for any reason, such part shall be deemed modified to the extent necessary to make it valid and operative and in a manner most closely representing the intention of the parties, or if it cannot be so modified, then eliminated, and such elimination shall not affect the validity of any remaining portion, which shall remain in force and effect as if this Agreement had been executed with the invalid portion thereof eliminated, and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this Agreement without including therein any such part or portion which may, for any reason, be hereafter declared invalid.

### 22 SURVIVING CLAUSES

- 22.1. Clauses that by their very nature are intended to survive termination and expiration of this Agreement shall survive such termination and expiration. Such clauses include, but are not limited to:
  - . Clause 9 Intellectual Property Rights
  - . Clause 11 copyright
  - . Clause 12 Trademarks, trade names and publicity
  - . Clause 13 Confidentially and non-Disclosure

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22.2. The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they shall operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses do not expressly provide for this.

### 23. CESSION AND DELEGATION

The Provider and PRASA shall not cede any of its rights or delegate any of its obligations in terms of this contract without the prior written consent of PRASA or the Provider, which consent shall not be unreasonably withheld.

### 24. NO SUB-CONTRACTING

Save as provided to the contrary in terms hereof, the Provider shall not sub-contract the provision of services or products in terms of this agreement or any part of such services a products without the prior written approval of PRASA, which approval shall not be unreasonably withheld. Despite any approval granted by PRASA in terms of this clause, The Provider remains solely liable for the performance of its obligations under this agreement. Accordingly payment of all invoices shall only be made by PRASA to The Provider.

### 25. NON EXCLUSIVITY

Nothing in this contract shall be construed as creating an exclusive relationship between the Provider and PRASA and the Provider may provide services of a similar or identical nature to other organisations or individuals who may require such service from time to time.

## 26. POACHING OF PERSONNEL

Neither Party shall, without the prior written consent of the other during the currency of this Agreement or for the period of 6 (six) months thereafter, engage, employ or otherwise solicit for employment whether directly or indirectly, any person who, during the currency of this Agreement, was an employee, representative, agent, consultant, or member of the personnel of the other Party and who was involved in the provision or acquisition of Services in terms thereof.

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#### JURISDICTION 27.

- 27.1. For the purpose of all proceedings hereunder the parties consent to the jurisdiction of the High Court having jurisdiction under Section 28 of the Magistrate's Court Act of 1944 as amended, notwithstanding that such proceedings are otherwise beyond such jurisdiction. This clause shall be deemed to constitute the required written consent conferring jurisdiction upon the said Court pursuant to Section 45 of the MagIstrate's Court Act of 1944 as amended,
- Notwithstanding 28.1 above, PRASA shall have the right at PRASA's sole option and discretion to institute proceedings in any other competent Court, which has jurisdiction.

#### 28. RULE OF CONSTRUCTION NOT APPLICABLE

Any rule of Construction that this contract shall be interpreted against the party responsible for the drafting or preparation of the contract shall not apply.

#### 29. INDEMNITY

- 29.1. The Provider hereby indemnifies and holds harmless PRASA against any loss, liability, damage, herm, which PRASA may suffer and/or any claim which may be brought against PRASA whether it be a claim by the Provider, the Provider's members, employees, agents or representatives, or by any third party, or the estate of such a person or entity; arising from or connected directly or indirectly to:
- 29.1.1. The Provider's performance, non-performance or mai-performance of any of the terms of this agreement (including and without limitation to the provision, performance, rendering or supply of the Services, and the breach of any warranty contained in this agreement, or the use or occupation of the Premises, and/or the Service Area, or the Provider not having disclosed any fact or circumstance material to this agreement, or the provider not having the necessary authority of approvals to enter into this agreement); and/or

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- 29.1.2. Any act or omission of any or all of the Provider's members, employees, agents, representatives, and/or suppliers;
- 29.1.3. Any damage to, loss of, and/or destruction of property belonging to or in the possession of a third party, harm, toss, theft, or destruction to property belonging to, in the possession of, and/or under the control of the PRASA;
- 29.1.4. Any harm, injury or death suffered or sustained by a third party, where such harm arises from, is connected to or is caused by an act or omission of the Provider's employees, agents, representatives, or by an act of any third party where such act occurs or within the proximity or any employee, agent, representative of the Provider and such employee, agent, representative could or should have prevented same from occurring.
- 29.2. Such indemnity shall extend also to all expenditure, disbursements, and all legal costs on an Attorney and Own-Client basis which may be incurred by the PRASA as a result of such loss, liability, damage of claim including without limitation the cost of opposing any action, motion, or prosecuting any appeal, and the cost of obtaining professional opinion relating to any aspect of same, as well as but not limited to any of the following:
  - 29,2.1. Any damage to PRASA's property, whether movable or immovable
  - 29,2.2. Loss, harm, or destruction of property belonging to PRASA, whether movable or immovable
  - 29.2.3. Liability in respect of any damage, loss, harm or destruction or property, whether moveable or immovable, belonging to the third party and/or third parties
  - 29.2.4. Liability in respect of death, injury, unlawful/wrongful arrest, malicious prosecution, assault, defamation, unlawful search, illness or disease to the third party, the PRASA employees and/or third parties.

## 30, INSURANCE

30.1. It is in the best interest of the contractor to obtain the necessary insurance cover commensurate with the risk it is exposed to. It is further important to note that the contractor remains vicariously liable for all the actions and omissions of its

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- employees, agents acting within the course and scope of their duties and employment even on the premises of the Client.
- 30.2. The Contractor shall provide, but not limited to, following insurances and maintain same for the duration of the contract;
- 30.2.1. The Employer's Common Law liability Insurance;
- 30.2.2. The Compensation for occupation Injuries and Diseases Act, No 130 of 1993, the Contractor shall produce proof of its registration of good standing with the Compensation Commissioner in terms of the Act;
- 30.2.3. Insurance for its assets against any damage, loss, theft and/or destruction irrespective of whether such damage, loss, theft and/or destruction arise through its negligence or not.
- 30.2,4. Professional Indemnity Insurance
- 30.2.5. Public Liability Insurance

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31. SIGNATORIES	•
On behalf of the Provider	
Signature THUS DONE AND SIGNED AT RIVER OF THE PRESENCE OF T	
AS WITNESSES  1. Signature	Learner Achin Klanigger Designation
2. Signature	Designation
On behalf of PRASA	Gro.u.f (50) Designation duly authorised hereto
THUS DONE AND SIGNED AT BENEMINGUICED  OCTORER 2010, IN THE PRESENCE OF	ON THE LITTE DAY OF
AS WITNESSES  1. Signature	GE office of Group CEO
2, Signature	Designation

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## 32. ANNEXURE A

# Piloting of Centre of Excellence Model and Learnership Implementation

# 32.1 Prodigy Learnership Contribution

Activilles	Deliverables	Unit	Units	Prodky warilbutkon	Phyment Date
Phase: Sign-up of RPL	Internal Product briefing tession	CON		; ; ;	
Agreements					ì
***	KZN tearner sign up, pre-assessment and indiretion (70)	<b>j</b> '			
	GTG fearner sign up, pre-assestment and induction (130)		0771311	R300,000,00	
	CPT/PE learner sign up, pre-assussment and induction (100)				
Pharm implementation of the Pikel Sessions Mingt 4 & 5 RPL programme	Registration and uplead of fearner data onto Prodigy 1345	   		red	
o produced to a comment of the first terms of	Report on pre-stressment results and prouging of similar features	<u></u>			
	CoE Communication Programme designed and implemented for phase 1. Place 1 ampleyers communicated and engaged regarding; CoE and RPL implementation				
***************************************	Finalisation of phase I HPL session: 13 learners in GTG	j		1	ļ
and the second of the second expression of the	Frint POE's, ettendance registers, evaluation forms for phase I sessions		, , , , , , , ,	R1,050,000 00	4
	Phase 1 Birk sossion conducted with 15 learners Mingt 4	<u>}</u>			
	Phase 1 RPL session conducted With 15 learness Mingt 5	ļ ·	1 1		'
**************************************	Feedback report on phase I session		1 1		
	Devices and amend training material	ļ		j	
· · · · · · · · · · · · · · · · · · ·	Proof fload transfer majored	]			
Phase: toppementation of the Sossions: Mingt 4 & 5 RPL	Tinalization of RPL schedule for 15 groups of 30 people each across KZN, GTG and CPT/PL				
lughthings	Coursels communicated dates of RPL sessions	l			
garan a garan a sering	Logistical arrangements for leveners according to Ret. schedule		*		···· - 
agen gent the section of the children and	implenmentation of APL sextrons For Govieng with Centre of Excellence (COE)		,		- 1,000 . 61 . 0.04.00
	Assessment and Remodistion with high-dual tenners and upload of results				
era werenned to the Mark Market	Weekly status supports on sessions, findings and feedback aggregated by programmy and region.		' '		
** , - ** ** **	Final consolidated report findings, learning areas and gaps, SWOT, etc aggregated by learning programma and region			R9,450,000 00	
<b></b>	Programme evaluation: evaluation questionnings provided to all 300 learners, distributed, collected and analysed by Produgy				
· · · · · · · · · · · · · · · · · · ·			į l		,
grander region (Ab. 1270) and the management	PRASA CEO balance scorecard populated  Regional recognition caremonies (GTG, XXN and CAT/PE)				
	And the best of the second sec	1	Land		
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Total	والقائم الأراجية ويتناف والمرافقة والأوراق والتاريخ والمرافية والمرافق والمرافق والمرافق والمرافق والمرافق والمرافق		46 6/4-4 1-44	810,600,000.00	

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### ANNEXURE B 33.

# Piloting of Centre of Excellence Model and Learnership Implementation

## 33.1 PRASA Centre Of Excellence

Activilles	Deliverables	Ualt Cost	Units	Yotel FRASA tonulbullan	Payment Date
Pro-Planning Phase	Pre Planning Meetins 1: PNASA Trandeka isuthefer (19) and Prodigy Registral Stantangara (85)		7		
S 454-7-1 1991-1 767	Pre Plouding Meeting 2: Minutes of Meeting with TD and Valeric Jonathan (VI)				
	Formulation of MS project plan				İ
	Proparation for Telesconderance: Pre-Assessment & Registration form, brachures, Telecon ngende, shills quositionnaires, identification of referent qualifications: Station Precinci Managers: Management HQF 4 and Condor Managers! Managers! Managers! Managers!	R 300,000.60	1	п 300,000.00	13-404-10
	Finalisation of tradigy-PRASA Contract and payment schedule		<u>.</u>		
Phase: Investigative (customisation of fip), material	Planning Workshop 1: (Teleconfurence with Thandelia Buthelexi (10)/ Valorie Ionalian (VI) and Tenm). Alignment of Iob Descriptions to Qualifications (Workshop agends 2012 skills questionnaires)			-	
_	Customisation of training material	R 300,000,00	1	a 300,000.00	26 Nov-10
	Presentation of customized material and sign off by PRASA	<u>;</u>	,		
	Planning Workshop 3: Prodigy and PRASA CEO and TB - Presentation of belanced scorecard and Monet programme	i ,			
Phase: Communication of CoE and RPL Roll-Out	Develop branding related to Centre of Excellence, Lago, pay- off line, web-link on antranet	R 562,000,00	1	R 562,IKNO.00	(13/Dec-10
Phose: innavallon: Design	Storybound design of CoE	* · · · · · · · · · · · · · · · · · · ·			1
and Establishment of PRASA Contra of Excellence		1	١.	84.000.0XX100	0340ec-10
JCoE1	Presentation and sign off of storyboard to PRASA	1 R4.000.0001810	,	иодалдулаучиу	103-15-61-10
	Selection of CoE site	,		a apragas titespeed on	
	Implement OpE of PRASA Head Office: A physical Centre of Excellence established, This with neither St PCs, 2 touch- screen terminals, 100 Jeanner stations, 4 proximas	It3,700,000,00	,	00,000,000,6ft	28 Jan-31
	Leanters to be provided with collambs to be collised during the sessions: Gautene, (50 nathooks)	U 400,000,00	,	g 400,000.00	26-Nov-11
Phase: Skills Audit Dirgnosile	Review 350 PRASA Station Lovel employee foll descriptions iclustered total functional competencies). Develop diagnostic tools via passonal interviews	a-pasergamper, rye enj', Makadah		and the second s	
	lingort and production of skills audit questionnaires, iteviare and approvated questionnaire by PRASA.	# 2.62,0XX0.00	,	19. 5 r 5°0000°03	LB-Mar 13
Project Cours	Final Consolidated Report on the uso of the Cog: past review and recommendations				The same of the sa
Sub-Total	)	هو برط ۱۳۰۰ هنده برومنده با ۱۳۰۰ اپرسون در از ر	L-101 h 1 pq - 0	R 9,474,000.00	
VAT				N 1'356'360'00	
Total				810,800,160.00	

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#### 34. ANNEXURE C

SECURITY, BACK-UP & DISASTER RECOVERY POLICIES

### 1. INTRODUCTION

This Annexure sets out the relationship and responsibilities between the PRASA and the provider in respect of security, back-up & disaster recovery.

## 2. SECURITY

- Security will be implemented to safeguard all the systems and data at PRASA to generally acceptable standards.
- The provider will be the single point of contact for any queries relating to back-ups.

### 3. Backup and Recovery

- The PRASA users will be responsible for the backup of all user-related data housed at PRASA premises, and/or held on other PRASA controlled media.
- In respect of information systems and data at The provider or a hosting partner appointed by The provider, The provider will:
  - o be responsible for the dally, weekly, monthly and yearly backup of critical software and information at the hosting partner;
  - o be responsible for the off site storage of critical software and information backup media; and
  - o will be responsible for the testing of the backups done on all critical software and information.

### Disaster Recovery

- The provider will be responsible for the disaster recovery plan for the information systems and data kept either at the provider or at appointed hosting partner.
- The provider will perform contingency tests twice per armum in respect of the information and data backed-up per clause 3 of this Annexure.
- The provider will report back the results of the tests to PRASA.

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### ADDENDUM TO PARTNERSHIP AGREEMENT

## made and entered into by and between

PASSENGER RAIL AGENCY OF SOUTH AFRICA (hereinafter referred to as "PRASA" and herein represented by MPHEPO RAMUTLOA being duly authorized hereto)

AND

PRODIGY BUSINESS SERVICES (Pty) Ltd. Registration No. 2006/018844/07 Accreditation No. 1520

(hereinafter referred to as "The Provider" and herein represented by NERISHNI SHUNMUGAM being duly authorized hereto)

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## 1 PARTIES

The parties to this agreement are the following:

### ll Prasa

Passenger Rail Agency of South Africa

### 1.2 The Provider

Prodigy Business Services (Pty) Ltd

### 2 PURPOSE OF THE ADDENDUM

A Partnership agreement between PRASA and Prodigy Business Services (PTY) LTD was concluded on the 15th of October 2010. The deliverables to this partnership agreement have been fulfilled.

Now that the pilot phase has been completed, the derived positive impact of the learning intervention conducted by prodigy Business Services Pty Ltd should not be lost. Given the transformation mandate PRASA to be the most efficient public transporter of South Africans, it has been agreed by PRASA that the station and corridor management programme conducted by prodigy Business Services Pty Ltd should be extended to the PRASA frontiline and similar workers employed all regions, stations and other areas of PRASA. These individuals would include employees from PRASA Rail, Autopax as well as any other division or subsidiary within and of PRASA. In order to maintain sustained and ongoing continual professional development within PRASA and its subsidiaries, it has been agreed that Prodigy Business services Pty Ltd will implement the following interventions over a three year period. The first component will be the MyStation Proofline Customer service Training Programme which targets the core component of PRASA's business i.e. the interface with PRASA commuters.

Thus Prodigy Business services Pty Ltd will be afforded the purtnership to implement Continual Professional Development for PRASA and its subsidiaries, following will be implemented;

- Implementation of a PRASA customer service (PRASA MyStation) frontline worker programme: 3,000 employees; 5 days of training and 5 days of workplace mentorship and coaching.
- Implementation of a PRASA customer service (PRASA MyStation) frontline worker programme: 6,000 employees: 5 days of training and 5 days of workplace coaching and mentorship.
- Continual Professional Development of 5 days of training for station and corridor reanagement,

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 Autopax Contect Centre, Customer Service and Professional Driver Training: Budget and learner numbers to be discussed with Autopax or PRASA Group CEO or other representative.

### 3 PAYMENTS

The service provider will submit a cost of the services to be provided in terms of this addendum, and once PRASA has accepted the costs proposed only then will this addendum be implemented, with the components outlined in paragraph 2 above.

## 4 DURATION OF THE CONTRACT ADDENDUM

4.1 This project, which is part 1 of a 3-part implementation, shall commence on the 1<sup>st</sup> September 2011 and will terminate/expire by 31<sup>st</sup> December 2013.

### 5 OBLIGATIONS

## 5.1 Obligations of the Provider

During the currency of this Agreement, the Provider shall provide the Services to the PRASA in accordance with: -

- 5.1.1. Products and/or services to PRASA as specified in Annexure A hereto and initialled by the parties for identification purposes.
  - 5.1.7 the provisions of relevant legislation governing the activities of public entities;
  - 5, 1,3 the Constitution of the PRASA;
  - 5.1.4 the terms and conditions of this Agreement;
  - 5.1.5 The Public Pinance Management Act; and
  - 5.1.6 The Preferential Policy Procurement Framework Act

Should the Provider encounter any problem or identify any trend in relation to any of the Services it provides in terms of this Agreement to PRASA or any component thereof, it must report such matter to PRASA in writing without delay. Thereafter, the Parties will agree on corrective measures to be taken to address or pre-empt the problem, as the case may be

## 5.2 Obligations of PRASA

- 5.2.1 PRASA shall appoint Prodigy to implement the MyStation Programme at PRASA.
- 5.2.2 PRASA shall in terms of Annexure A hereto make payment of amounts due to The Provider in accordance with this agreement. The Provider will undertake to invoice PRASA according to the schedule as per Annexure A.

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- 5.2.3 In order to enable the Provider to provide the Services, PRASA shall allow the Provider reasonable access to all necessary PRASA data and documentation.
- 5.2.4 PRASA shall ensure that any party over which it has direct control performs its duties and functions as may be reasonably required by The Provider to enable The Provider to comply with its obligation to provide the Services as detailed in Annexure A.
- 5.2.5 Without derogating from the generality of clauses 5.2.1 and 5.2.2, pRASA shall provide The Provider with all assistance reasonably required by The Provider from time to time to enable The Provider to comply with its obligations in terms of this Agreement.

If requested by The Provider, but without absolving The Provider from any of its Service provision obligations, PNASA will utilise its best efforts to facilitate compliance and/or co-operation from other 3rd (third) parties with whom The Provider need to interact in order to deliver the required contracted Services.

# 5.3 Obligations to the Employer (PRASA)

- 5.3.1 The Employer must comply with its duties of the Act and all applicable legislation including:
  - Basic Conditions of Employment Act (No.75 of 1997)
  - · Labour Relations Act (No.86 of 1999)
  - Employment Equity Act (NO.55 of 1998)
  - Occupational Health and Safety Act (No:85 of 1993)
  - Compensation for Occupational Injuries and Diseases Act (NO.130 of 1993)
- 5.3.2 Provide the Learner with appropriate training in the work environment to achieve the relevant outcomes required by the learnership
- B.3.3 The Employer must provide the Learner with adequate supervision at work
- 5.3.4 The Employer must release the Learner during normal working hours to attend off-the-job education and training required by the learnership
- 5.3.5 Keep up to date the records of learning and periodically discuss progress with the learner
- 5.3.6 The Employer must apply the same disciplinary, gridvance and dispute resolution procedures to the learner as to other employees
- 5.3.7 Should the Employer cancel training sessions 5 working days prior to the planned implementation date, then the cost of such cancellation will be borne by the employer
- 5.3.8 The employer will be responsible for learner accommodation and catering

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- 6.1 The Provider will provide the Internal auditors of PRASA with all necessary support, facilities and access to information pertaining to PRASA and these Services in accordance with legislative requirements. Appropriate assurances, will on request be provided to PRASA's internal auditors regarding the controls instituted in respect of The Provider systems, which provide Services to or interface with PRASA.
- 6.2 If any audit results in a finding that The Provider is not, insufar as it is applicable, rendering the Services in terms of GAAP and the Public Finance Management Act, The Provider shall, at its cost and expense, promptly take all actions required to achieve such compliance, and any resultant audit costs incurred by the PRASA in this regard shall be paid by The Provider.
- 7.1 For the duration of this agreement, the parties shall each nominate and maintain at least 1 (one) representative, as the single point of contact between the parties, to regulate and control the implementation and performance of the parties under this agreement. Such nominated representative may be changed by the party appointing him or her by giving at least 7 (seven) days prior written notice to the other party.
- 7.2 The nominated representatives shall meet as regularly as may be agreed between the parties.

## B INDEPENDENT CONTRACTORS

The parties shall act as independent contractors for all purposes under this agreement. Nothing contained herein shall be deeped to constitute either party as an agent or representative of the other party, or both parties as joint ventures or partners for any purpose. Save as expressly stated herein to the contrary, neither party shall be responsible for the acts or omissions of the other party, and neither party shall have authority to speak for, represent or obligate the other party in any way without the prior written approval of the other party.

## O INTELLECTUAL PROPERTY RIGHTS

- 9.1 All intellectual property resulting from the execution of this contract as described in Annexure A shall be the adia and exclusive property of the Provider. The Provider shall be entitled to register copy right in respect of such intellectual property.
- 9.2 Nothing in this agreement or Annexure A hereto shall restrict The Providers use of Ideas, concepts, know-flow, methods or techniques developed in relation to the services or products referred to in this agreement or Annexure A hereto.
- 9.3 The above provisions:

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- Excludes intellectual property that currently exists and has been 9.3.1 developed by the Provider prior to the commencement of this contract. The ownership of such intellectual property will remain with the Provider.
- Intellectual property developed exclusively for PRASA, the 9.3.2 ownership of such intellectual property shall reside with PRASA.
- Intellectual property that currently exists and has been developed 9,3,3 by PRASA prior to the commencement of this agreement, the ownership of such intellectual property will remain with PRASA.

### SECURITY, HACK-UP R DISASTER RECOVERY 10

In respect of any IT systems provided by the Provider, the Provider shall comply with the security, back-up and disaster recovery requirements as set out in Annexure B, including the provision of the necessary security, backup, offsite storage and disaster recovery services and testing.

#### COPYRIGHT 11

- The parties adjanowledge that the copyright and exclusive right of use of 11.1 all materials specifically supplied by either party with regard to the product or service in terms of this agreement is the sole property of the supplying party or sole property of the third party from which either party/supplying party has obtained usage rights;
- Future copyright and exclusive right of use of all materials created in 11.2 terms of this agreement is the sole property of The Provider except the copyright and exclusive right of use of all materials created in terms of this agreement for PRASA such shall be the sole property of PRASA. The Provider must procure from all contractors and sub-contractors (as specifically allowed by this contract) used by it in terms of this agreement, an assignment of copyright and exclusive right of use of materials created by those contractors and subcontractors.
- The Provider warrants that to the best of its knowledge the materials that 11.3 are created in terms of this agreement and the services that are provided to terms hereof shall not constitute an infringement of any copyright.

### Trademarks, trade hames and publicity 12

- The Provider shall not, without the prior written consent of PRASA, use, remove or cover the hames, services marks, trademarks, logos or other corporate identifications of PRASA or its licensors.
- The Provider shall not publicise the contents of this agreement or its existence without the prior written consent of PRASA first having been received which consent shall not be unreasonably withheld.

## CONFIDENTIALITY AND NON-DISCLOSURE

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- 3.1 For the purpose of this clause 13, "receiving party" shall mean that party receiving the other's confidential information and "disclosing party" shall mean that party disclosing its confidential information to the other.
- 13.2 The receiving party may disclose the confidential information only to its officers and employees and then only such officers and employees to whom such disclosure is reasonably necessary; provided that the receiving party shall-ensure compliance by such officers and employees to whom such disclosure has been made, with the terms of this agreement and in particular the provisions of this clause 13.
- 13.3 The receiving party agrees:
  - 13.3.1 not to disclose the confidential information to any third party of the line reason or purpose whatsoever without the prior written consent of the disclosing party, save in accordance with the provisions of this agreement,
  - 13.3.2 not to utilise, employ, exploit or in any other manner whatsoever use the confidential information disclosed pursuant to the provisions of tills agreement for any purpose whatsoever other than strictly in relation to this agreement and Amexure A herelo.
  - 13.3.3 that the unauthorised or unlawful use or disclosure of the confidential hitomation may cause literatable loss, harm and damage to the disclosing party. Accordingly, the receiving party indemnifies and holds the disclosing party harmless against any loss, action, expense, claim, harm or damage, of whatsever nature, suffered or sustained by the disclosing party pursuant the breach by the receiving party or any of its officers or employees to whom disclosure is made in terms of this agreement of the provisions of this agreement.
- 13.4 The receiving party agrees to protect the confidential information of the disclosing party by using the same standard of care used to safeguard its own information of a confidential nature and by taking all reasonable steps to prevent any unauthorised disclosure of such confidential information.
- 13.5 The disclosing party may, at any time by way of written notice to the receiving party, require the receiving party to return or destroy any material containing, pertaining to or relating to confidential information and to expunge such confidential information from any word processor, computer or other similar device into which it was entered or programmed, and may, in addition, require the receiving party to furnish a written statement (certified as correct by a director of the receiving party) to the effect that, upon such return, the receiving party has not retained in its possession, or under its control, either directly or indirectly, any such material. The receiving party shall comply with all requirements in terms of this clause 13 within 7 (seven) days of receipt of written notice thereof,

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- 13.6 The obligations of the receiving party pursuant to the provisions of this agreement shall not apply to any information that:
  - 13.6.1 is known to or in the possession of the receiving party prior to disclosure thereof by the disclosing party;
    - 13.6.2 is or becomes publicly known, otherwise than pursuant to a breach of this agreement by the receiving party;
  - 13.6.3 is acquired or developed independently of the disclosing party in circumstances that do not amount to a breach of the provisions of this agreement;
  - 13.6.4 Is disclosed by the receiving party to satisfy the order of a Court of competent jurisdiction of to comply with provisions of any law or regulations in force from time to time, provided that in these circumstances, the receiving party shall advise the disclosing party in writing prior to such disclosure to enable the disclosing party to take whatever steps it deems necessary to protect its interest in this regard. Provided further that the receiving party shall disclose only that portion of the information which it is legally required to disclose and the receiving party shall use its reasonable endeavours to protect the confidentiality of such information to the widest extent possible in the circumstances:
  - 13.6.5 is disclosed to a third party pursuant to the prior written authorisation from the disclosing party.

## 14 BLACK ECONOMIC EMPOWERMENT AND EMPLOYMENT EQUITY POLICY

- 14.1 PRASA and The Provider agree that it is an express material term of this Contract that The Provider is a Black Economic Empowered entity at the time of the conclusion of this agreement and shall be so at all times material hereto, more particularly throughout the duration or any extension of this agreement. The definition of a Black Economic Empowered entity is a company that has more than 26% of BEE equity. Any breach of this express material term shall entitle PRASA, notwithstanding the provisions of clause 15 hereof, to immediately cancel this agreement without notice and without projudice to any of its rights under this agreement or at law.
- 14.2 The Provider expressly warrants that it is Black Economic Empowered entity and undertakes to Turpish PRASA with the recessary proof in this regard.

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- 14.3 Should the BEE status of The Provider change and the BEE equity ownership fall below 26% at any time in the duration or extension of this Agreement or at any time material hereto. The Provider shall immediately in writing notify PRASA who, netwithstanding the provisions of Clause 15 hereof, shall be entitled at its sole option and discretion to immediately terminate this agreement without prejudice to its rights under this agreement or at law.
- 14.4 As a necessary corollary to clauses 14.1 and 14.2 above the Provider represents and warrants that it shall lieve, maintain and implement a suitable amployment equity policy, at all times during the term of this agreement.
- PRASA shall be entitled to audit The Provider in order to ensure compliance by The Provider with the Provider's BES policy and Employment Equity Policy.
- 14.6 Should the audit reveal that The Provider is not in compliance with its BEE policy, and/or it's Employment Equity Policy, PRASA shall be entitled but not ubliged to terminate this agreement, without prejudice to its rights utilities the agreement or at law.
- 14.7 Should The Provider's DEB rating (Including its Employment Equity Policy) change, the Provider shall in writing notify PRASA thereof within 14 (fourteen) days, of such change occurring.

### **15 BREACH**

Should alther Party ("the Defaulting Party") commit a breach of any of the provisions hereof, then the other Party ("the Aggrieved Party") shall be obliged to give the Defaulting Party 7 (seven) days written notice to remedy the breach. If the defaulting Party falls to comply with such notice, the Aggrieved Party shall netwithstending any prior waiver and without prejudice to any other remedy which the aggrieved party may have at law, be entitled to:

- 15.1 cancel the agreement and recover from the Defaulting Party such damages as he may have suffered under the difcumstances, including but not limited to repayment to the aggreement, of all monies received by the defaulting Party in terms of this agreement, of:
- 15.2 claim specific performance by enforcing the terms and conditions of this agreement;

### 16 DISPUTE RESOLUTION

All parties accept that disputes may arise between them during the course of this agreement.

16.1 All parties endeavour to resolve lesues amicable. Should this fall, either party may write a letter to the other party outlining issues in dispute and request a dispute resolution mechanism to be implemented as set out in 16.2 and 16.3.

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- 16.2 Referral of disputes to a joint committee of the parties. Any dispute which erises shall be referred to a joint committee consisting of at least the Chief Executive Officer of PRASA plus one other nominated by the Chief Executive Officer of the PRASA and the Lead Partner from the Provider plus one nominated by the Lead Partner from the Provider plus one nominated by the Lead Partner from the Provider, who will endeavour to resolve the dispute within 10 (ten) days of the dispute having been referred to them.
- 16.3 Should the joint committee fall to resolve the dispute; either party to the dispute will be entitled to refer the dispute to be adjudicated by a competent Court of law within the Republic.

## 17 IMPLEMENTATION

- 17.1 The parties hereby blind themselves to pass all such resolutions and to perform all such acts as may be necessary to give effect to the provisions of this agreement.
- 17.2 The provider shall at all times, possess and have appropriate knowledge, skills in terms of this agreement. The provider is further obliged to use and adopt reasonable, professional techniques and standards and provide the services with due care, skill and delegation.

### 18 WATVER

- 18.1 No waiver of any of the terms or conditions of this agreement shall be blinding for any purpose unless expressed in writing and signed by the party giving the same and any such waiver shall be effective only in the specific instance and for the purpose given.
- 18.2 No foliare or delay on the part of a party in exercising any right, power or putvilege shall operate as a waiver, nor shall any slingle or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

## 19 WHOLE AGREEMENT

This Agreement, together with Annexure A and B hereto, constitutes the whole and entire agreement between the parties with regard to the subject matter hereof and there are no agreements, representations or warranties between the parties other than those specifically set forth herein.

## 20 DOMICILIA AND NOTICES

20.1 The parties choose as their hominated addresses for all purposes under this Agreement, whether in respect of court processes, notices or other documents or communications of whatever nature, the following addresses:

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PRASA

Physical Address: Umjantahi House

30 Wolmarans Street

nistrofmach9 Ousdesmandl

Postal Address:

Private Beg X101 Bradmfontein

2017

Tel:

011 773 1600 011 774 6299

Pax No: E-mall:

mcamutioa@prasa.com

THE PROVIDER

PRODICY BUSINESS SERVICES (PTY) Ltd.

Physical Address: 39 Wessels Road

Riyonla

2128

Postal Address:

P.O. Box 2136

Riyonia 2128

Telt

(011) 234 9730/1 0866 131/309

₹acsimile No: Emails

neristral@skilismatters.com

- 20.2 Any fiotice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing.
- 20.3 Any party may by notice to the other party, change its nominated address to another physical address in South Africa, provided that the change shall become effective on the seventh day after the date of receipt of the notice by the other party.
- 20.4 Any notice given by one party to the other in terms of this agreement must be given by hand, or given by pre-paid registered post or by facsimile to the domicile chosen by the addressee in terms of clause 20.1 and shall be presumed, until the contrary has been proved, to have been received by the addressee on the date on which the same was delivered, if delivered by hand; on the saventh (7th) day after the date of positing, if sent by pre-paid registered post; or on the first business day following the date of despatch, if sent to the addressee's fatsimile number.

### 21 SEVERABILITY

Should any part of this Agreement for any reason be declared invalid or unenforceable for any reason, such part shall be deemed modified to the extent necessary to make it valid and operative and in a manner most closely representing the Intention of the parties, or if it cannot be so modified, then eliminated, and such

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elimination shall not affect the validity of any remaining portion, which shall remain in force and effect as if this Agreement had been executed with the invalid portion thereof eliminated, and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this Agreement without including therein any such part or portion which may, for any reason, be hereafter declared invalid.

## 22 SURVIVING CLAUSES

- 22.1. Clauses that by their very nature are intended to survive termination and expiration of this Agreement shall survive such termination and expiration. Such clauses include, but are not limited to:
  - Clause 9 Intellectual Property Rights
  - . Clause 11 copyright
  - . Clause 12 Trademarks, trade names and publicity
  - . Clause 19 Confidentially and non-bisclosure
- 22.2. The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they shall operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses do not expressly provide for this.

## 23. CESSION AND DELEGATION

The Provider and PRASA shall not cade any of its rights or delegate any of its obligations in terms of this contract without the prior written consent of PRASA or the Provider, which consent shall not be uhreasonably withfield.

## 24. NO SUB-CONTRACTING

Save as provided to the contrary in terms hereof, the Provider shall not sub-contract the provision of services or products in terms of this agreement or any part of such services a products without the prior written approval of PRASA, which approval shall not be unreasonably withhield. Despite any approval granted by PRASA in terms of this clause, The Provider remains solely liable for the performance of its obligations under this agreement. Accordingly payment of all invoices shall only be made by PRASA to The Provider.

### 25. NON EXCLUSIVETY

Nothing in this contract shall be construed as creating an exclusive relationship between the Provider and PRASA and the Provider may provide services of a similar or identical nature to other organisations or individuals who may require such service from time to time.

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### 26. Poaching of Personnel

Meither Party shall, without the prior written consent of the other during the currency of this Agreement or for the period of 6 (six) months thereafter, engage, employ or otherwise solicit for employment whether directly or indirectly, any person who, during the currency of this Agreement, was an employee, representative, agent, consultant, or member of the personnel of the other Party and who was involved in the provision of acquisition of Services in terms thereof.

### 27. JURISDICTION

- 27.1. For the purpose of all proceedings hardunder the parties consent to the jurisdiction of the High Court having jurisdiction under Section 28 of the Magistrate's Court Act of 1944 as amended, notwithstanding that such proceedings are otherwise beyond such jurisdiction. This clause shall be deemed to constitute the required written consent denferring jurisdiction upon the said Court pursuant to Section 45 of the Magistrate's Court Act of 1944 as amended.
- 27.2. Notwithstanding 28.1 above, PRASA shall have the right at PRASA's sole option and discretion to institute proceedings in any other competent Court, which has jurisdiction.

## 28. RULE OF CONSTRUCTION NOT APPLICABLE

Any rule of Construction that this contract shall be interpreted against the party responsible for the drafting or preparation of the contract shall not apply.

### 29. INDEMNITY

- 29.1. The Provider hereby indemnifies and holds barmless PRASA against any loss, liability, damage, harm, which PRASA may suffer and/or any claim which may be brought against PRASIA whether it be a claim by the Provider, the Provider's members, employees, agents or representatives, or by any third party, or the estate of such a person or entity; arising from or connected directly or indirectly to:
- 29.1.1. The Provider's performance, non-performance or mal-performance of any of the terms of this agreement (including and without limitation to the provision, performance, rendering or supply of the Services, and the breach of any warranty contained in this agreement, or the use or occupation of the Premises, and/or the Service Area, or the Provider not having disclosed any fact or circumstance material to this agreement, or the provider not having the necessary authority of approvals to enter into this agreement); and/or
- 29.1.2. Any act or omission of any or all of the Provider's members, employees, agents, representatives, and/or suppliers;

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- 29.1.4. Any harm, injury or death suffered or sustained by a third party, where such harm arises from, is connected to or is caused by an act or omission of the Provider's employees, agents, representatives; or by an act of any third party where such act occurs or within the proximity or any employee, agent, representative of the Provider and such employee, agent, representative could or should have prevented same from occurring.
- 29,2. Such indemnity shall extend also to all expenditure, dishursements, and all legal costs on an Altorrey and Own-Client basis which may be incurred by the PRASA as a result of such loss, liability, damage or claim including without limitation the cost of opposing any action, motion, or projeculing any appeal, and the cost of obtaining professional opinion relating to any aspect of same, as well as but not limited to any of the following:
- 29.2.1. Any damage to PRASA's property, whether movable or immovable
- 29.2.2. Loss, harm, or destruction of property belonging to PRASA, whether movable or immovable
- 29.2.3. Liability in respect of any damage, loss, harm or destruction or property, whether moveable or immovable, belonging to the third party and/or third parties
- 29.2.4. Liability in respect of death, injury, unlawful/wrongful arrest, malicious prosecution; assault, defamation, unlawful xearch, illness or disease to the third party, the FRASA employees and/or third parties.

### 30. INSURANCE

- 30.1. It is in the best interest of the contractor to obtain the necessary insurance cover commensurate with the risk it is exposed to. It is further impuriant to note that the contractor remains vicatiously liable for all the actions and omissions of its employees, agents acting within the course and scope of their duties and employment even on the premises of the Client.
- 30.2. The Contractor shall provide, but not limited to, following insurances and maintain same for the duration of the contract;
- 30.2.1. The Employer's Common Law liability Insurance;
- 30.2.2. The Compensation for occupation injuries and Diseases Act, No 130 of 1993, the Confractor shall produce proof of its registration of good standing with the Compensation Commissioner in terms of the Act;
- 30.2.3. Insurance for its assets against any damage, loss, theft and/or destruction brespective of whether such damage, loss, theft and/or destruction orise through its negligence or not.

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30.2.4. Professional Indomnity Insurance 30.2.5. Public Liability Insurance

# 31. SIGNATORIES

On behalf of the Provider

SIGN		DIRECTOR Dealgnation - duly authoris N Paccon this the 30	
		ENCE OF THE UNDERSIGNED WITH	
AŠ Ŵ	vitnesses		
1	Signature	Designation	ah dinemmenyar as
2.	Signature	Designation	e***
Only	ahalf of PRASA		
Floriat	professional response of the second of the s	Cot-One Tumaes  Designation - duly authorise	Cabiltal
mus Lita	DONE AND SIGNED AT LECKLE	Fred of the undersigned wit	" DAY OF
I.	Signature	Designation	***** C II MI
2.	Signature	Designation	<b>4</b>

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# ANNEXURE A OF ADDENDUM TO PARTNERSHIP AGREEMENT

# MADE AND ENTERED INTO BY AND BETWEEN

PASSENGER RAIL AGENCY OF SOUTH AFRICA (hereinafter referred to as "PRASA" and herein represented by Tshepo Lucky Montana being duly authorized hereto)

## AND

PRODIGY BUSINESS SERVICES (Pty) Ltd. Registration No. 2006/018844/07

(hereinafter referred to as "The Provider" and herein represented by NERISHNI SHUNMUGAM being duly authorized hereto)

Mr. Elin W

### 1 PURPOSE OF ANNEX A

Annexure A has reference to the addendum to the pertnership agreement signed between Prodigy and PRASA on the 30th of August 2011. This annex is not a variation but a clarification, thus not altering the terms of the partnership agreement. In particular the annex serves to regularize and define the specific terms and conditions of the addendum, in particular with reference to:

- 1. The timeframes for the 3 phase PRASA Mystation programme
- 2. The per learner cost for the MyStation Programme for the first 3000 learners
- 3. The monthly invoicing schedule for the first 3000 PRASA employees
- 4. The cost of cancellations

### 2 The Timeframe for the PRASA MyStation Programme

On August 30th 2011, the partnership agreement was extended and signed to include the implementation of the PRASA MyStation Frontline Customer Service Excellence Programme. The cost and deliverables matrix is attached

The 1" phase of the 3-phase partnership agreement is for a minimum of 3000 PRASA employees commencing 1<sup>87</sup> September 2011 and to be completed by 31<sup>11</sup> March 2014. (The partnership agreement had stated that this should be completed by September 2013, however the end date for the first 3000 has been extended to March 2014 to accommodate for PRASA's financial year end.)

The costing and timeframe for the remaining 2 phases (6000 PRASA employees) must be agreed to in writing by the 31st March 2013.

## 3 Detailed per learner costing

Phase: Plainting/ Pre-Implementation		
Project Inception discussions/meetings between Prodigy and PRASA 2011-March 2014	Planning framework/ GANNY	Procligy
PRASA frontline learner selection - high level : occupational groupings (3000 candidates identified : access controllers, ticket clerks, conductors, drivers, security guards). Coaching sessions also planned	PRASA Frontline Learner Ontobase	PRASA
Prodigy litternal planning and weekly operations meetings. Development of resource matrix, scheduling and logistical management. Quality assurance, obtaining daily attendance registers and submitting to PRASA, altendance reconciliation, review of facilitator evaluation,	Reports Operations Revource Matrix Attendance Recon Facilitator Reports Learner Evaluation Forms (angrepate captured)	Prodigy

Page 2 of 8

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THE PROOFES TO DESCRIPTION OF THE PROPERTY OF		
Project management: contingency planning,	Project reports and	Prodigy
risk assassment, project efficacy,	project success indicators	
management of Frodigy team, high level	ì	}
meethis with erasa clens		
Phase investigative (customisation of training	<u> </u>	}
material - Customer Services)	Letington, whethere strick is by an empression and a company of particular processing a complete.	
Prodfigy-PRASA MyStation Strategy	Skills programme Key	Prodigy
Workshops: Prodigy sessions to present the	outputs and outcomes	1
appropriate unit standards for the customer service training for frontline staff, Prodigy will	finalised on basis of workshop with PRASA:	<b>†</b>
present its generic frontitus service	this will then form the	ł
programme which will be workshopped with	foundation for the	
PRASA and their customised for frontline	MyStation Customer	1
PRASA rail customer services	Services programme	
• • • • • • • • • • • • • • • • • • • •	Developed	
Develop customised PRASA MyStetion Skills	Draft Customised PRASA	Prodley
Programme based on outputs from workshops.	MyStation Skills	1,100,41
The PRASA MyStation skills programme will be	Programme Developed:	
based on Prodigy's accredited frontline	comprising of the	
programme that comprises unit standards	following unit standards:	
from GETC: Transport NQF 1,NC Professional	see attached worksheet	
Driver NQF 3, NC Rall Transport Passenger	1	
Services NOF 3	ي. چ در اين اين مان در اين	
Prodigy Training Material Workshop 2: Meeting	Customised MyStation	Prodigy
between Prodigy and PRASA - Presentation of	programme Formulated	]
customised material	as work in progress	
Changes effected as required	MyStation Skills	}
and the state of t	Programme amended	and the Annual to Andrew Market and the
Presentation of customised meterial and sign-	Training material signed	Prodigy &
off by PRASA	off: learner workbook,	PRASA
	learner workplace	Ì
,	coaching logbook,	[
	facilitator guide, mentor	ĺ
	gulde, frandouts,	
municipality of the Markettine Decises on the property of	assessor nack	disaminganenanangi uma Desertingi sasah
Redraft of the MyStation Programme, central facilitator induction, purchase of videos,		Prodigy with PRASA Input
redesign of presentation		LUVOV Bibrit
Development of a little pocket booklet on	MyStation booklet/ Z	Prodigy
sellent aspects of customer service	Card (printing and design	110(03)
Section 12 mail property at the property of th	to be done by PRASA)	•
Phase: Communication of PRASA MyStation	the second of th	/ 2017-1449-2014-2
Customer Service Frontline Programme		
Development of communication content for	PRASA MyStation	Prodigy
yyStation Customer Service Programme	Communication content	rivary
systemati examinet out they traditionise	developed (PRASA	
	corporate: PRASA	
l	Website) and	
, and the state of		
	Communication induced	
	Communication tailored for frontline workers	
	for frontline workers	
reparation of regional management	for frontline workers (letters)	Prodicy
Preparation of regional management Presentation, and presentation to regional	for frontline workers (letters) Regional management	Prodigy
Preparation of regional management presentation, and presentation to regional managers across all provinces, done by	for frontline workers (letters)	Prodigy

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SMSs to each learner during peak times to remind them of key loarning actions	A CONTRACTOR OF THE CONTRACTOR	Prodigy
Communique regerding project	OnTrack	Prodigy and PRASA
Phase: PRASA MyStation Customer Service	من المسلم على المسلم br>المسلم المسلم	ALTONOMICA
Skills Programme Implementation Preparatory	•	
Phase		و هند خارات و دور در دور در
PRASA frontline Learner registration and screening records captured onto Prodigy PEDEX Learner Management System. All National Learner Record Database fields to be captured to ensure that correct learner information is transferred to the SETA.	Learner Management System	Prodigy
PRASA MyStation Customer Services Programme Finalised for roll-out	Final Customised PRASA MyStation Customer service Skills Programme	Prodigy
Chieranic de reditación (gapine execución en eleptrochamica de eleptroca procedente que en en especialmente de De la como de 1988 DA AN ESTACO de Procede de la Companya de la Companya de la Companya de la Companya de la Co	developed	Capper at 14 foliate standard market and
Phase: PRASA MyStation Customer Service		
Skills Programme implementation Engagement		1
Phase Content Phase: Implementation of PRASA MyStation Customer Service Skills Programme Training Sessions. The theoretical session is five days - 149 groups of 20 learners each (we have accommodated for more groups). This will be a 10 day programme conducted over a 3-6 menth period i.e. each learner must complete the programme in a maximum of Smonths. To be completed September annually.	Altendance registers Facilitator reports Dally and waskly emails Learner Evaluation Forms Learner Portfolios of Evidence Facilitator Reports	Prodigy
Assessment of learner POE's by a registered constituent SETA assessor/ subject matter	Assessor results per learner	Prodigy
export. Remediation conducted with Individual Jearners based on the assessor (sedback	Assessor results per learner	Prodigy
Moderation of learner POE's by a registered	Moderator results per learner	Prodigy
constituent moderator Uploading of learner results firstly onto Prodigy LMS and then onto the SETA MIS, orinting of the assessment, moderation and quality assurance documentation, verification breparation and external moderation.	Management Information System	Prodigy
experiential Phase: Each of the MyStation earners to conduct post training workplace pased customer service assignments and ecord these activities into a learner diary. This darry will fulfill the workplace requirement of the skills programme training. This perves in reinforce the training	Workplace reinforcement/ Learner Support Diary and Workplace Post Training Impact Reports. Physical onsite mentorship of learners via site visits. Each fearner will have a visit by a mentor at the	Prodigy
ومراجع والمواد الماس ومناس ومناس والمراجع المارة المارة المارة والمارة والمارة والمراجع والمر	station post the theoretical training.	

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Phase: MyStation litternational Customer	1	}
Service Recognition Trip		
Development of criteria, consolidating the		Prodigy and
performance scores across all regions and for	1	PRASA
all learners, shortlisting learners for PRASA,		ļ -
formulation of reports for rationale for		
choosing learners		443100 mm - 1000 11 mm - 1000 mm - 1
International summary report on best		Prodigy
practicing rail passenger countries as well as	1	
countries with best practicing companies:	1	1
proposed selection of country to visit.	of instruktions server with the U.S. who is for five and the territory of the contribution	
Arrangements with international companies to	<u> </u>	Prodigy With
host PRASA on elte visits, interviews, case		PRASA
studies, presentations. This is not a trip so		assistance
participants will be required to complete case	İ	ļ
studies, write a best practice report on lessons learnt and to be applied to PRASA and will be		{
required to present to PRASA on return.	1	
Terrolled to the Board to Charles at It at the formation of	ر در دورون و به مورون و در در در در در در در در در در در در در	, programment was removed the \$6 (1.5) and approxi-
Phase: Project Closure	A The transportation of the residence of the second state of the s	FA
Final consolidated report: findings, learning	Close out report.	} Prodigy
arens and gaps, SWOT, etc. aggregated by	į	
Jearning programme and region	المراجعة والمعالم المراجعة والمراجعة والمعالمة المراجعة والمراجعة والمراجعة والمراجعة والمراجعة والمراجعة والم	
Project Disburgements	<b>1.</b>	
MyStatkin material: Print learner workbooks,	All material, badges,	Prodigy
workplace coaching logbook, facilitator packs,	bags, booklets	(subcontracted)
assessment packs, evaluation forms,	!	}
attendance registers, metal badges for all	į.	{
completed PRASA learners	] . 	
Portfolio transportation costs - courier costs	POE's delivered and	Prodigy
for POE's to and from training venues and	collected from training	(subcontracted)
then back to learners after verification	Venues	
Disburgements are absorbed in the		
programme, this includes subsistence for	i -	1
facilitators, telephone, internet, 3G, travel,		]
accommodation, over-time, cameras for All facilitators, each facilitator has a proxima and	{	i
	· ·	į
lapton Additional Deliverables included	of Control Microsoft Control C	**************************************
The state of the s	The state of the s	n't-bannan manutar-bananan
Unemployed learners: Prodigy will require ten	The additional days for	Prodigy and
days at minimum (only for learners that do	theory and remediation is	PRASA to
not have sufficient workplace experience) for	contained in this costing	identify learners
the theory and 5 days for facilitated workplace		[
COACHINE	Maralna Taa mid	
Catering	Morning Tea, mid	Prodigy
- college in general section of the control of the college of the	morning tea, Lunch,	
Additional work on material	This is ongoing	Prodigy
Changes to customise for Autopax; case		Prodigy
studies and assignments to be redone	appa i va a offickoj <del>pravajska</del> in a a a a <u>a a gregopopom omana</u> i po 1 filozop e a omane broak je	
Two trips to stations for coaching and	1	Prodigy
remediation	ادار در دارد در دارد در استان می استان و در در این بازد در این بازد در این در در این در در این در دارد در این در در در دارد در این در در در در در در در در در در در در در	
Cost per learner		R24 000,00
Cost for 3000 learners	The state of the s	R72 000 000,00
The spring of the second secon	ا من من من من منطق من من منطق المنطق الم	· 10.00~1.4234.1(********************************

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## 4 LEARNER COST OF THE PRASA MYSTATION PROGRAMME

The per learner cost of the 1st phase of the programme is R24 000.00 (excluding VAT).

An invoicing Schedule for the first 3000 learners is attached in Section 5. A minimum of 100 learners per month must be done to ensure that Prodigy is able to retain the facilitators and support staff for the implementation of this programme; as well as ensuring that the project has the derived impact and momentum.

Invoicing will be on a monthly basis, based on training completed with a minimum of 100 learners per month. The Invoice will be submitted on the first day of the month to the Group Executive: Human Resources. The GE: HR will have 2 working days to verify the invoice. After 2 working days, if no response is received, the invoice is deemed to have been accepted by PRASA, and the invoice is payable within 30 days of acceptance.

### 5 Invoiging schedule -- Phase 1 of 3 prasa mystation programme

Dute L <sup>u</sup> Scptember 2011 (a 30 <sup>6</sup> June 2012	ASSISTED BY SPONDED SEE	R16(388/640.00
July 2012	58	R1,586,880.00
Kugust 2012	120	R3,283,200.00
Suptember 2012	120	R3,283,206,00
October 2012	120	R.J.283,200.00
November 2012	120	R3.283,200.00
Desember 2012	100	R2.736.000.00
January 2013	120	R3.283,200.00
February 2013	120	R3.283,200,00
March 2013	120	R3,283,200.00
April 2013	120	R3.283.200.00
May 2013	120	R3.283.200.00
June 2013	i20	R3,283,290.00
July 2013	[20]	R3,283,200,00

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August 2013	(20)	R3,283,200.00
September 2013	120	R3,283,200.00
October 2013	.120	R3,283,200.00
November 2013	120	R3,281,200.00
Decomber 2013	100	R2,736,000.00
January 2014	120	R3,283,200.00
February 2014	120	R3.283,200.00
March 2014	103	R2,818,080.00
Total Cost	3,000	R82,080,000,00

### 6 COST OF CANCELLATIONS

The partnership agreement states that PRASA will pay the full cost of cancellations. It has been agreed that PRASA will pay for cancellations as follows:

 Should a session be cancelled 5 working days or less, the full cost of 20 learners at R24 000,00 will be charged.

 Should a session have 1 - 5 learners absent, the absent learners will be charged at 25%.

 Should a session have more than 5 learners absent, Prodigy will charge PRASA 50% of the full cost for the learners absent.

 Should a learner miss the scheduled coaching session (and the extra session as per Prodigy value-add), Prodigy will charge PRASA 15% of the cost per learner.

A separate reconciliation of cancellations will be done and invoiced monthly. PRASA will have two days to verify cancellations. If Prodigy does not obtain feedback from PRASA, it will be deemed that the invoice has been accepted.

### 7 SIGNATORIES

On behalf of the Provider

Higheture Designation - duly authorised licreto

THUS DONE AND SIGNED AT YOUR AON THIS THE 311 DAY OF

2012, IN THE PRESENCE OF THE UNDERSIGNED WITNESSES:

Page 7 of 8

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1. Signature	Designation
2. Signature	Designation
On hehalf of PRASA	
Signature	GROUP CEO Designation - duly authorised hereto
THUS DONE AND SIGNED AT HATFIGE OCTORGA 2012, IN THE PRESENCE AS WITNESSES	
1. Signature	Designation
2, Signature	Designation

AS WITNESSES

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SS3-PLEAD-071



# Service Level Agreement

ANNEXURE TO PARTNERSHIP AGREEMENT

#### ENTERED INTO BY AND BETWEEN

PRASA LEARNING AND DEVELOPMENT DEPARTMENT (hereinafter referred to as "PRASA" and herein represented by NTLOMO KOKA; General Manager, PRASA Learning & Development being duly authorized hereto)

#### AND

PRODIGY BUSINESS SERVICES (Pty) Ltd. Registration No. 2006/018844/07

(hereinafter referred to as "The Provider" and herein represented by NERISHNI SHUNMUGAM being duly authorized hereto)

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Page 1 of 7

#### 1. Introduction

This service level agreement annexure is entered into between PRASA and Prodigy Business Services (PTY) LTD to ensure that a quality management system is in place for the period specified in the addendum as approved by the Group CEO in 2015, which conforms to Scope of Work requirements contained in the partnership agreement.

The management of both parties is totally committed to providing a quality service and ensuring that the skills interventions are successfully implemented within PRASA.

The service level agreement is binding on both parties and is mutually accepted by the respective organisations.

#### 2. Service Statement

This agreement is to outline the provision of the MyStation Learning and Development Intervention for employees within PRASA (ALL DIVISIONS AND SUBSIDIARIES) providing Support for both the organisation, its employees and unemployed youth.

- To understand the impact of customer service and service excellence on:
  - o The Organisation and Individuals -- "the employee"
- Employees' roles and responsibilities in ensuring service excellence
- . To entrench the new behaviour in effective customer service delivery
- To articulate the connections between new behaviours and business success
- To ensure that a change infrastructure exists to support all modernisation projects
- Ensure that all employees that have attended the programme, complete all aspects of the programme and meet the qualification requirements that have been agreed to between the parties (as in the past)
- Align the programme, where necessary, to meet the needs of PRASA division/subsidiary

This agreement aims to propagate sound working relationships between the respective parties as well as minimising the impact of delays and or misunderstandings.

The responsibility of Human Capital Management Department and Prodigy is to ensure the successful implementation of, adherence to, and dissemination of the provisions of this agreement.

The service provider will be tasked to assist the organization with crafting the most effective training strategies through the MyStation to ensure that it drives PRASA's key strategic objectives of service excellence, ensuring that employees understand their individual contribution to the success of the organisation. Prodigy's offering will be in line with the partnership agreement to include station and corridor management development, frontline staff development which includes outstomer service, protection service, operations and technical staff and any other PRASA staff that may require Prodigy's offering.

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# 3. SERVICE DISCRIPTION

				(Naph vol.)	9	******	- بيپ ماهيا، اساماد مصر		د د د د د د د د د د د د د د د د د د د		41 		er inerer		3.1.1	<b>513</b>			.,		suite I	Pettoria
TETA	modules to accrediation, to enable PRASA to claim from	<ul> <li>Alian the training program and</li> </ul>	organisational values	understanding of the	to PRASA Values, ensuring	<ul> <li>Align the MyStation programme</li> </ul>		Practices	PRASA Standard Operating	on best practice, incorporating	<ul> <li>Develop training material based</li> </ul>	sans(diames)	(divisions, departments and	alignment for HKASA	<ul> <li>Conduct training needs</li> </ul>	Develop training Material for FRASA Jany division, department or substituty requiring a		(Service Provider)	PRODICY Responsibility		大学 大学 大学 大学 大学 大学 大学 大学 大学 大学 大学 大学 大学 大	Service Description (Deliverable)
us (Revenue et R	greene (r	garang palagan	, <u>(</u>	-	TOM LEJA		Manage submissions		Submit training plan to			policies, procedures'	material DRASA	Electrication with	Provide all required	SA Jany division, depart	The state of the s	Responsibility  [Company/Client]	PRASA			Jeliverable)
age control agendor	<u>, 1</u> 4	<u> </u>	n i ar arr— ni fin	Values	to PRASA	MyStation	, 64,0-48	Waterial	Approved		<u> </u>	accepted/signed	UNANA and	presented to	Final training	TEMPER OF SUDSICIAL		and the second		offcomes	Measures	Performance
<u> </u>	Lun-Cl. U Farevi	energing to the S													End May 2015	y requiring the sen						Timelines
ەك ھە دو. سو يۇشۇپ		man, my magher	(11-1-14)	llance.			· · · · ·	, pes	eranická ař		11.1-0		7.08.00	Sealoud Co	Monthly meetings	ne service) using me my station concept			,			Monitoring Cycle
raining.	to implement the respective	the model used	The approved MyStation	end users.	various PRASA	training	customising	developing and	be used as the	operations will	subsidiaries	divisions/	departments/	PRASA	ine mystation	radon concept				(sometime and a	(Baseline	Norms

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Service level agreement between FRASA and Prodigy

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		ngaval/4		The thetthe	supplied	gye daler
schedules	VI III	meetings	attendance registers	are released on time for training	Employees and unemployed youth nationally based on numbers	() () ()
Operational	}	As per weekly	Tanona a	The that learners	Provide training to DDASA	Δ Ω 
	ng, rouid	<b>19</b>	similarly.			
	ر المارية المارية المارية المارية المارية المارية المارية المارية المارية المارية المارية المارية ا	anti y ar	be done			•,- •
			schedules will			- 11 -
	<i>*</i>		2015, Other	<u>ڪر ۽ .</u>		ver-4-
	L lan		December		•	-41-24-
	- 10 مــ مــ		May 2015 to	- T. T. J.		elm in V
		•	employees for	#*************************************		10 han
	Meetings	•	identified MLPS			
	Committee		first cohort of	, and a second		
	Steering		See schedule of	be a minimum of 3000		-, -, <del>-</del>
_	<ul> <li>Monthly</li> </ul>		operations	interventions and will		-r <del></del> -
	corporate	contract	PRASA	leamers is learning		
	manager at	dum to the	done with	total number of	developed by PRASA.	- • <i>-,-</i>
	with the project	contract/adden	Schedules to be	of cancellations. The	PRASA training schedule s	
	meetings held	of the		Annexure A (clause 6)	Allocate resources and keep to the	,, <b>,,</b>
Laser	<ul> <li>Bi weekly</li> </ul>	for the duration	place.	Inform Prodigy as per		
per WSP/ATR	schedule	then annually	systems in	parties	MyStation program	•
schedules as	of the training	2015, to and	Communication	training schedule to all 1	framework and plan for the	••••
Training	<ul> <li>Effective use ;</li> </ul>	r May-June	Effective	Communicate the	Develop an implementation	3.2.1
		evelopment	mentializing and	the of all planned My Sta	Develop and consolidate a schedule of all planned My Station training and development	is is
				(Company/Client):		
	و منافع المنافع  سازوسيسك	and the second	Responsibility	(Service Provider)		
			Charleson, 1			ic ne
Requirements)	i evi en militar	د الله الله الله الله الله الله الله الل	Measurable		· · · · · · · · · · · · · · · · · · ·	<del>renese</del> u rel <mark>l</mark> igge,
Norms	Monitoring Cycle	imelines	remornance	enveracie)	A CONTRACT TO THE PARTY OF THE	

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Service level agreement between PRASA and Prodigy

Annually Monthly Steercom
www.highted.indexmon
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May 2015 – Last date as specified in the addendum.
May 2015
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Service level agreement between PRASA and Prodigy

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(q	Facilitate/Co-manage to the	graduation decemony	Provide PRASA with a plan for the	employees details etc.	stating program, qualification and	certificates/Statements of results	provided with	PRODICY Responsibility (Service Provider)		Service Description (Deliverable)
Prasa to identify graduation committee Prasa to identify and confirm budget for the ceremony	project	department to be available for the	communication,  Marketing and Comms	Provide platform for		ceremony	the certification	Responsibility (Company/Client)		eliverable)
ar ye i i rege afgir ya fiftha a madal fadharan e i i baba a mar i i baba a mar i i baba a mar i i baba a mar i A mar i a	2544	-3x*  \cdot -5-	ernde kkrmi	42 24.3-		certification	Ceremony and	Jugge American State	outcomes)	Performance Measures
										Timelines
korron, ma Que d'Angles ja jard man yal fish jallandadd		ga ga 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 192 - 19	erze przemer	meetings quarterly	Committee	Graduation			arjii ne	Monitoring Cycle
		د داده و داده داده داده داده داده داده د		and programs	ceremonies	graduations	MyStation	mayer, manager transfer	Requirements)	Norms (Baseline

T.S



Service level agreement between PRASA and Prodigy

#### 4, PROJECT COSTS

The Provider agrees to keep the cost per learning intervention and not increase the cost per learner. A learning intervention will be five days of training followed by assistance to complete the POE requirements.

#### 5. NON-COMPLIANCE WITH SERVICE LEVEL AGREEMENT

Where the deliverables are not met these must be handled via the steering committee meetings and as per contract. The Provider must be notified timeously of poor performance/non-delivery so that it may be immediately remedied, will be given adequate time not more than 30 days to remedy the situation.

#### 6. REVIEW

Review will take place at twelve monthly intervals. All parties must sign the Service Level Agreement Review Sheet in order for this agreement to remain valid. The practice of tolerating situations where processes are allowed to continue while this agreement has lapsed is discouraged, however, as a rule, no process shall cease as a result of this SLA being invalid. Rather, this SLA shall be revised as soon as possible.

#### 7, CONTINGENCIES

Where a situation arises and there is a lack of resources to comply with this SLA, the training will be conducted for unemployed as per the contract, the numbers will be managed as per contract.

#### 8. CONSTRAINTS

It is agreed that where services are reliant on other parties in Shared Service Centre, with regard to service deliverables, no corrective action will be raised.

Signed at HATFICLD on	10th HAY 2015
1	Diginla
Ngrishini Shupmugam	Witness
Prodigy Business Services (PTY) LTD	Prodigy Date: <u>JO / 05 / 2015</u>
Date: 10 05 2015	Date: 10 / 05 / 2015

Ntlomo Koka
General Manager
Learning & Development
Human Capital Management
PRASA
Date: 29 May, 2015

Date: 99 May 2015

PRASA

TIS HILL

#### Athisten Cooper

From:

Nerishnì Shunmugam <nerishni@mweb.co.za> on behalf of Nerishni Shunmugam

<nerishni@skillsmatters.com>

Sent:

Thursday, 29 September 2016 6:15 PM

To:

Athisten Cooper; Claudio Bollo

Subject:

FW: MLPS "Extensive Training Material "Review Session

Attachments:

image001.png

From: "Mthura Swartz [CT]" < MSwartz@metrorail.co.za>

Date: Thursday, 23 April 2015 at 12:43 PM

To: Nelson Mphailane {GAUTENG} < nmphailane@prasa.com >, Nerlshnl Shunmugam < nerishni@skillsmatters.com >

Cc: Christian Nyaba < cnyaba@prasa.com>, Puseietso Dhlomo < pdhlomo@prasa.com>, Selina Kgobe

<sigobe@prasa.com>, Tibonile Hiope {GAUTENG} <THlope@prasa.com>, Dineo Mothiba <dmothiba@prasa.com>,

Nonhlanhia Kondowe < Nranape@prasa.com >, Ramagoganye Ngakane (PRASA CORP) < RNgakane@prasa.com >,

Ernest Phakathi < EPhakathi@prasa.com>

Subject: RE: MLPS " Extensive Training Material " Review Session

Dear Nelson and Nerishni.

I am glad to see that there is movement towards the finalisation of the new training material for MLPS. I would like to remind you that this is a very important process towards the creation of the new MLPS. To ensure that all our staff is ready for the modernisation program as stipulated in the Turnaround Strategy of MLPS. So this training is , for me, key in the creation of that awareness and change of attitude in our employees.

Given the above I am happy to see that both parties are giving the new material the urgency it deserves. All outstanding issues must be resolved ASAP so they don't undermine the key objectives of the program.

Sincerely,

Mthuthuzeli Swartz Executive Manager MLPS Tel 011 0857228 Tel 021 4492126 082 457 1573

Be moved



From: Nelson Mphailane (GAUTENG)

Sent: 23 April 2015 10:21 AM

To: nerishni@skillsmatters.com Cc: Christian Nyaba; Puseletso Dhlomo; Selina Kgobe; Tibonile Hlope (GAUTENG); Dineo Mothiba; Nonhlan

Kondowe; Mthura Swartz [CT]; Ramagoganye Ngakane (PRASA CORP); Ernest Z. Phakathi

Subject: FW: MLPS " Extensive Training Material " Rreview Session

#### Hi Nerishnee

Based on our last session with your team,

we requested certain information to be included in the material that was being developed by your team for the "Extensive Train Programme". We submitted quite number of documents that were requested by your team as per the attached list. It will be important for us to verify progress in this regard so that we can ensure the material is well packaged and signed-off to start the training.

As for Train Drivers we still have to discuss the malter because there are already stan-

As for Train Drivers we still have to discuss the malter because there are already standards governing their operating environment.

I hope the information clarifies the objective of the session.

#### Kind Regards

From: Nerishni Shunmugam [mailto:nerishni@skillsmatters.com]

Sent: 22 April 2015 04:07 PM

To: Nelson Mphailane (GAUTENG)

Co: Christian Nyaba; Ernest Z. Phakathi; Puseletso Dhlomo; Selina Kgobe; Tibonile Hlope (GAUTENG); Dineo

Mothiba; Nonhlanhia Kondowe; Mthura Swartz [CT]; Ramagoganye Ngakane {PRASA CORP}

Subject: Re: MLPS "Extensive Training Material "Rreview Session

#### Hi Nelson

Please could you let me know what the objectives of this session is? Is it to review the final material for mlps rail passenger services and the train driver qualification

Regards, Nerishni

)

On Apr 22, 2015, at 14:04, Nelson Mphailane (GAUTENG) < nmphailane@prasa.com > wrote:

This message and associated files are intended only for the use of the individual of entity to which it is addressed.

It may contain information that is confidential, subject to copyright or constitutes a trade secret. If you are not

the intended recipient, any dissemination, copying or distribution thereof is strictly prohibited. If you have received

this message in error, please notify us immediately by replaying to the message and deleting it from your computer.

#### <mime-attachment.ics>

This message and associated files are intended only for the use of the individual of entity to which it is addressed

It may contain information that is confidential, subject to copyright or constitutes a trade secret. If you are

the intended recipient, any dissemination, copying or distribution thereof is strictly prohibited. If you have received

this message in error, please notify us immediately by replaying to the message and deleting it from you computer.



# TAX INVOICE PRASA0911-037 Vat Registration Number: 4890179395

PRASA Private Bag X101 Braamfontein 2017

VAT No: 4900110612

c/o Mr. Mthuthuzeli Swartz

Mrs. Nonhlanhla Kondowe

20 July 2015

Dear Mr. Swartz.

#### Re: M Station Programm e- M PS Articulation Program m e

Activity	Units	Unit Price	Amount
Employees trained for MLPS for 13-	63	R24,000.00	R 1,512,000.00
17. July 2015 - Group A / Week 1/			
Module 1	 		Lama e servicioni, a constanti de la constanti
Sub-Total			R 1,512,000.00
VAT			H 211,680.00
Total Amount Due (incl. VAT)		-	R 1,723,680.00

Please process electronically,

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

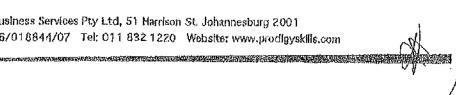
Account number:

050 798 774

Regards

Varish Ganpath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Websiter www.prodigyskille.com







# TAX INVOICE PRASA0911-038 Vat Registration Number: 4890179395

PRASA Private Bag X101 Braamfontein 2017

VAT No: 4900110612

c/o Mr. Mthuthuzeli Swartz

cc: Mrs. Nonhlanhla Kondowe

27 July 2015

Dear Mr. Swartz,

Re: M Ktation Programm e- M IPS Articulation Program m e

Activity	Units	Unit Price		Amount
Employees trained for MLPS for 20	75	F124,000.00	Ħ	1,800,000.00
- 24 July 2015 - Group B / Week 2/		·		
Module 1		The state of the s	<u> </u>	- 4 1-1-1-1
Sub-Total		1	R	1,800,000.00
VAT			A	252,000.00
Total Amount Due (Incl. VAT)	,		R	2,052,000.00

Please process electronically,

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Ganpath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyskills.com





"NS73"

# TAX INVOICE PRASA0911-039 Vat Registration Number: 4890179395

PRASA Private Bag X101 Braamfontein 2017

VAT No: 4900110612

c/o Mr. Mthuthuzeli Swartz

cc: Mrs. Nonblanhla Kondowe

31 July 2015

Dear Mr. Swartz,

#### Re: M Station Programme - Unemployed Youth Skills Programme - Responsible Citizenship for Public Transportation

Activity	Units	Unit Price	Amount
Unemployed learners trained for 13-	52	F124,000.00	R 1,248,000.00
15 July 2015.	, And the second part of the contract of the c		
Sub-Total			R 1,248,000.00
VAT	-		R 174,720,00
Total Amount Due (incl. VAT)	*	Guldengendo, alvala de descrip	R 1,422,720.00

Please process electronically.

The account details are as follows:

Name of account holder:

**Prodigy Business Services** 

Bank:

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Gaupath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg, Number; 2006/018844/07 Tel: 011 832 1220 Website; www.prodigyskills.com











# **TAX INVOICE PRASA0911-040** Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development Performance Management & Development Stream (PMDS) PRASA HCM Corporate 1040 Burnett Street, Prasa House, Hatfield.

12 August 2015

Dear Mr. Moshao,

# Re: M Station Programm e- M IPS Articulation Program m e

Activity	Units	Unit Price	Amount
Employees trained for MLPS for 03 07 August 2015 Group C / Week 3/ Module 1	62	R24,000.00	R 1,488,000.00
Sub-Total			R 1,488,000.00
VAT			R 208,320.00
Total Amount Due (incl. VAT)			R 1,696,320.00

Please process electronically.

The account details are as follows:

Name of account holder:

**Prodigy Business Services** 

Bank:

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Ganpath Cell: 082 560 6975



"NS 7.5"

# TAX INVOICE PRASA0911-041 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development
Performance Management & Development Stream (PMDS)
PRASA HCM Corporate
1040 Burnett Street,
Prasa House,
Hatfield.

20 August 2015

Dear Mr. Moshao,

# Re: M Station Programm e- M IPS Articulation Program m e

Activity	Units	Unit Price	Amount
Employees trained for MLPS for 11- 14 August 2015 – Group A / Week 4/ Module 2 and 3	72	R24,000.00	R 1,728,000.00
Sub-Total *			R 1,728,000.00
VAT			R 241,920.00
Total Amount Due (incl. VAT)			R 1,969,920.00

Please process electronically.

