

**S12**

**AFFIDAVIT & ANNEXURE**

**OF**

**MARIJKE CHRISTENE  
DE KOCK**



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

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## AFFIDAVIT

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I, the undersigned,

**MARIJKE CHRISTENE DE KOCK**

do hereby state under oath that:

1. I am an adult female and employed with the National Prosecuting Authority (NPA) as an Advocate. My office is situated at the Specialised Commercial Crime Unit, Visagie street Pretoria. I am a prosecutor specializing in commercial crime including theft, fraud and corruption.
2. All the facts stated in this affidavit are, unless the context indicates otherwise, within my own personal knowledge. They are to the best of my knowledge and belief true and correct.

### QUALIFICATIONS AND EMPLOYMENT HISTORY

3. I have a B Iuris and a LLB Degree obtained from the University of Pretoria. I joined the prosecuting service on 1 December 1986. I have held various senior positions including senior State Advocate and Deputy Director of Public Prosecutions.

4. I am currently employed in the position of Senior Deputy Director of Public Prosecutions.

## **THE BOSASA INVESTIGATION**

5. During early 2010, I was assigned as the prosecutor on the Bosasa matter. The police case reference number was Pretoria CAS 1556/02/2010. The charges being investigated were fraud and corruption and offences under the Prevention of Organised Crime Act. I was removed as the prosecutor in the matter on 29 February 2016.
6. I am in the process of compiling a more comprehensive affidavit which will set out my involvement in the Bosasa investigation in much more detail. This will be made available to the Commission at a later stage.

## **THE PURPOSE OF MY EVIDENCE**

7. I have been informed that a Mr. Angelo Agrizzi, who was a suspect in the Bosasa matter from the outset of the investigation, has provided the Commission with certain documents that he claims are either South African Police Service (SAPS) documents or NPA documents which came into his possession illegally.
8. My evidence deals with the identification of documents that Mr. Agrizzi has placed before the Commission during his testimony.



## THE AGRIZZI DOCUMENTS

9. I can identify the following documents: AA-418 to AA-443, AA-445 to AA-469, AA-482 to AA-484, AA-486 to AA-500, AA-502 to AA-512, AA-513 to AA-527 and AA528 to AA-555.
10. The documents made available to me, fall into four categories and I refer to them as group one, group two, group three and group four.

### *GROUP ONE: AA-418 to AA-443 (ANNEXURE MDK1)*

11. The first or group one document is a legal opinion with the title "*Mail & Guardian Subpoena duces tecum dated 14 February 2011.*"
12. I highlight that the Agrizzi exhibit is missing one page between AA-435 and AA-436 as contained in my original document. Other than that, the Agrizzi exhibit is an authentic copy of a confidential NPA document dated 28 October 2011. It has been numbered AA-418 to AA-443.
13. During October 2011, the Bosasa investigator, Colonel Danie Kriel (since retired), approached me. He requested me to study some documents and give my comments on a subpoena duces tecum that was served on the Special Investigative Unit (hereinafter referred to as the SIU). The subpoena was dated 14 February 2011 but they only approached me during October 2011. I read the documents and drafted an

opinion. The document is self-explanatory and the information mentioned above is set out in the first paragraph. I finished the document towards the end of October and dated it, 28 October 2011. I do not know how these documents found its way to Mr. Agrizzi.

*GROUP TWO: AA-445 to AA-469 AND AA-471 to AA-472, and AA-478 to AA-480 (ANNEXURE MDK2)*

14. The second group of documents date from the period November 2012. They are dated: 1 November, 2 November and 26 November 2012 respectively. These exhibits are copies of official NPA correspondence and a related document: AA-445 to AA-469, AA-471 to AA-472 and AA-478 to AA-480.
15. On 1 November 2012 at 10:17 AM, Adv. Marshall Mokgatlhe of the SCCU in Pretoria received the following e-mail communication from Adv. Lawrence S. Mrwebi:

*"With reference to the attached representations, please, as a matter of urgency, can I get a status report on the Bosasa matter, setting out, inter alia, the charges, possible suspects, evidence against such suspect/s, anticipated difficulties in the matter, etc. The prosecutor must comment on the representations specifically saying why it is necessary to go this route and state whether we can be able to defend this matter if challenged and any possible suggestions. In*

*view of urgency can I get the prosecutors report by 10 am on 2/11/2012 so that I can respond to the lawyers."*

16. Thirty minutes later Adv. Mokgatlhe ("Mhlekezi") forwarded this message to me. He emphasized the urgency of the matter and instructed me to forward my response to him for onward transmission to Adv. Mrwebi.

17. The "attached representations" was a three-page document dated 31 October 2012, received from Brian Biebuyck and transmitted to Adv. Mrwebi and marked "By e-mail". The gist of the representations / complaint is found in paragraph three of the Eversheds letter:

*"In our clients view the serving of these subpoenas constitutes harassment, intimidation and the badgering of our clients in a manner reminiscent of apartheid styled intimidation of purported witnesses, to coerce them into making some form of statement in pursuit of a spurious and unsustainable criminal prosecution against others."*

18. I immediately prepared a response and submitted it to Adv. Mokgatlhe.

19. The covering letter with the heading "Memorandum" prepared for and signed by Adv. M.P. Mokgatlhe on 2 November 2012, confirms that the Agrizzi exhibit AA-

471 to AA-472 and its attachment exhibit AA-445 to AA-469 dated 1 November 2012, should be seen as a single set of documents. The subject heading of the covering letter: "In re representation, Eversheds: Subpoenas issued in terms of section 205 of the Criminal Procedure Act, 51 of 1977 issued to Sydney Mark Taverner and Sharon Hope Taverner" identifies the topic.

20. I quote from the first two paragraphs of the covering letter dated 2 November 2012.

21. Adv. Mokgatlhe writes to Adv. Mrwebi and informs him:

*"1. In respect of the (Eversheds) representation received on 31 October 2012 and your e-mail communication dated 1 November 2012 please find the following:*

*(1) A written response from Adv. De Kock and Janse van Rensburg setting out the legal position and their views on the merits of the representation – Annexure A."*

22. The original document (Annexure A) was free from any symbols or marks. The original recipient or someone else must have added the handwritten vertical lines found in the right margin of AA-461 and AA-465. Advocate Mrwebi declined to intervene.

23. The Agrizzi document numbered AA-478 to AA-480 was a subsequent progress report on the Bosasa



investigation dated 26 November 2012. I prepared the document and submitted it to Adv. Mokgathe.

24. The Eversheds representations and the end of month progress report dated 26 November 2012 were less than thirty days apart. The progress report refers to the outcome of the Eversheds representations. I quote from the second paragraph on the second page of the progress report:

*"We informed the Special Director that the Eversheds letter amounted to an irregular attempt to review the issuing of the subpoenas, avoid the required court appearance by the witnesses and mislead the NPA as to the true facts concerning the legal process. The Special Director informed Brian Biebuyck that the application to the magistrate for the issuance of the subpoena was well considered and that the activities related to a lawful investigative process. He declined to withdraw the subpoenas stating that such behaviour would amount to an unlawful review of the decision of the issuing magistrate."*

25. I do not know how these documents found its way to Mr. Agrizzi.

*GROUP THREE: AA-482 to AA-484; AA-494 to AA-500 read together with AA-486 to AA-493 (ANNEXURE MDK3)*

26. I have been requested to identify a document originating from the Specialised Commercial Crime Unit dated 30 April 2013. I have compared the document numbered AA-482 to AA-484 with an original source document found on my computer. With assistance, I have also been able to recover a second document, properly formatted, that is identical to exhibit AA-482 to AA-484.
27. Exhibit AA-482 to AA-484 resulted from a request to prepare a progress report on the Bosasa investigation. An earlier response appears to have been insufficient as I received a request for more information and "a detailed report" in respect of the Bosasa investigation, Pretoria-Central CAS 1556/02/2010. (Compare paragraph 1 of exhibit AA-482)
28. The document described as the original source document, is an unformatted five-page document dated 30 April 2013. I drafted the five-page document but I was unhappy with the format. I then requested Tsholofelo Moyo (the personal assistant of Adv. Mokgathe) to transfer the information to a new document. She fixed the format and returned the document to me. The second document is identical to the Agrizzi document exhibit AA-482 to AA-484.

29. I received a specific instruction to provide *more information*. In response to this request, I attached an extract from a draft charge sheet “with highlighted dates and events.” In consequence, the *extract* from the Gillingham charge sheet (“Annexure A”) was also dated 30 April 2013.
30. The attachment, with the header information *Draft Charge Sheet – POC Gillingham – 30 April 2013* found its way to Mr. Agrizzi. Mr. Agrizzi supplied it to the commission. The exhibit numbers allocated to the *extract* is AA-486 to AA-500. The draft charge sheet or *extract* consists of two parts. The *general preamble* (AA-486 to AA-493) *refers* to ‘movable property’, ‘fixed property’ and ‘benefits’. The *draft charge sheet* part of the extract (AA-494 to AA-500), consists of four main counts of corruption with their alternatives as well as money laundering and theft. I would like to refer to it as the “red text” charge sheet.
31. I attach a copy of an earlier version of these two documents consolidated as one. I attach the earlier version printed in colour showing the “highlighted dates and events” mentioned in the memorandum. (See: page AA-482)
32. I do not know how these documents found its way to Mr. Agrizzi.

*GROUP FOUR: AA-502 to AA-512, AA-513 to AA-527 and AA-528 to AA-555 (ANNEXURE MDK4)*

33. This is the fourth group of documents. These exhibits are authentic copies of a number of confidential NPA documents dated 8 August 2013.
34. On 8 August 2013 at approximately 01:46 PM, I sent an e-mail to the Acting Regional Head of the SCCU in Pretoria. I copied the message to a colleague Advocate Andries G. Janse Van Rensburg. I described the message as confidential. The subject line of the e-mail message had the following description: *"Confidential E-Mail – BOSASA – GILLINGHAM – MTI – AND OTHERS"*.
35. The e-mail message had a restricted distribution and I attached three separate word documents to it.
36. The first word document had the following description: *"Proposed Racketeering Memorandum – BOSASA & Others – 08 08 2013.docx"*.
37. The second word document had the description: *"Provisional Draft Charge Sheet – BOSASA – Racketeering.docx"*.
38. The third word document had the description: *"Provisional List of 149 Racketeering Activities – POC and L Mti.docx"*



39. I prepared these documents for official use in the name of the then Acting National Director of Public Prosecutions, Advocate Nomgcobo Jiba. I forwarded them to my superior, Adv. Marshall Mokgatlhe. The heading in bold described the purpose: ***"Confidential Documents as Requested by the ANDPP."***
40. I understand that the first, second and third documents described above, all ended up with Bosasa.
41. On 8 August 2013, we (referring to the investigating officers and I), already had serious concerns about document security. Adv. Marshall Mokgatlhe was aware of these concerns and I alluded to this issue in the second paragraph of my e-mail.
42. The exhibit numbered AA-502 to AA-512 is identical to the first attachment: *"Proposed Racketeering Memorandum – BOSASA & Others – 08 08 2013.docx"*.
43. The exhibit numbered AA-513 to AA-527 is identical to the second attachment: *"Provisional Draft Charge Sheet – BOSASA – Racketeering.docx"*.
44. The line markings at the bottom of AA-547 and AA-548 are different to my document. Other than that the exhibit numbered AA-528 to AA-555 is identical in

contents to the third attachment: *“Provisional List of 149 Racketeering Activities – POC and L Mti.docx”*

45. The first three lines of the e-mail message gives the context or background to the memorandum. I was alive to the fact that this document may land up in the hands of the suspects. I had to comply with the instruction issued by the Acting National Director of Public Prosecutions but at the same time alerted the recipients to the fact that the document had great deficiencies. That it was issued and prepared in anticipation or preparation for something fuller or more important, therefore *“preliminary”*. The document was also labelled as a *“draft”* indicating that it was only meant as a plan or sketch of something that would in future evolve into something better or more comprehensive *“subject to evidence that is still outstanding.”*
46. Each of the documents forming part of the set had its own unique heading.

***“Proposed Racketeering Memorandum – Confidential Document – 8 August 2013”.***

47. I individualised the *“proposed”* or suggested memorandum (AA-502 – AA-512) by supplying it with the following header: *“Proposed Racketeering Memorandum – Confidential Document – 8 August 2013”.*

RA  
Weak

48. The first paragraph of the document numbered AA-502 gives an indication of the uncertainties. I required specific information on a date. The text was part memo / part instruction: *"During 2009 (Obtain the Exact Date) ..."*

***"Provisional draft charge sheet – Racketeering – As per the instruction of the ANDPP – Confidential – Subject to amendments – Investigation still in progress – 08 August 2013."***

49. The draft charge sheet (AA-513 – AA527) had the following, document specific header: *"Provisional draft charge sheet – Racketeering – As per the instruction of the ANDPP – Confidential – Subject to amendments – Investigation still in progress – 08 August 2013."*

50. The document was prepared for submission to the recipient with three separate *"conditions"* of use. It was *"provisional"*, it was *"subject to amendments"* and premature in time as the investigation was *"still in progress"*.

51. The draft document was prepared before its proper time and at best, a provisional document could be produced.

52. The premature status of the document can be explained or demonstrated with reference to the last two paragraphs on page AA-518.

53. Instead of describing the relationships "*within the enterprise*", I turned it around and issued an instruction to myself:

53.1 Describe the growing relationship(s) between the (Legal) Entities.

53.2 Describe the personal and / or (corrupt) relationship(s) between the individuals employed by and associated with the Criminal Enterprise.

53.3 Describe the types of relationships they are involved in (1) Personal Relationships (2) Financial Relationships (3) Corrupt Relationships etc.

54. I did the same in respect of the second critical element, "the pattern of racketeering activities." Instead of describing these activities, I gave a futuristic response:

54.1 The Planning of the Pattern of Activities (Describe)

54.2 The Ongoing nature of the (pattern of) activities [Describe]

54.3 The Continuous nature of the (pattern of) activities. [Describe]

54.4 The Repeated participation in the (pattern of) activities. [Describe]

54.5 The Repeated involvement with the (pattern of) activities. [Describe]

55. Other clues as to the provisional status of the document is the open-ended numbering "4 ..." at page AA-517 and the words "Seven (7) out of ...." at page AA-519.

56. The e-mail refers to the charge sheet as "*a preliminary and draft charge sheet (subject to evidence that is still outstanding such as the Forensic Audit Report and Electronic Evidence as well as other statements...*". I further indicated that the charge sheet was incomplete. The provisional draft charge sheet was limited to ten counts only.

***"Racketeering – Provisional List of Activities LMM & POC."***

57. The third document had the title: "*Racketeering – Provisional List of Activities LMM & POC.*"

58. The document header was very specific as it identified all the known recipients: "*Provisional list of Racketeering Activities – POC Gillingham + LM Mti – Note – This list is still incomplete and subject to amendments – Draft document only – Confidential – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013).*"



59. I highlighted some of the information in yellow. Compare the dates 10 May 2004 and 13 May 2004 on page AA-528.
60. The highlighted portions of the text functioned like a watermark. If copied, it would have a dotted frame like appearance that could assist in identifying a subsequent photocopy.
61. Other information such as the office note: "[Compare SIU report p.23]" page AA-529, the words "[Rework]" on page AA-530 and "[Confirm – Payment in respect of Mti]" on page AA-533, or [Move 2 2005] on page AA-554, would have conveyed the message or confirmed the fact that this was a work in progress and that critical information was still outstanding.
62. Despite the repeated warnings and the precautions that we took to prevent the leaking of these documents, they eventually found their way to Mr. Agrizzi.
63. I attach copies of the source documents extracted from the computer system of the National Prosecuting Authority. These documents have been printed in colour to show their original appearance. I can confirm the authenticity of these documents. I am the author of these documents.
64. I do not know how these documents found its way to Mr. Agrizzi.

## THE IDENTIFICATION AND AUTHENTICATION OF THE AGRIZZI DOCUMENTS

### GROUP ONE: MDK1 – MAIL & GUARDIAN SUBPOENA DUCES TECUM

65. I have compared the Agrizzi document numbered AA-418 to AA-443 with the original source document on my computer. I can identify the document from the following features:
- 65.1 The title in bold: ***"Mail & Guardian Subpoena duces tecum dated 14 February 2011"***
  - 65.2 The words "CONFIDENTIAL" found at the top and bottom of each page.
  - 65.3 My document consists of 28 pages, the last page being blank except for the words "confidential" found at the top and bottom of the page.
  - 65.4 The general content of page AA-418 including the words *"prepared by the"* at the bottom right of the page corresponds with my copy.
  - 65.5 The general content of page AA-419 including the words *"subpoena, the issuing"* at the bottom right of the page corresponds with my copy.
  - 62.6 The general content of page AA-420 including the words *"both these levels"* at the

bottom right of the page corresponds with my copy.

- 62.7 The general content of page AA-421 including the words "*between the parties*" at the bottom right of the page corresponds with my copy.
- 62.8 The general content of page AA-422 including the words "*publication was both*" at the bottom right of the page corresponds with my copy.
- 62.9 The general content of page AA-423 including the words "*Limited to present*" at the bottom right of the page corresponds with my copy.
- 62.10 The general content of page AA-424 including the words "*future criminal prosecution*" at the bottom of the page corresponds with my copy.
- 62.11 The general content of page AA-425 including the words "*possible criminal charges*" at the bottom of the page corresponds with my copy.
- 62.12 The general content of page AA-426 including the words "*its case in*" at the bottom right of the page corresponds with my copy.
- 62.13 The general content of page AA-427 including the words "*category of*



*information*" at the bottom of the page corresponds with my copy.

62.14 The general content of page AA-428 including the words "*in harm's way by*" at the bottom right of the page corresponds with my copy.

62.15 The general content of page AA-429 including the words "*of the report*" in the heading at the bottom of the page corresponds with my copy.

62.16 The general content of page AA-430 including the words "*instead of 'restricted'*" at the bottom of the page corresponds with my copy.

62.17 The general content of page AA-431 including the words "*M & G Limited*" at the bottom of the page corresponds with my copy.

62.18 The general content of page AA-432 including the words "*to assume that*" at the bottom right of the page corresponds with my copy.

62.19 The general content of page AA-433 including the words "*inhibit any defence:*" at

the bottom of the page corresponds with my copy.

62.20 The general content of page AA-434 including the words "*Fact Driven Approach*" in the heading at the bottom of the page corresponds with my copy.

62.21 The general content of page AA-435 including the concluding words "*following information:*" correspond with my copy.

62.22 The general content of page AA-436 including the words "*alleged offender is*" at the bottom right of the page corresponds with my copy.

62.23 The general content of page AA-437 including the words "*of constitutional rights*" at the bottom right of the page corresponds with my copy.

62.24 The general content of page AA-438 including the words "*Constitutional era:*" at the bottom of the page corresponds with my copy.

62.25 The general content of page AA-439 including the words "*Gauteng Court Case*" at the bottom right of the page corresponds with my copy.

62.26 The general content of page AA-440 including the reference "2008 (5) SA 31 (CC)"

62.27 The general content of page AA-441 including the words "*securing convictions in*" at the bottom right of the page corresponds with my copy.

62.28 The general content of page AA-442 including the words "*for the*" at the bottom right of the page corresponds with my copy.

62.29 The general content of page AA-443 including the last words "*process of court*", my title, initials and surname, (SCCU) Pretoria and the date, 28 October 2011, is identical to the copy in my possession.

62.30 The page described above and numbered AA-443 was not the last page of the original document, the final leaf was a blank page with the words "*CONFIDENTIAL*" inserted at the bottom and top of the page. This page was not included with the rest of the document when I released it for internal use.

## GROUP TWO: MDK2 – ANNEXURE A

66. The Eversheds representations pertained to the issuing of section 205 subpoenas in respect of Mr. and Mrs. Taverner. My response to these representations was a 25-page report. I drafted the source document and I can identify it from the following features:

66.1 The document description "*Annexure A – Bosasa Investigation – Subpoena issued in terms of Section 205 of Act 51 of 1977*", typed in bold.

66.2 The document was prepared for internal use. I signed the document together with Advocate AGJ van Rensburg. The signature on page AA-469, above the words "*Advocate M.C. de Kock*" is my signature. On or about 1 November 2012, the document was forwarded to the Office of the Special Director, Adv. Lawrence Mrwebi at VGM.

66.3 The document presented to me for comparison (pages AA-445 to AA-469) appears slightly darker than the original and the alignment appears skew. This may be because of it being copied.

- 66.4 The general contents of page AA-445 including the words "*This section is*" at the bottom right of the page correspond with my copy.
- 66.5 The general contents of page AA-446 including the words "*any alleged offence*" correspond with my copy.
- 66.6 The general contents of page AA-447 including the words "*contempt of court proceedings*", at the bottom right of the page, correspond with my copy.
- 66.7 The general contents of page AA-448 including the words "*and forced to*" at the bottom right of the page, correspond with my copy.
- 66.8 The general contents of page AA-449 including the words "*states the following:*" at the bottom right of the page, correspond with my copy.
- 66.9 The general contents of page AA-450 including the words "*as far back as 2005, in*" at the bottom right of the page, corresponds with my copy.

- 66.10 The general contents of page AA-451 including the word "*above*" on the last line, corresponds with my copy.
- 66.11 The general contents of page AA-452 including the word "*badgering*" on the last line, corresponds with my copy.
- 66.12 The general contents of page AA-453 including the words "*defined statutory process*" at the bottom right of the page, corresponds with my copy.
- 66.13 The general content of page AA-454 including the words "*relevant case law in*" at the bottom right of the page corresponds with my copy.
- 66.14 The general content of page AA-455 including the words "*any possible witness*" at the bottom of the page corresponds with my copy.
- 66.15 The general content of page AA-456 including the words "*a judicial officer*" at the bottom right of the page corresponds with my copy.
- 66.16 The general content of page AA-457 including the word "*testify?*" on the last line corresponds with my copy.

- 66.17 The general content of page AA-458 including the words "*the enquiry magistrate*" on the last line corresponds with my copy.
- 66.18 The general content of page AA-459 including the words "*stated in Hiemstra:*" at the bottom of the page correspond with my copy.
- 66.19 The general content of page AA-460 including the words "*to the matter*" at the bottom of the page correspond with my copy.
- 66.20 The general content of page AA-461 including the words "*reasonable complaint?*" at the bottom of the page correspond with my copy.
- 66.21 The general content of page AA-462 including the words "*or some documents XXX*" found in the last paragraph corresponds with my copy.
- 66.22 The general content of page AA-463 including the words "*en die aard*" found at the bottom right of the document corresponds with my copy.
- 66.23 The general content of page AA-464 including the words "*as bewese aanvaar*"

found at the bottom of the document corresponds with my copy.

66.24 The general content of page AA-465 including the words "*The suspect will only*" found at the bottom right of the document corresponds with my copy.

66.25 The general content of page AA-466 including the words "*the following submissions:*" found at the bottom of the document corresponds with my copy.

66.26 The general content of page AA-467 including the words "*to allow disclosure*" found at the bottom right of the document corresponds with my copy.

66.27 The general content of page AA-468 including the words "*enquiry magistrate will*" found at the bottom right of the document corresponds with my copy.

66.28 The general content of page AA-469 including the words "*the legal process*" found close to the centre of the document corresponds with my copy.

66.29 The document made available to me consists of 25 pages. My original electronic



copy of this document consists of 27 pages,  
the last two pages being blank.

**GROUP THREE: MDK3 – PROGRESS REPORT ON  
BOSASA INVESTIGATION WITH EXTRACTS OF  
DRAFT CHARGE SHEET**

67. I can authenticate and identify the Agrizzi documents marked AA-482 to AA-484 and AA-486 to AA-500 in at least the following respects:

67.1 The memorandum (AA-482 to AA-484) and “Annexure A” (document AA-486 to AA-500) form as a single set of documents.

**GROUP FOUR: MDK4 - PROPOSED RACKETEERING  
MEMORANDUM / PROVISIONAL DRAFT CHARGE  
SHEET / PROVISIONAL LIST OF ACTIVITIES  
NUMBERED 1 TO 149**

68. I am able to identify and authenticate these documents by the unique markings as described above.

I know and understand the contents of this statement.

I have no objection to taking the prescribed Oath.

I consider the prescribed Oath to be binding on my conscience.

*M.C. de Kock*

**M.C. DE KOCK**

I certify that the above statement was noted down by me and that the deponent has acknowledged that she knows and understands the contents of this statement. This statement was sworn to before me and the deponent's signature placed thereon in my presence at Parkview on 2019-04-01 at ..... *Parkview*

*7023115-0 SGA*  
*R Adams*

**COMMISSIONER OF OATHS**

*Ricardo Adams*  
*Sergeant*  
*7023115-0*  
*71, DUNDAS AVE*  
*Parkview*

SOUTH AFRICAN POLICE SERVICE
STATION COMMANDER
2019-04-01
CLIENT SERVICE CENTRE PARKVIEW
SOUTH AFRICAN POLICE SERVICE

MDK 1  
(28 pages)

CONFIDENTIAL

(19/3/19) MCDK-029  
MDK 1

**Mail & Guardian Subpoena duces tecum dated 14 February 2011**

**Background**

During October 2011 I received a request to comment on a subpoena *duces tecum* that was served on the Special Investigative Unit during February 2011.

The subpoena was issued by the Registrar of the South Gauteng High Court in Johannesburg at the behest of the Mail & Guardian Newspaper. It informs the SIU that Willie Hofmeyr is to appear in the Johannesburg High Court on 28 July 2011 in order to produce the following documents "in his possession or control":

(a) A copy of the report prepared by the Special Investigative Unit in 2009 into alleged procurement irregularities in the Department of Correctional Services, and

(b) The deeds, documents, writing or tape recordings referred to in paragraph 1.

The request itself appears ambiguous as "paragraph 1" of the subpoena only mentions a report and nothing else.