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Gaupath Cell: 082 560 6975

Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001

Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyskills.com





MS 7.6°

# TAX INVOICE PRASA0911-042 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development
Performance Management & Development Stream (PMDS)
PRASA HCM Corporate
1040 Burnett Street,
Prasa House,
Hatfield.

24 August 2015

}

Dear Mr. Moshao,

# Re: M Station Programm e-M IPS Articulation Program m e

Activity	Units	Unit Price		Amount
Employees trained for MLPS for 17-	66	R24,000.00	R	1,584,000.00
21 August 2015 - Group B / Week			-	
5/ Module 2 and 3		. arp		والمراج والمستان والمستعل والمستهدين المراد والمدرا والمستعدد
Sub-Total			R	1,584,000.00
VAT			B	221,760.00
Total Amount Due (incl. VAT)		-	R	1,805,760.00

Please process electronically.

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Gaupath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyskills.com





MST.

# TAX INVOICE PRASA0911-043 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development
Performance Management & Development Stream (PMDS)
PRASA HCM Corporate
1040 Burnett Street,
Prasa House,
Hatfield.

8 September 2015

Dear Mr. Moshao,

# Re: M Station Programm e-M IPS Articulation Program m e

Activity	Units	Unit Price	Amount
Employees trained for MLPS for 31	70	R24,000.00	R 1,680,000.00
Aug to 4 Sep 2015 – Group C /			
Week 6/ Module 2,3 and 4	1-25-7-04 N' 1-17-18-1		
Sub-Total			FI 1,680,000.00
VAT	41		R 235,200.00
Total Amount Due (Incl. VAT)	hadid daireanne	diameter language	R 1,915,200.00

Please process electronically.

The account details are as follows:

Name of account holder:

**Prodigy Business Services** 

Bank:

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Ganpath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Hardson St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyskills.com





# TAX INVOICE PRASA0911-044 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development Performance Management & Development Stream (PMDS) PRASA HCM Corporate 1040 Burnett Street, Prasa House, Hatfield.

16 September 2015

Dear Mr. Moshao,

#### Re: M Ktation Programm e- M IPS Articulation Program m e

Activity	Units	Unit Price	Amount
Employees trained for MLPS for 7-	58	R24,000.00	R 1,392,000.00
11 Sep 2015 - Group A / Week 7/			
Module 4			Market and the
Sub-Total	Anthrita i Anton are on pleinteil		FI 1,392,000.00
VAT			R 194,880.00
Total Amount Due (incl. VAT)		halanas ministra santus es es es	Pi 1,586,880.00

Please process electronically.

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

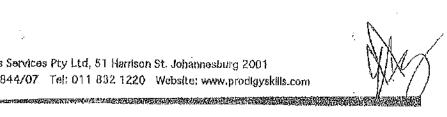
Account number:

050 798 774

Regards

Varish Gaupath Cell: 082 560 6975

Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website; www.prodigyskills.com







# TAX INVOICE PRASA0911-045 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development Performance Management & Development Stream (PMDS) PRASA HCM Corporate 1040 Burnett Street, Prasa House, Hatfield.

21 September 2015

Dear Mr. Moshao,

Re: M Ktation Programm e-M IPS Articulation Program m e

		(a * · · · · · · · · · · · · · · · · · ·		اد مین <del>د. انده می در در این بیم می در در بی بید در این بیم می در در بیر بید در در بید در در بید در در بیر بید در</del>
Activity	Units	Unit Price		Amount
Employees trained for MLPS for 14-	72	R24,000.00	R	1,728,000.00
18 Sep 2015 - Group B / Week 8/				
Module 4			مود الله الله الله	nad <del>district spilling and pyra faquality and the spilling and the spillin</del>
Sub-Total			R	1,728,000.00
VAT			R	241,920.00
Total Amount Due (incl. VAT)		4	R	1,969,920.00

Please process electronically.

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

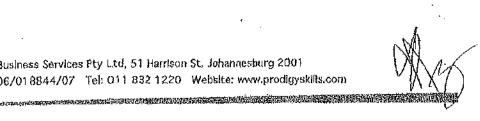
Account number:

050 798 774

Regards

Vanish Ganpath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St, Johannesburg 2001 Reg. Number: 2006/01 8844/07 Tel: 011 832 1220 Website: www.prodigyskills.com







# TAX INVOICE PRASA0911-046 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development
Performance Management & Development Stream (PMDS)
PRASA HCM Corporate
1040 Burnett Street,
Prasa House,
Hatfield.

05 October 2015

Dear Mr. Moshao,

#### Re: MYStation Programme - MLPS Articulation Programme

Activity	Units	Unit Price	is the grant of the second	Amount
Employees frained for MLPS for 28	46	R24,000.00	P	1,104,000.00
Sep to 2 Oct 2015 - Group C /		ľ		
Week 9/ Module 4		na dave a r mestelan air		A No. 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 - 1994 -
Sub-Total			R	1,104,000.00
VAT	واللام المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة المنطقة		B	154,560.00
Total Amount Due (Incl. VAT)	4-14-1-1		A	1,258,560.00

Please process electronically.

The account details are as follows:

Name of account holder:

**Prodigy Business Services** 

Banks

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Gaupath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg, Number; 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyskills.com







# TAX INVOICE PRASA0911-047 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development Performance Management & Development Stream (PMDS) PRASA HCM Corporate 1040 Burnett Street, Prasa House, Hatfield.

12 October 2015

Dear Mr. Moshao,

#### Re: MYStation Programme - MLPS Articulation Programme

Activity	Units	Unit Price	Amount
Employees trained for MLPS for 5	64	R24,000.00	R 1,536,000.00
to 9 Oot 2015 - Group A / Week 10/			
Module 4		***	Baranta Street
Sub-Total	-		R 1,536,000.00
VAT			R 215,040.00
Total Amount Due (Incl. VAT)	Marrie Combination of Process		R 1,751,040.00

Please process electronically.

The account details are as follows:

Name of account holder:

**Prodigy Business Services** 

Banke

Standard Bank

Branch code:

051001

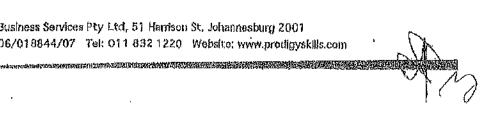
Account number:

050 798 774

Regards

Varish Gaupath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.protligyskills.com



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MS 1.12°

# TAX INVOICE PRASA0911-048 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development
Performance Management & Development Stream (PMDS)
PRASA HCM Corporate
1040 Burnett Street,
Prasa House,
Hatfield,

19 October 2015

Dear Mr. Moshao,

#### Re: MYStation Programme - MLPS Articulation Programme

Activity	Units	Unit Price	<del></del>	Amount
Employees trained for MLPS for 12	68	R24,000.00	R	1,632,000.00
to 16 Oct 2015 - Group B / Week	,			
11/ Module 4	Marie de la companya de la companya de la companya de la companya de la companya de la companya de la companya	ا چې د د د د د د د د د د د د د د د د د د د	مهدك إدراجها الأومود	
Sub-Total		to the description of the state	Ŕ	1,632,000.00
VAT		John Marie Charles and Commencer	R	228,480.00
Total Amount Due (Incl. VAT)	والإيوام والداعة أوادي		FI	1,860,480.00

Please process electronically.

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Varish Ganpath Celì: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyskills.com







# TAX INVOICE PRASA0911-049 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development
Performance Management & Development Stream (PMDS)
PRASA HCM Corporate
1040 Burnett Street,
Prasa House,
Hatfield,

26 October 2015

Dear Mr. Moshao,

# Re: MYStation Programme - MLPS Articulation Programme

Activity	Units	Unit Price		Amount
Employees trained for MLPS for 19	68	R24,000.00	R	1,632,000,00
to 23 Oct 2015 - Group C / Week				, ,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,
12/ Module 4 part B/ Module 5 - Bfn				ı
Sub-Total		**************************************	R	1,632,000.00
VAT			R	228,480.00
Total Amount Due (Incl. VAT)	المراجعة والمراجعة المراجعة	4	Ħ.	1,860,480.00

Please process electronically.

The account details are as follows:

Name of account holder:

Prodigy Business Services

Bank:

Standard Bank

Branch code:

051001

Account number:

050 7.98 774

Regards

Varish Ganpath
Cell: 082 560 6975

Prodigy Business Services Pty Ltd, 51 Harrison St. Johanneshurg 2001

Reg. Number; 2006/018844/07 Tel: 011 892 1220 Website; www.prodigyskills.com





"NS 7.14"

# TAX INVOICE PRASA0911-050 Vat Registration Number: 4890179395

Mr. Tshidiso Moshao C/o Mr. Mthura Swartz

Learning & Development
Performance Management & Development Stream (PMDS)
PRASA HCM Corporate
1040 Burnett Street,
Prasa House,
Hatfield.

09 November 2015

Dear Mr. Moshao,

## Re: MYStation Programme - MLPS Articulation Programme

Activity	Units	Unit Price	Amount
Employees trained for MLPS for 2	64	R24,000.00	H 1,536,000.00
to 6 Nov 2015 - Group A / Week			:
13/ Module 5		- ray-minus Agheriana	-16-60-19-19-19-19-19-19-19-19-19-19-19-19-19-
Sub-Total	·		Ft 1,536,000.00
VAT	da karangan karangan karangan karangan karangan karangan karangan karangan karangan karangan karangan karangan		R 215,040.00
Total Amount Due (Incl. VAT)	why where we have been a beautiful to		H 1,751,040.00

Please process electronically.

The account details are as follows:

Name of account holder:

**Prodigy Business Services** 

Bank

Standard Bank

Branch code:

051001

Account number:

050 798 774

Regards

Variah Gaupath Cell: 082 560 6975

> Prodigy Business Services Pty Ltd, 51 Hardson St. Johannesburg 2001 Reg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyakilis.com



# MS8°

#### Athisten Cooper

From:

Nerishni Shunmugam <nerishni@skillsmatters.com> on behalf of Nerishni

Shunmugam <nerishni@mweb.co.za>

Sent:

Wednesday, 24 August 2016 12:50 PM

To:

Athlsten Cooper; Claudio Bollo

Subject:

FW: Customer Service Training

From: Nonhlanhla Kondowe < Nranape@prasa.com>

Date: Monday, 11 July 2016 at 2:59 PM

To: Nerlshni Shunmugam <nerishni@skillsmatters.com>, "Mthura Swartz [CT]" <MSwartz@metrorail.co.za>,

Tshidiso Moshao < Tshidiso. Moshao @prasa.com>

Cc: Ntlomo Koka < NKoka@prasa.com>, Bhekani Khumalo < bnkhumalo@apx.co.za>, Allan Gangiah

<AGangiah@prasa.com>

Subject: RE: Customer Service Training

Good Day Nerishni

I was under the impression that you have been paid for the training done last year, I will find out from Mr Gangiah and he will contact you as the Head of Learning and development. He is the person responsible for all training and development matters.

Kind Regards

N. Kondowe

From: Nerishni Shunmugam [mailto:nerlshni@skillsmatters.com]

Sent: 11 July 2016 08:05 AM

To: Mthura Swartz [CT]; Tshidiso Moshao; Nonhlanhia Kondowe

Co: Nonhlanhia Kondowe; Ntiomo Koka Subject: Re: Customer Service Training

Dear Stakeholders

Hope you are well.

Please note that Prodigy has not received any payment for services rendered since March 2015.

I am writing to you because at the time, you were the management team we were reporting to.

Please may you kindly find out what the status of all the outstanding payments are.

Regards

Nerishni

From: "Mthura Swartz [CT]" < MSwartz@metrorali.co.za>

Date: Tuesday, 22 September 2015 at 9:12 AM

To: Tshidiso Moshao <a href="mailto:Tshidiso.Moshao@prasa.com">Tshidiso.Moshao@prasa.com</a>>, Dalsy Daniel <a href="mailto:ddaniel@prasa.com">ddaniel@prasa.com</a>>

Cc: Fezeke Makana < FMakana@prasa.com >, Nonhianhia Kondowe < Nranape@prasa.com >, Ntiomo Koka







#### STATEMENT PRASA Vat Registration Number: 4890179395

PRASA Private Bag X101 Braamfontein 2017

VAT No: 4900110612

c/o Mr. Mthuthuzeli Swartz

cc: Mrs. Nonhlanhla Kondowe

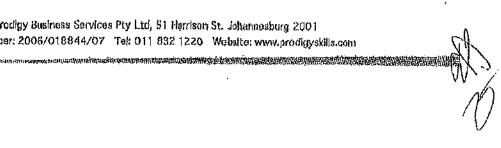
29 January 2016

Dear Mr. Swartz,

Re: MYStation Programme - MLPS Articulation Programme

				ing a sama da s
PRASAUS11-037 PRASAUS11-038		R2 052 000 00		
PRASA0911.039		181.422,720.00	in the state of th	
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Prodigy Business Services Pty Ltd, \$1 Herrison St. Johannesburg 2001 lieg. Number: 2006/018844/07 Tel: 011 832 1220 Website: www.prodigyskills.com







Mr Nathl Khena Acting Group Chief Executive Officer C/O Mr Bhekani Khumalo Acting Group Human Capital Management Executive PRASA 28 October 2015

Dear Mr Bhekani

### Re: Overdue payment and invoices for services rendered: MyStation Programme

As per the PRASA-Prodigy signed contract and Service Legal Agreement (dated August 2011 and May 2015), as well as the various communique from PRASA requesting Prodigy to implement the necessary training, Prodigy has rendered the necessary services. The PRASA end users and PRASA GHCM have signed off the proof of service rendered.

According to the signed contract, PRASA has five working days from date of receipt of invoice to confirm and verify delivery. Prodigy has been informed by PRASA that this process has been completed with all outstanding invoices and invoices have been approved for payment. Hence we are perplexed as to why payment has not been done. All invoices from May 2015 to date have not been paid. Payment is now over 30 days in arrears. As your office is aware National Treasury Regulation 8.2.3 stipulates that all amounts owing are to be paid within 30 days from the date of invoice.

As you are aware we have and are currently incurring several costs rendering the necessary services. Prodigy is an emerging enterprise and as such cash flow is critical to the efficacy of our services and to our survival. You will further note that the VAT system in South Africa is that VAT is payable on invoice, which further negatively impacts on Prodigy's financial and cash flow viability.

To date Prodigy has not received any feedback that would indicate that there have been any issues with the services rendered. Hence we kindly request your office to please communicate formally with Prodigy as to when payment will be forthcoming.

We wish to maintain a robust relationship with PRASA and await a favorable response from PRASA.

Yours sincerely

SIGNED NEWSHINI SHUNDAUGAN

0824577710

Prodigy Business Services Pty Ltd, 51 Harrison St. Johannesburg 2001

Tel: 011 832 1220, Fax: 086 613 1309, Email: Info@skillsmatters.com, Wabsite: www.prodigyskills.com

Director: N Shunmugam Reg. Number: 2006/018844/07

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 78035/2016

In the matter between:

PRODIGY BUSINESS SERVICES (PTY) LTD (REG NO: 2006/018844/07)

**APPLICANT** 

AND

PASSENGER RAIL AGENCY OF SOUTH AFICA

RESPONDENT

FILING NOTICE

DOCUMENT TO FILE

RESPONDENT'S ANSWERING AFFIDAVIT

DATED AT PRETORIA ON THIS THE 08th DAY OF DECEMBER 2016

NGENO AND MTETO INCORPORATED

ATTORNEYS FOR RESPONDENT
UNIT C C-50 BROOKLYN OFFICE PARK

488 FERHSEN STREET

ROOKLYN

RETORIA

P O BOX 4875

TEL: (012) 323 0154

FAX: (012) 323 0192

**REF: MR NGENO/PRA037/LIT** 

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA

AND TO: BICCARI BOLLO MARIANO INC

ATTORNEYS FOR THE APPLICANT

No.1 PARKLANDS, 229 BRONKHORST STREET

MUCKLENEUK

**PRETORIA** 

TEL: (011) 628 9300

FAX: (011) 622 3622

cbollo@bbmlaw.co.za / dreddy@bbmlaw.co.za /

acooper@bbmlaw.co.za

Ref: C BOLLO / D REDDY / A COPPER / RP2018

Received on 8 December 2016

A. Cooper BBM attaineys

Pages 1-22 only

Attained

10:25

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 78035/16

I, the undersigned,	
RESPONDENT'S ANSWERING AFFIDAVIT	
	Respondent
and  PASSENGER RAIL AGENCY OF	
PRODIGY BUSINESS SERVICES (PTY) LTD (Registration No 2006/018844/07)	Applicant
in the matter between:	

MFANIMPELA MOSES DINGISWAYO

do hereby make oath and state that:



MR.

- 1. I am an adult male employed as the General Manager: Group Legal Services by the Passenger Rail Agency of South Africa ("PRASA").
- The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct.

#### PURPOSE OF THIS AFFIDAVIT

- 3. I depose to this affidavit in order to oppose the application launched by the applicant. The applicant seeks an order sounding in money in the sum of R24 624 000 (twenty-four million six hundred and twenty-four thousand rand). It is significant to point out that the applicant seeks the relief in motion proceedings under circumstances when it knew or ought to have known that there would be a material dispute of fact between the parties. I will return to this aspect later.
- 4. In this affidavit, I will deal with the following:
  - 4.1 the applicant's unsolicited tender;
  - 4.2 the variation of the agreement and the applicable threshold;
  - 4.3 no formal agreement between the applicant and PRASA Tech;



MR

4.4 overpayment of services by PRASA.

### THE APPLICANT'S UNSOLICITED TENDER

As is apparent from the applicant's founding papers, it has instituted proceedings based on an addendum to a "partnership agreement". The partnership agreement is attached as annexure "MS2" to the founding papers. Clause 2 of the partnership agreement deals with the purpose thereof and provides as follows:

# "2. PURPOSE OF THE CONTRACT

A Partnership agreement between PRASA and PRODICY BUSINESS SERVICES (PTY) LIMITED whereby Prodigy avails 'Grant' Bursary Funding valued at R10.800.360.00 for 300 Learnerships to PRASA, which Prodigy has secured from the Services Sector Education and Training authority (SSETA), and PRASA appoints Prodigy to pilot the Centre of Excellence Model and Learnership Implementation at PRASA."

- 6. Subsequent to the entering of the partnership agreement, addenda were concluded between the parties. They are:
  - 6.1 the addendum dated 30 August 2011 attached as annexure "NS3" to the founding papers ("the first addendum");
  - a service level agreement dated 10 May 2015 ("the service level agreement").

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- 7. It appears that the current cause of action is premised on the service level agreement. The service level agreement is entered into between PRASA "Learning and Development Department" represented by the General Manager, PRASA Learning and Development, one Ntlomo Koka.
- 8. At the outset I point out that PRASA is a national government business enterprise as defined in the Public Finance Management Act of 1999 and is established in terms of section 22 of the Legal Succession to the South African Transport Services Act of 1989. As such, it is a legal entity with its own juristic personality. The PRASA Learning and Development Department is a department within PRASA. It does not have its own legal personality. Therefore, a contract cannot be concluded with a Department of PRASA. Accordingly, the agreement as it stands falls foul of the procurement legislation and policies, which renders the agreement null and void. Any claim based thereon is, with respect, unenforceable. Legal argument will be addressed hereon at the hearing of this application.
- The partnership agreement and the addenda referred to herein above are what is commonly referred to as an unsolicited tender.
- 10. Paragraph 1.3.3 Supply Chain Management Policy 2009, provides that "Unsolicited tenders are generally prohibited unless approved for consideration by the GCEO".



- 11. In approving their consideration, the GCEO shall take the following into account:
  - 11.1 that the unsolicited tender is a unique concept offering;
  - that the offering of the tender cannot be provided efficiently through competitive tendering process; and
  - 11.3 that there are no suppliers in the market that can provide a similar offering without copying from the unsolicited tender.
- 12. Paragraph 4.7.8 of Supply Chain Management provides as follows:

"This should be based on a thorough analysis of the market and use a transparent and equitable pre-selection process, to request only one amongst a few prospective bidders to make a proposal."

13. The National Treasury Practice Note No 11 of 2008/2009 provides as follows:

"An unsolicited proposal/concept means any proposal/concept received by an institution outside its normal procurement process that is not an unsolicited bid (a submission that must be innovative, unique and provided by a sole supplier)."

14. Paragraph 2.1 Criteria for Consideration of an Unsolicited Proposal provides as follows:

WR.

"Institutions are not obliged to consider an unsolicited proposal but may consider such a proposal only if it meets the following requirements:

- (a) a comprehensive and relevant project feasibility study has established a clear business case; and
- (b) the product or service involves an innovative design; or
- (t) the product or service involves an innovative approach to project development and management; or
- (d) the product or service presents a new and cost-effective method of service delivery".
- 15. The unsolicited proposal must contain the following information in terms of the proponent:
  - the proponent's name, address, identification or registration number (if a corporation), VAT registration number and the contact details of its authorised representative;
  - identification of any confidential or proprietary data not to be made public;
  - the names of other South African institutions that have received a similar unsolicited proposal;

M.R.

- the proponent's current SARS Tax Clearance Certificate and in the case where the proponent is a consortium or joint venture, a current SARS Tax Clearance Certificate for each member thereof;
- a declaration of interest containing the particulars set out in Standard
   Bid Document (SBD) 4, issued by the National Treasury,
- a declaration of the proponents past supply chain practices containing the particulars set out in SBD 8, issued by the National Treasury; and
- a declaration from the proponent to the effect that the offering of the unsolicited proposal was not as a result of any non-public information obtained from officials of the relevant institution or any other institution.
- 16. The services in respect of the partnership agreement and the addenda were not procured through a competitive tender process. There was no advertisement of the tender to the public. Instead Prodigy approached PRASA with a proposal to provide the entity with 300 funded learnerships from Services SETA via a Discretionary Grant process, which SETA awarded to the service provider Prodigy Business Services.
- 17. These bursaries would subsequently be ceded to PRASA in order to initiate the piloting of the Centre of Excellence. Learnerships were said to be



W.L.

within the domain of the Services SETA and for which Prodigy was accredited.

- 18. In return for Prodigy ceding the bursaries to PRASA, PRASA was required to appoint it to manage the implementation of the 900 PRASA learnerships and other related training and learning interventions via the Centre of Excellence.
- 19. There has been non-compliance with the procurement provisions in that:
  - PRASA did not conduct a comprehensive market/feasibility study
    establishing a clear business case and to ascertain that Prodigy was, in
    fact, the only accredited recognition of prior learning provider for the
    Public Administration qualification.
  - there is no evidence of names of other South African institutions that have received a similar unsolicited proposal from the service provider.
  - there is no evidence of declarations of interest from Prodigy and the PRASA officials and role players.
  - there was no evidence to prove that this services was obtained at a cost that is economical and market related prices

M·L.

- 20. Therefore, the requirements of the National Treasury Practice Note No 11 of 2008/2009 and section 51 of the PFMA, which deals with the economical use of resources, were not complied with and, as a result, the appointment was irregular to the tune of R133.2 million. None of the following payments were reported as irregular expenditure:
  - the appointment to train 995 learners employees for an estimated cost
     of R82 million for R27 360 per learner
  - the appointment to implement Phase 2 for total number of 3000 learners of My Station programme for a total cost of R82.1 million and
  - the appointment to train 400 unemployed youth by PRASA technical for the total cost of R28.3 million R71 968 per learner
- 21. Furthermore the appointment was not approved by CTPC as stated in the recommendation report for approval by the Group Chief Procurement Officer ("the GCPO") to the Group Chief Executive Officer ("the GCEO") on 25 November 2014 as such procurement process was ignored.

MR.

### VARIATION OF THE TENDER AND THE APPLICABLE THRESHOLD

22. Paragraph 9 of the Supply Chain Management Policy 2009 provides that:

"The CTPC is established with the objective to perform the functions as indicated below."

The CTPC is a cross-functional committee appointed by the GCEO. It shall be comprised of at least six members each with an alternate member, and not more than eight of whom at least two members are SCM Practitioners and one from Finance. The chairperson of the CTPC shall be appointed by the GCEO. The CTPC's primary function is to:

- 9.8.8 Review and approve requests of extension of contracts as per Delegation of Authority;"
- 23. Section 51 of the PFMA provides that:

"General responsibilities of accounting authorities. -

- (1) An accounting authority for a public entity (b) (ii) must take effective and appropriate steps to-prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity."
- 24. The addenda to the partnership agreement made and entered into between PRASA and Prodigy was signed on 30 August 2011.





- 25. The purpose of these addenda to the partnership agreement was to extend the station and corridor management programme, conducted by Prodigy, to the PRASA frontline and similar workers employed at regions, stations and other areas of PRASA. These services were for the station and corridor management programme where employees from PRASA rail, Autopax as well as any other division or subsidiary within PRASA.
- 26. In terms of the first addendum, Prodigy would provide the following for a period of three years:
  - first component My Station Frontline Customer service training programme
  - continual Professional Development for PRASA and subs;
  - implement customer service frontline worker programme for 3000 employees (cost per learner R 24000 excluding VAT and cost for 3000 learners R72 million)
  - implement customer service frontline worker programme for 6000 employees
  - continual Professional Development training for station and corridor
     management

W. L.

- Autopax Contact Centre, Customer Service and Professional Driver Training.
- 27. The total value of the further services amounted to R82 080 000.00 which is 760% over the initial contract value of R10 800 360.00, making the variation more than the 10% threshold for extensions/variations. PRASA has paid a total amount of R130 641 380.00 to the service provider since the inception of the agreement.
  - there is no evidence that such extension of the contract was considered for review and approved by the Corporate Tender and Procurement Committee (CTPC).
  - there is no indication that the extension was approved as per the Delegation of Authority.
- 28. This is non-compliance with the National Treasury regulations and the SCM policy which results in irregular expenditure.

## NO EVIDENCE OF A FORMAL AGREEMENT BETWEEN PRODIGY AND PRASA TECH

29. I have already referred the honourable court to section 51 of the PFMA

MR.

- 30. PRASA Technical came up with a programme called Sakhisizwe youth development programme which is said to be aligned to the national mandate of equipping marginalized unemployed youth across all provinces. The programme entails generic work readiness programme and basic project management that will enhance the employability of these beneficiaries for all industries and PRASA. PRASA Technical engaged with Prodigy and committed to train 400 unemployed youth in this programme. The above training provided was not part of the original contract in place, therefore an indication that training was provided for services not agreed upon.
- There is no evidence indicating that PRASA Tech had engaged with Prodigy nor a formal contract/SLA/partnership entered into between PRASA Technical and Prodigy. Non-existence of a formal agreement indicates that the two parties are not legally bound and any monies spent by PRASA may be fruitless and wasteful and irregular. Any monies paid by PRASA are irregular.

## LEGITIMACY OF PAYMENT MADE BY PRASA TO PRODIGY FOR THE PILOTING OF CENTRE OF EXCELLENCE

32. Paragraph 1.3.3. of the Supply Chain Management Policy 2009 provides as follows:

W.C.

"Unsolicited tenders are generally prohibited unless approved for consideration by the GCEO."

- 33. In approving their consideration, the GCEO shall take the following into account:
  - that the unsolicited tender is a unique concept offering;
  - that the offering of the tender cannot be provided efficiently through
     competitive tendering process; and
  - that there are no suppliers in the market that can provide a similar offering without copying from the unsolicited tender.
- 34. Paragraph 4.7.8 of Supply Chain Management -A guide for accounting officers and authorities states the following regarding single sourcing:

"This should be based on a thorough analysis of the market and use a transparent and equitable pre-selection process, to request only one amongst a few prospective bidders to make a proposal."

35. National Treasury Practice Note No 11 of 2008/2009 states that:

"An unsolicited proposal/concept means any proposal/concept received by an institution outside its normal procurement process that is not an unsolicited bid (a submission that must be innovative, unique and provided by a sole supplier)."

UR.

36. Paragraph 2.1 Criteria for Consideration of an Unsolicited Proposal states that:

"Institutions are not obliged to consider an unsolicited proposal but may consider such a proposal only if it meets the following requirements:

- (a) a comprehensive and relevant project feasibility study has established a clear business case; and
- (b) the product or service involves an innovative design; or
- (c) the product or service involves an innovative approach to project development and management; or
- (d) the product or service presents a new and cost-effective method of service delivery".
- 37. The unsolicited proposal must contain the following information in terms of the proponent:
  - the proponent's name, address, identification or registration number (if a corporation), VAT registration number and the contact details of its authorised representative;
  - identification of any confidential or proprietary data not to be made public;
  - the names of other South African institutions that have received a similar unsolicited proposal;



MR

- the proponent's current SARS Tax Clearance Certificate and in the case where the proponent is a consortium or joint venture, a current SARS Tax Clearance Certificate for each member thereof;
- a declaration of interest containing the particulars set out in Standard
   Bid Document (SBD) 4, issued by the National Treasury,
- a declaration of the proponents past supply chain practices containing the particulars set out in SBD 8, issued by the National Treasury; and
- a declaration from the proponent to the effect that the offering of the
  unsolicited proposal was not as a result of any non-public information
  obtained from officials of the relevant institution or any other
  institution.
- 38. Prodigy approached PRASA with a proposal to provide the entity with 300 funded learnerships from Services SETA via a Discretionary Grant process, which Services SETA awarded to the service provider Prodigy.
- 39. These bursaries subsequently ceded to PRASA in order to initiate the piloting of the Centre of Excellence.
- 40. PRASA paid R10 800 360 to Prodigy for training that was funded by Services SETA and did not receive the monies paid in from the Services

MC.

SETA as this training was already funded by SETA as proposed in the partnership agreement. This is not justifiable as Prodigy had already received monies from Services SETA therefore there is no basis for the service provider to subsequently bill PRASA.

41. There is no supporting evidence that Prodigy received funds from the Services SETA which led to the partnership agreement for funded bursary for training.

#### **OVERPAYMENT**

- 42. As pointed out, PRASA Technical came up with a programme called Sakhisizwe youth development programme aligned to the national mandate of equipping marginalized unemployed youth across all provinces. The programme entails generic work readiness programme and basic project management that will enhance the employability of these beneficiaries for all industries and PRASA. PRASA Technical engaged with Prodigy and committed to train 400 unemployed youth in this programme. The above training provided was not part of the original contract in place, therefore an indication that training was provided for services not agreed upon.
- 43. In terms of the Corporate Tender and Procurement Committee (CTPC) minutes of meeting, 24 November 2014, the request for extension of the My Station Programme and the Sakhisizwe youth development programme

ML

were rejected by the CTPC. A copy of the minute is attached as annexure "AA1" hereto.

- 44. A total payment to the amount of R28 787 280 has been made to Prodigy for the above mentioned programme. Subsequently a recommendation report was submitted to the GCEO for the ratification of the Sakhisizwe programme. This report was approved by the GCEO on 12 February 2015; however there is no evidence of a formal written document where both parties agree to the ratification.
- 45. There was no value for money for this programme. A cost of R28 million was charged for the same service for 995 learners (R27 360 per learner) and for 400 learners (R71 968 per learner). Based on the above there seem to be inconsistencies in the prices charged by the Service Provider, as there is no basis for the differences in the prices charged. Through inspection of the SCM file we could not verify that services provided were beneficial to the learners nor to PRASA.
- 46. There were no contractual clauses for payment of material development and payment for material development was made in the My Station programme for Metrorail below is the summary of invoices:

MR.

Invoice No.	Value	Service Provided	
0514 - 001	R 758 100	May 2015 -Technical articulation customization - access controllers skills programme	
0514 - 002	R 758 100	June 2015 -Technical articulation customization -administration officials skills programme	
0514 - 003	R 758 100	July 2015 -Technical articulation customization - senior administration officials skills programme	
0514 - 004	R 758 100	August 2015 -Technical articulation customization - managers skills programme	
0514 - 005	R 758 100	September 2015 - Technical articulation customization - porter skills programme	
0514 - 006	R758 100	October 2015 - Technical articulation customization - train driver skills programme	
0514 - 007I	R758 100	November 2015 -Technical articulation customization - rail transport passenger services (module 1 & 2)	
0514 - 008	R758 100	December 2015 - Technical articulation customization - rail transport passenger services (module 3,4 & 5)	
0514 - 009	R758 100	January 2016 -Technical articulation customization - train driving (full qualification)	
	R6 822 900		

Payments for training not attended by leaners were paid by PRASA and there was no recovery of this amount from Prodigy:

Invoice Date	Invoice Number	Value (Incl VAT)	Comment
	0911/006	R 2 052 000	Cancellation of sessions under 5 days of notice and sessions where 5> or 5< attendees were absent as at end July 2012 - Penalty fee for 123 learners - payment was made, but should not have been paid as provider was advised that no payments for penalties will be paid
01/10/12	0911/009	R 54 720	Sessions where 5< attendees were absent as at end September 2012 - Penalty fee for 8 learners - payment was made, but should not have been paid as provider was advised that no payments for penalties will be paid
		R2 106 720	

48. There was an overpayment which has not been recovered by PRASA estimated at R19.2m below as reflected hereunder:

Amount	Comments	
R 10,280,520.00	334 unemployed learners that was not properly approved by business	
R 6,822,900.00	9 invoices submitted for MLPS material development which was not part of the contract	

MR.

R 2,106,720.00	penalty related payments that was paid
R 2,517,120.00	A claim for training more than the 3 000 learners, where an additional 92 trained
R21,727,260.00	Total overpayments

- 49. A counterclaim will be lodged for recovery of the overpayment in due course.
- 50. For the reasons set out above, I respectfully state that the applicant's application be dismissed with costs.

#### CONDONATION

- 51. This answering affidavit is filed out of time. The reasons therefor are the following:
  - 51.1 the Public Protector conducted an investigation into the affairs of PRASA. She recommended that all contracts about R10 million be reviewed and, if necessary, appropriate action to be taken. The recommendations are remedial actions which are binding;
  - 51.2 PRASA appointed a firm of attorneys to conduct investigations as per the remedial action. There are numerous contracts with a contract value above R10 million;

MR

- 51.3 it was difficult to obtain the relevant procurement file;
- the file could only be retrieved recently. As soon as portions of the file were retrieved they were provided to the internal audit department of PRASA to peruse and advise PRASA's legal representatives on the contents thereof.
- 52. If regard is had to the contents of this affidavit, I contend that PRASA has reasonable prospects of success and I pray that the late filing of this affidavit be condoned.

MFANIMPELA MOSES DINGISWAYO

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at <u>DECEMBER</u> on this the <u>OS</u> day of <u>DECEMBER</u> 2016, the regulations contained in Government Notice No 3619 of 21 July 1972 and No 1648 of 19 August 1977 having been complied with.

COMMISSIONER OF OATHS

MNCEDISI RAYMOND MBHELE
Practising Automay - RSA
COMMISSIONER OF OATHS
EX Officio
190 THAMO SEHUME STREET
BANK TOMERS THIRD FLOOR
SUITE 314 - PRETORIA

### IN THE HIGH COURT OF SOUTH AFRICA **GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 78035/2016

In the matter between:

PRODIGY BUSINESS SERVICES (PTY) LTD (REG NO. 2006/018844/07)

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

#### NOTICE OF WITHDRAWAL AS ATTORNEYS OF RECORD

BE PLEASED TO TAKE NOTICE that BICCARI BOLLO MARIANO INC hereby withdraw as Attorneys of Record for the Applicant.

TAKE NOTICE FURTHER that the last known address of the Applicant is 51 Harrisson Street, Johannesburg and that the Applicant can be reached by way of email to:-

- 1. nerishni@skillsmatters.com; and
- 2. varish@skillsmatters.com.

DATED AT JOHANNESBURG ON THIS THE 27th DAY OF NOVEMBER 2017.



**BICCARI BOLLO MARIANO INC** APPLICANT'S ERSTWHILE ATTORNEYS OF RECORD No.1 Parklands, 229 Bronkhorst Street

Muckleneuck Pretoria

TEL: 011 628 9300

FAX: 011 622 3622

cbollo@bbmlaw.co.za / dreddy@bbmlaw.co.za / acooper@bbmlaw.co.za

REF: C BOLLO / D REDDY / A COOPER / RP2018

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA

AND TO:

NGENO AND MTETO INCORPORATED

RESPONDENT'S ATTORNEYS

Unit- C C50

Brooklyn Office Park

488 Fehrsen Street

Brooklyn

0181

Tel:

(012) 004 0424

Fax: (012) 004 0430

Email:tando@ngenomtetoinc.co.za

REF: MR T NGENO/PRA037/LIT

RECEIVI	ED A COPY HEREOF ON THIS
AT	DAY OF NOVEMBER 2017
	(AM/PM)
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NGENO AND MITETO INCORP

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 78035/2016

In the matter between:

PRODIGY BUSINESS SERVICES (PTY) LTD

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

### NOTICE OF APPOINTMENT OF ATTORNEYS OF RECORD

KINDLY TAKE NOTICE that DOCKRAT INCORPORATED, Office suite B Dunkeld Court 16 North Road, , Dunkeld West, Johannesburg are appointed as the Applicant's attorneys of record, at which address the Applicant will accept service of process, notices or documents in these proceedings.

DATED AT JOHANNESBURG ON THIS THE OF FEBRUARY 2020.



Attorneys for Applicant 16 North Road Dunkeld Court, Office Suite B

Dunkeld West

Johannesburg Tel: (011) - 618 - 2247

Fax: (011) - 618 - 1163 Email: yusuf@dockrat.co.za

REF: PRO15/0017

#### C/O ANREA RAE ATTORNEYS

39 Douglas Street

Pretoria

Tel: (012) 430 7757

Fax: (012) 430 4495

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

**PRETORIA** 

AND TO:

NGENO AND METTO INCORPORATED

Attorneys for Respondent

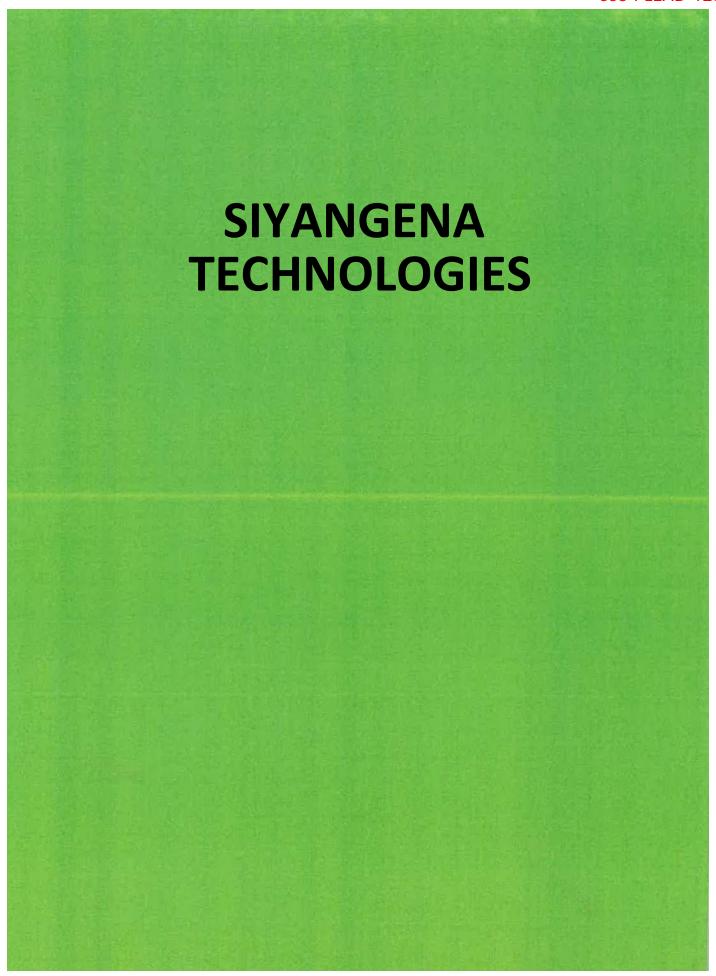
Unit - C 50

Brooklyn Office Park 488 Fehrsen Street

Brooklyn 0181

Tel: (012) 004 0424 Fax: (012) 004 0430

Email: tando@ngenomtetoinc.co.za
REF: MR T NGENO/PRAA037/LIT



#### IN THE HIGH COURT OF SOUTH AFRICA

#### GAUTENG DIVISION, PRETORIA

2018 -03- 0 5 In the matter between Suid AFRIKA GAUTERIG AFDELING, PRETORIA

Case No.: 14332 18

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

SIYANGENA TECHNOLOGIES (PTY) LTD

First Respondent

RETIRED JUSTICE EZRA GOLDSTEIN

Second Respondent

**RETIRED JUSTICE MEYER JOFFE** 

Third Respondent

#### NOTICE OF MOTION

TAKE NOTICE that the abovementioned applicant intends to make application to this Court for an order in the following terms:

- 1. In relation to the signing of the agreements:
  - 1.1. The signing of the JBCC agreement, dated 31 March 2011, is declared to be unauthorised.



1.2. The signing of the JBCC agreement, dated 1 July 2014, is declared to be unauthorised.

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- 1.3. The signing of the addendum agreement, dated19 September 2014, is declared to be unauthorised.
- 2. In relation to the decisions:
  - 2.1. The decision of the applicant to approve the appointment of the first respondent for the Supply and Installation of Integrated Security Access Management System (ISAMS) phase 1 tender, is reviewed and set aside.
  - 2.2. The decision of the applicant to approve the appointment of the first respondent for the Supply and Installation of Integrated Security Access Management System (ISAMS) phase 2 tender, is reviewed and set aside.
  - 2.3. The decision to appoint the first respondent for the guarantee, maintenance and upgrading of the equipment, as provided for in the addendum agreement, dated 19 September 2014, is reviewed and set aside.
- In relation to the agreements:
  - 3.1. The JBCC agreement, dated 31 March 2011, is set aside.
  - 3.2. The JBCC agreement, dated 1 July 2014, is set aside.

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- 3.3. The addendum agreement, dated 19 September 2014, is set aside.
- In relation to the arbitration agreements:
  - 4.1. The arbitration agreement contained in clause 40 of the JBCC agreement, dated 31 March 2011, is set aside.
  - 4.2. The arbitration agreement contained in clause 40 of the JBCC agreement, dated 1 July 2014, is set aside.
  - 4.3. The arbitration agreement contained in clause 40 of the JBCC agreements mentioned above, to the extent that such agreement is incorporated in the addendum agreement, is set aside.
- 5. As an alternative to paragraph 4:
  - 5.1. The arbitration agreement contained in clause 40of the JBCC agreement, dated 31 March 2011, shall cease to have effect with reference to the disputes referred to arbitration by the first respondent in the statement of claim as amended, dated 17 January 2018.
  - 5.2. The arbitration agreement contained in clause 40 of the JBCC agreement, dated 1 July 2014, shall cease to have effect with reference to the disputes referred to arbitration by the first respondent in the statement of claim, dated 15 May 2017.

- 5.3. The arbitration agreement contained in clause 40 of the JBCC agreement, dated 1 July 2014, to the extent that such agreement is incorporated in the addendum agreement, shall cease to have effect with reference to the disputes referred to arbitration by the first respondent in the statement of claim as amended, served on the applicant on 21 August 2017.
- 6. In relation to the works:

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- 6.1. The parties shall agree on an independent engineer within 30 (thirty) days of the date of this order, failing which the court may be approached on the same papers supplemented where necessary to appoint an engineer.
- 6.2. The appointed engineer shall value the works performed by the first respondent and serve on the parties and file in court a report on such value within a reasonable period.
- 6.3. The parties shall agree on the value of the works within 90 (ninety) days of receipt of the appointed engineer, failing which the court may be approached on the same papers supplemented where necessary to determine the value of the works.
- 6.4. The payments made by the applicant to the first respondent prior to the date of this order shall be set-off against the value of the works as agreed or determined by the court.

- 6.5. The applicant shall pay the deficit, if any, after the set-off ' referred to above to the first respondent within a reasonable period.
- 6.6. The first respondent shall pay the excess, if any, after the setoff referred to above to the applicant within a reasonable period.
- The costs of the application shall be paid by the first respondent, including the costs of three counsel where employed.
- 27. Further and / or alternative relief.

And that the accompanying affidavit of **ONICA MARTHA NGOYE** will be used in support thereof.

TAKE NOTICE FURTHER that the applicant has appointed WERKSMANS ATTORNEYS, c/o BRAZINGTON & McCONNELL, 424 Hilda Street, 2nd Floor, Hatfield Mall, Hatfield, Pretoria at the address set out below, at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that in terms of Rule 53 of the Rules of this Court, the applicant tenders insofar as it is able, within 15 (fifteen) days after service of this notice of motion, to file such record of any and all proceedings relevant to the decisions of the applicant in respect of the ISAMS phase 1 and phase 2 tenders, and the addendum agreement, with the Registrar of the above Honourable Court, together with the reasons for each decision.

TAKE NOTICE FURTHER that if you intend opposing this application you are required:
a) to notify the applicant's attorneys in writing within 15 (fifteen) days of the filing of the record and the reasons for the decisions, if any; b) within 30 (thirty) days after you have so given notice of your intention to oppose the application, to file your answering affidavit, if any; and further c) that you are required to appoint in such notification an address referred to in Rule 6(5)(d)(i) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose be given, the application will be made on the 26 March 2018 at 10h00 or so soon thereafter as counsel may be heard.

DATED at SANDTON on this the 4th

WERKSMANS

day of March 2018.

Applicant's Attorneys

The Central

96 Rivonia Road, Sandton

2196

E-mail: bhotz@werksmans.com/

igobetz@werksmans.com/ smoerane@werksmans.com

Ref.: SARC0001.789/J Gobetz

c/o BRAZINGTON & McCONNELL

424 Hilda Street

2<sup>nd</sup> Floor, Hatfield Mall

Hatfield, Pretoria

TEL: (012) 430-4303

FAX: (012) 430-7418

REF: Mr A McConnell

TO: THE REGISTRAR OF THE HIGH COURT PRETORIA

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AND TO: VAN DER MERWE & ASSOCIATES

First Respondent's Attorneys 62 Rigel Avenue Waterkloof, Pretoria

Tel: 087 654 0209

E-mail: <u>simone@vdmass.co.za</u> REF: GT VD Merwe/ST/S493/23

#### SERVICE PER E-MAIL

AND TO: THE HONOURABLE JUDGE E GOLDSTEIN

The Second Respondent

E-mail:

saulgold@global.co.za

AltaB@vatit.com

elgoldstein@vatit.com

AND TO: THE HONOURABLE RETIRED JUDGE MM JOFFE

The Third Respondent

E-mail:

mmj@mwebbiz.co.za

SERVICE PER E-MAIL

### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No.: 14332/18

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

SIYANGENA TECHNOLOGIES (PTY) LTD

First Respondent

RETIRED JUSTICE EZRA GOLDSTEIN

Second Respondent

RETIRED JUSTICE MEYER JOFFE

Third Respondent

#### **FOUNDING AFFIDAVIT**

I, the undersigned,

#### **ONICA MARTHA NGOYE**

do hereby make oath and say:

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- I am employed by the applicant as its Group Executive: Legal, Risk and Compliance ("head of legal").
- 2. The facts set out herein are not entirely within my personal knowledge, save where the contrary is expressly stated or otherwise appears from the context. I am nevertheless aware of the facts that do not fall within my personal knowledge from an investigation that the applicant caused to be conducted into the conduct of particular aspects of its business. Those investigations were undertaken by external investigators appointed by the applicant's board of control ("the board"), as well as internal investigators directed by the board. In my capacity as head of legal, I was informed of all progress made by the investigators.
- 3. The facts that are relevant and specific to this application were discovered and only revealed through the investigations. The investigations focussed on a number of relationships and activities that were suspected to be generally corrupt or inappropriate.
- 4. The facts described herein have been presented to me by the investigators and are mainly derived from and corroborated by documents attached to this affidavit as annexures. The attached documents are contemporaneous documents and form part of the applicant's records under my control as head of legal. I have used those documents where I have no reason to doubt their reliability and indicated the extent to which parts of the documents are not reliable below.

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- 5. I have not obtained confirmatory affidavits from all of the employees of the applicant who were involved in the events set out below because of the threats that have been made against some of the employees that are seen to be assisting the investigation, the sensitivity of the issues being investigated and the reluctance of some of the employees to assist in the investigation, and where I have reason to believe that they are attempting to frustrate the investigation.
- 6. I have obtained confirmatory affidavits where it was possible to do so, and when I was confident that the persons concerned were not and did not fear being intimidated and the integrity of the investigation would be maintained.
- 7. I respectfully submit that the facts that are unconfirmed by confirmatory affidavits are nevertheless consistent with and corroborated by the documents annexed hereto. I accordingly believe that the facts set out below are both true and correct.

#### The applicant

- 8.1. The applicant is the Passenger Rail Agency of South Africa ("PRASA"), a legal person established in terms of section 22 of the Legal Succession to the South African Transport Services Act 9 of 1989 ("SATSA"), with its principal place of business at PRASA House, 1040 Burnett Street, Hatfield, Pretoria.
- 8.2. PRASA is a state agency whose statutory mandate is to provide commuter rail services in the public interest throughout

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the Republic. The board controls and manages the affairs of PRASA.

8.3. PRASA is a National Government business enterprise listed in Part B of Schedule 3 of the Public Finance Management Act 1 of 1999, as amended ("the PFMA"). PRASA is obliged to comply with the statutory duties and fulfil the responsibilities imposed upon it in terms of the PFMA, not only in the control and management of its affairs, but also in the procurement of goods and services, as well as the conclusion or implementation of contracts with third parties, such as the first respondent, pursuant to the award of public tenders to them.

#### 9. The first respondent

- 9.1. The first respondent is Siyangena Technologies (Pty) Ltd ("Siyangena"), a company with limited liability, duly incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 21 George Storrar Avenue, Groenkloof, Tshwane.
- 9.2. Siyangena is joined in these proceedings by virtue of the interest it has in the declaration of invalidity and the setting aside of the decisions in issue and as a consequence the agreements on which it relies ("the contracts").
- 9.3. Siyangena is also joined in these proceedings by virtue of the interest it has as the claimant in the arbitration proceedings

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initiated against PRASA in terms the contracts. The arbitration 1/2 proceedings are dealt with in greater detail below.

#### 10. The second respondent

- 10.1. The second respondent is retired justice Ezra Goldstein. The second respondent's principal place of business is at c/o VAT IT Building, 2<sup>nd</sup> Floor, 54 Melrose Boulevard, Melrose Arch, Melrose North, Johannesburg.
- 10.2. The second respondent was appointed as an arbitrator by the Association of Arbitrators pursuant to clause 40.2 of one of the contracts sought to be enforced by the first respondent.
- 10.3. The second respondent is joined in these proceedings by virtue of any interest he may have in the arbitration proceedings that are pending before him. No relief is sought against him, unless he opposes the relief sought by PRASA, in which event a costs order will be sought against him.

#### 11. The third respondent

- 11.1. The third respondent is retired justice Meyer Joffe. The third respondent's principal place of business is at premises known as Slow, corner Rivonia and West Street, Sandton.
- 11.2. The third respondent was appointed as an arbitrator by the Association of Arbitrators pursuant to clause 40.2 of one of the contracts sought to be enforced by the first respondent.

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11.3. The third respondent is joined in these proceedings by virtue of any interest he may have in the arbitration proceedings that are pending before him. No relief is sought against him, unless he opposes the relief sought by PRASA, in which event a costs order will be sought against him.

#### 12. The purpose of this application

- 12.1. The first purpose of this application is to set aside the arbitration agreements contained in the contracts in order to resolve all of the disputes that have arisen between the parties in one forum. The disputes extend beyond the scope of the arbitration agreements, affect other persons who are not parties to the arbitration agreements and the resolution of the disputes is in the broader public interest. I accordingly submit that it is in the interest of justice for this honourable court to assume responsibility for the resolution of disputes, which involve an organ of state and by reason of the nature of the disputes should not be heard behind closed doors in private arbitration.
- 12.2. The application to set aside the arbitration agreements is brought in terms of section 3(2)(a) of the Arbitration Act 42 of 1965, which affords the above honourable court a discretion to set aside the arbitration agreement "on good cause shown".

  The arbitration agreement can be set aside at any time, and any party to the agreement can apply for that relief.

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- 12.3. PRASA submits that good cause is shown on the facts set out below. The facts establish *inter alia* that the resolution of the disputes referred to arbitration by Siyangena will not resolve the principal issue between the parties, namely whether the contracts are valid and enforceable.
- 12.4. The disputes concern the non-payment of certain invoices issued by Siyangena to PRASA pursuant to work purportedly performed in terms of the contracts. PRASA contends that the contracts and the decisions that resulted in the contracts should be set aside for the reasons stated in this application. In the premises, the very existence of the arbitration agreement contained on the contracts is accordingly in dispute.
- 12.5. The arbitrators have no jurisdiction to determine such disputes and, in the proper exercise of their powers, should dismiss the claims or at the very least refuse to proceed with the arbitrations until such time as those disputes are determined by a court. The arbitrators cannot make an award in favour of the first respondent, as to do so would require a finding that the contracts are valid and enforceable, which they cannot do. The suggestion that they can do so conditionally merely confirms the absence of jurisdiction to finally resolve the issues.
- 12.6. I respectfully submit that proceeding to determine whether PRASA is liable to pay Siyangena's invoices in the absence of jurisdiction over a particular aspect of the dispute would be unauthorised, irrational and accordingly reviewable.

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12.7. I respectfully submit further that it is undesirable and inconvenient that the disputes concerning the invoices, and the dispute concerning the validity of the contracts and the legality of the tender process, proceed in different forums. The evidence presented below is relevant to the issues in the arbitration, in particular the evidence founds the defence raised in the arbitrations that the contracts were unauthorised. The potential accordingly exists for conflicting decisions on

overlapping factual issues.

- 12.8. I respectfully submit further that public interest demands that the issues that arise in these disputes should not be ventilated behind closed doors in a process that is private and confidential in relation to both the evidence and the award. PRASA is a state owned institution that fulfils a public function using tax revenue to achieve its objectives. The awarding of the tender to Siyangena resulted in irregular, wasteful and fruitless expenditure. Furthermore, there are indications that PRASA's procurement processes were unlawfully abused by certain individuals within the organisation. Accordingly, it is important that the disputes be resolved in a public forum.
- 12.9. In the premises, PRASA applies for the setting aside of the arbitration agreements. In the alternative, PRASA applies for an order that the contracts shall cease to have effect with reference to the disputes referred to arbitration.

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- 13.1. PRASA brought an application to review and set aside the contracts on or about 1 February 2016. The previous application is not attached as the papers are voluminous and would unnecessarily burden the papers in this application. However, the previous application will be made available to the court at the hearing of the matter.
  - 13.1.1. In the founding affidavit in the previous application,
    PRASA submitted that the review of the decision to
    award the tender referred to in paragraph 1 of the
    notice of motion "should be granted in order to
    uphold the rule of law and principle of legality, to
    ensure that the manifest breach of constitutional
    obligations by Mr Montana is pronounced upon"
    (own emphasis) (p. 87, para. 196).
  - 13.1.2. PRASA sought to set aside the contract referred to in paragraph 2 of the notice of motion for the same reasons.
  - 13.1.3. PRASA sought the relief in paragraph 5 of the notice of motion because the decision was inter alia unlawful, and the relief in paragraph 6 because the contract is invalid.

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- 13.2. Siyangena contended that PRASA was constrained to comply with the requirements of Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") and, as PRASA had not applied to "condone the late filing of its review application" in terms of section 9(1) of PAJA, the application could not be entertained.
- 13.3. In the replying affidavit, it was stated that "Insofar as is necessary, the applicant makes application for condonation of its delay in launching the review proceedings on the grounds set out in the founding, supplementary and this replying affidavit. The applicant will therefore seek an amendment of its notice of motion to incorporate the conditional condonation it seeks" (para. 10.9, p. 2649).
- 13.4. The replying affidavit was delivered on 19 August 2016.

  Siyangena did not object to the notice provided in the replying affidavit that an amendment would be sought at the hearing.
- 13.5. PRASA applied at the hearing on 2 May 2017 for an amendment in the following terms, "Insofar as is necessary, condoning the applicant's late institution of the review application outside the 180 days prescribed in section 7(1)(b) of PAJA and that the Court should exercise the discretion conferred upon it in section 9 of the said Act to condone the Applicant's non-compliance." Siyangena objected. The objection was raised for the first time eight months after being informed that the amendment would be sought.

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- 13.6. Although it is unclear from the judgment whether the amendment was granted, and Siyangena disputed in the application for leave to appeal that there was a condonation application or amended notice of motion before the court, the learned judge approached the matter in his judgment on the basis that a request for condonation was before the court.
  - 13.6.1. In paragraph 7 (p.4) of the judgment, attached as annexure "FA1", the learned judge a quo considered whether the prescripts of section 9 of PAJA were satisfied and formulated one of the (separated) issues as, "is there an application before the court as contemplated in section 9 of PAJA?" (para. 8(3)). The learned judge was questioning whether the condonation application constituted an application in terms of section 9 of PAJA.
  - 13.6.2. In paragraph 19, the learned judge referred to the fact that the applicant relied on allegations of fact in the existing affidavits and stated that, "The essential question, however, whether this material is what section 9 requires."
  - 13.6.3. In paragraph 8 of the judgment of the court a quo in the application for leave to appeal, attached as annexure "FA2", the learned judge referred to the "application launched at the hearing" (p.5, para. 8).

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- 13.7. On 3 May 2017, the learned judge, in my respectful view erroneously, concluded that there was no application before him in terms of section 9 of PAJA. The learned judge reasoned that:
  - 13.7.1. Section 9 envisages, "not a condonation application, but an application to extend the period of 180 days". "[A] focussed application is required, not an *en passant* condonation application" (p.8, para. 20). The reasoning is further confirmation that an application for condonation was before the court *a quo*. However, in the view of the learned judge that application did not amount to an application for an extension of time.
  - 13.7.2. The application had to satisfy certain requirements (stated in Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality [2017] ZASCA 23 (24/03/2017), paragraph 7). The applicant had not done so and was "without a pleaded case" (p.10, para. 22).
  - 13.7.3. Accordingly, the learned judge concluded that PRASA "has not put up a section 9 application" (p.11, para. 23). The order included a statement that, "there is no application before this court as contemplated in section 9 of PAJA" (p.12, para. (3)).

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- 20 review on the principle of legality and only "[i]nsofar as is necessary" brought an application for condonation for the delay at the hearing.
- 13.8. In the judgment in the application for leave to appeal, the learned judge stated that he had held that, "no substantive application to extend had been made. Moreover, the substance of what would need to be traversed in such an application to extend had not been put up in the papers." (p.2, para. 1). The reasoning is founded on the view that an application to extend has certain discernible features that were not present in the application for condonation before the court.

- 13.9. The learned judge maintained in the application for leave to appeal that factual allegations pertinent to the interests of iustice were required and, "[p]ut bluntly, the substance of such an enquiry was not to be found in the papers." (p.5, para. 8). "The 'condonation' application launched at the hearing ... sought to rely on the remarks made in the body of an application that did not have as its aim the addressing of the issue of interests of justice." (p.6, para. 8).
- 13.10. The learned judge adopted the view that an application in terms of section 9 of PAJA has a certain form and content. In the absence of that form and content, there was, according to the learned judge, no application as contemplated in section 9 of PAJA and PRASA was without a "pleaded case".

- 13.11. In the result, neither the entitlement to an extension of the time period prescribed by PAJA nor the grounds of the review application were decided on the merits. I respectfully submit that PRASA was accordingly entitled to bring an application for an extension of time in terms of section 9 of PAJA and to reinstitute the review application.
- 13.12. In the meantime the Constitutional Court handed down judgment in *State Information Technology Agency Soc Ltd v Gijima Holdings* (Pty) Ltd [2017] ZACC 40, in which it was held that PAJA is not applicable where a state organ seeks to review its own decision. Accordingly, PRASA is entitled to reinstitute the review application, as it sought to do in the previous application, founded on the principle of legality and an issue will be whether PRASA has unreasonably delayed in bringing the application.

### 14. The legal framework applicable to PRASA

- 14.1. The decisions relevant to this application are administrative action, and as such are required to be "lawful, reasonable and procedurally fair" (section 33, Constitution of the Republic of South Africa, 1996). I respectfully submit, for the reasons set out below, that the conduct and decisions of PRASA set out below were unlawful, unreasonable and procedurally unfair.
- 14.2. As an organ of state, PRASA is required to be, "effective, transparent, accountable and coherent" and to "co-operate

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with one another in mutual trust and good faith" by *inter alia* "informing one another of, and consulting one another on, matters of common interest", "co-ordinating their actions ... with one another" and "adhering to agreed procedures" (section 41(c) and (h)(ii), (iii), (iv) and (v), the Constitution). I respectfully submit that PRASA failed to comply with all of these principles, for the reasons set out below. In particular in relation to national treasury and the department of transport ("the DoT").

- 14.3. As an organ of state, PRASA is required to, "assist and protect [the public protector] to ensure the independence, impartiality, dignity and effectiveness of [that institution]" and may not "interfere with the functioning of [that institution]" section 181, the Constitution). I respectfully submit, for the reasons set out below, that individuals within PRASA failed to provide such assistance and protection, and interfered with the functions of the public protector in relation to the actions and decisions referred to below.
- 14.4. In contracting for goods or services, PRASA must do so, "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective" (section 217, the Constitution). The procurement process followed by PRASA failed to satisfy those requirements, for the reasons set out below.
- 14.5. The following legislation and subordinate legislation applies to PRASA or applied at the time material to this application:

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- 14.5.1. The Public Finance Management Act, 1 of 1999 23 ("the PFMA").
- 14.5.2. The Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA").
- 14.5.3. The Public Protector Act, 23 of 1994.
- 14.5.4. The Preferential Procurement Regulations, 2001.
- 14.5.5. Preferential Procurement Regulations, 2011.
- 14.6. PRASA failed to comply with the abovementioned legislation to the extent set out below. I respectfully submit that the extent of the failure renders the decisions and the agreements unlawful, and accordingly such decisions and agreements cannot be enforced by the court.

# 15. The procurement framework of PRASA

- 15.1. PRASA is funded by national treasury through allocations made to the DoT. The allocations are communicated to the department through a medium term expenditure allocation that allocates the requested budget over a three year period.
- 15.2. The department issues an allocation letter detailing the budget specifically apportioned to PRASA. The PRASA enterprise program management office ("the EPMO") prepares a medium term expenditure framework, referred to by its acronym MTEF,

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based on the apportionment from the department. The MTEF details how the funds are to be distributed across the various capital projects and operations of PRASA.

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- 15.3. The main object and business of PRASA is to ensure that rail and bus passenger services are provided within, to and from the Republic of South Africa in the public interest in terms of the principles set out in the National Land Transport Act 5 of 2009 ("NLTA"). (SATSA refers to the principles set out in section 4 of the National Land Transport Transition Act 22 of 2000 ("NLTTA") (section 23(1) of SATSA). The NLTTA was repealed by section 94 of the NLTA.)
- 15.4. The second object and business of PRASA is to generate income from the exploitation of the assets acquired by it (section 23(2) of SATSA).
- 15.5. The national government is required to appoint a board of control, vested with the power and authority to lead, control, manage and conduct the business of PRASA. The board is required to exercise its powers subject to existing PRASA policies and the shareholders' compact concluded between the minister of transport and the board.
- 15.6. The delegation of authority, attached as annexure "FA3", requires that the board comply with *inter alia* the following:

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- 15.6.1. The fiduciary duties set out in section 50 of the PFMA, which includes exercising the duty of utmost care to ensure reasonable protection of the assets, acting with fidelity, honesty, integrity and in the best interests of PRASA in managing the financial affairs of PRASA; disclosing to the executive authority responsible for PRASA all material facts which in any way may influence the decisions or actions of the executive authority; and seeking to prevent any prejudice to the financial interests of the state (paragraph 2.13).
- 15.6.2. The general responsibilities set out in section 51 of the PFMA, which includes establishing and maintaining an appropriate procurement system which is fair, equitable, transparent, competitive and cost-effective, and capable of properly evaluating all major capital projects; and taking effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of PRASA (paragraph 2.14).
- 15.7. The delegation of authority reflects the requirements of section 54(2) of the PFMA in terms of which PRASA is required to promptly and in writing inform the relevant treasury and submit relevant particulars to its executive authority for



approval before the conclusion of a transaction that involves the acquisition of a significant asset, before concluding the transaction. The executive authority is the minister of transport and the relevant treasury in this context is the national treasury.

- 15.8. In terms of the delegation of authority, PRASA's board is required to obtain approval from the minister of transport for *inter alia* any transaction other than in the ordinary, regular and normal course of business, purchasing any asset other than in the ordinary, regular and normal course of business, and a decision falling outside the scope of the mandate and authority granted in terms of the SATSA and the shareholder compact (paragraph 1.1).
- 15.9. The delegation of authority specifically reserves for approval by the board decisions regarding upgrading of the existing infrastructure in general (paragraph 2.8).
- 15.10. In terms of section 52 of the PFMA, PRASA is required to submit to the accounting officer for the department designated by the executive authority responsible for PRASA, a projection of expenditure before the start of the financial year and a corporate plan covering the affairs of that public entity or business enterprise for the following three financial years.
- 15.11. The delegation of authority stipulates that the information required in terms of section 52 of the PFMA must be provided to the minister of transport and the relevant treasury, at least

one month before the start of the financial year. The information must be provided in the "prescribed format" and provide a funding plan (paragraph 1.3.1).

### 15.12. In terms of the delegation of authority:

- 15.12.1. The accountable person had to ensure that the approved policy, budget, action taken, expenditure incurred etc. was within the objects of the organisation, the approvals framework and the procedures adopted by the organisation.
- 15.12.2. The responsible person was answerable to the person accountable and had to ensure that transactions and events have been reviewed, monitored and evaluated for compliance against the approvals framework and the proper procedures adopted by the organisation before submission to the accountable party.
- 15.12.3. The advice of the persons required to be consulted had to be considered genuinely before the transaction was initiated.
- 15.12.4. The persons required to be informed had to be informed timeously and throughout the duration of the event or transaction, and in detail if requested.

- 15.13.1. The Group Chief Financial Officer ("GCFO") and Group Executive: Strategic Asset Development ("GE:SAD") were responsible for investigating an efficient and cost effective means to invest in modern rail technology. The GCFO and GE:SAD had to consult the EXCO. The GCEO was accountable for this planning. (Appendix 1A to the delegation of authority.)
- 15.13.2. The GCEO was responsible for developing and maintaining effective, efficient and transparent systems of procurement that were fair, equitable, transparent, competitive and cost effective. The GCEO was required to consult the GCFO and executive committee. The board was accountable for this governance and control. (Appendix 1A to the delegation of authority.)
- 15.13.3. The GCEO was responsible for approval of strategic capital investments. The GCEO had to consult the GCFO and the EXCO. The Board was accountable for the approval of the investment.

  (Appendix 1A to the delegation of authority.)
- 15.13.4. The GCEO was responsible for approval of capital expenditure. The GCEO had to consult the GCFO

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and EXCO. The board was accountable for the approval of the investment. (Appendix 1A to the delegation of authority.)

- 15.13.5. The GCEO could approve projects of a capital nature and any other strategic investments to a maximum amount of R100 million per investment, and provided the investment was within the approved budget and in terms of the SCM policy and other conditions set by the board. (Notes to the delegation of authority, paragraph 5.)
- 15.13.6. The board was responsible for *inter alia* the approval of the budget. The board was required to consult with the GCEO and the GCFO, and the national treasury had to be informed, as per the PFMA. The minister of transport was accountable for the budget. (Appendix 1A to the delegation of authority.)
- 15.13.7. The GCFO was responsible for procurement, once a decision to invest in establishing infrastructure, had been made. The GCFO had to consult the CPO and EXCO. The GCEO was accountable. (Appendix 1A to the delegation of authority.) The board's responsibilities are expanded in terms of the Board Charter which is attached as annexure "FA4".

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- 15.14.1. The board's primary responsibility is to ensure PRASA complies with the obligations imposed by laws and regulations that are applicable to PRASA and that management of regulatory compliance is the responsibility of the board (paragraph 5).
- 15.14.2. The board members have a duty to PRASA. They have the ultimate responsibility for PRASA's performance and are not mandated delegates or servants of any of its stakeholders (paragraph 7).
- 15.14.3. In regard to strategic planning and performance monitoring, the board must oversee PRASA's executive implementation of the strategic plan, particularly ensuring procedures and systems are in place to serve as checks and balances on the information received by the Board; and PRASA's performance against annual budgets, operational plans, relevant industry norms and prior year's performance (paragraph 10.4).
- 15.14.4. In regard to regulatory compliance management, the board is responsible for the regulatory compliance risk, and must ensure that PRASA complies with the obligations imposed by various laws and regulations. The board must therefore,

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inter alia, form its own opinion about the regulatory compliance effectiveness the ensure and management process management has a common understanding regarding the coordination of the compliance the organisation throughout arrangement (paragraph 12).

(paragraph 12).

15.15. The board charter also identifies (reserved) powers of the Board that cannot be delegated to the executive. The reserved

powers include:

- 15.15.1. The approval of capital expenditure, acquisitions and disposals in excess of the discretionary power delegated to the chief executive officer (paragraph 15.6).
- 15.15.2. The approval of contracts that do not relate to the ordinary business of PRASA (paragraph 15.13).
- 15.16. In terms of the code of conduct attached as annexure A to the board charter, the board is under a legal duty to act in a faithful manner towards and on behalf of PRASA and as such commits itself to the highest standards of behaviour (paragraph 5). To that end the board members are expected:
  - 15.16.1. To take all reasonable steps to satisfy themselves that they are in a position to take informed

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decisions, including steps to secure – in a timely manner – all information necessary to assist in making informed decisions (paragraph 5.7).

- 15.16.2. To attend meetings, review information and board documentation and monitor PRASA activities (paragraph 5.11).
- 15.17. The board established a committee, as set out in a terms of reference which is attached as annexure "FA5", known as the Finance, Capital Investment and Procurement Committee ("FCIP") to assist in discharging its responsibilities.
- 15.18. The primary role of the FCIP is to focus on specific issues and aspects of the board's responsibilities regarding the finance, capital investment and procurement of PRASA (paragraph 2), including:
  - 15.18.1. providing strategic direction regarding finance, capital investment and procurement;
  - 15.18.2. enforcing sound management practices and corporate governance;
  - 15.18.3. recommending for approval, tenders as per the delegation of authority and supply chain management policy;

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- 15.18.4. considering the procedure followed by the tender procurement committee, and all others involved with the procurement and disposal of goods and services, taking due cognisance as far as procedure, substance and value for money is concerned;
- 15.18.5. ensuring that a supply chain policy is in place;
- 15.18.6. condoning or rejecting a submission for noncompliance with the supply chain policy or reserve
  a decision pending further information or
  clarification of a specific matter; and
- 15.18.7. complying with the board terms of reference.

## 16. The procurement policy

- 16.1. PRASA has a supply chain management policy that applies to all of its business units, all levels and types of procurement, and *inter alia* all capital expenditure. PRASA's employees must adhere to its provisions at all times.
- The policy in place at the relevant time was the first revision to the 2009 document, dated 23 February 2009 ("the procurement policy"). A copy of the procurement policy is attached as annexure "FA6".

- 16.3. The procurement policy, in broad terms, is that all procurement takes place efficiently, effectively and optimally for PRASA. In particular, PRASA is required to *inter alia* guard against favouritism, improper practices and opportunities for fraud, theft and corruption (paragraph 3.1).
- 16.4. The objective of the procurement policy is *inter alia* to contribute to the containment or reduction of costs for PRASA and its business units (paragraph 5.2).
- 16.5. The procurement policy requires all purchases, leasing and disposal of goods and services to be authorised and executed in accordance with the delegation of authority (paragraph 3.1.7).
- The procurement policy referred to above set out the roles and responsibilities of the various persons and committees within PRASA. The roles and responsibilities of the various persons and committees that follow below are relevant to this application. I have set out the departments in the sequence that the tender in this matter should have followed. I have tried to paraphrase only those roles and responsibilities that are relevant.
  - 16.6.1. An end-user was an authorised business unit /
    employee of PRASA that requests the involvement
    of supply chain management ("SCM") in the
    acquisition of goods. The end-user was

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responsible for accurately obtaining proper budget approval, where applicable, and maintaining proper documentation to support the requests made to SCM (paragraph 9.8).

- 16.6.2. The procurement policy requires a needs assessment to be performed for all purchasing. The assessment is required to take due cognisance of *inter alia* future need requirements, identification of critical delivery dates, budget availability, expenditure, specifications, and a commodity (checking for alternatives) and industry analysis (paragraph 10.2).
- 16.6.3. The CPO was responsible for the overall management of the SCM function and the implementation of SCM policies and procedures (paragraph 9.7).
- 16.6.4. SCM had the responsibility, authority and accountability for the management and coordination of the SCM function, initiation and preparation of requests for proposals (RFPs) and the initiation and management of the Cross Functional Sourcing Committee ("CFSC") and Evaluation Teams (paragraph 9.1).

A competitive bidding process was applicable when the estimated total value was more than R350, 000.00 (paragraph 11.3.2). (The policy states R350 million. However that is a typing error. The limit was R350 thousand, as evidenced by an internal memorandum issued by Mr Mbatha to all staff stating "[u]nder this system the following pertinent points must be noted: the value of goods or services procured is less than R350k." a copy of

the memorandum is attached as annexure "FA7".)

16.6.5.

The CFSC was appointed by the CPO in 16.6.6. consultation with the end-user and had to include someone from SCM and other specialists from the end-user department and when it is deemed necessary, independent experts could be coopted. The CFSC was responsible for designing and checking bid specifications, compiling bid documents and the (bid) evaluation, facilitating the allocation of evaluation criteria and weightings, conducting administrative compliance evaluation of all proposals for a tax clearance certificate and evaluation of all bids according to the evaluation criteria stipulated in the bid document, ensuring all bids complied with policies, procedures and regulations and maintaining records to ensure the existence of an audit trail (paragraph 9.9).

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- 16.6.7. The procurement policy requires that any specifications included in bidding documents must promote the broadest possible competition and be based on relevant characteristics and/or performance requirements. References to brand names or similar classifications must be avoided in all instances unless authorised (paragraph 10.4).
- There is a structural difficulty with the functions of 16.6.8. the CFSC as set out in the policy document. According to the policy, the CFSC designs, evaluates and recommends bids for acceptance. This is not an effective or desirable separation of functions. A recommendation was made in January 2012 that the preparation of bid specifications and the evaluation of bids should be performed by independent bodies. The evaluation functions are presently separated and were at the time of the evaluation of the tenders in issue. The bids were evaluated by a bid evaluation committee ("BEC") and recommended by a bid adjudication committee ("BAC"). An amendment to this affect appears to have been included in the (2009) procurement policy. The BAC function was sometimes performed by the CTPC. I deal with this process below.

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- 16.6.9. The evaluation of bids must be performed by the BEC. The evaluation is done in two phases. First the bids are checked for compliance with critical criteria, if any are stated in the bid documents. Critical criteria are those aspects of the bid document that, if not met in full, automatically disqualify the bidder. The bids that qualified were evaluated and scored against the criteria that were stipulated in the bid document.
- 16.6.10. The evaluation criteria are those aspects of a bid that are measured to arrive at an assessment as to which bid best meets the needs described in the bid document and, to compensate for important differences between evaluation criteria, weights are allocated to the criteria (paragraph 11.4.5).
- 16.6.11. The BAC makes a recommendation as to the preferred bidder, after adjudicating the bids (paragraph 11.6.1). The final approval of the preferred bidder depends on the delegation of authority. The contract is awarded to the bidder who provides the best overall value to PRASA.
- 16.6.12. In the context of procurement, particularly at PRASA, a preferred bidder was generally understood and intended to mean the bidder who ranked number one after evaluation of the bids and



had received notification of being appointed as the preferred bidder, and with whom the PRASA intended to negotiate and, on successful completion of the negotiations, appoint as the final bidder.

- 16.6.13. A final bidder was generally understood and intended to mean the bidder who would enter into the contract with the PRASA and had received notification of being appointed as the final bidder.
- 16.6.14. Corporate Tender and Procurement The Committee ("CTPC") was responsible for considering the procedure followed by committees and persons involved in the procurement process, taking into account substance and value for money and making recommendations to the GCEO in delegation of authority the terms of (paragraph 9.4).
- 16.6.15. The GCEO was responsible for appointing the CTPC and recommending to the FCIP the acceptance of tenders within a value specified in the delegation of authority (paragraph 9.2).
- 16.6.16. The FCIP was responsible for considering the recommendations from the GCEO, the procedures followed by others involved in the procurement

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process, taking into account substance and value for money, approving recommendations as per the delegation of authority, condoning or rejecting a submission for non-compliance with the policy and complying with the board's terms of reference (paragraph 9.2).

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16.7. I have set out the above decision making processes and procedures in order to demonstrate that the necessary checks and balances exist within PRASA. The checks and balances are designed to protect the utilisation of public funds to bring about the best value for PRASA and to avoid improper, corrupt and fraudulent activities in the procurement processes. In regard to the contracts in issue, most of these checks and balances were deliberately ignored or breached by individuals within PRASA in order to unlawfully extend the scope of work under the first contract and to approve the award of the Phase 2 contract to Siyangena.

#### 17. The factual background

17.1. In preparation for the FIFA Confederations Cup in 2009 as well as the FIFA World Cup in 2010, PRASA, through its subsidiary, Intersite, appointed two contractors, Enza Construction (Pty)

Ltd and Rainbow Construction, to upgrade two stations, Nasrec and Doornfontein ("the pilot project"). Enza was appointed to upgrade the Nasrec station and Rainbow was appointed to the Doornfontein station. Siyangena was



appointed as a subcontractor to Enza and Rainbow for the installation of speed gates at the Nasrec station. The appointments were made pursuant to a procurement process followed by Intersite. The unsuccessful bidders for the subcontract were Phumelela Balustrades ("Phumelela") and Bridging Technologies SA ("BT-SA").

- 17.2. The speed gates were not installed at the following stations due to budget constraints: Rhodesfield Station, Orlando Station, Moses Mabhida Station, Windermere Station, Langa Station, Bridge City Station and Cape Town Station.
- 17.3. Intersite was responsible for real estate asset management, facilities management and development of the property portfolio. In particular, Intersite was responsible for *inter alia* building and equipment maintenance, access control and upgrading of the stations. Accordingly, Intersite should have been involved in any project affecting the stations.
- 17.4. The Strategic Asset Development department ("the SAD") was responsible for long term planning on strategic projects. All the major projects conducted by PRASA would be implemented by either SAD or some other specialised unit or entity, such as PRASA Cres or intersite. The SAD was mainly in charge of implementing projects relating to network planning, infrastructure and rolling stock. The infrastructure projects would be implemented by the Infrastructure unit within the SAD. Mr Dries Van der Walt was the Group Executive: SAD

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- The extension of the pilot project to the stations mentioned above ("the extension") commenced with Mr Gantsho. However, without the knowledge of Mr vd Walt. Mr vd Walt became aware of the project in or about August 2011, after it was a *fait accompli*. The project was retained in PRASA Cres., without the involvement of Intersite and SAD, whereas the Infrastructure department was involved from a technical advice point of view.
- 17.6. On or about 22 February 2010, Mr Gantsho sent an email to Mr Montana. A copy of the email is attached as annexure "FA8". Mr Gantsho attached a report to his email. The following statements were made in the report:
  - 17.6.1. In paragraph 3, "[a]fter interrogating the operation methods and comparing with other installed gates elsewhere in the world it turned out that these gates are not suitable." (our emphasis).
  - 17.6.2. In paragraph 5, "[i]n our effort to centralise this procurement we approached ESS also to provide PRASA with a quotation to supply all the 2010 stations. It turned out that their gates are fully imported and very expensive." (our emphasis).



17.6.3. In an unnumbered paragraph on page 2, 
"[c]urrently installation of speed gates is on hold 
until the VO's are approved as mentioned above 
that they were not budgeted for in the original 
scope. Provision is made for later retrofitting. There 
is a manual mechanism that is being investigated 
as a temporary measure to control access at the 
stations during 2010 at some stations." (our 
emphasis).

17.7. On or about 24 February 2010, Ms Erica Khumalo on behalf of Mr Gantsho sent another email with an accompanying letter dated 23 February 2010 to Mr Montana. A copy of the email is attached as annexure "FA9". In the letter, and despite the contents of the abovementioned report, Mr Gantsho requested formal authorisation to appoint Siyangena to "get the gates installed for [the] remaining WC2010 stations" ("the extended pilot project"). I mention the following peculiar aspects of his letter:

17.7.1. Mr Gantsho refers to a telephonic discussion with Mr Montana during which Mr Montana advised him to contract with Siyangena for the extension on the basis that Siyangena was contracted and installing similar systems at Nasrec and Doornfontein stations under the Intersite contract.

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- 17.7.3. Mr Gantsho required formal authorisation because the appointment would have to be attended to by the SCM department, would proceed prior to the availability of funding, PRASA was engaged in a cost containment process and there was sensitivity within PRASA to projects being run without authorisation.
- 17.8. On or about 15 March 2010, Mr Gantsho informed Mr Montana that he was proceeding with the preparation for the installation of the speed gates and CCTV cameras. A copy of the email is attached as annexure "FA10". Mr Gantsho stated in the email that the decision to proceed had been taken due to the limited time available to complete the installation and to put the gates and cameras into operation prior to the 2010 World Cup.
- 17.9. Mr Gantsho advised Mr Montana that he had, in the meantime, instructed Siyangena, to consider how the speed gates and CCTV cameras could be installed in the remaining seven (7) world cup stations and what would be required. Mr Gantsho advised that Siyangena required that PRASA make the

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following commitments in order to proceed with the project: the formal appointment of Siyangena, finalising the funding issue, and crafting a way forward in respect of all other PRASA stations for purposes of standardisation and uniformity.

- 17.10. On 16 March 2010, Ms Siphokazi Vanda, Mr Montana's secretary, sent an email to Mr Gantsho. A copy of the email is attached as annexure "FA11". A motivation and recommendation report signed by Mr Gantsho was attached. The report is also signed by Mr Montana. The report motivates the extension of Siyangena's appointment in respect of the seven remaining world cup stations and states that:
  - 17.10.1. The purpose of the report was to obtain approval to engage, with the intention to appoint, a supplier of speed gates and CCTV equipment for the FIFA World Cup related projects.
  - 17.10.2. A new and efficient method of access control and surveillance system had been initiated and installed at two PRASA stations, namely Doornfontein and Nasrec.
  - 17.10.3. SCM had expressed the view that would await a written instruction from the GCEO before advising on the appropriate procurement process or any further involvement. SCM was not supportive of the action to approach a supplier.

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- 17.10.5. Siyangena confirmed during discussions, that the first batch of equipment could be delivered by 14 March 2010, the last station could be completed by 4 June 2010 and the price would be the same as the price tendered for the Nasrec and Doornfontein stations.
- 17.10.6. Siyangena had offered, due to the cash flow constraints being experienced by PRASA, to fund the total scope for the remaining stations in an amount of R62 million.
- 17.10.7. Accordingly, PRASA would not be required to release capital in order to implement the project and the available budget (approximately R5 million) for the two stations could then be used elsewhere.
- 17.10.8. Mr Gantsho sought approval to engage SCM to formalise the procurement process, to issue a letter of intent to Siyangena to proceed, to base the contract on the existing contract with Intersite, for

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the GCFO to consider the funding proposal by Siyangena and advise, and to appoint Siyangena (referred to as ESS) as the preferred bidder.

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- 17.11. Mr Montana approved the recommendation with the following comment: "It is important that finance is engaged to determine availability of capex funding prior to accepting the funding proposal from the supplier. However, in the absence of such funding, GCFO to advise accordingly." (our emphasis).
- 17.12. On 17 March 2010, Siyangena submitted a written proposal (dated 18 March 2010) to Mr Gantsho for the extension of tender no SG/GATES/003/2009. A copy of the proposal is attached as annexure "FA12". In terms of the proposal, Siyangena would supply, maintain and guarantee the CCTV cameras, access control equipment and access gates at the following stations: Rhodesfield, Orlando, Cape Town, Windermere, Langa, Moses Mabhida, Bridge City, Nasrec and the new Doornfontein stations.

17.13. In terms of the proposal, the total tendered amount, excluding the extended warranties and maintenance, was R90 931 181.14, the commitments in the proposal were subject to negotiation which would provide clarification and, if necessary, adjustments and the financial conditions would be finalised upon award and final negotiations. Siyangena suggested that an appointment letter be issued as soon as possible and by not later than 19 March 2010.

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- 17.14. On 17 March 2010, Mr Gantsho sent an email to Mr Piet Sebola, Senior Manager: Projects, Mr Themba Camane, Executive Manager: Side Projects, and Ms Zoliswe Copiso: Procurement, Mr Michael Baloyi, Facilities Management, and Mr Sydney Khuzwayo Procurement. A copy of the email is attached as annexure "FA13".
- 17.15. The email contained the proposal from Siyangena and the signed motivation and recommendation report. In the email, Mr Gantsho proposed that:
  - 17.15.1. The finance department advise on whether funding was available and if it was unavailable what could be done taking into consideration the funding options presented by the supplier.
  - 17.15.2. The infrastructure department submit a request to the CTPC for *confinement* to the supplier after the funding was secured.
  - 17.15.3. The legal and compliance department clarify the contractual issues if confinement was approved.
  - 17.15.4. The SCM committee issue a letter of intent or appointment after following the prescribed due process.

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- 17.16. On 25 March 2010, Mr Sebola sent a letter to Mr Gantsho. A copy of the letter is attached as annexure "FA14". In the letter, Mr Sebola raised a number of concerns regarding the financing of the project. Mr Sebola wrote *inter alia* that:
  - 17.16.1. The submission from Siyangena reflected a contract price of R90 million, in contrast to the R62 million reflected in the motivation and recommendation report signed by the GCEO.
  - 17.16.2. Siyangena was not CIDB certified and accordingly the appointment of Siyangena would not comply with basic prerequisites.
  - 17.16.3. Siyangena did not have PSIRA clearance as required for suppliers of security solutions.
  - 17.16.4. There had been no business case or options analysis done for the Integrated Security Access and Management System ("ISAMS") proposed or offered by Siyangena.
  - 17.16.5. The funding model had to follow strict Treasury
    Public Private Partnership ("PPP") processes.
    The funding model had to be clarified as a costbenefit analysis had not been conducted in
    order to contrast the funding model to the

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traditional procurement route of outright 50 purchase.

- 17.16.6. There had been no strategy or implementation plan.
- 17.16.7. The CTPC had not been engaged.
- 17.17. The concerns raised by Mr Sebola were directed at the lawfulness of the procurement process. Those concerns should have been addressed. However, as demonstrated below, those concerns were simply ignored.
- 17.18. On or about 30 March 2010, Mr Gantsho responded to Mr Sebola. A copy of the response is attached as annexure "FA15". Mr Gantsho provided *inter alia* the following response:
  - 17.18.1. Mr Gantsho attempted to explain the difference in pricing by saying that the submission to the finance department was informed by the latest survey and confirmed by Siyangena, whereas the figures submitted to the GCEO were informed by the original survey conducted at the project inception in 2009.
  - 17.18.2. Mr Gantsho conceded that no project plan or process was in place. However, Mr Gantsho purported to explain that this was the project

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that was put on hold due to an escalation in construction costs which led to budgetary constraints. Mr Gantsho stated that the plan was to include the remaining 2010 World Cup stations in a national project for key stations in the coming financial years, which would require a thorough project scoping and business case.

- 17.18.3. In regard to the funding model, Mr Gantsho simply stated that the proposal was based on the (un)availability of funds.
- 17.18.4. Mr Gantsho conceded that no in-depth analysis had been conducted. However, Mr Gantsho said that this was due to the urgency of the project.
- 17.18.5. Mr Gantsho offered as a form of analysis that the funding model should be considered because: i) It would present a training period for the operators.; ii) if there were any breakdowns or emergency repairs required during the period, Siyangena would be responsible; and iii) no capital would be required from PRASA. The traditional option required funding to be readily available, and staff availability for operation and maintenance would have to be guaranteed.

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17.18.6. In regard to the remaining points of concern, Mr
Gantsho noted that the directive from the GCEO
was based on the fact that Siyangena had
conducted business with PRASA in the recent
past. It was therefore assumed that all company
vetting and checking had been done prior to
Intersite awarding work on the first contract and
the recommendation was informed by this
assumption.

- 17.19. On or about 12 April 2010, Ms Sindi Mabaso-Koyana, the GCFO at the time, sent an email to Mr Sebola. A copy of the email is attached as annexure "FA16". The email informed Mr Sebola that the executive committee had decided that the project would be implemented at Intersite. In other words, Mr Sebola would no longer be involved.
- 17.20. Mr Gantsho nevertheless continued to be intimately involved, and the matter was not handled by Intersite, but by PRASA Cres. on behalf of Intersite, as indicated by certain email correspondence transmitted after 12 April 2010. Copies of which are attached as annexures "FA17" and "FA18".
- 17.21. On 24 April 2010, Mr Sindane addressed a report to Mr Khulu Mchuba, the general manager of procurement at Intersite. A copy of the report is attached as annexure "FA19". In the report, Mr Sindane requested approval of the recommendation that the existing contract with Siyangena be extended to the

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additional five stations. Mr Sindane was either unaware or did not appreciate that no contract existed between Intersite and Siyangena. As stated above, Siyangena was a subcontractor and accordingly, there was no contract that could be extended.

- 17.22. Mr Sindane stated further that a request had been received from Mr Montana and Mr Gantsho for Intersite, "to assist with the implementation of the speed stiles and CCTV". Mr Sindane stated further that the infrastructure department had indicated that an amount of R62 million (excl. VAT) had been motivated to the GCFO, and the total of R70, 455,946.17 (which he said was within budget) could still be negotiated further based on bulk procurement.
- 17.23. On or about 28 April 2010, Mr Mchuba responded in an email to Mr Sindane. A copy of the email is attached as annexure "FA20". In the email, Mr Mchuba raised a number of concerns, including the fact that he, "couldn't pick-up anything confirming funds availability", and in terms of the delegation of authority, the authority to grant the approval sought fell with the board of control. Mr Mchuba was, in effect, informing Sindane that he could not grant the approval requested by Sindane.
- 17.24. On or about 30 April 2010, Mr Sindane sent an email to Mr Camane, Executive Manager: Side Projects at Intersite. A copy of the email is attached as annexure "FA21". Mr Sindane attached to the email an amended version of the motivation report. The report had been amended to delete the reference

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to the request by Mr Montana and Mr Gantsho that Intersite assist with implementation of the project.

17.25. On or about 30 April 2010, Intersite appointed Siyangena for an additional five stations at the tender price of R61, 803,461.55 (excl. VAT). The letter of appointment was signed by Mr Cromet Molepo, the CEO of Intersite. A copy of the letter is attached as annexure "FA22". In the letter it is stated that a formal contract containing the conditions of Siyangena's appointment would be provided in due course. A contract was never concluded between Siyangena and Intersite or PRASA.

## 18. The Phase 1 Tender

- 18.1. The phase 1 tender was initiated by Siyangena.
- 18.2. On 28 October 2010, Mr Chris Metelerkamp, the marketing director of ESS, sent an email to Mr Ferreira. A copy of the email is attached as annexure "FA23". The email simply says, "Boss Opportunity 2".
- 18.3. On 30 October 2010, Mr Ferreira sent an email to Mr Gantsho.

  A copy of the email is attached as anenxure "FA24". Mr

  Ferreira says, "Attached please find the design and bill of quantities for Athlone and Heideveld stations which we took the liberty of designing with Reggie from Cape Town." The works under the phase 1 tender included the Athlone station and the

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bill of quantities provided by Mr Ferreira is almost identical to the bills of quantities provided to the potential bidders.

- Mr Ferreira proceeded to say, "Could we please have a meeting to discuss if we could extend the current contract to include these stations or what should we do." The current contract was the extended pilot project referred to above.
- 18.5. The procurement policy prohibits the consideration of unsolicited bids, unless approved for consideration by the GCEO. The GCEO has to take prescribed factors into account in approving the unsolicited bid for consideration. None of the factors applied to this unsolicited approach from Siyangena. [In any event the GCEO was not approached for approval.]

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- 18.6. The phase 1 tender expanded the installation of ISAMS to sixty two (62) stations located in [KwaZulu-Natal, Western Cape and Gauteng Provinces]. The contract price for sixty two (62) stations was R1, 959,642,353.00 (including VAT). The average cost per station under the pilot project was approximately R2.5 million and under the extended pilot project was R12.4 million. The average cost per station in phase 1 ballooned to approximately R31.5 million.
- 18.7. The most immediate reason for the modernisation of the stations was for the purposes of the FIFA 2010 Soccer World Cup, without consideration of whether each of the components of those projects were required by PRASA.

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- 18.8. In taking a decision to expand the ISAMS project, PRASA ought to have satisfied itself that the ISAMS was an efficient and cost effective means of investing in modern rail technology. The person accountable for the investigation was the GCEO and the responsible persons were the GCFO and GE: SAD.
- 18.9. I have caused a search to be conducted of PRASA's records by FACTS Consulting and they were unable to find a report or similar documentation evidencing any consideration of whether the investment in relation to the ISAMS that were installed as part of the phase 1 tender was efficient and cost effective. The GE:SAD, Mr Dries van der Walt, confirms that he was not involved in such an investigation. A confirmatory affidavit by Mr vd Walt is attached as annexure "FA25".
- 18.10. I nevertheless accept that aspects of the ISAMS may constitute an efficient and cost effective means of investing in modern rail technology. However, the ISAMS as a whole do not for the reasons stated below.
- 18.11. If the investigation had revealed that the ISAMS sought to be installed or components thereof were efficient and cost effective, the initiation of the project constituted a decision on a strategic capital investment and required capital expenditure for which the board was accountable, the GCEO was responsible and the GCFO and the EXCO were required to be consulted. The board was responsible for the approval of the

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budget and was required to consult the GCEO and GCFO. The minister of transport was accountable for the budget.

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- 18.12. PRASA would, in essence, request permission from the DoT to invest an amount in the ISAMS and request that the investment be included in its budget. The investment would be motivated to the board and incorporated in the medium term expenditure allocation and a corporate plan submitted to the DoT and treasury. If the investment was approved, PRASA would receive an allocation letter incorporating the amount. The EPMO then issues the MTEF that details how the funds are to be allocated across the various capital projects and operations of PRASA. The board approves the MTEF. This allocation of funds is referred to as the budget for the projects referred to in the MTEF. The process culminating in the MTEF commences in about June and is finalised in about November of each year.
- 18.13. The phase 1 tender commenced in 2010 and accordingly the budget for the project should have been incorporated, at the latest, in the 2010/2011 MTEF. The 2010/2011 MTEF contains no allocation for phase 1. A copy of the 2010/2011 MTEF is attached as annexure "FA26".
- The earliest allocation is contained in the 2011/2012 MTEF. A copy of the 2011/2012 MTEF is attached as annexure "FA27".
  The 2011/2012 apportioned R317, 300,000.00 over the 3 year MTEF period.

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- 18.15. In addition, the phase 1 tender constituted a mega project, as defined in the National Treasury Guidelines attached as annexure "FA28", and a comprehensive appraisal was required to be conducted by the capital budgets committee ("the CBC"), a committee within national treasury, based on detailed information provided by PRASA.
- 18.16. I have caused a search to be conducted of PRASA's records by Mr Brian Alexander, General Manager responsible for Treasury at PRASA and FACTS Consulting, and no documents evidencing compliance with the guidelines could be found. His confirmatory affidavit is attached as "FA28.1".
- 18.17. The GCEO was accountable for the procurement once a decision to invest was made. The GCFO was responsible and the CPO and EXCO were required to be consulted.
- 18.18. An end-user within PRASA was required to be identified and a needs assessment should have been performed. The end-user and needs assessment should have focussed on *inter alia* budget availability and approval, the commodity required and possible alternatives, and the specifications.
- 18.19. The requirement for a needs assessment is of particular importance where PRASA already has the equipment or components of the equipment. PRASA already had equipment that provided security, and access and management control. The stations cannot be operated without such equipment.

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PRASA had, for example, closed circuit television, automatic gates control and fire detection systems.

- 18.20. I have caused a search to be conducted of PRASA's records by FACTS Consulting and they were unable to find any identification of an end-user or needs assessment.
- 18.21. PRASA, and the South African Rail Commuter Corporation ("SARCC"), on a general level, considered an automated access control and fare collection system ("AAFC") to provide a solution to meet a need. The need was to increase the rate of fare collection and improve the ease of movement into and from the stations which should lead to higher volumes, provide a safer environment and improve the customer experience, and limit costs. The objective was to realise sustainable, financial viability in order to limit reliance on state subsidies.
- The system would be most beneficial at stations where there were high volumes. The system is not needed in every station.
  It was not implemented prior to 2009 because of funding restraints and it was not considered to be a priority.

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18.23. In order to address this need PRASA undertook a station modernisation programme which sought to implement modern operating systems. The systems included, *inter alia*, traffic control systems, speed gates, ticketing systems and telecommunications systems. The name, Integrated Security and Access Management System (ISAMS), was a name for a

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suite of these systems. In order to contribute to addressing the need, the ISAMS needed to be a integrated, functioning system.

- 18.24. However, the ISAMS installed in the stations as a result of the tenders under review did not provide an operational AAFC system, [included equipment that did not serve this need] and was installed without regard to where the system was needed. Despite the installation of the ISAMS, the stations are still not equipped with an operating AAFC.
- 18.25. A risk of installing a system that was not integrated was that the system or components of the system would become redundant. Accordingly, the technical specifications should provide an interface for the ISAMS components. In addition, the individual components had to provide adequate performance in order to realise the need.
- 18.26. SCM should have prepared the RFP and managed and coordinated the procurement process. The CPO was responsible
  and required to manage the SCM function. In particular, SCM
  should have initiated and managed the CFSC. The end-user
  should have been consulted on the appointment of the CFSC.
  The CFSC was responsible for *inter alia* designing and
  checking the specifications against the procurement policy.
  The CFSC should have included two specialists.

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18.27. There are inefficiencies or indequacies in the specifications 6.1 that a needs assessment and a properly constituted CFSC would have avoided.

## 18.28. For example:

- 18.28.1. The speed gates are not integrated into an automated fare collection system. The speed gates are said to be capable of being adapted to operate in such a system. The speed gates are described as "future ready". The AFCC system is unavailable and will be unavailable to PRASA for the foreseeable future and, by the time the system is incorporated into such a system, the equipment may be redundant or inadequate and unable to adapt to the AFCC system. Accordingly, the investment in the access gates component of the ISAMS was premature if not integrated with a ticketing system..
- 18.28.2. A central component in an AFCC system, is a ticket reader. The access gates provided in the ISAMS are not installed with ticket readers.
- 18.28.3. The specifications state as follows:

"Turnstiles of the type EASYGATE are devices that enable the controlling and

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checking [of] the passing of people and are used to separate freely accessible areas and areas that are accessible only for persons with valid tickets." (page 2); and

"Any type of sensors on the magnetic card, contact chipped card, no-contact chipped card, biometric sensors, etc. can be connected to the turnstile as a means of identification of the passing person". (page 9).

- 18.28.4. The specification was deficient in that it failed to specify equipment that would enable the purpose of the access gates and provide for sensors to be connected to the access gate.
- 18.28.5. The gates should reduce the need for personnel to be present at the gates, if properly specified.

  PRASA accordingly reduced or redeployed staff employed at the gates. PRASA did not budget for staff to monitor the gates. The access gates, as specified, result in an increase in costs, as personnel are required to be present at the access gates as the gates do not function as an automatic system.

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- 18.28.6. In addition, PRASA will have to purchase new spares to repair and replace the components that are broken, stolen and vandalised prior to the installation of an AFCC system.
- 18.28.7. In the circumstances, the ISAMS as specified does not address the comprehensive needs of PRASA as required from an automated access control system.
- 18.29. In proof of the above, a confirmatory affidavit by Mr van der Walt, GE:SAD, is attached as annexure "FA25" above.

## 18.30. In addition:

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- 18.30.1. The Railcom communication system was specified to provide the automatic passenger information system ("APIS") with the information on train movements. The Railcom system communicates across railroad tracks using a serial protocol.
- 18.30.2. The RAILCOM system was not the most cost efficient nor modern system available. The Railcom system was already outdated in 2010 as Railcom+ was released in 2010, which was a superior system. The specification of Railcom when Railcom+ was available, is analogous to specifying a dial-up modem when ADSL is available. In

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addition, there were other systems available from other suppliers that were significantly more advanced than Railcom.

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- 18.30.3. The technical specifications stipulate that Dallmeier equipment is required to provide the digital interface to APIS. The Dallmeier system is an expensive system in comparison to other equipment. The Dallmeier cameras cost more to install and the recorders are higher priced in contrast to others in the market.
- 18.30.4. Furthermore, due to the limited capabilities of the cameras, more cameras are required in every area to perform the required function.
- 18.30.5. The access control system supplied by Siyangena is called Babylon which is manufactured by Autec, a German company. Babylon is an expensive system which is cumbersome and expensive to maintain.
- 18.30.6. The Babylon system is no more stable and does not offer greater functionality than other, more cost effective solutions. There are local South African solutions that are considered equal, if not better.

  One such solution is called Impro which is utilised by a large number of state departments. Another

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solution is Saflec which is utilised by Vodacom country wide. Both of those solutions are more cost effective and do not attract exchange rate risks.

- 18.30.7. The specified systems were not competitively priced and did not provide the necessary or latest technology. The acquisition of those system was not in accordance with PRASA's mandate to make efficient and cost effective investments in modern rail technology.
- 18.31. In support of the above, I attach the confirmatory affidavit of Anton Adlam, an Engineer in the employ of Secelec Consulting Engineers (Pty) Ltd as annexure "FA28.2"

- 18.32. I have caused a search to be conducted of PRASA's records by FACTS Consulting and they were unable to find any consultation on or appointment of a CFSC. The SCM and CPO accordingly failed to comply with their responsibilities. The reason for their failure appears from the email exchange below between Mr Chris Mbatha, the Group CPO, and Gantsho.
- 18.33. On or about 20 October 2010, Mr Mbatha sent an email to Mr Mchuba and Mr Gantsho requesting all information, including all specifications, on the "2010 stations". A copy of the email is attached as annexure "FA29". Mr Mbatha also requested information on all tenderers and briefing information in order to prepare for the second phase of the project.

to Mr Mbatha. A copy the response is attached as annexure "FA30". Mr Gantsho explained in his email that due to time constraints, a decision had been taken to "piggy back" on the existing contract that had been concluded and was founded on the procurement process followed by Intersite. Mr Gantsho

stated that a motivation in the form of a business case had

been prepared in an endeavour to standardise PRASA

infrastructure and facilities across all networks.

18.35. As a result, a CFSC was not appointed and the ISAMS was neither designed nor checked by competent specialists to determine whether it suited PRASA and complied with the procurement policy, and a RFP was not prepared by SCM.

18.36. The business case to which Mr Gantsho refers would have had to be prepared in June 2009. The business case provided the motivation to the EPMO. Mr Gantsho was interviewed by PRASA's attorneys. Mr Corlett Manaka and Ms Sarah Moerane attended the meeting. Mr Gantsho was asked to produce all relevant documents and particularly documents that were relevant to the ISAMS project. Mr Gantsho has not produced the business case referred to in the email above or indicated where it can be found. I have caused a search to be conducted of PRASA's records by Mr Brian Alexander for the business case, and no such document could be found.

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Confirmatory affidavits by Mr Manaka and Ms Moerane are attached as annexures "FA31" and "FA32".

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- 18.37. The statement by Mr Gantsho that there were "time constraints" was misleading. The time constraints that applied to the pilot project and extension, did not apply to the phase 1 tender. The work in relation to the phase 1 tender only commenced in June 2011.
- 18.38. Mr Gantsho does not indicate who took the decision to "piggy back" on the existing contract. In the context of the mater, I have difficulty in understanding what decision Mr Gantsho is suggesting was taken.
- 18.39. The existing contract to which Mr Gantsho referred, was the contract between PRASA and Siyangena to extend the pilot project to five additional stations. There was no procurement process and, in any event, any decision to take advantage of and use that project as a basis or support for a project that involved the installation of ISAMS in sixty two other stations would have been irrational.
- 18.40. I have dealt with the procurement process followed at Intersite in relation to the initial pilot project above. The process that was adopted was an open tender. However, as demonstrated below, the procurement process in the phase 1 tender was restricted to only a few potential bidders.

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- 18.41. I presume that Mr Gantsho intended to restrict the competitive bidding procurement process to a few potential bidders. The restriction of the competitive bidding process is only permitted in the limited circumstances or subject to the limitations provided for in paragraph 11.2 of the procurement policy. None of which apply to the phase 1 extension. The taking of such decision would have been extraordinary and require board approval. There is nothing to suggest that such a decision was ever taken.
- 18.42. The restriction of the competitive bidding process was entirely inappropriate for the extension of the ISAMS to sixty two stations.
- 18.43. In embarking on the procurement process, PRASA was required to comply with section 51 of the PFMA. In particular, maintaining a procurement system that was fair, equitable, competitive and cost-effective, and capable of preventing irregular, fruitless and wasteful expenditure, and losses resulting from criminal conduct.
- 18.44. The delegation of the authority and procurement policy established a general duty to develop and maintain a competitive and cost effective procurement system, guard against favouritism, improper practices and opportunities for fraud and corruption, and contain or reduce costs to PRASA. In particular, a competitive bidding process was required when the estimated total value was more than R350 thousand.

18.45. If a decision was made to extend the ISAMS to sixty two stations, it must have been contemplated that the estimated total value would exceed R350 thousand. The two pilot stations had a total value of approximately R6million and the expansion to five additional stations was valued at approximately R62million, being an average of R12.4million per station. Accordingly, a competitive bid process should have been adopted.

In the ordinary course, a competitive process would entail the advertising of an invitation to tender. The invitation would be published in two national and two local newspapers. The invitation would contain a description of the projection, invite interested persons to tender and inform them where the RFP could be collected. The invitation to tender and RFP would be prepared by SCM. In this matter, SCM was not involved, save to the limited extent below, there was no RFP and the invitation was confined to a select few.

18.47. In the ordinary course, the RFP was required to contain at least the bid conditions, specifications, data sheets, drawing, an invitation to bid, a pricing schedule, preference claim forms, tax clearance certificate, declaration of interest, declaration of past compliance with supply chain management practices, the general conditions of contract, a specific contract agreement stipulating delivery standards and requirements, and any specific conditions applicable to the service or product.

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18.48. An open tender process was not adopted and instead a restricted process was followed.

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- 18.49. On 4 November 2010, Ms Matshidiso Mosholi, a manager: procurement, in SCM sent an email to Siyangena at the address <a href="mailto:josedeo@engsys.co.za">josedeo@engsys.co.za</a>. A copy of the email is attached as annexure "FA33". Ms Mosholi refers to an attached invitation for consideration. The attachment is described as a "Turnstiles letter.doc". The attachment invited the tenderers to a closed briefing session on 8 November 2010 at 11h00.
- 18.50. The invitation was also sent to BT-SA, Omega Fire and Security CC, Protea Coin Group (Pty) Ltd, Turnstar Systems (Pty) Ltd, and Marothi-KgT Consortium.
- Mr Jose de Oliveira responded by email on 5 November 2010.

  Mr de Oliveira attached to his email a letter from Siyangena.

  The letter is under the name of Mr de Oliveira in his capacity as the technical director of Siyangena. The letter refers to the invitation for the supply, installation and commissioning of access gates. The letter informs PRASA that Mr P Reddy and Mr C Metelerkamp will attend the meeting on 8 November 2010 at 11h00. Copies of the letter and covering email from de Oliveira are attached as annexure "FA34"
- 18.52. On 5 November 2010, Ms Mosholi sent another email to which was attached a "Turnstiles letter doc". A copy of the email is

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attached as annexure "FA35". In the email, Ms Mosholi informed the recipients that the briefing had been changed to 13h00. The attached document was a copy of the invitation referred to above, other than the time of the meeting was stated as 13h00.

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18.54. The invitation referenced the pilot project for Doornfontein and Nasrec, and referred to the supply and installation of access gates (speedstiles). The letter does not refer to a RFP.

18.55. Ms Mosholi was asked by Mr Mbatha to prepare the letter and to send it to the bidders who submitted bids on the pilot project.

Ms Mosholi understood that the phase 1 tender was merely a reinstitution of a previous, suspended tender, which explained the reason why there was no CFSC and no RFP and caused her not to question their absence. Ms Mosholi could not recall what led her to this understanding, other than the unusual process that was adopted. A confirmatory affidavit by Ms Mosholi is attached as annexure "FA36"

- 18.56. Phumelela Ballustrades was not invited to the briefing session, despite submitting a bid on the pilot project as a subcontractor to the project for the Nasrec station.
- 18.57. The briefing session was held on 8 November 2010 at PRASA's offices in Johannesburg. The briefing was attended

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by Mr Mbatha, Mr Gantsho and Mr Mdluli. No documents were provided to the bidders at the briefing session. In particular there was no RFP. The bidders were told that the tender was, in effect, a reinstitution of a previous, suspended tender. A confirmatory affidavit by Mr Mdluli is attached as annexure "FA37"

18.58. On 9 November 2010, Ms Maryna Lottriet from Protea Coin, sent an email to Ms Mosholi. A copy is attached as annexure "FA38". In the email, Ms Lottriet refers to the "briefing yesterday" and says, "the gentleman that did the presentation said that he would send us all the necessary information to enable us to do the Tender. ... Please see what you can do to organize the necessary documentation." Marothi sent a similar email, requesting "a tender document after the briefing session".

18.59.

Ms Mosholi wrote an email to the invitees on 9 November 2010. Mr de Oliveira had been removed from the addresses and Reddy and Metelerkamp included at the addresses reddy@siyangena.co.za and chrism@ess.co.za. Ms Mosholi attached to the email, "information as promised" and undertook to send additional information. The information provided was the technical specifications for passenger access gates at selected stations, referred to in the heading of the email as speed stiles specification requirements 08-11-2010, a section of a bills of quantities for a typical large station, referred in the heading as typical large station and a spreadsheet reflecting

the number of small, medium and large stations in the different provinces, referred to as Station Categories 09-11-2010.

Copies of the email and attachments are attached as annexure "FA39"

- 18.60. The documents referred to above were provided by Mr Gantsho. Mr Metelerkamp complained about the state of the documents on 9 November 2010. Ms Mosholi informed him that the project manager would be asked to look into the problem. Ms Mosholi then sent the complaints to Mr Gantsho. Copies of the relevant emails are attached as a bundle of emails as annexures "FA40.1" to "FA40.5".
- 18.61. On 10 November 2010, Mosholi sent the (2008) draft SARCC specifications attached as annexure "FA41" to the invitees mentioned above. The document was provided by Mr Gantsho under cover of an email in which he said that the specification, "is for reference purposes. The one on PRASA letter head is spec for equipment already installed." It is unclear to me how the earlier document was intended to be used for reference purposes.
- 18.62. The equipment to which Mr Gantsho referred, was installed by Siyangena. Mr Gantsho was in effect asking the invitees to provide equipment that meets the specifications of the equipment installed by Siyangena.

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18.63. Mr Metelerkamp had also requested a copy of the specifications for the integrated communication system (ICS) (see annexure "FA40.2"). Mosholi sent the request to Mr Gantsho. Mr Gantsho replied to say *inter alia* that, "[o]n the issue of ICS, I feel there is no need for them to have specification of ICS as we are not asking for them to supply that." This statement proves that were was no appreciation or planning for the needs of PRASA.

18.64. On 10 November 2010, Ms Mosholi responded to Siyangena and the other invitees. Ms Mosholi repeated Gantsho's statement to the effect that the specification of ICS was irrelevant to the work. A copy of the email is attached as annexure "FA42".

18.65. Mr Reddy replied to say, "in your Bill of Quantities for a Typical Large Station, you request a price for the CCTV, the Access Control, Fire Detection, Passenger Information display etc. which jointly makes up the Information Communication System (ICS). Therefore, we require the specification for the ICS system, to enable us to give you an overall complete quote."

Mr Reddy also requested, pursuant to a discussion between Ms Mosholi and "our CEO", which presumably is a reference to Mr Ferreira, bills of quantities for a typical medium and small station. A copy of this email is attached as annexure "FA43".

18.66. Ms Mosholi sent Reddy's email to Gantsho, who responded on11 November 2010. Gantsho provided information to Mosholi

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which Gantsho said was prepared by Intersite, except the "New Specification for ICS", which Gantsho said was the current system installed under the WC 2010 projects programme. Gantsho attached the aforementioned document and a specification referred to as "ICS New 1-11-2010.docx", and bills of quantities for small and medium stations. Gantsho informed Masholi that both specifications should be used in conjunction to extract the best benefit for PRASA. In my view, it is highly irregular to leave it to the bidders to extract the best benefit for PRASA and is a dereliction of the duties owed to PRASA. In particular, the obligation of SCM to prepare requests for proposals (RFPs) and initiate and manage CFSC which was responsible for designing and checking bid specifications and compiling bid documents. Copies of the email and attached documents are attached as annexure "FA44".

18.67. The bills of quantities for small and medium stations contained the information to which Reddy had referred in the email above. The attached specifications were the (2007) SARCC specification for passenger information and technical specifications for integrated communications systems. The latter document is newer than the first.

18.68. On 11 November 2010, Ms Mosholi sent the "revised documents" to the invitees, attached to an email in which Ms Mosholi repeated the statements made by Gantsho in the

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above email. A copy of the email is attached as annexure "FA45".

- 18.69. The documents sent to the invitees do not comply with the procurement policy. The bills of quantities specified the following brands: EasyGate (Speedstiles), Dallmeier (CCTV), Babylon (Access Control), AV Digital (Public Address), TOA (Public Address), Siemens (IP Help Point IP intercom), and Ziton/Aritech (smoke detection).
- 18.70. On 12 November 2010, Protea Coin Group requested an extension. The extension was refused. On 15 November 2010, in an email to Mr Gantsho, Ms Mosholi referred to another call regarding the extension. Mr Gantsho enquired whether the request was by the company that was asking for clarity for information. The call was from Mr Meterlerkamp at Siyangena. The extension was granted. Copies of the relevant emails are attached as annexure "FA46".
- 18.71. The tender closed on 17 November 2010. PRASA received bids from Siyangena, Protea Coin, Omega and Marothi-KGT consortium.
- 18.72. Siyangena tendered a contract price of R965, 304,413.71 (excl. VAT) for the outright purchase of the equipment required for the sixty two stations, and a financing proposal at a contract price of R1, 959,642,325.22 (excluding VAT). Siyangena's bid document is voluminous. In order to avoid undue prolixity I

have attached only the relevant parts of the bid as annexure "FA47". The entire document will be made available to the court at the hearing of the matter and a copy provided to the respondents on request.

- 18.73. Although SCM was required to check the bids for compliance with the critical requirements of the request for proposals, there is no record and Mosholi is unaware of a compliance check being performed. As stated above, there was no RFP and no critical criteria or returnable documents.
- 18.74. The BEC was required to evaluate the bids from a technical perspective. The BEC was required to be composed of specialists from the end-user and could co-opt independent experts to assist the committee in its function. The BEC was required to evaluate the bids according to the evaluation criteria stipulated in the bid document (the RFP). There was no RFP, no evaluation criteria and no experts on the committee.
- 18.75. The BEC members were appointed by Mr Mbatha on 23 November 2010. A copy of the appointment is attached as annexure "FA49". Mr Mbatha, Mr Maishe Bopape (the chairperson), Mr Michael Baloyi, Mr Albert Mdluli (who acted as Secretary of the BEC), Mr Sydney Khuzwayo and Mr Jabulani Sindane were appointed to the BEC to evaluate the phase 1 bids. None of them were experts. The BEC members met on 9 December 2010 at PRASA's offices in Braamfontein. The members received a briefing and signed a document

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headed, "ATTENDANCE REGISTER - INTEREST". The document has a column with the heading, "DECLARATION OF INTEREST". A copy of this document is attached as annexure "FA48".

- 18.76. On 10 December 2010, Mr Sindane sent an email to the other BEC members to which he attached various documents. A copy of the email is attached as annexure "FA49". Mr Sindane informed the BEC members that attached to the email was the information "discussed and promised yesterday." Mr Sindane stated that the first attachment was a typical station layout and technical requirements. The document is not a layout drawing but rather an organogram and schedule of the recommended equipment. The documents list specific brand names for the equipment.
- 18.77. Sindane provided tender evaluation criteria. The criteria includes a section on completeness of tenders. This usually refers to the mandatory requirements and documents that the bidders are typically required to return, which are referred to as returnable documents (and part of the critical criteria). Those requirements and documents must be specified in the RFP. There was no RFP and accordingly no mandatory requirements and returnables. The proposed criteria also included a cost evaluation. The cost evaluation was the tendered amount.

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- 18.78. Mr Sindane proposed the 90:10 preference point system, meaning that ten points would be allocated to B-BBEE. However, Mr Sindane proposed that the points would be distributed 50/40/10, meaning that fifty points would be allocated to quality and functionality, forty to tendered price and ten to B-BBEE. The allocation of ten points for B-BBEE and fifty points to quality and functionality should have been specified in the RFP.
- 18.79. Sindane also listed other documents that were required. The listed documents are often required to be submitted in response to PRASA tenders but are specified in the RFP.
- In addition, Mr Sindane provided a cost summary schedule to 18.80. be completed for each bidder, reflecting the price, and each component of the price, and a scorecard for the evaluation process. In regard to the technical evaluation in order to determine the total points for quality and functionality, the scorecard included points for: experience - similar scale projects, technical capability etc.; performance record references, reputation etc.; experience and competence of key staff - organisational capacity, skills, implementation structure etc.; proposed approach and methodology; performance on delivery period; safety; occupational health and enterprise; targeted labour and implementation of completeness of submission; and financial capacity. The scorecard had a section to provide for the points allocated to price and empowerment objectives.

- 18.81. The BEC met to evaluate the bids on 13 and 14 December 2010. The draft minutes of the BEC meeting were sent by email to the other members of the BEC by Mr Mdluli on 15 December 2010. The draft minutes were prepared from the minutes of another meeting. Copies of the email and the draft minutes reflecting the original, unaltered parts of the original document and the amendments are attached as annexure "FA50".
- 18.82. Mr Mdluli sent the final minutes to the members of the BEC on 21 December 2010. According to the metadata, the document was created on 21 December 2010. Copies of the email, final minutes and metadata are attached as annexure "FA51".
- 18.83. There is another version of the minutes of the BEC meeting which is materially different to the initial minutes. According to the metadata this version of the minutes was prepared by Mr Swanepoel. The file name and date on which the document was created are the same as the final minutes above. However, the date on which the document was last modified is 12 January 2011. There is no record of this document being sent to the members of the BEC. Copies of the email attaching these minutes and metadata are attached as annexure "FA52".
- 18.84. The material differences appear from a comparison of the documents. I deal with some of those material differences below. The material differences consist of additions to the initial minutes. The purpose of those additions was to supplement

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the initial minutes in material respects in order to conceal irregularities in the process.

- The purpose of the meeting is recorded in paragraph 2 of the minutes. According to the initial minutes, the purpose of the meeting was to determine, "the evaluation criteria and allocate weights." The supplemented minutes contain the following addition, "and members of the evaluation team declared that they had no interest or conflict of interest in any of the submissions/proposals submitted by the tenderers and signed the necessary Confidentiality Agreements."
- 18.86. A declaration of (the absence of) any interest is required by the procurement policy from *inter alia* the members of the BEC. The declaration by members of the BEC that evaluated the phase 1 tender was signed on 9 December 2010, not 13 Ddecember 2010 and no confidentiality agreements could be found by FACTS Consulting who were tasked with locating such documents. Those additions are wrong.

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18.87. The meeting was attended by all the members of the BEC and Mr Gantsho. Mr Gantsho should not have been present at the meeting. Mr Gantsho was nevertheless present on both days of the meeting. However, the presence of Mr Gantsho at the meeting is not recorded in any versions of the minutes. In fact, the minutes do not contain any reference to Mr Gantsho.

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- 18.88. The meeting commenced with a review of the project requirements. The review was presented by Mr Gantsho. The preference point system and evaluation criteria were developed with the assistance of Mr Gantsho.
- 18.89. As I have stated above, the preference point system and evaluation criteria should have been included in the RFP. In my view, it is manifestly unfair to determine the preference point system and evaluation criteria after the bids are submitted.
- 18.90. The minutes record further that, "Before the criteria could be determined members went through the technical specification to familiarise themselves with the scope of work and the requirements of the RFP." This statement is wrong. There was no RFP and no single technical specification. As indicated above, the specifications for the works were contained in various, contradictory documents. Those documents were not placed before the BEC. The BEC discussed the documents provided by Sindane on 10 December 2010. The document described as the technical specification was the organogram and schedule of the recommended equipment attached to Sindane's email.
- 18.91. Mr Khuzwayo was interviewed in my presence, both of them initially maintained that there was a RFP but later conceded that there was no RFP. Mr Mbatha was interviewed by Mr Jeremy Gobetz and Mr Fani Dingiswayo. Mr Mbatha too

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conceded that there was no RFP. The concessions were only made during the week commencing on 5 February 2018. Ms Mosholi said in the same period that she was unaware of a RFP and had always assumed that the RFP from the previous suspended tender applied. I have been involved in this matter since the latter part of 2015, and this was the first occasion on which I have heard employees state or accept that a RFP was not prepared. I was always led to believe that a RFP existed. I was led to this belief because the process required a RFP, a RFP was ordinarily prepared, and the relevant documents, such as the minutes of the BEC meeting, referred to the existence of a RFP. Notwithstanding the above concession, when I approached Mr Khuzwayo to provide a confirmatory affidavit, he was unwilling to do so. Confirmatory affidavits by Mr Khuzwayo, Mr Gobetz and Mr Dingiswayo are attached as annexures "FA54" and "FA55".

- 18.92. Mr Mbatha was previously interviewed by Mr Manaka and Ms

  Moerane and asked about the events in which he was involved.

  [Mr Mbatha claimed not to be able to remember anything about the preparation of the documents or the process.]
- 18.93. The BEC determined that the points would be distributed as 60/20/10/10, being that sixty points would be allocated to technical / functionality, twenty to tendered price, ten to B-BBEE and ten to a "Funding Model". In other words, the BEC allocated ten additional points for quality and functionality to the points recommended by Sindane, only half the points

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recommended by Sindane for the price, and ten points for a funding model, all of which favoured Siyangena. The allocation of ten points for B-BBEE, sixty points to quality and functionality and ten points for the funding model should have been specified in the RFP. The reason for not adopting the preference point system proposed by Sindane is not stated in

18.94. The minutes record that the members of the BEC referred to the preference point system as the "weights", which indicates that the members did not appreciate what was required of them in relation to the preference point allocation, evaluation criteria and weightings. The BEC did not allocate any weighting to the criteria, in the sense of allocating a specific weight to particular criteria to emphasise or prioritise those criteria.

the minutes.

- The supplemented minutes contain the following statement, 
  "[t]he following requirements were regarded as important subcriteria for the Technical Criteria: ...". The criteria that were 
  used to evaluate the bids are listed with weightings attached to 
  each listed item. Although the criteria were used, the 
  weightings are not mentioned and only mentioned for the first 
  time in the supplemented minutes referred to above (annexure 
  "FA52").
- 18.96. The supplemented minutes also contain the following, "the development of the evaluation criteria would be based on the Scope of Works as highlighted in the Request for Proposal

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- 18.97. A number of the the amendments to the supplemented minutes were introduced by Mr Bopape in an email sent to the other members of the BEC on 21 December 2010. A copy of the email is attached as annexure "FA56". In that email Mr Bopape said that, "[r]emember these documents are matters of record and they should be as clear as the sky can be and we should able to defend them should there be a need to."
- 18.98. The BEC did not adopt Sindane's cost summary schedule and scorecard for the evaluation process, or what was required for completeness and selected some of the documents listed by Sindane and used those as the technical evaluation criteria. The BEC used a scorecard that contained the following: previous experience and references, technical expertise, implementation plan, project schedule, health safety and environment including risk matrix, project methodology, availability of spares, maintenance and training.
- 18.99. The BEC decided to score the criteria as: non-compliant, partially compliant, compliant, good and excellent. If the notes resulting from the discussion of the BEC and the individual members' notes on the scoring sheets demonstrates that the BEC was simply assessing completeness of each bid and does

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not appear to have considered the technical capability or functionality of the equipment offered by each bidder.

- 18.100. The members of the BEC read the bids that were received, discussed their observations and then proceeded to score the bids.
- 18.101. As indicated above, the CFSC should have facilitated the allocation of evaluation criteria and weightings. The CFSC would have included experts to assist with *inter alia* this function. Instead the BEC, composed as it was by inexperts, performed this function. The criteria and the weighting of those criteria is, with respect to the persons involved, amateurish. The criteria do not provide the means to distinguish the bidders based on the performance of the equipment contained in the bids, which is the very purpose of a technical evaluation.
- 18.102. In my view, the general, rudimentary criteria simply permitted the members of the committee to express an unsubstantiated, inexpert opinion which rendered the evaluation of the bids arbitrary.
- 18.103. Siyangena was awarded the highest points by the BEC.
- 18.104. The initial minutes record in relation to Siyangena that, "this tenderer has excellent technical expertise, a clear project methodology ...". In the supplemented minutes after the words, "technical expertise", the following was added, "and met all our

technical requirements". The technical requirements of the bid were not established.

18.105. I respectfully submit that the procurement process and evaluation of the bids by the BEC contravened the PPPFA in that there was a failure to prepare an invitation to submit a tender in which the specific goals and criteria for which points were awarded were clearly specified, the BEC considered criteria that were not objective and failed to allocate a score of 90 points for price to the lowest acceptable tender; and incorrectly allocated points to the tenders. As a result, the decision was unlawful.

18.106. The BEC did not consider the price. The BEC was required by the PPPFA, but failed, to allocate a score of 90 points for price to the lowest acceptable tender, and allocate points to the other acceptable tenders that were higher in price on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender; and failed to award the tender to the tenderer who would have scored the highest points on such a system.

18.107. I understand the PPPFA to require at the time a technical / functional evaluation to be done separately from the 90:10 allocation for price and preference. In other words, a technical threshold should have been created and the bids assessed to determine whether the threshold is achieved. If so, those bids would proceed to the price / preference evaluation.

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nevertheless understand that there was a practice at the time to include the technical points in the preference point allocation system, as Sindane and the BEC attempted to do in their 50/40/10 and 60/20/10/10 allocations. However, that perverted the mandatory allocation of ninety (90) points for price and the meaning of acceptable tender.

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18.108. Although the BEC did not evaluate the price, there is a price evaluation document, a copy of which is attached as annexure "FA57". The document was prepared by Mr Mbatha on 31 January 2011, according to the metadata, and attached to an email sent by him to Mr Mdluli on 14 February 2011. Copies of the email and the metadata are attached as annexure "FA58". Protea Coin and Siyangena are the only bidders mentioned in the document. The others were not evaluated for price. Those bidders should not have been excluded as, in the absence of an RFP and clearly stated critical criteria, there was no basis on which to do so. There was also no technical threshold that would justify their exclusion. The tenderers were requested to price the bills of quantities, not achieve a technical threshold.

18.109.

Siyangena had the second highest price and Protea Coin had the lowest price. In the price evaluation document, Protea Coin was awarded twenty points (20) and Siyangena was awarded eleven point five (11.5). The prescribed formula was not applied.

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- 18.110. If both Protea Coin and Siyangena were technically sufficient,
  [as stated by the BEC], and therefore acceptable, and Omega
  and Marothi KgT were not and properly disqualified, an
  application of the prescribed formula would have resulted in
  Protea Coin receiving ninety (90) points for price, and
  Siyangena thirty eight point three (38.3) points for price.
- 18.111. If the prescribed formula was applied to all the bids, Protea Coin should have been awarded ninety (90) points, Marothi KgT eighty one point one seven (81.17) points, Siyangena, thirty eight point three (38.3) points and Omega, eleven point six (11.6) points.
- 18.112. Sindane's preference point system would have resulted in forty
  (40) points for Protea Coin, thirty six point zero eight (36.08)
  for Marothi KgT, seventeen point zero two (17.02) points for
  Siyangena, and five point one six (5.16) for Omega.
- 18.113. If the preference point allocation system used by the BEC is adopted and the other bidders were not disqualified, Protea Coin should have been awarded twenty (20) points and Siyangena, eight point five one (8.51) points. Omega and KgT would have been awarded two point five eight (2.58) and eighteen point zero four (18.04) if they were not disqualified.
- 18.114. In addition, there is no B-BBEE certificate in Siyangena's bid.
  Although there is a section for statutory documents in the bid,
  the subsection for the B-BBEE certificate is blank. If it was

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blank at the time of the evaluation of the bid, Siyangena should not have scored any points for transformation. In addition, as there is no indication of the requirements of the funding model, a meaningful evaluation and allocation of points could not be performed.

- 18.115. The proper application of points would have had a dramatic impact on the points allocation. If any system other than that adopted by the BEC was used, Siyangena would not have been allocated the most points.
- 18.116. The matter ought to have proceeded from the BEC to the CTPC. The CTPC should have made a recommendation to the GCEO. Siyangena's bid did not proceed directly to the CTPC and instead was diverted to Mr Montana.
- 18.117. On 24 December 2010, Mbatha sent an electronic mail to which Mr Gantsho replied. The members of BEC were included. Mr Gantsho was not a member of the BEC. Copies of the emails are attached as annexure "FA59". In the email, Mr Mbatha advised that the recommendation of the BEC to appoint Siyangena has been rejected by Mr Montana. Mr Mbatha wrote that, "[p]lease note that our recommendation to have Siyangena Technolgies appointed for this work has been rejected by the GCEO. In fact he expressed concern over a wide range of issues that we may need to go out on a complete new and open tender early in the newyear."

  Mr Gantsho replied that, "[d]o not be disappointed guys, I know

you put a lot of effort in this work. Chris, can you please forward me the recommendation you submitted to the Chief with his comments. It will help to get it right the second time around."

(The emphasis is mine.)

- 18.118. The reasons for Montana's rejection are not recorded. I have caused a search to be conducted of PRASA's records by FACTS Consulting for a report by Montana, and any other document in this period that records his reasons for rejecting the bid, and nothing could be found.
- 18.119. Siyangena's bid was nevertheless resurrected in 2011. The bid was not placed before a BEC and proceeded directly to the CTPC.
- 18.120. The CTPC was required to *inter alia* consider the procedure followed by SCM and the BEC, and taking into account substance and value for money, make a recommendation to the GCEO. The primary functions of the CTPC included reviewing deviations from normal bid procedures and informed the GCEO of events where the SCM policy was not followed and making recommendations to the GCEO. The CTPC could reserve a decision pending further information or clarification, approve or condone the employment of limited bidding in cases of emergency as per the delegation of authority.
- 18.121. The CTPC should have met on 7 February 2011 but was postponed due to an EXCO meeting on the same day. The

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- 18.122. On or about 11 February 2011, Mr Swanepoel sent an email to the members of the CTPC. A copy of the email is attached as annexure "FA61". In the email, Mr Swanepoel stated that the agenda was attached. The attached documents included the agenda, and a number of other documents. I have only included the relevant attachments in annexure "FA61". The phase 1 tender was not included in the attached agenda. The declaration of interest required members to declare any interest or relationship with any of the tenderers who have tendered in the agenda items.
- 18.123. On or about 11 February 2011, Mr Bopape sent an email to Mr Mdluli. A copy of the email is attached as annexure "FA62". Mr Bopape attached a document that he referred to as, "the evaluation matrix for the ICS tender."
- The CTPC meeting was held on or about 14 February 2011.

  The meeting was attended by Ms Tara Ngubane, Mr Mbatha,

  Mr Tiro Holele, Mr Ernst Swanepoel, Mr Daniel Mthimkhulu

  and Mr Swanepoel, who were members of the CTPC, and Mr

  Michael Baloyi was in attendance. The CTPC discussed the

  recommendation by the BEC to appoint Siyangena in the

  phase 1 tender. The CTPC was not informed of the rejection

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by the GCEO of the recommendation to appoint Siyangena as the preferred bidder. Confirmatory affidavits by Mr Holele, Mr Swanepoel and Mr Ernst Swanepoel are attached as annexures "FA63", "FA64" and "FA65"...

18.125. The CTPC had before it a report. The report is undated and provides no indication of its author. However, the recommendation in the report was made by the CPO. The CPO was Mr Mbatha. The recommendation was made to the GCEO. The report recommended the appointment of Siyangena as the preferred bidder. A few versions of the report exist. I refer to the different versions below. The development of the different versions demonstrates the manipulation of information by individuals within PRASA. The reports contain a number of misrepresentations. The report was severely criticised by the CTPC.

- 18.125.1. The draft report was first attached to an email sent by Mr Mdluli to Ms Connie Monkwe, the secretary to Mr Mbatha, on 9 February 2011. Copies of the email and draft report is attached as annexures "FA66".
  - 18.125.1.1. The draft report states that a confined tender was called among the four companies that initially responded. This statement is wrong.

- 18.125.1.2. The scope of work was copied from
  the supplemented minutes of the
  BEC (annexure "FA52" above).
- 18.125.1.3. The draft report represents that tenders were "issued / sold". This is wrong.
- 18.125.1.4. The draft report represents that parameters were provided for resource functionality and minimum technical requirements, and two bidders did not meet the technical requirements. Those statements are incorrect.
- 18.125.1.5. There is an elaborate section on the evaluation of B-BBEE. [The bids were not evaluated in this manner.]
- 18.125.1.6. It was stated in the draft report that the members of the CTPC support the recommendation, which is peculiar considering the fact that the CTPC had not met when the draft report was prepared.

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- 18.125.2. The draft report was incomplete in a number of respects and the missing information is requested.

  For example, the delivery period, the tendered price, the budget and the B-BBEE status of the recommended supplier. It seems reasonable to infer that this information was not available to Mr Mdluli.
- 18.125.3. I presume that the missing information was provided by Mr Mbatha and included in the document by Mr Mdluli because on 11 February 2011 another version of the report was attached to an email sent by Mr Mdluli to Mr Mbatha. Copies of the email and the report are attached as annexure "FA67".
  - 18.125.3.1. The delivery period is stated as five months and the tendered delivery period for both Siyangena and Protea Coin is stated as five months. Those statements are material misrepresentations. There was no requirement to complete in five months and neither Siyangena

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nor Protea Coin tendered to 96 complete in five months.

- 18.125.3.2. A comparative schedule is included setting out the total average score of each bidder.
- 18.125.3.3. The budget is stated as, "N/A".

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- 18.125.3.4. The report included a statement that, "NB: Funding model to be provided by preferred bidder." The inclusion of this requirement is a constant theme throughout the matter. The only bidder to provide a funding model was Siyangena.
- 18.125.3.5. An elaborate evaluation of the B-BBEE status of the recommended company is included. This evaluation was not done by the BEC and there was no B-BBEE certificate in Siyangena's bid. This information is in any event not contained in a typical B-BBEE certificate. The detailed information about the composition of Siyangena is either contrived or was obtained

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from Siyangena after the 9.7 submission and evaluation of the bids.

- 18.125.4. Another version of the document was sent by Mr Mdluli to Mr Mbatha on 11 February 2011. Copies of the email and the report are attached as annexures "FA68". The report was amended from a recommendation report to a, "SUBMISSION FOR ADJUDICATION", sought the approval of the CTPC and purported to be submitted by Messrs Sindane, Gantsho and Mbatha.
- 18.125.5. On 14 February 2011, an updated version of the report was attached to an email sent by Mr Mdluli to Ms Connie Monkwe. Copies of the email and report are attached as annexure "FA69".
- 18.125.6. The introduction included a paragraph in which it is stated that, "[t]he view was to have a sense of the total costs of the entire project so that a decision of financing, implementation and prioritisation could be made." This was an attempt to justify the reason for not implementing a public tender. The statement is an express acknowledgement that there was no budget and no needs assessment.

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18.125.7. The scope of work included an additional item being a "[l]ist of stations as per Annexure A." A list of stations was not attached to the draft report, the scope of work in the supplemented minutes of the BEC did not include a list of stations and the bidders were not requested to provide a list of stations. However, Siyangena had provided a list of stations in its bid.

18.125.8. The comparative schedule was amended to include the scoring for price. I have dealt with this aspect above.

18.125.9. In addition, the report included the following recommendation:

"It is further recommended that:

the quoted price be considered indicative subject to negotiations with the preferred bidder

SCM puts together a team inclusive of Technical, Legal and Finance to negotiate pricing, funding and implement-ation conditions."

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- 18.125.10. The statement is of particular importance in the context of the decision of the board, the purported resolution and signing of the agreement.
- 18.126. Another version of the document was sent by Mr Mdluli to Ms Monkwe on 14 February 2011. Copies of the email and the report are attached as annexures "FA70". The comparative schedule was amended to reintroduce Marothi KgT and Omega but no score for price.
- 18.127. Mr Swanepoel prepared the minutes the day after the CTPC meeting, i.e. on 15 February 2011. Mr Swanepoel prepared the minutes from handwritten notes that he had taken at the meeting, supplemented where necessary from the voice recording referred to below. Mr Swanepoel filed his notes of CTPC meetings in a file in his office. The file could not be found by either Mr Swanepoel or Ms Monkwe, the committee secretary, who were tasked with locating the file. A copy of the minutes are attached as annexure "FA71".
- 18.128. The minutes were circulated *via* email to the members of the CTPC on 17 February 2011. A copy of the email is attached as annexure "FA72". None of the members responded to the email, and there is no indication that any of them indicated that the minutes incorrectly recorded what occurred at the meeting or the resolution that was taken.

18.129. The meeting of the CTPC was recorded. The recording has been transcribed. A certificate of authentication is attached as annexure "FA73". The transcription is one hundred pages. In order to avoid undue prolixity, the whole of the transcription is not attached. I attach only the relevant parts as annexure "FA74". However, the entire transcription will be made available to the court at the hearing of the matter and provided to the respondents on request. The recording reveals that the minutes are in fact correct in that the CTPC did not approve the recommendation of the BEC. The CTPC resolved to send the matter back to SCM with questions from the members of the CTPC, and SCM would address those issues before resubmitting the matter to the CTPC.

18,130. The minutes record that the "CTPC could not support the recommendation" and identified issues that had to be "clarified/submitted". The most relevant of which are the absence of a list of stations at which the work would be performed, a breakdown of the total cost "which indicates the requirements and cost per station", the high recommended price and the fact that the "price difference between the various tenders is huge", the original cost of the pilot project stations, and confirmation that funds were available.

18.131. The transcript reflects that there was concern over a number of issues. For example, there was concern that:

18.131.1. The PFMA would be contravened.

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Tara Ngubane: "CIDB is not here in all these 1 1 1 things that I've mentioned here, there's BEE there's price there's funding, we are actually contravening the act." (page 38).

18.131.2. The price difference.

Tara Ngubane: "And also the price difference between the two, it's huge.."

Tara Ngubane: "..it's huge, four hundred million, something is just not right, it's either our scope was not clearly understood by the tenderers." (page 38).

18.131.3. The presence of the funding model evaluation criteria.

Tara Ngubane: "And then also did we request a funding model from the service providers?"

Tara Ngubane: "Ok how does that work because I don't understand it's just saying here funding model but we are not given the details of that" (page 38-39).

18.131.4. The absence of budget approval.

Tara Ngubane: "There's no funding model here, actually what you saying here there's you don't have a budget. We're sending this thing to the FCP and what we saying, we saying one point one billion, we saying budget not applicable" (page 68).

18.131.5. The restricting of the procurement process to only a few bidders.

Tiro Holele: "What was the difference between those original ones I mean the ones that you talking about what was the prices and how does the quantum percentage wise increase financially?"

Tiro Holele: "But my view is that it grows substantially in terms of the volume".

Tiro Holele: "No not only that, I'm asking like cause these ones, I mean the decision is based on the original (ten) stations".

Tiro Holele: "Now suddenly you move from those two to four hundred stations, it is so huge Chris can it be justified that you still go to a further four".

Tara Ngubane: "To further four".

Tiro Holele: "Cause then other people can make the investments required, I'm just asking process wise you know".

Tara Ngubane: "Another thing Chair maybe you need to get a bit of background on this thing. Firstly when Intersite went out on tender there were two, it was Doornfontein and Nasrec".

Tiro Holele: "Now you move from that".

Tara Ngubane: "Now you move, you still confine it, it doesn't matter because these guys you must remember the other guys were not invited for the other, so you basically from two you extend it to eight, the scope has (increased) vastly from the original".

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Tiro Holele: "From eight ......." (page 40-41).

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Tara Ngubane: "Ya but, but the thing is I don't know, but I, its going to be very difficult to sell this one to the board".

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Tara Ngubane: "Because the issue of the, the thing is, the the, this is where now because of you're saying the two, it was three point something million, and this thing was increased to sixty something million".

Ernst Swanepoel: "Sixty two".

Tara Ngubane: "That's a huge difference, and it just contravenes all together with any procurement process that you get".

Tiro Holele: "No actually, look but maybe for our purposes here we don't even worry with that".

Tara Ngubane: "Yes let's not worry and then now we looking at this one, you still confine it to the four why don't you just do an open".

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Tiro Holele: "... let's not go into the content, the 105 process must just be cleaned up. I don't look I don't know I mean I".

Tara Ngubane: "I think maybe, maybe we need to go out on tender on this thing honestly". (page 42-43).

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Ernst Swanepoel: "... I think an open tender would perhaps just get the real price from the real guy who actually (manufactures) that because everybody has some handling fee included in this".

## 18.131.6. The required scope of works

Michael Baloyi: "No it it, there was maybe just a bit, in terms of we are saying the speed gates but we are talking about access management".

Ernst Swanepoel: "Ya that's (the full lot) ya".

Michael Baloyi: "Yes access control and management, so your speed gates, your sliding gates they are linked, it's a complete system it's just that now we are focusing on the speed gates (but).."

Tiro Holele: "Maar Mr Baloyi, then your 106 (memo's) misleading".

Tara Ngubane: "But the scope of work is misleading because you've got other things that are listed there that's why we ask". (page 58).

- 18.132. There is another document which purports to be the minutes of the CTPC. This document is materially different from the above minutes. This document was not circulated to the members of the CTPC.
- 18.133. The document was nevertheless signed as the minutes of the meeting by the chairperson, Ms Ngubane, and Mr Swanepoel, who prepared the initial minutes, and inserted into the file used as a minute book. A copy of the document is attached as annexure "FA75".
- 18.134. The document is stamped, "14 February 2011", being the date of the meeting. However, the document did not exist on that date. Mr Swanepoel stated that he stamped minutes of meetings with the date of the meeting. The front cover of the document reflects that the minutes were signed only on 20 February 2012, more than a year after the meeting was held and the metadata reflects that the document was last modified on 16 April 2012. However, the minutes purport to have been signed by Ms Ngubane on 20 February 2011.