It is not known if the SIU requested the Mail & Guardian for clarity on this issue. For purposes of this discussion I will assume that the subpoena was meant to request copies of any (title) deeds, documents, writings or tape recordings referred to in the SIU report.

**The Weber Wentzel Covering Letter dated 15 February 2011**

The subpoena *duces tecum* dated 14 February 2011 was accompanied by a covering letter issued by Weber Wentzel Attorneys. The covering letter was dated 15 February 2011.

In the covering letter it is stated that Weber Wentzel represents Mr. Adriaan Basson (a newspaper journalist) and M&G Limited in a defamation action brought against them by Bosasa Operations (Pty) Ltd.

Paragraph 2 of the covering letter calls on Willie Hofmeyr (the Head of the SIU) to "produce to the court a copy of the report prepared by the

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Special Investigative Unit into alleged procurement irregularities in the Department of Correctional Services in 2009".

### The SIU Response

On 25 March 2011, Robert Walser the SIU Corporate Lawyer, acknowledge receipt of the subpoena *duces tecum* and informed Weber Wentzel that it would not be a simple matter to determine whether the report you seek to access by means of the subpoena is privileged or not and that they would need to take time to obtain legal advice *and secure representations from interested parties*.

The SAPS and the NPA would obviously be regarded as "interested parties".

### The Subpoena duces tecum

#### Validity of the Subpoena

The rules of court makes it possible for any party who desires the attendance of any person **to give evidence** or produce a document at a trial to sue out from the office of the registrar one or more subpoenas for that purpose. (LAWSA – Volume 3 paragraph 293)

On a technical level, the "*subpoena*" (supplied to us) would appear to be invalid. On the face of it, the subpoena bears the date stamp of the Registrar of the South Gauteng High Court in Johannesburg. The date stamp is badly reproduced and may have been issued on the 14<sup>th</sup>.

There is no other indication that the Mail & Guardian intended to "sue out from the office of the registrar". The second page of the subpoena only refers to the date as "on *February 2011*".

It would not appear to have been signed or "authorised" by anyone in particular. The area requiring the signature of the designated official has been left blank.

I am of the view that even though it may have been the intention of the Mail & Guardian (or even the registrar) to issue a subpoena, the issuing

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process was carried out in such a haphazard way that the witness cannot be sure that a due process was followed and that the subpoena was indeed issued "out" from the office of the registrar.

The requirement of a legible and verifiable signature of a designated public official on what appears to be official documents is the first safeguard against possible abuse of the authority of the registrar and his office. (Compare **S v Stevens 1983 (3) SA 649 (A)** at 658D-G for the views of our courts on documents that gets produced under cover of defective and illegible signatures)

The right to subpoena witnesses by way of a subpoena duces tecum

Civil litigants sometimes abuse their right to subpoena witnesses by way of a subpoena *duces tecum*. The issue relating to the abuse of a legitimate court process was discussed in **Meyers v Marcus and another [2004] 2 All SA 438 (C)** paragraph 24. The following was said:

"As the above extract from the judgment in *Beinash v Wixley (supra)* clearly shows, a subpoena may amount to an abuse of the process of the court notwithstanding the fact that the subpoenaed witness may be able to give relevant evidence or produce relevant documents. To put it differently, the issues of relevance and abuse of process, though possibly interrelated, are separate and distinct. Thus, a subpoena issued in respect of a witness unable to give relevant evidence or to produce relevant documents will ordinarily amount to an abuse of the process of the court.

However, the converse is not necessarily true: the evidence sought to be obtained may be relevant and yet amount to an abuse of the process. This will be so, *inter alia*, where the subpoena is issued for an improper purpose."

It will be argued that the issuing of the Mail & Guardian subpoena amounts to an abuse of process on both these levels.

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## Defamation

### The Defamation Action

The Webber Wentzel letter dated 15 February 2011 fails to mention anything specific about the civil action that was brought by Bosasa Operations (Pty) Ltd except to say that it relates to defamation.

During May 2010 the Mail & Guardian newspaper published a newspaper report entitled '**The Story Behind 'Kitchen confidential'**' in it they divulge more detail about the said defamation action. It would appear as if the Mail & Guardian is being sued for damages in the amount of R500 000.00.

### The Facts surrounding the Defamation Action

The facts surrounding the defamation action can be pieced together from information divulged in media reports like, '**The Story Behind 'Kitchen confidential'**' mentioned above.

In this particular newspaper report, the second defendant, reports on the 'investigation' of the first defendant.

The style of the newspaper report is in the form of an interview. The second defendant gives a 'verbatim' account of the 'story behind the story' as it unfolded during January 2009. I quote from the newspaper report:

"My investigation intensified in January 2009 after Bosasa was awarded yet another multimillion rand tender by the prisons department.

After I published an article (January 23) asking serious questions of the Department of Correctional Services (DCS) for awarding yet another tender to Bosasa, the department placed expensive advertisements in two Sunday newspapers, urging members of the public with evidence of wrongdoing to come forward. The *Mail & Guardian* answered then minister Ngconde Balfour's call on January 30 by publishing a litany of email correspondence between Bosasa's chief operating officer and the department's finance chief (Patrick Gillingham), showing a blatant **corrupt relationship** between the parties."

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The defamation action would appear to be founded on this particular allegation, namely, the existence of a **corrupt relationship** between the parties.

I quote from the same newspaper story:

"The *M&G* was also continuously threatened with legal action by Bosasa's lawyers. Bosasa never pursued criminal charges against the *M&G* and me, but in **July** they issued summons against us, claiming damages of R500 000 in the South Gauteng High Court for alleged defamation.

The *M&G* is defending the case and ***we are satisfied that we have more than enough proof to justify labelling the relationship between the parties as "corrupt".***

#### The Defamation Action and the SIU Report

The defamation action would seem to flow from the fact that the *Mail & Guardian* decided to use the infamous "corrupt relationship" label to describe the bond or connection between the parties.

This may not be the only 'fact' forming the basis of the defamation action but this particular newspaper report at least makes it clear that the defamation action was launched at least three (3) months prior to Willie Hofmeyrs' report to parliament.

#### Definition and elements of defamation

The following is stated in LAWSA in respect of the delict of defamation:

"The delict of defamation is the unlawful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff. A statement is defamatory if it has the effect of injuring a plaintiff's reputation. ... The elements of the delict can therefore be summarised as the unlawful or wrongful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff. ***It is not an element of defamation that the statement should have been false because the defamatory nature of a statement is not dependent on its falsity.*** Once the plaintiff establishes that a defendant has published a defamatory statement concerning him or herself, it is presumed that the publication was both

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unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts either unlawfulness or intention." (Compare LAWSA (2<sup>nd</sup> edition) Volume 7 – paragraph 234)

The fact that the **falsity** (and therefore also the **truth**) of a statement is irrelevant as far as the elements of the delict are concerned finds support in a number of decisions emanating from the Supreme Court of Appeal. (Compare **Sutter v Brown 1926 AD 155**, and **National Media Ltd v Bogoshi [1998] 4 ALL SA 347 (SCA)**)

The **Bogoshi** judgment (supra) makes this issue quite clear. Hefer JA said:

"In my judgment we must adopt this approach by stating that the publication in the press of **false** defamatory allegations of fact will not be regarded as unlawful if, upon consideration of all the circumstances of the case, it is found to have been **reasonable** to publish the particular facts in the particular way and at the particular time." (Compare p. 361)

The newspaper will in essence have to prove that the "defamatory statement" or allegations were based on information obtained from a reliable source and that they took the necessary steps to verify the information, prior to publication. (Compare **Bogoshi** (supra) p. 361)

I have not fully researched this issue but if the general viewpoint or statement of the current legal position is correct, then the contents of the SIU report cannot make **any contribution** towards the issues that would be central to the defamation claim. Put differently, the SIU report was not available at the time of the publication of the defamatory newspaper report(s) and could therefore not have been used to "**verify**" the information that the newspaper received from the source.

The SIU may rightfully want to know in what way the report may possibly contribute towards or assist the *Mail & Guardian* in their defence of the defamation action.

#### Possible abuse of civil procedure by the plaintiff

The defamation action instituted by Bosasa Operations may be nothing but a clever tactical ploy. Bosasa may have more than one purpose in mind. They may be trying to force the M & G Media Limited to present



them with a copy of the "Mail & Guardian report" and thus in a way attempt to "legitimize" evidence that they themselves have obtained illegally.

The defamation action may be a disguised attempt to force the SIU to "publish" the report. Bosasa may also (by way of the Mail & Guardian as "intermediary") want to obtain privileged source material. They may have realised that the SIU report and the attachments would be the first line of defence to be raised by the newspaper.

The possible motivation and subjective (self serving) aims of the parties to the civil suit will be discussed in more detail below.

### Docket Privilege and Risks

#### Nexus between the SIU report and the defamation action

It is difficult to fathom how the SIU report could assist the Mail & Guardian in defending a defamation action. The SIU report could at most only serve to corroborate the views of the first defendant as published by the second defendant.

The traditional views on "corroboration" is that it is evidence that could (in some material respect) support evidence derived from another source. The SIU report would not appear to have been in existence at the time when the 'defamatory' newspaper report or series of newspaper reports were first published.

#### Possession and Control of the SIU report

The Mail & Guardian subpoenaed the head of the SIU for a report transmitted to another government institution. The report is at present in the possession and under the control of the SAPS. It is currently under protection of a specific type of privilege namely "docket privilege". The Mail & Guardian may arguably not even be entitled to a copy of the report from this particular source as they would hardly be cited as an accused in any future criminal prosecution.

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### The Risks Involved

The purpose of the subpoena may be benign in nature and only require the witness to "produce" certain documents. If the parties only require the "production" of the documents, the documents will be handed over to the registrar and the "parties" would then be allowed to inspect and copy the records prior to the registrar returning them to the witness. The process may however be far more invasive. If a witness is required to attend court and identify the documents or records, he must take the oath. The "other party" (in this instance one of the possible suspects in the criminal matter namely Bosasa) will then be entitled to cross-examine the witness.

In this regard, the following was stated in ***Waterhouse v Shields 1924 CPD 155:***

"Where a witness is called to produce and identify certain documents and is sworn the party other than the one producing the witness has full right of cross-examination and is entitled to cross-examine the witness generally upon the case."

The subpoena that was served on the SIU makes it abundantly clear that the "witness" will be required to testify about the documents. The Mail & Guardian "hereby tender the payment of witness fees in the amount of R150.00 together with all reasonable and necessary travelling expenses".

There can be no doubt that Bosasa will welcome any opportunity to cross-examine the head of the SIU about the report that was produced.

The practical implications of the testimony and cross-examination of the head of the SIU would be the following:

- Bosasa and its legal representatives would not only get the opportunity to "discover" the SIU report they will also be given full rights of "general" cross-examination prior to them being required to plea on any possible criminal charges.

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- Should the State decide to call the head of the SIU or any other official from the unit to testify about the report the suspects would get a second opportunity to cross-examine on the contents of the report as well as the preparation thereof.
- The Mail & Guardian will use the opportunity to consult with the "witness" and extract as much out of him as is possible in order to "fuel" future newspaper reports and fill in the gaps that may exist in their own investigation.

These are but a few of the practical risks and possible prejudice that could be suffered by the prosecution. The premature "release" of the fruits of the SIU investigation could also hamper the ongoing criminal investigation.

### Claiming Privilege

#### Privileged Documents

Rule 38(1)(b) of the Uniform Rules of court states the following:

"Any witness who has been required to produce any deed, document, writing or tape recording at the trial ....shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged..."

The rule only refers to "privilege" as a generic concept and fails to specify the particular type of privilege that could be claimed.

#### Litigation Privilege

I am of the view that the SIU report may be protected from disclosure by "work product" privilege or "litigation" privilege. The authors of "The South African Law of Evidence" (formerly Hoffmann and Zeffertt), devotes a full chapter to the topic "Privilege". They discuss two (2) lesser known areas of privilege "work product" and "litigation privilege".

The area of "litigation privilege" relates to materials obtained in anticipation of litigation. The authors refer to the Canadian case of *Ottawa-Carleton (Regional Municipality) v Consumers Gas Co. (1990) 74 OR (2d) 637* at 643 where the following was stated: "The adversarial system is based on the assumption that if each side presents its case in

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the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel...." (Compare p. 591). The authors elaborate on this point by referring to *R v Steyn 1954 (1) SA 324 (A)* and other cases that followed it. They proceed to say: "It has been recognised by our courts that 'when statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, those statements are protected against disclosure'. I would like to define the principle even further by stating that "and documents attached to the statement as annexure" would also be protected.

The wider privilege entitles a litigant to refuse to disclose any communication that forms part of a litigation brief. In the United States this area is called the "work product" doctrine. (Compare p. 592-3) The authors explain the difference between "legal professional privilege" and "litigation privilege". Litigation privilege will in short cover "the materials for the brief". Protecting the records collected by the SAPS during the investigation phase of the case from disclosure would avoid interests that are "contrary" to the enforcement of justice. This will not only avoid the tampering with witnesses but prevent the unscrupulous from obtaining any unfair advantage. (Compare p. 593 - 4)

#### Finding Support for the 'work product' argument

The SIU was requested to investigate certain issues and supply the government with a report. The executive summary to the SIU report states that evidence was gathered that points to the commission of certain offences and that the matter is therefore referred to the relevant Prosecuting Authority. The SIU referred to the provisions of section 4(1)(d) and 5(7) of the SIU Act. The Promotion of Access to Information Act states that an information officer of a public body may refuse a request for access should the "record" contain "an account of a ...deliberation that has occurred" for the purpose of taking a decision in the exercise of a power or performance of a duty "conferred or imposed by law." (Compare section 44(1)(a)(ii) of PAIA) It may be argued that the SIU report would fall into this category of information.

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## The Status of the Report

### Official Information and the issue of confidentiality

The SIU report may in the first instance be described as 'official information'.

Official information means information not open or officially disclosed to the public.

The report was prepared by the SIU at the instruction of the President. The Report has not been released and the current status is that it has been transferred from one "official" to another in the course of his / their duty.

The SIU Report was produced in official confidence and the confidential status thereof is still in force. The fact that the report may be regarded as a confidential communication with a limited distribution list and restricted disclosure to five (5) high ranking government officials only is made clear by the report itself. The confidentiality clause found on page 10 ('X') of the report states the following:

***" The contents of this report are strictly confidential and may not be disclosed, in whole or in part, to any person or authority other than the addressees listed above, without the prior written consent of the Head of the SIU. Failure to adhere to this confidentiality clause will result in prosecution. Any person breaching the required confidentiality shall be liable to indemnify the SIU and its members against any claim by any third party, arising from such breach."***

The Mail & Guardian subpoena would clearly be aimed at breaching the still intact confidential status of the report. The Mail & Guardian has never made an application to the head of the SIU to receive an officially sanctioned copy of the report. The **City Press** newspaper has displayed utter contempt for the confidential status of the report by publishing extracts from it. The subpoena may be nothing but a clever ploy to avoid the possibility of criminal prosecution and limiting the "fall out" or risks associated with a "third party" suing them for damages and a breach of confidentiality. If M&G Media Limited placed them in harm's way by

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publishing a still confidential report, they must not shy away from the consequences.

Traditionally all relevant evidence was admissible and South African court had very little concern with how it was obtained. The Mail & Guardian would still seem to operate under the impression that illegal is "OK". The traditional position has changed dramatically as a result of the South African Constitution. Now, evidence obtained through a breach of fundamental rights can only be admitted if it is justifiable in terms of the limitation clause of the Bill of Rights contained in the Constitution. Civil court also has the discretion to exclude unfairly obtained evidence. Civil courts are also obliged to promote the spirit, purport and objects of the Bill of Rights. [Compare LAWSA Volume 9 paragraph 765 for a discussion of illegally and unfairly obtained evidence]

### Unauthorised Possession of the SIU Report

#### Background

The matter of *Protea Technology Limited and another v Wainer and others* [1997] 3 ALL SA 594 (W) provides us with the following interpretation of the phrase "confidential information":

"The Act does not define "confidential information" but the expression must surely mean such information as the communicator does not intend to disclose to any person other than the person to whom he is speaking and any other person to whom the disclosure of such information is necessary or impliedly intended to be restricted. I think that there is a distinction between "confidential" information and "private" information. The scope of privacy will be discussed below. Confidentiality can exist even in relation to the communication of information which is in the public domain or is the property of another and, therefore, not private." (Compare judgment p. 603)

#### (1) Possession and Distribution of the report

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The Eversheds letter dated 16 November 2009 and addressed to the State Attorney Cape Town allege that a copy of the SIU report was furnished to Bosasa Operations (Pty) Ltd by "Mr. Gillingham's attorneys".

Neither Mr. Gillingham nor his attorneys could legally receive disclosure of the report unless they received the "prior written consent of the Head of the SIU."

I have not been placed in possession of any application / requests for such a "written consent" or a copy of a document purporting to have been issued by the head of the SIU allowing partial or full disclosure of the report to anyone except the persons mentioned on the distribution list. The person(s) who provided Mr. Gillingham or his attorneys with a copy of the report would clearly have committed a criminal offence.

It is my respectful submission that Bosasa Operations is in possession of an unauthorised copy of the SIU report. The mere fact that they (may have) received a copy of the report from an attorney does not in any way legalize their possession of the document.

#### Possession of the report by M & G Media Limited

I have been informed that extracts from the SIU report appeared in the *City Press* newspaper. M & G Media Limited has not given any indication as to the origin of their copy. They may have received their copy from Mr. Gillingham's attorney but I doubt this to be the case. If the report was "leaked" to them, their copy would be illegal and unauthorised.

Full particulars as to the source of their copy may in due course be revealed to us.

#### Unauthorised Disclosure of the Report

The SIU report clearly prohibits that unauthorised distribution and/ or possession thereof. The confidentiality clause inserted in the report clearly states that disclosure of the contents amounts to a criminal offence. The document would appear to have been classified as 'confidential' instead of 'restricted'.

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The publication *Constitutional Law of South Africa (2<sup>nd</sup> edition) Volume 3* p. 42 – 171 provides the following information on the national security policy of South - Africa.

The Minimum Information Security Standards ('MISS') was approved by Cabinet in 1996. The following is stated about 'MISS':

"MISS has not been published in any official document nor is it generally publicised though it is applicable to all departments and organs of state."

MISS *inter alia* provides for document security. The author states that the document classification regime is at the heart of 'MISS'. Documents may be classified as (a) restricted, (b) confidential, (c) secret, or (d) top secret.

The author refers to the failure of government to publish 'MISS', and proceed to state the following:

"It is remarkable in itself that, in a constitutional democracy founded in part on openness, a document so broad in scope and setting out the detailed constraints upon the exercise of power to withhold information from the public domain, which has the form of regulations or legislation, and which potentially results in the imposition of severe criminal sanctions should not be published through the standard mechanisms for government publication and, at the very least, gazetted."

In terms of 'MISS' the responsibility for classification rests with the author or head of the state institution concerned, or his delegate. By 'imposing' a particular classification on a document the author or head of the state institution in question, in essence removes the document from the public domain. 'MISS' itself does not create offences, but a wide range of offences, with severe penalties, for unlawful disclosure of classified information are created under a number of different pieces of legislation, including the *Protection of Information Act 84 of 1982*.

The deliberate violation or repeated violations of the confidentiality clause contained in the SIU report would be of importance in deciding whether the illegally obtained evidence is to be of further use (or perhaps abuse) by the M & G Limited.

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The mere fact that the report fails to mention the *Protection of Information Act* ('PIA') or gives any formal description of the applicable legislation does not detract from the serious nature of any violation of the applicable legislation.

## (2) Disclosure of the Report

Both Bosasa and the Mail & Guardian may want to claim having legitimately received disclosure of the report. I am of the view that neither of the parties will succeed in arguing for 'legitimate disclosure'. It is quite conceivable that the reports were obtained from two or more separate sources. The factors that would militate against a defence of lawful disclosure will be discussed individually.

### (a) The Bosasa Report

I am of the opinion the Bosasa will not succeed in claiming legitimate possession or disclosure of the report.

The following factors will inhibit such a defence:

- The report makes it clear that only five (5) individuals / entities will be allowed to possess the report.
- The copy said to be in possession of Bosasa / Eversheds were allegedly supplied to Gillingham by DCS at his disciplinary hearing. If this allegation proves to be correct, the DCS officials responsible for the disclosure / "release" of the report may arguably face disciplinary steps and / or criminal prosecution as a result of his / her / their behaviour.
- It may be argued that the "confidentiality" in respect of the report remains intact because disciplinary proceedings are "confidential" in themselves. The fact that Gillingham has received a copy merely indicates the fairness with which DCS were conducting his disciplinary hearing. Possession of the report (under these circumstances) would not necessarily amount to a breach of the confidentiality clause. The disclosure of the report was for a specific (and limited) purpose and occurred under 'confidential' circumstances.
- If the report was indeed made available to Gillingham for purposes of the disciplinary hearing, it would be safe to assume that

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Gillingham would have been informed of the still intact confidential status of the report.

- It would be safe to assume that Gillingham would have been informed that the report can and will be made available to him for the limited purpose of the disciplinary hearing. Possession or disclosure of the report must be distinguished from the distribution thereof. If he distributed the report or caused the distribution thereof to others, he may very well be in breach of confidentiality.
- It would be safe to assume that DCS did not waive the confidentiality of the report by providing Gillingham with a copy. The only person that would legally be entitled to "release" the report would be the individual or entity that restricted it. If the SIU removed the report from the public domain by classifying it as "confidential" then they would also be the only entity that can remove the restriction. DCS would not have the capacity to "de-classify" the report.
- DCS was at all times in control of the "disciplinary process". It can be argued that Gillingham would have received a copy of the report on condition that the contents are treated as 'confidential'. It would be "for his eyes only".
- When Gillingham was dismissed he ceased to be a DCS employee and his subsequent possession of the report became illegal.

(b) The Mail & Guardian Report

I am of the opinion that Adriaan Basson and M & G Media Limited would find themselves in a more precarious situation should they face the possibility of a criminal prosecution or further civil action flowing from their possession and subsequent publication of portions of the classified SIU report. I am of the view that they will not succeed with any defence claiming legitimate possession or valid disclosure of the report. The "right to know" and the sister argument "to let the public know" will appear anaemic against the tapestry of facts surrounding the publication of the Bosasa / DCS saga.

The following factors will inhibit any defence:

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- If the newspaper reporter obtained his copy from Gillingham or the same attorneys as was mentioned in the Eversheds letter, the 'Bosasa' argument would also apply to them.
- If someone else (besides Gillingham) provided the M&G with a copy it must be illegal because:

They only have an incomplete version of the report – i.e. the narrative version without the annexures'.

This in itself proves (1) that the unknown person who supplied them with a copy did not have access to the complete report, or (2) only 'leaked' a portion of the report with the purpose of keeping the rest a secret.

If the source had access to the complete report (and legally so) they would not have hesitated to provide the M&G with a full report. Logic dictates that the person would have supplied the M&G a complete set of documents if it had been obtained legally.

The source in all likelihood made a clandestine copy of the "narrative portion" of the report. If the person had possession of the full report and ample time to copy the complete set of documents, then he or she would have done so.

The incomplete nature of the report as well as the secretive and clandestine manner of disclosure will indicate that the reporter as well as the newspaper that published the extracts must have been aware of the fact that they have obtained an unauthorised copy.

They will struggle to convince a court that they did not have knowledge of their dishonest possession and the possible dishonest motivation of the person that provided them with a copy of the report.

The illegal nature of the report finds illustration in the fact that it is was only disclosed in part and is therefore incomplete.

### The Facts

#### Fact Driven Approach

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### Determining the Facts

Every matter involving the disclosure of restricted, confidential or secret information will involve a determination of the facts. Every case has its own unique "basket of facts" that would determine the right(s) that requires protection. The "fact driven" approach was also endorsed in cases such as *Unitas Hospital* and the *Masetla* matter. (Compare paragraph [18])

In the *Masetla* matter (supra) Sachs J made mention of issues such as the "factual matrix" and the specific enquiry required when "constitutionally protected interests interact with each other" as well as the "intensity of their engagement".

He specifically referred to the *Shabalala* matter and said: "...the names of informers in criminal matters should not be revealed at any stage even if such non-disclosure were to some extent to limit the capacity of the accused to make his or her defence." (Compare judgment paragraphs [161] and [162])

### The position of the Mail & Guardian

The executive summary of the SIU report states that the SIU's "intervention" was authorised by a presidential proclamation R44 of 2007 gazetted on 28 November 2007. The SIU only commenced with their investigation into the contracts awarded to Bosasa and its affiliates, shortly after the publication of the proclamation. The SIU was not the first entity that displayed an interest in the activities of Bosasa. The media would appear to have reported on this matter as early as 2006. The SIU report states the following:

"In 2006 various allegations surfaced in the media relating to the alleged irregular awarding of contracts by the Department of Correctional Services (DCS) to Bosasa Operations (Pty) Ltd (Bosasa) and its affiliated companies."

It can be assumed that the reference to "media" was meant to imply the Mail & Guardian Newspaper as well as its reporter Adriaan Basson. I conducted a five minute search on the internet and uncovered the following information:

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During May 2010 it was reported that Adriaan Basson (the Mail & Guardian reporter) has won the investigative journalism section of the Mondi Shanduka Newspaper Awards. The Mail & Guardian refers to "his story behind the story" and *inter alia* states:

"When the head of the Special Investigating Unit (SIU), Willie Hofmeyr, stood up in Parliament in November 2009 and shocked the nation with tales of crude favouritism, bribery and fraud at South Africa's prisons department, it came as sweet vindication for my investigation spanning three years.

During my investigation I nurtured numerous sources over a long period of time. I finally reaped the benefits when a batch of documents was leaked to me in the proverbial brown envelope, containing several "smoking guns".