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- 18.135. Although the date on which the document was created is recorded in the metadata as 15 February 2011, I am advised by FACTS Consulting, the IT experts, that if the initial minutes were used to create this subsequent document, the date on which the initial minutes were created would be recorded as the relevant date for the document. The fact that the document was created after this date is confirmed by the fact that Mr Swanepoel emailed the initial minutes, not this document, to the members of the CTPC on 17 February 2011.
- 18.136. This version of the minutes records that, "[i]n view of the final decision being made by the FCIP, the CTPC recommended a clean-up of the following matters." The issues raised in the initial minute have been sanitised. For example, the reference to the high recommended price, the price difference being huge and the requirement for a breakdown which indicates the requirements per station have been removed.
- 18.137. The document purports to set out the resolution of the CTPC, and records that the CTPC "[c]oncurred with the recommendation to award 'business' to Siyangena in an amount of R1, 100,447,031.56 (incl. VAT), subject to support by the GCEO and approval by the FCIP. The amendments do not represent what occurred at the CTPC meeting.
- 18.138. The document was prepared after the FCIP had approved the recommendation. Although Mr Montana was present at the FCIP meeting, he did not separately approve the

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recommendation and as stated above had previously rejected 108 the recommendation.

- 18.139. Ms Ngubane was requested by Mr Dingiswayo to assist the investigation. Copies of the correspondence with Ms Ngubane is attached as annexure "FA76". The last written response from Ms Ngubane informed Mr Dingiswayo that the acting GCEO would respond. I then wrote to the acting GCEO at the time, Mr Lindikaya Zide. In response, I was called to a meeting by Mr Zide to respond to a complaint made to him by Ms Ngubane. Mr Zide asked Ms Ngubane to record her complaint in writing. Ms Ngubane has not done so.
- 18.140. Mr Swanepoel was interviewed by inter alia Moerane. Swanepoel can recall the events relating to the initial minutes mentioned above. However, Mr Swanepoel claimed not to be able to recall the events surrounding the signed document (annexure "FA75" above) and how the document came to be inserted in the minute book.
- 18.141. An attempt was then made to amend the report that had been placed before the CTPC to provide for the concerns of the CTPC.
- 18.142. On 15 February 2011, Mr Gantsho sent an email to Mr Mbatha.

  A copy of the email is attached as annexure "FA77". In the email, Mr Gantsho requests that Mr Mbatha consider and critique the attached documents. One of the attachments is an,

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"Introduction CFSC.docx". As I stated above, a CFSC was not involved in the phase 1 tender. The document was prepared by Mr Gantsho on 15 February 2012, according to the metadata. Copies of the document and the metadata are attached. The preparation of this document, particularly at this stage, was an attempt to misrepresent and conceal that fact.

- 18.143. The content of the abovementioned document or some of it is included in a version of the report attached to an email from Mr Mbatha to Mr Khuzwayo, dated 15 February 2011. The report purports to be a recommendation to the FCIP, which evidences that Mr Mbatha had no intention of implementing the resolution of the CTPC. Copies of the email and report are attached as annexures "FA78".
  - 18.143.1. The comparison schedule has been materially altered in the later report (annexure "FA78"), and a weighting introduced. A weighting was not applied in the previous reports, which evidences that the weightings were an afterthought. In this regard, I refer to the introduction of the weightings into the supplemented minutes of the BEC to which I have referred above.
  - 18.143.2. The contract delivery period, and the tendered delivery period for both Siyangena and ProteaCoin, were amended to eighteen months. There

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was no requirement to complete in eighteen 1 1 0 months and neither Siyangena nor Protea Coin tendered to complete in eighteen months.

- 18.143.3. The budget was also included for the first time.

  The budget was R316, 000,000.00 over a three year period. This proves that Mr Mbatha knew that there was insufficient budget to award the contract.
- 18.143.4. Furthermore, this version of the document proves that Mr Mbatha was aware that the CTPC had not approved the recommendation, as the approval of the CTPC is sought.
- 18.143.5. A funding model for both Protea Coin and Siyangena was introduced. The funding model for Protea Coin was apparently calculated from the bid submitted by Protea Coin and is referred to as, "[t]heir funding option". However, Protea Coin scored zero (0) for a funding model.
- 18.143.6. The appointment of Siyangena was recommended at R1.1 billion, and calculated as, "the total life cycle cost of the project over five years".

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18.143.7. The additional statement about the quoted price being subject to negotiation and a team of experts being constituted to negotiate (in annexure "FA70"), was removed and replaced with the following, "[t]hat permission be granted to Management [to] clarify some of the terms of the funding model ... and that price negotiations be entered into" and that the "FCIP consider the proposed funding model". This alteration is significant in the context of the events described below.

18.144. Another version of the report was attached to an email sent to Mr Montana by Mr Mbatha on 15 February 2011. Copies of the email and report are attached as annexure "FA79". In the email, Mr Mbatha says, "[a]s discussed please find the submission to FCP. Please review and give me your comments. I have battled to put together the info. Review especially the recommendation and funding." The email evidences a discussion between Mr Mbatha and Mr Montana. It also evidences that the information was not readily available and that both Mr Mbatha and Mr Montana knew that the recommendation and the funding of the project was problematic.

18.144.1. The following was inserted in the paragraph relating to the contract / delivery period, paragraph 2, "The payment plan is over a five

year period." The only entity that had calculated 112 a payment plan over five years was Siyangena.

- 18.144.2. The content of the report reveals that Mr
  Montana was aware that the approved budget
  was insufficient to appoint Siyangena and that
  the CTPC had not approved the appointment of
  Siyangena.
- 18.144.3. The additional statement was amended to the following, "[t]hat considering the funding model below, permission be granted to Management [to] clarify some of the terms of the funding model ... and that price negotiations be entered into", in order to justify the permission sought for management to negotiate. The requirement that the FCIP consider the proposed funding model was removed. This alteration is significant in the context of the events described below.
- 18.144.4. The proposed contract price is set out in annexure 1 to the report. I deal with the calculation of the price below, as a similar document was placed before the board.
- 18.145. On 15 February 2011, Mr Mbatha sent an email to Mr Montana and a copy to Ms Ngubane, who was the chairperson of the

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CTPC. A copy of the email is attached as annexure "FA80". In 113 the email, Mr Mbatha says:

"Attached please find submission for FCP.

Chief Please review especially the recommendation.

The funding model I took straight out of the tender documents"

- 18.146. The funding model to which Mr Mbatha refers was taken from the bid submitted by Siyangena.
- 18.147. The email continues with the following:

"Tara, I have received answers to the TPC questions and I am satisfied with the answers. I will forward these under separate cover. ..."

- 18.148. The "TPC" to which Mr Mbatha refers was a reference to the CTPC. The email evidences that Mr Mbatha appropriated to himself the powers of the CTPC, satisfied himself about the concerns of the CTPC, overturned its decision and decided not to refer the matter back to SCM, and did not resubmit the tender to the CTPC.
- 18.149. Mr Mbatha did not, as stated by him, send the answers he had purportedly received to Ms Ngubane. I have caused a search to be performed by FACTS Consulting for any such document and nothing could be found.

- 18.150. As stated above, the minutes of the meeting of the CTPC were changed. It is reasonable to infer that the change was made after this exchange.
- 18.151. Despite the resolution of the CTPC, the tender was referred to the FCIP. The FCIP meeting was held on 17 February 2011. Mr Bernard Boshielo, Mr Montana and Mrs Bridgette Gasa, members of the CTPC, attended the meeting. Mr Mbatha, Mr Piet Sebola and Mr Tumi Mohube were present. A copy of the minutes of the meeting of the FCIP is attached as annexure "FA81". Mr Sebola's confirmatory affidavit is attached as "FA81.1".

- 18.152. The FCIP meeting was held on the same day that the minutes of the meeting of the CTPC was circulated to the members of the CTPC, including Mr Mbatha. Mr Mbatha had attended the CTPC meeting, was aware of the recommendation of the CTPC to refer the matter back to SCM, had received the initial minutes of the CTPC meeting and was present at the FCIP meeting.
- 18.153. The FCIP was requested to appoint Siyangena as the preferred bidder. Mr Montana was the person responsible for making the recommendation to the FCIP and in order to do so should have considered the recommendation of the CTPC.
- 18.154. The minutes record that the FCIP committee, "considered the submission". The FCIP did not have anything before it that can

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be described as a submission, although I am not entirely 1 1 5 certain what was intended by the word, "submission".

- 18.155. The FCIP had before it a pack of documents. A copy of the pack of documents is attached as annexure "FA82". The agenda has an item, tender approval (item 6). The section relating to tender approval is blank but the supply and installation of access gates is recommended in the SCM quarterly December 2010 report (page 2). The SCM report is dated 10 February 2011 and was prepared by Mr Mbatha.
- 18.156. A report was prepared for the FCIP meeting. There are two versions of the report that were attached to emails exchanged between Mr Mbatha, Mr Khuzwayo, Ms Mosholi and Ms Monkwe on 16 February 2011. Copies of the emails and reports are attached as annexures "FA83.1" and "FA83.2".

- 18.156.1. In the email attached as annexure "FA83.1", Mr
  Mbatha requested Mr Khuzwayo to proof read
  the report and "... make sure there is NO
  reference to the number of stations except the 2
  that were originally done ...". I cannot think of a
  rational reason to introduce any vagueness into
  the scope of work.
- 18.156.2. In the report attached to the abovementioned email (annexure "FA83.1"), the reference to the sixty two (62) stations was deleted.

The note requiring a funding model to be 18.156.3. provided by the preferred bidder was amended to refer to, "NB: See Annexure 1 for more details". Annexure 1 contains an outright purchase and funded option. The funded option is the model offered by Siyangena. The inclusion of a reference to this document in the report, particularly in the section immediately under the budget, is irrational, to say the least. The contains the outright purchase portion statement that the guarantee extensions and maintenance are proposed additions but no other information. The relevance of this statement becomes apparent from the facts set out below. The fact that it was included in this document indicates that there may have been discussions with Siyangena about the terms of its offer after submission of the bids, as the proposed additions to the outright purchase option are not included in the bid submitted by Siyangena.

18.156.4. The request for the support of the CTPC was retained.

18.156.5. The additional statement was amended to the following, "[t]hat considering the complexity of the funding model".

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- 18.156.6. Annexure 1 was amended to remove the details 1.1.7 of the outright purchase option.
- 18.156.7. The document was then altered and attached to the email from Ms Mosholi to Ms Monkwe (annexure "FA83.2").
- 18.156.8. The heading of the document was amended to a, "RECOMMENDATION REPORT". The recommendation was made to the FCIP and recommended the appointment of Siyangena as the preferred bidder in an amount of R1.95 billion. The recommendation was addressed to the FCIP by the GCEO, Mr Montana.
- 18.157. On 17 February 2011, Mr Mbatha had addressed a letter to Mr Montana which was attached to an email from Ms Monkwe, his personal assistant, of the same date. Copies of the email and letter are attached as annexure "FA84". In the letter, Mr Mbatha said,

"Chief

I thought through this and felt you need some info on the side going into the FCP. The price is that of 62 stations and is made up as follows ...

If the view is that this is too much for such a small percentage, I agree but do not know how we will respond to this."

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- 18.158. As stated above, Mr Mbatha had removed any reference to sixty two stations from the report. The email evidences his reason for doing so. Mr Mbatha clearly believed that the contract price was "too much" for "a small percentage" of stations.
- 18.159. Mr Montana and Mr Mbatha were asked questions by the committee and responded. The FCIP was not informed of the rejection of the recommendation to appoint Siyangena as the preferred bidder by Mr Montana or the recommendation of the CTPC to refer the matter back to SCM or the reasons for those decisions. The FCIP was not provided with this information, despite intimate involvement of Mr Montana and Mr Mbatha in the tender process.
- 18.160. The minutes record that, "an open tender was embarked upon by Intersite under tender reference SG/GATES/003/2009 [where] four companies responded to the tender and two of the four companies did not meet all the technical requirements and were disqualified. Protea Coin and Siyangena Technologies met the minimum technical requirements as stipulated in the tender."

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- 18.161. The statement mentioned above was material misrepresentation because an open tender was not embarked upon by Intersite in relation to the phase 1 tender. The tender was initiated by PRASA, not Intersite, and a closed list of contractors were invited to bid for the tender. In addition, there were no minimum technical requirements, particularly none that justified the disqualification of the bidders, or any that were stipulated in the tender. As stated above, Omega and the Marothi - KgT Consortium were not disqualified by any committee. They were simply excluded from further participation in the process by Mr Mbatha. None of these material facts were brought to the attention of the FCIP.
- 18.162. The FCIP failed to consider the procedure followed by the committees and persons involved in the procurement process, and failed to take into account substance and value for money.

  The FCIP nevertheless resolved to recommend the appointment of Siyangena as the preferred bidder for the Phase 1 contract.
- 18.163. The FCIP resolved to approve the appointment in the total amount R1, 959,642 353.00 (including VAT). The amount was significantly higher than the amount reflected in Siyangena's bid, the price evaluation document (annexure "FA47" above) and CTPC minutes, all of which reflected a price of R965,304,413.71 (excl. VAT) and R1, 100,447,031.56 (incl. VAT).

- 18.164. I deal with the budget information below (in paragraphs 18.174 1 2 () to 18.178) in relation to the decision of the board of control.

  The pack of documents placed before the FCIP contained the same information. The approved amount exceeded the budget by R1.6 billion.
- 18.165. The appointment of Siyangena as the preferred bidder was recommended to the board of control in a report. The report placed before the FCIP was amended and placed before the board. A copy of the report is attached as annexure "FA85".
- 18.166. The following is stated in the report:
  - 18.166.1. The scope of work is amended to include display boards and a public address system, and delete LAN cabling. The scope of work was expanded upon to attach as annexure 2 a bill of quantities for a large station. The bill of quantities is referred to in the table in paragraph 3, scope of work.
  - 18.166.2. The project period was amended to thirty six months.
  - 18.166.3. The following was inserted under the summary of the tender prices in paragraph 7.4, "NB:

    Please refer to par 11 on Funding Model and Annexure 1 for more details."

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18.166.4. The request for the support of the members of the CTPC was amended to, "The members of the [CTPC] supported the recommendation to appoint Siyangena. This statement is false. The CTPC had recommended that the matter be sent back to the SCM.

18.166.5. Annexure 1 was amended to include the detail of the outright purchase option. However, the guarantee was stated as, "Year 2". I understand this to mean an extension from year two.

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18.167. As appears from the emails above, the proposed contract price was calculated by Mr Mbatha. The calculation of the contract price is extraordinary. Mr Mbatha includes in the outright purchase price, items that were not offered and which he has taken from the funded option. Those items are the warranty and the maintenance. The outright purchase included a warranty for twelve (12) months at no additional charge and no maintenance. The warranty amount included in the proposed contract price calculation is R582, 677,834.81 and the maintenance amount is R253, 203,037.79.

18.168. Mr Mbatha was suggesting that an additional three year warranty be included in the outright purchase at that price.

Siyangena had offered, in the funded option, a five (5) year warranty at that price. Furthermore, the confinement of the maintenance work to the contractor who did the installation

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was irregular. There is no reason to deviate from the 122 procurement policy.

- 18.169. Mr Mbatha later expressed the view that these additional amounts were "too high", and respectively "threatened to make the project unaffordable and "did not yield any value to PRASA". I deal with those views below.
- 18.170. The proposal by Mr Mbatha was suspiciously irregular and I have difficulty in accepting that there was no communication between Mr Mbatha and representatives of Siyangena in order to ascertain whether Siyangena was prepared to include the warranty and maintenance obligations in the outright purchase option. However, if it is to be assumed that there was no communication, Mr Mbatha was making material amendments to the offer from Siyangena without authority and without consideration of the terms of that offer by the BEC or CTPC.
- 18.171. The cost of both items were included in the contract price contained in the JBCC agreement that was signed by Mr Montana. However, the JBCC agreement contains no terms relating to the obligation to provide the warranty and maintenance, and neither the warranty nor the maintenance are mentioned in any detail in the JBCC agreement. The JBCC agreement provides for those amounts to be paid on certificate. Accordingly, Mr Montana simply agreed to inflate the price of the works by R835, 880,872.60.

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- contract price Siyangena had tendered at а 18.172. R1, 100,447,031.56 (incl. VAT) (paragraph 11). The report recommended to the board that Siyangena be appointed as the preferred bidder at a contract price of R1, 959,642,353 (incl. VAT) (paragraph 12). The dramatically increased amount is set out in annexure 1 to the report as the total amount for a funded option. In terms of that funded option, PRASA would pay Siyangena a monthly amount for a period of five years and included an extended warranty after the second year and maintenance for the five year period. However, the board did not resolve to adopt the funded option. The board merely approved the appointment of Siyangena as the preferred bidder. The JBCC agreement that was signed by Mr Montana permitted Siyangena to be paid the increased amount as and when the work was completed on the presentation of interim payment certificates.
- 18.173. The board pack contained a report by the FCIP in which reference is made to the project at page 3. The report states that the FCIP considered the submission and was satisfied that the tender process followed was consistent with the SCM policy. This statement is misleading for the reasons stated above.
- 18.174. In the report, the FCIP recommended the appointment of Siyangena as the preferred bidder. The FCIP simultaneously recommended the approval of the capital programme over the 2011 MTEF. The proposed capital allocations over the 2011



MTEF period are set out in table 3 (on page 3). The 2011 MTEF 1 2 4 included the national speed gates project in an amount of R317, 300.00.

- 18.175. Annexure A to the report reflects that R1.3 billion was requested for the national speed gates as a modernisation of asset base programme (page 10). However, the modernisation of asset base programmes were of a relatively low priority, between 17% and 27%, over the MTEF period (page 9), which explains the proposed capital budget allocation of R300 million.
- 18.176. The board meeting was held on 28 February 2011.

The minutes of the meeting record that the capital programme 18.177. was approved by the board (paragraph 8.2.1.1). I find it inconceivable that the board, having approved the 2011 MTEF, would have appointed Siyangena as the preferred bidder in an amount of R1.95 billion, and if it had, the decision would have been irrational in the absence of some discussion about how the project would be funded. The decision would have contravened the PFMA by failing to act in the best interests of PRASA in managing the financial affairs of PRASA, failing to take effective and appropriate steps to prevent irregular expenditure, and failing to manage the revenue, expenditure and liabilities of PRASA. In addition, the members of the board, as officials of PRASA, would have failed to comply with their obligations in terms of the PFMA, committed an act of financial misconduct and committed an offence.

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- 18.178. Any approval in such circumstances would require the diversion, reallocation, of funds from other projects.

  A reallocation is not uncommon when a project unexpectedly exceeds its budget and funds are reallocated from other projects where there is a surplus in the budget because of an under spend. However, to approve a project, knowing there was a shortfall in the budget, would be extremely irregular and a contravention of the PFMA.
- 18.179. The minutes record that the board resolved to approve the appointment of Siyangena as the [preferred] bidder to the phase 1 tender. No tender price is mentioned in the board's resolution. The minutes were prepared by Mr Mohube but only signed by the chairperson on 10 October 2011. A copy of the signed minutes of the meeting is attached as annexure "FA86".

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- 18.180. However, the resolution signed by the company secretary, [Mr T Mohube], on 28 March 2011, records that the board resolved that, "Siyangena Technologies should be appointed as the preferred bidder for the Supply and Installation of a system of Speed Gates in the total amount of R1959 642353.00 including VAT." A copy of the resolution is attached as annexure "FA87".
- 18.181. Mrs Marissa Moore attended the board meeting. Mrs Moore was at the time employed by the National Treasury. Mrs Moore was appointed to the board shortly before the meeting and the meeting on 28 February 2011 was the first board meeting attended by her. Mrs Moore was aware through her

involvement with national treasury of other requests for funds by PRASA that were not met in full by national treasury. Mrs Moore would have been captivated by any discussion of the funding of a shortfall of approximately R1.6 billion. Mrs Moore cannot recall any such discussion. A confirmatory affidavit by Mrs Moore is attached as annexure "FA88".

18.182. The resolution is incorrect in other respects. The resolution states that, "at a Special Board of Control meeting held on the 28th March 2011, the BoC ... resolved [as above]". A copy of the minutes of the special meeting held on 28 March 2011 is attached as annexure "FA89". The appointment of Siyangena was not discussed at that meeting. The resolution was adopted at the meeting on 28 February 2011, and the resolution was signed on 28 March 2011.

18.183. The resolution also states that "the BoC considered the submission from the FCP Committee and having satisfied itself that the tender process that was followed was in line with the SCM Policy and was fair, transparent and objective, resolved [as above]". As stated above, the only information before the board was contained in the few paragraphs in the FCIP report in the board pack. There is no indication in the minutes that the board requested any information or that the board was in any position to make an informed decision. The board could not have considered the tender process. If the board had considered the tender process, it would not have been satisfied that the process was regular, as stated in the resolution.

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- 18.184. Mr Mohube was invited to a meeting at PRASA's attorneys offices to explain the resolution. Although Mr Mohube attended the meeting, he remained in attendance for only a few minutes before leaving unexpectedly and without providing an explanation. In addition, Mr Mohube was requested to assist the investigation by [providing copies of the resolution that he signed. Mr Mohube initially diverted the request to PRASA's secretariat and when it was reiterated, he simply failed to respond. The email exchange with Mr Mohube is attached as annexure "FA90".
- The absence of a resolution of the board including the amount is further evidenced by an email sent by Mr Mdluli to Mr Mbatha on 08 March 2011. A copy of the email is attached as annexure "FA91". In the mail Mr Mdluli said, "draft notice to proceed as requested, I am not too sure about the actual amounts approved as I have not yet received the Tender Advices." Mr Mdluli attached a draft notice to proceed to the email. The draft notice included the amount of R1.1 billion.
- 18.186. On or about 8 March 2011, Mr Mbatha sent a notice to proceed to Siyangena in respect of the Phase 1 tender. A copy of the notice is attached as annexure "FA92". It was stated in the notice inter alia that "PRASA have (sic) considered your tender SG/GATES/003/2009 for the supply and installation of access gates nationwide and your company has been approved as a preferred bidder. The approval is subject to negotiations on the

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price, terms and conditions with a view to your company being 128 declared a final bidder whereafter a contract will be signed."

- 18.187. On 12 April 2011, Ms Mosholi wrote to the unsuccessful bidders. A copy of one of the letters is attached as annexure "FA93". In the letter Ms Mosholi informed the unsuccessful bidders that their "tender proposal in response to the above RFP was unsuccessful due to non-conformance to technical requirements." The statement is wrong for the reasons stated above.
- 18.188. The phase 1 tender involved the acquisition of a significant asset or assets, and accordingly, PRASA was required to in writing inform national treasury and submit relevant particulars for approval, before concluding the transaction. In failing to do so, the PFMA was contravened. In terms of treasury regulation 28.3.1, PRASA is required to develop and agree a framework of acceptable levels of materiality and significance. The level is determined annually by the BOC. The level in 2010 was determined at any amount that was more than 0.5% of gross operating expenditure. Accordingly, in 2010, that was R33 409 125.00..
- 18.189. Furthermore, the transaction was other than in the ordinary, regular and normal course of PRASA's business and, accordingly, required approval from the minister of transport and for treasury to be informed.

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- 18.190. I have caused a search to be conducted of PRASA's records

  by Mr Brian Alexander and such writings, submissions and
  approvals do not exist. In failing to do so, the PFMA was
  contravened. Copies of the letters addressed to treasury and
  the minister are attached as annexures "FA94" and "FA95".
- 18.191. On or about 18 March 2011, Mr Mbatha sent a letter to Siyangena. A copy of the letter is attached as annexure "FA96". In the letter, Mr Mbatha referred to a meeting on 15 March 2011 with Mr Ferreira from Siyangena and noted that the parties had agreed on the following:

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- 18.191.1. The payment of R250 million as a deposit, payable on signature of the contract, "to purchase the equipment."
- 18.191.2. The number of stations would increase substantially to around 100 stations and Siyangena would reconfigure its offering to accommodate the increase.
- 18.191.3. Siyangena would indicate to PRASA what equipment it was purchasing and its estimated values.
- 18.192. Mr Mbatha recorded that the following was not agreed:

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- 18.192.1. The amount of R528, 677,843.81 for the 130 extended warranty was too high and threatened to make the project unaffordable.
- 18.192.2. The allowance for maintenance in the amount of R253, 203,037.79 was too high and did not yield any value to PRASA.
- 18.193. The agreement that PRASA would make an upfront payment in an amount of R250 million is startling, particularly considering the fact that Mr Mbatha did not know what equipment would be purchased. The agreement was contrary the procurement policy of PRASA and the requirements of the PFMA, in terms of which PRASA is precluded from making upfront payments to service providers. PRASA would, in effect, be agreeing to advance funds, disguised as a deposit, to Siyangena to assist Siyangena in discharging the obligations under the phase 1 tender.
- 18.194. The agreement to increase the stations substantially, from 62 to 100, was beyond the scope of work considered by any of the committees or persons involved in the procurement process, unauthorised, unlawful and highly irregular. Mr Mbatha was, in effect, agreeing to work that would add approximately R680 million to the project if the average cost per station is used and the cost of the warranty and maintenance remains the same.

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- 18.195. On the same day that the resolution was signed (28 March 2011), Mr PS Reddy, the managing director of Siyangena, apparently signed the JBCC Principal Building Agreement. Mr Montana purportedly signed the same document on 31 March 2011. A copy of the JBCC agreement is attached as annexure "FA97".
- 18.196. The board of control was not requested to appoint and did not resolve to appoint Siyangena as the final bidder, Siyangena was not notified that it was appointed as the final bidder, the board was not requested to approve the terms of the contract, did not resolve to conclude the alleged contract with Siyangena, was not requested to authorise and did not resolve to authorise Mr Montana to conclude the alleged contract, and was not requested to approve and did not approve the capital expenditure and acquisitions involved in the alleged contract.
- 18.197. The JBCC agreement purports to be a contract concluded as a result of a tender process. The document provides as follows:
  - 18.197.1. In the introduction to the "Contract Data Employer to Contractor", "Employer
    Addendum", it is stated that, "[t]his addendum
    contains all variables referred to in the Principal
    Building Agreement that are the responsibility of
    the Employer to provide the appropriate
    information that is necessary for the Contractor
    to complete his tender. The Addendum must be

completed in full and included in the tender 132 documents."

18.197.2. In paragraph 1.10 of the abovementioned section, it is stated that, "[f]ailure to complete the contract data schedule in full may result in the tender being disqualified".

- 18.197.3. In paragraph 5.5 of the abovementioned section, it is stated that, "[o]n acceptance of the tender ...".
- 18.197.4. In paragraph 7 of the abovementioned section,
  Mr Montana signed the document, purportedly
  as the principal agent. Above the signature of
  Mr Montana appears the following declaration,
  "I, the principal agent ... declare that the
  information provided above is complete and
  accurate at the time of calling for tenders.
  Where necessary, should any of the above
  information need to be varied, tenderers will be
  forthwith informed thereof in writing."
- 18.197.5. There are similar statements in the "Contract

  Data Contractor to Employer", "Contractor

  Addendum".

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- 18.197.6. Paragraph 5 of the abovementioned section, 133 provides for "THE TENDER".
- 18.197.7. In paragraph 5.1, of the abovementioned section it is stated that, "This tender is to be submitted to the principal agent at the street address provided in the invitation to tender before the tender closing date".
- 18.197.8. In paragraph 5.2, it is stated that, "By the submission of this tender to the employer the tenderer offers and agrees to contract for, execute and complete the works for the tender sum as stated below".
- 18.197.9. In paragraph 5.3, "Tenders will be opened in public directly after the stated closing time ...".
- 18.197.10. In paragraph 5.4, "The lowest or any tender will not necessarily be accepted."
- 18.197.11. In paragraph 5.5, "This tender shall remain in full legal force for thirty (30) calendar days ...".
- 18.197.12. In paragraph 5.6, "This tender takes into account all listed items ...".

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- 18.197.13. In paragraph 5.7, "The successful tenderer will 134 be appointed in terms of the JBCC Principal Building Agreement".
- 18.197.14. Paragraph 5.8, provides for the "TENDER SUM COMPILATION". In particular, paragraph 5.8.5 provides for the "TOTAL TENDER SUM".
- 18.197.15. The signatory purportedly signed "for and on behalf of the tenderer".
- 18.197.16. The section that commences with the heading,

  "CONTRACT AGREEMENT", contains the, "POST

  TENDER PROVISIONS" and the,

  "CONTRACTUAL AGREEMENT". The latter

  section contains the contract sum.
- 18.198. Accordingly, the JBCC agreement represents that Siyangena tendered the amount of R 1 959 642 353 (including tax)] on the terms set out therein, PRASA accepted the offer after a tender process, and the parties concluded the JBCC agreement. The representation is false.
- 18.199. I point out that the entire document was completed in the same manuscript other than the signatures and the name and capacity of the signatory for PRASA. The person who prepared the JBCC agreement inserted the names of the signatory for Siyangena and witness 2, an employee of Siyangena, but not

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the name of the signatory for PRASA. The preparer was aware that Mr Reddy and Mr De Oliveira, Siyangena's representatives, would sign the document but unaware that Mr Montana would sign. The inference is that a representative of Siyangena prepared the document.

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- 18.200. The JBCC agreement is a sham. The JBCC agreement purports to be the contract between the parties. The JBCC agreement provides that the agreement is the entire contract and no representations and terms not contained in the agreement are binding (clause 1.8 and 42.1). However, the parties had yet to finalise their negotiations.
- 18.201. On 4 April 2011, Mr Mbatha wrote to Mr Ferreira. A copy of the letter is attached as annexure "FA98". In the letter, Mr Mbatha says, referring to the requirement to successfully conclude negotiations before Siyangena could be declared a final bidder, "such negotiations are underway but not fully concluded". Mr Mbatha also refers to the price offering that was based on average prices, indicating that the contract price negotiations had to be finalised.
- 18.202. Mr Mbatha nevertheless agreed that PRASA would pay Siyangena a "deposit/mobilisation fee of R250 000 000.00 ... to secure the equipment". The agreement is highly irregular and a contravention of the PFMA. Furthermore, Mr Mbatha was not authorised to conclude the agreement.

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- 18.203. In addition, Mr Mbatha said that the following issues had to be finalised: the allowance for extended guarantee and maintenance, the risk matrix, mitigation strategies and B-BBEE and the project rollout which would be based on corridors and the exact number of stations per corridor and a reconfiguration of what constitutes a large, medium and small station. Mr Mbatha stated that the "reconfiguration will have a material bearing on the price and the number of stations."
- 18.204. Mr Mbatha states further that, "PRASA would like to engage Siyangena in a structured negotiation program to clarify and agree on all outstanding matter[s] and sign the contract. This PRASA hopes will take place ... so that by mid April 2011 the contract is signed and monies disbursed."

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- 18.205. The JBCC agreement was signed to justify payments to Siyangena. Siyangena submitted an invoice and a statement that are dated 31 March 2011, the day Mr Montana purportedly signed the JBCC agreement, for a mobilisation fee in an amount of R285 million, including VAT. Copies of the invoice and statement are attached as annexure "FA99".
- 18.206. In order to effect payment, the finance department of PRASA requires a pack of supporting documents. The finance department requires that the payment is authorised by the appropriate person and within the budget allocation. The pack of supporting documents for the first payment would typically include the contract.

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18.207. The pack of supporting documents for the payment of the mobilisation fee contains the letters from Mr Mbatha to Mr Ferreiria, dated 18 March 2011, setting out the state of their negotiations and the agreement to pay the deposit / mobilisation fee (annexures "FA96" above), and the board resolution appointing Siyangena. The JBCC agreement was not included in the pack. If it had existed at the time, it would have been included in the pack. There is also no document indicating the budget available to pay the invoice. The invoice was signed by Mr Montana on 19 April 2011, paid and reversed on 20 April 2011, and paid again on 21 April 2011. A copy of the pack is attached as annexure "FA100".

18.208. In the minutes of a meeting on 26 May 2011 concerning the project, the "[v]erification of the project value and negotiation based on economies of scale" and the possibility of accommodating the warranty and maintenance negotiations in a service level agreement were raised, which indicates that the contract was not finalised or its conclusion was unknown on that date. A copy of the minutes is attached as annexure "FA101".

18.209. In a project progress report for June 2011, the project schedule reflected in relation to the procurement of the service provider that the "[p]rocess still in progress and on critical path" and execution "[d]epending on [i]nstallation contractor's appointment". In the overall project status section the following is stated, "CONTRACTOR PROCUREMENT PROCESS IN

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PROGRESS AND ON CRITICAL PATH OF THE PROJECT", "UPON CONTRACTORS APPOINTMENT, IT IS ONLY THEN PROPER ASSESSMENTS AND A SCOPING WILL BE DONE". In the key risks section, "PROCUREMENT OF SERVICE PROVIDER TO BE FINALISED URGENTLY". In the client (PRASA) decisions required section, "FINAL APPOINTMENT OF SERVICE PROVIDERS". There are similar comments in the report for July 2011. Those comments, once again, indicate that the contract was not finalised or its conclusion was unknown on that date. A copy of the report is attached as annexure "FA102".

- 18.210. During or about August 2011, the phase 1 project was moved from PRASA Cres. to SAD and the SAD was tasked with its full implementation. The decision was taken at a meeting of the EXCO. A project change request form reflects this change. A copy of the form is attached as annexure "FA103". A copy of an email to Mr vd Walt handing over the project is attached as annexure "FA104". A confirmatory affidavit by Mr vd Walt is attached as annexure "FA104".
- 18.211. A function of the SAD included ensuring that all the project documentation was in order. In other words, the agreement, specifications, scope of works, implementation schedule, the programme etc.
- 18.212. In relation to the phase 1 project, Mr vd Walt recalls that at handover in August 2011, the negotiation of the contract had not been concluded and the agreement had to be finalised. Mr

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vd Walt was of the view that this provided an opportunity to restructure the project in order to obtain greater value for PRASA. Mr vd Walt was personally involved in some of the negotiations.

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- 18.213. Mr vd Walt also recalls that there was no needs assessment that he could use to understand the scope of the works that were required, and various other departments that should be involved from inception in the planning, evaluation and implementation of a project of this nature, for example, security and IT, were not involved. The failure to include them led to deficiencies in the system, such as the absence of proper monitoring control rooms that could house the equipment.
- 18.214. Mr vd Walt was informed that the works were remeasurable but the manner in which this would be done was not explained. The number of stations that would be maintained was also not defined. Accordingly, it was not clear what Siyangena was offering to PRASA through this project. An understanding of the deliverables was vital to the implementation of the project and required in order to monitor progress.
- 18.215. Mr vd Walt recalls that he was provided with a schedule of payments and Siyangena made demands for payment according to that schedule. The mobilisation fee had already been paid before his involvement, which concerned him greatly as the entire project should have implemented by the SAD. The

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project should not have been implemented piecemeal by 140 different departments.

- 18.216. Although Mr vd Walt agreed to pay some of the monthly invoices, he refused to make further payments after about November 2011 until the contract was finalised. The contract was not finalised by him.
- 18.217. On 29 August 2011, Mr Ferreira sent an email to Mr Gantsho.

  A copy is attached as annexure "FA106". In the email, Mr

  Ferreira says, "attached please find the agreed payment
  structure agreed during contract negotiations. This is in line
  with the JBCC Contract signed between PRASA and
  Siyangena". The statement that this is in line with the contract
  is wrong. The JBCC agreement provides for payments on
  certificate.
- 18.218. I doubt whether the JBCC agreement was signed in August 2011 because on 22 September 2011, Mr Ferreira enquired about payment and stated, once again, that the invoices were "in line with the JBCC Contract signed". Mr Gantsho replied. In his reply, Mr Gantsho said, "the outstanding issues at the moment is the copy of the [contract] on which payment ... terms are based on. I am told that my colleagues at SCM and Legal are finalising." I have inserted the word, "[contract]", as it appears to have been intended. Copies of the emails are attached as annexures "FA107".

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18.219. Mr vd Walt replied to Mr Gantsho to say, "appointment letters, or tender advice or signed contract is also required to be attached to the covering letter to provide comfort to senior people of legitimate payments. We need to arrange these quickly in order not to miss the payment run preparation". Mr Gantsho responded, "[f]or Siyangena ... I am awaiting both appointment letter and copy of the contract from my colleagues ... I do not have those. Yesterday I had a chat to Chris, who has a different view on these payments.3 (sic) This means the documents we processed to Sindi did not have governance / contractual backing!" (annexure "FA107" above).

- 18.220. In the period from June 2011 to May 2012, Siyangena submitted invoices for a monthly amounts in excess of R25 000 000.
- 18.221. The pack of supporting documents for the invoices submitted for June 2011 to September 2011 includes a checklist which appears to confirm that the payment requester has confirmed that the invoices contain a detailed description and the quantity of goods and services supplied, and the amount to be paid for goods and services. The invoices do not contain such information. The invoices merely refer to a monthly instalment as per a submitted payment plan. The invoices were signed by Mr Montana, Mr Gantsho and Mr van der Walt, and paid on 31 October 2011. A copy of the pack is attached as annexure "FA108".

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The pack of supporting documents includes extracts from the JBCC agreement. However, the JBCC agreement provides for payments on certificate, not in monthly instalments. The clauses relating to payment on certificate were omitted from the payment pack and only those parts relating to the tender, contract data and contractual agreement were included. The funded option schedule from the bid submitted by Siyangena was also included. The documents created the impression that PRASA had agreed to pay monthly instalments.

18.223. The impression was confirmed in a memorandum containing a recommendation by Mr van der Walt and Mr Mbatha. The recommendation was approved by Mr Montana. The memorandum materially misrepresents the contractual position. In paragraph 2 of the memorandum, the following is stated:

"The project / equipment is financed by Siyagena Technologies based on PRASA tender specifications over a 5 year period commencing 31 March 2011, with a project value of R1, 959,642,353.00.

The contract with Siyangena provides for contracted payments as per the attached payment plan and cash flow draw down schedule.

The cash flow drawn down schedule reflects a mobilization fee of R250m for the purchasing and

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installation of the equipment, plus agreed monthly payback instalments to Siyangena Technologies over the 5 year period ... The PRASA payback instalments for the first year have been agreed to as 12 monthly payments of R25, 724,975.67 each, incl VAT."

18.224. The memorandum confirms that Siyangena only occupied the site on 11 September 2011 and under the JBCC agreement would not have been entitled to payment from June 2011.

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- 18.225. The pack of documents contains a further memorandum, signed on 27 October 2011, by Mr Montana. The memorandum purports to be a delegation of authority to the GCFO "to release payments ... on behalf of the GCEO for payment of invoices above R25 million."
- 18.226. The pack of documents also contains a project status report which reflects the budget as R138.5 million and payments of R128.6 million. However, the payments do not include the R285 million mobilisation fee.
- 18.227. The payment of the invoices submitted for monthly instalments for October 2011, and November 2011 to March 2012, was supported by a similar pack of documents, save for a letter from Mr Ferreira which evidences that the payment provisions of the JBCC agreement were not applied by the parties.

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- 18.228. The payment of an additional invoice submitted for November 1.4.4
  2011 was extraordinary. Siyangena invoiced an amount of
  R641,250.00 for, "Occupational Health, Safety &
  Environmental services". There is no support for this payment
  in the pack of supporting documents. A copy of the pack is
  attached as annexure "FA109".
- 18.229. On 13 March 2012, Mr vd Walt sent an email to Siyangena. A copy of the email is attached as annexure "FA110". Mr vd Walt mentioned the following inter alia concerns in this email: the contract value, scope of works and remeasurability of the agreement were not confirmed, there was confusion as to the base number of stations, the list of stations was not provided, and the contract price.
- 18.230. Mr Ferreira and Mr vd Walt exchanged emails on 14 March 2012. Copies of the emails are attached as annexures "FA111". The response merely confirms that the agreement was inchoate. In particular, Mr vd Walt confirmed that the agreement was not finalised.
- 18.231. The confusion that ensued is evidenced by a memorandum prepared by Mr Mbatha on 26 March 2012, in which the following is stated, "[t]he Board approved a contract award", "[a]fter the award Management were requested to negotiation with the supplier.", "[t]he GCEO signed a JBCC contract", "[t]he contract made provision for a further agreement to be signed

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detailing agreement to cash flows, remeasurability and other 1 4 5 project related matters.", [t]his agreement is yet to be signed."

- 18.232. Mr Mbatha stated that PRASA had requested that the maintenance and guarantee be reviewed. This request was made in Mr Mbatha's letter dated 18 March 2011 (annexure "FA96" above). Mr Mbatha stated that, "[t]he principle was agreed". Mr Mbatha stated further that PRASA had requested that the contract and cash flows be reviewed so that "there are no equal monthly instalments." The JBCC agreement provides for payments to be made on certificate, not monthly instalments.
- 18.233. Mr Mbatha said that there was an agreement on these key issues but "the agreement on the quantum of warrantee (sic) and maintenance" was outstanding and "[t]he issue of maintenance and guarantee remained negotiable". As indicated above, Mr Mbatha had proposed that the price include R253,203,037.79 for maintenance and R582,677,834.81 for the guarantee. The JBCC agreement did not provide any detail in relation to the maintenance or the guarantee. The JBCC provided for the payment of those amounts as part of the price, on certificate for work completed.
- 18.234. Mr Mbatha crucially concludes that, "[t]here is a risk that both parties may not agree on a deliverable and related payment in the future if this process is not bedded down quickly." In

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context, the deliverable is the works. Mr Mbatha was, in effect, 46 saying that there was no agreement on the works.

18.235. The works are not being performed in terms of the JBCC agreement. As stated above, the JBCC agreement consists of a general description of the works and bills of quantities, and inadequately delineates the works. PRASA does not have the capability or the capacity to design the works, and it could not have been intended that PRASA would design the works. The works are being designed by Siyangena. In other words, Siyangena is determining the deliverable.

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- 18.236. The designs performed by Siyangena are not, in any event, being used to verify that the works were performed or to assess the value of the works that were the subject of the claim. The claims for payment are mainly based on the quantities of items installed, as evidenced by the payment packs. The items and quantities of the items for which Siyangena claimed were purportedly assessed by individuals employed by PRASA. In particular, Mr Gantsho. However, the performance of the works the methods of work, materials used in the installation and workmanship has not been assessed.
- 18.237. The quantities for which Siyangena has claimed are used to determine progress. According to such a method of determining progress, the installation of the items specified in the bills of quantities is practically complete. However, as

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demonstrated below, the assessment or reporting of that 1.4.7 progress is unreliable.

18.238. The works has been criticised by Secelec for the reasons set out in a report, a copy of which is attached as annexure "FA112". Siyangena naturally disagrees with that criticism.

- 18.239. The payment of the invoices submitted for monthly instalments for April and May 2012 was supported by a similar pack of documents as above, save that for the first time a document purporting to be a completion certificate is included. The document records that, "Finalisation of contract & payment terms need to be complete". The pack of supporting documents contains a memorandum from Mr van der Walt in which it is stated that, "[t]here is currently a dispute as to the nature and extent of the contract with Siyangena ... The dispute relates to the re-measurable nature of the contract as per PRASA's request, compared to a fixed payment contract as required/interpreted by Siyangena." A copy of the pack is attached as annexure "FA113".
- 18.240. The payment of the invoice submitted for August 2012 was extraordinary. The invoice purported to be for the value of work done in an amount of R428,142,272.64. The pack of documents supporting the payment contains credit notes for some of the monthly instalments. The pack also included a memorandum containing a recommendation to Mr Montana by Mr Gantsho and supported by Mr van der Walt. The

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memorandum states that the invoice was for "further interim 148 payment in terms of the approved restructured contract" and "[t]he invoice and payment request have been verified in terms of the restructured contract". A copy of the pack is attached as annexure "FA114".

18.241. The memorandum reinforced the absence of a budget. In paragraph 3, it is stated that, "[b]udget provision ... in terms of the restructured contract will be ensured with the EPMO."

- 18.242. The pack of supporting documents contained a copy of the memorandum prepared by Mr Mbatha in March 2012 (paragraph 18.231 above), save that the date was amended to 16 October 2012. The memorandum confirms that the agreement was inchoate.
- 18.243. The pack contains a document purporting to be a payment certificate, signed by Mr Gantsho. The document records a complaint about works requiring rectification as a result of vandalism. However, the document records that both PRASA and the contractor, Siyangena, would rectify the work.
- 18.244. The payment of the invoice submitted for November 2012 was supported by a similar pack of documents. The invoice purports to be for work done. The pack included a memorandum containing a recommendation to Mr Montana by Mr Gantsho and supported by Mr van der Walt. The memorandum states that the invoice was presented in terms

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of *inter alia* the "signed JBCC contract and restructured contract". The document proceeds with, "The restructured contract with Siyangena dated 31 March 2011 is re-measurable, includes revised payment and cash flow terms." The memorandum confirms that the parties purported to vary the terms on which Siyangena would be paid. A copy of the pack is attached as annexure "FA115".

18.245. The memorandum (for the November 2012 invoice) purports to record that the "progress is at about 75%." However, the document purporting to be a completion certificate, in the same pack of documents, records the progress at 68%. The memorandum contained in the pack of documents for the invoice submitted for the following period in March 2013, initially recorded progress at 80% but was amended to 67%. The memorandum is dated 7 March 2013. The March 2013 invoice purports to be for work done between December 2012 and February 2013. In other words, the work performed in the three month period had reduced progress, if the documents are to be believed. Furthermore, the document purporting to be a completion certificate in respect of the invoice submitted in the prior period in August 2012, recorded the progress at 60%. In other words, the documents represented progress of 7% over six months for which Siyangena was paid approximately R400 million, representing 20% of the contract price. The progress report becomes more absurd in respect of an invoice submitted on 15 March 2013. The memorandum in respect of that invoice, dated 25 March 2013, records progress at 82.5%, and

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representing that progress had progressed by 15.5% (from 67% to 82.5%) in approximately two weeks. The latter memorandum was used to justify payment of an additional R243 million to Siyangena. In the ordinary course, with persons performing their functions responsibly, the payments would not have been authorised on such contradictory information.

18.246. Siyangena submitted invoices for October and November 2012, March 2013, in a total amount of R51 million. The pack of supporting documents included a memorandum containing a recommendation to Mr Montana by Mr Gantsho and supported by Mr van der Walt. The memorandum evidences that the work was unrelated to the scope of work in the phase 1 tender but included under the rubric of re-measurability. The appointment of Siyangena amounted to a confinement in contravention of the procurement policy. Mr Montana made a handwritten note on the document stating that, "I need written explanation why the decision recommending confinement to Siyangena was not submitted to the Group CEO in accordance with the PRASA SCM Policy. This is irregular and unauthorised. Need written explanation." Mr Montana nevertheless approved the payment and added to the phase 1 project. A copy of the pack is attached as annexure "FA116".

18.247. The invoices submitted for August and December 2013 in a total amount of approximately R67 million were for similar unrelated work. The payments were not supported with any

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material information. Copies of the payment packs are 151 attached as annexures "FA117" and "FA118".

- 18.248. In relation to some of the invoices, Siyangena provided a document that purported to be extracts from the bills of quantities, save that the quantities reflected justified the payment that was claimed. I caused a comparison to be performed of the extract submitted in support of one of the claims and the bills of quantities for a station of comparable size. I compared the Daspoort station (a small station) to Siyangena's bills of quantities for a small station. Copies of the extract and the relevant parts of the bills of quantities are attached as annexures "FA119" and "FA120". The following discrepancies were noted:
  - 18.248.1. In several instances the rates or quantities or both were increased in the extract with the result that a higher amount was claimed. An example is to be found in section 1 of the extract where the increased rates and quantities result in an additional R4.9 million being invoiced to PRASA.
  - 18.248.2. The extract contains several additional items, not included in the bills of quantities, which are inserted as new line items with their own rates and quantities. The additional items result in a higher amount being claimed. An example is the inclusion

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of the "Engineering" line item above item 1.4 for the  $\frac{1}{5}$  2 amount of R150, 000.00.

18.248.3. Some of the "New" items are for work or equipment provided for in other, previously existing items in the bills of quantities resulting in an apparent duplication of costs. An example is found in the new line item below item 2.1.1.2. The new item is described as "Manufacture, supply and install stainless steel bracket, to PRASA specifications, to accommodate 2 speakers". However item 2.1.1.2 specifically provides that the "Rate [for this item] shall include for all brackets necessary for mounting to pole and fixing of speakers".

Some additional items are included in the extract 18.248.4. with item numbers that represent that those items were always included in the bills of quantities. An example is reflected as, "5.2.4", on the extract, "FO: FIBRE OPTIC CABLE, MULTIMODE, 10/125UN FOR **OUTDOOR** INSTALLATION, **PULLED** IN UNDERGROUND DUCTING. RATE TO INCLUDE SPLICING AND TERMINATING", in an amount of R81, 850.32. This item was not included in the bills of quantities. Item 5.2.4 in the bills of quantities was described as, "Patch Panel: 2U patch panel complete with mid couplers and integrated splice

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kit for fibre optic terminations". That item was 153 renumbered in the extract as item 5.2.8.

18.248.5. The additional amount invoiced for the Daspoort station was R7 million over the priced bills of quantities for a small station.

- 18.248.6. I attach a comparative schedule setting out the differences between the extract and bills of quantities as annexure "FA121". As stated above, the comparison was done in respect of one of the small stations. The total additional amount for this station alone, without taking into account the additional quantities, is R6.5 million. The discrepancies are present in claims relating to other stations.
- 18.249. In November 2012, the project was moved to PRASA Cres and toward the end of December 2012, Mr Van der Walt was transferred to PRASA Rail.
- 18.250. The JBCC agreement is inchoate. The JBCC agreement records in clause 41.6, "[f]urther provisions and information agreed by the parties". An item on which there was agreement was, "A separate memorandum of agreement to be entered into between [the parties]." This agreement is not attached and there is no indication in the document as to its content. Mr Mbatha indicated, in the memorandum referred to in

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paragraph 18.231 above, that it would detail, "cash flows, 154 remeasurability and other project related matters".

- 18.251. The terms on which the mobilisation fee, maintenance and guarantee would be paid are not set out in the JBCC agreement.
- 18.252. The works are identified in general terms (see contract data employer, clause 2.2) but not detailed in any contract documents. The site description is, "[a]s per station layout and description", which does not exist. And as, "62 stations but may vary subject re-measurement". The terms of the remeasurement, and the upper and lower limits of the number of stations, are not set out in the document.
- 18.253. On 28 February 2013, Mr Montana approved an extension to phase 1 to include, "the installation of a fit for purpose security system at Braamfontein and Wolmerton staging yards at the total value of R97, 749,219.81 (VAT inclusive)." A copy of the recommendation report, prepared by Mr Mbatha, is attached as annexure "FA122". The extension was sought and approved by Mr Montana under the guise of a remeasure. Mr Montana did not have the authority to approve the extensions. An extension to a project that requires approval of the board, must be approved by the board.
- 18.254. The public protector enquired into an allegation that the tender was improperly extended (paragraph (x)(1) of the report,

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annexure "FA123"). The public protector found that the 155 allegation concerning the extension to sixty two (62) stations was substantiated.

18.255. The public protector received the complaint on 17 February2012 and published a report during August 2015.

On 7 November 2012, Mr CH Fourie, Executive Manager: 18.256. Good Governance and Integrity, from the public protector's office wrote a letter to Mr Montana. A copy of the letter is attached as annexure "FA124". Mr Montana was informed that the public protector had received, "various complaints in connection with allegations of inter alia financial mismanagement, maladministration and tender irregularities by [PRASA] and yourself in particular." (paragraph 1). The letter proceeds to detail, "the complaints allegations that PRASA irregularly awarded the following tenders to certain service providers without following appropriate tender processes", including "a tender for the installation of high speed passenger gates worth R800million was allegedly awarded to a certain contractor in 2009/2010 for the Doornfontein station but it was later irregularly extended to other stations nationally without following proper tender processes", (paragraph 2.7). In paragraph 6, Mr Fourie requested a response to the various allegations as well as inter alia the following information and documentation by 23 November 2012:

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- 18.256.1. All relevant bid documents submitted in respect of 1.5.6 the tenders in question.
- 18.256.2. All the relevant documents regarding the budgets for the tenders.

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- 18.256.3. All minutes of the meetings of the relevant bid committees, up to the final stage of the awarding of the tenders.
- 18.256.4. All memoranda, minutes and/or reports submitted to the accounting officer by the committees in respect of the approval of the procurements of the tenders.
- 18.256.5. All correspondences between PRASA and the tendering companies before, during and after the conclusion of the procurement processes.
- 18.256.6. The names, designations and contact details of all the officials of PRASA that were involved in the respective procurements.
- 18.256.7. The contracts entered into between PRASA and the successful tenderers/contractors in the tenders.
- 18.256.8. The supply chain management policies of PRASA in terms of which the procurements were made.

18.257. Mr Montana responded in a letter dated 13 November 2012. A copy of the letter is attached as annexure "FA125". In this letter, Mr Montana noted that following the submission of the complaints to the public protector, "the Board [had] instituted its own investigation by commissioning an external audit firm working with PRASA's Group Internal Audit to probe the said allegations, and the investigation found that the allegations were without basis." (page 2).

18.258. Mr Montana stated that SATAWU had since "dissociated itself from the allegations made by its former president, Mr E. Mphahlele." Mr Montana requested clarification regarding "the details of the submission of the complaint and the complainant", (page 2). Mr Montana nevertheless confirmed PRASA's commitment to cooperate with public protector's investigation and requested an extension to 14 December 2012 in order to submit the requested documents (page 3).

18.259. There is no record of any information being submitted to the public protector as requested by Mr Fourie or any compliance with the undertaking provided by Mr Montana. Instead, on 12 February 2013, Makhubela Attorneys, acting on behalf of PRASA, issued a letter in which it attempted to ward off an investigation by the public protector. A copy of the letter and report are attached as annexure "FA126".

18.260. In the letter, the attorneys recorded that a meeting had been held between officials of PRASA and the office of the public

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protector on 6 February 2013 where the following was 158 discussed:

- 18.260.1. "A Special Board Meeting was convened on 14 February 2012 by the Chairperson of the Board, Mr SN Buthelezi, on an urgent basis" in order to consider the "dossier of allegations of impropriety".
- 18.260.2. "Following the meeting, the board came to a resolution that Deloitte & Touche (hereinafter referred to as Deloitte), concurrently assisted by our client's internal auditors, be appointed to investigate the merits or demerits of the allegations."
- 18.260.3. "On 28 February 2012, Deloitte submitted a report after conducting a thorough investigation of the issues raised in the dossier:
  - 18.260.3.1. The forensic investigation conducted by Deloitte could not find any basis or truth in the allegations that were made by SATAWU and [the allegations] are therefore defamatory in nature. A copy of the report is attached hereto marked 'A';

- 18.260.3.2. The report was then forwarded to 159 the then Minister of Transport, Dr Ndebele;
- 18.260.3.3. Furthermore, the report was also forwarded to SATAWU after the Board had come to the resolution that the forensic investigation was sufficiently conducted and was therefore considered to be final."
- 18.260.4. "Further to this, the board resolved that legal proceedings be instituted against SATAWU and Mr Mphahlele.
  - 18.260.4.1. SATAWU was then sued for defamation and associated reputational damages as a result of the allegation that were brought forward by the organisation and its then President;
  - 18.260.4.2. The matter was then defended by SATAWU's former legal representatives;

- 18.260.4.3. After careful consideration of both 160 the parties' cases, the court ruled in PRASA's favour."
- 18.260.5. "During the meeting we advise that as a result of the court order, PRASA is in a process of executing the order against both SATAWU and Mr Mphahlele. It is therefore our client's view that the matter as it stands is still before a court of law and as such the office of the Public Protector should reconsider its position with regards to the matter." (paragraphs 2-4 and 6).

18.261. Mr Montana and Makhubela Attorneys overstate the scope and findings contained in the report. In particular, the statement by Mr Montana that, "the investigation found that the allegations were without basis" and the statement by Makhubela Attorneys that, "[t]he forensic investigation conducted by Deloitte could not find any basis or truth in the allegations".

18.262. In the introduction to the report it is noted that, "the Chairman's request was specifically not for a proactive and detailed forensic investigation into the allegations, but merely a document verification exercise with a view to confirm that the various written and verbal responses by management to the allegations were supported documentation" (paragraph 1.2). It is stated that "Based on specific instructions received, the scope of this exercise was limited to the written and verbal

responses and related documentary evidence that management submitted to the Board in response to the allegations. Further, the focus of our document verification exercise was limited to only those responses that relate to the alleged tender/procurement irregularities and entailed a review of the documentation as against management's responses" (paragraph 1.3).

18.263. In relation to Siyangena, the report noted that "the contract was awarded for the Doornfontein station only but was extended to other stations without following procurement processes". Furthermore, the report records that the auditors, "were not provided with a signed document indicating the approval of this confinement [to four bidders] process by the GCEO". Despite those concerns, the report concludes with the statement that, "the documentation provided and reviewed appears to support management's response" (page 8).

18.264. The request for information was renewed in a letter sent to PRASA by Mr Abongile Madiba, Chief Investigator: Good Governance and Integrity, on 14 February 2013. A copy of the letter is attached as annexure "FA127". Mr Madiba stated in the letter that he found it, "difficult to conclude that a forensic investigation was conducted into the allegations raised by the complaints unless a contrary view from your side exists" (paragraph 3). Mr Madiba noted that, "nowhere in the Public Protector Act or in the Constitution has the Public Protector been able to find a provision that limits her mandate on the

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grounds that the allegations being investigated relate to a 162 matter that is before court" (paragraph 4).

- 18.265. Mr Madiba reiterated the request for information and documentation as requested in the letter of 7 November 2012, "in compliance with provisions of section 7(4) of the Public Protector Act before close of business on 18 February 2013", and threatened to use the contempt provisions of the Public Protector Act.
- 18.266. On 18 February 2013, Makhubela Attorneys replied to say that, 
  "in order to compile a meaningful response regarding the 
  complaints contained in your letter of 7 November 2012, [it] will 
  take a substantial period of time" (paragraph 5). Furthermore, 
  "[A]t this stage, we unfortunately cannot make a more accurate 
  assessment of when we will be in a position to meaningfully 
  respond to the 36 complaints, and to supply the 
  documentation" (paragraph 9). A copy of the letter is attached 
  as annexure "FA128".
- 18.267. The view was expressed that the demand for submissions by 18 February 2013 was, "unreasonable in the extreme" (paragraph 10). Despite the fact that the submission had been requested three months prior to the date of the letter. Instead, a threat was made that PRASA would approach a Court "with an urgent application to obtain an order as contemplated in section 8(1)(e) of the PAJA, namely a temporary interdict against yourselves to prevent you from continuing in an

arbitrary manner with the investigation and to the detriment of 163 my clients' rights" (paragraph 14.1).

- 18.268. On 20 February 2013, Mr Madiba stated that there had been undertakings on a number of occasions to make the requested submissions and that, "[I]n the light of the history of the failed attempts by the investigation team assisting the Public Protector in this investigation to obtain the required information and documentation, the view is held that the contention expressed in your letter under reply that your client was not afforded reasonable and sufficient opportunity to respond and submit same, is without merit" (paragraph 3). A copy of the letter is attached as annexure "FA129".
- 18.269. Furthermore, Mr Madiba stated that, "your client's frequent requests for an extension of time were granted, notwithstanding the fact that the time given to it to respond was sufficient and reasonable", (paragraph 4). A final request was made for the submission by 22 February 2013, and a threat to issue a subpoena directing PRASA's chairperson and CEO to appear before the Public Protector and to submit the requested information and documentation (paragraph 7).
- 18.270. The submission was not made. The failure to provide a submission is recorded in an email by Mr Paul Tjale, Senior Investigator: Good Governance and Integrity, to *inter alia* Mr Ephraim Mphahlele. A copy of the letter is attached as annexure "FA130".

- The subpoenas were issued on 28 February 2013 with a request to appear before the Public Protector on 13 March 2013. Despite the subpoenas, neither the then chairperson, Mr Buthelezi, nor Mr Montana appeared before the Public Protector. Mr Makhubela was sent by Mr Montana to appear in his stead. The failure to appear is recorded in a letter by Mrs Madonsela, dated 26 March 2013. A copy of the letter is attached as annexure "FA131".
- 18.272. The public protector stated that, "[A]s a consequence of your failure to appear before me as directed in the subpoena, I am now proceeding with an inquiry into the reasons for your refusal/failure to comply" (paragraph 4).
- 18.273. Mr Montana and Makhubela attorneys submitted information in two letters, dated 15 March 2013. Copies of the letters are attached as annexure "FA132".
- 18.274. Mr Montana alleged in his letter that, "the premature issuance of the subpoena against PRASA, at the time when there was co-operation by PRASA and on-going interaction between PRASA and the Office of the Public Protector, is consistent with this unfair and heavy-handed approach" (page 2). Mr Montana made this allegation despite the numerous requests for information that had been made since 7 November.
- 18.275. Mr Montana remarked further that "[I]t is on record that the Board concluded that the allegations levelled against PRASA

were unfounded, false and defamatory ... PRASA acknowledges that it is the prerogative of the Public Protector to decide on how to conduct any of its investigation, however, we are of the view that there is a compelling case for the Office of the Public Protector to also place some reliance on the work done by Deloitte supported by PRASA's Group Internal Audit" (page 3). I have already explained above why this report was not sufficient for these purposes.

18.276. Mr Montana nevetheless resubmitted the Deloitte report by attaching it to his letter. The letter from Makhubela Attorneys attached a response to each of the allegations. The information was superficial and incomplete.

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- 18.277. In response to the allegation regarding the speed gates project, the following was submitted:
  - 18.277.1. "[T]his project was issued to tender with the reference number: SG/Gate/003/2009. The tender was in respect of speed gates and included public information boards and public address systems for the Doornfontein and Nasrec Stations. The tender was awarded to Siyangena Technologies. The project was extended to seven other World Cup stations after it emerged that the main contractors at the said seven stations had excluded the critical work of installing modern speed gates, the

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seven stations are: Cape Town, Rhodesfield, Windermere, Langa, Bridge City, Moses Mabhida and Orlando.

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18.277.2. PRASA took a decision to extend the roll out of the speed gates project to a further 71 stations. In accordance with the PRASA SCM policy, a closed tender was extended to the original four companies that had submitted bids for the original World Cup speed gates project, and all four responded. A contract of R1.7 billion was awarded to [Siyangena], the successful bidder." (paragraph 2.7)

18.278. The information was not only superficial but inaccurate and misleading. The assertion that the closed tender was carried out, "in accordance with the PRASA SCM policy", is wrong. The value of the contract is understated.

18.279. On 4 April 2013, Mr Montana wrote to the public protector. A copy of the letter is attached as annexure "FA133". Mr Montana requested that the public protector reconsider and set aside the subpoena on the basis that the appearance of Mr Makhubela, on 13 March 2013 was "within the ambit of cooperation and accordingly the matter had been dealt with on that level" (page 2).

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- 18.280. On 4 June 2013, Mr Nkebe Kanyane, Chief Investigator: Good Governance and Integrity, issued a notice in terms of section 7(4)(a) of the Public Protector Act, to Mr Montana, Mr Buthelezi and Mr Zide, the company secretary, requiring them "to ensure that the outstanding information and documents ... which have a bearing on the matter being investigated are produced and made available for inspection and collection by the Public Protector officials" (paragraph 4) on 7 June 2013. A copy of the notice is attached as annexure "FA134".
- 18.281. In response, Mr Montana raised the following objections relating to procedural fairness:
  - 18.281.1. "At the commencement of the investigation, the Office of the Public protector has failed to format the investigation and clarify the procedures to be followed. This failure has resulted in unnecessary and repeated requests for documentation which have already been provided by PRASA" (paragraph 11.5). This was in spite of the concerns raised by Public Protector officials regarding the sufficiency and adequacy of the information provided.
  - 18.281.2. "The time period of (1) day is, insufficient time and procedurally unfair. In an attempt to circumvent the investigation, the Office of the Public Protector seeks to manipulate the vested

powers and impose time frames which, in the given circumstances are unreasonable" (paragraph 12.2). Mr Montana ignored the time afforded for the response to the first request for information, which was made eight months prior to the date of this letter.

18.281.3.

"The Office of the Public protector has failed to find any substance in the complaint, however, instead of dismissing them, the Public Protector is seeking information from PRASA, to make out a case in support of the allegations raised by the complainant. It is all too clear that the Office of the Public Protector is in effect, seeking ammunition from PRASA and will seek to utilise any ammunition against PRASA. Having conducted the investigation in that fashion, a reasonable inference can be drawn that the objectivity of the Public Protector has been tainted. This means that the investigation will be biased and work against PRASA" (paragraphs 16.1-16.2). The allegations made by Mr Montana are scandalous and ignore the duty of the public protector to investigate and request information.

18.282. On 2 July 2013, the public protector noted that, "it is not in the interest of justice that PRASA keeps relying on technical issues

whenever my office requests for information and documents relating to my investigation. Suffice to say that I have noted your willingness to cooperate. However, the failure to provide my office on time with relevant information and documents requested causes serious concern resulting in me having to resort to powers vested in me in terms of the law" (paragraphs 2-3). "[M]y office had not received all documents requested in its letter dated 7 November 2012 hence a further request was made" (paragraph 4.2) and "[M]y office's request for access to outstanding documents by notice in terms of section 7(4)(a) was made in line with your pledge to allow access to the Data Room and to cooperate with my investigation. My investigators have perused all the responses and realised that the documents received from PRASA do not cover all the issues raised in the allegations" (paragraph 6). Mr Montana was not complying with his obligations or his undertakings to cooperate with the investigation. A copy of the letter is attached as annexure "FA135".

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18.283. On 6 May 2015, Mr K Malunga, the Acting Public Protector at the time, advised Mr Montana of his "final opportunity to engage with the investigation team" by making use of the opportunity afforded "to access the evidence upon which our provisional findings were made" in preparation for the Public Protector's issuance of her report (paragraphs 1-2). A copy of the letter is attached as annexure "FA136".

- 18.284. On 1 June 2015, Mr Tjale, the senior investigator in the office 1 7 () of the Public Protector recorded in an email that the deadline and subsequent extension for submission of "feedback regarding PRASA's response to the Public Protector" had also been missed. A copy of the email is attached as annexure "FA137".
- 18.285. The public protector's report was released in August 2015. The public protector commenced with the statement that, "the documents submitted by Mr Montana were not always reliable as some crucial documents were undated and unsigned" (paragraph 6.1.2.3). As a result, her investigations were reliant on documents whose authenticity and reliability she questioned (paragraph 6.1.2.9).
- 18.286. The public protector stated further that, "Mr Montana's changing narrative regarding what happened is a cause of concern regarding honesty". The Public Protector concluded that she was "unable to accept Mr Montana's submission that the roll out was for meeting the 2010 Soccer World Cup needs (paragraph 6.2.10).
- 18.287. In particular, the public protector remarked that, "had PRASA applied the provisions of their own SCM Policy, specifically with regard to needs assessment required to be completed by an end user ... it would have identified the future needs requirement to have the same technology on the same infrastructure nationally". In regard to the delivery date for the

project, the public protector stated that, "had there been a 1 7 1 proper needs assessment, the need for emergency extension of the tender would have been obviated" (paragraph 7.1.5).

18.288. I respectfully submit that Mr Montana, with the assistance of others concerned with PRASA, made a concerted effort to frustrate the public protector's investigation through any means possible. Mr Montana continued to directly frustrate any investigation into any wrongdoing until his resignation, and thereafter he did so indirectly through the assistance of persons within PRASA.

## 19. Phase 2

- 19.1. The phase 2 tender sought to extend the installation of ISAMS to one hundred and sixty one (161) stations located in Gauteng, KwaZulu-Natal and Western Cape provinces.

  A needs assessment was not performed. The works from the phase 1 tender were arbitrarily extended without consideration of the actual requirements of PRASA. The extension was not approved and not included in the budget.
- 19.2. The phase 2 tender was initiated by Siyangena. Siyangena submitted a written proposal to extend the ISAMS project to key corridors nationwide on 20 January 2013. A copy of the proposal is attached as annexure "FA138". The proposal was not solicited by PRASA. Siyangena referred to an opportunity afforded to it by someone within PRASA to submit, "a bid for

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the extension of the existing ISAMS project". The request for a 1.7.2 proposal by an individual within PRASA and the consideration of the proposal was a contravention of the procurement policy.

19.3. The proposal indicates that Siyangena envisaged an extension of the phase 1 tender, in an amount of approximately R3.4 billion, presumably under the remeasure rubric. However, the public protector had by then started an investigation into the award of phase 1 tender.

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- 19.4. The phase 2 tender commenced in 2013 and accordingly the budget for the project should have been incorporated in the 2013/2014 MTEF. The 2013/2014 MTEF contains, for work of this nature, only about R235 million for 2013/2014 and no allocation for the following 2 years. The budget allocation proves that the phase 2 tender was not planned, the DoT, national treasury and the board were not approached for a budget allocation, and the ISAMS was not a priority. A copy of the 2013/2014 MTEF is attached as annexure "FA139".
- 19.5. The 2014/2015 MTEF, prepared after the tender, contains no allocation for 2014/2015, but approximately R250 million for 2015/2016, and R264 million for 2016/2017. The tender was awarded in excess of R2.5 billion. The budget allocation proves that the phase 2 tender was not planned by the EPMO and not approved by the DoT and National Treasury.

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19.6. The MTEF 2015/2016 includes a budget for, "Asset 173 protection". The corporate plan for that year explains asset protection as follows:

The "[a]llocation of R573 million on security equipment is proposed over the next three years to improve security in key strategic points. This allows for a funding space of R181 million in 2015/16, R190 million in 2016/17 and R202 million in 2017/18. The allocation will allow spending on an Integrated CCTV system, access control and alarm systems in key stations, buildings and rail corridors. Even though the proposed spending is R573 million over the next three years, the overall PRASA Capital Programme includes a number of security initiatives which are not part of this security capital baseline. ... There is also further spending on speed gates which include CCTV and access points."]

- 19.7. The explanation proves that the proposed spending of R573 million, included a variety of projects, only one of which was the ISAMS. The award of the phase 2 tender to Siyangena for R2.5 billion was not contemplated.
- 19.8. In addition, as with phase 1, the phase 2 tender constituted a mega project, as defined in the National Treasury Guidelines (annexure "FA28" above), and a comprehensive appraisal was

required to be conducted by the CBC, based on detailed 1 7 4 information provided by PRASA.

- 19.9. I have caused a search to be conducted of PRASA's records by Mr Brian Alexander of PRASA, and no documents evidencing compliance with the guidelines could be found.
- 19.10. As stated above, a needs assessment, focussed on *inter alia* budget availability and approval, the commodity required and possible alternatives, and the specifications, should have been performed. In addition, a CFSC should have been appointed to ensure that the tender satisfied the needs of PRASA, to develop the specification and to facilitate the allocation of evaluation criteria and weightings. The CFSC would have included experts to assist with this function. A CFSC was not appointed and as a result the contraventions of the procurement policy and inefficiencies mentioned in regard to the phase 1 tender were retained.
- 19.11. On the same day, 25 June 2013, Ms Mosholi prepared a letter.

  The letter invited the recipients to a briefing session to be held on 28 June 2013. Ms Mosholi sent an email to which the letter was attached to eleven entities: Siyangena, Fang Security Infrastructure, SA Fence & Gate Investment Holdings (Pty) Ltd, Marothi-KgT Consortium, Fintech Projects, Siyenza Holdings (Pty) Ltd, Bona Electronic Solutions (Pty) Ltd, Wright Surveillance, Protea Coin Group (Pty) Ltd, Omega Fire &

Security CC, and Gordian Fence SA. A copy of one of the 1.7.5 letters sent is attached as annexure **\*\*FA140\*\***.

- 19.12. I have been unable to ascertain the reasons why the procurement process was restricted to the entities referred to above and Ms Mosholi is unable to remember. As stated above in relation to the phase 1 tender, a competitive bidding process was required. The restriction of the process is only permitted in limited circumstances and was entirely inappropriate for the extension of the ISAMS to a further 161 stations. The restriction was not approved by the board.
- 19.13. The restriction of the procurement process contravened the PFMA and the delegation of authority.
- 19.14. The email to Siyangena was sent to Mr Reddy at reddy@ siyangena.co.za. Mr Reddy responded by email on 26 June 2013 and confirmed that Siyangena would be attending the briefing session, however, he did not specify who would be in attendance. A copy of the email is attached as annexure "FA141".
- 19.15. On 26 June 2013, PRASA issued a request for proposal (RFP).