I've been studying the Bosasa contracts since 2006 and never stopped asking questions, phoning people and collecting documents.

My investigation intensified in January 2009 after Bosasa was awarded yet another multi-million rand tender by the prisons department....."

The confirmation of the reporter's account of his "three year" investigation into the affairs of Bosasa, can be found in a Beeld Newspaper report dated 30 November 2006 with the "title" – ***New twist in prisons scandal***. The reporters on the 2006 "story" were Adriaan Basson and Carien du Plessis.

The ***Kitchen confidential*** report referred to above was also found on the internet and would appear to have been published on 23 January 2009. This was more than ten (10) months prior to Willie Hofmeyr, standing up in Parliament during November 2009.

The ***Kitchen confidential*** report *inter alia* revealed the following:

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"The *Mail & Guardian*" reported in late 2007 on the SIU's investigation into tender rigging in the department, which includes massive tenders awarded to the Bosasa group."

In the May 2010 report with the title *The Story Behind "Kitchen confidential"* the reporter boasts that:

"The *M&G* was also continuously threatened with legal action by Bosasa's lawyers. Bosasa never pursued criminal charges against the *M&G* and me, but in July they issued summons against us, claiming damages of R500 000 in the South Gauteng High Court for alleged defamation."

The reporter adds the following rider to the "defamation" twist:

**"The *M&G* is defending the case and we are satisfied that we have more than enough proof to justify labelling the relationship between the parties as 'corrupt'."**

### Legitimising Unconstitutionally Obtained Evidence

#### The Constitutional Perspective

Courts would normally look favourably upon a claim of a litigant if the request to gain access to documents or other information can "reasonable be required to assert or protect a threatened right or to advance a cause of action". (Compare *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) paragraph [25])

The *M&G* will have to prove that they require the SIU report in order to protect a threatened right. I am sceptical that they will succeed with this argument

#### Related Legislation

Under PAIA information officer of a public body may refuse access to records of a public body if "the prosecution of an alleged offender is

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being prepared or about to commence or pending and the (particular) record could reasonably be expected to (1) impede the prosecution, or (2) result in a miscarriage of justice in that prosecution". (Compare section 39(1)(b)(ii) of the Act)

Using a Legitimate Process to achieve an Illegitimate Purpose

Civil proceedings differ substantially from criminal proceedings. In civil proceedings, a litigant is obliged to disclose his case. He or she is also obliged to discover all documents, including those which might damage his own case, or which might directly or indirectly enable his adversary to advance his case. Obtaining tainted or illegitimate documents or other records may conceivably advance the case of a party to a civil suit and may therefore become a desirable objective. The traditional or "Pre-Constitutional" approach taken by our courts was that relevant evidence was admissible and that a court was not concerned with how it was obtained. With the advent of the Constitutional era things changed. Civil courts no longer follow a mechanical approach to illegally obtained evidence. The ***Fedics*** and ***Protea Technology*** matters to be discussed below will illustrate the new and more balanced approach taken by civil courts.

***Fedics Group (Pty) Ltd and another v Matus and others; Fedics Group (Pty) Ltd and another v Murphy and others [1997] 4 ALL SA 14 (C)*** considered the civil approach to evidence obtained in violation of a civil litigant's constitutional rights. The facts of the matter are not important to this discussion except to say that the tainted documents forming the subject matter of the dispute was obtained by way of an illegal search.

The court first gave consideration to the "traditional approach" and thereafter made the following remarks in paragraph [92] of the judgment:

"Without trying to formulate principles of general validity or rules of general application, the implications of these differences between criminal and civil proceedings in the present context are, in my view, twofold. On one hand, the litigant who seeks to introduce evidence which was obtained through a deliberate violation of constitutional rights

will have to explain why he could not achieve justice by following the ordinary procedure – including the Anton Pillar procedure – available to him. On the other hand, the Court will, in the exercise of its discretion, have regard to the type of evidence which was in fact obtained. Is it the type of evidence which could never be lawfully obtained and / or introduced without the opponent's co-operation, such as privileged communications, or the recording of a tapped telephone conversation – or is it the type of evidence involved in this case, namely documents and information which the litigant would or should eventually have obtained through lawful means? In the latter case, the Court should, I think, be more inclined to exercise its discretion in favour of the litigant who seeks to introduce the evidence than it would be in the case of the former.”

In addition to the desired approach to be taken by civil courts in respect of unconstitutionally obtained evidence the court made the valid remark that it was (a) not asked to *authorise* an infringement, or (b) to *condone* a constitutional infringement, but that it was asked to (c) *ignore* the constitutional infringement for the purposes of *this* litigation. [Compare paragraph [86] of the judgment]

The admissibility of evidence obtained in breach of a right was also taken under scrutiny in the matter of ***Protea Technology Limited and another v Wainer and others* [1997] 3 ALL SA 594 (W)**. The learned judge made the comment that the common law was for many years inflexible in its refusal to exclude evidence illegally obtained. The court referred to the erstwhile reliance on the philosophy that the end justifies the means. The almost fatalistic approach would seem to have been that unlawful conduct would expose the perpetrator to a possible criminal prosecution and that the criminal sanction could be made more severe by an action for damages. If the threat of prosecution and the possibility of paying damages were insufficient discouragement to those that had the intention to break the law, then the attitude of the courts would be “so be it”. Views like these are today outdated.

The learned judge referred to the modern approach as required by the Constitutional era:

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"If the common law is at odds with the Constitution the courts must, if that can realistically be done, develop the common law in such a manner as to promote the spirit, purport and objects of the Bill of Rights. Such development requires the test of admissibility to be formulated differently: any evidence which depends upon the breach of a fundamental constitutional right can only be admitted if the admission of the evidence is justifiable by the standards laid down in section 36(1). Thus if a person proves, whether in civil or criminal proceedings that a right identified in Chapter 2 of the Constitution has been infringed, the onus lies upon the party who seeks the benefit in any way from that infringement to satisfy the court that the common law (or statute as the case may be) provides a limitation of the nature referred to in section 36(1). *Prima facie*, the complainant has the right to have it excluded. In order to decide whether it should be regarded as partially or wholly overridden, each case will have to be considered on its own facts and discretion exercised with judicial regard to the substance of section 36(1). Thus, for example, that the breach of rights occurred in conjunction with a breach of the criminal law is not itself decisive .... Section 36(1) of the Constitution seeks to ensure that the wider vision is maintained. Uncovering the truth and exposing the ungodly are not thereby relegated to unimportance. They are, as they ever have been, weights in the scales of justice." (Compare p. 610 – 611 of the judgment)

In the matter of ***Protea Technology*** (supra) the court pointed out that both parties to the litigation were accused by the other of dishonesty and improper motives and that the process of balancing interests can seldom be mathematically quantified. The court decided to admit the unconstitutionally obtained evidence as it would be quite wrong to allow one party to damage and malign the other while depriving the other of relevant material at its disposal to disprove such allegations. (Compare judgment p. 612)

The matter at hand can on a factual level be distinguished from both the ***Fedics*** and ***Protea Technology*** matters referred to above. The particular and distinguishing features of the ***Bosasa Operations (Pty) Ltd / Basson and M&G Media Limited South Gauteng Court Case***

**No: 09/29700** (hereinafter only referred to as the Bosasa / Mail & Guardian matter), can be summarised as follows:

(1) The Mail & Guardian served a subpoena *duces tecum* on the head of the SIU in an attempt to obtain a copy of a confidential report prepared by the Special Investigative Unit in pursuance to a presidential proclamation.

(2) The report clearly states that the contents thereof are: (i) strictly confidential, (ii) that it may not be disclosed, in whole or in part to any person or authority other than a very limited number of individuals, and (iii) that failure to adhere to the confidentiality clause of the report will result in prosecution.

### The Legal Position

#### Documents supplied in confidence

Confidential information must be distinguished from documents that were supplied "in confidence". The former classification relates to a certain status awarded to certain records and is discussed in the *Masetlha* case (supra). (Compare paragraphs [29], [30] and [32] of the Constitutional Court judgement)

#### Enforcing the "Right to know"

In the *Masetlha* case (supra) the Constitutional Court described the "rights" of a newspaper as "the right to know and to let the public know and nothing more". (Compare paragraph [28])

The "right to know" also requires a balanced approach and the possible prejudice to any future criminal prosecution must also be determined.

#### Protecting Confidential or Secret Information

The desired approach to be taken in respect of information that fall within the category of "secret" or protected or restricted was considered in the Constitutional Court case *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC).



### Protecting the Integrity of the judicial process

Courts may be called upon to protect the integrity of the judicial process. The following was stated in the *Brummer* matter (supra): "There is no doubt in my mind that the integrity of the judicial process is an essential component of the rule of law and the integrity of the judicial process may be severely compromised if a record, which a party to litigation intends to use to prove his claim or disprove the other party's claim, was made available to a third party before the trial is finalised. A disclosure might create a huge risk of prejudice to the administration of justice." (Compare paragraph [46] of the judgment)

The early release of information forming part of a police investigation (albeit for a valid reason) may be devastating to the final outcome of the criminal case. (Compare *Masetlha* (supra) paragraph [33] for the "early release" response to a claim for disclosure). The principles laid down in the "Shabalala" matter may result in information being restricted and the "non-disclosure" may limit the rights of accused and/or others. (Compare *Masetlha* (supra) paragraph [162] for competitive interests that may be brought to bear on matters due to "context-sensitive jurisprudence that is driven by justice rather than rules".)

### Disclosing the fruits of the criminal investigation

The normal disclosure process of the contents of a police docket excludes third parties like the news media. The *Shabalala* judgment is not the only source of information or legal guideline that we have in determining the use (or abuse) of information contained in a police docket. Subsequent legislation like section 39 of the PAIA also refers to this topic. The mandatory protection of police dockets is of high importance. Section 39 refers to some of the limitations aimed at the protection of the administration of justice.

It must be understood that the body of law relating to the "protection of the administration of justice" is a broad category that evolves from day to day. Government is seized with the duty to protect society in general this includes the "right" to ensure effective policing and to facilitate the investigation and prosecution of crime. This may also include the responsibility to ease the prosecution's task of securing convictions in

certain high priority crime areas. (Compare *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC) paragraph [16])

### Conclusion

#### Summary of the Facts

(1) The **manner** in which the Mail & Guardian obtained a copy of the SIU report. [The Mail & Guardian never approached the Office of President / SIU to validly obtain a copy of the SIU report]

(2) The *Mail & Guardian* wants the "duces tecum" copy of the SIU report to replace their illegally obtained document. This approach is a clear indication and demonstration of their intended abuse of the court process.

(3) The subpoena *duces tecum* amounts to nothing more than a fishing expedition. Courts should not encourage this type of behaviour. Courts must strive to promote fairness and avoid abuse. (Compare *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA))

(4) The mere fact that the *Mail & Guardian* decided use a subpoena *duces tecum* to obtain legitimate disclosure and possession of the SIU report, do not detract from the fact that an investigation is under way, and that a prosecution may flow from such an investigation, would thus in itself be a factor that requires consideration.

(5) The court will have to give recognition to the 'conflicting public interest' principle. The well known decision of *Key v Attorney General* pointed out that tension exists in any democratic criminal justice system and that this principle will inevitably require that conflicting public interests namely the "right to access of information" and the equally important public interest in bringing criminals to book, be weighed up. (Compare *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at 195G-196B)

(6) The Constitutional Court has a duty to preventing conduct that hinders or threatens to hinder the administration of justice. (Compare *S v Singo* 2002 (4) SA 858 (CC) at paragraphs [41] and [42] for the

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expression of the desire to provide "appropriate relief" to those in need of assistance)

The health and wellbeing of the administration of justice is of paramount importance to society. Court's may respond to an overzealous request for information by allowing it to be trimmed and proceed to supply the applicant with a reduced record. (Compare *CCII Systems* (supra) paragraph [11] for an example of a voluntary decision taken by the applicant to water down the original request.)

(7) The "integrity of the judicial process" is of high importance. If documents are made available before any criminal trial is finalised, the disclosure itself may create a huge risk of prejudice to the administration of justice. Courts will interpret the Act with fairness to all. (Compare *Brummer* (supra) paragraphs [46] and [47])

(8) I am of the view that there are various levels of argument that could be advanced in support of the view that the subpoena amounts to an abuse of the process of court.

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Adv. M. C. De Kock

(SCCU) Pretoria

28 October 2011

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Marijke de Kock (MC)

**From:** Marijke de Kock (MC) <mcdekock@npa.gov.za>  
**Sent:** Thursday, November 1, 2012 12:41 PM  
**To:** smitcj@saps.gov.za  
**Subject:** Taverner - Section 205 Subpoena  
**Attachments:** REPS FROM LAWYERS.pdf

**Importance:** High

FYI

---

**From:** Marijke de Kock (MC)  
**Sent:** 01 November 2012 11:40 AM  
**To:** Andries G. Janse Van Rensburg  
**Cc:** 'Kriel Danie - Colonel'  
**Subject:** Section 205 Subpoena  
**Importance:** High

FYI

---

**From:** Marshall Mokgatlhe  
**Sent:** 01 November 2012 10:47 AM  
**To:** Marijke de Kock (MC)  
**Cc:** Tsholofelo P. Moja  
**Subject:** FW: Section 205 Subpoena  
**Importance:** High

Dear Marijke,

Please find the e-mail from Adv Mrwebi for your urgent attention. Please forward your response to me so that I can send it to adv Mrwebi.

Regards,

Marshall Mokgatlhe

---

**From:** Lawrence S. Mrwebi  
**Sent:** Thursday, November 01, 2012 10:17 AM  
**To:** Marshall Mokgatlhe  
**Cc:** Tsholofelo P. Moja  
**Subject:** Section 205 Subpoena

Mhlekaazi

With reference to the attached representations, please, as a matter of urgency, can I get a status report on the Bosasa matter, setting out, inter alia, the charges, possible suspects, evidence against such suspect/s, anticipated difficulties in the matter, etc. The prosecutor must comment on the representations specifically saying why it is necessary to go this route and state whether we can be able to defend the matter if challenged and any possible suggestions.

In view of urgency can I get the prosecutors report by 10 am on 2/11/2012 so that I can respond to the lawyers.

Regards

NA  
Umak



ADV LS MRWEBI  
SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS  
HEAD OF SPECIALISED COMMUNAL CRIME UNIT  
TEL WORK 012-8456372  
FAX 012-8431710  
EL 0824538260



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# EVERSHEDS

## Special Commercial Crimes Unit

Att: Advocate L Mwrebi

Email: mwrebi@npa.gov.za

Date 31 October 2012

Your ref

Our ref B Biebuyck/S Freese/I18901

Direct dial (27 11) 523-6027

Direct fax 086-674-2751

brianbiebuyck@eversheds.co.za

Docex 7 Sandton Square

Docex 4 Johannesburg

## By e-mail

### CONFIDENTIALITY CAUTION

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Dear Sir

### SUBPOENAS ISSUED IN TERMS OF SECTION 205 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 ISSUED TO SYDNEY MARK TAVERNER AND SHARON HOPE TAVERNER

We address you at the instance of our clients Mr Mark Taverner and his wife Mrs Sharon Taverner who regrettably continue to be hounded by the Special Commercial Crimes Unit as appears from the attached Section 205 subpoenas now served on them at the instance of Colonel Daniel Kriel and Advocate Marieke de Kock.

We have previously advised Colonel Kriel that our clients are not prepared to meet with him or to furnish him with a statement, and in this regard we refer to the attached emails, the contents whereof speaks for themselves. To now issue Section 205 subpoenas in the light of what has gone before clearly illustrates that the Special Commercial Crimes Unit persists in its efforts to harass our clients employing the strong arm tactics associated with the powers under Section 205.

In our clients view the serving of these subpoenas constitutes harassment, intimidation and the badgering of our clients in a manner reminiscent of apartheid styled intimidation of purported witnesses, to coerce them into making some form of statement in pursuit of a spurious and unsustainable criminal prosecution against others.

In our view the aforesaid subpoenas constitute an abuse of the process and stand to be set aside on one or more or all bases set out below:

22 Fredman Drive  
Sandton, Johannesburg  
P O Box 78333  
Sandton City 2146  
Tel +27 11 286 6900  
Fax +27 11 286 6901

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**CONSULTANTS** Hilton Cockayne, Selwyn Cohen, John Hall, Charles Marais, Maryana Middleton, Derek Rabin, Jeff Smith  
**SENIOR ASSOCIATES** Ravie Govender, Natasha Jansen, Wayne Josselson, Melissa Leibowitz, Rene Makoe, Themba Malandela, Lerato Monnapotla, Ayanda Nondwana, Trevor Poirier, Hedda Schensema, Lee Segeels, Floyd Selomo, Freddie Terblanche  
**ASSOCIATES** Cassandra Andreou, Sasha Baker, Keneilwe Banda, Mark Carrood, Jaryd Chetty, Sekel Chivandamira, Claire de Witt, Jean Ewango, Sandra Freese, Michal Johnson, Kelly Kramer, Kate Lindsay, Letrishe Mahabear, Tladi Marumo, Lerato Malshe, Jameel Patel, Bianca Pollitstini, Thabang Rapuleng, Janine Reddi, Aasila Saldulker, Charles You  
**CHIEF EXECUTIVE OFFICER** May-Elaine Thomson  
**CHIEF FINANCIAL OFFICER** Paul Labuschagne

\*not attorney/not director

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Mwrebi

1. The subpoenas have not been issued for a legitimate purpose in relation to a bona fide investigation, but have rather been issued to intimidate our clients, and so our clients believe, to orchestrate yet another "trial by media" in the print and electronic press.
2. The terms of the subpoena and the information requested are over broad and wide ranging in their scope. Moreover the subpoenas seek documentation and information in relation to the financial records of a close corporation as far back as 2005, in circumstances where the close corporation has a legal obligation to only maintain such records for a period of 5 years i.e. a cut off of 2007.
3. Whilst on the face of it the subpoena purports to have been issued by Magistrate Naidoo pursuant to representations made by the Director of Public Prosecutions, given the over broad and vague assertions in relation to the offense purportedly under investigation, it is entirely unlikely that any or sufficient information was placed before Magistrate Naidoo to enable her to properly exercise a discretion and independent judgment before reaching the conclusion that the issue of the subpoenas in question were appropriate and lawful, and that our clients were potentially witnesses able to furnish information relative to the purported offenses.
4. Given that the alleged offences purportedly under investigation are devoid of any detail which would enable the magistrate to have properly applied her mind, no rational decision in regard the issue or otherwise of the subpoenas was capable of being taken.
5. Notwithstanding the foregoing, insofar as Mrs Taverner is concerned, and as appears from a copy of the request for examination dated 16 October 2012 (prior to service of the subpoenas in question), Mrs Taverner, who is suffering from throat cancer, has pre-arranged medical examinations, including a CAT and MRI scan on 20 November 2012 and is accordingly not available to appear in court on the date indicated in the subpoena. Given the nature of Mrs Taverner's illness, and the anticipated medical examination she is required to undergo on 20 November 2012, it is not unreasonable that Mr Taverner accompany her to hospital on the day in question, and for this reason he too will not be available to appear in Court on 20 November 2012.
6. In the light of the foregoing, we are instructed to call you, as we hereby do, to confirm to us in writing by no later than close of business on Monday, 5 November 2012 that the attached Section 205 subpoenas have been withdrawn and will not be acted upon, failing which, our instructions are to apply to court to have such subpoenas set aside on the bases set out herein, alternatively, that our clients be excused from attendance at court on 20 November 2012 given their personal circumstances referred to above.
7. We trust that it will not be necessary for our clients to institute the aforesaid proceedings, and that you will undertake the necessary steps to withdraw the subpoenas in question.

We await your advices in this regard.

Yours faithfully

  
**Brian Biebuyck**

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**Director**

**For Routledge Modise  
practising as Eversheds**

Enclosures



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## Specialised Commercial Crime Unit



The National Prosecuting Authority of South Africa  
Igunya Jikelele Lobethutshisi boMzantsi Afrika  
Die Nasionale Vervolgingsgesag van Suid-Afrika

2 November 2012

### PRETORIA

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Pretoria

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0001  
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### MEMORANDUM

**FROM:** SCCU: PRETORIA – ADVS MOKGATLHE, DE KOCK AND JANSE VAN RENSBURG

**TO:** ADV L S MRWEBI, SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS – HEAD OF THE SPECIALISED COMMERCIAL CRIME UNIT.

**SUBJECT:** IN RE REPRESENTATION, EVERSLED: SUBPOENAS ISSUED IN TERMS OF SECTION 205 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 ISSUED TO SYDNEY MARK TAVERNER AND SHARON HOPE TAVERNER.

1. In respect of the representation received on 31 October 2012 and your e-mail communication dated 1 November 2012 please find the following:
  - (1) A written response from Adv De Kock and Janse van Rensburg setting out the legal position and their views on the merits of the representation – **Annexure A**.
  - (2) A copy of the judgement of *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC) on any Constitutional challenge to the section 205 subpoenas.
  - (3) The BOSASA investigation relates to a tender fraud scheme in the amount of more than 2 billion rands. The investigation commenced as a result of a SIU report recommending that a criminal investigation be instituted against Mr Patrick





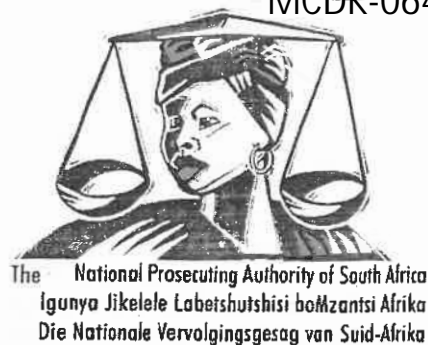
Gillingham and others. The report is attached as **Annexure B**.

- (4) The background and facts surrounding the case is set out in the report.
- (5) The investigation is not yet completed and a charge sheet has not yet been drafted.
- (6) During the investigation it was established that payments amounting to R550,000-00 were made to Stylus Metal Design Studio from 14 October 2005 – 17 January 2006 by W D Mansell and Grande Four Property Trust (both prospective suspects). The said Stylus Metal Design Studio is the trading name of Purple Primula 47 CC of which Mr and Mrs Taverner are the members.
- (7) It is important for the Prosecution to establish what these payments were intended and made for.
- (8) There exists no other viable procedure to establish why the payments were made and Mr and Mrs Taverner has since the beginning been un-cooperative.
- (9) The actions of the Prosecution and the issuing of the subpoenas can easily be defended.

  
M P M KGATHLE  
ACTING REGIONAL HEAD:  
SSCU: PRETORIA

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## Specialised Commercial Crime Unit



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**TO: ADV M MOKGATLHE**  
**ACTING REGIONAL HEAD: SCCU**

**FROM: ADV M DE KOCK**

**DATE: 26 NOVEMBER 2012**

**SUBJECT: PROGRESS REPORT ON THE BOSASA INVESTIGATION**

### Background

The SAPS investigation commenced during February 2010. The full background to the SAPS investigation is set out in a 75 page report prepared by the Special Investigation Unit and attached hereto as Annexure A. The SIU investigation resulted from various allegations that surfaced in the media relating to the irregular awarding of contracts by the Department of Correctional Services (DCS) to Bosasa Operations (Pty) Ltd (Bosasa). In conclusion the SIU found that an irregular/improper and corrupt relationship existed between Bosasa (or members of the Bosasa Group of Companies) and two DCS officials, namely the former Commissioner of Correctional Services, Mr. L. Mti and the DCS Chief Financial Officer, Mr. P. Gillingham. The SIU pointed out that they did not conduct a comprehensive financial investigation into the benefits allegedly received by Commissioner Mti because of various limitations experienced during their investigation. The SIU was of the view that the entire procurement process in respect of the four (4) tenders in question was undermined to the extent that Bosasa and its affiliates were unduly and unfairly advantaged as against their competitors for and in respect of the various tenders.

### Summary of the Available Evidence

The SAPS investigation clearly indicates criminal behaviour on the part of Patrick Gillingham, W.D. Mansell, R. Hoeksma and others. The benefits received by Gillingham includes the vehicles mentioned in the SIU report, cash and cheque

Justice in our society, so that people can live in freedom and security

deposits, foreign travel and the property referred to as Erf 106 Midstream Estate. The investigation in respect of the benefits received by Commissioner Mti is still underway. The current SAPS investigation relates to three (3) previously unknown bank accounts of Mti.

**Section 205 subpoenas issued in respect of Mr. and Mrs. Taverner**

Two witnesses a Mr. and Mrs. Taverner have recently been subpoenaed to appear in court and testify about payments in the amount of R550 000 made to an entity called Stylus Metal Design Studio. Prior to the scheduled court appearance on 20 November 2012, Brian Biebuyck of the firm Eversheds, called on Advocate Mrwebi (the SCCU Special Director) to withdraw the subpoenas issued by the court. Mr. Biebuyck, described the court process as efforts to harass his clients and the employment of strong arm tactics. He described the section 205 process as intimidation and badgering constituting an abuse of process. We informed the Special Director that the Eversheds letter amounted to an irregular attempt to review the issuing of the subpoenas, avoid the required court appearance by the witnesses and mislead the NPA as to the true facts concerning the legal process. The Special Director informed Brian Biebuyck that the application to the magistrate for the issuance of the subpoena was well considered and that the activities related to a lawful investigative process. He declined to withdraw the subpoenas stating that such behaviour would amount to an unlawful review of the decision of the issuing magistrate.

Mr. and Mrs. Taverner duly appeared in court on the 16th of November 2012 and the matter was postponed until the 14th of February 2013. The date was so arranged at the request of Advocate Theron appearing on behalf of the examinees.

#### **Matters under investigation and way forward**

The investigation of the matter is not yet completed and a charge sheet has not been drafted. Almost 200 statements have been obtained since the start of the investigation. We are still of the view that the investigation will take another six (6) months to complete. Advocate van Rensburg and myself are in regular contact with the investigators.