  A copy of the RFP is attached as annexure "FA142". The RFP was issued under tender no. HO/FM/CRES/140/06/2013. The tender was for the work referred to in the proposal received from Siyangena in January 2013.

19.15.1. The "Introduction and Background" of the RFP 176 records that PRASA:

"[I]dentified the need to roll out an integrated security access management system to various stations during 2010. A detailed analysis was done on the specific requirements and initial roll out to the national key corridors was tendered and awarded in 2011.

This RFP is the further rollout to the remaining stations identified but not covered in the initial rollout. All equipment specified is in line with the equipment utilised during the initial roll out and any and all products must be able to fully integrate with equipment and materials already installed" (paragraph 7).

- 19.15.2. The statements in the first paragraph are wrong.There was no needs assessment or a detailed analysis on the specific requirements.
- 19.15.3. The scope of work is detailed in paragraph 8 of the RFP as follows:

"Public address system; display boards and help points; video surveillance system;

access control system; smoke and fire detection; structured cabling; civil works related to the project; and access gates – future ready for automatic fare collections (AFCC)."

- 19.15.4. The scope of work was derived from the phase 1 tender. The addition to the requirement for access gates, that the gates should be "future ready", is an acknowledgement that the works do not result in a functioning, automatic fare collection system.
- 19.15.5. The phase 2 RFP specified in the Bidders Requirements, Experience and Competency, section and the "Technical Evaluation" criteria that the bidders must demonstrate competency and familiarity with the specific technologies by indicating what accreditations and certifications he has with the following technologies: Autec Babylon (Access Control and Security Installations); Dallmeier SeMSy (CCTV and Video surveillance Installations); and ComInfo (Speed-gate Installations)".
- 19.15.6. The mere specification of brand names contravenes the procurement policy. The requirement to demonstrate competency and familiarity with specific brands and to provide

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accreditation and certification with those brands is, to say the least, irrational and directed at favouring and being biased towards a bidder with access to those brands. In this instance, that bidder was Siyangena.

- 19.15.7. The RFP specified a technical threshold of 70%.

  The evaluation criteria to be used for the technical evaluation were broad, save in relation to the brands. The bidders were required to demonstrate "financial capability", "ability to execute a project of this magnitude", "competency and familiarity" with the specified brands, and "competency and familiarity with working within the rail environment".

  The criteria were not objective.
- 19.16. The briefing session was held on 28 June 2013 at the offices of PRASA in Pretoria. The briefing was attended by all eleven invitees and Mr Reggie Kisten, the Manager: PRASA CRES Telecoms. A copy of the attendance register is attached as annexure "FA143". Mr Kisten was interviewed in the presence of Mr Dingiswayo. Mr Kisten claimed to be unable to remember anything about the meeting.
- 19.17. Although the email and invitation from Ms Mosholi stated that the bid document and bill of quantities would be sent to the bidders before the meeting, there is no record that this was

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done. I assume that the bidders received the documents at the 179 briefing session.

- 19.18. The tender closed on 16 July 2013. The 'Tender Opening Register' records that seven (7) bids were received. The following bidders responded: Siyangena, Protea Coin Group (Pty) Ltd, Bona Electronic Solutions (Pty) Ltd, KgT Enterprises CC, Siyenza Holdings, SA Fence and Gates Holdings (Pty) Ltd, and Omega Fire and Security CC.
- 19.19. Siyangena tendered a contract price of R2,224,848,801.40 (excl. VAT). Siyangena's bid document is voluminous. In order to avoid undue prolixity I have attached only the relevant parts of the bid as annexure "FA144". The entire document will be made available to the court at the hearing of the matter and a copy provided to the respondents on request.
- 19.20. On 15 July 2013, Mr Mbatha sent a memorandum to Mr Phungula, Mr Gantsho, Mr Kevin Mabona (ICT), Mr Kisten and Ms Mosholi. A copy of the memorandum is attached as annexure "FA145". The purpose of the memorandum was to appoint the recipients as members of the "Tender Evaluation Team" ("TET") for the phase 2 tender. The TET is the equivalent of a BEC. None of the persons appointed to the TET were experts.
- 19.21. The TET met on 17 July 2013. As stated above in relation to the phase 1 tender, the BEC (referred to as the TET in this



instance) was required to perform a technical evaluation of the bids with the assistance of experts, and according to the evaluation criteria stipulated in the RFP.

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- 19.22. The meeting was attended by the members of the BEC referred to above. The meeting was also attended by Ms Lehabe. The names of the persons who attended are recorded in an attendance register. A copy of the attendance register is attached as annexure "FA146". There is no record of the appointment of Ms Lehabe to the BEC. Ms Lehabe signed the declaration of interest and the confidentiality agreement, and performed a compliance check but did not participate in the scoring. I assume that Ms Lehabe attended the meeting in a secretarial capacity, although in that event Ms Lehabe should not have performed the compliance check.
- 19.23. Although ordinarily minutes are prepared of any meeting of a committee evaluating tender bids, no minutes can be found of this meeting. I have caused a search to be conducted of PRASA's records by FACTS Consulting and they were unable to find any record of the minutes to this meeting.
- 19.24. However, the declarations of interest, confidentiality agreements, compliance assessments and scoring sheets of each of the members were found. Copies of the scoring sheets and combined scoring sheet are attached as annexures "FA147".

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- 19.25. The scoring sheets reflect the evaluation criteria applied by the BEC and the weights attributed to each of the criteria. The evaluation criteria deviated from those stated in the bid in that there was no assessment of financial capability and the criteria included "EMERGING CONTRACTORS" and "RESOURCES".

  The evaluation criteria that were used by the BEC were allocated a total weighting and divided into sub-criteria that were apportioned individual weightings. The sub-criteria were not mentioned in the RFP.
- 19.26. I repeat the criticism I expressed above in relation to the evaluation criteria used in phase 1. The criteria used in phase 2 simply permitted the members of the BEC to express an unsubstantiated, inexpert opinion which rendered the evaluation of the bids arbitrary. The actions and decision of the BEC contravened the PPPFA and, as a result, was unlawful.
- 19.27. The scoring sheets reveal that forty percent (40%) of the technical evaluation was attributed the brand names, Autec, Dallmeir and Cominfo, and the testing and commissioning of such software. The result was that Siyangena achieved an almost perfect score and all the other bidders scored almost no points and failed to achieve the technical threshold. The result was a foregone conclusion.
- 19.28. On 19 July 2013, Mr Phungula signed a report to the CTPC, in his capacity as the BEC Chairperson. A copy of the report is attached as annexure "FA148". Mr Phungula sought the

CTPC's approval, "to appoint Siyangena Technologies for the supply and installation of integrated security access management systems at the total amount of R2, 770,534,289.64 (VAT inclusive) for a period of five (5) years" (paragraph 15). In this report, attached as annexure "FA148", Mr Phungula further noted the following:

- 19.28.1. Bona Electronic Solutions' bid was eliminated for not submitting all required documents, thus resulting in a non-compliant bid.
- 19.28.2. "(A) minimum qualifying score (threshold) of 70% was set as per the PPPFA regulations in order for a bid to be considered further on BBBEE and Pricing evaluation. Those bidders who fail to obtain the 70% threshold were disqualified. (paragraph 7.2). The qualifying score was based on the extent to which the technical criteria were satisfied.
- 19.28.3. Consequently, from the remaining six (6) acceptable bids, only Siyangena met the 70% threshold with a score of 87%. The closest scoring competitor, Protea Coin, received a score of 35% (paragraph 11.1). This is further evidenced in the technical evaluation report attached as annexure 1 to the report, wherein Siyangena was the only entity that satisfactorily demonstrated Autec Babylon, Dallmeier SeMSy and Cominfo

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Speedgate accreditations, with a score of 37.6% \$\frac{1}{8} \frac{3}{3}\$ out of a possible 40%. The closest scoring competitor was Protea Coin with a score of 11.2%.

- 19.29. The report contains no reference to a budget for the project.
- 19.30. The tender should have proceeded to the BAC and CTPC, as required by the procurement policy and envisaged by the report. The CTPC was required to make a recommendation to the GCEO and required to consider the tender prior to any consideration by the FCIP. The CTPC was responsible for considering the procedure followed by SCM and the TET, and to consider substance and value for money. There is no indication that the BAC and CTPC ever met to consider the phase 2 tender. Instead, the tender proceeded directly to the FCIP. The CTPC had rejected the phase 1 tender, whereas the FCIP had approved the appointment of Siyangena. In the phase 2 tender, the CTPC was bypassed entirely.
- 19.31. I have caused a search of PRASA's records by FACTS Consulting, and there is no record of any meeting of the CTPC taking place. As a result of this, and the fact that the report to the FCIP (mentioned below) which does not contain any reference to the CTPC's deliberations was signed on the same day as a report seeking the CTPC's approval, it can be inferred that a meeting of the CTPC did not take place and the CTPC did not recommend the award to Siyangena. In addition,



it can be inferred that there was no intention to place the tender  $\frac{1}{8}$  4 before the CTPC.

On the same day, 19 July 2013, Mr Mbatha signed a report to 19.32. the FCIP seeking its approval, "to appoint Siyangena Technologies for the supply and installation of integrated security access management systems at the total amount capped at R2, 000,000,000.00 (VAT inclusive) for a period of five (5) years" (paragraph 15). A copy of the report is attached as annexure "FA149" . The report provided no explanation for the capping of the amounts concerned, despite referring to the amount tendered by Siyangena of R2,7 billion. Furthermore, the report made no reference to any approval by the CTPC. The report purported to be on behalf of Mr Montana and the recommendation was supported by Mr Montana as evidenced by his signature on the document. Mr Montana supported the recommendation, despite the absence of a report from the CTPC.

July 2013. Dr Bridgette Gasa, Mr Xolile George, Mr Mawethu Vilana, Mr Montana, Mr Zide and Ms Martha Kotu were present at the meeting of the FCIP. The following were in attendance by invitation: Mr Mbatha, Mr Sebola, Mr Bopape, Ms Rebecca Setino, Mr Godfrey Sonny, Ms Ngubane and Mr Holele. There is no indication in any of the minutes referred to below, that the FCIP was informed of the absence of a recommendation by the CTPC and that the FCIP considered the procedure

followed by the committees and persons involved in the 185 procurement process.

- 19.34. A version of the minutes of the FCIP meeting is attached as annexure "FA150". The minutes are unsigned. This version of the minutes record that following a consideration of Mr Mbatha's submission, the FCIP resolved as follows:
  - 19.34.1. "That management should investigate where there are gaps on Priority Corridors of the Phase 1 process and plug those corridor-gaps through a variation order capped at R300-million.
  - 19.34.2. That management to consider the most cost effective way of intervening with a view of minimising costs and maximising benefits from the system integration perspective.
  - 19.34.3. That the rest of the priority corridors be put on open tender process." (paragraph 10.5)
- 19.35. This version of the decision of the FCIP recognises that an investigation into cost effective investments and a needs assessment had not been performed and was required, the work was not a priority and that there were difficulties with the budget allocation. However, a variation in an amount of R300 million was extraordinary and the FCIP, in my view, would not have made such a recommendation.

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19.36. Another version of the minutes was discovered following a search of PRASA's records conducted by FACTS Consulting.

A copy of this version of the minutes is attached as annexure

"FA151". The minutes are unsigned. In this version a materially different resolution by the FCIP is recorded as follows:

"The FCIP Committee having considered the submission would not recommend to the Board for the approval and the appointment of Siyangena Technologies. The Committee raised its concern that the information provided was not sufficient enough to make an informed decision. Management was requested to follow the procurement process and provide detailed and accurate information. The matter was deferred to the next FCIP meeting."

- 19.37. This version is materially different in that it envisages a resubmission of the tender to the FCIP.
- 19.38. The above version of the minutes was attached to an email sent by Ms Martha Kotu, the secretary of the FCIP, to Mr Enos Ngutshane, PRASA's Nominated Manager in terms of the National Railway Safety Regulator Act 16 of 2002, on 15 January 2014. A copy of the email is attached as annexure "FA152.1". In the email, Ms Kotu says, "Could you kindly edit and comment on the attached minutes for me." Mr Ngutshane responded, "Good work. Thanks." According to the metadata,

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Mr Ngutshane modified the document on 20 January 2014. Ms Kotu attached the minutes to an email sent to Mr Zide on 20 January 2014. A copy of the email is attached as annexure "FA152.2". Ms Kotu says, "[p]lease find attached the previous minutes of the FCIP Committee meeting held on 22 July 2013 for your perusal." Ms Kotu reminded Mr Zide to peruse the minutes on 6 February 2014. Mr Zide then sent the minutes to Mr Montana, on 5 May 2014. A copy of this email is attached as "FA152.3". There was no response from Mr Montana.

19.39. A further version of the minutes exists. A copy of this version is attached as annexure "FA153". The minutes are unsigned. This version records another materially different resolution. The resolution is recorded as follows:

"The FCIP Committee having considered the submission would not recommend to the Board for the approval and the appointment of Siyangena Technologies, but rather that those stations that were already being identified and some work has commenced on them be completed and the balance of the work that needs to be done be subjected to the tender process. Management will submit progress on this matter at the next FCIP Committee."

19.40. Another version of the minutes exists. A copy of this version and its metadata is attached as annexure "FA154". As with the previous versions, this version is unsigned. This version is an amalgamation of the annexures "FA151" and "FA153".

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This version was provided to Ms Claudia Brink, an audit manager at the auditor general. The email thread is attached as annexure "FA155.1". In the last email in the thread, sent on 2 July 2015, Ms Kotu says that, "I have engaged with the previous FCIP Committee chairperson ... to sign the minutes, once signed, we shall forward the signed copies ...". According to the metadata, the minutes were created on the same day as the minutes referred to above were last modified, indicating that this version was created from the above minutes. This version was last modified by Ms Kotu on 1 July 2015.

- 19.41. On 2 July 2015, Ms Kotu requested Dr Gasa to sign the above version of the minutes. Dr Gasa refused. Copies of the emails are attached as annexures "FA155.2".
- 19.42. Following the FCIP meeting, Mr Phungula, in his capacity as acting CPO, wrote a recommendation report, attached as annexure "FA156", to Mr Montana. The report noted that following the resolution of the FCIP, management had since identified priority corridors in the Northern Gauteng region in the amount of R351, 078,716.90. I understand the resolution to require an investigation into the existence of gaps in priority corridors and to selectively plug those gaps based on where the works were the most needed and not simply to identify priority corridors. In addition, the amount recommended by Mr Phungula exceeded the cap of R300 million imposed by the FCIP.

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19.43. The tender should have proceeded to the board, not the 189
GCEO. Mr Montana nevertheless approved the recommendation. In his approval of the recommendation on 6 September 2013, Mr Montana noted in manuscript:

"The submission is approved. However, it is important to capture properly the decision of the FCIP. It resolved as follows:

- i) The gaps should be dealt through a variation order, which this submission seeks to address. The R351 million for the separate statement of works excludes VAT.
- ii) The FCIP, which is now the Board decision, after its report was adopted by the Board at its last meeting, resolved that open lines/corridors where ISAMS has not been implemented, be taken out to tender."
- 19.44. Mr Montana purported to approve the recommendation despite the fact that the amount exceeded the cap that was purportedly imposed by the FCIP. The approval was beyond the mandate of Mr Montana and unauthorised. Furthermore, Mr Montana selectively ignores two paragraphs of that version of the resolution of the FCIP, which required management to consider the most cost effective way of intervening to minimise costs and maximise benefits, and specified that only priority

corridors were to be put to open tender, not open corridors 190 where ISAMS had not been implemented.

- 19.45. The recommendation by Mr Montana exceed the budget by approximately R115 million allocated in the 2013/2014 MTEF.
- 19.46. Mr Phungula then issued notices of appointment as preferred bidder and final bidder to Siyangena. Copies of the notices are attached as annexures "FA152" and "FA158". The notice of appointment as preferred bidder required Siyangena's acceptance and an indication of willingness to proceed "by no later than 13 September 2013". There is no record of such acceptance. There is also no indication of any negotiations in the period after the notice.
- 19.47. Mr Phungula, nevertheless, proceeded to issue a notice of appointment as final bidder, on 10 September 2013, to which an acceptance was required "by no later than 16 September 2013". As above, no such acceptance can be found.
- 19.48. Mr Phungula must, at some point, have realised that the appointment exceeded the cap purportadly imposed by the FCIP and on 13 September 2013, issued a further notice of appointment as final bidder. A copy of the notice is attached as annexure "FA159". The notice records that the, "approval has been granted to appoint Siyangena technologies (Pty) Ltd for the supply and installation of Integrated Security Access Management System (ISAMS) as part of Phase 1 / variation

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order at the total contract amount of R300 000 000.00 (VAT Excl.). The latter supersede[s] the initial letter Ref HO/FM-CRES/140/06/2013 dated 10 September 2013".

- 19.49. The notice now reflected an amount of R294, 992,460.28 (excluding VAT) for the works. One of the corridors initially identified as a priority, namely the Pretoria to Pienaarspoort corridor, had been excluded from the project. Mr Ferreira responded, in a letter dated 16 September 2013 attached as annexure "FA160", accepting the appointment.
- 19.50. Mr Montana later (on 11 December 2013) approved a payment of R82, 989,473.68, purportedly in order to rectify rate of exchange fluctuations to the phase 1 variation in the amount of R300million. Mr Montana was not authorised to approve the alleged rectification without board approval. The matter was not placed before the board. The payment request was later approved on 20 January 2014 in an amount of R94, 608,000.00 (VAT inclusive). Copies of both approvals are attached as annexures "FA161" and "FA162"
- 19.51. The concerted effort to appoint Siyangena to the phase 2 tender commenced afresh in September 2013.
- 19.52. On 20 September 2013, Mr Phungula issued a letter, a copy of an example of which is attached as annexure "FA163", to all tenderers, including Siyangena, advising them that, "having assessed the bids, PRASA came to the conclusion that the

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tender must be cancelled and be advertised in the media." 192

Tenderers were not informed of the variation awarded to

Siyangena.

- 19.53. On 1 October 2013 PRASA issued a second RFP in respect of phase 2. A copy of the RFP is attached as annexure "FA164" with a closing date of 29 October 2013. The RFP was similar to the first.
- 19.54. The technical requirement of accreditation and certification in Autec Babylon, Dallmeier and ComInfo products as well as the minimum threshold of 70% for satisfaction of technical requirements were retained (paragraph 14.4).
- 19.55. On 9 October 2013, a tender briefing session was held with approximately 29 entities in attendance as evidenced by the attendance register attached as annexure "FA165".
- 19.56. I did not attend the meeting. However, in a letter sent to all the potential bidders on 11 October 2013, Mr Phungula mentions that the meeting was informed that the tender document was under review following concerns raised by entities that, "the tender document was biased towards a particular company". A copy of the letter is attached as annexure "FA166". The concerns are not contained in documents prior to this date and it would be reasonable to infer that the concerns were raised at the briefing session. It would be reasonable to infer too that



concerns were raised at the briefing session and meetings in 193 the prior period to which I have referred above.

- 19.57. Mr Phungula listed the concerns and the responses as follows:
  - 19.57.1. Concern 1: "That Dallmeier system is only distributed by one company.

Mr Phungula's response: "if bidders were to approach the OEM, they would find out that in fact they can approach four vendors, in the Republic of South Africa, for costing."

- 19.57.2. This response is incorrect in that Siyangena and its associated entity, ESS, were the sole accredited distributors of Dallmeier products in the Southern Hemisphere as evidenced by confirmation certificates purportedly issued by Dallmeir. These are attached as "FA167" AND "FA168".
- 19.57.3. Concern 2: "That Autec is only obtainable from one company."

Mr Phungula's response: "The OEM will advise that in fact costing can be obtained from three vendors".

19.57.4. The response is incorrect. Siyangena was one of two partners for the Autec products, as evidenced

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by an email from Autec. A copy of the email is 194 attached as annexure **"FA169"**.

19.57.5. Concern 3: "That Cominfo (speed-gates) are only obtainable from one company".

Mr Phungula's response: "Bidders are once again implored to speak to the OEM who will give at least two distributors for costing."

- 19.57.6. The response is incorrect. Siyangena was the Cominfo "exclusive OEM partner for the PRASA project", as evidenced by a letter from Cominfo. According to an email from Cominfo, the distributors of Cominfo products in the Africa region were ESS and MASS Solutions. Copies of the letter and the email are attached as annexures "FA 170" AND "FA171".
- 19.58. Despite the responses, the prospective bidders' concerns did not abate as evidenced by an email from Ms Lehabe, on 16 October 2013, to all prospective bidders. A copy of the email is attached as annexure "FA172". In the email, Ms Lehabe addressed a query. The email, attached as annexure "FA172", reads as follows:

"Kindly receive the question and answer from one of the bidders:

Based on your response attached, please can Prasa circulate a copy of your procurement policy which indicates whether an OEM is in fact allowed or not allowed to participate in the tender process as an installer/integrator for the above-mentioned equipment?

According to our knowledge, an OEM is participating in this tender process and we would like to request clarification on this matter.

ANSWER: The Prasa ISAMS tender is open to everyone who has the capacity to delivery expected outcomes as indicated in the RFP. Subsequent to the foregoing OEM's are also free to participate. However, in this tender specifically there are three OEM's involved hence their participation as a single entity will be quite a challenge and not a prudent move. PRASA also advocates for BBBEE aspirations as encapsulated in the relevant ACT of DTI. The SCM policy does talk about OEM's in circumstances where confinements, or OEM accreditations are concerned. SCM Policy is not distributable."

19.59. On 25 October 2013, Mr Phungula addressed a letter, attached as annexure "FA173", to all prospective bidders extending the closing date for the phase 2 tender from 29 October 2013 to 29 November 2013. The letter requested prospective bidders to

indicate their acceptance of the notice and their "willingness to proceed in writing ... by no later than 30 October 2013".

- Despite this extension, by 31 October 2013, prospective 19.60. bidders still had not received a tender document, as evidenced by emails from two prospective bidders, Siemens (Pty) Ltd and EOH Security and Building Technologies (Pty) Ltd. The emails are dated 28 October 2013 and 31 October 2013, respectively. Copies of the emails are attached as annexures "FA174" and "FA175".
- 19.61. I assume that only eleven (11) entities from the initial 29 indicated their "willingness to proceed" as the subsequent RFP was sent to only eleven (11) entities by Ms Lehabe. The RFP was sent on 8 November 2013 as an attachment to an email, together with the technical specifications, list of stations and bills of quantities. A copy of the email is attached as annexure "FA176".
- 19.62. On 11 November 2013, revised specifications and a RFP were sent to prospective bidders by Ms Lehabe. The documents were attached to an email. Copies of the email and relevant parts of the attachments are attached as annexures "FA177"
- The RFP, as revised, did not address any of the concerns 19.63. raised by the bidders.



- 19.64. The situation was further confused on 28 November 2013, 19.7 when Mr Phungula issued an "Urgent Directive" to prospective bidders. A copy of the directive is attached as annexure "FA178". The directive informed the bidders that the tender, "is no longer valid since it has been superseded by certain developments." The bidders were advised further that:
  - and resultant extensive deliberations on factors impacting the ISAMS tender it was decided to adopt a new approach. The main objective of the new approach is to enhance openness, equity, competitiveness and integrity of the SCM process. This is done following perceptions created during the previous briefing session on this matter and which are continuing to circulate. You, as a valuable bidder, are required to familiarise yourself with the new process timeline and input critical aspects thereof as outlines in the steps below:
    - i) Step 1 On 02 December 2013 Bidders are requested to do mark-up on the RFP with a view to improve on areas that are frustrating or suboptimal
    - ii) Step 2 On the 22 December 2013 will be the closing date for marking up the RFP and

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all collated information will be analysed for 198 incorporation into the optimised RFP.

- iii) Step 3 On 20 January 2014 PRASA will send an optimised RFP which factored inputs from step 1 above. The optimised RFP will be send to all bidders currently participating in the ISAMS tender.
- iv) Step 4 A new briefing session will be held, probably on the 24 January 2014 such date will be stipulated in the optimised RFP.
- v) Step 5 On the 24 February 2014 will be the closing date of the tender hence the submission of completed RFP's with price offers from bidders".
- 19.65. Mr Phungula closed by advising that, "[t]he desired consequence is that there should be no bidder who is perceived to have an unfair advantage over the others or who applies bullying tactics in the market to the exclusion of others."

  This letter evidences the recurring concern regarding the unfair advantage that Siyangena benefitted from during the process.

  Despite such statements, Mr Phungula did nothing to address the merits of the concern and technical requirements that founded the unfair advantage remained the same. The failure

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to address the concern created a perception of bias amongst 199 the bidders.

- 19.66. In response, Mr Angelo Agrizzi of Sondolo IT (Pty) Ltd, wrote a letter dated 11 December 2013, addressing a number of concerns arising from the RFP. A copy of the letter is attached as annexure "FA 179". It is noted in the letter that:
  - 19.66.1. "With reference to RFP document 14.4c the bidder must demonstrate his competency and familiarity with the specified technologies by indicating what accreditations and certifications he has with the following technologies:
    - Autec Babylon (Access Control and Security Installations)
    - Dallmeier SeMSy (CCTV and Video Surveillance Installations)
    - Cominfo (Speedgate Installations)"

Response: "No provision was made in the RFP document that equivalent equipment may be included in the RFP." (paragraph 2).

19.66.2. "With reference to RFP document 16.1 Bidders are required to submit bids that are strictly in accordance with all requirements of the RFP.

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Bidders must note that in submitting an alternative Bid they accept that PRASA may accept or reject the alternative Bid and shall evaluate in accordance with the criteria stipulated in this RFP."

Response: "All technical specification related to equipment to be utilised in the RFP are branded and no alternative or equivalent option is given". (paragraph 3)

19.66.3. "With reference to Technical Specification 15.4

This access gate may be installed only by a qualified technician, anyone who has completed special training or supplier involved in the implementation of phase 1 of the project to ensure synergy and integration of installed systems."

Response: "If the potential bidder was not involved during Phase 1 and was not familiar with the installation of Phase 1 it might pose disqualification." (paragraph 5)

19.66.4. "With reference to Technical Specification 19 The following items of equipment form the basis of ISAMS Phase 1 hence strongly recommended to be used for this installation.

**CCTV** System

Dallmeier

Mo

BMS/Access Cpntrol System

Babylon

201

Intrusion System

Babylon

Intrusion Peripherals

Rokonet

Fire Detection System

GΕ

LAN System

Cisco, as

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by the

various sub

systems"

Response: "No provision was made in the RFP document that equivalent equipment may be included in the RFP." (paragraph 7)

- 19.67. The above concerns and responses are examples of preference in respect of brands and products that could be supplied by only one bidder, as raised by Sondolo IT (Pty) Ltd on 11 December 2013. I mention below further examples taken from comments submitted by prospective bidders on 20 December 2013:
  - 19.67.1. Siyenza Holdings wrote: "The problem that suppliers face with the specified equipment is that it is only available from a limited number of suppliers and in most cases only two. The current supplier to PRASA is one of the two suppliers and their own installations company, quoting against

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the competition benefits from this arrangement." 202

- 19.67.2. Blackstar Communications wrote: "Blackstar **PRASA** for understands the need standardisation of equipment but believes the objective to have competitive responses can be achieved, through open standards and solutions that can interface, integrate, are backwards compatible and support the current installations." The letter is attached as annexure "FA181".
- 19.67.3. L&C Impro-Tech wrote: "Alternate bids (similar Integrated Technology) should be considered especially where there is difficulty in acquiring the necessary accreditation." The letter is attached as annexure "FA182".
- 19.68. On 17 January 2014, Mr Phungula issued a further directive to prospective bidders. A copy of the directive is attached as annexure "FA183". The directive informed the bidders that five (5) bidders had made submissions in response to the request for inputs "to optimise ISAMS RFP Ref. HO/FM-CRES142/09/2013." Mr Phungula stated that:

"Submitted inputs were subsequently analysed in terms of their value-add, risk and appropriateness to the overall ISAMS programme as envisaged by

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PRASA Group. The views received from the five bidders, viewed in totality, do not materially alter the RFP and related tender documents. There was nothing in the inputs received that warrants further revision of the RFP and the bidding process, as contemplated by PRASA. The last revision in October 2013, read together with the letter dated 11 October 2013 is considered sufficient to form ground for fairness, competitiveness, transparency and equity. Subsequent to the latter there was no need to spend extra resources in terms repackaging the RFP. Attention of prospective bidders is drawn to the following improvements previously made in the October 2013 revision of the RFP:

Clause 8.1 – The scope of work has been clustered into three individually awardable units.

Letter dated 11 October 2013 – Suppliers, of required integration software platforms based on prior installations in Phase-1, have been pointed out in the letter and can also be searched by internet. All cited software suppliers are accessible to all bidders."

19.69. In other words, Mr Phungula simply refused to amend the RFP to address the concerns of the bidders in any meaningful

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manner. As a result, the procurement process was unlawful 204 and irregular.

- 19.70. On or about 27 January 2014, submissions for the phase 2 tender closed. PRASA received only seven (7) bids. The bids were received from: Siyangena, Mafoko Security Patrols (Pty) Ltd, IDtek Solutions (Pty) Ltd, Black Star Communications (Pty) Ltd, Protea Coin Group (Pty) Ltd, Sondolo IT (Pty) Ltd, and SA Fence and Gate (Pty) Ltd.
- 19.71. On or about 27 January 2014, Mr Phungula sent a memorandum to Mr Gantsho, Ms Lehabe, Mr Kisten, Ms Mosholi, Mr Baloyi, Mr Nkuna and Mr Nhlapho, appointing them as the TET members to evaluate the phase 2 tender submissions. A copy of the memorandum is attached as annexure "FA184".
- 19.72. The TET met on 30 and 31 January 2014, and 3 February 2014 to evaluate the bids. A copy of the attendance registers are attached as annexures "FA185". As with the previous meeting of the TET, no minutes can be found of this meeting. However, there are also no scoring sheets or other relevant documents, and no record of any report from SCM outlining the evaluation and recommendation by the TET. I have caused a search to be conducted of PRASA's records by FACTS Consulting and they were unable to find any record of the minutes to this meeting and the report.

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- 19.73. On 17 February 2014, the CTPC meeting was held. The 205 meeting was attended by Mr Mbatha, Ms Monkwe, Mr Phungula, Mr Hishaam Emeran, Ms Hope Zinde, Mr Vincent Kobuwe. The minutes of the CTPC's meeting are attached as annexure "FA186". The minutes are unsigned.
- 19.74. The minutes do not reflect that the CTPC considered the procedure followed by the committees and persons involved in the procurement process. The minutes contain no reference to the budget. The minutes are superficial.
- 19.75. The CTPC was, once again, not entirely satisfied with the submission. The minutes record that the CTPC resolved: "Matter Supported subject to the revised submission be communicated to committee members." I presume that the "submission" to which reference is made refers to a report that was placed before the CTPC. The CTPC was clearly considering a document as appears from the following comments recorded in the minutes:

## "Comment(s):-

- Page 4, paragraph three to be deleted.
- On page 4, the compliance to be put on the bottom
- Page 4, narrative be re-written to be factual

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- The paragraph that backs the scoring for each 206 bidder should contain a detailed comment that links the evaluation criteria.
- Confirmation of budget to reflect." (page 9)
- 19.76. However, neither the submission nor the revised submission can be found. If the revised submission had been communicated to the members of the CTPC there would be record of such communication. I have caused a search to be conducted of PRASA's records by FACTS Consulting and they were unable to find any record of either submission.
- 19.77. On 20 February 2014, Mr Phungula prepared and signed a recommendation report seeking, "the support of the FCIP" to appoint Siyangena. The report was attached to an email sent by Mr Phungula to Mr Montana for his, "perusal and preparation for Governance Committee on 24 February 2014."

  Copies of the email and the report are attached as annexure "FA187".
- 19.78. The report noted that following the evaluation of the bids in respect of the technical criteria, Siyangena was the sole bidder to score over the 70% threshold with a score of 87%. The closest scoring competitor was Protea Coin with a score of 25%. The result of the alleged optimisation of the RFP by Mr Phungula was an increase in the discrepancy between Siyangena and the other bidders.

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- 19.80. As the sole remaining bidder, Siyangena was awarded a score of 90 points for the tendered price of R2, 526,327,633.60. Protea Coin tendered at a price approximately R380 million lower than the price offered by Siyangena. Protea Coin offered R2, 143,796,634.94.
- 19.81. In relation to the CTPC, it was noted in the report that, "the ISAMS submission was considered and the Committee resolved that the recommendation be supported and elevated for approval by the FCIP." (paragraph 18). No mention is made of the requirement for a revised submission and confirmation of the budget. The report does not mention the budget allocated to the project.
- 19.82. Mr Phungula made the following recommendation:
  - 19.82.1. "Based on this report the support of the FCIP is hereby sought to [appoint] Siyangena Technologies for the supply and installation of integrated security access management systems (ISAMS Phase 2);

- 19.82.3. That an acceptable Sub Contracting plan be put in place and incorporated in the final contract". (paragraph 18).
- 19.83. Despite the report, there was no meeting of the FCIP. I have caused a search of PRASA's records by FACTS Consulting, and no record of the minutes of the FCIP meeting can be found.

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- 19.84. Instead, on 13 March 2014, Mr Phungula sent an email to Mr Montana providing him with the composition of the TET, "as discussed", and requesting Mr Montana to, "comment on its composition". Mr Phungula noted further that, "[t]he attached BEC was supposed to evaluate ISAMS Phase 2 tomorrow 14 March 2014". I cannot understand the reason why a TET would be reconstituted to reevaluate the bids, or why Mr Montana rejected the recommendation of the CTPC.
- 19.85. Mr Montana responded on 14 March 2014 noting that, "[t]his is too junior a team to evaluate a bid estimated to be around R3bn. We need an evaluation team made of senior and suitable experienced Managers at GM and Senior Manager

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level." A copy of the email thread is attached as annexure 209

- 19.86. In accordance with the instruction, on 14 March 2014, Mr Phungula sent a memorandum to Mr Imraan Khan (GM: ICT), Mr Palelo Lebaka (GM: Depot Modernisation), Ms Mosholi, Mr Ngobeni, Mr Takalani Mukwevho (GM: Fleet Management Services), Mr Sorin Baltac (GM: Signalling) and Ms Jacqueline Beukes (GM: Finance), appointing them to the reconstituted TET. A copy of the memorandum is attached as annexure "FA189".
- 19.87. Following the appointment, Ms Lungu wrote to the TET advising them that "the Evaluation meeting scheduled for 18/03/2014 has been suspended until further notice." No explanation was provided.
- 19.88. On 31 March 2014, Mr Phungula issued a second memorandum appointing another TET with the same members as above, other than Ms Beukes, who was excluded, and including Ms Yvonne Page, GM: Finance. A copy of this memorandum is attached as annexure "FA189.1".
- 19.89. On 8, 10 and 14 April 2014, this latest TET met to evaluate the phase 2 tender. A copy of the attendance register of 8 April 2014 is attached as **"FA190"**. There are no minutes or any other documents from the meeting

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19.90. The dearth of documents in relation to the phase 2 tender is extraordinary, particularly considering the normal practice in terms of which minutes and reports are prepared before and after each meeting and the number of meetings that occurred in relation to the phase 2 tender. The documents that are usually prepared are often attached to emails and hard copies are retained. There is no trace of the missing documents referred to above, despite the diligence of FACTS Consulting. I can only infer that any hard copies were destroyed and the electronic record of such documents were deleted, through a concerted effort to conceal or obfuscate the events to which those documents relate and hinder any investigation into the procurement process.

19.91. There is no indication that the tender proceeded to the CTPC or the GCEO after the reevaluation of the bids by the latest TET. There are no minutes of a CTPC meeting, and there are no reports to the CTPC or from the CTPC to the GCEO. There are also no minutes of the FCIP meeting.

19.92. The tender was not considered by the CTPC, despite there being numerous meetings of the CTPC after 14 April 2014. There are minutes of four meetings of the CTPC prior to 29 May 2014. A number of tender recommendations were discussed in those meetings, according to the minutes. However, the phase 2 tender was not one of the tenders discussed.

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- 19.93. The board met on 29 May 2014. The board had before it a 21 submission purportedly from the FCIP, entitled "Supply and Installation of Integrated Security Access Management System Phase 2". The contents of the submission are astounding considering the fact that there was no FCIP meeting and demonstrate the proclivity for preparing documents that were inaccurate. Copies of the submission and report are attached as annexures "FA191".
  - 19.93.1. The submission is headed, "SUBMISSION TO THE BOARD MEETING TO BE HELD ON THURSDAY, 29 MAY 2014" and in paragraph 1, the relevant division is identified as the FCIP.
  - The purpose of the submission is stated in 19.93.2. paragraph 3. The purpose was, "to obtain approval by the board to appoint Siyangena Technologies for the supply and installation of integrated security access management systems (ISAMS Phase 2); total amount of the [f]inalisation and R2 526 327 633.60 (VAT Inclusive) for a period of five (5) years and approval to negotiate maintenance, warrantees, ROE and mobilisation fee."
  - 19.93.3. In paragraph 5, it is stated that, "The FCIP Committee having discharged its duties in accordance with the authority and powers granted

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to it by the Board makes the following recommendations ...". The FCIP then purports to recommend the appointment of Siyangena for the ISAMS phase 2 in the above-mentioned terms.

- 19.93.4. In paragraph 4, the submission identifies an attachment as a, "Recommendation report". The attached report purports to be from Mr Montana to the FCIP. The report contains a recommendation to appoint Siyangena. In other words, the submission represents that the FCIP accepted the recommendation of Mr Montana.
- 19.93.5. I find the presentation of the submission and the report, as being that of the FCIP, concerning because, as indicated below, Mr Montana knew that the FCIP had not met and the submission could not be that of the FCIP and the FCIP had not accepted his recommendation.

## 19.94. In the report:

19.94.1. In paragraph 1, Mr Montana stated that the decisions of the board referred to in paragraph above, "were fully implement". The statement is wrong. As stated above, management did not consider the most cost effective way of intervening.

- 19.94.2. In paragraph 2, "Electronic ticketing for integrated 2.1.3 system" was an operational related project and "[a]utomatic Fare Collection (AFC)", was a future project. These statements are an acknowledgement that the ISAMS being installed did not, without more, provide such systems.
- 19.94.3. In paragraph 1, Mr Montana states on the one hand that the recommendation to appoint Siyangena for phase 2 addresses the requirement to attend to the remaining priority corridors. In paragraph 2.5, Mr Montana states that phase 2 seeks to address closing the gaps in the priority corridors that were not covered by phase 1. The statements are contradictory. The purpose of the variation referred to above was to close gaps, and that was limited to R300 million.
- 19.94.4. In the procedural section (paragraph 5), Mr Montana makes no mention of the number of tenders that were collected, as is typically the case, namely seven (7), in order to avoid emphasising that only Siyangena was the only bidder to exceed the technical threshold.
- 19.94.5. The most astounding misrepresentation is made in the notes to the procedural section (paragraph 5).In those notes, Mr Montana refers to the

correspondence exchanges with the bidders. In that correspondence the bidders expressed concerns about a bias in the tender. However, Mr Montana states that, "[t]he inputs received from the bidders confirmed that the RFP was optimal." That statement was untrue.

- 19.94.6. There is a reference to annexure "A" which is "a detailed technical evaluation report." The annexure is not attached. Although the report sets out the scores of the other bidders, the score of Siyangena is not disclosed, which conceals the discrepancy and the extent to which the tender favoured Siyangena.
- 19.95. The report does, however, explain some of the peculiarities in the procurement process.
  - 19.95.1. Mr Montana rejected the recommendation by the CTPC, purportedly due to concerns that Mr Montana had with the evaluation, and ordered that a different evaluation team be appointed to reevaluate the tender (paragraph 7). The statement appears to have been inserted in the document as the paragraph has a different formatting that distinguishes it from the rest of the report.

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19.95.2. The report does not state the concerns that Mr Montana had with the evaluation conducted by the first TET. Mr Montana was not present at the TET meeting and any concerns he had about the evaluation must have been derived from the minutes of or a report on the proceedings. I can only assume that the contents of the minutes or the report created concern over the result. However,

although Mr Montana must have had sight of the

minutes, the minutes and the report of the meeting

cannot be found in the records of PRASA.

19.95.3. The report proceeds to state that both evaluation teams made similar recommendation(s) after independently applying their minds on the quality of the bids and the identified technical capabilities of the bidders to deliver the project. The differences in the recommendations cannot be assessed as there are no minutes of the meetings. In any event, this statement is contrived to justify the absurd result of the evaluation process.

19.95.4. I respectfully submit that it was highly irregular for Mr Montana to intervene in the process in this manner. Mr Montana should have either adopted or rejected the recommendation made by the CTPC, and presented his decision to the FCIP. It was not for Mr Montana to refer the tender to a

differently constituted TET for re-evaluation. Mr 216

Montana subverted the procurement process with the result that the decision of the subsequent TET was not considered by the CTPC.

- 19.96. There is no record of either the signed minutes or the signed resolution of the board. However following a search, we were able to find an unsigned copy of the minutes from the meeting.

  A copy of these unsigned minutes is attached as "FA192".
- 19.97. In an email from Mr Zide to Mr Phungula and Mr Montana, dated 2 June 2014, with the subject "board approvals", Mr Zide provided an update on the meeting of the board on 29 May 2014. In relation to the ISAMS phase 2 tender, Mr Zide confirmed that:

"Joe, once more you will recall the discussions and issues raised by the Chairman of the FCIP committee related to the above submission and I suggest that those be included and signed by the GCEO. Once more I will for your records forward you the Board Resolution, upon the same being signed by the Chairman of the Board." (paragraph 2).

A copy of this email is attached as "FA193".

19.98. The issues raised by the chairman of the FCIP are not set out in the email. The issues were not included in the draft minutes

as suggested by Mr Zide, and there is no signed version of the  $2\,1\,7$  minutes.

- 19.99. The unsigned minutes contain the following in relation to the ISAMS phase 2 project:
  - 19.99.1. In paragraph 11.1 to 11.3, provide the reason why there was no meeting of the FCIP. Mr Montana reported that FCIP committee did not have a quorum. Accordingly, the submissions that ordinarily would be deliberated and recommended by the FCIP to the board, were deliberated with the chairperson of the FCIP. The statement implies that Mr Montana and the chairperson of the FCIP discussed the submissions. Mr Montana stated further that, "the submissions of the FCIP are however brought to the board for approval." I fail to understand how the submissions can be regarded as the submissions of the FCIP, if there was no meeting of the FCIP.
  - 19.99.2. In paragraph 11.3.2.2, it is recorded that, "[t]he
    Group CEO submitted that following the decision
    of the Board, at its meeting held in July 2013, for
    Management to go out on open tender process for
    Phase 2 of ISAMS, Management was submitting
    the outcomes of the tender process undertaken
    and a recommendation for the appointment of a

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successful bidder." The submission made by Mr Montana was misleading as the tender did not proceed to the board, and the decision of the FCIP was materially different. There is no reference in the minutes of the meeting of the board on 31 July 2013 to the phase 2 tender. This paragraph makes it clear that the submission was made by management, outside the structures contemplated by the procurement policy.

19.99.3. In paragraph 11.3.2.4, it is recorded that, "[t]he Group CEO submitted that based on the detailed report submitted in the Board pack, Management was seeking approval of the Board to appoint the successful bidder, Siyangena Technologies, for the Supply and Installation of Integrated Security Access Management System (ISAMS Phase 2)."

The report purports to be submitted by the FCIP. The report is superficial and misleading for the reasons stated above.

19.99.4. In paragraph 11.3.2.5, the resolution is recorded as: The Board following the presentation and deliberation of the above recommendation, resolved to approve the appointment of the successful bidder (Siyangena Technologies) for the Supply and Installation of Integrated Security Access Management System (ISAMS Phase 2) for

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a period five (5) years in the amount of R2 billion, Five hundred and Twenty Six million, Three hundred and Twenty Seven Thousand, Six hundred and Thirty Three rands and sixty cents (R 2 526 327 633.60) inclusive of Vat.

The Board furthermore authorised the Group CEO to negotiate the contractual issues in particular, maintenance, warrantees, ROE and mobilisation fee and sign on behalf of PRASA the agreement between Siyangena Technologies and PRASA."

- 19.99.5. The board ought to have been concerned about the contents of the report. In particular, concern should have been raised about the procurement process and the reasons why Siyangena was the only bidder to achieve the technical threshold. The board could not have considered the tender process. If the board had considered the tender process, it would not have been satisfied that the process was regular.
- 19.99.6. There is no indication that the board considered the budget. The award to Siyangena exceeded the budget provided in the MTEF for 2013/2014 and the following the periods. I find it inconceivable that the the board could have approved the appointment of Siyangena in the absence of a

budget. The board must have been unaware that there was no budget, and failed to enquire. The failure to enquire about the budget meant that the board was not in any position to make an informed decision and, as a result, the decision contravened the PFMA.

in the best interests of PRASA in managing the financial affairs of PRASA, failing to take effective and appropriate steps to prevent irregular expenditure, and failing to manage the revenue, expenditure and liabilities of PRASA. In addition, the members of the board, as officials of PRASA, failed to comply with their obligations in terms of the PFMA, committed an act of financial misconduct and committed an offence.

19.99.8. The authority given to Mr Montana to negotiate was irregular. The negotiations should have been done by a team that should include experts and representatives of the end user. In any event, the board should have approved the appointment of Siyangena as the final bidder and the contract should have been placed before the board for approval before it was signed by Mr Montana.

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- 19.100. A copy of the board's unsigned resolution is attached as 221 annexure "FA194". The resolution records that:
  - 19.100.1. "The board having considered the submissions from the Governance and Performance committee, regarding the approval of Integrated Security Access Management Systems (ISAMS) Phase 2 resolved to approve the appointment of Siyangena Technologies for the supply and installation of ISAMS Phase 2, for the contract period of (5) years, at a contract value of ... R2, 526,327,633.30 including VAT."
  - 19.100.2. The statement that the board considered the the Governance and submissions from The committee Performance wrong. Governance and Performance committee is not responsible for procurement. The Governance and Performance committee would not, in the ordinary course, have considered the tender or presented a submission to the board. There is no record of the Governance and Performance committee ever having considered the phase 2 tender. A copy of the relevant part of the terms of reference of the Governance and Performance committee is attached as annexure "FA195".

- 19.100.3. The board further authorised Mr Montana in the 222 terms set out above. I have dealt with the irregularity of such an authorisation above.
- 19.101. On 6 June 2014, Mr Phungula, signed the letter of appointment, attached as annexure "FA196", appointing Siyangena as the preferred bidder for phase 2 of the ISAMS project, with a, "baseline contract value of R2 536 327 633.60 (VAT Inclusive)" for a contract period of 5 years. The appointment was to be subject to negotiations on maintenance, warrantees, ROE, mobilisation fee and annual escalations. The letter stated the following:
  - 19.101.1. "There will be no mobilisation fee that will be paid upfront to Siyangena in this contract
  - 19.101.2. ROE adjustment of the contract will not be entertainment in Phase-2
  - 19.101.3. The above cited contract value approved by PRASA Board of Control cannot be exceeded.
  - 19.101.4. Siyangena to provide PRASA with firm and fixed price that will be sustained until end of the contract in 2019.
  - 19.101.5. Maintenance and warrantees of stations covered by the ISAMS Phase-1 Variation Order to be

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extended from 2016 to 2019 to ensure quality 2.23 assurance overall program synergy and systems integration.

19.101.6. Siyangena to provide expected payment schedule that will be milestone-driven and subject to negotiation and acceptance by PRASA.

- 19.101.7. [Siyangena] will be required to provide PRASA with performance guarantee as per JBCC contract."
- 19.102. The letter of appointment confirmed that the procurement process was not complete and that it would be completed once the final bidder was appointed. Siyangena was notified that it would be appointed as the final bidder once the terms and conditions of the contract were finally negotiated.
- 19.103. In terms of the appointment letter, Siyangena was required to, "indicate [its] acceptance of this notice and your willingness to proceed in writing to the undersigned by no later than Monday 09 June 2014". On 9 June 2014, Siyangena responded to its appointment, with a letter signed by Mr Reddy and Mr Ferreira. A copy of the letter is attached as annexure "FA197". The letter was addressed to Mr Khuzwayo. In the letter Siyangena accepted the appointment subject to negotiation on the points raised in the letter from PRASA, and provided a counter proposal. The terms of the counter proposal were inter alia as follows:

19.103.1. In paragraph 2 in relation to the refusal to "entertain any ROE adjustment of the contract": "Siyangena ... proposes the following as a compromise

fluctuation.

 Siyangena be appointed on the rates as agreed and negotiated for the <u>extension</u> to Phase 1 as these were adjusted for ROE

solution to be negotiated and agreed with PRASA:

b. Although the rates stated above were only fixed and maintained until March 2016, end of Phase 1 contract, Siyangena will keep these rates fixed until June 2019 (End of ISAMS Phase 2 Contract)". (paragraph 2).

19.103.2. In paragraph 5 in relation to the "request to extend the warranties of the stations of ISAMS Phase 1 Stations": "The current stations are covered by an extensive maintenance programme and guarantee until March 2016. Siyangena has further already tabled as part of our tender document a basis for the extension of said contract should PRASA wish to exercise this option. We therefore propose that this matter not form part of this contract, but be addressed as part of the existing contract and an extension of the guarantee and maintenance be negotiated at a later stage."

- 19.103.3. In paragraph 7: "Siyangena agrees to provide a 225 variable performance guarantee as per the JBCC Contract on the following standard terms and values:
  - a. Guarantee equal to 10% of the contract value up until 50% of the contract value is certified and paid.
  - b. Guarantee equal to 5% of the contract value from date when 50% of the contract value is certified and paid until installation handover is achieved at 80% of the stations.
  - c. Guarantee equal to 2,5% of the contract value from the date when installation handover is achieved at 80% of the stations until all the installation handover are achieved.
  - d. Guarantee equal to 1% for a period of one year from the date of the final installation handover at the stations."
- 19.104. The board was neither approached for approval nor approved the appointment of Siyangena as a final bidder.

19.105. Mr Phungula, nevertheless, sent a notice of appointment as the final bidder to Siyangena on 17 June 2014,. A copy of the letter is attached as annexure"FA198". This letter advised Siyangena of their appointment, "for a period of five (5) years starting from 01 July 2014 ending 30 June 2019 at the total contract value of R2 536 327 633.60...". The notice advised further that "[t]he five year contract will be based on the following as agreed on 10th and 13th June 2014:

- 19.105.1. The seven points stipulated on the appointment letter as a preferred bidder dated 6 June 2014 were accepted by both PRASA and Siyangena Technologies.
- 19.105.2. The contract includes maintenance and warranty over a period of five (5) years.
- 19.105.3. Invoicing will be done quarterly, i.e. milestone per stations.
- 19.105.4. Siyangena Technologies will provide a guarantee of 10%,
- 19.105.5. Siyangena Technologies to ensure that they do not exceed the contract value.

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- 19.106. Siyangena accepted the terms set out in the notice of 227 appointment. A copy of the acceptance is attached as annexure "FA199".
- 19.107. As with the phase 1 tender, phase 2 involved the acquisition of a significant asset or assets, and accordingly, PRASA was required to in writing inform national treasury and submit relevant particulars for approval, before concluding the transaction. In failing to do so, the PFMA was contravened. The level is determined annually by the BOC. The level of materiality and significance in 2014 was determined at any amount that was more than 0.5% of gross expenditure. Accordingly, in 2014, that was R41 655 200.
- 19.108. Furthermore, the transaction was other than in the ordinary, regular and normal course of PRASA's business and, accordingly, required approval from the minister of transport.
- 19.109. I have caused a search to be conducted of PRASA's records by Mr Brian Alexander and such writings, submissions and approvals do not exist. In failing to do so, the PFMA was contravened. Copies of the letters addressed to treasury and the minister are attached as annexures "FA94" and "FA95" above.
- 19.110. A JBCC agreement was signed by Mr Reddy on 25 June 2014 and Mr Montana on 30 June 2014. A copy of the JBCC

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agreement and annexures thereto are attached as annexure 228 **"FA200"**.

- 19.111. I repeat the criticism I expressed above in relation to the JBCC agreement used in phase 1. In particular, the JBCC agreement is incomplete. The contract data for the employer was not completed and is not contained in the JBCC agreement.
- 19.112. The contract data for the employer also provides for the appointment of the principal agent. There is no section containing the appointment of a principal agent. The JBCC agreement depends on the appointment of a principal agent, and cannot be implemented without such an appointment.
- 19.113. The JBCC agreement does not provide the number of stations or provide a list of the stations. The works are not set out. The JBCC agreement cannot be applied in the absence of an accurate delineation of the works.
- 19.114. The JBCC agreement required a "penalty regime to be agreed once final list of stations is confirmed." There is no record that the penalty was agreed.
- 19.115. The works are being performed and payment claimed and made in the same manner as the phase 1 tender. The criticismI expressed in relation to the works, claims and payments in the phase 1 tender above, applies to the phase 2 tender,

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[including the discrepancies in the items founding the claims 229 submitted by Siyangena.]

19.116. The procurement process adopted in the phase 2 tender was unlawful and irregular for the reasons stated above.

## 20. The addendum

- 20.1. The addendum sought to upgrade the equipment installed in the phase 1 tender and to provide maintenance and a warranty for that equipment that was coexistent with phase 2. The addendum was initiated by Siyangena.
- 20.2. On or about 28 August 2014, Mr Phungula sent a letter to Mr Ferreira. A copy of the letter is attached as annexure "FA201"

  In the letter, Mr Phungula referred to correspondence addressed to the GCEO by Mr Ferreira on 20 June 2014. The correspondence to the GCEO cannot be found.
- 20.3. However, Mr Phungula confirmed in the letter dated 20 June 2014 that Mr Ferreira had emphasised, "the importance of the alignment of [the] ISAMS Phase 1 guarantees to ISAMS Phase 2 whilst stressing that the two projects are intertwined". Mr Phungula further requested Siyangena to submit a structured proposal as follows: "1. Why ... the guarantees of Phase 1 stations (which end 2016) must be brought into alignment with Phase 2 which ends in 2019? What will be the implication if this is not done? 2. At what cost to PRASA must this alignment be

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undertaken? Give a cost breakdown per station, and not just a 230 global figure." Mr Phungula confirmed that the above proposal would be considered by the SCM for, "analysis and verdict on value-for-money perspective".

- 20.4. The request for a proposal by Mr Phungula and the consideration of the proposal was a contravention of the procurement policy.
- 20.5. On 11 September 2014, Mr Ferreira sent an email to Mr Phungula, and a copy of the email to Mr Tom Dubek and Mr Xoliswa Lungu. Mr Ferreira attached a document addressed to Mr Phungula, which purported to be a proposal or bid with a covering letter entitled, "supply and installation of integrated security access management system alignment of phase". The covering letter is dated 1 September 2014 and is addressed to Mr Phungula. Copies of the email, letter and proposal are attached as annexures "FA202.1" and "FA202.2"
- 20.6. The covering letter from Mr Ferreira commences with the following statement: "Thank you for the opportunity that you have given [to] us to submit you with a bid to align the ISAMS Phase 1 maintenance and guarantee to the ISAMS Phase 2 project". Mr Ferreira states, on page 5 of the covering letter, that "[t]his proposal therefore covers the extension of that maintenance in line with the request from PRASA and our previous correspondence".

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- 20.7. The proposal letter, on page 5 of the covering letter, sets out the total cost for the upgrade and extension of the phase 1 maintenance and guarantee, calculated at R794, 634,605.77, inclusive of VAT.
- 20.8. In paragraph 1, the proposal provides the specific conditions.
  - 20.8.1. In relation to payment, the specific conditions provide that "[t]he maintenance is payable yearly in advance. The upgrade to the existing system is payable as per ISAMS Phase 2 contract conditions. The guarantee is payable in advance in order to secure guarantee benefits ... payment plan is enclosed as annexure d."
  - 20.8.2. In the pricing paragraph, it is stated that, "as is the case with the CCTV we now make use of digital cameras against the analogue cameras installed in 2010 ...". This corroborates the necessity for a proper assessment of the technology in which the investment is to be made. The specified cameras were outdated prior to the completion of the works.
- 20.9. There was no budget, no procurement process, no consideration by any of the required committees, no approval and no decision by the board. The entire process was avoided.

  The actions of those involved were unlawful and irregular.

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- 20.11. An addendum agreement was, nevertheless, signed by Mr Reddy on 19 September 2014 and by Mr Montana on 30 September 2014. Mr Montana was not authorised to sign the addendum agreement.
- 20.12. The annexures that were attached to the proposal, sent by Mr Ferreira to Mr Phungula, were attached to the addendum agreement, excluding annexure D (the payment plan). A copy of the document is attached as annexure "FA203".
- 20.13. The object of the addendum was stated to be the following:

"...to align the maintenance of the ISAMS equipment for Phase 1 and extension with Phase 2 of the project as well as upgrading of the Phase 1 equipment in line with the latest technology. It also includes the extension of the guarantee and maintenance on the full equipment of Phase 1 and the extension of Phase 1. It therefore serves as an integral part of the supply and installation of the ISAMS equipment."

20.14. I point out that the extensions of the guarantee and maintenance of the equipment for the phase 1 variation order

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(extension) was included in phase 2 and accepted by 233 Siyangena.

20.15. The addendum came to my attention during the urgent application instituted by Siyangena in May 2016, after PRASA had suspended Siyangena's services pending the review application in 2016, to interdict PRASA from preventing its employees and representatives to access the various railway stations to perform its obligations in terms of the agreement (Phase 2). The addendum was attached to the founding affidavit in the urgent application.

## 21. <u>Improper financial benefits</u>

- 21.1. In acting in the manner stated above, the applicant failed to guard against favouritism, improper practices and opportunities for fraud and corruption. The failure to do so resulted in an inappropriate, if not corrupt, relationship between individuals involved with PRASA and persons related to Siyangena.
- 21.2. A criminal charge has been laid at the Brooklyn police station, under police case reference number, CAS 278/09/2015. The charge relates to alleged corrupt activities concerning the relationship between individuals involved with PRASA at the material time, and persons related to Siyangena, namely, Mr J Van der Walt, an attorney and sole director of Precise Trade and Invest 02 (Pty) Ltd ("Precise Trade"), Mr Ferreira and Mr

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Reddy, directors in ESS and TMM Holdings, entities within the 2 3 4 Siyangena group of companies.

- 21.3. The corrupt activities concerned property transactions that conceal financial benefits received by individuals involved with PRASA from entities closely associated with Siyangena.
- 21.4. The first transaction concerned the sale of an immovable property situated at 10 Newport Road, Parkwood, registered as Erf 359, under title deed number T5267/2015. I refer to this property as the Parkwood Property.

- During or about April 2014, the Parkwood property was owned by Mr Montana. r Montana had previously purchased it on or about 4 July 2008 for an amount of R1, 850,000.00. On or about 5 May 2014, Mr Montana sold the Parkwood property to Precise Trade, at a purchase price of R6, 800,000.00, thereby realising a profit in the sum of R4, 950,000.00. The market value of the property, according to an email sent to Mr Montana by Ms Ursula Willis on 30 October 2012, a private banker at ABSA Private Bank, was approximately R3.5 million. A copy of the email is attached as annexure "FA204".
- 21.6. Accordingly, Mr Montana sold the Parkwood property at around R3, 300,000.00 more than its market value. Mr Montana then proceeded to instruct Mr van der Walt to make various payments from the proceeds of the sale of the house. For example:

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21.6.1. In the period 09 June 2014 to 13 June 2014, in 235
a series of emails with the subject heading "TL
Montana Interiors", Mr Montana asks Mr van der
Walt to pay an amount of R79,576.92 from the
proceeds of the sale. A copy of the email is
attached as annexure "FA205".

21.6.2. In an email, dated 30 June 2014, Mr Montana asks Mr van der Walt to make various payments. The email subject heading is, "Request for Various Payments from the Proceeds of the Sale of ERF 359, Parkwood". The payments included: R150,000.00 to the City of Johannesburg, R250,000.00 into his credit card (account number 4787 6900 5597 0023), and R110, 800.00 to Sunburst Corporate Catering Services (Pty) Ltd in respect of invoice rendered to Mr Montana. A copy of the email is attached as annexure "FA206".

21.7. In August, September and October 2014, after the purported sale to Mr van der Walt, a number of emails were sent to Mr Montana concerning work to be done to the master bedroom and kitchen. Mr Montana requested Mr van der Walt to make the payments. Copies of the emails are attached as annexures "FA207.1" to "FA207.4".

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- 21.8. On or about 23 November 2013, Mr Montana submitted a 236 complaint to the Group Head: Department of Development concerning the development of a creche in the vicinity of the Parkwood property.
- 21.9. The purchaser of the property was Precise Trade, represented by Mr J Van der Walt, an attorney and the sole director of the company. A copy of the deed of transfer attached as annexure "FA208".
- 21.10. At the time, Mr van der Walt was the attorney for Siyangena, and Siyangena was performing work on the phase 1 project, and bidding to be appointed to phase 2.
- 21.11. Furthermore, shortly after the transfer of the property, on 19
  September 2014, an addendum in the phase 1 project was signed by Mr Montana, which purports to bind PRASA to a further liability to Siyangena of approximately R800 million. A copy of the addendum is attached as annexure "FA209".
- 21.12. The second transaction relates to the sale of Erf 225 Rose Street, Waterkloof, Pretoria. I refer to this property as the Waterkloof Property.
- 21.13. The Waterkloof property was owned by Aanmani Guest House CC ("Aanmani"), Ms Karen de Beer was the sole member.

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- 21.14. Mr Montana approached Ms de Beer, towards the end of 2012, 237 to sell the Waterkloof Property to him. Ms de Beer, representing Aanmani, agreed to sell and a contract of sale was concluded between Aanmani and Mr Montana on or about 10 February 2013. A copy of the contract is attached as annexure "FA2010". A sworn statement deposed to by Ms de Beer is attached as annexure "FA211".
- 21.15. The purchase price was R10, 500,000.00. The purchase price had to be paid in cash into the trust account of Van Rensberg Inc. Attorneys upon signature of the contract. The contract lapsed because Mr Montana failed to pay the purchase price timeously.
- 21.16. Aanmani put the property up for sale through an agent. Mr Montana, once again, indicated that he was interested in purchasing the property. Mr Montana was informed by the agent that an offer from him would not be entertained unless he was prepared to pay a non-refundable deposit. Mr Montana agreed to pay a non-refundable deposit of R3.5 million, which was subsequently paid.
- 21.17. A sale agreement was concluded between Aanmani, represented by Ms de Beer, and the Minor Property Trust, represented by Mr Johan Smith, a trustee. The beneficiaries of the Minor Property Trust are the children of Mr Montana. The purchase price was R11 million. A copy of the contract for the

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sale of the Waterkloof Property is attached as annexure 2.3.8 "FA212".

- 21.18. The balance, in an amount of R7.5 million, was paid by Precise Trade. Mr Smith then requested that the contract be altered to reflect Precise Trade as the purchaser. A copy of the deed of sale is attached as annexure "FA213".
- 21.19. On 26 November 2014, Ms de Beer met Mr Montana at the property. Ms de Beer and Mr Montana carried out a walk through inspection of the house and Ms de Beer handed the keys to Mr Montana.
- 21.20. Ms de Beer informed her neighbours that Mr Montana had purchased the property and was the new owner. Copies of the emails are attached as annexure "FA214".
- 21.21. On 25 August 2014, Siyangena submitted the unsolicited proposal that resulted in the alleged addendum in the phase 1 project.
- 21.22. The third transaction relates to the sale of Portion 18 of Erf 1, Sandhurst, IR Gauteng situated at 119 Empire Place, Sandhurst, Johannesburg. I refer to this property as the Sandhurst Property. The facts relating to this property transaction are contained in a sworn statement by Mr Louis Green, an estate agent employed by Pam Golding Investments ("Pam Golding"), who was instructed by Mr N G Kohler to

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market and sell the Sandhurst property during or about the 239 middle of 2014. A copy of the statement is attached as annexure "FA215".

- 21.23. The Sandhurst property had been placed on show on several occasions. On or about 26 October 2014, Mr Montana visited the show day and expressed an interest in purchasing the aforesaid property. Mr Montana made an offer to purchase the Sandhurst property in an amount of R13.9 million. The offer was accepted by the seller on 28 October 2014.
- 21.24. On 6 November 2014, Mr Green received an email from Mr Van der Walt. A letter from Loubser Van der Walt Inc Attorneys was attached to the email. A copy of the thread of emails and letter are attached as annexure "FA216". In the letter, the attorneys confirmed that they had R5 million in a trust account with Investec Bank.
- 21.25. On or about 7 November 2014, Mr Green received a further email from Mr Van der Walt to which was attached proof of payment of the amount of R5 million into the trust account of Pam Golding for and on behalf of Mr Montana. A copy of the email and proof of payment are attached as annexure "FA217".
- On 25 November 2014, Mr Green received another letter from
   Mr van der Walt confirming an instruction from his client (Mr
   Montana) to change the buyer to Precise Trade. The letter

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instructed Mr Green to allocate the deposit paid on behalf of 240 Mr Montana to Precise Trade.

- 21.27. Mr van der Walt advised that the new offer to purchase must stipulate that a guarantee must be provided by Loubser van der Walt Inc, in respect of money to be held in trust on behalf of Precise Trade. The clause (in the Montana offer) pertaining to a loan to be obtained from a financial institution was to be deleted. Mr Green complied and a new offer to purchase was signed by Mr van der Walt, on behalf of Precise Trade. The full purchase price was paid by Precise Trade.
- 21.28. On 27 November 2014, the day on which the new offer to purchase was signed on behalf of Precise Trade, Mr Kohler (the seller) addressed an email to Mr Montana, asking him to indicate whether he had any interest in taking occupation of the property before transfer. A copy of this email is attached as annexure "FA189.1".
- 21.29. Mr Montana continued to be involved in the transaction. For example, the email address, tmontana@prasa.com, that was used by Mr Montana was stipulated as a contact for the "Transferee" by the conveyancers. In addition, the conveyancers addressed [regular] progress reports to Mr Montana. Copies of those documents are attached as annexure "FA218".

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21.30. On 3 February 2015, Mr Montana addressed an email to Mr 241

Kohler regarding the payment of the transfer costs in respect
of the property. A copy of the email is attached as annexure

"FA219". In the email, Montana said that:

"We were not aware of the delays in the payment of fees and the consequent breach of Contract."

I am aware that our attorneys were busy with vat registration of the trust ... This may have contributed to the delays. ... I have asked the attorneys to abandon the vat registration for now and ensure transfer is concluded immediately without further delay.

I have discussed the matter with our attorney, Mr Riaan Van der Walt who has since been in contact with Talita. He made an undertaking to settle the fees by today or latest tomorrow morning."

- 21.31. The Sandhurst Property was transferred to Precise Trade on 6 March 2015. A copy of the deed of sale is attached as annexure "FA220".
- 21.32. On 12 March 2015, the sellers of the Sandhurst Property addressed an email to Mr Montana. A copy of the email is attached as annexure "FA221". The email contains the following:

I called Eskom today to let them know we have sold no 119 and to try to transfer the electricity account out of Janet's name. However the process seems to need both parties, we need to give Eskom a move out instruction to terminate our account, and then the new owners need to give them the move in instruction to activate the new owner's account. However when we give them the move out instruction, they will cut off the electricity supply until the move in order is given. I obviously don't want to leave you without electricity (the pond and the wine cellar are linked and the wine cellar needs power to pump out water and prevent flooding). Would you please let me know as soon as you are able to do the account transfer with Eskom so we can co-ordinate the instructions to happen on the same day?"

21.33. On 19 March 2015, Mr Louis Green addressed an email to the sellers of the Sandhurst property regarding the repairs to the gate motor, the security cameras and the transfer of the electricity account. A copy of the email is attached as annexure "FA222". The email contains the following:

"Hi Janet

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I chatted with Lucky regarding the repair of the Gate motor, the security cameras and the transfer of the electricity account.

He has confirmed that the appointment at 09H30 on Friday 20 March 215 and has requested that they only attend to the gate motor. He will at his expense reinstate the security video system.

He has also requested that you hold off as far as the transfer of the accounts is concerned. He is extremely busy at the moment and undertakes to pay all the related bills until the transfer has been done. He has indicated that he should be able to attend to it within the next few weeks. Your indulgence in this regard would be much appreciated.

Could you please advise who the gardening and pool services companies are as he would like to continue with their services."

21.34. A further thread of emails relating to the Sandhurst property transaction is attached as annexure "FA223". In particular, I wish to draw attention to the email addressed by the seller to a pool service company dated 31 March 2015, in which it is said that:

"Hi Braam

This is just to confirm that we have notified the new owner, Lucky, that the pool cover part has arrived and we are awaiting his instructions to carry out the repairs. We have also given the Pam Golding agent, Louis Green, your contact details so they can get in touch with you directly if necessary."

- 21.35. It will be noted that Mr Van der Walt, as the sole director and shareholder of Precise Trade and Invest, is not copied on any of the aforementioned emails. The emails are directed to Mr Montana.
- 21.36. On 10 May 2016, Mr Green sent an email to Mr Montana. In the email, Mr Green advised that the sellers of the Sandhurst property had found two extra keys for the electric pool cover.

  Mr Van der Walt responded. A copy of these emails are attached as annexure "FA224". In Mr van der Walt's email, he said:

"Hi Louis

Please explain why you have CC Mnr L Montana in this mail. You are well aware of the fact; and as already explained to you last year; before the property was even Bought by my Company; that Mnr L Montana has nothing

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to do with Precise or this property. Please refrain from 245 this action in the future."

- 21.37. The papers in the previous application were issued on 02 February 2016. The Sandhurst property transaction was mentioned in those papers. The above email was sent only after Mr Montana was confronted with allegations contained in those papers and two days before Mr Van der Walt deposed to a confirmatory affidavit.
- 21.38. The fourth transaction relates to the sale of an immovable property situated at 12 Montrose Road, Hurlingham, Remaining Extent of Erf 70 Hurlingham. I refer to this property as the Hurlingham property. The seller of the Hurlingham property was Mrs MH Gevisser and the conveyancing attorney was Janine Bredenkamp.
- 21.39. Mr Montana, after signing the offer to purchase the Hurlingham property attempted to substitute another entity as the purchaser of the Hurlingham property. However, the conveyancer refused to do so as she wanted to finalise the transaction.
- 21.40. Mr Green was mandated by Mrs Gevisser to market and sell the Hurlingham property. The property was placed on show, which Mr Montana attended, on or about 12 October 2014. Mr Montana, having viewed the property, immediately expressed an interest in purchasing the property. On or about 15 October

2014, Mr Montana requested that the offer to purchase be 2.4.6 forwarded to Mr Smith.

- 21.41. The Minor Property Trust, represented by Mr Smith, submitted an offer to purchase the Hurlingham property for the amount of R12 million on 20 October 2014. A copy of the offer is attached as annexure "FA225". The offer was subject to payment of a deposit in the amount of R2, 400,000.00 and the purchaser obtaining a bond for R9, 600,000.00.
- 21.42. The offer was signed by Mr Smith, in his capacity as a trustee of the Minor Property Trust. However, both Mr Smith and Mr Montana represented to Mr Green that the property was being purchased by Mr Montana. I attach a copy of a letter as annexure "FA226" in which Mr Green refers to the Minor Property Trust as Mr Montana's trust. The offer was rejected by the seller.
- 21.43. On 23 October 2014, the Minor Property Trust, through an email from Serisa Davids (Ms Davids), made another offer to purchase the Hurlingham property for the amount of R13,500,000.00. A copy of the email and the attachments are attached as annexure "FA227".
- 21.44. The clause relating to bond finance (clause 6) was deleted, which indicated that the offer was for a cash purchase.