#### **Anticipated Date of Enrolment**

It is difficult to speculate on the anticipated date of enrolment but it would definitely be impossible to enrol the matter prior to the 14th of February 2013.

**Other Issues**

I am not yet in a position to specify the proposed charges against the suspects. The investigation is still in progress and I cannot give a summary of the nature and quality of the current and still to be obtained evidence except to say that we do not anticipate it to be challenged on any known grounds. No legal issues and/or challenges other than the court proceedings mentioned above has been brought to our attention. We will have more clarity on the issuing of the section 205 subpoenas on the 14th of February 2013.

Hoping you find the above in order.

Regards

MC DE KOCK  
DEPUTY DIRECTOR OF PUBLIC OF PROSECUTION  
SCCU PRETORIA



## ANNEXURE A

### BOSASA INVESTIGATION

#### Subpoena issued in terms of Section 205 of Act 51 of 1977

##### Wording of Section 205

##### **205 Judge, regional court magistrate or magistrate may take evidence as to an alleged offence**

(1) A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication – related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorised thereto in writing by the Director of Public Prosecutions, require the attendance before him or her of any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.

(4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

##### The use of lawful powers vested in our courts

The author of *Commentary on the Criminal Procedure Act* starts his discussion of section 205 with the following sentence: "This section is

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generally used to compel a person who refuses to make a statement to the police to furnish the required information under oath."

The courts of our country (and others around the world) are vested with the power to compel citizens to furnish information if the relevant court is of the opinion "that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order". The Supreme Court of Appeal has on many occasions in the past expressed the opinion that citizens are required to assist in the fight against crime. In *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A) at 886, Viljoen JA stated the following in respect of the term "jurisdiction":

"A lawful power to decide *something* in a case or to adjudicate upon a case, and to give effective judgment, that is, *to have the power to compel* the person condemned to make satisfaction."

The administrative and criminal jurisdiction of courts overlap<sup>1</sup> and every process issued out of any court shall be in force throughout the Republic.<sup>2</sup>

The following explanation of the lawful and legitimate powers of our courts are found in *Ewing McDonald & Co. Ltd. v M & M Products* 1991 (1) SA 252 (AD) at p. 327:

"Now the jurisdiction of the courts of every country is territorial in its extent and character, for it is derived from the sovereign power, which is necessarily limited by the boundaries of the State over which it holds sway. Within those boundaries the sovereign power is supreme, and all persons, whether citizens, inhabitants, or casual visitors, who are present within those boundaries and so long as they are present, and all property (whether movable or immovable) for the time being within those boundaries, are subject to it and to the laws which it has enacted or recognised."<sup>3</sup>

Section 205 of the Criminal Procedure Act allows a public prosecutor to approach a judge, regional court magistrate or "a magistrate" to require the attendance before him of "any person" who is likely to give material or relevant information as to any alleged offence.

<sup>1</sup> Section 2 (1) and 2 (2) of the Magistrates Courts Act, No. 32 of 1944

<sup>2</sup> Section 4 (3) of the Magistrates Courts Act, No. 32 of 1944

<sup>3</sup> [1991] 1 All SA 319 (A) at 326 - 327

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It has been decided by our courts that the words "any person" includes an artificial person. (Compare *De Villiers v Nedfin Bank, a division of Nedcor Bank Ltd* 1997 (2) SA 76 (ECD) at 80E)

### The Investigative Authority of the State

The investigative authority of the State rests on 'the longstanding principle that "the public has a right to every man's evidence".<sup>4</sup> The *subpoena* issued in accordance with the procedure laid down in section 205 is nothing but the exercise of that authority. This does not amount to the abuse of power, it amounts to the legitimate exercise of a "sovereign power" that requires citizens and foreigners alike, to assist in the administration of justice.<sup>5</sup> There is nothing in law that can prevent the *issuing magistrate* from enforcing the attendance of any examinee.<sup>6</sup>

### Contempt of Court and the Refusal to Testify

A prosecutor would normally revert to the section 205 procedure if he or she anticipates that a witness will be unwilling to do so, but "is likely to give material or relevant information as to any alleged offence.

The following is stated in the general or introductory discussion on section 205 found in *Commentary on the Criminal Procedure Act* by Du Toit *et al.* at p. 23-51

"Where a person's attendance is procured in terms of s 205(1) he may be compelled, inter alia, to take the oath and to answer any questions put to him unless he has a 'just excuse' for his refusal, as s 205(2) expressly applies the provisions of s 189 to such proceedings."

Section 189 of the Criminal Procedure Act refers to recalcitrant witnesses and the fact that they could be sentenced to imprisonment should they fail to co-operate without having a 'just excuse'.

At first glance it would seem as if the punishment prescribed in section 189 follows on the refusal to testify. This construction may not be altogether accurate. The exact nature of "contempt of court" proceedings

<sup>4</sup> Commentary (supra) at p. 23 – 52 with specific reference to the decision of *Branzburg v Hayes et al* 408 US 665 (1972) at 688

<sup>5</sup> S v Cornelissen (supra) at p. 53 d -54 d

<sup>6</sup> S v Cornelissen (supra) at p. 51 f - i

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was explained by Nestadt J. in *Protea Holdings v Wriwt and Another* 1978 (3) SA 856 (W) at 868 A – H:

"It becomes necessary, therefore, to deal briefly with the nature of contempt proceedings of this kind. The object of this type of proceeding, which is concerned with the wilful refusal or failure to comply with an order of Court, is the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order and to compel the performance thereof (Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 2<sup>nd</sup> ed at 583). Not all orders of Court will on their breach give rise to this sort of remedy. A distinction is drawn between orders *ad pecuniam solvendam* and orders *ad factum praestandum*. It is unnecessary to deal with this further, because the order of Court with which I am dealing, namely an interdict, being "a most solemn and authoritative form of order", is a classic example of that type of order which is enforced by contempt of Court proceedings. Though the proceedings are or may be civil in nature, the contempt constitutes a criminal offence. I refer in this regard to what Steyn CJ said in *S v Beyers* 1968 (3) SA 70 (A) at 80:

"Dat daar n gevestigde prosedure bestaan waarvolgens n gedingvoerder wat n bevel teen sy teenparty verkry het, in sy eie belang bestraffing van sy teenparty weens minagting van die Hof kan aanvra om gehoorsaamheid aan die bevel af te dwing, val nie te betwyfel nie. Dit is n proses van tweeslagtige aard wat volgens sivielregtelike prosedure afgehandel word. In navolging van die Engelse reg word die minagting dan beskryf as siviele minagting. Dit is egter ewe duidelik dat hierdie vorm van minagting nie deurgaans n strafregtelike inhoud ontse is nie. Dit word telkens beskryf en behandel as n misdaad met geen aanduiding dat dit anders as die gemeenregtelike minagting van die hof beskou word nie.... Die opvatting dat dit inderdaad n misdaad is, blyk ten duidelikste uit die feit dat n gewone straf opgele word as die aansoek slaag. Strafoplegging sonder dat n misdaad gepleeg is, sou in ons reg iets onbestaanbaar wees. Al is afdwinging van n burgerlike verpligting die hoofdoel van die straf, dan word dit nogtans nie opgele bloot omdat die verpligting nie nagekom is nie, maar uit hoofde van misdadige minagting van die Hof wat daarmee gepaard gegaan het."

In so far as these principles can be made applicable to section 205 and its compatriot section, section 189, it is clear that we must distinguish between two (2) separate situations that could possibly arise.

If the prosecutor succeeds in obtaining a section 205 *subpoena*, in order to obtain certain information and the witness is willing to provide the information but fails to respond to the *subpoena*, he will be brought to Court as a result of his failure to obey the *subpoena*. In such a situation the "examinee" will be found to be in "culpable remiss" and forced to

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furnish the necessary information. The court will be requested to enquire why the evidence was not produced timeously.

If the witness is truly recalcitrant, he (or she) will most probably turn up at Court at the designated time and place but inform the Court that he (or she) is unwilling to provide the information as he (or she) "has a just excuse", for the failure to produce the required information. Any witness who refuses to testify must exhibit the "refusing" state of mind".<sup>7</sup> The mere fact that there is a "demand to testify" cannot *per se* be equated to a refusal.

The "recalcitrant witness" will be punished on the principle of contempt of Court. Nestadt J. expressed no compassion for those that disobey Court orders. He said the following in *Protea Holdings v Wriwt and Another*, (*supra*) at p. 871H:

"It is vital to the administration of justice that those affected by Court orders obey them. Our Courts cannot tolerate the disregard of its orders. Accordingly, it seems to me that I would be failing in my duty if I did not impose a punishment which takes into account the serious nature of this type of offence."

The *subpoena* that gets issued in terms of section 205 is accompanied by a return of service. Even though section 205 makes no specific mention of section 54 of the Criminal Procedure Act, there cannot be any doubt that a Court would be empowered to *issue a warrant of arrest* in accordance with the procedure described in section 55(2) of the said Act. The failure of the witness or "examinee" to appear in court on the allocated date will *normally* result in the issuing of a warrant of arrest. The seriousness of the occasion will inform the remainder of the process. It is not compulsory that the warrant of arrest *must* be executed before the examinee can be heard.<sup>8</sup>

### **The Eversheds Representation dated 31 October 2012**

On 31 October 2012 Advocate L. Mrwebi, the Head of the Specialised Commercial Crimes Unit, received a document in the style of a letter from Brian Biebuyck on behalf of his clients Mr. Mark Taverner and his wife Mrs Sharon Taverner. The letter *inter alia* states the following:

<sup>7</sup> See *R v Karrim* [1951] 2 All SA 248 (N) on the interpretation of the word 'refuse'

<sup>8</sup> *Terry v Botes and another* [2002] 3 All SA 798 (C) at 802

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"We address you at the instance of our clients Mr Mark Taverner and his wife Mrs Sharon Taverner who regrettably continue to be hounded by the Specialised Commercial Crimes Unit as appears from the attached section 205 subpoenas now served on them at the instance of Colonel Danie Kriel and Advocate Marieke de Kock."

The writer continuous in paragraph 2:

"We have previously advised Colonel Kriel that our clients are not prepared to meet with him or furnish him with a statement..... To now issue Section 205 subpoenas in the light what has gone before clearly illustrates that the Special Commercial Crimes Unit persists in its efforts to harass our clients employing the strong arm tactics associated with the powers under Section 205.

In our view the serving of these subpoenas constitutes harassment, intimidation and the badgering of our clients in a manner reminiscent of apartheid styled intimidation of purported witnesses, to coerce them into making some form of statement in pursuit of a spurious and unsustainable criminal prosecution against others."

The writer thereafter submits that the issuing of the *subpoenas* constitute an abuse of the process and stand to be set aside on one or more or all bases set out below, namely (and I summarise):

- (1) The *subpoenas* have not been issued for a legitimate purpose.
- (2) The *subpoenas* have not been issued in relation to a *bona fide* investigation.
- (3) The *subpoenas* have (rather) been issued to intimidate our clients.
- (4) The *subpoenas* have been issued (and so our clients believe) to orchestrate *yet another* "trial by media" in the printed and electronic press.
- (5) The terms of the *subpoena* (and the information requested) are over broad and wide ranging in their scope.
- (6) The *subpoenas* seek documentation and information in relation to financial records of a close corporation as far back as 2005, in

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circumstances where the close corporation has a legal obligation to only maintain such records for a period of 5 years i.e. cut off 2007.

(7) Whilst on the face of it the subpoena purports to have been issued by Magistrate Naidoo pursuant to representations made by the Director of Public Prosecutions (given the over broad and vague assertions in relation to the offense purportedly under investigation), it is entirely unlikely that any or sufficient information was placed before Magistrate Naidoo to enable her (a) to properly exercise a discretion and (b) to (form) an independent judgment before reaching the conclusion that the issue of the subpoenas in question were:

- Appropriate (and)
- Lawful (and)
- That our clients were potentially (?) witnesses able to furnish information relative to the purported offences.

(8) Given that the alleged offences purportedly under investigation are devoid of any detail which would enable the magistrate to have properly applied her mind, no rational decision in regard the issue or otherwise of the subpoenas was capable of being taken.

The writer proceeds to describe some personal circumstances in respect of his clients and then proceeds:

In light of the foregoing, we are instructed to call on you, as we hereby do, to confirm to us in writing by no later than close of business on Monday, 5 November 2012 that the attached Section 205 subpoenas have been withdrawn and will not be acted upon, failing which, our instructions are –

- (a) To apply to court to have such subpoenas set aside on the basis set out herein;

Alternatively

- (b) That our clients be excused from attendance at court on 20 November 2012 given their personal circumstances referred to above.

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The writer concludes his "address" by stating that he trusts that it will not be necessary for our clients to institute the aforesaid proceedings and "that you will undertake the necessary steps to withdraw the *subpoenas* in question.

### **Comments on the Eversheds Letter**

Given the instruction that "the prosecutors report by 10 am on 2 November 2012 (so that I can respond to the lawyers) and the limited time to provide a written response to the "representation", the following issues can be highlighted:

(a) The submission that the Mr and Mrs Taverner "continue to be hounded" by the SCCU, is unsupported by any substantiating facts. The "SCCU" has not had any dealings with Mr or Mrs Taverner since the start of the BOSASA investigation. None of the prosecutors have ever had any contact with any of the two individuals. Colonel Kriel informs me that he first met Mr. Taverner on 10 July 2012. Colonel Kriel has never met Mrs. Taverner in person or even spoke to her on the phone.

(b) The writer states that the section 205 *subpoenas* were served on Mr and Mrs Taverner "at the instance of Colonel Danie Kriel and Advocate Marieke de Kock". The section 205 *subpoena* is normally issued by a magistrate on the strength of an application by the prosecutor and the process is of a formal and procedural nature. This is not a personal vendetta or "strong arm tactics" aimed at harassing or intimidating some individual or certain members of society. This is the use of a legitimate procedure aimed at securing the attendance of examinees in accordance with a legitimate Chapter 23 process.

(c) The writer indicates that his clients are not prepared to meet the investigator (or) to furnish him with a statement. This is a clear indication that the witnesses are unwilling to co-operate with the investigators. The witnesses ("examinees") exhibit the required "refusing state of mind" and can with confidence be described as recalcitrant.

(d) The procedure found in section 205 has withstood Constitutional scrutiny (Compare the judgment of *Nel v Le Roux NO and others* (infra)) and can therefore not be defined as "harassment" or "intimidation" or "badgering".

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(e) The writer submits that the process is an "apartheid styled intimidation" to coerce them to make "some form of statement" in the pursuit of a spurious and unsustainable criminal prosecution. The case was registered with the SAPS during February 2010, since then substantial evidence has been gathered supporting the initial suspicions. The evidence obtained point to criminal behaviour and the investigation cannot be defined as either "spurious" or "unsustainable". The writer gives no indication of any reasons why any future prosecution (against others) should be doomed to failure or why it is considered "spurious" [false, bogus, fake or unauthentic] or "unsustainable" [indefensible, weak, unsound, invalid or flawed].

(f) The writer concludes paragraph 3 of the letter by stating that the required statement would be obtained in pursuit of a "criminal prosecution against others". He declares that he represents Mr and Mrs Taverner and the close corporation referred to as Purple Primula 47 CC. It is well documented that Mr. Biebuyck regularly communicates on behalf of BOSASA. His track record of appearances on behalf of BOSASA and employees of the company cast some doubt on his ability to give Mr and Mrs Taverner the objective and uncoloured assistance that they require. The representation under discussion creates the impression that he is not able to draw a distinction between the various parties that he has assisted over time.

(g) The writer indicates that the issuing of the *subpoenas* constitute an abuse of process as the *subpoenas* have not been issued for a legitimate purpose. This amounts to a false generalisation. The submission made by the writer clearly rests on some unknown assumption. This is nothing but a wrong impression. The *enquiry magistrate* is the proper person to determine and pronounce on these issues.

(h) The writer contends that the *subpoenas* have not been issued in relation to a *bona fide* investigation. This allegation is clearly without foundation and another example of an error in reasoning.

(i) The writer makes the submission that the *subpoenas* have been issued to intimidate his clients. One may reasonably ask how a *subpoena* issued out from a prescribed and defined statutory process

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can result in the intimidation of a witness. The writer clearly tries to sway the reader with the use of emotional language.

(j) The writer claims that the *subpoenas* have been issued to orchestrate (yet another) trial by media against "our clients". I am not aware of any recent media coverage that Mr. or Mrs Taverner or Purple Primula 47 CC has ever been exposed to. A quick internet search only revealed a report concerning Mr. Taverner and the Hotel & Restaurant industry. The search in respect of "Sharon Hope Taverner" failed to turn up any results. A search in respect of Purple Primula 47 CC was just as uneventful. I presume Mr. Biebuyck will be able to substantiate what at first glance appears to be a misleading statement. Section 205(3) clearly states that the "enquiry" be conducted in private at any place designated for the purpose. The writer fails to indicate why or how the process will involve the media.

(k) The writer advances no reasons for his classification of the *subpoena* as "over broad". This phrase has a specific application and would at least have to be substantiated in some way. The *enquiry magistrate* is legally bound to determine issues raised by the examinees should he regard it as relevant. The same applies to the issues surrounding the "scope" of the enquiry.

(l) The writer states that the *subpoena* seeks documentation. (May we suggest that the writer consider the wording of "Annexure A to Schedule 1" of the *subpoenas*)

(m) The *subpoena* was issued by a magistrate. The writer fails to indicate why he makes the suggestion that the *subpoena* (purports) to have been issued by a magistrate.

(n) The further submissions relating to "the offences (purportedly) under investigation", the "appropriateness" and "lawfulness" of the *subpoenas* etc. are issues that can be raised at the *enquiry* should Mr. Biebuyck be in possession of instructions to ventilate these issues in the appropriate forum.

(o) The writer requests Adv. Mrwebi to "withdraw" the *subpoenas*. This submission would assume the Special Director to have superior powers to the *enquiry magistrate*. (Please compare the relevant case law in

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respect of the respective functions and duties of the *issuing magistrate* and the *enquiry magistrate* listed as part of this response.)

(p) The writer (in the alternative) requests that his clients "*be excused from attendance at court on 20 November 2012*". The failure to attend the examination proceedings is a grave step with certain procedural consequences. The Special Director cannot excuse the witnesses from the court appearance. The legal representatives of Mr and Mrs Taverner can approach the relevant magistrate at any time prior to the 20<sup>th</sup> of November 2012 and it is suggested that they contact the prosecutors (and the court) to make the necessary arrangements.

It is respectfully submitted that should the writer have any legitimate grounds for making any of the abovementioned submissions and the confidence to raise them in a court of law, then he should do so. These concerns and issues should be raised in court. The person appointed and judicially entrusted to deal with the appropriateness of any "excuse" that may be raised is the magistrate.

### **The Section 205 Process**

The procedure in obtaining a section 205 *subpoena* is of a *sui generis* nature and just like the procedure described in section 55(2) of the Criminal Procedure act it can be sub - divided into *two phases*. The *first* phase of the process involves the so-called *issuing magistrate*, whilst the *second* phase involves the *enquiry magistrate*.<sup>9</sup>

It is important to note that section 205 can be described as a "procedural tool" with a general application. Section 205 enables the Director of Public Prosecutions (as represented by the designated prosecutor) to obtain information "as to any alleged offence" whether or not it is known by whom the offence was committed.<sup>10</sup>

Section 205 has in the past been used to obtain information from medical doctors<sup>11</sup>, journalists<sup>12</sup> and bank employees. In general it can be used to obtain information from any possible witness .

<sup>9</sup> Commentary on the Criminal Procedure Act by Du Toit et al. p. 23 – 52B

<sup>10</sup> Section 205(1) of the Criminal Procedure Act, No. 51 of 1977

<sup>11</sup> Davis v Additional Magistrate, Johannesburg, and Others [1989] 4 All SA 195 (W)

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## (2) Section 205 and the Responsibilities of the Issuing Magistrate

The *first phase* of the enquiry requires of the *issuing magistrate* to exercise a judgment as to whether the circumstances placed before him warrant the issue of a *subpoena* upon the person named by the prosecutor.<sup>13</sup> The judgment must be *independent* and needs to consist of two (2) separate issues.

The magistrate must in the first instance determine if the application by the prosecutor reveals "the existence in law, of the alleged offence".<sup>14</sup> If the issuing magistrate has by way of the exercise of an independent judgment, confirmed for him or herself that the investigating officer in the criminal matter has been seized with the investigation of an offence that requires the production of "material or relevant information", the issuing magistrate can move to the second question.

The second question revolves around the "likelihood of the prospective witness being able to give material evidence regarding the offence."<sup>15</sup>

The offence (or alleged offences) specified in the application received from the prosecutor is but one of a host of factors that the *issuing magistrate* can consider in his determination of the validity of the application. Put differently, the offence (or alleged offences) mentioned by the prosecutor is not the only factor that could be used to determine the adequacy of the request.<sup>16</sup>

## (3) Section 205 and the Constitution

The author of *Commentary on the Criminal Procedure Act*, voices his opposition to the use of section 205, by referring to the "procedure" involved. He states the following:

"The Constitution expressly recognizes the rights to *inter alia*, privacy (s 14) and administrative justice (s 33) as well as the rights of accused persons to silence and a fair trial (s 35). A procedure that treats a witness as an accused person and that requires him to divulge information after being compelled to do so by a judicial officer

<sup>12</sup> S v Cornelissen; Cornelissen v Zeelie NO en Andere 1994(2) SASV 41 (W), Matisonn v Additional Magistrate, CT and Another 1980 (2) SA 619 (CPD), R v Parker 1966 (2) SA 56 (RA)

<sup>13</sup> Commentary (supra) at p. 23 – 52B

<sup>14</sup> Commentary (supra) at p. 23 – 52C

<sup>15</sup> Commentary (supra) at p. 23 – 52C

<sup>16</sup> Davis v Additional Magistrate, Johannesburg, and others 1989 (4) SA 299 (W) at 305

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who has acquired the power so to compel him by reason of a decision of another judicial officer, made without the exercise of a proper judgment and without according him the right to be heard, would seem, prima facie, to infringe all these rights. The extent to which the infringement of these rights will, in each case be considered to be reasonable, justifiable and, where appropriate, also necessary remains to be determined. It is submitted, however, that decisions made by the *issuing magistrate* without at least a proper judgment of the merits are unacceptable."<sup>17</sup>

Du Toit, the author of *Commentary on the Criminal Procedure Act* refers to Stegmann J, who in turn refers to MacDonald JA in the decision *R v Parker 1966 (2) SA 56 (RA)*, when he makes the following submission:

"Procedures such as those laid down by s 205 constituted in MacDonald JA's opinion, an inroad into the right of privacy possessed by every member of the public and imposed a duty on (*issuing*) magistrates to ensure that members of the public are not unduly harassed by inquisitions. Magistrates are bound to take these rights into account when exercising their discretion, as well as the fact that persons whose rights to privacy are infringed are not given a right to be heard at this stage of the procedure."<sup>18</sup>

The passage from the judgement in *R v Parker (supra)* gives a slightly different impression, I quote directly from the said judgment:

"The occasions on which a person is compelled to testify are clearly defined by law. As far as possible the right of a person to keep information to himself is respected and it is only when respect for privacy would or might adversely affect the interests of justice that the law intervenes to compel a person to speak. The procedure laid down in sec. 102 is exceptional (no similar procedure is to be found in the criminal laws in force in the United Kingdom) and constitutes an inroad into the right of privacy possessed by every member of the public."<sup>19</sup>

This extract from the judgment in *R v Parker*, provides us with the context in which these words were said. If we want to interpret and apply *Parker* in a South African context, we must first ask ourselves the following question, "Is there anything in our law that would define the occasion on which a particular person (in this instance a corporate entity – Purple Primula 47 CC trading as Stylus Metal Design Studio and the two (2) members representing the said entity), would be compelled to testify?"

<sup>17</sup> Commentary (supra) at p. 23-52C

<sup>18</sup> Commentary (supra) at p. 23-52C

<sup>19</sup> *R v Parker 1966 (2) SA 56 (RA)* at 58D

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The author of *Commentary* and Mr. Biebuyck *would* seem to confuse the right of the accused with the responsibilities of the witness.

The author of *Commentary* conveniently fails to mention the judgment of *Nel v Le Roux NO and others 1996 (3) SA 562 (CC)*. The particular judgment was delivered by Ackermann J. with Chaskalson, Mahomed, Didcott, Kriegler, Langa, Mokgoro, O'Regan and Sachs concurring. Ackermann J. said the following in paragraph [11] of the judgment:

"The s 25(3) rights to a fair trial accrue only to an accused person. The recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of s 189(1) is not, in my view, an 'accused person' for purposes of the protection afforded by s 25(3) of the Constitution. Such examinee is unquestionably entitled to procedural fairness, a matter which will be dealt with below, but not directly to s 25(3) rights, for the simple reason that such examinee is not an accused facing criminal prosecution. The s 189(1) proceedings are not regarded as criminal proceedings,<sup>20</sup> do not result in the examinee being convicted of an offence,<sup>21</sup> and the imprisonment of an examinee is not regarded as a criminal sentence or treated as such. If after being imprisoned, an examinee becomes willing to testify this would entitle the examinee to immediate release; in American parlance such examinees 'carry the keys of their prison in their own pockets'.<sup>22</sup> The imprisonment provisions in s 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee. This disposes of the attack directly based on the s 25(3) fair trial rights."

The "examinee" remains a witness; he may turn out to be a recalcitrant witness or may for some valid reason be unwilling to testify, but the procedure that is used cannot be described as "an inquisition" and does not infringe on his or her rights.

### Responsibilities and Duties of the Enquiry Magistrate

The responsibilities and duties of the *issuing magistrate* originate in the oversight function mentioned above. The duties of the *issuing magistrate* should be clearly distinguished from the responsibilities (and duties) of the *enquiry magistrate*.

<sup>20</sup> Ackermann J. referred to *S v Heyman and Another 1966 (4) SA 598 (A)*

<sup>21</sup> *Natal Law Society v N 1985 (4) SA 115 (N)* at 116F

<sup>22</sup> *In re Nevitt 117 F 448, 461 (CA 8<sup>th</sup> Cir, 1902)*; *Shillitani v United States 384 US 364 (1966)* at 368 and *La Fave and Israel Criminal Procedure 2<sup>nd</sup> ed (1992)* at 382

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The author of *Commentary on the Criminal Procedure Act* gives the following explanation of the activities of the *enquiry magistrate*:

"Once the *subpoena* has been authorised it can be assumed, in the absence of evidence to the contrary, that the *issuing magistrate* (or judge) exercised a proper discretion. It is then for the person subpoenaed to produce countervailing evidence, which would require the enquiry magistrate (or judge) to decide whether the subpoena was validly authorised."<sup>23</sup>

The author of *Commentary* lists a number of instances where the *enquiry magistrate* may hold the *subpoena* to be "void". This submission should be understood in the context of the *Matisonn* judgment.<sup>24</sup>

The attendance of "the person concerned" may be obtained informally and a subpoena may not even have been obtained (in the present instance the witnesses gave an early indication that they did not want to be interviewed and therefore the more formal route of a *valid subpoena* cannot be faulted).

The views expressed by the author of *Commentary* may be open to some criticism. The conclusion however is clear; the powers of the *enquiry magistrate* are limited.<sup>25</sup>

The *enquiry* and *issuing magistrate* would normally be of equal status. The *enquiry magistrate* would not be vested with any powers of review in respect of the activities of the *issuing magistrate*.

The magistrate has no jurisdiction to embark on a formal enquiry. He or she cannot hear any evidence in order to review, correct or set aside the instructions of the *issuing magistrate*. He cannot withdraw the subpoena. He cannot cancel the *subpoena*. He cannot pronounce on the validity of the *subpoena*.

Procedural or technical defects must be distinguished from the instance where the witness genuinely knows nothing concerning the alleged offence.<sup>26</sup> The views expressed in *Hiemstra's Criminal Procedure* are more succinct. The following is stated in *Hiemstra*:

<sup>23</sup> *Commentary* (supra) at p. 23-52C

<sup>24</sup> *Matisonn v Additional Magistrate, Cape Town, and Another* 1980 (2) SA 619 (C)

<sup>25</sup> *Matisonn* (supra) at p. 625F

<sup>26</sup> *Matisonn* (supra) at p. 623E-F and 627A-B

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"When a magistrate is of the view that the proceedings were not launched in accordance with the stipulations of section 205, such as when the subpoena was not authorised by a magistrate or when the witness cannot give any relevant information, the proceedings are stopped. The magistrate however does not have the power to investigate how it came about that another judicial officer authorised questioning."<sup>27</sup>

The *enquiry magistrate* can only stop the proceedings if they are in conflict with the objects (objectives) of section 205.<sup>28</sup> This procedure is best explained by stating that the duties of first and second magistrate may overlap.<sup>29</sup>

The *enquiry magistrate* can exercise his discretion in favour of the examinee. The purpose of the section 205 procedure would be to obtain a statement from the examinee. Uncertainty about the "nature of the offence alleged" does not constitute a bar to the issue of the subpoena, nor to the duty of the examinee to obey it.<sup>30</sup> The examinee cannot complain about any technical or formal defect in respect of the wording of the *subpoena* if he or she complied with the order by attending the enquiry.<sup>31</sup>

If the person who issued the *subpoena* was not a magistrate, the "instruction" would be void in the sense of it being "unproductive of legal consequence".<sup>32</sup> The absence of a "jurisdictional fact" should be distinguished from the absence of legal authority.

As a general rule, the determination of an "administrative official" is final. The court can only enquire whether the official has in fact decided, not whether the decision is right or wrong.<sup>33</sup> The following was stated in *Netto v Clarkson and Another* 1974 (1) SA 66 (D & CLD) at 68H:

"The Court can interfere and declare the exercise of the power invalid on the ground of non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter."

<sup>27</sup> Hiemstra's Criminal Procedure by Albert Kruger at p. 23-52

<sup>28</sup> Matisonn (supra) at p. 626 F-G

<sup>29</sup> S v Cornelissen (supra) p. 73 b - f

<sup>30</sup> Matisonn (supra) at p. 628B

<sup>31</sup> Matisonn (supra) at p. 628H

<sup>32</sup> Ex parte Singer; Law Society, Transvaal, Intervening 1984 (2) SA 757 (A) at 762 H - 763 A

<sup>33</sup> Theron v Ring van Wellington, NG Sendingkerk in SA 1976 (2) SA 1 (A) at 34 H

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The Close Corporation Purple Primula 47 CC and its members Mr. and Mrs Taverner (each with a 50% share in the entity) can be considered, competent and compellable witnesses. The true purpose of the court proceedings or "examination" envisaged in section 205(3) is to make a determination on the matter of necessity. Once the court has made the determination that a witness is required to give the requested evidence, in the words of section 205 (4) "that there is a necessity to furnish the information" and the court has ruled on the "excuse" or warned the witness on the continued "failure" to provide the information, it can impose the punishment as contemplated in section 189. The functions of the *enquiry magistrate* is directed towards *necessity* or the precise extent to which the witness is compellable whilst the *issuing magistrate* will have to determine if the *circumstances* put forward in the application, will justify the issuing of the order.

#### The Requirements of the Section 205 Application

The submissions made by the prosecutor can take the form of an allegation.<sup>34</sup> The prosecutor cannot rely on a "supposed offence" it must be an alleged offence.<sup>35</sup>

The application will be adequately substantiated if there is a probability (likelihood or prospect) that the examinee would be in a position to furnish material and relevant information with regard to the alleged offence.<sup>36</sup> It is not necessary that all possible offences be mentioned.<sup>37</sup>

The prosecutor obtains the right to approach the court when the crime or elements thereof occurred within the territorial area of the court or the harmful effect thereof were felt within the courts area of jurisdiction. The *issuing magistrate* considers the *circumstances* placed before him in exercising his "judgment".

It can respectfully be submitted that the *issuing magistrate* would be able to consider the following factors in reaching his conclusion:

(1) Can it be said that the investigating officer was busy with the investigation of a reasonable complaint?

<sup>34</sup> S v Cornelissen (supra) at p. 60 e-f

<sup>35</sup> S v Cornelissen (supra) at p. 68 c - h

<sup>36</sup> S v Cornelissen (supra) at p. 92 g - 93 c

<sup>37</sup> S v Cornelissen (supra) at p. 95 a-b

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(2) Can it be said that the investigating officer was acting on credible information?

(3) Has any investigation taken place? (Would there be any information to indicate that a previously "unreasonable complaint" has since been substantiated and thus become more reasonable?)

(4) Can it be said that the "suspicion" itself may be reasonable?

In *R v Da Silva* [2006] 4 All ER 900 the court referred with approval to *Shaaban Bin Hussien and Others v Chong Fook Kam and Another* [1969] 3 All ER 1626 (the decision quoted in the matter of *Powell NO (infra)* as well as the guidelines issued by the Financial Intelligence Centre). Longmore LJ stated the following:

"Thus in *Hussien v Chong Fook Kam* [1969] 3 All ER 1626, [1970] AC 942, in which the Privy Council decided that reasonable suspicion was not the same as *prima facie* proof, Lord Devlin said: 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."

Longmore LJ gave his own interpretation of the word "suspecting":

"It seems to us that the essential element in the word 'suspect' and its affiliates, in this context<sup>38</sup>, is that the defendant must think that there is a reasonable possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts', or based upon 'reasonable grounds'."

If we use this explanation to try and aid the court in giving some content to the *circumstances* that the *issuing magistrate* may take into consideration, then the following may be suggested. The *issuing magistrate* may want to ask him or herself if there is a reasonable possibility that some information or some document(s). XXX The possibility need not be 'clear' or 'firmly grounded' or 'targeted on specific facts' or even based upon reasonable grounds. It should however be more than mere imagination. The possibility that the particular avenue of investigation could turn out to be a dead end would not stand in the way of conducting the investigation.

<sup>38</sup> The "context" of the interpretation of the word "suspecting" was section 93A(1)(a) of the Criminal Justice Act, 1988, of the UK

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The evidence may not yet be adequate to establish the offence.<sup>39</sup> The section 205 application may be near the starting point of the investigation, at that time when *prima facie* proof is still lacking.<sup>40</sup>

### The Court Order Required

The issuing of an "order" in terms of section 236 can (and is normally) decided on information put forward by way of an affidavit. The court will look into the *circumstances* put forward by the applicant in order to decide if the *subpoena* can be issued.

The *issuing* activity is of a *sui generis* nature, it cannot be described as an action. It may be more appropriate to define the *issuing activity* as an administrative task.<sup>41</sup>

The court can (in exceptional circumstances) call upon the investigator to give *viva voce* evidence. The *issuing stage* of the process is devoid of any factual dispute and therefore cross – examination never takes place.

The activity that results in the section 205 *subpoena* being issued can in some respects be said to resemble an *ex parte* application. The following similarities can be pointed out. The prosecutor or applicant would be the only person who is interested in the relief which is being claimed and the relief sought may be seen as a preliminary step in the proceedings.<sup>42</sup> The court would grant the relief when the request is substantiated by satisfactory evidence.<sup>43</sup>

The following description of the *ex parte* process is found in *Burgerlike Prosesreg in die Landdroshowe* (supra) in the part dealing with Rule 55:

"Die *ex-parte* aansoek om n interdik verloop kortliks soos volg: Die applikant stel n beëdigde verklaring op waarin hy die feite waarop die aansoek berus en die aard

<sup>39</sup> Haysom (supra) at 158 F – H

<sup>40</sup> Powell NO and others v Van Der Merwe NO and others 2005 (1) SACR 317 (SCA) – paragraph [36] and [37]

<sup>41</sup> Terry v Botes and another [2002] 3 All SA 798 (C) at 801

<sup>42</sup> Erasmus, Superior Court Practice by Van-Loggerenberg et al at B1 - 41

<sup>43</sup> Erasmus (supra) at B1 – 42B

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van die bevel wat hy of sy vra uiteensit. Hierdie verklaring word tesame met n kennisgewing waarin die datum van aansoek en die gevraagde bevel uiteengesit is by die klerk van die hof indien. Kennis van die aansoek word nie aan die persoon teen wie die interdik aangevra word, gegee nie. Op die datum en tyd wat in oorleg met die klerk van die hof gereel is, word die aansoek deur die hof aangehoor. Tydens die verhoor, wat nie in die ope hof plaasvind nie, kan die applikant of sy of haar regsverteenwoordiger sy of haar saak aan die hof voordra en moet die hof n beslissing oor die aansoek gee."<sup>44</sup>

The *enquiry magistrate* would be entitled to accept the request to be valid, "examinee", provide the information on or before the return date.<sup>45</sup>

In the exceptional event of the examinee being unable to provide the "required information" they would be entitled to object to the *subpoena* by stating that it did not create any occasion to respond. The examinee will thus claim a lack of knowledge.

The author of *Burgerlike Prosesreg* (supra) explains the practicalities of this type of situation:

"Die feite waarop n aansoek om n interdik berus, moet ingevolge reel 56(2) in die applikant se beedigde verklaring uiteengesit word. Dit moet uit die feite ... blyk dat aan die vereistes wat vir die verlening van n interdik gestel word, voldoen is. Indien dit nie die geval is nie, openbaar die beedigde verklaring nie n skuldoorsaak nie en kan n interdik nie op grond daarvan verleen word nie.

Die punt dat die applikant se beedigde verklaring nie n skuldoorsaak openbaar nie, kan deur die respondent ter bestryding van die interdik op die keurdatum van die bevel *nisi* opgewerp word. Hoewel die punt in wese n betoog op die meriete is, word tog in gevalle waar die aansoek klaarblyklik ongegrond is, toegelaat dat dit *in limine* geopper word. Ten spyte daarvan dat n respondent wat n aansoek wil bestry normaalweg n beedigde verklaring moet indien waarin die gronde vir sy of haar teenkanting uiteengesit word, kan dit in buitengewone gevalle tog gebeur dat die hof n aansoek wat nie n skuldoorsaak openbaar nie van die hand wys, selfs al is so n verklaring nie ingedien nie. .... Wanneer *in limine* aangevoer word dat n applikant se beedigde verklaring nie n skuldoorsaak openbaar nie, of anders gestel, dat dit nie die gevraagde regshulp regverdig nie, word slegs daardie verklaring in ag geneem en die bewerings wat daarin gemaak word as bewese aanvaar."<sup>46</sup>

<sup>44</sup> Burgerlike Prosesreg in die Landdroshowe (supra) Afd. L - 55

<sup>45</sup> Erasmus (supra) at B1 - 44

<sup>46</sup> Afd L - 57

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The *enquiry magistrate* would only be allowed to interfere with the activities of the *issuing magistrate* should the facts set out in the affidavit fail to disclose a cause of action. The bank would thus have a "just excuse" if they are "unlikely" (unable) to give the material or relevant information".<sup>47</sup> The court will not be entitled to act in terms of section 205(4) if the examinee is able to give an adequate explanation for the failure to produce the information. This will obviously require the examinee to indicate why the evidence is not available.

The public prosecutor will specify the date on which the "material or relevant" information must be furnished. The "compliance date" will precede the "appearance date".<sup>48</sup> If the information has not been made available on or before the "compliance date" the issue of dispute will by implication revolve around the failure to comply with the court order. If the prosecutor is not satisfied that all the required information was received, the prosecutor will cite "partial compliance" as the reason for the section 205 examination.

### **General Remarks**

#### **Dirty Money**

On many occasions the main aim of the investigator would be to trace stolen money and to find out what has happened to it. Investigators often "Follow the money". If it is the purpose of the investigator to discover the final destination of the dirty money, he or she may (out of necessity) require access to the bank accounts of innocent third parties. Every transaction so recorded may be regarded as a necessary link in the chain of payment. The persons called upon to provide the information would in essence be asked to disclose the identity of the wrongdoers.<sup>49</sup> The jurisdiction of the court may thus rest on the (dirty) nature of the "money".

In essence the investigator is only busy following the dirty traces of the money as it leads away from the scene of crime. The suspect will only

<sup>47</sup> Section 205(1) of the Criminal Procedure Act No. 51 of 1977

<sup>48</sup> Section 205(1) of the Criminal Procedure Act, No. 51 of 1977

<sup>49</sup> Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, HL

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face prosecution if it can eventually be proved that he or she received or dealt with the dirty money or in some way benefitted from the proceeds of the crime.

### The Information Requested

The information requested and later obtained by way of the section 205 process does not always end up being used in court. The process may sometimes uncover information that is of little use. The task of the investigator is to investigate allegations of criminality. The investigation of crime including suspicious financial transactions requires the examination of information and records that may (or may not be available) in order to find out what can be proved. These activities can fairly be described as part of the process of investigating a crime or a possible crime with a view to prosecution. Relevance to the point of dispute in the criminal trial would determine if the evidence eventually gets used.

### The Benefits of Business Records

The benefit of business records and other documentary evidence and the dispassionate events they record was explained by Squires J. in *S v Shaik and Others 2007 (1) SACR 142 (D&CLD)* at 160c-d:

"Moreover, the oral evidence was reinforced by a small avalanche of documents, about 27 files of them .... But these were perceptibly more helpful, in that they came from many different sources and covered a long period of time and, placed in chronological sequence, often in the form of inquiry and response, their contents produced a clearer picture of contemporary events than fallible human memory could do. In many instances they effectively constituted the dots which, when joined by the logic of cause and effect, could found a compelling, if circumstantial, conclusion. As the Eastern sage puts it, 'As today is the effect of yesterday, so also is it the cause of tomorrow.' And, of course, separate, isolated circumstances that, in combination, point strongly to a particular conclusion can often carry more weight than direct oral explanations"

### Conclusion

A proper appreciation of the section 236 evidence gathering mechanism would facilitate the exercise of the oversight function of the courts. I therefore make the following submissions:

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(1) The investigative authority of the State rests on 'the longstanding principle that "the public has a right to every man's evidence".<sup>50</sup> The *subpoena* issued in accordance with the procedure laid down in section 205 is nothing but the exercise of that authority. This does not amount to the abuse of power, it amounts to the legitimate exercise of a "sovereign power" that requires citizens and foreigners alike, to assist in the administration of justice.

(2) Section 189(1) makes it clear that a witness will not be considered recalcitrant if he or she "has a just excuse for the refusal or failure". The formal inquiry in front of a magistrate may be seen as a mechanism designed to encourage freedom of speech and communication. The magistrate will not allow questioning that is protected by or falls into the category of "just excuse".

(3) The application will be adequately substantiated if there is a probability that the examinee would be in a position to furnish material and relevant information with regard to the alleged offence.

(4) It is not necessary that all possible offences be listed.

(5) The *issuing magistrate* only considers the *circumstances* placed before him in exercising his or her judgment.

(6) The *issuing magistrate* will grant the relief if the request is substantiated by satisfactory evidence. The *issuing stage* of the proceedings is devoid of any factual dispute and the information as to the alleged offence may be obtained whether or not it is known by whom the offence was committed.

(7) The *compulsory disclosure* of corporate records should not be considered as oppressive or even exceptional in nature. The presence of suspicious activities would by definition make it reasonable and proper for the corporate entity (artificial person) to allow disclosure.

<sup>50</sup> Commentary (supra) at p. 23 – 52 with specific reference to the decision of *Branzburg v Hayes et al* 408 US 665 (1972) at 688

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(8) The "right to know" has been defined with sufficient clarity and must be distinguished from any unprincipled invasion of privacy.

(9) The powers of the *enquiry magistrate* are limited in nature. He or she cannot hear any evidence in order to review, correct or set aside the instructions of the *issuing magistrate*.

(10) The *enquiry magistrate* cannot withdraw the *subpoena*, cancel the *subpoena* or in any way pronounce on the validity of the *subpoena*.

(11) The public prosecutor will specify the date on which the material or relevant information must be furnished. The "compliance date" so specified will precede the "appearance date".

(12) If the information is made available on or before the "compliance date" and the prosecutor is satisfied that the affidavit is in accordance with the provisions of section 236 of the Criminal Procedure Act, the proceedings will be terminated and the *enquiry magistrate* will not become involved.

(13) If the requested information was not made available or if the compliance was of a partial nature, the dispute between the parties will require the attention of the *enquiry magistrate*. The nature of the dispute will be determined by the facts in issue.

(14) Uncertainty about the nature of the offence alleged does not constitute a bar to the issuing of the *subpoena* or the duty of the examinee to obey it.

(15) The examinee cannot complain about any technical or formal defect in respect of the wording of the *subpoena* if he or she complied with the order by attending the enquiry.

(16) The *enquiry magistrate* can only enquire whether the official (the *issuing magistrate*) has in fact made a decision on the *circumstances* placed before him or her. The *enquiry magistrate* cannot decide if the decision (or *judgment*) was right or wrong. The *enquiry magistrate* will

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only be allowed to interfere with the determination that was made should it transpire that the *issuing magistrate* acted *mala fide* or from ulterior motive or if he or she failed to apply his or her mind to the matter.

(17) If the *pre-requisite state of affairs* cannot be faulted, the activities of the *enquiry magistrate* will focus on the “just excuse” dispute described in section 189 of the Criminal Procedure Act, No. 51 of 1977.

(18) The activities of the *issuing magistrate* revolves around the “oversight function” described above whilst the duties and responsibilities of the *enquiry magistrate* involves the failure of the examinee to comply with the section 205 *subpoena*.

### Conclusion

The letter forwarded to Advocate Mrwebi is clearly an irregular attempt to review the issuing of the *subpoenas*, avoid the required court appearance by the witnesses and mislead the NPA as to the true facts concerning the legal process.

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Advocate M. C. de Kock

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Advocate AGJ van Rensburg

(SCCU – Pretoria – 1 November 2012)

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**TO: The Special Director of Public Prosecutions:**

**Adv. L.M. M rwebi**

**FROM : Adv MC de Kock and Adv AGJ van  
Rensburg.**

**DATE: 30 April 2013**

**SUBJECT: BOSASAM atter**

**Report on the BOSASA investigation**

**1.1 Introduction**

In response to the request for more information and a detailed report in respect of the progress with the investigation of Pretoria Central CAS 1556 / 2 / 2010 I wish to report as follows:

**1.2 The prosecution of Patrick O'Connell Gillingham**



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- I am busy working on a draft charge sheet in respect of Patrick O'Connell Gillingham. The proposed charges against him involve corruption, money laundering and fraud. It is alleged that POC Gillingham received corrupt benefits in the amount of approximately R3.6 million. These benefits consisted of both movable and immovable property. It is important to notice the sequence of payments as this gives an indication of the nature of the corrupt relationship that existed between Gillingham and individuals related to the BOSASA Group of Companies. I attach an extract from the draft charge sheet with highlighted dates and events. (Compare Annexure A) During the period 2004, 2005, 2006 and 2007 Patrick Gillingham received a stream of benefits at very regular intervals.
- The investigation against Gillingham has not yet been finalised and we still await the forensic audit report. The final sum of the evidence may be more damning than the picture that has emerged thus far.
- I am of the opinion that it will be possible to enrol the matter during the second half of 2013 as indicated before.

### 1.3 The Prosecution of the BOSASA Group of Companies

1.3.1 It is anticipated that the evidence of the corrupt relationship between Patrick O'Connell Gillingham and various individuals within the BOSASA Group of Companies namely, W.D. Mansell, Angelo Agrizzi, Carlos Bonifacio, Andries van Tonder, Frans Hendrik Steyn Vorster and others, will be sufficient to prosecute the said individuals for *inter alia*

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money laundering and corruption. It can thus be confirmed that the above individuals may be liable for prosecution and that their involvement will be specified in more detail in the second draft charge sheet to be produced once the Gillingham charge sheet has been finalised.

1.3.2 Should the evidence mentioned above be of a sufficient nature to implicate the BOSASA Group of Companies, more specifically BOSASA Operations or some of the lesser entities like Sondolo IT or Phezulu Fencing, the charge sheet would be drafted in a way that would implicate as many of these entities it is possible to prosecute.

#### 1.4 The Prosecution of Linda Morris Mti

1.4.1 Linda Morris Mti received benefits in the amount of approximately R88 000.00 from the BOSASA Group of Companies. He also bore the responsibilities and duties described in the Prevention and Combating of Corrupt Activities Act no. 12 of 2004 more specifically those described in section 34 of the said Act.

1.4.2 It is difficult to speculate but should the police investigation point to a corrupt relationship and the criminal involvement of Mti in the four (4) tenders mentioned in the Gillingham charge sheet (at present in draft format), he will also be prosecuted.

1.4.3 It must be pointed out that negligence is sufficient to prosecute a person for offences under the Prevention of Organised Crime Act, 121 of 1998. Should the sum of the evidence gathered during the investigation be of a sufficient nature to enable a Racketeering prosecution, it would

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theoretically be possible to prosecute Linda Mti, under section 2(1)(e), (f) or (g) of the said Act.

#### 1.5 Enrolment Date

It is anticipated that the prosecution of Patrick Gillingham will commence during the second half of 2013. Depending on developments it would theoretically be possible to enrol the case against BOSASA or the individuals mentioned in paragraph 1.3.1 above within six (6) months from this date. It is very difficult to give an accurate estimate on future events but I foresee the prosecution of both BOSASA and Mti within the next eighteen (18) months. The target dates for the second and third group of prosecutions should thus be July 2014 and December 2014.

Hoping you find the above in order.

Regards

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MC DE KOCK  
DEPUTY DIRECTOR OF PUBLIC OF PROSECUTION

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# Specialised Commercial Crime Unit



The National Prosecuting Authority of South Africa  
Igunya Jikelele Labetshutshisi boMzantsi Afrika  
Die Nasionale Vervolgingsgesag van Suid-Afrika

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**TO: ADV L MRWEBI**  
**SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS**

**FROM: ADV MC DE KOCK / ADV AGJ VAN RENSBURG**

**DATE: 30 APRIL 2013**

**SUBJECT: PROGRESS REPORT ON THE BOSASA INVESTIGATION**

### 1.1 Introduction

In response to the request for more information and a detailed report in respect of the progress with the investigation of Pretoria Central CAS 1556 / 2 / 2010 I wish to report as follows:

### 1.2 The prosecution of Patrick O'Connell Gillingham

I am busy working on a draft charge sheet in respect of Patrick O'Connell Gillingham. The proposed charges against him involve corruption, money laundering and fraud. It is alleged that POC Gillingham received corrupt benefits in the amount of approximately R3.6 million. These benefits consisted of both movable and immovable property. It is important to notice the sequence of payments as this gives an indication of the nature of the corrupt relationship that existed between Gillingham and individuals related to the BOSASA Group of Companies. I attach an extract from the draft charge sheet with highlighted dates and events. (Compare Annexure A) During the period 2004, 2005, 2006 and 2007 Patrick Gillingham received a stream of benefits at very regular intervals.



- The investigation against Gillingham has not yet been finalised and we still await the forensic audit report. The final sum of the evidence may be more damning than the picture that has emerged thus far.
- I am of the opinion that it will be possible to enrol the matter during the second half of 2013 as indicated before.

### 1.3 The Prosecution of the BOSASA Group of Companies

1.3.1 It is anticipated that the evidence of the corrupt relationship between Patrick O'Connell Gillingham and various individuals within the BOSASA Group of Companies namely, W.D. Mansell, Angelo Agrizzi, Carlos Bonifacio, Andries van Tonder, Frans Hendrik Steyn Vorster and others, will be sufficient to prosecute the said individuals for inter alia money laundering and corruption. It can thus be confirmed that the above individuals may be liable for prosecution and that their involvement will be specified in more detail in the second draft charge sheet to be produced once the Gillingham charge sheet has been finalised.