  Furthermore, the sale was subject to the payment of a deposit in an amount of R2 million.

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- 21.45. On or about 3 March 2015, a new offer to purchase was submitted in which Mr Montana was substituted for the Minor Property Trust as the purchaser. A copy of the offer is attached as annexure "FA228". The provisions relating to the bond finance were deleted.
- 21.46. On or about 24 March 2015, Precise Trade paid a deposit of R2 million rand into the trust account of Janine Bredenkamp Inc., the conveyancers attending to the transfer of the Hurlingham property. A copy of the proof of payment issued by Investec Bank is attached as annexure "FA229".
- 21.47. There were various delays relating to the payment of the balance of the purchase price, in the amount of R11,500,000.00. I attach a copy of a letter between Mr Van der Walt and Ms Bredenkamp as annexure "FA230". Mr Van der Walt wrote:

"We herewith confirm that we hold instructions from our client to confirm, in writing, that his delay in rendering a guarantee, is not due to his mala fides, but due to unforeseen circumstances, pertaining to the sale of one of his properties, of which the profits out of that sale, is earmarked to be utilised for payment of this property, i.e the rendering of the guarantee.

It was conveyed to our offices that such funds will only be available during the last week of May 2015 to be

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transferred to our offices, whereafter our offices will invest the funds in an interest bearing account with Investec, to enable our offices to render a guarantee as stipulated in your letter of the 30th of March 2015 through Investec."

- 21.48. The outstanding purchase price was eventually paid on 15 May 2015. A copy of the confirmation of payment by the conveyancer is attached as annexure "FA231".
- 21.49. During the latter part of 2011, Mr Gantsho approached a certain Mr Craig Murphy regarding the purchase of a property in the Point precinct in Durban, Kwa-Zulu Natal. The property, situate at unit C7-10, The Sails, 14 Timeball Boulevard, Point Waterfront Precinct, Durban, was owned by the Stafford Murphy Family Trust.
- 21.50. Mr Murphy has deposed to an affidavit setting out the sequence of events that led to the sale of the unit. A copy of the affidavit is attached as annexure "FA232".
- 21.51. During 2011, Mr Murphy placed the unit, including all furniture and fittings therein, on the market at a sale price of R3, 050,000.00, being R2.8 million for the immovable property and R250 000 for the movables. During the latter part of 2011, Mr Gantsho approached Mr Murphy and indicated an interest in purchasing the unit, as well as the furniture.

- 21.52. Mr Gantsho visited the unit several times. During those visits 249 Mr Gantsho and Mr Murphy negotiated the terms of the sale of both the unit and the furniture and fittings.
- 21.53. When the negotiations had reached to a stage where the agreement was to be reduced to writing, Mr Gantsho, for the first time, informed Mr Murphy that he was not in fact the purchaser of the property. Mr Gantsho advised Mr Murphy that a Mr Van der Walt would contact Mr Murphy to provide further details.
- 21.54. Mr Murphy was then contacted by Mr Van der Walt who advised that the purchaser was to be an entity called Grand Tower Trade and Invest 04 (Pty) Ltd ("Grand Tower"). Mr Van der Walt is the sole director and shareholder of Grand Tower.

  I attach confirmation of the directorship from the auditors of Grand Tower as annexure "FA233",
- 21.55. Although the terms and conditions of the sale were negotiated with Mr Gantsho, the terms relating to the payment of the purchase price were negotiated and agreed with Mr Van der Walt as the representative of Grand Tower. Mr Murphy and Grand Tower then concluded agreements for the sale and purchase of the unit and the furniture and fittings. Copies of the agreements, dated 20 February 2012, are attached to the affidavit of Mr Murphy as annexures "A" and "B". The transfer of the property from the Stafford Murphy Family Trust to Grand Tower was registered on 20 September 2012.

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21.56. On 23 June 2012, Mr Gantsho addressed an email to 2.5.0

Reverend FO Marumo. A copy of the email is attached as annexure "FA234". In the email Mr Gantso wrote:

"Visit the following link for information on your accommodation. My Apartment is c7-10

Enjoy every moment if any questions or need anything just call me."

21.57. Mr Gantsho was interviewed by the investigators. Mr Gantsho was advised that the interview was being recorded and consented thereto. I attach, as annexure "FA235", a transcript of the interview of Mr Gantsho held on 12 August 2016:

"You see when I first saw the apartments we were busy with our 2010 projects at the time. So at some point we would be maybe missing our flights coming back because of the duration of the meetings and all that. ... one of the colleagues in Durban said ... there are places here at the waterfront where people can stay. ... we used to sleep in different apartments there. ...

... So we slept there and at one point I went there with the family and then we looked at the place. ... Then I got curious ... I asked which one of these apartments are

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selling. ... Mr Murphy said he is selling in that I think it's C10. We went in there we looked at it ... if we came there on a Thursday or a Friday we sleep over on Saturday then we'll invite some of the guys we were with at the meetings ... one of the guys who once went there is Mr ... I don't know his surname...he is Alvin, he is from Siyangena. In one instance I think it was Mr Metelerkamp ... So we really got interest in this particular apartment and then I approached Mr Murphy to say that I would like to buy this. ... then this Alvin guy said he is also interested their company is also interested ... and he said you look very much interested in this and I said yes I am but I think it is too steep for me to be acquiring it. He said okay but do you like this flat and I said yes I do. ... Then he said okay that is fine.

And then I approached this guy Murphy I said Craig I'm really interested in this apartment. ... So we went in through the whole nitty gritties of it ... The next thing I heard Alvin saying you can get the flat. Then when you are ready ... Said okay you can buy the flat and then we get it to be acquired by the company. ... He said ... it won't be a problem for us ... as a company to acquire the flat and then maybe at some point when you ready for it we can talk. I said okay then that's fine. ...

21.58. Mr Gantsho was suspended by PRASA in April 2014.

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21.59. I respectfully submit that the appearance of the inappropriate, if not generally corrupt, relationship between individuals involved with PRASA and persons related to Siyangena, renders it in the public interest that the disputes between the parties be heard in open court and not behind closed doors in private arbitration.

Conclusion

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- 22.1. I respectfully submit that the facts set out above prove the following:
  - 22.1.1. PRASA was not authorised to proceed with the works contemplated in the phase 1 and phase 2 tenders, and the addendum. The approval of the minister of transport was neither sought nor granted, the works were not provided for in the budget allocated to PRASA by the DoT, and the board had not provided for the works in the approved budget.
  - 22.1.2. The procurement process adopted in relation to the phase 1 and phase 2 tenders, and the addendum was unlawful in that the actions and decisions taken contravened the PFMA, PPPFA, the Preferential Procurement Regulations and the procurement policy of PRASA, to the extent set out above.

and

- 22.1.3. Siyangena was appointed as a preferred bidder subject to negotiations in the Phase 1 tender. The board did not approve the appointment of Siyangena as a final bidder, the amount of the tender or the conclusion of the contract.

  Accordingly, the signing of the JBCC agreement was, in the circumstances, unlawful, irregular and unauthorised.
- 22.1.4. Siyangena was appointed as a preferred bidder subject to negotiations in the phase 2 tender. The board did not approve the appointment of Siyangena as a final bidder in the phase 2 tender or the conclusion of the contract. Accordingly, the signing of the JBCC agreement was, in the circumstances unlawful, irregular and unauthorised.
- 22.1.5. The board did not decide to award the addendum to Siyangena. The board did not approve the appointment of Siyangena, the amount of the tender or the conclusion of the addendum agreement. Accordingly, the signing of the addendum agreement was, in the circumstances, unlawful, irregular and unauthorised.

- 22.1.6. An inappropriate relationship developed between 254 individuals involved with PRASA and persons related to Siyangena.
- 22.1.7. Siyangena determined the extent of the delivered works and, ultimately, the payments by PRASA.
- 22.1.8. The delivered works disproportionately exceeded the budget, the offers made by all the other bidders and the cost of the works as tendered by Siyangena.

## 23. The investigation

- 23.1. The difficulties experienced in bringing this application are illustrated above. The irregular conduct that founds this application occurred prior to the reconstitution of PRASA's board in August 2014, and during the tenure of the previous PRASA executive management committee, controlled by Mr Montana.
- 23.2. In its reconstitution, the entire board was replaced save for only two members of the previous board, Mr George and Mr Zide, the company secretary.
- 23.3. During March 2017 the then Minister of Transport, Ms Dipuo Peters, unilaterally terminated the appointment of the board members with immediate effect and purportedly dissolved the

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entire board and appointed a new interim board. The board 255 was reinstated as a result of a court order of 8 April 2017.

- 23.4. The learned Mabuse J noted that, "it is in the public interest that the affairs of PRASA be properly regulated by an independent Board of Control independently of any interference from the government" and "it is of paramount importance that corruption in PRASA be exposed and prevented." (paragraphs 65 and 60).
- 23.5. After the abovementioned proceedings, certain members did not return to the board on account of the victimisation they had experienced and resigned. In a further attempt to impair the operation of the board, the former Minister of Transport Mr Joe Maswanganyi failed to replace the members who had resigned. The term of office of the remaining members expired on 31 July 2017. The former Minister failed thereafter to appoint anyone to the board until October 2017. The former Minister then appointed five persons to an interim board. The minimum number required on the board is six, the maximum is eleven. The board was obliged to continue under such conditions with their duties in the interests of PRASA and as best it can with reduced resources.
- 23.6. The reconstituted board was required to familiarise itself with the intricacies of PRASA's complex business operations which was an onerous exercise considering the magnitude and technical nature of those operations. PRASA consists of three

operating divisions, two subsidiaries, employs over 25,000 256 people and has over 18,000 suppliers.

- 23.7. The board's task was made more arduous by the fact that the members of the reconstituted board were not drawn from within PRASA and had no prior experience of PRASA's business operations, PRASA was in significant financial difficulty, and was subjected to an investigation by the public protector. The report of the public protector provides an indication of the disarray inherited by the reconstituted board.
- 23.8. The board was expected to acquire an understanding of each of the complaints to the Public Protector, make enquiries and obtain information relating to the complaints, ascertain the nature and extent of the irregular activities and expenditure, determine whether there was any unlawful conduct involved, and take action where necessary.
- 23.9. PRASA experienced remarkable and unusual difficulty throughout that process. There was a marked enmity towards the new board and a vigorous resistance to providing relevant information. There were numerous attempts to conceal information and to prevent the unearthing of facts relating to activities and relationships that the board suspected were corrupt or at the very least irregular and required further scrutiny. PRASA was compelled to employ extraordinary measures in order to expose the facts that were material to this application.

- 23.10. Mr Montana, who is implicated in the irregular and unlawful decisions to award the ISAMS tenders to Siyangena, controlled PRASA. Mr Montana abused his position as the GCEO to obstruct the consideration of any action in which he could be implicated.
- 23.11. Mr Montana resigned on 15 March 2015 and the Board accepted his resignation on 1 April 2015. Mr Montana's last working day was 15 July 2015. Mr Montana managed to frustrate the dissemination and communication of relevant information while he was at PRASA and thereafter through a network of associates who were collaborating with him. Mr Montana's influence is still being experienced.
- 23.12. The reconstituted board was not the only institution to be impeded by Mr Montana. The Public Protector experienced similar frustration and the progress of her investigation and final report was retarded by the interference, despite the statutory powers held by that office and which could be exercised in the course of the investigation.
- 23.13. As intimated above, Mr Montana was the subject of various complaints brought by the Executive Committee of SATAWU, led by its then President Ephraim Mphahlele and General Secretary Craig Nte. The complaints included various allegations of financial mismanagement, procurement irregularities, unmanaged conflicts of interest and maladministration. The complaints directed against Mr

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Montana and others within PRASA, were lodged with the office 2.5.8 of the Public Protector in February 2012.

- 23.14. As set out above, Mr Montana, with the assistance of others concerned with PRASA, made a concerted effort to frustrate the public protector's investigation through any means possible.
- 23.15. As a result, the Public Protector was only able to finalise her investigation and launch her report "Derailed" in August 2015, three and a half years after the complaints were submitted. As appears from the report, the Public Protector's investigative team experienced immense difficulty in sourcing relevant information from PRASA, which delayed the finalisation of the report. The Public Protector summarised the attempts to frustrate its investigation in the Derailed report (on page 20) as follows:

"I must record that the investigation team and I had immense difficulty piecing together the truth as information had to be clawed out of PRASA management. When information was eventually provided, it came in drips and drabs and was incomplete. Despite the fact that the means used to obtain information included a subpoena issued in terms of section 7(4) of the Public Protector Act, many of the documents and information requested are still outstanding."

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23.16. The board was reconstituted under the chairmanship of Dr Popo Molefe, in August 2014. I mention that during the induction of the board in September 2014, Mr Montana mentioned the investigation by the public protector and indicated that the investigation concerned a trivial matter, that he was handling it, and that his last interaction with the public protector's office had been in March 2013 when he had submitted his response. Mr Montana further indicated that PRASA was awaiting a reply from the public protector. As a result, the board was satisfied that Mr Montana had adequately dealt with the public protector and that PRASA should await her response.

23.17. The reconstituted board was unaware that the public protector had prepared a draft report regarding her investigation into PRASA's affairs until March 2015, when it learnt through media reports that the public protector had prepared a draft report. The board was unaware, at the time, that the public protector had delivered her draft report, dated 6 February 2015, to Mr Montana.

- 23.18. The draft report was only received in the middle of March 2015 after a demand was made to Mr Montana. Mr Montana then advised the board that he was in the process of preparing a response from management to the draft report.
- 23.19. A letter from the public protector was received around late June2015 requesting that the board intervene in ensuring that

PRASA respond to the draft report. The public protector indicated that assistance was required because of challenges encountered in obtaining a response from PRASA management.

PRASA's Governance Committee met with the Public Protector and following this meeting, Mr Montana was informed of the intention to hold a special board meeting on 2 July 2015. Mr Montana indicated that he was not available for the special board meeting and challenged the notice. Mr Montana also indicated that he would challenge any findings adverse to him reached by the board at the meeting. Mr Montana was instructed by the board to respond. Mr Montana left PRASA on 15 July 2015, without responding.

- 23.21. The involvement of the reconstituted board thereafter is seen in the following comment in the report: "......Towards the final stages, the new Board was engaged, including sharing of provisional findings with it and enlisting its support with regard to missing or conflicting information in the management submissions" (page 20 (xvi)). The management submissions were made by the executive committee, controlled by Mr Montana, and it was responsible for providing the incomplete and missing information.
- 23.22. The executive committee under Mr Montana simply failed to disclose any impropriety in which he was implicated. Mr Montana held sway over PRASA through the active assistance

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of his associates and the intimidation of those who would not do his bidding. PRASA employees who did not bend to his will were victimised, suspended or unfairly dismissed. For example, the following employees, amongst others, were the recipients of Mr Montana's despotic treatment:

- 23.22.1. On 19 and 20 May 2015, Mr Fani Dingiswayo (the General Manager: Group Legal Services) and I (the Group Executive: Risk, Legal and Compliance) were unlawfully and summarily dismissed by Mr Montana. Mr Montana accused me of gross insubordination and Mr Dingiswayo of using his position as the General Manager of PRASA's Group Legal Services to the detriment of PRASA.
- 23.22.2. The accusations were demonstrably false and there was no legitimate reason to dismiss or suspend me or Mr Dingiswayo. As indicated in Mr Dingiswayo's letter to me (referred to below), an important reason for Mr Montana targeting Mr Dingiswayo was the fact that Mr Dingiswayo had raised certain concerns about a tender. I was dismissed for questioning and objecting to Mr Montana's decision to summarily dismiss Mr Dingiswayo.

23.22.3. On 29 May 2015, following written representations to the board by Mr Dingiswayo and I on 24 and 25 May 2015, Mr Montana withdrew the summary termination of our employment with PRASA, and placed us on suspension. Those suspensions were ultimately uplifted on 27 July 2015 by Mr Nathi Khena, who succeeded Mr Montana as the Acting GCEO.

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- 23.22.4. Attached as annexure ""FA236" to "FA241" are Mr Montana's letters of termination, dated 20 May 2015, Mr Dingiswayo's letter to Dr Molefe, dated 24 May 2015, my letter to Dr Molefe dated 25 May 2015, Mr Montana's letters withdrawing the dismissals, dated 29 May 2015, a letter from Mr Dingiswayo and I to the Chairperson of Human Capital Management Committee, dated 1 June 2015, and Mr Khena's letter uplifting the suspensions dated 27 July 2015.
- 23.22.5. Mr Montana's victimisation and bullying of senior executives such as Mr Dingiswayo and I demonstrates the harsh summary and unlawful treatment he meted out to those who stood in his way.
- 23.22.6. As Mr Dingiswayo correctly recorded in paragraph 4 of his letter to Dr Molefe (RA6), what

he and I suffered was by no means an isolated experience under Mr Montana. Mr Dingiswayo was referring to the dismissal, by Mr Montana, of Mr Nsizwa Cromet Molepo, which had been found by the Labour Court to be procedurally and substantively unfair.

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23.22.7. Mr Nsizwa Cromet Molepo (the then CEO of PRASA's Property Division) was maltreated and dismissed on 1 February 2012. In the subsequent review by PRASA (at the instance of Mr Montana) of the award by the CCMA that Mr Molepo be reinstated retrospectively to the date of his dismissal, the Labour Court (which dismissed the review) found, at paragraph 56, as follows:

"Mr Montana, the applicant's chief executive officer, was satisfied to terminate the employment of [Mr Molepo] on what can only be described as illegitimate considerations. The evidence shows that [Mr Molepo] was continuously solicitous to retain his employment. He was rebuffed by Mr Montana."

23.22.8. So egregious was Mr Montana's conduct in those proceedings that the Labour Court ordered Mr Montana to pay the costs of that review personally. The Court expressed the concern that:

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"There should, however, be bounds within which [public] bodies such as [PRASA] should be allowed to litigate at public expense. The circumstances of this case call to mind that officials of public bodies such as [PRASA] should practice proper husbandry, particularly because public funds are concerned. Such officials should not be allowed to litigate without proper reflection. This is what transpired in the dispute between [PRASA] and [Mr Molepo]." (see, paras 66 to 67).

- 23.22.9. A copy of the Labour Court's judgment is attached as annexure "FA242"
- 23.23. Mr Montana's heavy-handed conduct towards Mr Dingiswayo and I is important for another reason. It shows that, through the tyrannical manner in which Mr Montana controlled the PRASA executive committee, Mr Montana grossly undermined this committee's ability to take action adverse to his illegitimate interests. It was obvious to the executive committee that taking any steps unfavourable to Mr Montana or the irregular conduct in which he was implicated involved severe risk to their employment, and would inevitably be met with an extremely harsh response, such as an unlawful dismissal or suspension.
- 23.24. At the behest of Mr Montana, other PRASA officials were confronted with demands to provide reasons why they should not be disciplined for spurious charges. This was part of Mr

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Montana's strategy of controlling PRASA and designed to 265 conceal irregular and/or unlawful practices.

- 23.25. The control that Mr Montana exerted over PRASA resulted in a culture of conscious ignorance of any wrongdoing and a deliberate avoidance of controversy. Although it was common knowledge that Mr Montana and his associates were involved in suspicious activities and relationships, there was a reluctance to provide relevant information to the new board. The situation was exacerbated by threats being made against persons that were assisting in the investigation.
- 23.26. The lengths to which Mr Montana was prepared to go is indicated by the content of a report prepared by Mr Mamabolo. Philemon Makgatlela Mamabolo ("Mr Mamabolo") is the Assistant Manager of Special Operations at PRASA and a member of the Business Intelligence Unit. Mr Mamabolo's duties include the investigation of unethical and criminal conduct. The BIU was established in July 2013. It was mandated to investigate allegations of wrongdoing and/or corruption within PRASA.
- 23.27. Mr Montana obstructed the BIU's efforts to investigate the wrongful conduct in which he was suspected to be involved.

  He refused to provide the BIU with access to the equipment it required to conduct such an investigation and failed to cooperate with the BIU whenever it sought information from him.

23.28. Mr Mamabolo nevertheless managed to investigate certain activities that were impeding on PRASA's business operations and prepared a report that he handed to Dr Molefe in July 2015. The report evidences the concerted effort made by Mr Montana to retain control of PRASA. A complaint of conspiracy to commit murder was made with the SAPS as a result of the report. A copy of the report and a confirmatory affidavit by Mr Mamabolo are attached as annexures "FA243" and "FA244" respectively.

23.29. PRASA's then new board only became aware of the irregularities that tainted the ISAMS project upon receipt of the report from the public protector. The severity and magnitude of the problems within PRASA completely overwhelmed the board's resources and available capacity, and the board was compelled to take the abnormal step of engaging forensic investigators appointed by PRASA's attorneys to unearth the relevant information. PRASA's attorneys were mandated to commence the investigation on 5 August 2015.

23.30. PRASA instituted a review application in this matter, pursuant to that investigation, in January 2016. As stated above, that application was dismissed without a determination or consideration of the merits of the application. I have dealt with the grounds of the dismissal and the progress of that matter through the courts in the background section above. The investigation has progressed significantly since the institution

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of the initial application, as evidenced by a comparison of the 267 founding affidavits.

- 23.31. The scope of the investigation, coupled with the pervasive nature and scale of the concealment, suppression, removal and destruction of relevant information, demanded the appointment of a multi-disciplinary team of experts led and directed by PRASA's attorneys of record, and comprising forensic auditors, IT specialists (FACTS Consulting) and general investigators.
- 23.32. In order to assist in the investigation, FACTS Consulting was briefed to source, extract and analyse data from PRASA's network, which included various servers, computers and backup media, using forensic methods.
- 23.33. The exercise was laborious. As an example of the extent of this exercise, the email records had to be gathered, FACTS Consulting commenced the process of extracting, processing and labelling the files. FACTS Consulting has received twelve sets of emails to be processed, filtered and uploaded onto a database. There are approximately 60, 000,000 emails and attachments per set.
- 23.34. In addition, FACTS Consulting has made mirror image copies of more than one hundred (100) computers belonging to 'Persons of Interest' ("POI") as determined by PRASA and its investigation team. The process involves making a formal

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request to access each computer and a waiting period which on average was approximately two months for each POI. Some requests have taken up to six months and others have not responded. Mr Gantsho, for example, was requested to provide access to his computer on 19 November 2015 and provided access only on 23 February 2016. A month after the initial review was instituted. This was typical of the obstruction experienced by FACTS Consulting.

- 23.35. A number of persons actively impeded the investigation by removing hard copies of the documents from PRASA's premises and deleting electronic copies from their computers.

  In a number of instances, the storage drives on electronic devices provided to the investigators for copying were damaged or cleaned.
- 23.36. An example of a key employee hampering the investigation by deleting crucial documentation, after Mr Montana had resigned from PRASA, is to be found in an arbitrator's award dated 9 April 2016. The relevant parts of which are attached as annexure "FA245".
- 23.37. The arbitrator found that Mr Othusitse Mogolelwa, one of PRASA's internal IT specialists, had deliberately deleted information from Mr Montana's computer, on the instruction of Mr Montana. Those events transpired in July 2015 when Mr Montana left the employ of PRASA. The arbitrator's findings are found at paragraph 95 of the award:

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"The Employee is manifestly guilty of the charge 2.69 against him. I accept the uncontradicted evidence of both employer witnesses. His own admissions contained in his affidavit are damning.

He deleted the information without authority, in a clandestine manner and in a situation where there was a cloud hanging over the organisation which required investigation. He made sure that his employer would not be in a position to recover it. He sabotaged the information. He ensured that it was irrecoverable.

He was protecting the ex CEO. He had no right to take instructions from him. He lied about saving the information. He had no right to save information on his personal laptop in any event."

- 23.38. The arbitrator summarily dismissed Mr Mogolelwa.
- 23.39. Another difficulty experienced by FACTS Consulting during the course of the investigation and analysis was a lack of an up to date asset register, recording the serial numbers of the computers assigned to the employees. The employees were assigned new computers over the relevant period, and the old computers were reassigned or put into storage, without any record being made in the asset register. The location of the relevant computers would take a considerable period of time.

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In some instances the employees themselves had retained the 270 computers and claimed that the computers could not be found or had been stolen.

- 23.40. In relation to those computers that could not be recovered,

  FACTS Consulting was required to expand their analysis to
  those employees' colleagues and associates who could have
  been included in relevant communications.
- 23.41. In addition, each computer using a Windows operating system contains between seven and fifteen shadow volumes, being a replica of the data at a previous point in time. The shadow volume is basically the same as another computer and is processed in the same manner as any other computer image. The number of computer images being analysed in this investigation was over a thousand and each of those images had deleted files that needed to be recovered and repaired. The reconstruction process is an extremely time consuming process.
- 23.42. The database contains more than 1.2 billion documents. A search for relevant documents is performed, based on keywords relating to a specific document or person. The document then has to be reviewed for relevance and distributed to the relevant persons in the investigation team.
- 23.43. In addition to the documents, FACTS Consulting received hundreds of hours of recordings of meetings which had to be

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manually searched as the naming and storing of the recordings 271 provided no indication of the contents. In certain instances, the recordings had to be transcribed.

23.44. The difficulties experienced in obtaining relevant documents can be attributed to *inter alia* the following: there were multiple versions of the same document with different names or descriptions, there were multiple versions of the same document with the same name or description, there was no control of the identification of different versions of documents, the documents were in different formats, numerous persons were involved in editing the same document, there was no centralised repository for storing documents, the documents were found across multiple devices, and the document versions were amended over long periods of time.

23.45. There are numerous examples above of minutes and reports that are materially different but provide no indication of the difference or sequence in which they were produced in the name or description. The surrounding documents had to be found and analysed in addition to the documents themselves to place the documents in context.

23.46. There was a concerted effort on the part of PRASA, its investigators and legal representatives to bring this application as soon as reasonably possible, while acting reasonably on behalf of a state owned institution fulfilling a public function and employing tax revenue to achieve its objectives. In my view,

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this application could not reasonably have been brought 272 earlier.

#### 24. <u>Grounds of review</u>

- 24.1. I submit that section 1(c) of the Constitution of the Republic of South Africa, 1996, entrenches the constitutional principle of legality, which governs the use of all public power.
- 24.2. As set out above, PRASA is a public entity and a national government business enterprise in terms of the PFMA. I submit that PRASA's decisions constitute an exercise of public power by a statutory body.
- I submit further that the exercise of such public power, under the principle of legality, is only legitimate where it is lawful. The exercise of public power will be unlawful *inter alia* where it contravenes the law, is *ultra vires*, procedurally unfair, arbitrary, irrational or where it is exercised in bad faith. I respectfully submit that the actions and decisions taken in relation to the tenders referred to above were unlawful for all of those reasons.
- 24.4. In addition, the actions and decisions were irregular in that they were not in accordance with the procurement process.
- 24.5. Furthermore, as stated above, PRASA is required to comply with section 217(1) of the Constitution. PRASA contravened

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section 217(1) of the Constitution in that the failure to comply 273 with:

- 24.5.1. the PFMA which rendered the process obscure, uncompetitive and not cost-effective;
- 24.5.2. the PPPFA which rendered the process unfair, inequitable, obscure, uncompetitive and not cost-effective; and
- 24.5.3. the procurement framework, adopted and implemented for the purpose of complying with the obligation contained in section 217(1), which rendered the process unfair, inequitable, obscure, uncompetitive and not cost-effective.
- 24.6. The failures mentioned above rendered the decision:
  - 24.6.1. unconstitutional or unlawful, and accordingly invalid and of no force and effect; and / or
  - 24.6.2. irregular, procedurally unfair, based on irrelevant considerations, arbitrary, capricious, irrational, grossly unreasonable, reasonably suspected of bias or being in bad faith, and accordingly invalid and of no force and effect.

25. The remedy

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- 274 25.1. I respectfully submit that the agreements, the two JBCC agreements and the addendum agreement, should be set aside, and the real issue is whether Siyangena should be paid for the work performed to date.
- 25.2. In the event that the court is inclined to permit Siyangena to be paid for the work, I propose that the work be valued by an expert, engineer to be agreed or determined by the court, and the applicant be order to pay the amount by which such value exceeds the payments already made. The respondent should be ordered to repay any overpayment. The remedy I propose is formulated in the notice of motion.
- 26. In the premises, I pray for an order in terms of the notice of motion.

MARTHA NGOYE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at SANDTON on this the 2nd day of March 2018. and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

MMISSIONER OF OATHS

Full names:

JONATHAN ISAKOW COMMISSIONER OF OATHS

Address:

PRACTISING ATTORNEY REPUBLIC OF SOUTH AFRICA

GROUND FLOOR, MARLBOROUGH GATE HYDE PARK LANE OFFICE PARK

Capacity:

HYDE LANE HYDE PARK

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no: 14332/2018

In the application of:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

**APPLICANT** 

and

SIYANGENA TECHNOLOGIES (PTY) LTD

**1**ST RESPONDENT

**RETIRED JUSTICE E GOLDSTEIN** 

**2ND RESPONDENT** 

**RETIRED JUSTICE M JOFFE** 

3RD RESPONDENT

## **OPPOSING AFFIDAVIT**

I, the undersigned,

#### THOMAS ANDREAS DUBEK

do hereby make oath and state that:

- I am the Chief Financial Officer of the first respondent, SIYANGENA TECHNOLOGIES (PTY) LTD ("Siyangena").
- Save where otherwise stated, the facts contained herein are within my personal knowledge and are both true and correct.

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- Where I make submissions of a legal nature in this affidavit or where I refer to legal advice, such submissions and advice emanate from the legal advisors who assist Siyangena in this matter.
- 4 Siyangena's address for purposes of these proceedings are c/o its duly appointed, authorised and instructed attorneys of record Van Der Merwe & Associates Inc of 62 Rigel Avenue, Waterkloof Ridge, Pretoria ("VDMA").
- I am advised that it is not necessary for me to deal with each and every fact which preceded the filing of this affidavit and I shall accordingly confine myself in this affidavit to the facts which are relevant to the relief sought.

## [A] INTRODUCTION:

- The applicant PASSENGER RAIL AGENCY OF SOUTH AFRICA

  ("PRASA") [as tenderer] awarded Siyangena [as successful bidder]

  two contracts to supply, commission, install, guarantee and
  maintain Integrated Security Access Management Systems

  ("ISAMS") at certain PRASA train stations, in two phases.
- 7 The first contract ("ISAMS Phase 1") was:

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- 7.1 awarded to Siyangena more than seven years ago on 31

  March 2011 consequent upon administrative decisions/action taken by PRASA on 20 February 2011 and 31 March 2011, in pursuance of PRASA's tender process under PRASA's tender number SG/GATES/003/2009 ("the Phase 1 Tender"); and
- 5.2 subsequently consensually and in writing extended duringDecember 2013.
- The second contract ("ISAMS Phase 2") was awarded to Siyangena almost 4 years ago on 1 July 2014 in pursuance of PRASA's tender process under PRASA's tender number HO/FM-CRES/142/09/2013 ("the Phase 2 Tender").
- 9 Third, more than 3 years ago and during 19 September 2014,
  PRASA furthermore separately contracted Siyangena to attend to
  the maintenance, service and upkeep of ISAMS Phase 1 on PRASA's
  behalf at the Phase 1 train stations ("the Addendum").
- In pursuance of the aforesaid PRASA and Siyangena concluded two JBCC agreements, one on **31 March 2011** [approximately 7 years ago] in respect of ISAMS Phase 1 and the other on **1 July 2014** [almost 4 years ago] in respect of ISAMS Phase 2 ("the JBCC Contracts").

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- 11 Each of the JBCC Contracts contain arbitration clauses, which presently sustain the following three arbitrations which are presently pending between Siyangena [as claimant] and PRASA [as defendant] ("the Arbitrations"):
- 11.1 Two arbitrations concerning respectively ISAMS Phase 1 and the Addendum, both of which are pending before retired judge E Goldstein [the second respondent]; and
- 11.2 A third arbitration concerning ISAMS Phase 2 which is pending before retired judge M Joffe [the third respondent].
- 12 In the arbitrations:
- 12.1 Siyangena claims payment from PRASA in respect of contract consideration:
- 12.1.1 In relation to ISAMS Phase 1 [which is 99.74% completed] in the amount of R98,889,537.89 [representing 5% of the total Phase 1 contract consideration 95% thereof already having been paid by PRASA];
- 12.1.2 In relation to ISAMS Phase 1 Extension [which forms part of the ISAMS Phase 1 works that have been 99.74% completed] in the amount of R84,879,419.22

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[representing 23% of the total Phase 1 Extention contract consideration – 77% thereof already having been paid by PRASA];

- in the amount of R1,592,195,483.28 [representing 62.7% of the total Phase 2 contract consideration 37.3% thereof already having been paid by PRASA].
- 12.2 PRASA contends that the JBCC Agreements are void for want of legality and that the arbitrators are contingently divested of jurisdiction to determine the disputes that were referred to arbitration,
- On 19 February 2018 Siyangena issued an application under case number 11314/2018 ("the Siyangena Application"), which application is pending, will be heard together with this application and in terms of which Siyangena pursues an order that:
- 13.1 should it be declared by a court of competent jurisdiction and/or held by either one or both of the arbitrators that:
- 13.1.1 Siyangena was awarded the Phase 1 Tender and/or the Phase 2 Tender; and/or

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13.1.2 the Phase 1 Extension and/or the Addendum was concluded;

inconsistent and/or in want of compliance with the Constitution

[for any reason] and consequently declared invalid;

- then and in such event, that it be declared in terms of section 172(1)(b) of the Constitution that any such declaration of invalidity shall not have the effect of:
- divesting Siyangena of any rights to which, but for the declaration of invalidity, Siyangena might have been entitled to under the respective contracts awarded to it by PRASA in pursuance of the Phase 1 and Phase 2 Tender processes, the Phase 1 Extension and the Addendum, but for the declaration of invalidity; nor
- 13.2.2 divesting the arbitrators of their jurisdiction to determine

  Siyangena's claims in the arbitrations.
- 14 On 3 March 2018, PRASA issued this application, to which I will throughout this affidavit refer as the "Review Application" and in terms of which it pursues:

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- 14.1 An order declaring the signature of the JBCC Agreements to have been unauthorised [prayer 1 of PPASA's notice of motion];
- An order reviewing and setting aside PRASA's decision to appoint Siyangena for the supply and installation of ISAMS in respect of ISAMS Phase 1 and ISAMS Phase 2 as well as PRASA's decision to appoint Siyangena for the guarantee, maintenance and upgrading of the ISAMS equipment, as provided for in the Addendum [prayer 2 of PRASA's notice of motion].
- 14.3 An order setting aside the JBCC Agreements and the Addendum [prayer 3 of PRASA's notice of motion].
- 14.4 An order setting aside the arbitration clauses contained in the JBCC Agreements [prayer 4 of PRASA's notice of motion] alternatively that they shall cease to have effect with reference to the disputes referred to arbitration by Siyangena [prayer 5 of PRASA's notice of motion].
- An order for relief [manifestly a just and equitable remedy contemplated by section 172(1)(b) of the Constitution contingent upon the other relief sought by it in terms of the

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application [prayer 6 of PRASA's notice of Motion] ("the PRASA Equitable Remedy").

- Also, by way of introduction, it must be noted that the Review Application is the second attempt by PRASA to have its subject administrative action reviewed and set aside, it having prosecuted a previous [dismissed] application for such relief during 2016 ("the 2016 Review Application").
- Siyangena opposed the 2016 Review Application and I attach hereto a copy of the affidavits filed in relation to the 2016 Review Application [exclusive of the annexures thereto] as annexures "ST1", "ST2" and "ST3" respectively. Legal argument will be presented on their contents, in addition to the affidavits filed in these proceedings to date, at the hearing of this application. Suffice to state that the affidavits of PRASA, in comparison with one another, pursuing the same relief, demonstrates the dishonesty with which these proceedings are persisted with by PRASA.
- 17 I have read the founding affidavit of PRASA, in support of the Review Application and deposed to by Onica Martha Ngoye ("Ngoye").



- 18 The bulk of Ngoye's 267-page [exclusive of annexures] founding affidavit constitutes:
- allegations of [at best] a secondary factual nature that not substantiated by primary facts and consequently nothing more than Ngoye's own personal conclusions and which do not constitute evidential material capable of supporting a cause of action;
- 18.2 inadmissible hearsay; and
- 18.3 inadmissible documentary hearsay.
- In the premises Siyangena shall argue at the hearing of the Review Application that any such allegation in Ngoye's founding affidavit ought to be either struck out or disregarded in pursuance of the adjudication of the Review Application.
- 20 What is more, the bulk of Ngoye's affidavit relates not to accusations made primarily against Siyangena but rather innuendos that Siyangena was somehow involved in what Ngoye:
- and particularly during the period 2009 to date; and

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- 20.2 describes the absolute circus that was [and manifestly remains] PRASA, unbeknown to Siyangena.
- 21 Siyangena was obviously [and has remained] not privy to the operations within PRASA, with which the founding affidavit is predominantly concerned.
- 22 Consequently, due to the manner in which Ngoye's affidavit has been [carefully] crafted, Siyangena cannot substantially challenge Ngoye's allegations concerning the inner dealings of PRASA.
- Siyangena has however particularly consulted with Mr Jabu Sindane ("Sindane") and Mr Luyande Gantsho ("Ganthso") in regard to the contents of Ngoye's affidavit and both of them find it astonishing and misleading, with which Siyangena concurs. I attach hereto copies of the confirmatory affidavits by Sindane and Gantsho, as annexures "ST4" and "ST5".
- 24 Siyangena's attorney managed to locate Jabu Sindane and Luyanda
  Gantsho in order to schedule a consultation for purposes of testing
  the submissions made in Ngoye's affidavit. The extent of what
  Siyangena's counsel extracted from the aforesaid consultations is
  incorporated throughout this affidavit where reference to any of
  these individuals are made and to that extent the confirmatory

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affidavit's will not necessarily repeat each and every allegation independently from this affidavit. Let me, however, confirm that both Messrs Sindane and Gantsho were advised of the nature and extent of the information required. Both were invited to have their own legal representatives present. Mr Gantsho advised that he has limited access to his counsel since he was under cross-examination In the labour dispute with PRASA. I mention this in order to reiterate that their participation in these proceedings could not be interpreted as efforts to assist Siyangena or bolster any argument for or on its behalf. The purpose of consultation with the aforesaid individuals was to obtained clarity and, to the extent possible, insight into the allegations of impropriety within PRASA, an aspect Siyangena cannot give first hand evidence on without consulting with someone within PRASA. I will later in this affidavit deal with fact that Mr Gantsho stated that he was misled by the investigators of PRASA.

- 25 Siyangena emphasises at the outset that:
- 25.1 Siyangena now finds itself in a litary of time-consuming, existence threatening and expensive litigation, against PRASA, not due to its own sins but manifestly due the personal issues within the management of PRASA;

- under circumstances where it has over the last 8 years performed its contractual obligations towards PRASA to a state of 98.7% completion in relation to projects which in the average are valued at R5,657,389,430.21;
- completely innocent to the internal issues within PRASA.
- Neither Siyangena nor any one of its employees have ever been involved with any fraudulent or corrupt activity as alleged, implied or insinuated by PRASA and any contention to the contrary is denied.
- 27 Siyangena opposes the Review Application on the basis that:
- 27.1 The institution of the Review Application is unauthorised, alternatively was not properly authorised at the time of its issue;
- 27.2 PRASA has unduly delayed the prosecution of the Review Application and that it must for this reason alone be dismissed;
- 27.3 In the event that the court finds, within the confines and parameters of the admitted admissible evidence in Ngoye's affidavit, together with the facts stated in this affidavit, that PRASA is entitled to an order as set out in prayers 1 to 3 of its

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notice of motion, then and in that event Siyangena opposes the relief sought by PRASA in prayers 4 to 6 of its notice of motion and, in doing so, Siyangena seeks a declaratory order in terms of section 172(1)(b) of the Constitution that any such order granted to PRASA shall not have the effect of:

- 27.3.1 divesting Siyangena of any rights to which, but for such orders being granted, it might have been entitled to under the respective contracts awarded to it by PRASA in pursuance of the Phase 1 and Phase 2 Tender processes, the Phase 1 Extension and the Addendum; nor
- 27.3.2 divesting the arbitrators of their jurisdiction to determine Siyangena's claims in the arbitrations.
- It is in this respect important to note that Siyangena's stance in relation to paragraph 25.3 above is premised upon a court finding that PRASA is entitled to have the tenders and contingent contracts set aside on a **technical basis**.
- This is so because **Siyangena was, I reiterate, not a party to**nor involved what transpired within PRASA in relation to the

  tender processes. Accordingly, should a court be inclined to have

  the tenders and contingent contracts set aside on such a

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technicality, it is Siyangena's stance that it would certainly not be just and equitable, due to Siyangena's innocence, to deprive it any rights to which, but for such orders being granted, it might have been entitled to under the respective contracts awarded to it by PRASA in pursuance of the Phase 1 and Phase 2 Tender processes, the Phase 1 Extension and the Addendum.

- 30 I will structure this affidavit as follows in order to place the relief sought by Siyangena in terms of this Review Application in factual and legal context:
- 30.1 I shall first, from a factual perspective, deal with:
- 30.1.1 how ISAMS came about and who actually "wrote the spec" to sustain ISAMS;
- 30.1.2 how Siyangena initially became involved with PRASA;
- 30.1.3 Siyangena's involvement in relation to the PRASA train stations that were utilised in the 2010 FIFA Soccer World Cup;
- 30.1.4 ISAMS Phase 1 and the extension thereof;
- 30.1.5 ISAMS Phase 2;



- 30.1.6 The Addendum; and
- 30.1.7 The innuendos (I say innuendos since the allegations advanced by PRASA are not only designed to misdirect the Court but also devoid of truth) contained in PRASA's affidavit concerning Siyangena, Lucky Montana ("Montana"), Luyanda Gantsho ("Gantsho") and Riaan Van Der Walt ("Van Der Walt"). I submit that the information gathered by Siyangena in response to the innuendos by PRASA clearly show that PRASA failed to draw a link or nexus between these allegations of befuddled interests between Montana and Van der Walt versus Signingena's knowledge thereof or involvement therein. I submit that, in fact, PRASA regurgitated facts it assumed to be the truth without any support for the assumptions of impropriety and the consequential innuendos.
- 30.2 I shall thereafter sequentially:
- deal with PRASA's implementation of and conduct in terms of the relevant contracts notwithstanding its management's best [failed] endeavours to avoid PRASA's contractual payment obligations towards Siyangena in terms of those contracts; and

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30.2.2 provide an overview of the litigation to date and deal with Siyangena's contention that PRASA has idly sat by, unduly delaying the prosecution of this Review Application to such an extent that same ought to be dismissed on this basis alone; 30.2.3 deal with the judgment of the Constitutional Court in State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited [2017] ZACC 40; 30.2.4 address the orders sought by PRASA in prayers 1 to 3 of its notice of Motion; 30.2.5 address the orders sought by PRASA in prayer 5 of its notice of Motion; 30.2.6 address the orders sought by PRASA in prayers 4 and 6 of its notice of Motion, 30.2.7 make certain submissions in regard to this application and conclude as to the order sought by Siyangena; 30.2.8 deal with the authority of Werksmans to pursue these

proceedings,

- 30.3 I shall lastly:
- To the extent that a further need to do so arise, respond to the allegations contained in the founding affidavit on a paragraph-by-paragraph basis; and
- 30.3.2 conclude as to this Review Application in general.
- 31 The facts leading up to the prosecution of this application is involved and the documentary evidence relied upon by Siyangena are extremely voluminous, to such an extent that it is comprised of thousands of pages.
- 32 Siyangena has, in view of being as succinct as possible, compiled:
- An indexed and paginated bundle of documents which relate to the Phase 1 Tender and the Phase 1 Extension which consists of 11 volumes ("the Phase 1 Documents Bundle");
- An indexed and paginated bundle of documents which relate to the Phase 2 Tender and consists of 12 volumes ("the Phase 2 Documents Bundle"); and



- An indexed and paginated bundle of documents which relate to

  the Addendum and which consists of 9 volumes ("the

  Addendum Documents Bundle").
- 33 From what will appear hereunder, the facts surrounding the true impasse between Siyangena and PRASA cannot be subject to a bona fide dispute. On the contrary, the facts stated in this affidavations should, if honestly approached, be common cause.
- On this point, I will demonstrate hereunder that Ngoye's version is not only a completely self-serving selective exposition of the actual facts, but that she has in actual fact mislead this court in material and crucial respects.
- 35 Siyangena will as far as possible not burden this affidavit with a legio of annexures and, instead, cross-reference the allegations set out in this affidavit with the documents indexed and paginated in the respective bundles.
- A complete copy of Siyangena's indexed and paginated bundles have been provided to PRASA in pursuance of the Siyangena Application and Siyangena shall ensure that a complete copy of the bundle is available to the court at the hearing of the Review Application and the Siyangena Application.

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- 37 Before I continue, I further emphasise the following:
- 37.1 Ngoye relies predominantly on what is conveyed to her pursuant to the investigations into the Siyangena/PRASA debacle the outcome of which I will demonstrate actually militates against the prosecution of this application and the relief sought;
- The striking contents of Ngoye's affidavit does, at first sight, instil some shock when considered out of context and within the confines of the convenient selection of facts included therein, particularly in an unfounded and unmeritorious attempt to discredit Siyangena;
- 37.3 but I will however demonstrate hereunder that she has, notwithstanding her best disingenuous endeavours, calculatedly and dishonestly mislead the court, under oath.
- 38 Unfortunately for PRASA, paper is the perfect confidant, notorious for being "more patient than man".
- 39 Although the relatively limited portion of the founding affidavit which relates directly to Siyangena or individuals associated therewith is mainly aimed at discrediting Siyangena, all that it actually confirms is that notwithstanding the litany of complaints

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and concerns raised and charges laid, not a single one has culminated into any form of prosecution or hearing. In addition to the aforesaid it is of importance to bring to the Honourable Court's attention to what extent PRASA went in order to establish "facts" to launch this application (for a second time) years after it had to be launched:

- 39.1 I will explain in detail hereinunder that the core of the attack on Siyangena is, in fact, political power-play under circumstances where the previous chairperson of the Board, Mr Popo Molefe, initiated some sort of "investigation" into allegations of impropriety regarding the previous GCEO, Mr Lucky Montana;
- The office of the Public Protector issued a report in February 2015 in which she [the then Public Protector Advocate Thuli Madonsela] concluded that **PRASA did not follow the necessary internal procurement processes**. No adverse finding was made against Siyangena;
- I will endeavour to, briefly, deal with certain issues contained in the report of the Public Protector since **she never** consulted with Siyangena on the draft report or the final report. The report is, as I understand it, currently the object

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of review proceedings but Siyangena is not a party thereto. The purpose will not be to launch an attack on the office of the Public Protector or the report but rather to clarify issues to which the Public Protector, on her own version, could not get clarity as a result of uncooperative officials, incomplete documents and, with respect, incompetence within PRASA;

- 39.4 The previous Chairperson of the Board Mr Molefe, so it seems, managed to obtain approval for Werksmans Attorneys to conduct its own investigation with regards to the issues raised in the office of Public Protector. I need to mention that from the information I have gathered it seems as if Werksmans invoiced PRASA in R220 000 000.00 [TWO **HUNDRED** AND TWENTY MILLION RAND [almost a quarter of a billion rand] to conduct these "investigations", which, with respect, yielded nothing;
- 39.5 The personal bank accounts of directors of Siyangena were accessed without permission and, I submit, under false pretences causing a complete disregard for constitutional values;



- 39.6 The media received "information" from time to time causing several unsubstantiated media reports with vicious attacks on Siyangena, its staff and its owners;
- The relentless attack on Siyangena culminated into a first review application which was dismissed with costs. The application for leave to appeal was dismissed with costs. The petition was dismissed with costs. The reconsideration application before the Supreme Court of Appeal was dismissed with costs. Millions of rands were wasted on these proceedings and, so I submit, it became an obvious embarrassment whilst the taxpayer had to stand in for these futile exercises;
- 39.8 Undue and further delays caused this application for review to be launched only after the legal representatives of Siyangena launched an application under Section 172 of the Constitution of the Republic of South Africa. This application for review brings nothing new to the fore and is but a regurgitation of previous facts, allegations and assumptions devoid of any merit;
- 39.9 I wish to record that criminal charges were laid against, as far as I know, Montana, Van der Walt and several others following the "Werksmans investigation". As I have mentioned

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hereinabove none of the aforesaid charges culminated into any prosecution or criminal charges being pursued by the National Prosecuting Authority, as far as I could ascertain;

- What these charges and allegations, however, managed to do was to suffocate the business of Siyangena and the commercial aspirations of its directors. As a result of the media hype created by these unsubstantiated allegations [I, again, submit that those are without merit and no nexus to Siyangena] and as a consequence of the unreasonable delay by PRASA to prosecute these proceedings timeously Siyangena have suffered severe financial damages. In the process they have had to liquidate various investments, retrench staff, freeze salaries of all staff members and terminate contracts with SMME sub-contractors;
- 39.11 This application is the consequence of an embarrassing implosion of the "Werksmans investigation" and its inability to find any impropriety in the conduct of Siyangena or any of its directors;
- 39.12 It is in light of the aforesaid that I beg the Court to keep in mind what I have submitted with regards to the *mala fide*

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intention of this application. The few submissions made in the founding paners with regards to the **actual involvement of Siyangena** in impropriety is non-existent. In the fullness of time these matters will be dealt with through the proper channels and the proper action by Siyangena.

# [C] ISAMS:

# ISAMS, the Siemens Specification and the 2010 FIFA World Cup:

- 40 ISAMS is, as its name says, an integrated security access management system which is generally comprised of public address, speed gates, fire detection infrastructure, electronic display boards, help points, CCTV camera services and access control systems.
- 41 During 2008/2009 and in Preparation of the 2009 FIFA Confederations Cup as well as the 2010 FIFA World Cup, Intersite [a subsidiary of PRASA], pursuant to an open tender process, contracted:
- 41.1 Rainbow Construction ("Rainbow") to upgrade and modernise Doornfontien train station; and

- 41.2 Enza Construction (Pty) Ltd ("Enza") to upgrade and modernise

  Nasrec train station.
- 42 Siyangena was appointed as sub-contractor to Rainbow and Enza,

  by Intersite, however only to install speed gates at the

  Doornfontein and Nasrec train stations.
- 43 Although PRASA confirms the aforesaid in its founding affidavit [paragraphs 17.1], PRASA [calculatedly and purposefully] omits the following crucial information from its founding affidavit, manifestly with the intention to mislead the court:
- PRASA specifically in the founding affidavit alleges that the tender specifications in respect of both ISAMS Phase 1 and ISAMS Phase 2 were designed to favour Siyangena.
- PRASA heavily relies on this allegation to sustain its case, notwithstanding that it is to the knowledge of PRASA entirely false, for the reasons that appear hereunder.
- 43.3 Siyangena only commenced trading in **2008**.
- During approximately **2006/2007** Siemens, at the instance of PRASA, commenced with the installation of a system called

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Siemens Railcom Management System ("the Siemens Railcom System"). This system can be described as the "heart" of the Information and Communication System ("ICS") and is used to integrate the various standalone electronic systems at the PRASA train stations.

- 43.5 PRASA also installed its own Automatic Passenger Information

  System ("APIS") which system was made possible by the

  Siemens Railcom System.
- The Siemens Railcom System can be compared with an Engine

  Management System. The components which are used in the

  "engine" should obviously be compatible with it in order to be

  integrated and managed through one system. It is for this

  reason that specific makes [or "brands" as PRASA puts it] of

  equipment had to be used to ensure that it was compliant with

  and could be integrated with the Siemens Railcom System.
- 43.7 I annex hereto as annexure "ST6" a document drafted by Siemens which explains the Siemens Railcom System.
- designed for and used in relation to access control, time management, attendance management and security

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management at PRASA train stations, in synergy with the Siemens Pailcom System.

- The Babylon System was specifically chosen by Siemens to integrate with the Siemens Railcom System. It is also necessary to mention that there is a strategic partnership between Siemens and Autec in this regard.
- Johannesburg Park Station in 1997. Another Babylon System was installed by Siemens at Durban Station in 1999. In this respect I annex hereto a copy of a letter from Autec confirming that they sold products to Siemens since 1989 as annexure "ST7".
- During **1998/1999** Dallmeier cameras were installed at Cape

  Town Station by Siemens. Dallmeier cameras also formed part

  of the hardware products used in the designing of the Siemens

  Railcom System.
- 43.12 At the Durban station an Autec (Babylon) Dongle was installed in 1999. This Dungie (System) was upgraded in 2004/2005 again by Siemens. In confirmation thereof I annex hereto marked annexure "ST8" the confirmatory affidavit of JM

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Naidoo, a former Siemens employee, who confirms that he was personally involved in the installation whilst being a Siemens employee;

- As part of PRASA's ICS it decided to roll out the Siemens

  Railcom Manager Communication Management System to

  Integrate all station based communications within PRASA. This

  included and presently includes the following:
- 43.13.1 Public address ("PA");
- 43.13.2 Customer information screens ("CIS") or electronic display boards ("EDB");
- 43.13.3 Closed circuit surveillance equipment ("CCTV");
- 43.13.4 Emergency help points and the signalling utilising supervisory control and data acquisition ("SCADA").
- The decision to roll out the Siemens Railcom Management Communication Management System was taken during 2006/2007. It is these specifications which form the core of the specifications which are still applicable today. If different specifications are used for new projects, it would not be possible to interface with the existing management system

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and would render the system, which is designed and intended to ensure that the stations are operated in synergy, unfit for its intended purpose.

- 43.15 The standard specifications which are used for public address systems, help points, CCTV and EDBs all originated from the imitial roll out of the ICS project carried out by Siemens in 2006, according to Siemens' specifications.
- 43.16 Sidney Charles Els ("Els") was employed by PRASA from October 2008 as its Senior Engineer Telecoms and responsible for the management of ICS on behalf of PRASA.
- 43.17 Els' duties particularly concerned the management and execution of the ICS project for PRASA in time for the 2010 FIFA Soccer World Cup.
- 43.18 Els confirms, under oath, that:
- The deployment of ICS had already taken place in respect of certain PRASA stations during 2006/2007, which went out on tender;

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- 43.18.2 Siemens presented its key technologies to PRASA for purposes of ungrading the relevant PRASA stations that were identified for purposes of the then intended upgrade, on a national basis, in relation to the then anticipated 2010 FIFA Soccer World Cup;
- 43 18 3 Siemens' key technologies ("the Siemens Specification"):
- 43.18.3.1 became the standard for PRASA's station upgrade technology and ultimately the national ISAMS requirements within PRASA in order to ensure that all of its stations conform; and
- 43.18.3.2 consisted of TOA (Public Address System), the Siemens Railcom System, Dallmeier CCTV Technology and the Siemens Access Control Technology (i.e. Autec/Babylen).
- 43.19 A copy of Els' affidavit dated 10 February 2016 is attached hereto as annexure **"ST9**".
- I also attach hereto correspondence issued by Els, dated 25
  May 2010 in relation to the ICS project, as annexure "ST10",
  the contents of which are self-explanatory.

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- 43.21 It is not completely correct to state that Nasrec and Doornfontein constituted the pilot phase of ISAMS.
- 43.22 The only aspect which was "pilot" was the speed gates in relation to these two stations. The balance of the ISAMS bouquet was already standard specifications and was being rolled out at stations countrywide by Siemens and various other contractors, Siemens having particularly been appointed to supply and install the Public Address Systems and Electronic Display Boards at various stations nationwide and other contractors were also busy with the installation of Access Control and Fire Detection at identified stations.
- 43,23 Doornfontein was ultimately completed as part of ISAMS Phase 2 and Nasrec was completed some time after Rhodesfield and Orlando Stations.
- 43.24 In this respect, Rhodesfield Station was the first station in respect of which the ISAMS upgrade had been completed, particularly due to the fact that it was connected to the Gautrain/OR Tambo Airport route and had to be functional for purposes of sustaining such transport in relation to the Confederations Cup and ultimately the 2010 FIFA Soccer World

Cup.

- What in actual fact transpired was that Nasrec and Doornfontein were identified by PRASA during 2008/2009 for being upgraded with the supply, commissioning and installation each in respect of only certain elements of the ISAMS bouquet, for purposes of the stations being utilised as such during the 2009 Confederations Cup.
- The tender specifications for Nasrec were prepared by Thusanang Consulting Engineers (Pty) Ltd ("Thusanang") whom were contracted as consulting engineers by PRASA in relation to the supply, installation and commissioning of ISAMS at this PRASA train station.
- I attach hereto a copy of the Project Scope of Work for the Speedstile Access Control Gate at Nasrec Station, dated January 2009, as annexure "ST11", from which the court will note that it provides that "Tenderers shall be obliged to tender on the specification forming part of this document. No alternative offers will be considered with regard to the specified proposed system and equipment" in clause 5 thereof.
- 43.28 The tender specifications for Doornfontein were prepared by Bakone Consulting Engineers (Pty) Ltd ("Bakone") whom were

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contracted as consulting engineers by PRASA in relation to the supply, installation and commissioning of ISAMS at this PPASA train station.

- 43.29 In this respect I attach hereto the tender specification, as prepared by Bakone and in relation to Doornfontein, as annexure "ST12".
- 43.30 Rainbow and Enza were contracted [as principle contractors] by Intersite to perform a complete station upgrade in respect of Nasrec and Doornfontein. Their appointment however was subject to sub-contractors being appointed to execute various specialised trades including the complete ISAMS bouquet.
- 43.31 The appointment of Rainbow and Enza were however predominantly concerned with the civil and construction work attendant upon the supply, install and commission ISAMS at the respective stations.
- The provision of speed styles, CCTV, access and public address and help point technologies in relation to the supply, installation and commissioning of ISAMS in respect of Nasrec and Doornfontein each respectively went out on separate open tenders.

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- Siyangena submitted bids in relation to such tenders for the supply, installation and commissioning of ISAMS at Doornfontein and Nasrec and was ultimately allocated the speed styles tender in respect of Doornfontein as well as the speed styles, CCTV, Access Control and Fire Detection in relation to Nasrec Station. I attach hereto:
- 43.33.1 the outcome of the Nasrec sub-contractor tender process as annexure "ST13", from which the court will note that at least two other contractors tendered for the exact same scope of works that were ultimately awarded to Siyanqena;
- 43.33.2 Siyangena/ESS's cost proposal and bill of quantities as annexure "ST14";
- 43.33.3 PRASA's letter of appointment dated 25 August 2009, as annexure **"ST15**";
- 43.33.4 Bakone's Reduced Tender Report dated 17 September 2008.
- 43.33.5 Development and Engineering Consultants' letter of recommendation in relation to the appointment of Siyangena, as annexure "ST16.

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- 43.34 Siemens also tendered for the aforesaid project and I attach hereto a copy of Bakone's letter dated 21 July 2009, Siemens' letter dated 19 May 2009 and Intersite's memorandum of appointment in respect of Siemens in relation to Doornfontein, as annexures "ST17" to "ST19".
- The installation of [however at the time unbeknown to Siyengena] Dallmeier cameras at the specific stations and the Autec public address system was not only done by Siyangena but also various other sub-contractors. We have attached affidavits from 2 such contractors, Mr Tommy Davis and Sam Lessing who carried out installations at Orlando, Moses Mabhida, Rossburgh, Isipingo, Reunion and Duffs Road stations as annexure "ST20" and "ST21". The importance of this will become later apparent in that PRASA claims that Siyangena was unduly advantaged in that Siyangena were the only ones capable of doing these types of installations.
- 43.36 However, it is of utmost importance to note that Siyangena was awarded these **subordinate tenders** by Intersite and consequently appointed **by Intersite** as **sub-contractor** to Rainbow and Enza respectively, for purposes of **installing the speed styles** at the respective stations.

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- 43.37 Siyangena complied with all of its obligations towards

  Intersite/PRASA in relation to their appointment as subcontractor in respect of Doornfontein and Nasrec stations.
- I reiterate that the provision of CCTV [Dallmeier], access and public address [Autec] and help points technologies in relation to the supply, installation and commissioning of ISAMS in respect of Nasrec and Doornfontein were allocated not only to Siyangena but to various other third parties as well pursuant to the same subordinate open tender process.
- Not only were these tenders allocated to such third parties, the installation of CCTV [Dallmeier], access and public address [Autec] and help points technologies in relation to the supply, installation and commissioning of ISAMS in respect of Nasrec and Doornfontein were in, fact performed by such other third parties.
- At the same time during 2008/2009 PRASA, in conjunction with Intersite, simultaneously identified certain PRASA train stations, particularly Cape Town, Rhodesfield, Moses Mabhida, Windemere, Langa and Bridge City train stations ("the World Cup Stations"), as stations in respect of which ISAMS had to by supplied, commissioned and installed, before the 2010 FIFA

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Soccer World Cup.

- PRASA's intention to also procure the supply, installation and commissioning of ISAMS in respect of the World Cup Stations was unknown to Siyangena until **5 March 2009** when Siyangena's CEO, Mario Ferreira ("Ferreira") submitted a Siyangena's tender to install access gates at PRASA's HM Pitje station, to PRASA appointed consultant Thusanang, one Mr Kgaudi.
- As aforesaid, Thusanang [Kgaudi] was at the time involved with the supply, installation and commissioning of ISAMS in respect of the World Cup Stations and Kgaudi in fact informed Ferreira on this occasion that PRASA had already contracted Siemens [on closed tender] to supply, install and commission ISAMS in respect of the World Cup Stations. I pause at this point and attach hereto an internal memorandum of PRASA [then the SA Rail Commuter Corporation Ltd] in confirmation of the aforesaid, as annexure "ST22" together with Siemens' quotation report, as annexure "ST23".
- During October 2009, Siemens notified PRASA that it deemed to unlikely that the world Cup Stations would be timeously completed. They attempted to hold PRASA at ransom by

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initially requesting an exorbitant acceleration fee to complete the project on time, which was rejected by PRASA, and later stated to the project team they would be unable to complete even with the acceleration fee.

Then, during or about November 2009, Ferreira was requested to attend a meeting with Thusanang. During this meeting it was explained to Ferreira that Thusanang was encountering difficulties with Siemens and Siyangena was requested by Thusunang to submit a proposal based on a specification, drawings and bills of quantities based on the Siemens Specification. The subject drawings and bills of quantities were provided to Siyangena, for the first time at this meeting and related to work that had to be executed in respect of the World Cup Stations. The documentation provided to Siyangena in order to do so comprised the Siemens engineering Drawings and Bills of quantities and were still on Siemens title blocks and letterheads, in relation to the subject stations. Copies of these documents could not be located by Siyangena and I cannot append it as an annexure.

43.44 In further proof that the Siemens Specification had aiready formed a crucial and cardinal role in respect of the ISAMS

specifications and commensurate tenders, I firstly annex hereto the tender specifications for the Moses Mabhida Station [tender number DN81901] (initially contracted to Siemens as aforesaid) as annexure "ST24", which went out on open tender and was awarded to third party contractors not Siyangena once more showing other contractors could deliver the said specification.

- These specifications were **prepared during approximately**2008 by LDM Consulting (Pty) Ltd and was entirely based on the Siemens Specification and accordingly the Siemens Railcom System [and specified equipment] and PRASA's APIS.
- The decision taken in 2006/2007 to install the Siemens Railcom System, in accordance with the Siemens Specification, of necessity had the effect that PRASA would be obliged to install the same system nationwide. This is so because the entire purpose for the systems is the integration between PRASA train stations.
- All the products were required to interface with these systems and the court will particularly note that PRASA **insisted** on particularly specified equipment to be used in pursuance of the supply, commissioning and installation of ISAMS at this.

station. These specifically required items are clearly described in clause 16 to comprise specifically the Dallmeier CCTV cameras and the Babylon Access Control system. I furthermore refer the court's attention to paragraphs 10 and particularly also paragraph 12 thereof, which states the following:

## "CCTV Surveillance System

The CCTV system will be interfaced to the PRASA Central Automated Messaging System, the APIS (Automatic Passenger Information System). The APIS is made possible with the new Railcom system currently being rolled out to all stations.

The Dallmeier equipment specified in the schedule of quantities provides the digital interface to the APIS. The Railcom system is dependent on certain manufacturer products, these have been specified by model name and manufacturer."

(own emphasis)

I annex hereto as annexure "ST25" the tender specifications for Rhodesfield Station which was prepared by Arcus Gibb and Abakali Quantity Surveyors in September 2009. I again refer the honourable Court to the technical specifications set out in this tender. Similarly, the Rhodesfield Station specification incorporates the Siemens Specification as a requirement and particularly refers to the same "branded"

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equipment and specifications that were required by PRASA in relation to the Moses Mabhida Station.

- 43.49 I also attach hereto a copy of the Rhodesfield stations Bill of Quantities as annexure "ST26".
- 43.50 I first refer the court to page 7 thereof [item 4.2.1] concerning the specification as regards cameras and which specifies "Siemens CCD1415-DNX" as the required equipment. This camera model was in actual fact a Dallmeier product and not a Siemens Product.
- 43.51 Second, I refer the court o page 9 thereof which in no uncertain terms specify the equipment required to be the Siemens K32 door controller. This is also incorrect, it was in actual fact an Autec K32 and not a Siemens product.
- The tender specifications for the aforementioned tenders were prepared long before the Nasrec Station specifications, in respect of which the court will be reminded that Siyangena was appointed **as a sub-contractor** to Enza.
- 43.53 PRASA conveniently elects to omit that the Dalimeler CCTV system was not the only set of equipment specified by name,

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make and model. The public address system (AV Digital), electronic display boards (ITENS) and help points (Siemens) were all specified by name, make and model for the same reason as the Dallmeier products. The reason for this is that the equipment installed at new stations all have to interface with the Siemens Railcom System. This interdependence with Railcom is also clear from the documents provided by Sindane prior to the adjudication of Phase 1 as appears from annexure FA49 to the founding affidavit.

- PRASA commenced with the rolling out of the Siemens Railcom System at stations nationwide **since 2006/2007**, before Siyangena even commenced trade. PRASA is still, to this date, in the process of rolling it out to further stations. Although PRASA doesn't share a single word about this in its founding papers, it consistently and continuously instructed Siyangena to perform under the agreements it now hopes to renege on. I will deal in detail with this allegation hereinunder.
- There can be no doubt that the deponent to the founding affidavit, or at least the people advising her, had to have had knowledge of the technical requirements. It also is worth mentioning that all these facts were declared during the initial review proceedings and the deponent as head of legal would.

have been made aware of them, yet she continues to blatantly lie to the honourable court and denies any such knowledge.

- It is a fact that it was, remains and was at all material times considered by PRASA **absolutely crucial** to install manufacturer specified software and hardware products which can interface with the existing Siemens Railcom System and that Siyangena simply had nothing to do with the compilation of the Siemens Specifications.
- 43.57 In January 2010, Siemens finally informed Intersite that it would not be able to complete the roll-out of ISAMS in respect of the World Cup Stations timeously, which was, understandably, disastrous to PRASA.
- 43.58 Siemens' inability to complete the World Cup Stations was tabled and discussed during a weekly PRASA World Cup Project Management Meeting, during the last week of January 2010, where PRASA ISAMS Project Manager, Mr Gantsho was present. Also present at this meeting were Lucky Montana [the then GCEO of PRASA] ("Montana"), **Cromet Molepo** [the then CEO of Intersite and present acting CEO of PRASA] ("Molepo") and one Patrick Gombet.
- 43.59 Gantsho was, as PRASA's ISAMS Project Manager, mos

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intricately involved in relation to the supply, installation and commissioning of ISAMS in PRASA train stations and particularly at this point in time.

- During this meeting Siemens' inability to complete the World

  Cup Stations was discussed and Molepo informed the meeting that Intersite was aware of "a company" which is utilised by Intersite as sub-contractor to install ISAMS at Nasrec and Doornfontein that could possibly assist with alleviating PRASA's predicament.
- In reaction to **Molepo's** comment, Gombet identified "the company" as Siyangena and informed Gantsho that he should make contact with Sindane to obtain Siyangena's contact details.
- 43.62 Gantsho was then instructed to contact Siyangena, which he did, particularly to ascertain Siyangena's capacity to assist with the completion of the ISAMS roll out in the World Cup Stations.
- The procurement of an alternative contractor to take over from Siemens was of utmost importance and priority, particularly because it was an inherent requirement of FIFA that South Africa's infrastructure must guarantee, to the extent possible, safety. Further, is was of paramount importance to urgently

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attend to the crisis at hand in order to avoid global embarrassment to the Republic of South Africa, upon parliamentary and ministerial ultimatum and demand.

- 43.64 Ferreira met Montana for the first time on 17 February 2010 when Montana requested him to attend a meeting with Montana at his offices as Montana was sceptical on whether a contractor could deliver where Siemens had been unable to. At this meeting, Montana enquired from Ferreira as to whether Siyangena would be able to take over from Siemens and complete the World Cup Stations prior to the World Cup. Ferreira confirmed Siyangena's ability and capacity to do so.
- 43.65 Subsequent to engaging Siyangena in pursuance of the aforesaid, Gantsho addressed a letter to Montana on 23 February 2010 [founding affidavit pp 402]. In terms of this letter Gantsho emphasises:
- 43.65.1 the undisputable [although not addressed by Ngoye] strategy adopted by PRASA to **standardise PRASA's**"installed base";
- 43.65.2 that Siyangena's speed gates were considered too much on the high end in terms of PRASA's operations and

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intended purpose at that time;

- alternative local suppliers could be sourced but due to the time constraints applicable PRASA may not be able to achieve the objective of having the alternative speed gates installed timeously for purposes of the World Cup; and
- Should "ESS" [in fact actually Siyangena] be approached,

  PRASA would still be able to meet the then imminent deadlines applicable.
- dantsho subsequently and under the prevailing urgent circumstances motivated Siyangena's appointment to Montana on the basis of the written Motivation and Recommendation Report that appears on page 407 of the founding affidavit, which Montana counter-signed in approval of the motivation on or about 16 March 2010, informing that he considered it "important that finance be engaged to determine availability of capital funding prior to accepting the funding proposal from the supplier. However in the absence of such funding, **Group CFO** to advise accordingly" [emphasis added].

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- 43.67 It must at this point in time be remembered that Intersite was at this point in time still responsible to ensure that ISAMS is timeously supplied, commissioned and installed in the World Cup Stations.
- In the premises, Gantsho received from Ferreira and subsequently forwarded PRASA's approval of Siyangena's appointment to Intersite [Sindane] on 17 March 2010, as appears from annexure FA13 to the founding affidavit [pp421]. I however attach hereto the entire relevant email string, as annexure "ST27".
- On this same date 17 March 2010, Ferreira met with Montana (at Montana's request) for the second time only. During this meeting Montana and Ferreira again discussed Siyangena's capacity and capability to complete the World Cup stations in the limited time available. Ferreira again confirmed that, should Siyangena receive the go ahead from PRASA to finalise the WC stations (which Siemens had declined to execute due to time constraints and pricing disputes) by no later than 19 March 2010, Siyangena would finish in time for the Soccer World Cup kick off deadline of 11 June 2010. Thereafter, Ferreira did not see Montana again until beginning of 2013
- 43.70 Gantsho admits to having received annexure FA14 to the founding affidavit [pp422], being a letter from Piet Sebola

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[PRASA's General Manager – Strategic Asset Management]
("Sebola") but in this respect informs as follows:

- 43.70.1 In terms of PRASA's procurement framework, its GCEO [at the time Montana] was authorised to approve transactions up to the value of R100 million without the approval of other committees or procurement processes, which authority is particularly exercised under the pressing and exceptional circumstances prevalent at the time;
- 43.70.2 Montana duly approved the appointment of Siyangena as aforesaid, as he was fully authorised to do, which appointment was in relation to a transaction that did not exceed R100 million;
- The contents of this letter was adequately addressed in Gantsho's letter of 30 March 2010 [annexure FA15 to the founding affidavit pp 424] and ultimately, PRASA's Group Chief Financial Officer, Sindi Mabaso-Koyana, confirmed to Sebola and Ganthso on 12 April 2010 that "Exco has agreed that this project be implemented at Intersite" [as appears on page 428-429 of the founding affidavit].

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- 43.71 Sindane then, consequent upon the aforesaid, prepared the first draft of the recommendation to the chairman of Intersite's board and its CEO, in relation to the appointment of Siyangena by Intersite, in order to complete the World Cup Stations. This draft and unsigned document appears on page 437 of the founding affidavit.
- 43.72 Sindane then sent his draft recommendation to his superior,

  Themba Camane, whom settled same and returned the settled version to Sindane on 30 April 2010, as appears on page 436 of the founding affidavit [annexure FA21].
- The Camane settled written recommendation was then signed on 26 April 2010 by Sindane [as Intersite Senior Projects manager], Camane [as Intersite Executive: Project Management] and Molepo [Intersite's CEO at the time and PRASA's present CEO].
- On 28 April 2010 Molepo expressed his dissatisfaction with the process that was required to be followed under the pressing circumstances in relation to the then imminent World Cup, indicating that "Appointments should proceed without any further delay and there are processes to be followed in cases like this and I expect some diligence in handling of this

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matters...". I attach hereto a copy of Molepo's letter dated 28 April 2010, as annexure "ST28".

- In pursuance of the aforesaid and on 30 April 2010, Intersite

  [per Molepo its CEO] issued a letter of appointment to

  Siyangena [annexure FA22 to the founding affidavit pp 439].
- 43.76 It is the same Molepo who has recently resolved, as acting CEO in respect of PRASA, to prosecute this Review Application.
- On same date, Sindane addressed a letter to Camane in relation to the amended motivation for Siyangena's appointment, a copy of which I annex hereto as annexure "ST29".
- 43.78 Consequent upon its appointment, Siyangena devotedly applied all of its available resources to complete the supply, installation and commissioning of ISAMS in respect of the World Cup Stations.
- 43.79 In compliance with all of its obligations in terms of its aforesaid appointment, Siyangena handed over the last of the World Cup Stations on 8 June 2010, thereby completing the supply, installation and commissioning of ISAMS in relation to the

World Cup Stations within time.

- I pause at this stage to emphasise that each of the World Cup Stations were formally opened, with ministerial participation, and published in the media. In this respect I attach hereto relevant extracts from the media publications as annexure "ST30".
- 43.81 What is of paramount importance to note, apart from the aforesaid, is the following:
- 43.81.1 Each train station within PRASA's railway network is classified by it, in accordance with its own criteria, as either a small, medium or large station.
- As regards the World Cup Stations, each of them had to be completed according to the Siemens Specification, drafted by Siemens, in relation to Siemens' initial appointment;
- A3.81.3 Siyangena only became acquainted with the precise ambit and essence of the Siemens Specification when it was requested to quote thereon consequent upon Siemens withdrawing from its commitments towards Intersite and PRASA as aforesaid;

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- 43.81.4 Each of the subject stations were completed in time and the extent of the ISAMS installation in relation to each, as well as the civil construction work commensurate to each, were measurable upon their completion; and
- 43.81.5 In relation to the PRASA classification of the World Cup Stations:
- 43.81.5.1 Moses Mabhida, Windermere and Langa were at the relevant point in time classified as medium stations;
- 43.81.5.2 Rhodesfield, Cape Town and Bridge City were at the relevant point in time classified as large stations; and
- Doornfontein as well as Nasrec were at the relevant point in time classified as small stations.
- For the reasons that follow, the aforesaid contextualises the entire Review Application and particularly what follows in relation to ISAMS Phase 1, its extension, ISAMS Phase 2 and the Addendum.
- In this respect one would have expected of PRASA to disclose this crucial information to the court, which I repeat it calculatedly did not do. It rather elected to hide the aforesaid from the court.

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- This was done notwithstanding the fact that PRASA knew of the aforesaid prior to the prosecution of this Review Application. In this respect, I draw the court's attention to the following:
- The subject matter of the aforesaid allegations are addressed in Siyangena's answering affidavit to the 2016 Review Application, which will be made available at the hearing of this application;
- 46.2 Each of the documents referred to herein above was in PRASA's possession prior to the filing of this affidavit.
- Moreover, Gantsho advised that he was interviewed by PRASA's investigators and particularly the Werksmans investigative team on several occasions more than two years ago. The information ostensibly obtained from Gantsho by the investigative team was under PRASA's control and within its knowledge for years on end.
- Attached to the founding affidavit is, however, a convenient selection of the transcripts of the aforesaid interviews. Gantsho advised my legal team that many of these interviews were recorded.

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- He states that these interviews were conducted under strenuous circumstances and with an intention to execute the malicious intention of the investigation team to which I have referred to earlier on in this affidavit.
- 46.6 I mention at this stage that, according to Gantsho, the first words spoken to him at the commencement of the first interview by Mr Bernard Hotz, an attorney employed by Werksmans Attorneys and on their investigative team were:

  "Help us to nail the criminals, Montana and the Ferreira". This is telling of the context within which the Court should consider these "interviews" and interrogations as well as the information so obtained and presented as fact.
- Gantsho, further, explained that he was soon to be targeted for disciplinary proceedings within PRASA and, as far as my team could ascertain from Mr Gantsho, those proceedings are still ongoing and not concluded.
- Mr Gantsho explained that the continued interrogations, sometimes under oath and sometimes not, were designed to confuse him and were, on several occasions, done without him having the necessary source documents available or being

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asked questions in context. His version is that his rights were disregarded during these proceedings and he was not always informed of same.

- As a result of the possible inconsistency and selective recording of the aforesaid interviews it is highly unlikely that PRASA can rely on those "facts" to convince this Court of any version forced onto Mr Gantsho and/or commented on by him.
- I, again, beg the Court to take cognisance of the fact that efforts employed by Siyangena to investigate the veracity of the allegations in the founding affidavit as far as the PRASA internal process, procedures and structures are concerned leaves an impossible task for Siyangena and, to that extent, Siyangena's best endeavours cannot compare to the infrastructure, resources and control over documents, computers, institutional memory, employees and/or any other resource available to PRASA to conduct their internal investigation.
- 46.11 It is, to that end, that Siyangena can respond to the allegations of internal irregularities and/or non-compliance with policies and procedures.

- 46.12 I confirm that the same exercise was done with Mr Jabu Sindane. To the extent possible the necessary information was obtained from Mr Sindane and contained herein. His confirmatory affidavit is also appended hereto.
- Having said this I wish to confirm that the selective reliance of certain sections of these so called "transcripts" confirms what I have said hereinabove about the nature, extent and history of this application. I have indicated, and Gantsho confirms this, that these interviews were, allegedly, conducted under dubious circumstances but that is something Mr Gantsho will have to ventilate in his still to be concluded disciplinary proceedings.
- 46.14 Reliance on the aforesaid extracts should, therefore, be contextualised and accordingly carry limited weight, if any.
- 17 I will now turn to deal with background information relevant and necessary to support the true facts. A proper understanding of the World Cup Phase of the ISAMS roll out is, however, paramount to contextualise the Review Application, the Siyangena Application and is instructive as to the true facts within which this application must be decided.

## ISAMS Phase 1:

- 48 As aforesaid:
- PRASA [as tenderer] awarded Siyangena [as successful bidder] two contracts to install ISAMS at certain PRASA train stations, in two Phases.
- The first contract was awarded to Siyangena on 31 March

  2011 consequent upon administrative decisions/action taken
  by PRASA on 20 February 2011 and 31 March 2011 which
  matured in ISAMS Phase 1 ("ISAMS Phase 1").
- 49 ISAMS Phase 1 is contractually sustained by particularly but not exclusively the following:
- PRASA's relevant invitation to bid in respect of tender number SG/GATES/003/2009: SUPPLY AND INSTALLATION OF ACCESS GATES (SPEEDSTILES) AT DOORINFONTEIN AND NASREC STATION [per M Mosholi PRASA's Procurement Manager at the time] dated 4 November 2010 and which is indexed and paginated as item 2.1 in volume 2 of the Phase 1 Documents Bundle under paginated page 1 thereof.
- 49.2 PRASA's Technical Specifications for Passenger Access Gates at Selected Commuter Rail Stations, Integrated Communications

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System, Passenger Information Systems for SARCC Metrorail Stations and Access Gates for Stations, which are collectively indexed and paginated as item 2.2 in volume 2 of the Phase 1 Documents Bundle under paginated pages 2 to 155 thereof.

- 49.3 PRASA's Bill of Quantities, which is indexed and paginated as item 2.3 in volume 2 of the Phase 1 Documents Bundle and contained under paginated pages 156 to 188 thereof.
- PRASA's Notice to Proceed dated 8 March 2011 [per C Mbatha PRASA's Chief Procurement Officer at the time], which is indexed and paginated as item 2.4 in volume 2 of the Phase 1 Documents Bundle and contained under paginated page 189 thereof.
- A written JBCC agreement concluded between Siyangena [duly represented by PS Reddy] and PRASA [duly represented by L Montana] on 31 March 2011 at Braamfontein, Johannesburg, which is indexed and paginated as item 2.5 in volume 2 of the Phase 1 Documents Bundle and contained under paginated pages 190 to 219 thereof ("the Phase 1 Agreement").

## ISAMS Phase 1 Tender Process:

- PRASA alleges that the Phase 1 tender was initiated by Siyangena (par 18.1 of the founding affidavit), pursuant to the correspondence of Chris Metelerkamp dated 20 October 2010 (annexure "FA23" to the founding affidavit, pp 441) and the subsequent e-mail from Ferreira to Gantsho on 30 October 2010 (annexure "FA24", pp 442) which relate to Athlone and Heideveld Stations.
- The startling allegation is then made that the works under the Phase 1 tender included the Athlone Station, which it did not.
- Moreover, reference is made to PRASA understanding that the Phase 1 tender was an extension of what it refers to as the Pilot Project, or rather the extended Pilot Project.
- The absence of the deponent's primary knowledge in regard to the actual facts to dominate at that point in time is telling.
- According to Siyangena, what in fact transpired is that Athlone and Heideveld Stations were initially part of the World Cup Stations. However, FIFA shortly before the World Cup announced a last-minute venue change which rendered the proposed utilisation of Athlone and Heideveld Stations redundant within the context of the World Cup.

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- What is more, the contract to supply, install and commission ISAMS in the respect of the World Cup Stations were done and facilitated under reference number SG/Gates/ZZZ03/2009. However, due to an administrative error on the part of PRASA, particularly Chris Mbatha ("Mbatha"), this reference was also incorporated into the reference for the tender process in relation to ISAMS Phase 1.
- 56 What in fact ought to have happened is that a new reference, particularly relating to a tender process initiated in 2010 (not 2009 as the reference refers to), ought to have been allocated to the Phase 1 tender process. However, due to this administrative error, the World Cup phase reference was retained.
- 57 What is furthermore of importance to note is that the project and commensurate responsibility relating to the implementation of ISAMS in other PRASA Train Stations was initiated by a business decision taken by PRASA.
- 58 In this respect the process in relation to this decision being taken, during 2010, was as follows:



- When Doornfontein and Nasrec were completed, the works in relation thereto were assessed, reported on and Intersite as well as PRASA was satisfied therewith;
- Thereafter, a decision was taken to roll out ISAMS in relation to the World Cup Station (bearing in mind that Doornfontein and Nasrec were to be completed for purposes of the Confederations Cup in 2009 already);
- The decision was then factually made to pursue the roll out of ISAMS in respect of the World Cup Stations;
- After Siyangena had completed the World Cup Stations in 2010, the works conducted by it on the supply, installation and commissioning of ISAMS in respect of the Wold Cup Stations were similarly assessed, reported on and Intersight as well as PRASA was satisfied with same;
- Thereafter, particularly due to the success of ISAMS's roll out in relation to the World Cup, PRASA took a business decision to also roll out ISAMS in respect of 62 further stations.
- 59 Gantsho was participant in the aforesaid processes and confirms what it stated in this affidavit.

- Moreover, Sindane has provided Siyangena with an email from Kavesh Singh [Intersite] to Thabane Dladla and Sindane, on 3 November 2010, in respect of which 23 [of the ultimate 62] further train stations were identified for purposes of rolling out ISAMS. I attach hereto a copy of the said letter as annexure "ST31".
- Siyangena cannot dispute that the ISAMS Phase 1 tender process was a closed tender process.
- 62 In this respect, the following is of importance:
- During the World Cup phase Intersite was responsible for procuring the supply, installation and commissioning of ISAMS in the subject train stations;
- Pursuant to PRASA's decision to also procure the supply, installation and commissioning of ISAMS in respect of other train stations, that project or responsibility was transferred from Intersite to PRASA;
- In respect of Nasrec, Doornfontein and the World Cup Stations, only 8 entities submitted bids in relation to the tenders issued by PRASA for the supply, installation and commissioning of ISAMS in respect of the subject stations;

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- The 62 train stations identified by PRASA in respect of which it intended to procure the supply, installation and commissioning of ISAMS that would ultimately form the subject matter of ISAMS Phase 1, had not been measured at that the relevant point in time when the decision was made in the procurement process initiated;
- 62.5 It was consequently impossible for PRASA to issue exact tender specifications, bills of quantities and the likes in relation to an open tender process because of the insurmountable difficulty, costs implications and the consequential nature of having each of the Phase 1 Train Stations measured prior to initiating the procurement process;
- In the premises what PRASA decided to do is to pursue a closed tender process confined to the 8 entities which in fact submitted bids in relation to the World Cup tenders and to invite them to submit bids in relation to the supply, installation and commissioning of ISAMS in respect of ISAMS Phase 1;
- In doing so, PRASA had, as aforesaid, already classified the 62

  Phase 1 Train Stations in accordance with the applicable criteria, as either small, medium or large train stations;

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- Not having been involved in the practicalities of the roll out of ISAMS during the World Cup phase, PRASA's point of reference was the quantities of equipment and the extent of the resources applied towards the procurement of ISAMS in relation to the World Cup Stations;
- Each of those World Cup Stations, as aforesaid, were also classified as either small, medium or large stations and therefore was the only measurable criterium, retrospectively approached and reversed engineered, against which PRASA could determine the accuracy and appropriateness of tenders in relation to the respective 62 Phase 1 Train Stations;
- 62.10 Contextually, PRASA then invited the said entities, within the closed tender process, to submit bids based on what was described as a typical small, medium and large PRASA Station;
- In this regard PRASA then enabled itself to properly have regard to the bids submitted, with the rider that should it become necessary to deviate from the quantities established and applicable to the subject stations in relation to the World Cup Stage, then and in such event such deviation could be addressed by way of a remeasurement/variation order against the unit rates tendered, but only if necessary.

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- 63 In consequence the Phase 1 tender process was initiated by Matshidiso Mosholi. PRASA's Procurement Manager employed in its supply chain management, on the terms as set out in her letter of 4 November 2010, which appears on paginated page 493 as annexure "FA33" to the founding affidavit.
- 64 In consequence of Mosholi's invitation the parties attended a briefing meeting on 8 November 2010 at 11h00 at the Umjantshi House for the supply, installation and commissioning of ISAMS in relation to the 62 identified Phase 1 train stations.
- 65 Gantsho was, inter alia, present at this tender briefing meeting and both Mr Reddy and Mr Metelerkamp attended this meeting on behalf of Siyangena.
- The ambit of the Phase 1 Tender was thoroughly explained to the attendees and PRASA undertook, at this meeting, to provide the attendees with the necessary documentation in relation to the tender process and particularly, the specifications upon which they would be required to tender.
- On PRASA's version, this was done on 9 November 2010 [annexure FA39 pp 504-523], 10 November 2010 [pp 534 to 699] and 11 November 2010 [annexure FA45 pp 700-866].

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- On 1 November 2010 Sindane provided Mbatha with the tender specifications in relation to the ISAMS Phase 1 Tender Process and I attach hereto a copy of Sindane's email and the annexures thereto, as annexure "ST32". It is important to note that the information provided by Intersite to PRASA together with the specifications for the ISAMS system installed in relation to the World Cup stations had to be used for purposes of the Phase 1 Tender Process. In this respect I attach hereto copies of the correspondence exchanged between Sindane, Gantsho, Mosholi, Mbatha and Baloyi on 11 November 2010, as annexure "ST33".
- 69 PRASA's request for proposals in relation to the Phase 1 Tender process was accordingly confined to what was conveyed to the invitees at the closed briefing meeting and the documentation subsequently issued to the invitees.
- The documents sent to the invitees specified the brands/equipment that were recommended as part and parcel of the Siemens Specification, this being so that the ISAMS infrastructure that PRASA intended to procure had to be compliant with the already installed ISAMS infrastructure in relation to the World Cup stations.

  I also confirm that the order and type of items in the bills of quantities issued to the contractors bears a remarkable similarity to

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the items listed and specified by both consultants that put out independent tenders during the World Cup for the ICS components.

- 71 All parties at the tender briefing meeting understood it as such and not a single party complained about this aspect of the tender requirements. It is now, at this stage only, that PRASA complains about this particular aspect of the tender requirements.
- I admit that the Phase 1 Tender closed on 17 November 2010 and that Siyangena, Protea Coin, Omega and Marthi-KGT ("KGT") submitted tenders.
- 13 I point out at this juncture that of all the tenderers, only Siyangene had supplied, installed and commissioned ISAMS in relation to a PRASA train station from front to back.
- A bid evaluation committee was subsequently appointed to evaluate the bids received, consisting of Mbatha, Maishe Bopape [chairperson], Michael Baloyi [Technical], Albert Mdluli [secretary], Sydney Khuswayo [PRASA Supply Chain Management] and Sindane [Technical] ("the BEC"). The appointment of the BEC committee members were preceded with the correspondence attached hereto as annexure "ST34".

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- 75 The BEC held a bid evaluation meeting on 13 December 2010.

  Sindane confirms that he attended this meeting.
- It is stated in Ngoye's founding affidavit that Gantsho was present at this meeting. We have taken this version up with Gantsho in who vehemently denies being at this meeting. Gantsho particularly contends that this not the truth. To prove the fallacy in Ngoye's version, I attach hereto a letter issued by Mbatha excusing Gantsho from this meeting, as annexure "ST35".
- 77 In pursuance of this meeting and prior to opening the tenders received, Mr Sindane proposed a 90/10 evaluation criteria in terms of which 50 points is awarded to quality and functionality, 40 points towards price and 10 points toward BEE.
- I pause at this stage to remind that Sindane was at the point in time employed by Intersite and was its project manager in relation to the ISAMS World Cup phase. If anyone, he was the BEC member which had the most experience and expertise of all the BEC members in relation to ISAMS already having been successfully completed under his watch in relation to the World Cup Stations.
- 79 After deliberations and debate, the BEC ultimately decided to amend Sindane's criteria to the extent that 60 points be awarded to

quality and functionality, 30 points towards price – which was in turn made up of 20 points for price and 10 points for funding model, and ultimately 10 points toward BEE.

- This puts paid to any inference or innuendo that Sindane was in any respect involved or connected with Siyangena.
- Moving on, only the bids of Siyangena and Protea Coin served before the BEC consequent upon the bids of Omega and KGT being considered in want of compliance with what was expected of the tenderers to submit to PRASA and consequently disqualified. In this respect PRASA incorrectly states in paragraph 18.70 of its founding affidavit that Siyangena was afforded an extension on its request and Protea Coin decline such. The fact is clearly depicted the other way around as is evidenced from the correspondence that appear on page 842 of the founding affidavit.
- 82 PRASA is purposefully misinterpreting the subject correspondence.
- 83 Only after the evaluation criteria was established did the BEC members open the tenders and each individually scored the respective tenders.
- As to the valuation criteria, PRASA criticises the particular valuation criteria applied on the basis that it is in want of what was required



under the PPPFA and its regulations. Its contentions are simply incorrect.

- Although the PPPFA came into operation on 3 February 2000, the regulations first promulgated thereunder were declared *ultra vires* and consequently invalid, prior to the BEC committee meeting [and the entire Phase 1 Tender process for that matter] and the presently applicable regulations were substituted for them pursuant to it being gazetted only on 8 June 2011.
- So Consequently, it was not required of PRASA to allocate a score of 90 points for price to the lowest acceptable tender and allocate points in pursuance of the tender process on such basis. The reliance that PRASA places on the application of the PPPFA evaluation criteria is simply wrong.
- Whilst on the topic of pricing, I attach hereto a tender price comparison which Siyangena has prepared in relation to the bids submitted by Siyangena and Protea Coin respectively, as annexure "ST36".
- 88 In order to contextualise the said price comparison, it should be kept in mind that Siyangena, at the time of submitting its bid, had already successfully completed the install, commissioning and

installation of ISAMS in the World Cup Phase, according to the Siemens Specification. Protea Coin had, at the time when it submitted its bid and to date, not commissioned, supplied or installed ISAMS in a single PRASA station from front to back.

- Siyangena, clothed with the experience in regard to what is actually required to successfully supply, install and commission ISAMS in a typical small, medium and large PRASA station, priced its bid on what it new would be the likely actual expenditure to be incurred by PRASA in relation thereto. This is manifestly why there was not a single variation order issued or required in relation to ISAMS Phase 1, bar the extension thereof and were new items not listed in the tendered bills of quantities were added to the contract, with which I deal-hereunder.
- On the other hand, the unexperienced Protea Coin priced only on the plain specification, did not include in its price certain obvious expenses and contingencies but, moreover, in considerable instanced did not charge any "margin" or profit on certain portions of the tender.
- 91 In addition, Siyangena priced the imported components at R12.00 to the euro, whereas Protea Coin priced it at R10.50.

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- I request the honourable court to read the contents of the attached price comparison into this affidavit as if specifically recorded and I confirm that, once the Siyangena and Protea Coin pricing structures are both reduced to apples, i.e. if one disregards and downwards apply Siyangena's submitted bid to conform to the basis upon which Pretea Con submitted its tender, then Syangena's total tender price, capitalised, amounts to R863,695,996.32 This amount is, on a massive aggregate contract sum, but 12.87% more than the price of Protea Coin.
- 93 As to the composition of Siyangena's tender price, the court will note from the attached price comparison that Siyangena's pricing is structured as follows ("the Siyangena Pricing Structure"):
- 93.1 In regard to small stations:
- 93.1.1 Siyangena's profit margin on each station is 24%; the balance of 76% being costs;
- 93.1.2 The cost component [76% of the contract price] is in turn comprised of the costs and disbursements consequent upon the procurement of equipment, labour costs, transport costs and overheads, as depicted in annexure

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"ST37" hereto, which is a breakdown of the 76% cost companent of the pricing.

- I confirm that this portion of the pricing is actual 93.1.3 expenditure incurred by Siyangena in pursuance of supplying, installing and commissioning ISAMS.
- In regard to medium stations: 93.2
- Siyangena's profit margin on each station is 24.21%; the 93.2.1 balance of 75.79% being costs;
- The cost component [75.79% of the contract price] is in 93.2.2 disbursements and the costs comprised of turn consequent upon the procurement of equipment, labour costs, transport costs and overheads, as depicted in annexure "ST38" hereto, which is a breakdown of the 75.79% cost component of the pricing.
- I confirm that this portion of the pricing is actual 93.2.3 expenditure incurred by Siyangena in pursuance of supplying, installing and commissioning ISAMS.
- In regard to large stations: 93.3



- 93.3.1 Siyangena's profit margin on each station is 27.17%; the balance of 72.83% being costs;
- The cost component [72.83% of the contract price] is in turn comprised of the costs and disbursements consequent upon the procurement of equipment, labour costs, transport costs and overheads, as depicted in annexure "ST39" hereto, which is a breakdown of the 72.83% cost component of the pricing.
- 93.3.3 I confirm that this portion of the pricing is actual expenditure incurred by Siyangena in pursuance of supplying, installing and commissioning ISAMS.
- The BEC subsequently independently evaluated the bids submitted in relation to the ISAMS Phase 1 Tender and the commensurate appointment of Siyangena was subsequently recommended by the BEC.
- 95 PRASA attempts to make a meal of two pertinent issues raised by it in relation to the Phase 1 Tender process, which denote to the unavailability of budget [as set out in the relevant MTEFs] and that ultimately its FCIP did not approve Slyangena's appointment.

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PRASA's contentions on both aspects are without merit, for the reasons set out hereunder.

- 96 As to the availability of budget Gantsho informs Siyangena as follows:
- 96.1 PRASA is allocated a tri-annual budget by treasury.
- In anticipation of a forthcoming budget allocation and in order to procure the required funding from treasury, PRASA evaluates its estimated expenditure and budgetary needs in relation to the envisaged three year period;
- That estimated budget is specified as to ring-fenced and particularly prioritised expenditure and discretionary expenditure and is provided to the Minister whom ultimately presents that to treasury;
- As to the ring-fenced or particularly prioritised expenditure, same would relate to expenditure for which PRASA requires budget to be allocated to such particular need/purpose and to be prioritised as to amount and availability;
- 96.5 As to the discretionary expenditure, it comprises monetary estimations of the extent of budget that PRASA requires in

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order to finance its non-prioritised and ring-fenced expenditure;

- In relation to the latter, PRASA's board retains the discretion to allocate and re-allocate funds available on the discretionary and non-ringfenced budget allocations by Treasury in accordance with priority and need as same develops pursuant to PRASA's operations;
- 96.7 It is therefor not correct to state that there was not enough budget for ISAMS to be rolled out in respect of Phase 1 and that due to budgetary constraints Siyangena ought not to have been awarded the ISAMS Phase 1 contract, the reason being that the procurement costs in relation to ISAMS Phase 1 was never a ring-fenced prioritised budgetary allocation by treasury and same would be funded through the allocation of surplice and available discretionary budget;
- 96.8 PRASA's contentions are simply not true and again, the deponent's lack of personal knowledge is telling.
- 97 As to the approval of the CTPC, I am advised that it works as follows:
- 97.1 PRASA is labouring under a complete misunderstanding of its own procurement protocol;

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- 97.2 PRASA's GCEO [Montana at the time] had the authority to approve and authorise transactions up to R100 million on PRASA's behalf.
- 97.3 In order for a tender that envisages a transactional value of less than R100 million to be approved, the process would be as follows:
- 97.3.1 The subject tender would be evaluated by the BEC for tender compliance;
- 97.3.2 If approved by the BEC, the appointment of the identified preferred bidder would be recommended by the BEC to the CTPC;
- 97.3.3 The CTPC [with no delegation of authority to discretionarily or otherwise issue any binding decision] would then recommend the appointment of the BEC identified preferred bidder to the GCEO, whom is the authorised delegate to exercise a discretion in relation to the appointment of the subject preferred bidder.
- The GCEO would then ultimately, as sole authorised delegate, either approve or reject the appointment of the subject BEC identified preferred bidder.



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- 97.4 PRASA's GCEO does not have the authority to approve and authorise transactions over R100 million on PRASA's behalf, which function is exclusively reserved for its board.
- 97.5 In order for a tender that envisages a transactional value of more than R100 million to be approved, the process would be as follows:
- 97.5.1 The subject tender would be evaluated by the BEC for tender compliance;
- 97.5.2 If approved by the BEC, the appointment of the identified preferred bidder would be recommended by the BEC to the FCIP [not the CTPC];
- The FCIP [not the CTPC and with no delegation of authority to discretionarily or otherwise issue any binding decision] would then recommend the appointment of the BEC identified preferred bidder to the Board, which is the authorised delegate to exercise a discretion in relation to the appointment of the subject preferred bidder.
- 97.5.4 The Board would then ultimately, as sole authorised functionary, either approve or reject the appointment of the subject BEC identified preferred bidder.

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- The Phase 1 Tender is a tender that envisages a transaction with a monetary value in excess of R100 million.
- 99 Consequently, PRASA's contention that:
- Montana rejected Siyangena's appointment as preferred bidder is firstly denied but secondly it is irrelevant because Montana has no binding authority to accept or reject Siyangena's appointment due to the monetary value of the envisaged transaction being in excess of R100 million.
- 100 PRASA's rhetoric in regard to the purported impropriety in relation to the CTPC meeting and its [its unproven] contentions in regard to the manipulation of documentation that relate thereto, is in the circumstances completely irrelevant.
- 101 The fact of the matter is that the CTPC should never have been involved in relation to the Phase 1 Tender process at all. The fact of the matter further is that the proposed appointment of Siyangena served before the FCIP, which did not have to consider the recommendation of the CTPC, and approved Siyangena's appointment.



- 102 The FCIP resolved to approve the appointment of Siyangena to supply, install and commission ISAMS in respect of Phase 1 in the total amount of R1,959,642,353.00.
- in respect of the supply, installation and commissioning of ISAMS in respect of Phase 1 in the total amount of R1,959,642,353.00, on 28 February 2011 and its company secretary signed a resolution to that effect on 28 March 2011, which is certainly not unusual. In this respect I refer to annexure FA86 pages [1181 to 1186] which demonstrates that the previous chairman of the PRASA Board Mr Popo Molefe lied under oath. This is so because it proves the Minutes of the Board indicate that the BOC approved Siyangena's appointment and is signed by the then chairman of the BOC Mr Sifiso Buthelezi.
- 104 The difference between the aforesaid amount of R1,959,642,353.00 and the amount initially tendered, is because the ultimately approved amount included:
- The finance option proposed by Siyangena upon the request of PRASA;



- a warranty for the equipment that would be installed in pursuance of rolling out ISAMS Phase 1 [in the amount of R582,677,834.81]; and
- a further amount for maintenance in respect of the installed systems in the amount of R253,203,037.79.
- 105 It was manifestly in pursuance of the aforesaid that Mbatha issued Siyangena with the relevant notice to proceed on 8 March 2011, referred to herein above.

### The extension of ISAMS Phase 1:

- 106 The ISAMS Phase 1 Works initially comprised the provision, construction and installation of ISAMS by Siyangena in PRASA in respect of what was ultimately 62 train stations identified by PRASA ("the Phase 1 Works").
- 107 During December 2013, the parties consensually and in writing extended the Phase 1 Works and commensurately also adjusted the monetary value of the Phase 1 Agreement pursuant to:
- 107.1 the issue of a written variation order by PRASA to Siyangena;

- a notice of appointment issued by PRASA [per J Phungula PRASA's Chief Procurement Officer at the time] to Siyangena, which is indexed and paginated as item 2.6 in volume 2 of the Phase 1 Documents Bundle and contained under paginated page 220 thereof;
- a notice of appointment issued by PRASA [per J Phungula PRASA's Chief Procurement Officer at the time] to Siyangena, which is indexed and paginated as item 2.6 in volume 2 of the Phase 1 Documents Bundle under paginated pages 221 to 222 thereof;
- 107.4 the subsequent acceptance of the variation order by the claimant ("the Phase 1 Extension").
- 108 PRASA alleges that Siyangena initiated the Phase 1 Extension, which is completely untrue.
- in relation to particular stations in certain corridors but not each of them. This entailed that certain stations within a corridor were upgraded and modernised in relation to ISAMS and others not, but these stations were required to integrate in the ISAMS system and to be standardised with the specifications rolled out in the ISAMS

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equipped stations otherwise the intended purpose for the subject installations would not be achieved. It was for this reason that PRASA procured the Phase 1 Extension, as a variation order, within the context of Phase 1.

- 110 The material express, alternatively tacit, further alternatively implied terms of the Phase 1 Extension are as follows:
- 110.1 The Phase 1 Works were extended, on the terms of the Phase 1 Agreement, to also concern the provision, construction and installation of ISAMS in respect of PRASA's train stations on the routes between Pretoria and Mabopane train stations, Saulsville to Pretoria West train stations and Kaalfontein to Pretoria train stations ("the Extension Works").
- The Extension Works, as such, comprised the the provision, construction and installation of ISAMS by Siyangena in additional PRASA train stations situated in Northern Gauteng [7 additional stations] and Southern Gauteng [5 additional stations] ("the Phase 1 Extension Works").
- Siyangena would perform the Phase 1 Extension works upon PRASA's specific instance and requests.

110.4 The:

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- 110.4.1 total aggregate contract value of the Phase 1 Extension;
- contract consideration due and payable by PRASA to Siyangena in exchange for the claimant performing the Phase 1 Extension Works;
- amounted to R294,992,460.28 (exclusive of Value Added Tax) and is computed as set out PRASA's notice of appointment, which is indexed and paginated as item 2.6 in volume 2 of the Phase 1 Documents Bundle on paginated page 221 thereof.
- 111 Of importance is that Siyangena's obligations in terms of the Phase 1 Agreement and in respect of the Phase 1 Works and the Phase 1 Extension Works, was only to supply and install ISAMS and did not include the obligation to attend to the maintenance and upkeep of the systems installed at the relevant PRASA train stations. For this reason, the parties concluded the Addendum, which I deal with later in this affidavit.
- 112 The works in respect of ISAMS Phase 1 and the Phase 1 Extension has for all intents and purposes been completed and the completion thereof has been verified and certified by PRASA.

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- 113 In this regard, the asset verification, installation and practical completion certificates, in respect of the Phase 1 Works and the Phase 1 Extension Works and which relate to each subject PRASA train station that formed the subject matter thereof, have been indexed and paginated as:
- items 3.1 to 3.83 of volume 3 of the Phase 1 Documents

  Bundle under pages 1 to
- 113.2 items 4.1 to 4.79 of volume 4 of the ISAMS Phase 1

  Documentation Bundle under pages 1 to 384.
- 114 In further confirmation hereof, I also again refer the court to the contents of the PRASA Status Report and the Siyangena Status Report, attached hereto as annexures "ST40" and "ST41" respectively.

#### 115 Of the total aggregate:

ISAMS Phase 1 contract consideration [R1,959,642,352],
PRASA has made payment to Siyangena in respect of
approximately 95% of the contract consideration and payment
in the aggregate amount of **R98,889,537.89** [inclusive of
interest] remains outstanding; and

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- ISAMS Phase 1 Extension contract consideration [R366,784,838.84], PRASA has made payment to Siyangena in respect of approximately 77% of the contract consideration and payment in the aggregate amount of **R84,879,419.22** [inclusive of interest] remains outstanding.
  - 116 In the premises, the total outstanding ISAMS Phase 1 consideration amounts to **R183,768,957.11** [inclusive of interest] ("the outstanding Phase 1 consideration"), which is sustained by the following Siyangena Invoices:
  - Invoice No. ST00816 dated 30 July 2015 in the amount of R42,151,022.75, which is indexed and paginated, together with its supporting expositions and documentation together with proof of its transmission to PRASA, as items 9.1 to 9.3 of volume 9 of the Phase 1 Documents Bundle under pages 1 to 128.
  - Invoice No. ST01016 dated 31 July 2015 in the amount of R51,311,720.90, which is indexed and paginated, together with its supporting expositions and documentation together with proof of its transmission to PRASA, in volume 7 of the Phase 1 Documents Bundle under pages 1 to 419.

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- 116.3 Invoice No. ST03617PF dated 9 February 2017 in the amount of R20,620,395.86;
- Invoice No. ST00618 dated 31 May 2017 in the amount of R20,985,730.77, which is indexed and paginated, together with its supporting expositions and documentation together with proof of its transmission to PRASA, as items 9.4 to 9.6 of volume 9 of the Phase 1 Documents Bundle under pages 129 to 261.
- 117 I confirm that the Siyangena Pricing Structure equally applies to the manner in which Siyangena's Phase 1 Extension contract price/consideration was calculated in relation to each small, medium and large station that formed part of the Phase 1 Extension Works.
- PRASA for the first time challenged the validity of the Phase

  1 Agreement during August 2015, PRASA and Siyangena regularly corresponded with one another. In fact, PRASA persisted with daily instructions for Siyangena to perform under the agreements. This endures to this day!



119 The correspondence exchanged between PRASA and Siyangena during the period 1 September 2015 and 31 January 2018, concerning ISAMS Phase 1, is indexed and paginated in volume 10 of the Phase 1 Documents Bundle under pages 1 to 156.

# 120 The subject correspondence:

- 120.1 contain contract instructions from PRASA to Siyangena;
- addresses various issues raised in regard to ISAMS Phase 1 but not, a single suggestion that the said agreement is invalid;
- 120.3 contain correspondence from Siyangeana in response to PRASA's issues and attaching monthly status reports; and
- evidences that Siyangena and PRASA were conducting themselves in accordance with and in the implementation of the Phase 1 Agreement, notwithstanding PRASA challenging the validity of the Phase 1 Agreement at the relevant point in time.

## **ISAMS Phase 2:**



- 121 ISAMS Phase 2 is contractually sustained by particularly but not exclusively PPASA's relevant invitation to hid. Sivangena's relevant tender and a written JBCC agreement concluded between Siyangena [duly represented by PS Reddy] and PRASA [duly represented by L Montana] on 30 June 2014 at Braamfontein, Johannesburg ("the Phase 2 Agreement").
- October 2013, issued a request for proposals for the supply and installations of ISAMS under Tender No. HO/FM-CRES/142/09/2013. PRASA's request for proposals issued on 1 October 2013 is indexed and paginated as item 1 of volume 2 of the ISAMS Phase 2 Bundle under paginated pages 1 to 46.
- 123 Part and parcel of the PRASA's request for proposals was its technical specifications as well as its bill of quantities, which are respectively indexed and paginated in Volume 2 of the Phase 1 Documents Bundle under paginated pages 47 to 155 and pages 156 to 173.
- 124 PRASA contends that annexure FA138 [pp1685] to its founding affidavit constitutes an unsolicited bid to ignite the Phase 2 Tender Process. This is a misrepresentation by PRASA. Siyangena was already at this stage awarded the Phase 1 Extension to close off

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corridors in Gauteng. Annexure "FA138" was a proposal requested by PPASA to ascertain the magnitude involved in similarly rolling out the project to the other key corridors nationwide. PRASA, on appreciating the magnitude of the project decided to go out on an open tender for this work and at no time did they negotiate or discuss this proposal further.

- 125 ISAMS Phase 2 was a completely new tender process, which first commenced, as a close tender, on 25 June 2013 consequent upon PRASA's invitation to attend the ISAMS Phase 2 Tender briefing meeting on 28 June 2013 [annexure FA140 page 1713] and the attendant issue of its invitation to bid and request for proposal, by PRASA, on 26 June 2013 [annexure FA142 page 1716].
- 126 This process was ultimately abandoned due to PRASA deciding to embark on an open tender process. Then, on 1 October 2013, PRASA initiated a compete new second tender process in relation to ISAMS Phase 2
- 127 Again, PRASA's request for proposals was premised on its own.

  ICS specifications which included the Siemens Specification.



- 128 On 29 May 2014, PRASA's then board of control, having considered the submission from its Governance and Performance Committee regarding the approval of ISAMS Phase 2:
- approved the appointment of Siyangena for the supply and installation of ISAMS Phase 2, for the contract period five (5) years, at a contract value of R2,526,327.633.60 [Incl VAT]; and
- authorised Montana to sign the [necessary] agreement to appoint Siyangena for the supply and installation of ISAMS Phase 2 [the Phase 2 Agreement].
- 129 In relation to the ISAMS Phase 2 contract consideration, I confirm that its computation is similarly premised and based on the Siyangena Pricing Structure. However, it is of paramount importance to note that Siyangena, in pricing on the ISAMS Phase 2 Tender, did not at all include in its charge any provision or adjustments for Rate of Exchange or annual price escalation nor was any of these items taken into consideration in pursuance of raising and issuing invoices to PRASA in pursuance of ISAMS Phase

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- 130 A copy of PRASA's board resolution dated 29 May 2014 is indexed and paginated in volume 2 of the Phase 2 Documents Bundle under paginated page 174 thereof.
- 131 The contents of this board resolution were confirmed:
- in writing on 2 June 2014 via correspondence exchanged between Siyangena and PRASA, copies of which correspondence is indexed and paginated as item 5 of volume 2 of the Phase 2 Documents Bundle under indexed and paginated pages 175 to 176 thereof;
- under oath by Mr P Molefe in paragraphs 17.4.1 and 17.4.2 of his replying affidavit filed in respect of PRASA's [dismissed] review application, the relevant extracts of which together with the annexures thereto are attached hereto as annexure "ST42"; and
- 131.3 subsequently culminated in:
- 131.3.1 a letter of appointment issued by PRASA to Siyangena in respect of ISAMS Phase 2 on 6 June 2014, a copy of which is indexed and paginated as item 6 of volume 2 of the Phase 2 Documents Bundle under pages 177 to 178;

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- a letter of acceptance of appointment issued by Siyangena to PRASA on 9 June 2014, a copy of which is indexed and paginated as item 7 of volume 2 of the Phase 2 Documents Bundle under paginated pages 179 to 181;
- 131.3.3 a notice of appointment issued by PRASA to Siyangena in respect of ISAMS Phase 2 on 7 lune 2014, a copy of which is indexed and paginated as item 8 of volume 2 of the Phase 2 Documents Bundle under paginated pages 182 to 183;
- 131.3.4 an acceptance of appointment letter issued by Siyangena to PRASA on 17 June 2014, a copy of which is indexed and paginated as item 9 of volume 2 of the Phase 2 Documents Bundle under pages 185 to 186;
- 131.3.5 the ultimate conclusion of the Phase 2 Agreement on 30 June 2014.
- 132 The ISAMS Phase 2 works comprised the the provision, construction and installation of ISAMS by Siyangena in PRASA train stations situated in Northern Gauteng [22 stations], Southern Gauteng [23 stations], Kwa Zulu Nata! [9 stations] and Western Cape [32 stations] ("the Phase 2 Works").

- 133 The Phase 2 Works has been substantially completed up to a state of 97,66% completion.
- 134 In this regard, the practical completion certificates, together with the installation/asset verification certificates, in respect of the Phase 2 Works and which relates to each subject PRASA train station situated in:
- Northern Gauteng, are indexed and paginated items 3.1 to 3.18 in volume 3 of the Phase 2 Documents Bundle and particularly appear from page 1 up to page 244 thereof;
- 134.2 In respect of Southern Gauteng, are indexed and paginated items 3.19 to 3.32 in volume 3 of the Phase 2 Documents Bundle and particularly appear from page 245 up to page 381 thereof;
- 134.3 In respect of Kwa-Zulu Natal, are indexed and paginated items
  3.33 to 3.43 in volume 3 of the Phase 2 Documents Bundle
  and particularly appear from page 382 up to page 499 thereof;
- In respect of Western Cape, are indexed and paginated items
  3.44 to 3.65 in volume 3 of the Phase 2 Documents Bundle
  and particularly appear from page 500 up to 675 thereof.

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- 135 Each practical completion certificate is:
- signed on behalf of both Siyangena and PRASA [both duly represented]; and
- 135.2 signed on behalf of PRASA
- 135.3 a JBCC2000 practical completion certificate
- where PRASA financial services have verified for capitalisation purposes, accompanied by an asset verification certificate which is similarly but independently signed on behalf of Sivangena, PRASA Cres (Technical) and PRASA Financial department [both duly represented].
- 136 Part and parcel of Siyangena's obligations in terms of the Phase 2

  Agreement and in respect of the Phase 2 works, was to attend to
  the maintenance and upkeep of the systems installed at the
  relevant PRASA train stations.
- 137 In pursuance of and compliance with the aforesaid obligation,
  Siyangena attended to the maintenance and upkeep of the systems
  installed at the relevant PRASA train stations in pursuance of ISAMS
  Phase 2.

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- 138 On each occasion that a Siyangena technician would be called out to conduct maintenance and repairs in respect of a particular station, he would complete a service report which is a uniquely numbered document which identifies each subject station, the identity of the Siyangena technician(s) deployed, the date of deployment, the duration of the attendance and a description of the particular services rendered/carried out by him/them. Such a certificate is furthermore co-signed by a duly authorised representative of Siyangena and PRASA in confirmation of its contents.
- 139 In this regard, the relevant service reports, in respect of the Phase 2 Works and which relates to each subject PRASA train station situated in:
- Northern Gauteng, are indexed and paginated items 5.1 to 5.17 in volume 5 of the Phase 2 Documents Bundle and particularly appear from page 1 up to page 139 thereof;
- 139.2 In respect of Southern Gauteng, are indexed and paginated items 5.18 to 5.31 in volume 5 of the Phase 2 Documents Bundle and particularly appear from page 141 up to page 207 thereof;



- In respect of Kwa-Zulu Natal, are indexed and paginated items
  5.32 to 5.38 in volume 5 of the Phase 2 Documents Bundle
  and particularly appear from page 208 up to page 226 thereof;
- In respect of Western Cape, are indexed and paginated items
  5.39 to 5.59 in volume 5 of the Phase 2 Documents Bundle
  and particularly appear from page 227 up to 408 thereof.
- 140 Of the total aggregate ISAMS Phase 2 contract consideration [R2,536,327,633.60], PRASA has made payment to Siyangena in respect of approximately 37.3% of the contract consideration and payment in the aggregate amount of R1,592,195,483:28 [including interest] remains outstanding ("the Outstanding Phase 2 Consideration").
- 141 In regard to Siyangena's ISAMS Phase 2 invoices, the following must be noted:
- The Siyangena's ISAMS Phase 2 invoices represent in essence 11 claims for payment of contract consideration submitted by Siyangena under the Phase 2 Agreement to PRASA for payment ("the Phase 2 Payment Claims");

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- 141.2 Claims 1 to 4 of the Phase 2 Payment Claims have all been paid by PRASA and are sustained by the following Siyangena Phase 2 Invoices:
- 141.2.1 Invoice No. ST001115 dated 20 August 2014 in the amount of R304,000,025.54, which was paid in full by PRASA on 19 September 2014;
- Invoice No. ST001715 dated 30 October 2014 in the amount of R339,250,676.60, which was paid by PRASA in full on 12 December 2014; and
- Invoice No. STUDI815 dated 29 December 2014 in the amount of R133,512,368.81, which was paid by PRASA in full on 12 December 2014.
- Invoice No. ST000116 dated 1 April 2015 in the amount of R389 465 396.88, which was paid by PRASA in full on 29 May 2015
- Claims 5 to 11 of the Phase 2 Payment Claims have remained unpaid are sustained by the following Siyangena Phase 2

  Invoices:

- Invoice No. ST00916 dated 30 July 2015 in the amount of R215,093,360.43 in respect of claim 5 of the Phase 2 Payment Claims and which is indexed and paginated, together with its supporting documentation and proof of its delivery, as items 7.1 to 7.4 of volume 7 of the Phase 2 Documentation under pages 1 to 38.
- Invoice No. ST01116 dated 2 December 2015 in the amount of R264,685,433.96 in respect of claim 6 of the Phase 2 Payment Claims and which is indexed and paginated, together with its supporting documentation and proof of its delivery, as items 7.6 to 7.8 of volume 7 of the Phase 2 Documentation under pages 40 to 77.
- Invoice No. ST00117 dated 18 April 2016 in the amount of R313 958 747.56 in respect of claim 7 of the Phase 2 Payment Claims and which is indexed and paginated, together with its supporting documentation and proof of its delivery, as items 7.11 to 7.13 of volume 7 of the Phase 2 Documentation under pages 80 to 121.
- 141.3.4 Invoice No. ST0171PF dated 18 July 2016 in the amount of R78,532,935.98 in respect of claim 8 of the Phase 2 Payment Claims and which is indexed and paginated,

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together with its supporting documentation and proof of its delivery, as items 7.15 to 7.17 of volume 7 of the Phase 2 Documentation under pages 123 to 204.

- Invoice No. ST03317PF dated 25 January 2017 in the amount of R208,630,176.46 in respect of claim 9 of the Phase 2 Payment Claims and which is indexed and paginated, together with its supporting documentation and proof of its delivery, as items 8.1 to 8.3 of volume 8 of the Phase 2 Documentation under pages 1 to 478.
- Invoice No. ST01318PF dated 15 August 2017 in the amount of R80,490,189,29 in respect of claim 10 of the Phase 2 Payment Claims and which is indexed and paginated, together with its supporting documentation and proof of its delivery, as items 9.1 to 9.4 of volume 9 and 9A of the Phase 2 Documentation under pages 1 to 575.
- 142 Siyangena is yet to invoice PRASA for the balance of the Phase 2 Works completed after August 2017.
- 143 It is of utmost importance to note that PRASA criticises the Phase 2
  Tender Process on the same basis as regards budgetary constraints

and lack of CTCP approval. These objections are for the same reasons stated in relation to their lack of merit in relation to the Phase 1 Tender Process, equally devoid of merit within the present context.

### The Addendum:

- 144 The Addendum is contractually sustained by inter alia the following:
- 144.1 PRASA's notice of appointment as preferred bidder dated 6

  June 2014, which is indexed and paginated as item 2.1 of

  volume 2 of the Addendum Documentation Bundle under pages

  1 to 2.
- Siyangena's written notice of acceptance dated 9 June 2014, which is indexed and paginated as item 2.2 of volume 2 of the Addendum Documentation Bundle under pages 3 to 5.
- 144.3 Further correspondence between the parties which is indexed and paginated as items 2.3 and 2.4 of volume 2 of the Addendum Documentation Bundle under pages 6 to 8.
- 144.4 Siyangena's written proposal in terms of the supply and installation of ISAMS which is indexed and paginated as item

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- 2.5 of volume 2 of the Addendum Documentation Bundle under pages 9 to 30.
- 144.5 A written addendum concluded between PRASA [duly represented by L Montana] and Siyangena [duly represented by PS Reddy] on 30 September 2014, which is indexed and paginated as item 2.6 of volume 2 of the Addendum Documentation Bundle under pages 31 to 37 ("the Addendum").

### 145 In terms of the Addendum:

- and ISMAS Phase 2, essentially contracted Siyangena to attend to the maintenance, service and upkeep of the equipment installed during ISAMS Phase 1 on PRASA's behalf at its train stations;
- Siyangena would, until 2019, be responsible for maintaining and guaranteeing all the equipment installed in respect of ISAMS Phase 1 as well to bring the 2010 and Phase 1 station installations in line with the improved technical specifications of ISAMS Phase 2;

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- 145.3 In exchange for Siyangena's performance in terms of the Addendum, PPASA would remunerate it in the total aggregate sum of R905 883 450.58.
- 146 Siyangena has performed in respect of all of its obligations towards
  PRASA in terms of the Addendum.
- 147 PRASA has failed to make payment to Siyangena in respect of any remuneration in exchange for Siyangena's maintenance, service and upkeep of the ISAMS Systems and, as at May 2017, PRASA is in arrears with such payment in the aggregate sum of R776,136,685.14 [in respect of fourteen invoices] ("the Outstanding Addendum Consideration").
- 148 I attach hereto copies of the relevant invoices as annexure "ST43".
- 149 ISAMS Phase 1 [as extended] as well as ISAMS Phase 2 both incorporated a guarantee and maintenance component to the respective contracts.
- 150 It is of paramount importance to note that the guarantees, for obvious reasons, was not concerned with nor covered equipment damaged vandalised or stolen, at the respective train stations.

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- 151 Siyangena, throughout the existence of the contracts, notwithstanding and at its own cost, replaced equipment damaged, vandalised or stolen at the respective train stations until PRASA stopped paying its invoices during 2015.
- 152 Siyangena's contribution in this respect alone is worth millions, for which it was not compensated. In light thereof that the installed equipment in synergy operates as a communication solution, the effective application thereof is dependent upon the entire bouquet being operational, which in turn required and still requires same to be maintained and guaranteed. If not, the entire integrity of the system will be compromised.
- 153 Again, PRASA is impermissibly completely silent on this aspect.
- 154 What PRASA however contends is that the Addendum was instigated by Siyangena, which it was not. The conclusion of the addendum was first discussed during the kick-off meeting in respect of ISAMS Phase 2 during July/August 2014.
- 155 The discussions particularly concerned the upgrade, guarantee and maintenance of the equipment supplied and installed in respect of ISAMS Phase 1 and particularly to bring it in line with the equipment to be installed in relation to ISAMS Phase 2 and,

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moreover, to align the maintenance periods in respect of each. This was pursued because is would be illogical and irrational to have a multi-million rand first phase of sophisticated infrastructure unmaintained and not guaranteed whilst you are simultaneously pursuing the installation of the second phase thereof. The risks in not having something like this in place and if something would happen, would entail a catastrophy.

156 It was in pursuance of these discussions that Siyangena was requested to quote PRASA on the ambit of what ultimately culminated into the Amendment.

### [F] THE PRESENT STATUS OF THE WORKS

- is a complete disconnect, in all respects, between PRASA's [frequently changing] board of control and the entity which is in fact PRASA. The significance of this disconnect is particularly evidenced by the following:
- 157.1 In terms of the arbitrations Siyangena pursues payment of contract consideration from PRASA in consequence of the Phase 1 Tender [as extended in terms of the Phase 1 Extension], the Phase 2 Tender and the Addendum.

- 157.2 Siyangena's case that it had complied with all of its obligations in terms of the relevant contracts and particularly:
- That the works contemplated by the ISAMS Phase 1

  Tender, has been performed to a stage of 99.74% completion; and
- Of the total aggregate ISAMS Phase 1 contract consideration [R1,959,642,352], PRASA has made payment to Siyangena in respect of approximately 95% of the contract consideration and payment in the aggregate amount of **R98,889,537.89** [R71,932,116.76 excluding interest] remains outstanding.
- 157.2.3 That the works contemplated by the ISAMS Phase 1

  Extension, has been performed to a stage of 100% completion; and
- Of the total aggregate ISAMS Phase 1 Extension contract consideration [R366,784,838.84], PRASA has made payment to Siyangena in respect of approximately 77% of the contract consideration and payment in the aggregate amount of R84,879,419.22 [R63,136,753.52 excluding interest] remains outstanding.

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- Tender, has been performed to a stage of 97.66% completion; and
- Of the total aggregate ISAMS Phase 2 contract consideration [R2,536,327,633.60], PRASA has made payment to Siyangena in respect of approximately 37.3% of the contract consideration and payment in the aggregate amount of R1,592,195,483.28 [R1,219,522,002.18 excluding interest] remains outstanding.
- That Siyangena has complied with all of its obligations in terms of the Addendum and payment in the amount of R1,088,144,447.71 remains outstanding in respect thereof.
- According to Siyangena, PRASA is indebted to it in the aggregate sum of **R2,864,108,888.10** [R2,442,735,320.17 exclusive of interest], as at the end of February 2018.
- In confirmation hereof, I attach hereto Siyangena's monthly ISAMS status report as at January 2018, as annexure "ST44",

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and I request that its contents be read into this affidavit as if specifically incorporated.

- 157.5 In resisting Siyangena's claims in the arbitrations, PRASA's position is summarised as follows:
- 157.5.1 PRASA challenges the arbitrators' jurisdiction to adjudicate upon the disputes in the arbitration;
- 157.5.2 PRASA challenges the agreements relied upon by Siyangena on the basis that they are invalid for want of legality in spite of having been approved by PRASA's BOC; and
- 157.5.3 PRASA, apart from the technicalities raised by it, answers
  Siyangena's allegations with bare denials insofar as it
  concerns the merits of Siyangena's claims.
- I can only interpret this to mean that PRASA's participation in the arbitrations [and in the past litigation] is/was advanced by its clueless board of control, because in actual fact, according to PRASA's true protagonists, its position **as at December**2017 was as follows:



- Tender, has been performed to a stage of 99.66% completion and of the total aggregate ISAMS Phase 1 contract consideration payment in the amount of R60,685,301.00 [of which an amount of R9,373,586.10 had already accrued from its previous financial year budget] remained outstanding.
- That the works contemplated by the ISAMS Phase 1
  Extension, has been performed to a **stage of 100% completion** and of the total aggregate ISAMS Phase 1

  Extension contract consideration payment in the aggregate amount of **R60,094,580.38** [of which an amount of R17,943,557.63 had accrued from its previous financial year budget] remained outstanding.
- That the works contemplated by the ISAMS Phase 2
  Tender, has been performed to a stage of 97.66%
  completion and of the total aggregate ISAMS Phase 2
  contract consideration payment in the aggregate amount
  of R1,370,099,165.25 remained outstanding.
- 157.7 In confirmation of the aforesaid, I attach hereto a PRASA ISAMS internal report in respect of December 2017,

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issued by PRASA's ISAMS Project Manager: Reggie Kirsten, as annexure "ST45".

- 158 The aforesaid [true facts] render PRASA's conduct since 2015, as will be set out herein, not only unconscionable but of great concern keeping in mind that its legal costs are financed by the public purse.
- 159 In addition to the aforesaid, I confirm that Siyangena on a monthly basis issued progress reports to PRASA in relation to ISAMS Phase 1, ISAMS Phase 2 and the Addendum and that PRASA has, as with the aforesaid report, on a monthly basis issued similar reports for internal purposes.
- 160 I challenge PRASA to disclose its internal progress reports in relation to ISAMS in its answering/replying papers, for the last 12 months.

# [G] THE CONTINUOUS IMPLEMENTATION AND ENFORCEMENT OF THE CONTRACTS SOUGHT TO BE SET ASIDE

161 In pursuance of ISAMS, PRASA and Siyangena consensually established a National Project Team Committee, consisting of representatives from both PRASA and Siyangena.

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- 162 The minutes of the meetings that took place between the parties in respect of ISAMS Phase 2 are extensive and indexed and paginated in bundle 12 of the Phase 2 bundles.
- 163 It is important to note that the meetings continued to take place even after PRASA's contentions that the award of the ISAMS Phase 1 and ISAMS Phase 2 tenders, the agreements concluded contingent thereupon, as well as the extension of the Phase 1 Agreement at the conclusion of the Addendum are in compliance with the relevant Constitutional imperatives. PRASA was warned about their indecisive conduct by way of correspondence from Siyangena's attorneys. I append hereto but two examples of such correspondence dated 7 January 2016 and 2 August 2016 as Annexure "ST46". I take the liberty of quoting the following extract from the letter dated 7 January 2016:

"It is now a month since we directed the urgent correspondence to your offices and we have not even received your acknowledgement that the letter was duly received in your offices or that you will take instructions thereon.

We get the impression that your client is uncertain as to what to do.

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Let it be recorded that whilst your client denies our client's entitlement to payment it seems as if your client insists on further goods and services to be rendered in terms of the "invalid" agreement.

Your client is hereby afforded 3 (Three) days from date of this letter to furnish us with their formal and comprehensive response to our letter dated 9 December 2015 in absence whereof we must assume that your client has reneged on their initial view that the agreement is "invalid".

Kindly be advised that this letter will form part of our client's discovery documents in future litigation should it become necessary to institute further action for goods and services supplied/rendered under the circumstances explained in our previous correspondence. Your client seems quick to point a finger but slow to take responsibility." [Own emphasis]

Siyangena is yet to receive the response to the issue raised in the correspondence.

164 These meetings have been and are taking place, to date.

165 What is more, PRASA has notwithstanding the aforesaid and is presently issuing Siyangena with daily instructions concerning the

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maintenance, upkeep and service of the ISAMS system at its relevant stations.

- 166 In some instances, PRASA, in issuing these instructions, even place
  Siyangena on terms and warns it of the contractual rights afforded
  to it in circumstances where Siyangena is in breach of the relevant
  agreements.
- 167 Regardless of the launching of the first review application, PRASA's representatives, on a daily basis, continued to provide Siyangena with instructions to continue with the execution of the Phase 2 Works in the form of daily site instructions.
- instructions available and the only reason for not appending all of it is to prevent unnecessary prolixity of these papers. Siyangena tenders to make available all these daily site instructions received from PRASA. If all these site instructions have to be annexed to this affidavit it will consist of at least a couple of additional level arch files.
- 169 Regardless of this Review Application having been launched, PRASA, apart from its board, is still implementing the subject contracts as we speak.

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- 170 In confirmation, I attach hereto a bundle of correspondence exchanged between PRASA and Siyangena, particularly during the period 11 September 2017 to date, together with minutes of site meeting in relation to PRASA train stations, confirming that despite the position adopted by PRASA's board, it is implementing the agreements and calling on Siyangena to perform in terms of same as I depose to this affidavit.
- 171 PRASA's representatives have threatened Siyangena with penalties, as stipulated in the JBCC agreements, if it would fail to perform its duties timeously.
- 172 At this juncture I need to pause and endeavour to explain the consequence of these continued instructions and the impact thereof on the case of the applicant:
- Not a single word is said in the founding papers of the applicant as to theses continued and uninterrupted instructions by PRASA's technical team to Siyangena up and until date hereof;
- 172.2 I submit the reason for the blatant failure and designed silence on the issue is because PRASA is fully aware of its complete dependence on the system and the services

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## rendered [and in the process of being rendered] by Siyangena:

- Numerous letters were directed by the attorneys acting on behalf Siyangena advising of the fact that a court will at some point in time be advised and informed of the ill-conceived conduct of PRASA i.e. on the one hand [as and when it suits PRASA] reneging on the agreements concluded with Siyangena whilst, on the other hand [when it suits PRASA] insisting on performance under the agreements, all at the same time. I refer to annexure "ST46" appended hereto. I repeat the quote referred to in paragraph 163 supra:
- Despite these continued and uninterrupted instructions by PRASA to Siyangena PRASA refuses to pay Siyangena;
- Should the Court, therefore, consider equitable relief at the hearing of this matter it should be borne in mind that PRASA continued to furnish Siyangena with instructions to execute under the agreement whilst it [PRASA] approaches the court to declare these agreements a nullity. The approach by PRASA, under those circumstances, is malicious, improper and obviously designed in an effort to solicit a benefit at the expense of Siyangena;

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- As and when a court considers an equitable remedy one of the major considerations should be that Siyangena continued to perform under the agreements, not at its own volition or on a mission of its own, but under specific daily instructions [written and verbal] from PRASA' technical team;
- I conclude this portion of the affidavit [on the continued instructions to perform under the agreement] to confirm that PRASA acted as if the agreements are enforceable, valid and in the process of being executed. This conduct of PRASA is, as the Honourable Court reads this affidavit, still in process and it would be unconscionable to penalise Siyangena under circumstances where PRASA, applicant, instructs Siyangena to execute under agreements it [PRASA] wants to convince the Court is a nuility. It is, with respect, dishonest and unbecoming.
- 173 These instructions have been collated and are indexed and paginated:
- 173.1 Phase 1 bundles, bundle 10, page 1 to 156
- 173.2 Phase 2 bundles, bundle 10, page 1 to 559; and
- 173.3 Addendum bundles, bundle 9, page 1 to 365.

- **PROPERTY** WALT, THE [H] SIYANGENA, VAN DER TRANSACTIONS AND PARAGRAPH 21 OF THE FOUNDING AFFIDAVIT:
- 174 Siyangena cannot be expected to comment on the conduct of the employees of PRASA, I can state unequivocally that Siyangena or its representatives were in no way involved in any improper conduct.
- 175 Throughout the founding affidavit the deponent made sweeping statements based on her suspicions. There are no primary facts alleged by the deponent. There is in any event no basis for the sweeping statements made by the deponent.
- 176 During Siyangena's involvement with ISAMS Phase 1, Montana and Ferreira had a discussion in regard to Ferreira's other business interests, which inter alia related to investments in immovable property and construction.
- 177 In response, Montana noted that similarly he was also involved in such industries. Montana enquired as to whom Ferreira used to assist him in this regard as he was always on the lookout to improve his team and in particular was looking for a good lawyer. Ferreira then referred Montana to Van Der Walt, whom was at the

property acquisitions within Ferreira's other interests and whom, from time to time recommended and was a partner in some ventures which came across his table in his day to day activities.

- 178 Neither Ferreira, Siyangena or any other entity associated with either of them had any knowledge of subsequent dealings between Montana and Van Der Walt until November 2014 when during a conversation with Van Der Walt Ferreira became aware of these dealings. Ferreira's request to Van Der Walt was to ensure that any and all dealings with Montana by Van Der Walt were completely above board and completely transparent. Van Der Walt beeding Ferreira's request and after requesting Montana on various occasions to deposit monies into his trust account to continue with their proposed joint venture, decided not to include Montana in the dealings and proceeded with the transfer of the subject properties on his own accord without Montana.
- 179 I confirm, in no uncertain terms, that not a single financial benefit was procured by Siyangena or any company related to it in pursuance of the dealings between Montana and Van Der Walt.



- 180 What is more, what the nature and the extent of the dealing were between van Der Wait and Montana is completely unknown to Siyangena and/or any person [particularly Ferreira] related to it.
- 181 I do attach hereto two affidavits by Van Der Walt explaining the subject property transactions from his point of view.
- 182 Neither Siyangena nor any person related to it were participant in any inappropriate, fraudulent or corrupt activities as alleged or at all.
- 183 There existed not a single corrupt relationship between any one of Siyangena's employees or representatives and the representatives/employees of PRASA as alleged or at all.
- 184 There was not a single financial benefit received by any individual involved within PRASA from any entity closely [or remotely] associated with Siyangena.
- 185 The striking absence of primary factual allegations to this effect in the founding affidavit is telling. PRASA is challenged to produce primary admissible facts in relation to the unsubstantiated contentions levelled against Siyangena in this regard.



- 186 In relation to the Parkwood property, it is telling that PRASA relies on an email from Montana's personal banker and impermissibly elevates it to the status of a property valuation. Annexure FA204 to the founding affidavit [pp2851] is simply an email from Montana's banker in response to his request for her to "Would you please be so kind and also send me the latest updates or rather balances on each of the properties. This is important in determining the properties to be disposed under the current economic conditions" [founding affidavit pp 2851]. The document is nothing more and nothing less and the interpretation and status that PRASA wants to award it is rejected.
- 187 Be that as it may, according to Van Der Walt the subject property was in a dire state of disrepair when it was purchased by Precise Trade and substantial renovations had to be performed in respect thereof.
- 188 A considerable portion of the renovations where, according to Van Der Walt, agreed to be financed by payment of the commensurate expenses from the purchase consideration. This sustained the instructions from Montana to Van Der Walt to make the payments referred to in paragraph 21.6 and substantiates the correspondence referred to in paragraph 21.7.

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189 As regards the Point Precinct Property in Durban, Alvin denies each and every allegation in relation to Siyangena allegedly purchasing this property. Alvin was notified of the subject property at an informal function where other contractors were also present, at which function Gantsho presented to all present, by way of an inventory of the contents in regard to the property. Contrary to what is alleged in the founding affidavit, Alvin was not interested in acquiring same at all. In the result Alvin forwarded the opportunity to Van Der Walt and never heard of it again.

#### 190 According to Ganthso:

- it was a property in respect of which he expressed an interest to Murphy but Gantsho could not afford the property. Gantsho accordingly informed Alvin and other contractors, by way of an inventory of the contents, of the subject property [which is how Alvin and subsequently Van Der Walt came to know of it].
- 190.2 In exchange for introducing Van Der Walt to the subject Property, Murphy in agreement with Gantsho, agreed that Ganthso could from time to time utilise the property, under the reference of an "owner booking" [as the property was being rented out on an ad hoc basis] provided that it was available when Gantsho intended to frequent it.

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- The instance when Ganthso's reverent and friend, Rev FO Marumo, visited the property was when Gantsho in his name secured same in pursuance of the aforesaid and as an "owner booking".
- 191 Suffice to state that Siyangena has not acted in any unlawful manner as alieged or at all and was never participant, related or involved in any of the transactions under reference.
- approach Van der Walt in order to request a consultation for purposes of discussion of the concerns and submissions raised by PRASA in its founding papers. Van der Walt made himself available for an hour and, guided by his own counsel, consented to such a meeting.
- 193 During the consultation with Van der Walt it became evident that:
- Montana and Van der Walt had their own separate discussion on possible business he and Montana could have generated for their own benefit;
- properties since he [Van der Walt] is an investment property owner in his own right whilst Montana had the desire to

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further his own investment portfolio of which he gave proof to van der Walt;

- according to Van der Walt Montana had a facility at his finance bank to the tune of approximately R10 000 000.00 [TEN MILLION RAND] and he, at that point in time, had several other properties in his portfolio;
- they explored several options [again I reiterate that those endeavours were done without the knowledge of participation of Siyangena] and identified specific possibilities amongst them;
- 193.5 Van der Walt explained that although one or two of these investment opportunities resulted in a transaction none of those were designed to procure an undue benefit for Montana to favour Siyangena;
- 193.6 Van der Walt confirmed that all these transactions were financed from his own pocket and, under no circumstances, as an agent for or on behalf of Siyangena;
- 193.7 Van der Walt confirmed that, at no point in time, did he hide his involvement or identity in these transaction or purported

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to act as agent for or on behalf of Siyangena in any of those.

None of these transactions were done in secret or under disguise;

- 193.8 Van der Walt, in any event, confirms that he terminated these business ventures with Montana before the Phase 2 tender was awarded to Siyangena which, in Itself, is an indication of the fact that these transactions and/or endeavours were not designed to benefit Montana or to act as bait for the awarding of any tenders or work to Siyangena;
- 193.9 The explanation given by van der Walt in his affidavit

  (Annexure "ST47" appended hereto) and during consultation shows that the allegations raised by PRASA in the founding papers are mischievious, unsubstantiated and without merit.
- 194 It is noted that criminal charges have been laid at the Brooklyn Police Station. The charges laid are malicious and the primary intent behind it is to, in terrorum, intimidate.



#### PRASA AND MONTANA:

- 195 On 29 March 2018 VDM received a letter from attorneys acting on behalf of Montana of which a copy is appended hereto as Annexure "ST48". In the letter Montana's attorney states that he, Montana, will file his own affidavit with regards to the allegations raised against Montana in the papers. As a consequence of the aforesaid a copy of the affidavit was obtained and, from what I understand, filed on the court file. I will not append the aforesaid affidavit hereto as an annexure since it will be on the court file but to the extent that it will address some of the allegations raised in the founding papers I will request the Honourable Court to take note thereof.
- 196 The affidavit was furnished to both PRASA and Siyangena with the intention to make a contribution in respect of the facts of the case as Montana wishes to assist the above court in order to come to a conclusion on the issues raised.
- 197 Suffice to state that the contents of this affidavit is damning for PRASA, to say the least.
- 198 It is both necessary and relevant to take the contents of this affidavit into account in pursuance of adjudicating upon this Review

Application and I accordingly submit that its contents ought to form part of the evidential material before this court in relation to this application.

199 Siyangena will present argument in relation on this application with reference to the contents of this affidavit, at the hearing of this matter.

#### [J] THE LITIGATION TO DATE:

- 200 On **12 October 2015**, Siyangena instituted arbitration proceedings against PRASA in respect of ISAMS Phase 1 ("the Phase 1 Arbitration").
- 201 In terms of the Phase 1 Arbitration, Siyangena pursues payment from PRASA in respect of Siyangena's unpaid invoices that make up the Outstanding Phase 1 Consideration, together with interest and costs, and said proceedings are pending before Goldstein.
- 202 During **August 2015**, the Public Protector issued her report, *inter alia* but particularly to PRASA, the recommendations contained in which allegedly motivated the institution of the 2016 Review Application, which PRASA did on **2 February 2016**.