1.3.2 Should the evidence mentioned above be of a sufficient nature to implicate the BOSASA Group of Companies, more specifically BOSASA Operations or some of the lesser entities like Sondolo IT or Phezulu Fencing, the charge sheet would be drafted in a way that would implicate as many of these entities it is possible to prosecute.

### 1.4 The Prosecution of Linda Morris Mti

1.4.1 Linda Morris Mti received benefits in the amount of approximately R88 000.00 from the BOSASA Group of Companies. He also bore the responsibilities and duties described in the Prevention and Combating of Corrupt Activities Act no. 12 of 2004 more specifically those described in section 34 of the said Act.

1.4.2 It is difficult to speculate but should the police investigation point to a corrupt relationship and the criminal involvement of Mti in the four (4) tenders mentioned in the Gillingham charge sheet (at present in draft format), he will also be prosecuted.

1.4.3 It must be pointed out that negligence is sufficient to prosecute a person for offences under the Prevention of Organised Crime Act, 121 of 1998. Should the sum of the evidence gathered during the investigation be of a sufficient nature to enable a Racketeering prosecution, it would theoretically be possible to prosecute Linda Mti, under section 2(1)(e), (f) or (g) of the said Act.

#### 1.5 Enrolment Date

It is anticipated that the prosecution of Patrick Gillingham will commence during the second half of 2013. Depending on developments it would theoretically be possible to enrol the case against BOSASA or the individuals mentioned in paragraph 1.3.1 above within six (6) months from this date. It is very difficult to give an accurate estimate on future events but I foresee the prosecution of both BOSASA and Mti within the next eighteen (18) months. The target dates for the second and third group of prosecutions should thus be July 2014 and December 2014.

Hoping you find the above in order.

Regards

---

MC DE KOCK  
DEPUTY DIRECTOR OF PUBLIC OF PROSECUTION  
SCCU PRETORIA

Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear favour or prejudice and by working with our partners and the public to solve and prevent crime

**ANNEXURE "A"**

**IN THE REGIONAL COURT FOR THE GAUTENG DIVISION HELD AT  
PRETORIA**

**CASE NO. ....**

In the matter between:

**THE STATE**

and

**Patrick O.C Gillingham**

**ACCUSED**

---

**THE CHARGE SHEET**

---

**The State alleges that the accused is guilty of the following crimes:**

**COUNT 1 – Corruption – Corrupt Activities relating to the Procuring  
of Tenders (Section 13 (1) (b) of the Prevention and  
Combating of Corrupt Activities Act No. 12 of 2004)**

**In the alternative (as separate counts)**

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**SUBCOUNT 1:** Corruption – Receiving of an Unauthorised Gratification (Section 10 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 1 August 2004 - 31 March 2009)

**SUBCOUNT 2:** Corruption – Offences in respect of Corrupt Activities relating to public officers (Section 4 (1) (a) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period xxx – 31 March 2009)

**SUBCOUNT 3:** Corruption – General Offence of Corruption (Section 3(a) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 1 August 2004 - 31 March 2009)

**SUBCOUNT 4:** Tender Fraud (Kitchen Tender) HK 2 / 2004 – Period Early 2004 - 31 March 2009)

**Count 2 –** Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004)

**In the alternative (as separate counts)**

**SUBCOUNT 1:** Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004) Period 11 April 2005 – 31 March 2009

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**SUBCOUNT 2:** Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004) Period 11 April 2005– 31 March 2009

**SUBCOUNT 3:** Corruption – Receiving of an Unauthorised Gratification (Section 10 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 1 April 2005 - 31 March 2009)

**SUBCOUNT 4:** Corruption – General Offence of Corruption (Section 3(a) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 11 April 2005 - 31 March 2009)

**SUBCOUNT 5:** Tender Fraud (Access Control Tender) HK 2 / 2005 (11 April 2005-31 March 2009)

**Count 3 –** Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004) Period 29 November 2005 – 31 March 2009

In the alternative (as separate counts)

**SUBCOUNT 1:** Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act

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No. 12 of 2004) Period 29 November 2005 - 31 March 2009

**SUBCOUNT 2:**

Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004) Period 29 November 2005 – 31 March 2009

**SUBCOUNT 3:**

Corruption – Receiving of an Unauthorised Gratification (Section 10 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 29 November 2005 - 31 March 2009)

**SUBCOUNT 4:**

Corruption – General Offence of Corruption (Section 3(a) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 29 November 2005 - 31 March 2009)

**SUBCOUNT 5:**

Tender Fraud (Fencing Tender) HK 24 / 2005 – 29 November 2005

**Count 4 –**

Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004) Period 3 March 2006 – 31 March 2009

In the alternative (as separate counts)

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**SUBCOUNT 1:**

**Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004) Period 3 March 2006 31 March 2009**

**SUBCOUNT 2:**

**Corruption – Corrupt Activities relating to the Procuring of Tenders (Section 13 (1) (b) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004) Period 3 March 2006 31 March 2009**

**SUBCOUNT 3:**

**Corruption – Receiving of an Unauthorised Gratification (Section 10 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 3 March 2006 - 31 March 2009)**

**SUBCOUNT 4:**

**Corruption – General Offence of Corruption (Section 3(a) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 – Period 3 March 2006 - 31 March 2009)**

**SUBCOUNT 5: Tender Fraud (TV System Tender) HK 25 / 2005 – 3 March 2006**

**Count 5 Money laundering – (Period Early 2004 – 31 March 2009) in contravention of section 4 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998. (Full Period All 4 Tenders)**

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**First Alternative to Count 5 - Acquisition, possession or use of proceeds of unlawful activities (Period **Early 2004 – 31 March 2009**) in contravention of section 6 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998. (Full Period All 4 Tenders)**

**Second Alternative to Count 5 - Money laundering (Period **11 April 2005 – 31 March 2009**) in contravention of section 4 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998. (Access Control Tender)**

**Third Alternative to Count 5 - Acquisition, possession or use of proceeds of unlawful activities (Period **11 April 2005 – 31 March 2009**) in contravention of section 6 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998 (Access Control Tender)**

**Fourth Alternative to Count 5 - Money laundering (Period **29 November 2005 – 31 March 2009**) in contravention of section 4 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998. (Fencing Tender)**

**Fifth Alternative to Count 5 - Acquisition, possession or use of proceeds of unlawful activities (Period **29 November 2005 – 31 March 2009**) in contravention of section 6 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998. (Fencing Tender)**

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**Sixth Alternative to Count 5 - Moneylaundering (Period 3 March 2006 - 31 March 2009)** in contravention of section 4 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998. (TV System Tender)

**Seventh Alternative to Count 5 - Acquisition, possession or use of proceeds of unlawful activities (Period 3 March 2006 - 31 March 2009)** in contravention of section 6 read with section 8 and further read with section 1 of the Prevention of Organized Crime Act 121 of 1998. (TV System Tender)

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**Count 6 - Theft (Period 1 August 2004 - 31 March 2009)**

**First Alternative - Theft (Period 11 April 2005 - 31 March 2009)**

**Second Alternative - Theft (Period 23 November 2005 - 31 March 2009)**

**Third Alternative - Theft (Period 3 March 2006 - 31 March 2009)**

## GENERAL PREAMBLE

### Individuals and Entities Mentioned in the Charge Sheet

2. Patrick O'Connell Gillingham  
ID no. 510406 5096 088

### Movable Property:

2.16 He was the owner of a Mercedes Benz E270 CDI A with vehicle register number DMT512S and license number (RPG821GP)

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- PG01GP [Personalized License Number] to the value of R504 659.
07. The vehicle was formally ordered on 15 June 2004, it arrived at the dealership on 12 October 2004 and it was delivered to the customer on 15 October 2004.
- 2.17 The vehicle was purchased from a dealer known as "Grand Central Motors" (Midrand). The first offer to purchase was dated 11 June 2004; and the signature of Frans Hendrik Steyn Vorster appears on this document. The amended offer to purchase was dated 13 October 2004 and the signature of Patrick O'Connell Gillingham appears on this document. The deposit payment in the amount of R120 281.00 in respect of this vehicle was received on 13 October 2004.
- 2.18 On 12 October 2004 Dr. Jurgen Smith issued a cheque with number 348 for R155 000.00 to Patrick O'Connell Gillingham. This enabled Gillingham to make the payment in the amount of R120 281.00 mentioned above.
- 2.19 He is the owner of a Volkswagen Golf 1.6 with vehicle register number DCL068S and license number RMD413GP to the value of R201 010.01 purchased from The Glen Volkswagen (Glenvista) and registered in the name of Patrick O'Connell Gillingham on 8 September 2004 with the date of liability given as 31 August 2004. The vehicle is still registered in his name. On 30 August 2004 a cheque in the amount of R196 959.97 issued by Dr. J.G. Smith from his Nedbank current account with account number 1928031803 was deposited into the current account of Patrick O'Connell Gillingham account number 1012851592 held at ABSA Bank. Funds in the amount of R196 959.97 were electronically transferred to the dealership on the 1<sup>st</sup> of September 2004.
- 2.20 On the 1<sup>st</sup> of September 2004 (During September 2004) the Glen Volkswagen received an order document from BOSASA Operations (Pty) Ltd for one (1) set of mud guards and a 6 disk CD shuttle. These items to the value of R4050.04 had to be fitted to the Volkswagen Golf 1.6 mentioned above. BOSASA paid for these expenses on 21 September 2004.
- 2.21 He is the owner of a Mercedes Benz E320 CDI with vehicle register number JVX526S and license number (VVL275GP) PG01GP [Personalized License Number] to the value of R555 150.02

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purchased from Mercedes Benz Constantia Kloof (Roodepoort) and registered in the name of Patrick O'Connell Gillingham on **23 April 2007**. The vehicle is still registered in his name.

- 2.22 The vehicle was originally ordered by Frans Vorster and Fat Bellies Butchery on **15 March 2007**. The quotation, invoice and offer to purchase were thus prepared in his name. Frans Vorster later indicated to the dealership that the sale of the vehicle be transferred to his business partner, Mr. P. Gillingham. On **11 April 2007** Patrick O'Connell Gillingham signed an undertaking with the dealership and the vehicle was registered in his name on **23 April 2007**.
- 2.23 On **11 April 2007** an amount of **R180 000.00** was transferred from the FNB account of **BOSASA Operations (Pty) Ltd** with number **62053735290** into the FNB structured facility account of **Angelo Agrizzi**, account number **62091005217**. On the same date Mr. Agrizzi transferred the amount of **R180 000.00** with the reference **Trf Poc** into the FNB Money Market Account of **Carlos JDCM Bonifacio**, account number **62012712411**. On the same date Mr. Bonifacio issued a cheque from this account payable to C. J. Bonifacio in the amount of **R180 000.00**. The said cheque was deposited into his current account at Nedbank with the account number **1988251273**. On the same day Mr. Bonifacio instructed Nedbank to transfer the amount of **R180 00.00** from the said current account to "**Sandown Motor Holdings, Nedbank Westgate Acc. No. 1454045833, Branch Code 145 405**" with reference **GILLINGHAM**. Mr. Bonifacio added the further and following instruction: "Please confirm transfer by **fax for attention of KOBUS – 086 686-1240**" The payment had to be made with immediate effect. The money reached the bank account of Sandown Motor Holdings on the same date and is reflected in their bank statement with the reference "**Gillingham**". The remainder of the full purchase price of the said vehicle (R375 150.02) was financed through Stannic.
- 2.24 An **Instalment Sale Agreement** in the name of Patrick O'Connell Gillingham dated **10 April 2007** with the starting date of **11 April 2007** issued by Stannic was utilized to finance the R375 150.02 mentioned above.

### Fixed Property:

- 2.25 During 2004 and earlier, Patrick O'Connell Gillingham was the registered owner of a property situated at **12 Hurricane Road,**

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**Pierre van Ryneveldpark, Centurion** occupied by himself and his family.

- 2.26 On 31 January 2005 Procrops 157 (Pty) Ltd, as represented by Willem van der Merwe, accepted an offer to purchase by Patrick Gillingham. This offer in the amount of R695 000.00 was made in respect of a property described as Erf 106 Midstream.
- 2.27 In order to finance the purchase of the then vacant stand mentioned above, situated in **Midstream Estate**, Patrick Gillingham secured a mortgage bond in the amount of R1000 000.00 from ABSA Bank. The loan amount in respect of the R695 000.00 was made available for this purpose.
- 2.28 The deed of transport was dated 21 February 2005, the date of registration was given as 31 March 2005 and the commencement date in respect of the mortgage repayments was given as 15 April 2005.
- 2.29 On 15 February 2005 a cash amount of R52 027.00 was deposited into the bank account of Van der Merwe Du Toit Ingelyf. Prior to this date and on the 14<sup>th</sup> of February 2005 a cheque in this exact amount drawn on the account of BOSASA Operations (Pty) Ltd was cashed.
- 2.30 The amount of R52 027.00 mentioned above was required for the transfer of Erf 106 into the name of Patrick O'Connell Gillingham.
- 2.31 Erf 106 was later improved with the erection of a double story house with five (5) bedrooms to the value of R1 855 500.00. The relevant dates and activities in respect of the construction of the Gillingham residence are set out below.
- 2.32 During March / April 2005, Patrick Gillingham and his wife had various meetings with Mrs. Zietsman, an architect. On 22 April 2005 she issued them with an invoice in the amount of R41 075.00. On the 9<sup>th</sup> of June 2005, a cheque issued from the account of BOSASA Operations (Pty) Ltd was paid into the bank account of the architect. The amount of the BOSASA cheque corresponds with the invoice amount mentioned above.
- 2.33 The residential dwelling erected on Erf 106, was constructed on behalf of Mr. & Mrs. Gillingham by R.R. Hoeksma of Riekele Construction "CC". The Quotation/Specifications was dated 3 May

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2005. The estimated start date of the construction was given as 9 May 2005 and the estimated occupation date was 30 November 2005 as stated above.

2.34 The construction of the residential dwelling was accompanied by a variety of other related expenses including the fitting of the kitchen and the landscaping of the garden. Specific amounts and the nature of these improvements will be set out below:

#### 2.34.1 The Kitchen

2.34.1.1 Patrick O'Connell Gillingham and his wife contracted Sterlings Living (Pty) Ltd to install the kitchen at # 6 **Marlboro Place, Midstream Estate** (Erf 106). The value of the construction of the kitchen was quoted as R133 813.49, but kitchen appliances were added and the overall value of the services was thus increased to R185 810.41.

2.34.1.2 On 20 August 2005, Patrick Gillingham issued Sterlings Living with a cheque in the amount of R66 000.00. His bank account reflects the payment date as 23 August 2005; this cheque payment is preceded by five (5) deposits on the bank account of Gillingham made up of the following separate transactions:

- A cheque in the amount of R20 000.00 drawn on the Standard Bank Account of **Grande Four Property Trust** dated 4 August 2005.
- A cheque in the amount of R20 000.00 drawn on the Standard Bank Account of W.D. Mansell, with the deposit date 16 August 2005.
- A cash deposit in the amount of R20 000.00 dated 18 August 2005.
- A cash deposit in the amount of R20 000.00 dated 19 August 2005.
- A cash deposit in the amount of R20 000.00 dated 20 August 2005.

2. 34.1.3 On 5 September 2005, Sterlings Living (Pty) Ltd received a cheque payment in the amount of R50 396.92. This cheque was drawn on the Standard Bank account of **Grande Four Property Trust** and is dated 29 August 2005. This cheque signed by W.D. Mansell, bears the reverse side inscription **GIL 011, Electrical app, taps, basins & sink.**

*W.D. Mansell*  
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2.34.1.4 On 1 4 November 2005 Sterlings Living (Pty) Ltd received a cheque payment in the amount of R53 500.00. This cheque was also drawn on the Standard Bank account of **Grande Four Property Trust**. The cheque was signed by W.D. Mansell and bears the reverse side inscription **GIL 011**

2.34.1.5 On 14 November 2005 **Grande Four Property Trust** received a credit transfer in the amount of R570 000.00 from BOSASA Operations (Pty) Ltd.

2.34.1.6 The remaining R15 913.49 is made up of two (2) cash deposits respectively dated 2 December 2005 and 10 January 2006.  
(Confirm correctness of amounts)

### 2.35. The Kitchen

2.35.1. 1 On 8 December 2005 an amount of R7884.24 was deposited into the bank account of "Inspired Glass" for services rendered. The payment reference was given as "**IB Payment from POC Gillingham**". This payment did not originate from a bank account of Patrick (POC) Gillingham but from the Prestige Plus Current Account of W.D. Mansell. The Mansell bank account reflects the payment as "**IB payment to Spire Technology CC 912838175**".

### 2.36 The Kitchen

2.36.1 On 3 October 2005 an amount of R19 152.00 was deposited into the bank account of RSA Stone Art CC for services rendered namely the supply and delivery of a granite kitchen top. The payment reference was given as "**PO Gillingham**". This payment did not originate from a bank account of Patrick Gillingham but from Prestige Plus Current Account of W.D. Mansell. The Mansell bank account reflects the payment as "**IB payment to RSA Stone Art CC**".

### 2.37 Wooden Shutters and Doors

2.37.1 During early November 2005, POC Gillingham placed orders for a variety of wooden shutters and doors with a company known as "American Shutters CC". The company produced the products requested at the quoted cost of R84 043.96 with delivery during February 2006.

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2.37.2 American Shutters received two (2) payments. The first payment in the amount of R43 000.00 was dated 7 November 2005. This interbank payment originated from the bank account of W.D. Mansell with the reference ***"IB Payment to American Shutters"*** whilst the bank statement of American Shutters reflects the words ***"IB Payment from Patric Gillingham"***.

2.37.3 The second payment in the amount of R41 043.96 was made from the current account from Patrick (PO) Gillingham on 18 February 2006. He made the payment on the 17<sup>th</sup> of February 2006 and used the reference ***"STD S.A. American Shutters"***.

2.37.4 On 24 February 2006 Patrick Gillingham made a payment of R350 00.00 to the ***Grande Four (Property) Trust***, shortly thereafter and on the 27<sup>th</sup> of February 2006, Mr. Mansell made a payment in the amount of R392 000.00 to ***LC Viljoen Inc 912838175***. This amount being a part payment for the purchase of Erf 971, Midstream in the name of POC Gillingham (Junior).

2.34 Shortly after Mr. and Mrs. Gillingham and their family moved to ***Midstream Estate***, the former primary residence of the Gillingham family was sold. On 22 December 2005 an amount of R589 484.70 was transferred into the cheque account of Patrick Gillingham.

2.25 The corrupt benefits / gratifications received by Gillingham subsequent to the 24<sup>th</sup> of January 2005 amounted to R3 231 722.79 (Verify – Further Benefits still being added – Blinds etc.)

## **BENEFITS**

### **Properties referred to in the charge sheet**

#### **Erf 106 Midstream**

2.1 A property described as Erf 106, Midstream, in the amount of R695 000.00 improved with a residential dwelling to the value of R1 855 500.00 under NHBRC certificate number 459252/2005 with expected date of occupation 30 November 2005

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- 2.2 The residential dwelling erected on Erf 106, was constructed on behalf of Mr. & Mrs. Gillingham by R.R. Hoeksma of Riekele Construction "CC". The Quotation/Specifications was dated 3 May 2005. The estimated start date of the construction was given as 9 May 2005 and the estimated occupation date was 30 November 2005 as stated above. [Optional information – Important date is estimated start date of 9 May 2005]

#### Erf 971 Midstream Ext 8

- 2.2 A property described as Erf 971 Midstream Ext 8, with the purchaser Patrick O'Connell Gillingham (junior) ID no 791002 5026 082 in the amount of R 465 000.00 with intended improvements and architectural drawings to the value of R39 613.20

#### Erf 61 Sagewood Ext 1

- 2.3 A property described as Erf 61, Sagewood Ext 1 in the amount of R 395 000.00 improved with a residential dwelling to the value of R2 162 600.00 under NHBRC certificate number 470230/2005 with expected date of occupation 1 November 2005

#### The Four Tenders

**Note** – Describe the Arrangement / Agreement / Transaction that Generated the Proceeds

- 4.1 **HK 2/2004: APPOINTMENT OF A SERVICE PROVIDER FOR THE RENDERING OF CATERING AND TRAINING SERVICES AT THE VARIOUS MANAGEMENT AREAS FOR A PERIOD OF THREE YEARS: 1 AUGUST 2004 TO 31 JULY 2007**
- 4.1.1
- 4.2 **HK2/2005: SUPPLY AND DELIVERY, INSTALLATION, COMMISSIONING, SUPPORT AND MAINTENANCE OF A COMPREHENSIVE ACCESS CONTROL AND BODY SCANNING SYSTEM WITH CCTV COVERAGE OF CORRECTIONAL SERVICES STAFF AND INMATES, AT 66 MAXIMUM SECURITY FACILITIES/CENTRE'S OF EXCELLENCE**
- 4.3 **HK 24/2005: SUPPLY, DELIVERY, INSTALLATION, AND COMMISSIONING, OF SECURITY OUTER PERIMETER FENCES**

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**WITH / OR (WITHOUT) TAUT WIRE DETECTION INNER FENCES, AND CCTV SURVEILLANCE CAMERAS: VARIOUS CENTRA: DEPARTMENT OF CORRECTIONAL SERVICES.**

- 4.4 HK 25/2005: SUPPLY, DELIVERY, INSTALLATION, COMMISSIONING AND MAINTENANCE OF TELEVISION SYSTEMS AND MONITORS TO ALL CORRECTIONAL CENTRES WITHIN THE DEPARTMENT OF CORRECTIONAL SERVICES, THE SYSTEM MUST INTEGRATE INTO THE LOCAL, REGIONAL AND NATIONAL CONTROL ROOMS AND MUST PROVIDE FOR EFFECTIVE VIDEO CONFERENCING FACILITIES.



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MDK4

Marijke de Kock (MC)

**From:** Marijke de Kock (MC)  
**Sent:** 08 August 2013 01:46 PM  
**To:** Marshall Mokgathe  
**Cc:** Andries G. Janse Van Rensburg  
**Subject:** Confidential E- Mail - BOSASA - GILLINGHAM - MTI - AND OTHERS - RACKETEERING Documents  
**Attachments:** Proposed Racketeering Memorandum - BOSASA & Others - 08 08 2013.docx; Provisional Draft Charge Sheet - BOSASA - Racketeering.docx; Provisional List of 149 Racketeering Activities - POC and L Mti.docx

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Dear Advocate Mokgathe

**CONFIDENTIAL DOCUMENTS AS REQUESTED BY THE ANDPP**

Attached please find a proposed draft Racketeering Memorandum, a preliminary and draft charge sheet (subject to evidence that is still outstanding such as the Forensic Audit Report and Electronic Evidence as well as other statements that could have an impact on the wording of the proposed charge sheet, the List of 149 Racketeering Activities (Incomplete and subject to further amendments) as well as a Provisional Draft Charge Sheet with ten (10) counts only. The Final Draft Charge Sheet may differ substantially from the proposed draft.

The concerns about the security of these documents have been raised with yourself earlier this week and will thus not be repeated in this e-mail.

It is anticipated that the List of Racketeering Activities may double should the BOSASA and associated activities be added to the current / present list of activities.

Kindly be informed that the investigation is still in progress and that potentially critical information must still be added to the documents that is submitted to you under cover of this e-mail.

Best Regards

Adv. M.C. de Kock

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**Marijke de Kock (MC)**

**From:** Marijke de Kock (MC) <mcdecock@npa.gov.za>  
**Sent:** Monday, March 25, 2019 9:29 AM  
**To:** Marijke de Kock (MC)  
**Subject:** FW: Confidential E- Mail - BOSASA - GILLINGHAM - MTI - AND OTHERS - RACKETEERING Documents  
**Attachments:** Proposed Racketeering Memorandum - BOSASA & Others - 08 08 2013.docx; Provisional Draft Charge Sheet - BOSASA - Racketeering.docx; Provisional List of 149 Racketeering Activities - POC and L Mti.docx

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**From:** "Marijke de Kock (MC)" <mcdecock@npa.gov.za>  
**Date:** 08/08/2013 at 13:45:41  
**To:** "Marshall Mokgatlhe" <mpmokgatlhe@npa.gov.za>  
**Cc:** "Andries G. Janse Van Rensburg" <agjvrensburg@npa.gov.za>  
**Subject:** Confidential E- Mail - BOSASA - GILLINGHAM - MTI - AND OTHERS - RACKETEERING Documents

Dear Advocate Mokgatlhe

**CONFIDENTIAL DOCUMENTS AS REQUESTED BY THE ANDPP**

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## PROPOSED MEMORANDUM

### A. INTRODUCTION

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### B. BACKGROUND

1. During 2009 (Obtain the Exact Date) the **Special Investigation Unit** (Hereinafter only referred to as the SIU) issued a report in terms of section 4(1)(d) of the SIU Act. The author of the report *inter alia* stated the following:

"In 2006, various allegations surfaced in the media relating to the allegedly irregular awarding of contracts by the **Department of Correctional Services** to **BOSASA Operations (Pty) Ltd** and its affiliated companies.

Later in 2006, the Public Service Commission and the Office of the Auditor General referred specific allegations relating to **contracts awarded to BOSASA** to the SIU for investigation. Some of the more serious allegations are that:

- An **irregular relationship** existed between BOSASA or members of the BOSASA Group of Companies and **two** DCS officials, namely, the former Commissioner of Correctional Services, Mr. L. Mti (**Commissioner Mti**) and the DCS Chief Financial Officer (**CFO**), Mr. P. Gillingham (**Gillingham**).
- Commissioner Mti and Gillingham **may have** unduly received benefits as a result of the award of some of the contracts awarded by DCS to BOSASA and its affiliates.
- Two tenders, namely, the kitchen tender and the access control tender were irregularly extended
- BOSASA and its affiliates were responsible for drafting bid specifications for these tenders.

Shortly after the publication of the proclamation, the SIU commenced with the investigation of the contracts awarded to BOSASA and its affiliates, namely, the kitchens, access control, fencing and television contracts.

The purpose of this report is to refer in terms of section 4(1)(d) of the Act, the evidence gathered by the SIU relative to the abovementioned contract which, in its view, points to the commission of an offence by BOSASA and its affiliates and the persons mentioned in this report, to the Acting National Director of Public Prosecutions (NDPP) and further, to advise the DCS in terms of section 5(7) of the Act, that the evidence gathered by the SIU justifies the institution of legal proceedings by it against BOSASA and its affiliates and the persons mentioned in this report."

The said report is a 75 page document dealing with issues such as the DCS procurement policy, the structure of the BOSASA Group of Companies,

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

Commissioner Mti's formal relationship with BOSASA and a detailed analysis of **four contracts** to wit, the Kitchens Tender (HK2/2004), the Access Control Tender (HK2/2005), the Fencing Tender (HK24/2005) and the Television System Tender (HK25/2005). The last section of the report deals with the **benefits** said to have been received by Patrick O'Connell Gillingham and Commissioner Mti.

The report gives a summary of its findings and thereafter *inter alia* recommends that the NDPP considers instituting **criminal proceedings** against Gillingham, Commissioner Mti, BOSASA, the latter's office bearers and to the extent that Mansell, Agrizzi and Smit may not be office bearers of BOSASA, that they also be considered for prosecution in their personal capacities. The same recommendation was made in respect of all **four the contracts or tenders** that was under investigation to the SIU.

The SIU report refers to **seventeen** prominent role players including Gillingham, Mti, Agrizzi, Mansell, Dr Jurgen Smith, Carlos Bonifacio, Andries van Tonder and Frans Vorster. The draft charge sheet *inter alia* refers to these individuals as Accused 1, Accused 2, Accused 3, Accused 4, Accused 6, Accused 8, Accused 9 and Accused 10. (Compare SIU report page xvii)

The SIU report recommended the **criminal prosecution** of BOSASA. The (provisional) draft charge not only refers to **Bosasa Operations (Pty) Ltd**, but also includes Sondolo IT (Pty) Ltd and Phezulu Fencing (Pty) Ltd. These legal entities are listed in the (provisional) draft charge sheet as Accused No's 11, 12 and 13 respectively.

The summary of the facts, the internal structure of the BOSASA Group of Companies, the office bearers of BOSASA and the affiliated entities are described in detail in the SIU report and will therefore not be repeated in this memorandum. (Compare p. 14 – 16 of the SIU report) The timeline in respect of the Kitchen tender are found on page 19 of the SIU report. The timeline in respect of the Access Control tender is found on p. 31 whilst the Fencing and TV System timelines are found on p.41 – 42 and page 52 – 53 respectively. The List of Activities (Annexure A to the charge sheet) follows the same method. The timeline and the dates mentioned in the SIU report can thus be compared with the charge sheet timeline, should further clarity be required in respect of the 149 activities mentioned in Annexure A.

The Kitchen Tender – SIU report p. 17 – 28  
 The Access Control Tender – SIU report p. 29 – 40  
 The Fencing Tender – SIU report p. 41 – 51  
 The TV System Tender – SIU report p. 52 - 61

The following facts mentioned in the SIU report have *inter alia* been confirmed during the SAPS investigation of the case:

- That BOSASA and / or its staff were involved with the drafting (writing) of the Bid Specifications for the various tenders. [Confirm and Expand]

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

- W.D. Mansell not only made various direct payments into the bank account of Patrick O'Connell Gillingham but he also made a substantial number of other payments that would later benefit Mr. Gillingham [Compare Items 49, 81, 88, 89, 92, 94, 103, 105, 108, 115, 120, 135 and 141 on the Provisional List of Racketeering Activities]
- Frans Vorster (of BOSASA) was involved in the purchase of the Mercedes Benz E270 CDI A, the Volkswagen Polo purchased from Lindsay Saker Krugersdorp and the Mercedes Benz E230 CDI. These three (3) vehicles were for the personal use of Patrick O'Connell Gillingham or his children. [Confirm number of cars] + [Provisional List of Activities Items 11, 28, 128 and 144]
- The involvement of Angelo Agrizzi is evident from the fact that he signed various contracts on behalf of BOSASA, this includes the Kitchen Contract. He was also involved in the amount of R180 000.00 that was channeled through the bank account of Carlos Bonifacio of BOSASA. [Compare Items 9, 23, 70, 145 and 146]
- Riaan Riekle Hoeksma was involved with the purchase of Erf 61 Sagewood Extension 1, the erection of the 5 bedroom dwelling constructed on the premises as well as the construction of the 5 bedroom dwelling erected for Patrick O'Connell Gillingham on Erf 106, Midstream Estate. Riekle Construction (an entity under the control of Riaan Hoeksma) was involved with the payment in respect of the architectural drawings in respect of Erf 971, Midstream Estate. His further involvement will become evident from the Forensic Audit Report. [Compare Items 24, 53, 57, 67, 69, 107, 112, 133 and 137]
- Dr. Jurgen George Smith was involved with the entities that use the word "Concilium" as part of their name. His full involvement in the racketeering enterprise will become clear from the Forensic Audit Report but preliminary investigations points to his involvement with the purchase of the Mercedes Benz E270 CDI A that was ordered for Patrick O'Connell Gillingham during October 2004. [Compare Item 28 of the Provisional List of Activities]
- Gavin Joseph Watson was the Chief Executive Officer of the BOSASA Group of Companies. His personal involvement in the **four tenders** forming the subject of the investigation, will become evident from the electronic evidence as well as the considerable financial gain that the BOSASA Group of Companies obtained from their **corrupt relationship** with the BOSASA Group of Companies, its employees and associated persons.

### C. MODUS OPERANDI

The modus operandi consisted of a series of repetitive activities involving the writing of bid specifications that favored the BOSASA Group of Companies, tampering with evaluation criteria, progressively increasing the BOSASA sphere of influence within the Department of correctional services, ensuring that the BOSASA stranglehold on the Department and its officials is systematically increased.

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

November 2005 – BOSASA “confident” of getting the TV System Bid (Locate Document)

**D. IDENTIFICATION OF THE ACCUSED**

- (i) Patrick O’Connell Gillingham - ACCUSED No.1
- (ii) Linda Morris Mti - ACCUSED No. 2
- (iii) Angelo Agrizzi - ACCUSED No. 3
- (iv) William Daniel Mansell - ACCUSED No. 4
- (v) Riaan Riekele Hoeksma - ACCUSED No. 5
- (vi) Jurgen George Smith - ACCUSED No. 6
- (vii) Gavin Joseph Watson - ACCUSED No. 7
- (viii) Carlos Joao da Costa M. Bonifacio - ACCUSED No. 8
- (ix) Andries Johannes J. van Tonder - ACCUSED No. 9
- (x) Frans Hendrik Steyn Vorster - ACCUSED No. 10
- (xi) BOSASA Operations (Pty) Ltd - ACCUSED No. 11
- (xii) Sondolo IT (Pty) Ltd - ACCUSED No. 12
- (xiii) Phezulu Fencing (Pty) Ltd - ACCUSED No. 13
- (xiv) Consilium Properties CC - ACCUSED No. 14
- (xv) Consilium Business Consultants (Pty) Ltd - ACCUSED No. 15
- (xvi) Consilium Management Services (Pty) Ltd - ACCUSED No. 16
- (xvii) Autumn Storm Investments 119 (Pty) Ltd - ACCUSED No. 17
- (xviii) Riekele Konstruksie BK - ACCUSED No. 18
- (xix) RRH Property Development (Pty) Ltd - ACCUSED No. 19
- (xx) Hoeksma Broers BK - ACCUSED No. 20
- (xxi) Lebonke Trading CC - ACCUSED No. 21
- (xxii) Rand Bricks (Pty) Ltd - ACCUSED No. 22

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

(xxiii) Rapitrade 273 (Pty) Ltd - ACCUSED No. 23

(xxiv) Die Rugga Trust - ACCUSED No. 24

(xxv) Hoeksma Familie Trust - ACCUSED No. 25

(xxvi) Grande Four Property Trust - ACCUSED No. 26

(xxvii) W.D. & J Mansell t/a Grande Four Ranches - ACCUSED No. 27

### E. Analysis of the Evidence

#### The Enterprise – The Department of Correctional Services and the BOSASA Group of Companies and Associated Entities

8. The Act defines an 'Enterprise' as

*"..... including any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity";*

9. The Department of Correctional Services ("DCS") as well as the BOSASA Group of Companies (*inter alia* consisting of BOSASA Operations (Pty) Ltd, Sondolo IT (Pty) Ltd and Phezulu Fencing (Pty) Ltd, are enterprise(s) within the meaning of Section 1 (1) of the Prevention of Organized Crime Act, No. 121 of 1998 ("POCA"), being juristic person(s) within the meaning of that section. The Department of Correctional Services as well as its partnership enterprise, BOSASA Operations (Pty) Ltd functioning under the auspices of the BOSASA Group of Companies, provided the accused with the continuity of structure under which to conduct their unlawful activities.

#### Roles of the Accused in the Enterprise

10. Accused No. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 were managers of the enterprise both by **active performance** and by virtue of them being **principal members** of the enterprise.

11. Accused No. XXXX actively associated themselves with the enterprise by **facilitating** and **participating** in the commission of offences to benefit the enterprise.

12. Accused No. XXXX received or retained **property derived** directly or indirectly from a pattern of racketeering activity.

13. Accused No. XXXX received or retained property **on behalf of the enterprise** that was derived from or through a pattern of racketeering activity.

14. Accused No. XXXX **used any property** or **invested any property** directly or

*used  
or*



## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

indirectly **on behalf of any enterprise** or in (the) **acquisition of any interest** in or the establishment or operation or activities of the enterprise to wit BOSASA Operations (Pty) Ltd and / or the BOSASA Group of Companies.

15. Etcetera .....

**F. List of Proposed Charges**

COUNT	ACCUSED	CHARGE
1.	All Accused	Contravention of section 2(1)(e) of POCA – Participating in the Conduct of an Enterprise
<b>THE SUBSTANTIVE CHARGES</b>		
Sub count 1	Accused 1	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 2	Accused 2	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 3	Accused 3	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 4	Accused 4	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 5	Accused 5	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 6	Accused 6	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 7	Accused 7	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 8	Accused 8	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 9	Accused 9	Contravention of section 2(1)(f) of POCA – Managing an Enterprise
Sub count 10	Accused 10	Contravention of section 2(1)(f) of POCA – Managing an Enterprise

**G. SUMMARY OF THE CASE**

16. The summary of the case is set out in the preamble to the draft charge sheet attached to this memorandum as **Annexure B**.

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

**H. STATEMENT OF THE LAW**

17. Chapter 2 of Act No 121 of 1998 (POCA) contains prohibitions regarding racketeering activities. It consists of seven sub-sections.

All six substantive sub-sections (2(1) (a) – 2(1) (f)) require proof of the existence of an "enterprise" and a pattern of racketeering activities."

*In casu* the relevant sub-sections are;

Section 2(1) (b) (Receives or retains property on behalf of the enterprise).

- (i) Any person who, receives or retains, directly or indirectly, on behalf of any enterprise; and
- (ii) Knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity commits an offence.

Section 2(1)(e) (Participate in the affairs of the enterprise)

Any person who - whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a through a pattern of racketeering, commits an offence.

Section 4(a) (Money laundering)

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not, shall be guilty of an offence.

Section 5(a) - Any person who knows or ought reasonably to have known that

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated, shall be guilty of an offence.

### The Enterprise

An "enterprise" is defined in Section 1(1) as:

"any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity".

An "enterprise" is established by proving that it has

- (a) A common or shared purpose
- (b) A formal or informal structure
- (c) A system of authority
- (d) Continuity

There is sufficient evidence to prove that the accused are associated in fact, and that they had a shared or common purpose that existed over several years.

The unlawful activities consisted of the acts committed by the accused as enunciated in the indictment and statement of the facts.

### The Pattern of Racketeering Activity

A "pattern of racketeering activity" is defined in Section 1(1) as:

"the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

referred to in Schedule 1, of which one of the offences occurred within 10 years after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1".

The accused committed **more than two Schedule one offences** during the period(s), as stipulated in the Indictment.

The requirement that one offence must have occurred after 1999 and the other within ten years of the last offence, has been met. [None of the offences occurred prior to the year 2002]

The committed offences are connected in that they were part of a planned, ongoing, continuous or repeated occurrence.

Taking into account the number of offences, the period of time, over which they were committed, as well as the continuous offences committed and roles played by each accused, a pattern of racketeering activity existed.

The requirement that the accused be associated with the enterprise has therefore been met.

**I. POCA RACKETEERING POLICY**

**J. ANTICIPATED DEFENCES**

**K. ASSET FORFEITURE UNIT**

**L. CONCLUSION**

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NA



## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

ADV. M.C. DE KOCK  
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS  
SCCU - PRETORIA

Provisional Draft Authorization – Section 24 of Act 121 of 1998

AUTHORISATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF  
ORGANISED CRIME ACT, ACT NO 121 OF 1998

**THE STATE VERSUS:**

1. PATRICK O'CONNELL GILLINGHAM
  2. LINDA MORRIS MTI
  3. ANGELO AGRIZZI
  4. WILLIAM DANIEL MANSELL
  5. RIAAN RIEKELE HOEKSMAN
  6. JURGEN GEORGE SMITH
  7. GAVIN JOSEPH WATSON
- 
8. CARLOS JOAO DA COSTA MONTEIRO BONIFACIO
  9. ANDRIES JOHANNES JACOBUS VAN TONDER
  10. FRANS HENDRIK STEYN VORSTER
  11. BOSASA OPERATIONS (PTY) LTD
  12. SONDOLO IT (PTY) LTD
  13. PHEZULU FENCING (PTY) LTD
  14. CONSILIUM PROPERTIES CC

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## PROPOSED RACKETEERING MEMORANDUM – CONFIDENTIAL DOCUMENT – 8 AUGUST 2013

15. **CONSILIUM BUSINESS CONSULTANTS (PTY) LTD**
16. **CONSILIUM MANAGEMENT SERVICES (PTY) LTD**
17. **AUTUMN STORM INVESTMENTS 119 (PTY) LTD**
18. **RIEKELE KONSTRUKSIE BK**
19. **RRH PROPERTY DEVELOPMENT (PTY) LTD**
20. **HOEKSMA BROERS BK**
21. **LEBONKE TRADING CC**
22. **RAND BRICKS (PTY) LTD**
23. **RAPITRADE 273 (PTY) LTD**
24. **DIE RUGGA TRUST**
25. **HOEKSMA FAMILIE TRUST**
26. **GRANDE FOUR PROPERTY TRUST**
27. **W.D. & J MANSELL t/a GRANDE FOUR RANCHES**

I, **NOMCOBO JIBA**, Acting National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution in respect of contravention of section 2(1) (e) of the Prevention of Organised Crime Act, No 121 of 1998, against the above named accused.

**GIVEN UNDER MY HAND AT PRETORIA on this      day of August 2013**

\_\_\_\_\_  
(Acting National Director of Public Prosecutions)

**PRETORIA – SOUTH AFRICA**

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

IN THE REGIONAL COURT FOR THE GAUTENG DIVISION HELD AT  
PRETORIA

CASE NO. ....

In the matter between:

THE STATE

And

Patrick O'Connell Gillingham

ACCUSED No.1

Linda Morris M ti

ACCUSED No. 2

Angelo Agrizzi

ACCUSED No. 3

William Daniel M ansell

ACCUSED No. 4

Riaan Riekele Hoeksma

ACCUSED No. 5

Jurgen George Smith

ACCUSED No. 6

Gavin Joseph Watson

ACCUSED No. 7

Carlos Joao da Costa M. Bonifacio

ACCUSED No. 8

Andries Johannes J. van Tonder

ACCUSED No. 9

Frans Hendrik Steyn Vorster

ACCUSED No. 10

BOSASA Operations (Pty) Ltd

ACCUSED No. 11

Sondolo IT (Pty) Ltd

ACCUSED No. 12

Phezulu Fencing (Pty) Ltd

ACCUSED No. 13

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
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**Consilium Properties CC**

**ACCUSED No. 14**

**Consilium Business Consultants (Pty) Ltd** **ACCUSED No. 15**

**Consilium Management Services (Pty) Ltd** **ACCUSED No. 16**

**Autumn Storm Investments 119 (Pty) Ltd** **ACCUSED No. 17**

**Riekele Konstruksie BK** **ACCUSED No. 18**

**RRH Property Development (Pty) Ltd** **ACCUSED No. 19**

**Hoeksma Broers BK** **ACCUSED No. 20**

**Lebonke Trading CC** **ACCUSED No. 21**

**Rand Bricks (Pty) Ltd** **ACCUSED No. 22**

**Rapitrade 273 (Pty) Ltd** **ACCUSED No. 23**

**Die Rugba Trust** **ACCUSED No. 24**

**Hoeksma Familie Trust** **ACCUSED No. 25**

**Grande Four Property Trust** **ACCUSED No. 26**

**W.D. & J. Mansell t/a Grande Four Ranches** **ACCUSED No. 27**

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**PROVISIONAL DRAFT CHARGE SHEET**

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**GENERAL PREAMBLE - RACKETEERING CHARGES**

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
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**WHEREAS** the Prevention of Organised Crime Act, Act 121 of 1998 (hereinafter referred to as "the Act") defines in Section 2 thereof various criminal offences with regard to racketeering;

**AND WHEREAS** the Act defines an 'Enterprise' as

*"..... including any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity";*

**AND WHEREAS** the Act provides that any person/s who manage[s] the operation or activities of an enterprise and who know[s] or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity is guilty of a criminal offence; [Section 2(1) (f) of POCA]

**AND WHEREAS** the Act provides that *"whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity"* is guilty of an offence; [Section 2(1) (e) of POCA]

**AND WHEREAS** the Act provides that any person/s who acquires or *maintains*, directly or indirectly, *any interest in* or control of any enterprise through a pattern of racketeering activity is guilty of an offence; [Section 2(1) (d) of POCA]

**AND WHEREAS** any person/s who *receives or retains* (certain persons *received or retained*) any *property derived*, directly or indirectly, *from* a pattern of racketeering activity; and knows or *ought reasonably to have known* that *such property is so derived*; and *uses or invests*, directly or indirectly, *any part of such property* in (the) acquisition of any interest in, or the establishment or *operation* or activities of, any enterprise, (that is) derived or *is derived from* or (is derived) *through* a pattern of racketeering activity, is guilty of an offence; [Section 2 (1) (a) (i), (ii), (iii) of POCA]

**AND WHEREAS** any person/s who *receives or retains* any *property*, directly or indirectly, *on behalf of any enterprise* and knows or ought reasonably to have

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
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known that such property *derived* or *is derived from* ~~through~~ pattern of racketeering activity, is guilty of an offence; [Section 2 (1) (b) (i) and (ii) of POCA]

AND WHEREAS any person/s who *uses* or *invests* any **property**, directly or indirectly, *on behalf of* any enterprise or in acquisition of any interest in, or the *establishment* or *operation* or *activities* of any enterprise; and knows or ought reasonably to have known that such **property** *derived* or *is derived from* or *through a pattern of racketeering activity*; [Section 2(1) (c) (i) and (ii) of POCA]

NOW THEREFORE the State alleges that Accused 1 and 2 (and other individuals) at all relevant times were associated in fact and thus Formed an Enterprise (or) Associated with an Enterprise (or) Participated in the Conduct of an Enterprise (or) Conspired with an Enterprise, as defined in Section 1 of the Act and as intended in Sections 2(1)(a), 2(1)(b), 2(1)(c), 2(1)(d), 2(1)(e), 2(1)(f) or 2(1)(g)

NOW THEREFORE the State alleges that all the Accused and other persons, known and unknown to the State, and directly or indirectly involved therein operated and / or managed the Enterprise and / or participated in the conduct of the affairs of the Enterprise and / or were employed by the Enterprise;

AND that such conduct and or operation and/or management and/or involvement in and/or employment by and/or participation in the conduct of the affairs of the Enterprise *occurred through* a pattern of racketeering activity as set out in **Annexure "A"**.

AND that the offences upon which the Accused are arraigned were committed in order to benefit the Enterprise, its managers, members, employees and persons directly and indirectly involved therein.

## DESCRIPTION OF THE CRIMINAL ENTERPRISE

### The Criminal Enterprise

1. The Criminal Enterprise consisted of (*but may not have been limited to*) the following individuals, partnerships, corporations, associations, other juristic persons, any other unions or group of individuals *associated in fact* to wit: Gavin Joseph Watson, Angelo Agrizzi, William Daniel Mansell, Jurgen George Smith, Carlos Joao

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**PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
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da Costa Monteiro Bonifacio, Riaan Riekele Hoeksma, Linda Morris Mti and Patrick O'Connell Gillingham, Andries Johannes Jacobus van Tonder, Frans Hendrik Steyn Vorster, BOSASA Operations (Pty) Ltd, Sondolo IT (Pty) Ltd, Phezulu Fencing (Pty) Ltd, Consilium Properties CC, Consilium Business Consultants (Pty) Ltd, Consilium Management Services (Pty) Ltd, Autumn Storm Investments 119 (Pty) Ltd, Riekele Konstruksie BK, RRH Property Development (Pty) Ltd, Hoeksma Broers BK, Lebonke Trading CC, Rand Bricks (Pty) Ltd, Rapitrade 273 (Pty) Ltd, Die Rugga Trust, Hoeksma Familie Trust, Grande Four Property Trust, W.D & J Mansell t/a Grande Four Ranches.

**The Legitimate Enterprise**

1. The Criminal Enterprise described above (and) below, made use of a variety of legitimate entities. These entities existed in the public sector as well as the private sector and included Close Corporations, Companies and Trusts.
2. The boundaries of the Criminal Enterprise by far exceed the narrow boundaries of the legitimate enterprises but made use of the structures they put in place and their sphere(s) of influence, to advance the objectives of the Criminal Enterprise.

**The Criminal Enterprise**

**The Purpose of the Criminal Enterprise**

1. To obtain Government Tenders (more particularly tenders issued by the Department of Correctional Services).
2. To increase its sphere of influence within Government and / or to increase the financial influence and / or the monetary benefit derived from new and ongoing Government contracts and / or the interests / rights / privileges / claims and securities and any further interest therein and all the proceeds derived from such activities.
3. To expand the benefits and / or profits derived by the criminal enterprise and / or the fruits derived from these unlawful activities.
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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
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The Organised Crime Leaders

1. Linda Morris Mti (the Commissioner of the Department of Correctional Services)
2. Patrick O'Connell Gillingham (the Chief Financial Officer of the Department of Correctional Services)
3. Gavin Joseph Watson (the Chief Executive Officer of the BOSASA Group of Companies)
4. William Daniel Mansell a major male businessman and "Consultant" employed by (or) associated with the BOSASA Group of Companies.
5. Dr. Jurgen George Smith, a major male businessman and member of various Close Corporations using the word "Consilium" as part of their business description.
6. Carlos J. M. Bonifacio (the Group Accountant of the BOSASA Group of Companies)
7. Riaan Riekele Hoeksma a major male businessman in the Building Industry,
8. Andries Jacobus Johannes van Tonder
9. Frans Hendrik Steyn Vorster
10. The business entities (Companies, Close Corporations and Trusts) controlled by and / or managed by **and / or associated with** the organised crime leaders as specified above.

The Relationships within the Enterprise

1. Describe the growing relationship(s) between the (Legal) Entities.
2. Describe the personal and / or (corrupt) relationship(s) between the individuals employed by and associated with the Criminal Enterprise.
3. Describe the types of relationships they are involved in (1) Personal Relationships (2) Financial Relationships (3) Corrupt Relationships etc.

The pattern of Racketeering

1. The Planning of the Pattern of Activities (Describe)
2. The Ongoing nature of the (pattern of) activities. [Describe]
3. The Continuous nature of the (pattern of) activities. [Describe]

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
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4. The Repeated participation in the (pattern of) activities. [Describe]
5. The Repeated involvement with the (pattern of) activities. [Describe]

The Nature of the Particular Tenders Awarded to BOSASA

The Kitchen Tender

1. The Appointment of a Service Provider for the Rendering of Catering and Training Services at Various Management Areas (Seven (7) out off ...)
2. The Contract Period – 3 Years
3. Further extensions of the said contract

The Access Control Tender

1. The Appointment of a Service Provider to (i) Supply, (ii) Deliver (iii) Install (iv) Commission (v) Provide Support and (vi) Maintain a Comprehensive Access Control **and** Body Scanning System **with** CCTV Coverage of Correctional Services Staff and Inmates **at 66 Maximum Security Facilities/Centre's of Excellence.**
2. The Contract Period –
3. Further extensions of the said contract

The Fencing Tender

1. The Appointment of a Service Provider to (i) Supply, (ii) Deliver, and (iii) Commission, Security Outer Perimeter Fences with (or without) Taut Wire Detection Inner Fences **and** CCTV Surveillance Cameras **at Various Centra** within the Department of Correctional Services
2. The Contract Period –
3. Further extensions of the said contract

The Television System Tender

1. The Appointment of a Service Provider to (i) Supply, (ii) Deliver (iii) Install (iv) Commission and (v) Maintain, Television Systems **and** Monitors **to all correctional centre's** within the Department of Correctional Services, the System **must** integrate into the local, regional and national control rooms **and must provide** for effective Video Conferencing Facilities.
2. The Contract Period –
3. The extensions of the said contract

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
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**The State alleges that the accused is guilty of the following crimes:**

**COUNT 1**

**Conducting an Enterprise through a pattern of racketeering activities**

(Accused No. 1, 2, 3, 4, 5, 6, 7, 8) **[All the Accused]**

THAT the accused are guilty of a contravention of Section 2(1)(e) read with sections 1, 2(2) and 3 of Act 121 of 1998.