- 203 Parties implicated in any way in this investigation of the Public Protector were sent notices under section 7(9) of the Public Protectors Act alerting them of evidence implicating them and the possibility of adverse findings. Needless to say, Siyangena has NEVER received such a notification from the Public Protector
- 204 The findings of the Public Protector centre around PRASA's internal procurement, control and authorisation processes.
- 205 The Public Protector only questioned whether Siyangena was extended the scope of work for the PRASA Railway Stations following its successful involvement in the FIFA World Cup 2010 Station upgrades.
- 206 The Public Protector adjudicated whether PRASA's conduct in.

  extending the said contract contravened its Supply Chain

  Management Policy.
- 207 The Public Protector concluded that there was no evidence of criminality found in its investigations, except of violations of the Public Finance Management Act, which were "technical violations". "We did not find any kind of criminality which is white collar crime" (own emphasis) the Public Protector concluded

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- 208 The review application was, for purposes of these proceedings, predominantly concerned with the review and consequential setting aside of PRASA's administrative decisions/actions in awarding and subsequently concluding the Phase 1 Agreement, the Phase 2 Agreement and the Addendum to/with Siyangena. Let me also record that PRASA only filed its first review application after Siyangena instituted arbitration proceedings for PRASA's failure to pay invoices.
- 209 On **1 May 2017**, Siyangena instituted arbitration proceedings against PRASA in respect of ISAMS Phase 2 ("the Phase 2 Arbitration").
- 210 In terms of the Phase 2 Arbitration, Siyangena pursues payment from PRASA in respect of Siyangena's unpaid invoices that make up the Outstanding Phase 2 Consideration.
- 211 The review application served before Sutherland J on **2 May 2017**, who dismissed the review application with costs, on the basis as set out in his judgment dated 3 May 2017 and attached hereto as annexure **"ST49"**.
- 212 PRASA thereafter applied for leave to appeal against the aforesaid judgment, which application:

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- 212.1 served before Sutherland J on **5 July 2017**; and
- was dismissed on the basis as set out in the judgment of Sutherland J dated **7 July 2017**, a copy of which is attached hereto as annexure "ST50".
- 213 On **21 July 2017** PRASA patitioned the SCA for leave to appeal the judgement of Sutherland J.
- 214 On **26 May 2017**, Siyangena instituted arbitration proceedings against PRASA in respect of the Addendum ("the Addendum Arbitration").
- 215 In terms of the Addendum Arbitration, Siyangena pursues payment from PRASA in respect of Siyangena's unpaid invoices that make up the Outstanding Addendum Consideration and same is pending before Goldstein.
- 216 It was however at the time agreed between the parties that the arbitrations would be held over pending the outcome of the aforesaid appeal process.





- 217 The Supreme Court of Appeal refused the petition on the basis of its order dated **22 August 2017**, a copy of which is attached hereto as annexure "ST51".
- 218 The arbitration hearings were thereafter set down to commence before retired Goldstein and Joffe on 2 and 5 October 2017 respectively.
- 219 However, on **21 September 2017**, PRASA delivered an application to the president of the SCA:
- 219.1 in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act");
- 219.2 to refer the decision of the honourable justices Bosielo JA and Tsoka AJA dated 22 August 2017, dismissing the petition;
  - back to the SCA for reconsideration ("the reconsideration application").
- 220 In doing so, PRASA materially relied on the following grounds to sustain the reconsideration application:
- 220.1 PRASA [for the first time] opportunistically, if not dishonestly contended that its review application was never based on the

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Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), but in fact on "the principle of legality";

- in consequence, PRASA only pursued condonation for the delay in the institution of its review application "insofar as it is necessary" [also now raised for the first time]; and
- the Constitutional Court's judgment in **State Information**Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd

  2017 (2) SA 63 (SCA) ("Gijima") might remove the basis upon which PRASA's review application was dismissed if the Constitutional Court follows the minority judgment of Bosielo JA [who dismissed the petition], the SCA's judgment in **Gijima** being fatal to PRASA's metamorphized case.
- 221 On 22 September 2017, PRASA launched an urgent application to the above court, in terms of which it sought an order staying the arbitration proceedings, particularly pending the outcome of the reconsideration application and, failing the reconsideration application, a fresh review application ("the Stay Application").
- 222 The Stay Application served before Brenner [AJ] on Friday 29 September 2017 and was determined in favour of PRASA on the

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terms of the order of Brenner [A]] attached hereto as annexure "FA52".

- 223 The arbitration hearings were consequentially postponed.
- 224 The reconsideration application was dismissed by the president of the SCA on **7 November 2017** and a copy of the subject order is attached hereto as annexure "ST53".
- 225 On 14 November 2017, the Constitutional Court handed down its judgment in the Gijima matter, a copy of which is attached hereto, for ease of reference, as annexure "ST54".
- 226 The arbitration proceedings were then re-initiated only to be postponed consequent upon these pending applications being instituted.
- 227 On 19 February 2018, the Siyangena Application was issued.
- 228 On 3 March 2018, the Review Application" was issued.
- 229 On **6 March 2018**, Werksmans [purportedly on behalf of PRASA] and VDMA [on behalf of Siyangena] together with counsel attended a meeting with his Lordship Ledwaba [DJP].

- 230 During the aforesaid meeting it was agreed that:
- The hearings in respect of the arbitrations be consensually 230.1 postponed and that the arbitration proceedings be stayed pending the adjudication of the Siyangena Appliction and the Review Application.
- Siyangena shall file its opposing affidavit in relation to the 230.2 Review Application by 3 April 2018.
- PRASA shall file its replying affidavit in relation to the Review 230.3 Application as well as its answering affidavit in relation to the Siyangena Application by 2 May 2018.
- Siyangena shall file its replying affidavit in relation to 230.4 Siyangena Application by 18 May 2018.
- PRASA shall file its practice note, chronology, heads of 230.5 argument and list of authorities in relation to both the Review Application and the Siyangena Application by 28 May 2018.
- Siyangena shall file its practice note, chronology, heads of 230.6 argument and list of authorities in relation to both the Review Application and the Siyangena Application by 4 June 2018.
- The Review Application and the Siyangena Application are both 230.7 set down for joint determination, the hearing in respect of the

applications to commence on **27 June 2018** for a period not exceeding three consecutive days, before a full bench of the North Gauteng High Court.

- 230.8 The parties shall ensure that the duly indexed and paginated application papers, in respect of both subject applications, together with the parties' practice notes, chronologies, heads of argument and lists of authorities, are delivered in triplicate to the office of his Lordship Ledwaba [DJP] by a date to be directed by him.
- 231 His Lordship Ledwaba [DJP] has since issued a formal directive in relation to the further conduct of the Review Application and the Siyangena Application, a copy of which I annexure hereto as annexure "ST55".
- 232 On 13 March 2018, 6 court days after the issue of the Review Application and 5 court days after the meeting with his Lordship Ledwaba [DJP], Siyangena delivered a notice in terms of uniform rule 7, recording that it disputes the authority of Werksmans to act on behalf of PRASA and its authority to so act is disputed until Werksmans have satisfied the court that they are authorised so to act.

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- 233 A copy of Siyangena's notice in terms of rule 7 is attached hereto as annexure "ST56".
- 234 Siyangena did not receive the courtesy of a reply to its rule 7 notice but Werksmans continued to purportedly act for PRASA in relation to the Review Application, the delivery of Siyangena's rule 7 notice notwithstanding.
- 235 Consequently, and on 21 March 2018, Siyangena caused a notice in terms of rule 30A to be served [via email] on PRASA. I attach hereto a copy of Siyangena's rule 30A notice together with proof of its electronic transmission, as annexure "ST57"
- 236 In terms of Siyangena's rule 30A notice, PRASA was
- First, called upon to comply with the first respondent's 236.1 aforesaid notice in terms of rule 7 before 16h00 on Friday 23 March 2018; and
- Second, in doing so, further called upon to at least produce the 236.2 following documentation to demonstrate to the satisfaction of the court that the institution of this application has been duly authorised:

- A certified copy of the relevant extract from the minute 236.2.1 book of the applicant's board of control relating to the particular board meeting(s) during which the applicant's board of control decided to:
- institute this application; and 236.2.1.1
- instruct and commensurately authorise Werksmans to 236.2.1.2 prosecute the application on the applicant's behalf.
- A certified copy of the relevant resolution(s) of the 236.2.2 applicant's board of control, signed by the applicant's duly authorised delegate [together with proof of his/her delegation], sustaining the institution of this application and the authority of Werksmans to prosecute the application on the applicant's behalf.
- An affidavit by the chairperson of the applicant's board of 236.2.3 control:
- Confirming that a decision to institute this application 236.2.3.1 and to commensurately instruct Werkmans to prosecute same on the applicant's behalf was taken



at a properly constituted meeting of the applicant's board of control, with specific reference to the:

- 236.2.3.1.1. Exact date(s) upon which the particular board meeting(s) took place; and
- 236.2.3.1.2. Who were in attendance at such particular meeting(s); and
- 236.2.3.1.3. What was precisely decided by the applicant's board of control at the said meeting(s) in relation to the institution of this application and the authority of Werksmans.
- 236.2.3.2 Confirming the truth, authenticity and correctness of the relevant extract from the minute book of the applicant's board of control referred to above; and
- 236.2.3.3 Confirming the truth, authenticity and correctness of the resolution by the applicant's board of control referred to above.
- 237 PRASA [rather Werksmans] failed to comply with Siyangena's aforesaid notice in terms of rule 30A timeously and at all.

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#### 238 Rule 30A provides that:

- Where a party fails to comply with the uniform rules of court or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he/she/it intends to after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out; and
- 238.2 Failing compliance within 10 days, an application may be made on notice to the court and the court may make such order thereon as to it seems meet.
- 239 Compliance with Siyangena's said application was not received in consequence of which Siyangena prosecuted an urgent application in terms of rule 30A, pursuing an order for the dismissal of this Review Application ("the Siyangena Rule 7 Application").
- 240 I deposed to the founding affidavit in relation to the Siyangena Rule
  7 Application and I pray that its contents be incorporated into this
  affidavit.
- 241 PRASA opposed the Siyangena Rule / Application and VDMA shall ensure that a copy of the Siyangena Rule 7 Application is

incorporated into the documents to serve before court at the hearing of this application.

- 242 Siyangena will rely on the averments in the Siyangena Rule 7

  Application to sustain argument on its defence to this application, in that its prosecution was not properly or at all authorised and the subsequent attempts to preath life into it is of no consequence.
- 243 What is more, PRASA, in response to the Siyangena Rule 7 Urgent Application, prosecuted a counter-application in terms of which it seeks a declaratory order that Werksmans are in fact duly instructed to prosecute the Review Application on PRASA's behalf.
- 244 PRASA's said counter-application, as with the Siyangena urgent Rule 7 Application, concerns the question as to whether Werksmans were duly authorised to institute these proceedings on PRASA's behalf.
- 245 The Siyangena Urgent Rule 7 Application was initially enrolled for hearing on Tuesday 3 April 2018 but, in consequence of PRASA's answering affidavit and its counter application, the papers exceeded the maximum extent allowable in the urgent court of this division of the high court.

- 246 Siyangena has caused this issue to be thoroughly researched, which research indicates that if no authority to prosecute the Review Application existed prior to its prosecution, the question that remains is whether its institution could be ratified by PRASA, which question is factually and legally inseparably intertwined with the question as to whether their was an inordinate delay in the prosecution of the Review Application.
- 247 Since PRASA refused [so it seemed] to have the urgent counter application removed from the roll where it was enrolled for 3 April 2018 I had to depose of another affidavit in the form of an opposing affidavit to the urgent counter application. The aforesaid affidavit will form part of this bundle of documents and, eventually, the bundle serving before this Honourable Court when this matter is heard, I am uncertain as to what the outcome of the urgent counter application would have been by the time the Honourable Court reads these papers but suffice to say that the attitude of Siyangena is that the issue of authority, ratification thereof and/or whether it caused Werksmans to be authorised to launch these proceedings would be part of the argument this Court will eventually decide. I may, under those circumstances, beg for the Court to take cognisance of any subsequent affidavit deposed to resisting the interim urgent counter application launched by PRASA.

- 248 I add to the aforesaid to state that this opposing affidavit had to be filed, according to the directive of the Deputy Judge President, on Tuesday, 3 April 2018. That was, "coincidentally" the same day on which PRASA wanted its urgent counter application to be heard. I submit that the aforesaid counter application was designed to frustrate the due finalisation of this opposing affidavit and to distract Siyangena from applying its mind when this affidavit had to be completed and finalised without interference.
- 249 It is therefor desirable to, in the circumstances, have the issue of authority decided in these proceedings.

### [L] THE PUBLIC PROTECTOR'S REPORT:

- 250 It is common cause that the offices of the Public Protector issued a report during or about August 2015.
- 251 In her report the Public Protector slams PRASA for alleged noncompliance of procurement policies and procedures.
- 252 On any given version PRASA had full knowledge of the contents of the report of the Public Protector since the day it was issued, now almost 3 [THREE] years ago.

- 253 The Public Protector, in her report, states that officials of PRASA did not render their full cooperation and/or support in order for her to finalise the report.
- 254 The Public Protector, in particular, expressed her concern that she was never furnished with all the supporting documents in order to come to a duly informed decision.
- 255 I submit that it is safe to state [relying on what the Public Protector wrote] that her report relied on incomplete documents, inaccurate information and a lack of cooperation from those who had to assist the Public Protector.
- 256 From the report it, further seems as if the investigation followed internal brawls within PRASA, its unions and/or its management.
- 257 The reason why I raise the issue of the Public Protector's report in this affidavit is because of the fact that no adverse remedial action against Siyangena was proposed by the Public Protector.
- 258 In fact, the Public Protector never consulted Siyangena or involved Siyangena in her investigation.

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- 259 I am advised that the Public Protector, pursuant to her obligations under the Public Protector Act, may approach or subpoena any person implicated in her report for assistance, information or feedback.
- approach any person and/or entity against whom an adverse report is to be issued for feedback and comment. I use this opportunity to reiterate that the Public Protector never involved Siyangena in her investigation and, in context, never implicated Siyangena as a party whose rights were adversely affected in her report.
- 261 To rely on the report of the Public Protector as authority for an adverse finding against Siyangena (on any issue) would be highly inappropriate and misplaced. If afforded the opportunity to address her Siyangena would have had absolutely no concern, difficulty or objection against full cooperation with the offices of the Public Protector.
- 262 From what I understand the report of the Public Protector is, in any event, the subject of a review application. I have mentioned hereinabove that Siyangena is not a party to those proceedings and

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it does not intend to become embroiled in litigation with the Public Protector on this issue.

### [K] GIJIMA:

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263 Before I deal with what we submit is the proper interpretation of the Constitutional Court's judgment in Gijima, it is important to note the following comments of Cachalia JA, Tshiqi JA and Van der Merwe JA when the SCA gave judgment in Gijima, as follows:

"[39] The facts of this case demonstrate precisely why SITA should not be allowed to bypass PAJA and rely directly on the principle of legality. Under s 7 of PAJA, SITA was well outside the 180-day rule when it commenced proceedings to nullify its contract with Gijima. By framing its application as a legality review it sought to circumvent PAJA and its 180day rule. What is more, SITA's true objective in seeking to nullify its contract with Gijima was not to vindicate the principle of legality, but one of self-interest: to avoid having to deal with its payment dispute arising from its breach of contract through arbitration. The such dishonourable countenance cannot conduct, particularly from an organ of state.

[40] But, even if SITA was entitled to rely directly on the principle of legality it would still have had to overcome the insurmountable hurdle of justifying its delay. This is because, having instituted legality review proceedings it

would need to show that proceedings were instituted within a reasonable time, failing which, that there were, nevertheless, good reasons for the court to entertain the application and overlook the fact of the unreasonable delay in the circumstances of the case. In this latter regard, SITA would have to persuade the court that any potential prejudice or adverse consequences caused to Gijima by the delay could be overcome. It has not done so."

- 264 It is apparent that PRASA, in this matter, has taken the same "dishonourable" approach as SITA, PRASA's object being not to vindicate the principle of legality, but one of self-interest: to avoid having to deal with its payment dispute arising from its breach of contract through arbitration.
- 265 Gijima's facts are to a large extent comparable to the facts of this matter.
- 266 Gijima concluded an agreement with SITA which was ultimately found to be in want of compliance with the Constitution.
- 267 The Constitutional Court concluded that, in awarding the Gijima/Sita agreement, SITA acted contrary to the dictates of the Constitution and exercised its discretion in terms of section 172(1)(a) of the Constitution declaring the award of the subject contract invalid.

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- 268 However, under section 172(1)(b) of the Constitution, the Constitutional Court exercised its discretion to order further that a just and equitable remedy was that the award of the subject contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which it might have been entitled, but for the declaration of invalidity.
- 269 On a proper reading of the Constitutional Court's judgment in Gijima, the particular exercise of its section 172(1)(b) discretion was specifically based on the following considerations:
- justice and equity dictate that, despite the invalidity of the award of the subject agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings;
- 269.2 Gijima may well have performed in terms of the contract while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings;
- 269.3 It must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed;

from the outset, Gijima was concerned whether the award of the contract complied with legal prescripts in consequence of which it raised the issue with SITA repeatedly; who assured it that a proper procurement process had been followed.

### [L] THE PRESENT STATUS OF THE ARBITRATIONS

- 270 The first arbitration is pending before Goldstein and concerns a claim by Siyangena for payment of outstanding contract consideration in respect of ISAMS Phase 1, as extended pursuant to the ISAMS Phase 1 Extension, which arbitration proceedings are opposed by PRASA.
- 271 The second pending arbitration proceeding before Goldstein in respect of the addendum and in terms of which Siyangena claims payment of outstanding contract consideration due and payable to it by PRASA in terms of the Addendum, which arbitration proceedings are similarly defended by PRASA;
- 272 Lastly, the third arbitration relevant to this application, is pending before Joffe and in terms thereof Siyangena pursues payment of outstanding contract consideration in respect of 15AM5 Phase 2.

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- 273 The parties selected the Association of Arbitrators as the dispute resolution body to facilitate the arbitrations and the arbitration proceedings are consequently subject to the Association of Arbitrators (South Africa) Rules for the Conduct of Arbitrations 2013 Edition ("the Rules").
- 274 Paragraph 1 of article 23 of the Rules materially provides that:
- the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the <a href="existence">existence</a> or <a href="mailto:validity">validity</a> of the arbitration agreement;
- for that purpose, an arbitration clause that forms part of the contract shall be treated as an agreement independent of the other terms of the contract; and
- a decision by the arbitral tribunal that the contract is a nullity shall not automatically invalidate the arbitration clause.
- 275 The Phase 2 Arbitration and the Addendum Arbitration are also subject to the Rules.
- 276 Having regard to PRASA's defence to the pending arbitrations, considered in context with the nature of the defences raised to

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Siyangena's claims and the grounds upon which such defences are based, it is staggering that the arbitrations are persisted with apart from the Constitutional challenge, particularly due to what is contained in the PRASA Status Report.

- 277 Be that as it may, the arbitration hearings have been postponed on several occasions in consequence of PRASA's [failed] attempts "to avoid having to deal with its payment dispute arising from its breach of contract through arbitration".
- 278 Of importance to note is that PRASA's defences to Siyangena's claims as formulated in Siyangena's statements of claim, upon a proper reading of PRASA's statements of defence in each of the three arbitrations, was until very recently generically confined to:
- A legality challenge in respect of the award and conclusion of the agreements relied upon by Siyangena;
- 278.2 A denial that Montana was authorised to conclude the relevant agreements on PRASA's behalf; and
- 278.3 A bare denial of Siyangena's allegations that it complied with its obligations in terms of the relevant agreements.

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- 279 The pleadings in respect of:
- 279.1 the Phase 1 Arbitration is indexed and paginated in volume 1 of the Phase 1 Documentation Bundle;
- the Phase 2 Arbitration is indexed and paginated in volume 1 279.2 of the Phase 2 Documentation Bundle;
- the Addendum Arbitration is indexed and paginated in volume 279.3 1 of the Addendum Documentation Bundle.
- 280 Importantly, PRASA substantially amended its statement of defence in respect of the Phase 1 Arbitration on 2 February 2018 and I attach hereto a copy of its amended statement of defence as annexure "ST58". Siyangena anticipates that PRASA will in due course also amend its statements of defence in respect of the Phase 2 and Addendum Arbitrations to bring same in line with this statement of defence.
- 281 I do not intend to deal with the contents of this statement of defence, suffice to state that of relevance to this application PRASA in terms thereof, first essentially contends that Godstein is divested of jurisdiction to adjudicate upon Siyangena's claims due to:

- 281.1 The conclusion of the ISAMS Phase 1 Agreement allegedly being unauthorised:
- The award of the ISAMS Phase 1 Tender and the commensurate conclusion of the ISAMS Phase 1 Agreement allegedly being invalid for want of legality in that same was done in contravention of section 217 of the Constitution:
- 281.3 Goldstein lacks jurisdiction to adjudicate Siyangena's claims for payment and make an award in respect of the claims without determining whether the Phase 1 Agreement and the arbitration agreement contained therein are enforceable; and
- The parties have allegedly not agreed to refer the dispute concerning the enforceability of the Phase 1 Agreement and the arbitration agreement contained therein to arbitration.
- 282 Second, PRASA attempts "to avoid having to deal with its payment dispute arising from its breach of contract through arbitration" by contending that the Phase 1 Agreement is invalid for want of legality in the Phase 1 Tender Process and the conclusion of the ISAMS Phase 1 Agreement.

- I pause at this stage to refer back to Gijima, in which case the arbitrator held that he did not have the necessary jurisdiction to determine the dispute due to SITA's legality challenge and ultimately the Constitutional Court, by implication and in holding as it did, referred the matter to the arbitrator to adjudicate upon the merits thereof.
- 284 The arbitrations have in the interim been postponed pending the outcome of these proceedings.

# [M] THE INSTITUTION OF THIS APPLICATION IS NOT PROPERLY AUTHORISED:

- 285 On the basis as contended for in the Siyangena Rule 7 Application, considered in conjunction with the opposition thereto, it is submitted that the institution of this application was unauthorised at the time of its issue and that the steps taken to ratify its prosecution is insufficient for purposes of breathing life into the Review Application.
- 286 This is a matter for legal argument and full legal argument will be addressed on this issue at the hearing of this application. I have mentioned that the papers filed on the issue of authority (or lack

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thereof) should be incorporated herein for argument when the other issues are determined by this Honourable Court.

287 Suffice to state that the Review Application should be dismissed for this reason alone.

## [N] THE INSTITUTION OF THIS APPLICATION HAS BEEN UNREASONABLY DELAYED:

- 288 It is desirable and in the public interest that finality be reached within a reasonable time, in respect of judicial and administrative decisions and litigation in general.
- 289 It was a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party has been guilty of unreasonable delay in initiating the proceedings.
- 290 The rationale for the long-standing rule is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. The application of the rule requires consideration of two questions, namely, was there an unreasonable

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- delay and, if so, should the delay in all the circumstances be condoned.
- 291 The delay in the prosecution of this application must be first considered against the factual premise that the subject decision sought to be reviewed and set aside were taken years ago.
- years ago on 31 March 2011 consequent upon administrative decisions/action taken by PRASA on 20 February 2011 and 31 March 2011;
- 293 ISAMS Phase 2" was awarded to Siyangena almost 4 years ago on 1 July 2014.
- 294 Third, more than 3 years ago and during 19 September 2014,

  PRASA separately contracted Siyangena in relation to the

  Addendum.
- JBCC agreements, one on **31 March 2011** [approximately 7 years ago] in respect of ISAMS Phase 1 and the other on **1 July 2014** [almost 4 years ago] in respect of ISAMS Phase 2.

- 296 I have already dealt with the status of the works herein above and confirm that Siyangena has performed its obligations towards PRASA in terms of the contracts which are now sought to be set aside.
- 297 The simple reality is that PRASA, in its various affidavits, never sought to justify or explain the undue delay in pursuing the first review application and attempts in setting aside the subject decisions.
- 298 PRASA never sought to address in its various affidavits the immense prejudice that the undue delay has caused (and continues to cause) Siyangena, nor did it address the immense public interest concerns that a setting aside of the tenders, now that the work under the tenders have for all practical purposes been completed, would have.
- 299 Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle itself is thus a requirement of legality.
- 300 This principle itself is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and

finality because people may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

- 301 In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts.
- 302 Thus, the very purpose of a court undertaking a review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.
- 303 The reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality: time is of utmost importance. This rule exists for good reason, to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain and protracted delays could give rise to calamitous effects, not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.
- obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of that undue delay should not be tolerated.

- 305 Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action.
- 306 A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.
- 307 PRASA for the first time challenged the legality of the subject decisions and conclusion of the subject contracts when Siyangena instituted arbitration proceedings against it consequent upon PRASA's breach of its payment obligations towards Siyangena.
- 308 PRASA delayed the institution of its dismissed first review application with 1817 days in respect of Phase 1 and 795 days in respect of Phase 2 as at February 2016.
- 309 The reconsideration application was dismissed as long ago as October 2017.
- 310 Thus, the Review Application has been threatened and remained unprosecuted for almost 4 months.
- 311 PRASA's conduct has occasioned a delay that by far exceeds the delay of 22 months, which in Gijima the Constitutional Cour

considered a determining factor in issuing the same order sought by Siyangena in terms of this application.

- 312 The practical completion certificates are issued jointly and consensually between the parties after a thorough inspection of the relevant PRASA train station to which the subject certificate applies. Such certificates essentially certify that the ISMAS works in respect of the particular PRASA train stations concerned have been completed.
- 313 Part and parcel of the practical completion certificate is an asset verification certificate. The purpose of this asset verification certificate is to certify that the assets which would constitute full completion of the ISAMS Phase 2 works at the subject train station concerned, was in fact installed and physically formed part of the works.
- 314 It is based on the aforesaid documentation that PRASA would and in fact ultimately did capitalise the assets installed by Siyangena at the relevant PRASA train stations, as documented and recorded by the Auditor General of South Africa.
- 315 What this means is that all the assets installed by Siyangena at the relevant PRASA train stations in respect of ISAMS which have been

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verified, certified and which are subject to the certificates of practical completion and verification, as referred to herein above, have all been capitalised by PRASA and is recorded as assets within PRASA's books with the Auditor General.

- 316 What this further means is that PRASA has recorded its acquisition and ownership of these assets in its asset register and financial documents with the Auditor General. Thus, according to PRASA itself, it has become the owner of the particular assets.
- 317 It is astonishing that PRASA, having on its own version and books acquired the assets subject to ISAMS Phase 2, does not want to pay for same, although it gladly accepts ownership in respect of the subject assets.
- 318 The main portion of the payments made to Siyangena was for the procurement, installation and implementation of extremely high-tech equipment at various stations belonging to PRASA and the construction relating to the installation of ISAMS at the designated PRASA train stations made subject to ISAMS Phase 1 (as extended) and ISAMS Phase 2.

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- 319 I have already dealt with the Siyangena Pricing Structure and reiterate the basis upon which the contracts were priced and tendered for by Siyangena.
- 320 I have already dealt with the state of completion of the ISAMS

  Phase 1, ISAMS Phase 1 Extension and ISAMS Phase 2 Works

  herein above, which is narticularly confirmed by the PRASA

  December 2017 ISAMS Status Report, which itself also confirms

  PRASA's indebtedness towards Siyangena.
- 321 What is furthermore of paramount importance to note is that Siyangena and PRASA have never seized and are still conducting themselves in terms of the relevant agreements and particularly in pursuit of completing the Phase 2 Works, in terms of the Phase 2 Agreement, which is in an advance state of completion and ongoing, as we speak.
- performance in terms of the relevant agreements and has, furthermore, made payment to Siyangena in considerable amounts of consideration in terms of each agreement [bar the Addendum] in exchange for Siyangena's performance.

- PRASA has since July 2015 not paid Siyangena's invoices. But for this change in circumstances, the parties are acting in compliance and in accordance with the subject agreements.
- 324 As aforesaid, on the ground [removed from its board], PRASA is implementing the contracts as we speak.
- 325 At any given time Siyangena employs approximately 18 subcontractors, whom in turn employ approximately 500 individuals collectively. Siyangena itself employs at any given time approximately 115 individuals itself, a significant amount of whom are highly qualified and specialised individuals.
- 326 Pursuant to the conclusion of the Phase 1 Agreement, the Extension, the Phase 2 Agreement and the Addendum, Siyangena concluded various other subcontract-agreements, employed numerous employees and purchased products worth millions of rands for installation at PRASA's train stations.
- 327 PRASA is fully aware of the catastrophic consequences that will follow if the award of the tenders and the agreements concluded in pursuance thereof, is set aside and nullified.

- 328 PRASA is particularly aware that it cannot conduct its business without the products and services provided by Siyangena.
- 329 It is for this reason that PRASA never took any steps to interdict Siyangena from continuing with its execution of the contract amidst the contractual disputes between the parties having arisen as long ago as 2015.
- 330 The simple reality is that the entire rail commuter system in South Africa is dependant on the installations performed by Siyangena. The setting aside of the tender and the undoing of the agreements that followed the award of the tenders to Siyangena would have disastrous consequences and will lead to the collapse of the entire rail system.
- 331 In this respect, I confirm that the following will prevail in consequence of setting aside the tender and the undoing of the relevant agreements:
- There will be unavailability of the Public Address Systems which is a requirement of the Rail Safety Regulator and a condition of PRASA's operating license.
- 331.2 Where speed gates' glass is broken either through vandalism and/or by accident it creates an access control and ticket

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verification issue which PRASA will not be able to address without our client's assistance.

- There will be loss of CCTV viewing abilities from the control rooms which protection services are used for crowd control and day to day safety on the stations.
- 331.4 If the CCTV system goes offline, PRASA will be unable to recover video footage for incidents of theft, insurance or accuracy and data capturing. It will cause a severe lack of safety which can cause injury and death by users of the railway system.
- Where the Access Control is activated, PRASA may under certain circumstances not have access to certain areas and, worse, not be able to lock down on these areas.
- Fire alarms are currently relayed back to the control room causing severe difficulties given PRASA's inability to address any real issues when they surface with the system.
- 331.7 Siyangena maintains the air conditioners to the equipment rooms and control rooms in order to ensure that the equipment remains reliable and operative. If these fail the extremely expensive and sensitive equipment will overheat and PRASA will run the risk that the equipment will be damaged beyond repair

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and it will not be covered by the warrantees and insurance as a result of the fact that the temperature of these control rooms need to be maintained as a condition for the warrantee.

- PRASA has absolutely no understanding of the system itself, the required maintenance and the reproductions of PRASA's failure to maintain and run the system.
- The nett effect will be that there will be a total shutdown of the rail commuter infrastructure which PRASA will not be able to reactivate. It will therefore mean that PRASA's decision not to pay Siyangena (or to invalidate the agreements) will cause the paralysis of the entire system and the whole exercise over the past 7 years to become a wasteful and fruitless expenditure.
- 331.10 PRASA's unconscionable attitude and breach of its payment obligations towards Siyangena threaten the very existence of Siyangena and all of those (sub-contractors, suppliers and employees) that are dependant for their survival on the financial survival of Siyangena.
- 331.11 PRASA, inexplicably, seized payment of Siyangena's invoices since July 2015.

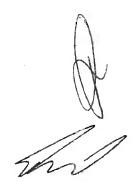
- 331.12 This necessitated Siyangena to liquidate its investments as
  financial sustenance for performing its abligations in terms of
  the respective agreements.
- This untenable situation has prevailed since July 2015 and has reached a stage where Siyangena has been financially crippled as a consequence of PRASA unlawful breach of its payment obligations towards Siyangena in terms of the respective agreements.
- 332 Suffice to state that all prevailing facts and circumstances render only one available conclusion, which is that this is the text-book case where the prosecution of a review application has been unduly delayed.
- 333 This is particularly so under circumstances where it is trite that the triggering event for the time period within which and organ of state wants to pursue the review and setting aside of its own decision begins to run is date upon which the subject decision is taken.
- 334 Moreover, the public protector's report was issued as long ago as

  August 2015 –almost 3 [THREE] years ago.
- 335 It is further telling that PRASA did not elect to pursue an appeal to the constitutional court in relation to the first review application

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when the decision in Gijima came out. PRASA rather inexplicably elected to delay the furtherance of its attempts to pursue the review of the subject administrative action for a number of further months.

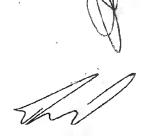
- 336 The meagre explanations proffered by PRASA to shrug its inordinate delay under the rug is simply insufficient. PRASA particularly in paragraph 23 of its founding affidavit attempts to excuse the inordinate delay occasioned in the prosecution of this application, which is cold comfort if regard is had to the trite legal principles applicable as to when a person is deemed sufficiently informed to pursue the review and setting aside of administrative action, particularly that of its own.
- 337 Full legal argument will be presented at the hearing of this application in this respect.
- 338 Suffice to state that the application must be dismissed on this basis alone.





## [O] THERE IS NO CASE MADE OUT FOR ANY RELIEF IN TERMS OF SECTION 3(2) OF THE ARBITRATION ACT:

- 339 Section 3(2) of the Arbitration Act provides that the court may at any time [and] on the application of any party to an arbitration agreement [and] on good cause shown:
- 339.1 set aside the arbitration agreement;
- order that a particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
- 339.3 Order that the arbitration agreement shall cease to have effect with reference to any dispute referred.
- 340 Although section 3(2) of the Arbitration Act does not expressly provide for an order staying arbitration proceedings, one is unable to gauge from the nomenclature used in the drafting of the application whether reliance is placed on section 3(2) or not and Siyangena may possibly attempt to argue that an order can be pursued thereunder.



### 341 In this respect:

- 341.1 The question in applications of such nature is whether the applicant has shown good cause within the meaning of the section 3(2) for avoiding arbitration.
- 341.2 Such an onus is not easily discharged. There are certain advantages, such as finality, privacy, a judex of one's own choice, and avoiding delays through having to await one's turn on the roll of trial cases, which a party to an arbitration may wish to retain; and one who has contracted to allow his opponent these advantages will not readily be absolved from his undertaking.
- The discretion of the court is to be exercised judicially, and only when a very strong case has been made out and there should be 'compelling reasons' for refusing to hold a party to his contract to have a dispute resolved by arbitration.
- The term 'good cause' is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.

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- 342 In this application, PRASA requests that the arbitration agreement be at the very least set aside or cease to have effect on the disputes that form the subject matter of the arbitration proceedings.
- 343 In doing so, PRASA has assumed the stance that it is in fact a party to the arbitration agreements within the meaning of section 3(2) of the Arbitration Act.
- 344 PRASA must therefor demonstrate that good cause exists and this is not easily met as a court's discretion to set aside [and as such also suspend] an existing arbitration agreement must be exercised only where a persuasive case has been made out, it not being possible or desirable however for court's to find precisely what circumstances constitute a persuasive case.
- 345 It is, notwithstanding the aforesaid, trite that the requirement of good cause in order to escape an arbitration agreement entails a consideration of the merits of each case in order to arrive at a just and equitable outcome in a specific set of circumstances.
- 316 What is more, the Arbitration Act being a pre-constitutional statute, good cause must embrace enquiry into whether the arbitration agreement, if implemented, would unjustifiable diminish or limit

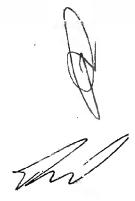
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protections afforded by the Constitution. Absent infringement of Constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity and if a truly compelling reason exists.

347 I am advised that the Constitutional Court has in this respect ruled previously that the values of the Constitution will not necessarily best be served by enhancing the power of courts to set aside arbitration awards and that if courts are too quick to find fault with the manner in which an arbitration has been conducted, the goals of private arbitration may well be defeated.

348 It is submitted and it will be argued that:

- 348.1 Section 3(2) of the Arbitration Act does not permit or provide for the issue of an order staying arbitration proceedings; and
- Stay of the arbitration proceedings in terms of section 3(2) of the Arbitration Act.





### [P] JUST AND EQUITABLE RELIEF UNDER THE PREVAILING CIRCUMSTANCES:

- 349 Even if PRASA is able to circumvent the aforesaid insurmountable challenges and even, thereafter, manages to establish a ground to review the relevant decisions, it is trite that once a ground for review is established it is necessary to determine a just and equitable remedy in the circumstances.
- 350 Part and parcel of this determination is to consider the potential practical difficulties when the appropriate remedy is considered.
- remedy that a court may consider, upon such an application, will excuse PRASA from its payment obligations towards Siyangena.
- 352 On the contrary, it is submitted that an approach, identical to the approach of the Constitutional Court in Gijima, ought to be followed if and when the court determines such a review application.
- 353 As aforesaid, Siyangena seeks an order in terms of which it is declared that:
- 353.1 should it be declared by a court of competent jurisdiction and/or held by either one or both of the arbitrators that:

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- 353.1.1 Siyangena was awarded the Phase 1 Tender and/or the Phase 2 Tender; and/or
- 353.1.2 the Phase 1 Extension and/or the Addendum was concluded;

inconsistent and/or in want of compliance with the Constitution [for any reason] and consequently declared invalid;

- then and in such event, that it be declared in terms of section 172(1)(b) of the Constitution that any such declaration of invalidity shall not have the effect of:
- divesting Siyangena of any rights to which, but for the declaration of invalidity, Siyangena might have been entitled to under the respective contracts awarded to it by PRASA in pursuance of the Phase 1 and Phase 2 Tender processes, the Phase 1 Extension and the Addendum, but for the declaration of invalidity; nor
- divesting the arbitrators of their jurisdiction to determine Siyangena's claims in the arbitrations.
- 354 It is submitted, for the reasons set out herein above, that Siyangena has made out a proper case for such relief.

- 355 The equitable relief proposed by PRASA is not just and equitable for the following reasons:
- I have already dealt with the Siyangena Pricing Structure herein above and reiterate the composition of the contract consideration contemplated in each of ISAMS Phase 1 [as extended] as well as ISAMS Phase 2.
- The asset and installation verifications in relation to the supply, installation and commissioning of ISAMS in relation to Phase 1 and Phase 2 have been duly and properly performed and a remeasurement of that alone, would prove the truth, authenticity and correctness of the equipment supplied, delivered and installed by Siyangena at the subject train stations.
- The difficulty however is that Siyangena's ability to by way of collateral documentation substantiate each and every transaction which it incurred in relation to its almost R5 billion performance over the past 8 years.
- 355.4 It is however, of paramount importance to note that a considerable portion of Siyangena's claims against PRASA



relates to Siyangena's performance in relation to the guarantee and maintenance component in relation to contracts.

- In this respect, Siyangena's performance in pursuance of same is not readily measurable. This is so because Siyangena did not keep record of each every document in substantiation of each and every attendance expended towards the maintenance and guarantee components of the respective contracts.
- 355.6 This performance of Siyangena's in respect of its obligations are not at all measurable.
- What is more, the PRASA Equitable Remedy is from a practical perspective not enforceable. I say this because it is sought to operate in a vacuum for want of a terms of reference. PRASA wants the independent engineer to value the works performed by Siyangena but it is [questionably] silent on the criteria to be adopted in relation to the contemplated valuation.
- 355.8 The only way in which a proper valuation of the present installations can be adopted is if the rates in the respective bills of quantitates and Siyangena's tender documents, as approved by PRASA, are retained.

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- The valuation proposed by PRASA is consequently open to the exercise of an arbitrary discretion of an engineer that will enter this impasse cold and unfamiliar with the intricacies involved in the predominant circumstances.
- 355.10 Then, the viability of the PRASA Equitable Remedy is dependent upon the parties agreeing on the value of the works within 90 days from receiving the engineer's report. The chances of the parties reaching such agreement are slim to say the least, particularly having regard to the circumstances under which these proceedings are taking place.
- 355,11 If the engineer valuation and *inter se* consensus dependant approach of PRASA does not achieve the intended purpose, then PRASA wants a court to perform such role. This is with respect, completely absurd as the court does not have the resources nor necessarily the expertise to perform such a role.
- 355.12 The PRASA Equitable Remedy will particularly not be capable of being applied towards the quantification of labour expended on maintenance, replacement of stolen and/or vandalised equipment or call outs.

The fact of the matter is that the PRASA Equitable Remedy will 355.13 he anything but just and equitable.

# [Q]SERIATIM RESPONSES:

- 356 Due to the stance adopted by Siyangena in relation to the nature of its defence to the review application, considered with the version it has provided herein above, this affidavit will not endeavour to address the contents of the founding affidavit on a paragraph by paragraph basis.
- 357 My failure to respond to specific allegations is not an admission, concession or waiver of any nature. Such failure to respond should, for present purposes, be considered as a denial of same.
- 358 I stand by what I have stated hereinabove as well as in my other affidavits filed in relation to this matter.
- 359 I deny any allegation, submission or opinion expressed by any party which is contrary to the contents of the aforementioned affidavits, but I accept any admission of an allegation contained herein.
- 360 In regard to correspondence exchanged, I admit that they were sent by their authors and received by their intended recipients on



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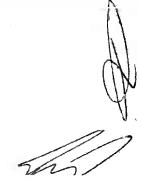
the dates depicted therein but I dispute PRASA's interpretation of such correspondence as well as the context in which reference is made to its contents.

361 Full legal argument will be presented on the contents of the correspondence within the context of the facts as sustained by the evidence of probative value contained in the affidavits

362 I do, however, within the aforesaid confines, respond to certain aspects of the founding affidavit, as set out hereunder. I need to reiterate that, by responding to these paragraphs I incorporate what I have said hereinabove as context and background to each such response. The purpose of the ad seriatim response should in no way be interpreted as an effort to repeat what I have said hereinabove and my failure to, again, deal with these issues in detail is most certainly not an admission that the allegations contained in the founding papers are correct or not disputed:

## Ad paragraph 1 thereof:

363. The contents hereof is noted



### Ad paragraphs 2 to 7 thereof:

- 364 It is admitted that the contents of the founding affidavit do not fall within the deponent's own personal knowledge.
- 365 The bulk of Ngoye's 267-page [exclusive of annexures] founding affidavit constitutes:
- allegations of [at best] a secondary factual nature that not 365.1 substantiated by primary facts and consequently nothing more than Ngoye's own personal conclusions and which do not constitute evidential material capable of supporting a cause of action;
- 365.2 inadmissible hearsay; and
- 365.3 inadmissible documentary hearsay.
- 366 In the premises Siyangena shall argue at the hearing of the Review Application that any such allegation in Ngoye's founding affidavit ought to be either struck out or disregarded in pursuance of the adjudication of the Review Application.

- 367 I have demonstrated herein above that PRASA has performed a convenient selection of documents disclosed to the court in relation to this application.
- 368 What is more, PRASA proposes a particular avenue as a just and equitable remedy in relation to this matter but evidently and purposefully not deal with the present status of the works and issues relevant to the exercise of a discretion in terms of section 172(1)(b) of the Constitution.
- 369 This is so under circumstances where PRASA has had ample opportunity in the past and in this Review Application, to record its version as to Siyangena's performance in terms of the contracts awarded to it.
- 370 PRASA does its level best to avoid dealing with those facts because the factual reality is that Siyangena has performed in respect of its obligations towards PRASA in terms of the said contracts.
- 371 Save as aforesaid each and every allegation is denied.

## Ad paragraphs 8 to 11 thereof:

372 It is admitted that the contents of the founding affidavit do not fall within the deponent's own personal knowledge.

#### Ad paragraph 12 thereof:

- 373 The intended purpose of the application is noted.
- 374 It is denied that PRASA is entitled to an order as prayed for in terms of this Review Application.
- 375 Save as aforesaid I have already dealt with the issues under reply and deny any:
- 375.1 Factual allegation contrary to what I have stated herein above; and
- 375.2 submission that is not sustained by Siyangena's version and the documents referred to by Siyangena herein.

## Ad paragraph 13 thereof:

376 I have already dealt with the contents hereof insofar as it is relevant to the present proceedings and I repeat what I have said hereinabove.

## Ad paragraph 14 thereof:

377 I admit that PRASA's conduct is subject to the Constitution, the Public Finance Management Act, the Preferential Procurement Policy

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Framework Act and the regulations promulgated thereunder from time to time.

- 378 I admit the remainder of these allegations insofar as they are supported by the express provisions of the subject legislation and regulations, as they were in force at the material times and in relation to the material events that form the subject matter of these proceedings.
- 379 Siyangena does not have primary knowledge of any breach of the aforesaid statutes and regulations on the part of PRASA and was, I reiterate, not participant in any contravention thereof as my be alleged or inferred by PRASA, or at all.

#### Ad paragraphs 15 to 16 thereof:

- 380 Siyangena does not have primary knowledge of the allegations under reply.
- 381 These allegations are admitted insofar as they are precisely in accordance with the documentation relied upon to sustain them. To the extent that they are not, Siyangena reserves the right to argue to the contrary.

- 382 I have also, throughout the aforesaid, dealt in some detail with the procurement processes of PRASA in relation to the procurement of contractors to supply, install and commission ISAMS Phase 1 [as extended], ISAMS Phase 2 and the conclusion of the Addendum.
- 383 Save as aforesaid, each and every allegation is denied. I also pause to repeat that the deponent to PRASA's founding papers can, at best, rely on hearsay evidence with regards to the factual background applicable to the procurement policy and, to the extent that I have not denied it earlier on, deny that she has a proper understanding of PRASA's own procurement policy and how it was applied.

## Ad paragraph 17 and subparagraphs thereto::

- 384 I have dealt with these allegations in some detail hereinabove.
- 385 I repeat that Siyangena cannot meaningfully or at all respond to many of the allegations concerning the internal operations of PRASA in so far as its conduct does not relate to Siyangena and, obviously, due to the fact that Siyangena does not have access to the resources and/or witnesses and/or documents in order to verify these allegations.

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- 386 In so far as the factual background to the review application according to Siyangena is concerned I have already deal with same hereinabove and to the extent that the averments contained in the founding papers contradict what I have stated I repeat what I have said hereinabove.
- PRASA, internally, in relation to the supply, installation and commissioning of ISAMS.
- 388 Accordingly, Siyangena cannot meaningfully or at all respond to the primary allegations of fact concerning the internal operations of PRASA insofar as its conduct does not relate to Siyangena.
- 389 Insofar as the factual background to the Review Application according to Siyangena is concerned, I have already dealt with same herein above.

#### Ad paragraph 18 and subparagraphs thereto:

390 I dealt with the processes, as Siyangena understands them, with regards to the Phase 1, Phase 1 extension, Phase 2 and Addendum agreements and how they were concluded.

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391 Without derogating from the aforesaid, I respond to certain paragraphs which are concerned with allegations made directly against Siyangena and/or Ferreira, as follows:

#### 391.1 Ad paragraph **18.1** to **18.4** thereof:

The stations to which Chris Metelerkamp is referring to are Athlone and Heideveld stations, Athlone was a station done as part of the 2010 project while Heideveld was never part of Phase 1 so how these could be construed to be the instigation of the ISAMS project is pure conjecture and factually incorrect.

## 391.2 Ad paragraph 18.6 thereof:

PRASA is not comparing the same scope of works, during 2010 the scope of the works was primarily limited to CCTV, and Speedgates only. On 2 stations there was also Access Control while 3 other stations only had Speedgates. The Phase 1 stations include a full bouquet of services including Public Address Systems, Electronic Display Boards, CCTV, Access, Smoke Detection, Civils and Speedgates. These other services were done by other contractors including Siemens during the 2010 project.

#### 391.3 Ad paragraph 18.28.2 thereof:

Each automated fare collection system utilises their own propriety reader as various systems utilise various ticketing methodologies, it's not normal for the gates to have their own readers as the readers merely provide a signal instructing the gates to open. On PRASA's request the speedgates at Park Station in Johannesburg were fitted by a third party who was testing an automated fare collection system with their readers to test the functionality of the gates and the gates were found to work perfectly with the third parties' readers.

#### **391.4 Ad paragraph 18.28.5 thereof:**

This is factually incorrect, PRASA employed before and continue to employ manual ticket verifiers. There were therefore no additional costs of personnel at the gates. We agree once automated these staff will become redundant and as indicated previously the gates have been tested and will work with any propriety automated fare collection system.

## 391.5 **Ad paragraph 18.30.4 thereof:**

This is denied, Dallmeier provides a wide variety of cameras and do not have limited capabilities but are considered a

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market leader worldwide. At Cape Town Parade concourse 2
Panomera cameras cover the entire concourse are versus what
would have been 20 plus cameras to get the same coverage so
in fact you use less not more cameras.

#### 391.6 Ad paragraph 18.30.5 thereof:

PRASA implied that Siyangena specified Autec but this was specified by PRASA and has been in use within PRASA since 1998 long before ISAMS was initiated. The specification was determined by PRASA and has been in use in PRASA since 1998.

#### 391.7 Ad paragraph 18.30.7 thereof:

Siyangena was the first to ask for an extension and they were denied as is seen from the email on page 842, not the other way around as stated in clause 18.70. It was only after Protea-also asked for an extension that this was given. Email on page 842 clearly says

"This is the second company, the first one was Friday when Chris called you regarding the ICS information. Remember on Friday you agreed with Chris that no extension must be give."

#### 391.8 Ad paragraph 18.106, 18.107 and 18.109 thereof:

The 90/10 PPPFA only came into law in terms of Government Gazette no 34350 dated 8 June 2011 long after the tender evaluation for ISAMS Phase 1 took place. It was not a requirement in December 2010 to allocate a 90/10 basis or for there to be two evaluations so this is incorrect.

As per above at the time of the evaluation there was no prescribed formula hence why Sindane also proposed another alternative, if there had been regulations they would all use the same formula.

#### 391.9 Ad paragraph 18.111 thereof:

There was no prescribed formula

#### **391.10 Ad paragraph 18.114 thereof:**

Siyangena clearly states in their covering letter that they are a Level 3 BBEE contributor so its factually incorrect that Siyangena should not score any points for BEE.

#### 391.11 Ad paragraph 18.115:

This is factually incorrect on the even using the scoring system that Sindane proposed the scoring would have been according



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to the calculations on page 898, assuming 50 Technical, 40 Pricing and 10 BEE, as follows:

-	Weight	Marothi	Omega	Coin	Siyangena
Technical	50	16.7	14.2	20.8	40.8_
Price	40	36.08	5.16	40	17.02
BEE	10	5.8	3.6	5.7	9
		58.58	22.96	66.5	66.82

Even using Sindane's model and excluding the pricing model Siyangena still the highest.

#### **391.12 Ad paragraph 18.235 thereof:**

This is incorrect, all stations are designed in conjunction with PRASA and drawings are signed off prior to commencement of the works on site.

### 391.13 Ad paragraph 18.236 thereof:

This is incorrect, verifications are done on both a regional and national basis prior to payment.

## **391.14 Ad paragraph 18.238 thereof:**

I annex hereto a detailed response to the report of Secelec

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dealing with the conclusions reached in the report of Secelec as annexure "ST59".

It is necessary to point out certain facts were not disclosed in the founding affidavit and/or not taken into account by Secelec. If these facts were taken into account the outcome of the report would obviously have been different.

There are various different CCTV installations at Park Station. In the last three years Siyangena has done an installation which is connected to the control room. There have been installations done by two other contractors namely Protea Coin and AJ Electronic Security Systems. These systems are also linked to the control room. These installations are linked and utilise the equipment room adjacent to the monitoring area to house their equipment. All the equipment installed, the monitoring philosophy and the procedures are as stipulated by PRASA.

Siyangena was not responsible for control or operational procedures. These are internal procedures within PRASA.

Siyangena merely installed the equipment as defined by PRASA.

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The Park Station precinct has been identified for a major upgrade by the project team due to the number of stand alone systems in operation that have not been integrated into a holistic consolidated solution.

The pictures taken by Secelec indicating poor installation quality methods are of those installations carried out by other contractors. In this regard I refer the honourable Court to the attached report for detailed information.

A further major contributing point that has to be highlighted is the poor lighting. The first respondent was not responsible for the lighting and merely installed the specified cameras in the locations as stipulated by PRASA.

# 391.15 Ad paragraph 18.239, 18.244 and 18.245 thereof:

A detailed breakdown of each claim was submitted to PRASA for payment.

These invoices, together with their supporting documentation, were not only delivered to PRASA but are also included in the reference bundles I referred to hereinabove

Why PRASA did not use it or why there are differences in the percentages complete only PRASA can attest to but each and every claim was supported by a detailed breakdown of the works done. At no point was there a reversal of any percentage completion or a dispute in regard thereto. All claims were cumulative and invoiced on a work done to date less work previously invoiced.

I confirm the truth, authenticity and correctness of each and every invoice, including the invoices under reply, raised upon and issued by Siyangena to PRASA as well as the accuracy of the basis upon which each was prepared.

## 391.16 Ad paragraph 18.246 thereof:

These invoices were for work done for the fencing project which was not part of ISAMS but was fencing from Khayelitsha to Chris Hani. This was later rectified and allocated correctly after Montana's query.

## 391.17 **Ad paragraph 18.247 thereof:**

A detailed breakdown of the claim was submitted with each claim, why PRASA did not use it we do not know but each item was broken down in detail.

#### **391.18 Ad paragraph 18.248 thereof:**

PRASA is being disingenuous in their comparison and are comparing apples and pears. The original tender allowed only for the supply and install of the equipment while the signed contract allowed for not only the installation of the equipment but also the maintenance and upkeep of the system over a period of 5 years. The initial accepted tender included for a 5-year payment plan and financing option and this was the basis on which the tender was awarded. This is evident from the fact that initially there were set monthly invoices and not progress claims which covered not only the installation but also the guarantee and maintenance of the project. These were invoiced and paid by PRASA accordingly.

However, in late 2012 PRASA requested that they no longer wished to pursue the financing option but wanted only the installation, guarantee and extended warranty and services (maintenance) to be included and in conjunction with the PRASA project team the rates were reworked to include for these items in the rates. In the process PRASA were credited R55 082 943.07 of financing costs and these were added to the project contingency which increased from R45 966 876.85 to R101 049 819.92.

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Furthermore, when PRASA went out on tender they did not have the time to physically go out and measure each individual station and quantify the exact quantities but instead went out on three generic types of stations namely small, medium and large. During the contract execution a joint survey was done by the project team comprising both PRASA and Siyangena representatives of every site and only then was it properly quantified and the specific scope of works per station agreed. All stations followed this process. We've attached copies of the approved design drawings that were approved prior to commencement on the station.

With Regards Daspoort it bears importance to note that Daspoort was executed as part of the variation order as an extension to Phase 1 and was not a Phase 1 station so comparing the rates to the Phase 1 station tendered rates is further evidence of the fact that PRASA is trying to confuse the court by comparing two separate contracts. The phase 1 variation order was only given in September 2013 more than two years after the Phase 1 contract had been signed. Below we have taken an extract according to XE.com of the exchange rates at both points in time.

On 16 November 2010 (Phase 1 Tender submitted) 1 US Dollar was equal to R7.06 and 1 Euro was equal to R9.54.

On 10 September 2013 (Notice of Appointment - Phase 1 Variation Order) 1 US Dollar was equal to R10.03 and 1 Euro was equal to R13.30.

As can be seen from the above the exchange rate had deteriorated in relation to the Rand/US Dollar relationship by 42% and the Rand/Euro relationship by 39%.

The reason for the rates of the Phase 1 extension being higher than the agreed rates of Phase 1 was also due to the above severe deterioration in the currency that occurred between November 2010 and September 2013.

## 391.19 Ad paragraph **18.248.1** thereof:

As stated above this is a disingenuous comparison, PRASA by their own admission are aware that the Phase 1 extension rates have been adjusted for currency fluctuation, as is referred to in its founding affidavit on page 224 in paragraph 19.103.1: " rates as agreed and negotiated for the extension to Phase 1 as these were adjusted for ROE fluctuation."

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Thus, to compare the two is an attempt at misleading the court that they are the rates are from the same contract.

#### 391.20 Ad paragraph **18.248.2** thereof:

As stated above the tender was based on a generic station and did not include for all the specific items required. The inclusion of the Engineering item is an example of an item that is standard on most contracts yet in the generic Bills of Quantities this was not included and hence had to be included as part of the re-measured items.

#### 391.21 Ad paragraph 18.248.3 thereof:

Yet again PRASA is trying to confuse the items. Item 2.1.1.2 is described as follows:

"Manufacture, supply and install HDG Steel vandal resistant cage, to PRASA specifications, to accommodate 2 speakers. Rate shall include for all brackets necessary for mounting to pole and fixing of speakers."

As can be seen this is for a vandal resistant cage to accommodate two speakers and includes for fixing the said vandal proof cage to the pole and the fixing of the speakers to it and is **NOT** for the bracket to fix the speakers to the pole as listed below:

"Manufacture, supply and install Stainless Steelbracket, to PRASA specifications, to accommodate 2 speakers."

I attach hereto photographs as annexures "ST60" and "ST61" which confirm the two items to be completely different and separate installations. The first photograph is a Vandal Resistant Cage and the second a Bracket.

#### 391.22 Ad paragraph 18.248.4 thereof:

Once again this is an attempt at confusing the two contracts, they are correct in saying that item 5.2.4 in the Phase 1 tender bills of quantities was a patch panel, however by the time PRASA requested a proposal for closing off of the corridors for Phase 1 extension Siyangena were already aware of the majority of the additional items and the numbering on the BOQ that they are referring to was the numbers included in the original submission.

## 391.23 Ad paragraph 18.248.5 and 18.248.6 thereof:

As stated you cannot compare the two stations, not only are they for two different phases of the contract, two different agreed rates but the additional scope is not taken into account.

At Daspoort in order to house the speedgates a new speedgate

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building was designed and built see attached pics. The original generic BOQ called for 1 platform speaker yet the approved design required 42. The BOQ called for 1 Electronic display board yet the final approved design called for 4. The BOQ called for 2 DVR's yet 4 needed to be installed as the cameras increased from 19 to 39. This comparison can be done for all the items but we have only highlighted a few to show that the comparisons made are done in bad faith in order to create a picture of over claiming when in fact the original allowed BOQ had been under measured.

I attach hereto before and after photographs in relation to the subject train stations as annexure "ST62".

## **391.24 Ad paragraph 18.253 thereof:**

This falls within his delegated authority of approving up to R100 million and was for CCTV coverage and surveillance of the staging yards at Wolmerton and Braamfontein necessitated after the death of a train driver, was not an extension of ISAMS although similar technologies were used.

391.25 Let me reiterate that any inferences or innuendos di wrongdoing by Siyangena contained in paragraph 18 of the

founding affidavit are vehemently denied. I need to reiterate and confirm that the applicant failed to produce any evidence which could establish a burden on the first respondent to rebut same as far as allegations and/or proof of wrongdoing is concerned.

- 391.26 I must, further, reiterate that the so called "Werksmans investigation" did not yield any criminal [or even civil] liability as a consequence of alleged ill-conduct and/or wrongdoing. I have raised hereinabove that despite these charges being levelled against Montana and Van der Walt [as far as I understand] none of those were prosecuted. The same goes for innuendos of internal wrongdoing which would have benefited the applicant.
- 391.27 I conclude the ad seriatim response under paragraph 18 to reiterate that none of the allegations contained herein. on reasonable interpretation thereof, implicates any wrongdoing or frustrating conduct by Siyangena as far as the Public Protector and her report is concerned.

## 391.28 Ad paragraphs **19.1** to **19.3** thereof:



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As previously stated in paragraph 123 herein above PRASA contends that annexure FA138 [pp1695] to its founding affidavit constitutes an unsolicited bid to ignite the Phase 2 Tender Process. This is a misrepresentation by PRASA. Siyangena was already at this stage awarded the Phase 1 Extension to close off corridors in Gauteng. Annexure "FA138" was a proposal requested by PRASA to ascertain the magnitude involved in similarly rolling out the project to the other key corridors nationwide. PRASA, on appreciating the magnitude of the project decided to go out on an open tender for this work and at no time did they negotiate or discuss this proposal further.

## 391.29 Ad paragraphs 19.46 thereof:

From the deponents own annexures it can be seen that the initial notice of appointment from the applicants was sent to MR Pragason Reddy (Annexure FA157 to the applicants founding papers). Mr Reddy was unavailable and did not have access to the correspondence. The applicant then telephonically contacted the first respondent enquiring as to why there had been no acceptance. The court will note from Annexure FA158 to the applicants founding papers that the applicant then directed the aforesaid correspondence to

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Ferreira **but** amended the required acceptance to be no later than 16 September 2013. Upon receipt of same Ferreira immediately accepted the appointment as is evident from Annexure FA160 to the applicants founding papers.

- Most of the submissions advanced under the aforesaid paragraph [with its subparagraphs] relate to internal processes of PRASA and, in further particularity, different versions of draft minutes of certain meetings. It is obviously impossible for Siyangena to comment on the aforesaid save to, again, record that no impropriety [by Siyangena] can be deducted from the aforesaid.
- During consultation with Mr Gantsho Siyangena's legal counsel enquired about these allegations of different versions of minutes (not in particular those referred to in paragraph 19, but also others implying some mischievous or secret agenda in these different versions of unsigned agendas).
- 391.32 Mr Gantsho explained that it was not uncommon to have different versions of drafted agendas and/or minutes which would surface from the records in an investigation like the one conducted by Werksmans.

- Mr Gantsho explained that, like any other normal corporate entity, its functionaries will prepare drafts of whatever document needs to be signed which drafts will then be circulated amongst the members of a particular committee and/or internal structure. Unsurprisingly these different versions will get amended and/or supplemented and in many instances portions will get deleted to be replaced.
- 391.34 In many instances [probably most of them if not all] these draft minutes are eventually approved in a final format and, where necessary, signed off. This process does not insinuate any ill conceived intention or effort to mislead and/or misguide.
- 391.35 To the extent, therefore, that PRASA relies on different versions of (even unsigned) minutes to show impropriety I submit that the aforesaid is unfounded and meritless read in context with the actual circumstances and possibilities. Again, however, it cannot be expected of Siyangena to give first-hand or appropriate comment on the internal processes of PRASA and the way their officials conducted themselves without the knowledge of Siyangena.

- 391.36 As far as remarks are made with regards to the technical specifications, its origin and how those came about I repeat what I have said hereinabove and submit that the deponent to PRASA's founding affidavit does have the necessary or required understanding of how the technical specifications originated or got incorporated in the eventual bills of quantity and contractual specifications. I repeat what I have said hereinabove as far as these issues are concerned.
- 391.37 Several innuendos are advanced with regards to "efforts" employed by Montana to prefer Siyangena over other bidders.

  In this regard I refer to the alleged "astounding misrepresentation" referred to in paragraph 19.94.5 of the founding papers.
- As much as Ngoye hopes to pursue allegations of ill-nature against Montana with reference to what he purportedly represented and/or misrepresented I wish to reiterate what I have said hereinabove and in particular the fact that the applicant (hopelessly) failed to draw any link between Montana and Siyangena as far as alleged undue benefits and/or advances are concerned.

- 391.39 I understand the efforts of Ngoye, inter alia, in paragraph 19 and subparagraphs thereto [of the founding papers] to imply that Montana went out of his "normal" way to benefit Siyangena. I deny that Siyangena benefited from any ill-conceived efforts by Montana and I deny that Montana received [or can be perceived to have received] any privileges, benefits and/or advantages from Siyangena, directly or indirectly.
- 391.40 Seen against the fact that the Board, in any event, approved and in fact mandated the agreements with Siyangena I submit any such efforts by Montana would have been of no consequence had the Board considered the matter and applied its mind, which I submit it did under all circumstances.
- 391.41 To the extent that Ngoye submits that the "Board was neither approached for approval nor approved the appointment of Siyangena as final bidder" I submit that the aforesaid internal issues and/or possible lack of authority falls outside the ambit of Siyangena's knowledge. Siyangena, at all relevant times believed that the PRASA internal processes were duly complied with and executed under the agreements so concluded. I need not remind the Honourable Court of the fact that PRASA acted [and continues to act] in line with the provisions of the

agreements as it instructs Siyangena on a daily basis to execute Its obligations under the agreements.

## Ad paragraph 20 and subparagraphs:

#### Ad paragraph 20.1 thereof: 391.42

This is incorrect, the addendum stems from a request from operations to align the 2 phase of ISAMS so it can function as a cohesive system. This request was brought up by the project team during the negotiations for the Phase 2 contract. I, again, refer to PRASA's own minutes of the Board meeting dated 29 May 2014.

#### Ad paragraph 20.2 thereof: 391.43

I attach hereto the email from Ferreira to the GCEO dated 20 June 2014:

Ad paragraph 20.9 thereof: These submissions by Ngoye are vehemently denied and dealt with by me hereinabove. I will also refer to the affidavit of Montana with regards to the fact that Ngoye misdirected herself in this regard.

392 Save as foresaid each and every allegation contrary to what I have sald increinabove is denied. I repeat what I have submitted with regards to Siyangena's bona fide belief that all internal processes at PRASA were complied with and that Siyangena receives instructions from PRASA on a daily basis to execute under these agreements PRASA now hopes to renege on [whilst it enforces the agreements in the same breath]

## 393 Ad paragraph 21 and subparagraphs thereto:

- 393.1 I have dealt with allegations of improper financial benefits hereinabove.
- 393.2 On a reduction of the allegations raised by Ngoye in these paragraphs I am still to find the alleged undue or improper financial benefit.
- I nave indicated hereinabove that I cannot comment on the relationship between Van der Walt and Montana save to confirm that as far as I know Van der Walt is a developer/property investor in his own right whilst Montana obviously displayed a desire to become involved in the business of property development and investment. Van der Walt and Montana conducted their own business amongst





themselves and I can only refer to the affidavit deposed to by Van der Walt in this regard [an annexure to these papers].

- I cannot seem to find one single allegation that Siyangena 393.4 provided funds and/or benefits and/or aided Van der Walt to solicit the involvement of Montana and/or to lure Montana into any transaction with Van der Walt. Even more important is the complete lack of an allegation [let alone proof thereof] that Montana benefited from the relationship he had with Van der Walt.
- As a consequence of the aforesaid I must reiterate that: 393.5
- There is no allegation that Siyangena used [or abused] Van der 393.6 Walt as an agent;
- There is no allegation that Siyangena paid Van der Walt any 393.7 benefit to use in any of the alleged transaction with Montana;
- There is no proof or allegation that Montana received any 393.8 benefit since the factual end result of the transactions between Van der Walt and Montana is that Van der Walt ousted montana from the relationship and is, at present, the only and sole owner of these properties via his entities;

- Nowhere in Ngoye's affidavit is one single fact which could impry or indicate that Slyangena is linked to any benefit actually [or even potentially] received by Montana;
- 394 As a consequence of the aforesaid I submit that Ngoye failed to establish any grounds on which a court can realistically rely to assume any undue benefits from Siyangena to Montana
- 395 The same goes for the reference to Gantsho in these subparagraphs in the founding papers. I have dealt with the aforesaid hereinabove and as a consequence deny any undue benefit or even potential undue benefit which PRASA can rely on in order to show ill-conceived conduct by Siyangena.

## 396 Ad paragraphs 22, 23 and 24 thereof:

- in these paragraphs PRASA deals with, mainly, background to its investigation, its assumptions of impropriety and the grounds for review of the tenders and/or the agreements pursuant thereto.
- I deny the aforesaid allegations to the extent that they are in any way contrary to what I have said hereinabove.

- 397 I have dealt with these allegations in fair detail before I dealt with the paragraphs ad seriation and I incorporate those allegations [which I have made] herein as if repeated.
- 398 It is denied that an inappropriate relationship developed between individuals involved with PRASA and persons related to Siyangena.

  I have already dealt with this herein above. The conclusions of PRASA in this respect are unfounded and there is not a single allegation in the founding affidavit to suggest otherwise.
- 399 Siyangena certainly did not determine the extent of the deliverables contemplated by the contracts. All of these deliverables were predetermined in accordance with the specifications and the Engineering drawings procured by PRASA, compliance with which was at all times a prerequisite of PRASA.
- 400 The delivered works are commensurate to what was required by PRASA and Siyangena's invoices accurately reflect the value added to PRASA's infrastructure in pursuance of its compliance in terms of ISAMS Phase 1, ISAMS Phase 2 and the Addendum.
- 401 PRASA seeks an order declaring the signature of the JBCC Agreements to have been unauthorised [prayer 1 of PRASA's notice of motion].

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- 402 Siyangena at all material times acted on the reasonable and bona nide belief that the signatories to the lotters of instruction, contrasts and correspondence on behalf of PRASA, were duly authorised to do so on its behalf and bind it on the terms and conditions contained in the said documents.
- its only now, years after the fact, that PRASA attacks the issue of its own signatories to the respective contracts, under circumstances where all within PRASA has, vis-à-vis Siyangena, conducted themselves in accordance with the respective contracts. The parties particularly conducted themselves on the basis that the contracts were validly and lawfully concluded between the parties, on the basis that the parties' representatives in fact had proper authority to represent the respective parties at all material times.
- 404 PRASA is consequently estopped from denying the authority of its representatives to bind it towards Siyangena in terms of the signed contracts, the issued letters of instruction and the correspondence between the parties in general.
- 405 In any event, Siyangena denies the alleged lack of authority on the part of PRASA's representatives (to conclude the agreements with Siyangena) and the founding affidavit lacks the necessary probative allegations of fact to sustain the relief sought.

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- 406 Siyangena opposes the subject relief sought on such basis.
- 407 PRASA also seeks an order reviewing and setting aside PRASA's decision to appoint Siyangena for the supply and installation of ISAMS in respect of ISAMS Phase 1 and ISAMS Phase 2 as well as PRASA's decision to appoint Siyangena for the guarantee, maintenance and upgrading of the ISAMS equipment, as provided for in the Addendum [prayer 2 of PRASA's notice of motion].
- 408 PRASA pursues an order setting aside the JBCC Agreements and the Addendum [prayer 3 of PRASA's notice of motion].
- 409 PRASA seeks an order setting aside the arbitration clauses contained in the JBCC Agreements [prayer 4 of PRASA's notice of motion]
- 410 The review and setting aside of the subject administrative action and the contracts concluded contingently thereon, are predominantly sought on the basis of the internal flaws within PRASA. Siyangena was in no fashion associated, participant or in any manner involved with any of the conduct complained of by Ngoye as alleged or at all.
- 411 The aforesaid demonstrates that Siyangena was, in fact, the victim of PRASA's conduct, not the instigator or cause therefor.

- 412 This notwithstanding, the ground for procuring the review of the subject administrative action are.
- 412.1 Matters for legal argument; and
- Their merit is dependant on the admissible facts before court and full legal argument will be presented on this aspect at the hearing of the matter.
- 413 If a court finds, on the contents of the founding affidavit, that the subject administrative action should be set aside based on the conduct of PRASA's officials, then Siyagena again emphasises that it cannot be held accountable or to blame for such conduct and the consequences of same in relation to validity or legality of the subject decisions. In such an event Siyangena prays for an order in terms of the Siyangena Application and as detailed herein above, for the reasons stated.
- aforesaid, PRASA seeks an order that the arbitration clauses shall cease to have effect with reference to the disputes referred to arbitration by Siyangena [prayer 5 of PRASA's notice of motion]. As I have stated herein above, there is no case made out for such



relief to be granted and the founding affidavit is in want of the necessary allegations to sustain the relief sought.

## [S] CONFIRMATORY AFFIDAVITS:

- "ST4" and "ST5"], Mario Ferreira, Pragason Reddy and Gert Van Der Merwe are attached hereto as annexures "ST63" to "ST65".
- 416 In the premises Siyangena pursues an order dismissing the Review Application with costs, alternatively that it be granted and order that:
- should it be declared by a court of competent jurisdiction and/or held by either one or both of the arbitrators that:
- Siyangena was awarded the Phase 1 Tender and/or the Phase 2 Tender; and/or
- 416.1.2 the Phase 1 Extension and/or the Addendum was concluded;

inconsistent and/or in want of compliance with the Constitution [for any reason] and consequently declared invalid;

- then and in such event, that it be declared in terms of section 416.2 172(1)(b) of the Constitution that any such declaration of invalidity shall not have the effect of:
- divesting Siyangena of any rights to which, but for the 416.2.1 declaration of invalidity, Siyangena might have been entitled to under the respective contracts awarded to it by PRASA in pursuance of the Phase 1 and Phase 2 Tender processes, the Phase 1 Extension and the Addendum, but for the declaration of invalidity; nor
- divesting the arbitrators of their jurisdiction to determine 416,2.2 Siyangena's claims in the arbitrations.
- 417 It is submitted, for the reasons set out herein above, that Siyangena has made out a proper case for such relief.
- 418 In light of the fact that PRASA failed to make out a case for the relief sought, I beg the Court to dismiss the application with costs and to grant the relief to which I made reference hereinabove.

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DEPONENT

COMMISSIONER OF OATHS

#### PETER WAUGH

COMMISSIONER OF OATHS
Proprietor: Peter Waugh and Associates
Appointment Ref: 9/1/8/2 Pretoria (12/7/2006)
Republic of South Africa
Suite 3, 77 Rigel Avenue (North)
Waterkipol Hidge, Freteria