IN THAT the Accused prior to but including the period 1 June 2003 until 29 October 2010, and at or near PRETORIA and/or KRUGERSDORP in the regional division of Gauteng, wrongfully and unlawfully, whilst managing or employed by or associated with the Enterprise, conducted or participated in the conduct directly or indirectly of the Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

**List of Activities - The Conduct or Participation in the Conduct (Directly or indirectly) of the affairs of the enterprise through a pattern of racketeering activity**

**THE SUBSTANTIVE CHARGES**

(In the alternative to the above and as separate counts)

**SUBCOUNT 1**

(Accused No. 1) – Patrick O'Connell Gillingham

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections 1, 2(2) and 3 of Act 121 of 1998.

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
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AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

IN THAT prior to and during the period 1 June 2003 until **29 October 2010**, and at or near PRETORIA and / or KRUGERSDORP in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, **Linda Morris Mti, Angelo Agrizzi, William Daniel Mansell, Riaan Riekele Hoeksma, Jurgen George Smith, Gavin Joseph Watson** and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, **conducted or participated in the conduct, directly or indirectly**, of such Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

List of Activities (Direct and Indirect) participation in (or) conduct of the (Criminal) Enterprise through a pattern of racketeering activities) by the persons employed by or associated with that Enterprise – List of Activities mentioned in **Annexure A**

**SUBCOUNT 2**

**(Accused No. 2) – Linda Morris Mti**

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections 1, 2(2) and 3 of Act 121 of 1998.

IN THAT prior to and during the period 1 June 2003 until **30 November 2006**, and at or near PRETORIA and / or KRUGERSDORP in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, **Patrick O'Connell Gillingham, Angelo Agrizzi, William Daniel Mansell, Riaan Riekele Hoeksma, Jurgen George Smith, Gavin Joseph Watson** and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, **conducted or participated in the conduct, directly or indirectly**, of such Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

List of Activities (Direct and Indirect) participation in (or) conduct of the  
(Criminal) Enterprise through a pattern of racketeering activities) by the  
persons employed by or associated with that Enterprise – List of Activities  
mentioned in Annexure A

SUBCOUNT 3

(Accused No. 3) – Angelo Agrizzi

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections  
1, 2(2) and 3 of Act 121 of 1998.

IN THAT prior to and during the period 1 June 2003 until 31 March 2007, and at or  
near PRETORIA and / or KRUGERSDORP in the regional division of Gauteng, the  
Accused wrongfully and unlawfully managed the operations or activities of an  
Enterprise, and knew or reasonably ought to have known, that any person to wit,  
*Patrick O'Connell Gillingham, Linda Morris Mti, William Daniel Mansell, Riaan  
Riekele Hoeksma, Jurgen George Smith, Gavin Joseph Watson* and other  
persons known and unknown to the State, whilst employed by or associated with that  
Enterprise, *conducted or participated in the conduct, directly or indirectly*, of  
such Enterprise's affairs through a pattern of racketeering activity as set out in  
*Annexure A*

List of Activities (Direct and Indirect) participation in (or) conduct of the  
(Criminal) Enterprise through a pattern of racketeering activities) by the  
persons employed by or associated with that Enterprise – List of Activities  
mentioned in Annexure A

SUBCOUNT 4

(Accused No. 4) – William Daniel Mansell

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections  
1, 2(2) and 3 of Act 121 of 1998.

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

IN THAT prior to and during the period **1 June 2003** until **31 March 2007**, and at or near PRETORIA **and / or KRUGERSDORP** in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, **Patrick O'Connell Gillingham, Linda Morris Mti, Angelo Agrizzi, Riaan Riekele Hoeksma, Jurgen George Smith, Gavin Joseph Watson** and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, **conducted or participated in the conduct, directly or indirectly**, of such Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

**List of Activities (Direct and Indirect) participation in (or) conduct of the (Criminal) Enterprise through a pattern of racketeering activities) by the persons employed by or associated with that Enterprise – List of Activities mentioned in Annexure A**

**SUBCOUNT 5**

**(Accused No. 5) – Riaan Riekele Hoeksma**

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections 1, 2(2) and 3 of Act 121 of 1998.

IN THAT prior to and during the period **1 June 2003** until **31 March 2007**, and at or near PRETORIA **and / or KRUGERSDORP** in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, **Patrick O'Connell Gillingham, Linda Morris Mti, Angelo Agrizzi, William Daniel Mansell, Jurgen George Smith, Gavin Joseph Watson** and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, **conducted or participated in the conduct, directly or indirectly**, of such Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

List of Activities (Direct and Indirect) participation in (or) conduct of the (Criminal) Enterprise through a pattern of racketeering activities) by the persons employed by or associated with that Enterprise – List of Activities mentioned in *Annexure A*

#### SUBCOUNT 6

(Accused No. 6) – Jurgen George Smith

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections 1, 2(2) and 3 of Act 121 of 1998.

IN THAT prior to and during the period 1 June 2003 until 31 March 2007, and at or near PRETORIA and / or KRUGERSDORP in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, *Patrick O'Connell Gillingham, Linda Morris Mti, Angelo Agrizzi, William Daniel Mansell, Riaan Riekele Hoeksma, Gavin Joseph Watson* and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, *conducted or participated in the conduct, directly or indirectly*, of such Enterprise's affairs through a pattern of racketeering activity as set out in *Annexure A*

List of Activities (Direct and Indirect) participation in (or) conduct of the (Criminal) Enterprise through a pattern of racketeering activities) by the persons employed by or associated with that Enterprise – List of Activities mentioned in *Annexure A*

#### SUBCOUNT 7

(Accused No. 7) – Gavin Joseph Watson

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections 1, 2(2) and 3 of Act 121 of 1998.

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

IN THAT prior to and during the period **June 2003** until **29 October 2010**, and at or near PRETORIA **and / or KRUGERSDORP** in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, **Patrick O'Connell Gillingham, Linda Morris Mti, Angelo Agrizzi, William Daniel Mansell, Riaan Riekele Hoeksma, Jurgen George Smith** and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, **conducted or participated in the conduct, directly or indirectly**, of such Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

**List of Activities (Direct and Indirect) participation in (or) conduct of the (Criminal) Enterprise through a pattern of racketeering activities) by the persons employed by or associated with that Enterprise – List of Activities mentioned in Annexure A**

**SUBCOUNT 8**

**(Accused No. 8) – Carlos J.M. Bonifacio**

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections 1, 2(2) and 3 of Act 121 of 1998.

IN THAT prior to and during the period **1 June 2003** until **29 October 2010**, and at or near PRETORIA **and / or KRUGERSDORP** in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, **Patrick O'Connell Gillingham, Linda Morris Mti, Angelo Agrizzi, William Daniel Mansell, Riaan Riekele Hoeksma, Jurgen George Smith, Gavin Joseph Watson** and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, **conducted or participated in the conduct, directly or indirectly**, of such Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

*Wade  
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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

List of Activities (Direct and Indirect) participation in (or) conduct of the  
(Criminal) Enterprise through a pattern of racketeering activities) by the  
persons employed by or associated with that Enterprise – List of Activities  
mentioned in **Annexure A**

#### SUBCOUNT 9

(Accused No. 9) – Andries Johannes J. van Tonder

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections  
1, 2(2) and 3 of Act 121 of 1998.

IN THAT prior to and during the period **1 June 2003** until **29 October 2010**, and at or  
near PRETORIA and / or KRUGERSDORP in the regional division of Gauteng, the  
Accused wrongfully and unlawfully managed the operations or activities of an  
Enterprise, and knew or reasonably ought to have known, that any person to wit,  
**Patrick O'Connell Gillingham, Linda Morris Mti, Angelo Agrizzi, William Daniel  
Mansell, Riaan Riekele Hoeksma, Jurgen George Smith, Gavin Joseph Watson,  
Carlos Joao da Costa Monteiro Bonifacio** and other persons known and unknown  
to the State, whilst employed by or associated with that Enterprise, **conducted or  
participated in the conduct, directly or indirectly**, of such Enterprise's affairs  
through a pattern of racketeering activity as set out in **Annexure A**

List of Activities (Direct and Indirect) participation in (or) conduct of the  
(Criminal) Enterprise through a pattern of racketeering activities) by the  
persons employed by or associated with that Enterprise – List of Activities  
mentioned in **Annexure A**

#### SUBCOUNT 10

(Accused No. 10) – Frans Hendrik Steyn Vorster

THAT the accused are guilty of a contravention of Section 2(1)(f) read with sections  
1, 2(2) and 3 of Act 121 of 1998.

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PROVISIONAL DRAFT CHARGE SHEET – RACKETEERING – AS PER THE  
INSTRUCTION OF THE ANDPP – CONFIDENTIAL – SUBJECT TO  
AMENDMENTS – INVESTIGATION STILL IN PROGRESS – 08 AUGUST 2013

IN THAT prior to and during the period **1 June 2003** until **29 October 2010**, and at or near PRETORIA **and / or KRUGERSDORP** in the regional division of Gauteng, the Accused wrongfully and unlawfully managed the operations or activities of an Enterprise, and knew or reasonably ought to have known, that any person to wit, **Patrick O'Connell Gillingham, Linda Morris Mti, Angelo Agrizzi, William Daniel Mansell, Riaan Riekele Hoeksma, Jurgen George Smith, Gavin Joseph Watson, Carlos Joao da Costa Monteiro Bonifacio, Andries Johannes J. van Tonder** and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, **conducted or participated in the conduct, directly or indirectly**, of such Enterprise's affairs through a pattern of racketeering activity as set out in **Annexure A**

**List of Activities (Direct and Indirect) participation in (or) conduct of the (Criminal) Enterprise through a pattern of racketeering activities) by the persons employed by or associated with that Enterprise – List of Activities mentioned in Annexure A**

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

**RACKETEERING CHARGE SHEET – 08 August 2013**

**Racketeering – Provisional List of Activities & POC**

Activities Numbered from 1 to 149

1. During 2003 Patrick O'Connell Gillingham was assigned the task to drive the process of the implementation of the so-called "three meal system". He thereafter gave regular feedback at EMC/MCC meetings regarding the progress made with the implementation of the three meal system.
2. On 10 May 2004, Chief Deputy Commissioner Tshivhase informed DCS staff members that Patrick O'Connell Gillingham would be the Project Manager of the Kitchen Tender project.
3. On 10 May 2004, Willem Pretorius, an Assistant Director: Tender Management, within the Department of Correctional Services received instruction to initiate a tender process in respect of the outsourcing of catering and training services at various management areas for a period of three (3) years.
4. During the period between the 10<sup>th</sup> and the 13<sup>th</sup> of May 2004, Patrick O'Connell Gillingham had several meetings with staff members and provided them with a hard copy document with draft Bid Specifications in respect of the Kitchen Tender.
5. The Departmental request for the publication of the Official Tender Notice in respect of Bid Invitation for HK 2/2004 was faxed through to the Government Printers on 13 May 2004. This activity was performed as a result of the instructions given to staff members of DCS

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

6. On the 19<sup>th</sup> of May 2004 Linda Morris Mti approved the process “to invite bids for the rendering of catering and training services for a three year period”.
7. As a result of these instructions, the final Bid Specifications used for the Kitchen Tender (HK 2/2004) was published in the relevant Government Gazette on the 21<sup>st</sup> of May 2004.
8. On 1 June 2004, Linda Morris Mti, appointed Patrick O’Connell Gillingham as Chief Financial Officer of the Department of Correctional Services.
9. The compulsory information session held on the 4<sup>th</sup> of June 2004, was attended by various employees of the BOSASA Group of Companies. Angelo Agrizzi attended on behalf of the BOSASA Group. The compulsory information session mentioned above, was chaired by Patrick O’Connell Gillingham.
10. On 8 June 2004, Linda Morris Mti, gave Patrick O’Connell Gillingham a written warning in respect of “Allegations of Misconduct”. The report mentioned allegations of fraud, inappropriate relationships, maladministration and intimidation of staff. [Compare SIU report p. 23]
11. On 11 June 2004, Frans Hendrik Vorster, submitted an offer to purchase in respect of a Mercedes Benz E270 CDI A that would later be registered in the name of Patrick O’Connell Gillingham.
12. On 15 June 2004, the Mercedes Benz E270 CDI A mentioned above was ordered from “Grand Central Motors” (Midrand)
13. On 15 June 2004, Patrick O’Connell Gillingham prepared a memorandum entitled “Appointment of Bid Evaluation Committee: Bid HK2/2004: Rendering of Catering and Training Services”. Patrick O’Connell Gillingham recommended that he be appointed as chairperson of the BEC. The memorandum was formally signed on 18 June 2004.

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

14. The closing date for this bid (HK 2/2004) was stipulated as 25 June 2004.
15. On 26 June 2004 a person referred to as "Danny" created the "Supplementary Evaluation Criteria" mentioned below.
16. On 6 July 2004, Hendrik Truter (at that time a clerk: tenders with the Department of Correctional Services) received a document with the title "Supplement to Evaluation Criteria". This document was provided to him by Patrick O'Connell Gillingham and had to be included in the documents to be prepared for the Bid Evaluation Committee.
17. On 8 July 2004 the Bid Evaluation Committee (BEC) convened to commence with the evaluation of the bids. Patrick O'Connell Gillingham was the chairperson of the Bid Evaluation Committee.
18. On 8 July 2004 Patrick O'Connell Gillingham, as chairperson of the BEC signed a declaration of interest and a code of conduct, relevant to benefits received. The declaration was in respect of the kitchen tender. [Rework]
19. On 9 July 2004, Linda Morris Mti was requested to appoint members to the National Bid Adjudication Committee (NBAC). The document submitted to the Commissioner for his signature was signed by Patrick O'Connell Gillingham in his position as CDC Finance. The Commissioner approved of the process on 13 July 2004.
20. On 20 July 2004, the Bid Evaluation Committee of the Department made the recommendation that BOSASA Operations be awarded the Kitchen Tender Bid in respect of all seven (7) the management areas. The Director Procurement stated the following: "It could be mentioned that no interest was declared by any of the committee members and that all of them signed the code of conduct" The

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv! Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

chairperson of the BEC signed the memorandum with the recommendations on **23 July 2004**.

21. On **22 July 2004**, and flowing from the procurement process Linda Morris Mti, signed the appointment letters of six (6) members of the National Bid Adjudication Committee (NBAC) to adjudicate on the recommendations in respect of the Kitchen Tender (HK 2/2004).

22. The National Bid committee convened on **27 July 2004** with the singular purpose to consider the appointment of a service provider for the rendering of catering and training services at various management areas for a period of three (3) years namely from 1 August 2004 until 31 July 2007.

23. On **29 July 2004** the contract between DCS and BOSASA Operations was signed in Pretoria. Johannes Gumede and **Angelo Agrizzi** represented BOSASA Operations (Pty) Ltd, whilst **Patrick O'Connell Gillingham** and others, represented the Department. The contract awarded to BOSASA had a value of **R718 283 084.07**.

23A On **26 August 2004**, the Glen Volkswagen prepared an offer to purchase ("Cash on Delivery") in respect of a new Volkswagen Golf 5, indicating the purchaser as Patrick O'Connell Gillingham. The purchase amount was indicated as R196 959.96.

24. On **30 August 2004** a cheque in the amount of R196 959.97 issued by Dr. J.G. Smith from his Nedbank current account with account number 1928031803 was deposited into the current account of Patrick O'Connell Gillingham with account number 1012851592 held at ABSA Bank.

25. On **1 September 2004**, funds in the amount of R196 959.97 were electronically transferred to a dealership known as The Glen Volkswagen by Patrick O'Connell Gillingham.

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

26. On **1 September 2004** the Glen Volkswagen received an order document from BOSASA Operations (Pty) Ltd for one (1) set of mud guards and a 6 disk CD shuttle. These items to the value of **R4050.04** had to be fitted to the Volkswagen Golf 1.6 mentioned above. BOSASA paid for these expenses on 21 September 2004.
18. On **8 September 2004**, a Volkswagen Golf 1.6, with the license number RMD413GP was registered in the name of Patrick O'Connell Gillingham.
19. On **13 September 2004**, Linda Morris Mti, signed an offer to purchase a vacant stand in a security estate referred to as Savannah Hills.
20. The deposit in the amount of R10 000.00 was paid into the bank account of the transferring attorneys on **14 September 2004**.
21. On **17 September 2004**, Montagu Homes, accepted an offer to purchase a vacant stand, situated in a security estate referred to as Savanna Hills.
22. On **21 September 2004**, BOSASA made a payment to the Glen Volkswagen, in respect of the mud guards and CD shuttle that was fitted to the Volkswagen Golf 1.6 that was registered in the name of Patrick O'Connell Gillingham.
23. On **29 September 2004** the transaction to purchase Efr 61, Sagewood Extension 1 from Montagu Homes, was cancelled on the request of the purchaser, Linda Morris Mti.
24. On **4 October 2004**, Autumn Storm Investments (Pty) Ltd as represented by Riaan Riekele Hoeksma, signed an offer to purchase Erf 61, Sagewood Extension. The purchase price of the property was given as R395 000.00.
25. On **5 October 2004**, Montagu Homes, congratulated Autumn Storm and Mr. Hoeksma, on the acquisition of the property.

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26. During October 2004, Martha Jacoba Zietsman of HMZ Architects and Developers CC had interviews with Linda Morris Mti in respect of a double story house to be designed to his specifications.
27. On 12 October 2004, the Mercedes Benz E270 CDI A ordered by Frans Hendrik Steyn Vorster of BOSASA, arrived at Grand Central Motors (Midrand).
28. On 12 October 2004 Dr. Jurgen Smith issued a cheque with number 348 for R155 000.00 to Patrick O'Connell Gillingham. This enabled Gillingham to make the deposit payment in the amount of R120 281.00 in respect of the Mercedes Benz E270 CDI A previously ordered by Frans Vorster.
29. On 13 October 2004 Grand Central Motors (Midrand) was presented with amended offer to purchase. The signature of Patrick O'Connell Gillingham appears on the document.
30. On 13 October 2004, Patrick O'Connell Gillingham, made a deposit payment in the amount of R120 281.00, in respect of the Mercedes Benz E270 CDI A, mentioned above.
31. The Mercedes Benz E270 CDI A, was delivered to Patrick O'Connell Gillingham on 15 October 2004.
32. On the 22 October 2004 the architect Mrs. Zietsman, received a payment in respect of the services that she had rendered. [Confirm – Payment in respect of Mti]
33. On 30 October 2004 an amount of R2500.00 was paid into the bank account of Patrick Gillingham. The amount mentioned above was a deposit payment in respect of an overseas trip for Megan Gillingham that was due in June 2005.
34. On 16 November 2004, Patrick O'Connell Gillingham and others attended a meeting called by the Commissioner of Correctional Services. They were made

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

aware of the fact that R90 Million was available for the procurement of security equipment and that the money had to be spent before 31 March 2005. This was the event that started the Departmental proceedings that later resulted in the advertising of the Access Control bid. [Starting dates to be moved forward]

35. On 3 December 2004, Patrick O'Connell Gillingham, requested prices for security equipment from the Department of Public Works. The process had the support of Linda Morris Mti.

On 3 December 2004 S.S. Mlombile made the following note on a document "AJCV 3" – "The Commissioner wants the option of DCS buying without the help of the Department of Public Works explored as he fears DPW may not respond on time before the end of the financial year"

36. On 8 December 2004, AJC Venter received an instruction from Patrick O'Connell Gillingham, informing him that the Commissioner of DCS instructed that security equipment must be procured by the Department of Correctional Services and not by the Department of Public Works. A document with the title "Need for Security Equipment: Various Correctional Centre's" was subsequently signed by Linda Morris Mti on 21 December 2004. (HK2/2005)

37. On 9 December 2004, the Director Security Management Services was requested to obtain specifications from the Department of Public Works. These specifications were obtained on the same date and a memorandum relating to the need for security equipment at various correctional centers was sent to Patrick Gillingham and Linda Morris Mti.

On 9 December 2004 bid specification was obtained from the Department of Public Works. The specifications (hereinafter only referred to as the DPW Bid Specifications) were made available to Patrick O'Connell Gillingham.

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

38. On 15 December 2004, Patrick O'Connell Gillingham, made mention of the fact that the procurement process in respect of the Access Control tender had to be expedited and that the first tender bulletin would only be published on 16 January 2005.

39. On 17 December 2004 a cash amount of R17 000.00 was paid over to Jenny's Travel, in respect of an overseas trip for Mr. and Mrs. Gillingham, planned for July 2005.

40. On 21 December 2004 the Linda Morris Mti approved the procurement process for the Access Control Tender and *inter alia* made the following written comments: *"We may have three elements in it namely Fence, Scanner and CCTV as specified" and "DCS must try to do this on its own if we are not to experience roll over and further delays from DPW."*

41. The process to be followed in respect of the procurement of security equipment (including the erection of security fences at various prisons) was under discussion as early as January 2005. During January 2005, Patrick O'Connell Gillingham indicated that CCTV cameras, X-ray scanners etcetera would be installed as first priority. The erection of security fences would receive attention once the Department knew how much money would be available from the capital budget. [Confirm facts]

42. On 13 January 2005, Jenny's travel received an amount of R22 000.00 in respect of the overseas trip of Mr. and Mrs. Gillingham planned for July 2005. [Cash payment]

43. On 14 January 2005, Hendrik Truter received a set of bid specifications. The words **delivery and commissioning** do not appear in this document and is only added to later versions.

44. On 21 January 2005 the 13 January 2005 payment to Jenny's Travel, was followed by a further cash amount of R2700.00

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45. On 24 January 2005, an e-mail received from "Kobus" was forwarded to Siyabulela Mlombile by Patrick O'Connell Gillingham.

46. On 26 January 2005, the Department of Correctional Services received an electronic copy of the Proposed Bid Specifications for the Access Control Tender, from Patrick O'Connell Gillingham.

On or about the 26<sup>th</sup> of January 2005, Damons and Venter had a meeting with Patrick Gillingham. They discussed the bid specifications.

47. On 27 January 2005, altered bid specifications were received from Patrick O'Connell Gillingham via a person referred to as "Kobus".

48. On 28 January 2005, Willem Pretorius, received a written request to invite bids in respect of a comprehensive access control system for the Department of Correctional Services. The formal request was contained in a document signed by Mzwandile Sokupa, and was dated the same day. The written request itself was completed in the handwriting of Patrick O'Connell Gillingham. [Rework]

49. On 30 January 2005, an amount of R16 410.00 was paid into the bank account of Patrick O'Connell Gillingham by W.D. Mansell. This was a part payment in respect of the overseas trip of Megan Gillingham during June 2005.

50. On the 31 January 2005, A.J.C. Venter wrote a memorandum addressed to Patrick O'Connell Gillingham and others. Venter *inter alia* made comments on the body scanning equipment mentioned in the Kobus Version of the Bid Specifications. Venter made mention of the fact that Mlombile wanted clarity with regard to the bid process and its legitimacy. The legitimacy concerns about the Kobus Version of the Bid Specifications did not deter the Department in adopting it as their own. The bid

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PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

was eventually published in the Government Tender Bulletin of **February 2005**.  
[Rework]

51. On **31 January 2005**, Procprops 157 (Pty) Ltd, as represented by Willem van der Merwe, accepted an offer in the amount of **R695 000.00** that was made in respect of **Erf 106 Midstream**. The offer to purchase Erf 106 was made by Patrick Gillingham.

*Note – Minutes of a MCC Meeting dated 1 February 2005. Report on procurement of security equipment by CDC Finance: "The CDC presented report on the processes followed in the development of the tender process for the procurement of security equipment at correctional centers". (Discussion of the Report) "The CDC Central Services expressed a concern that the directorate Information Technology has not had to opportunity to comment on the tender document."*

52. On **4 February 2005** (the date on which the advertisement to invite bids in respect of the Access Control Tender appeared in the Government Tender Bulletin), Sondolo IT did not exist.

53. The construction on **Erf 61 Sagewood Extension 1** started on **7 February 2005**. The property was improved with the erection of a double story house with five (5) bedrooms and five (5) bedrooms to the value of approximately R2 000 000.00. (Linda Morris Mti)

54. On **8 February 2005** (the date on which the bid documents were issued to "Sondolo"), the company name change had not taken place and the new directors had not been appointed yet.

55. On **14 February 2005** (the date of the compulsory information session arranged by DCS), the Company directors had been in office for four (4) days.

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Note – On 14 February 2005 AJC Venter had a conversation with Gillingham informing him that he did not believe Gillingham to be the author of the Access Control Tender Specifications received from the kobu@b fn.co.za address.

56. On **15 February 2005** a cash amount of R52 027.00 was deposited into the bank account of Van der Merwe Du Toit Ingelyf. The amount of R52 027.00 mentioned above was required for the transfer of Erf 106 into the name of Patrick O'Connell Gillingham. (Possible source BOSASA) **[Confirm with Audit Report]**
57. The full amount payable in respect of **Erf 61 Sagewood Extension 1** namely R392 781.00 was paid on **17 February 2005** from the cheque account of Riekele Konstruksie BK. (R.R. Hoeksma)
58. The project manager for the Access Control Tender, Patrick O'Connell Gillingham, prepared a memorandum entitled "Appointment of Bid Evaluation Committee: Bid HK2/2005: supply, delivery, installation, commissioning, support and maintenance of a comprehensive access control and body scanning system with CCTV coverage of department of correctional services staff and inmates, at 66 maximum security facilities/centre's of excellence ". On **10 March 2005**, Linda Morris Mti approved the appointment of the members of the Bid Evaluation Committee on the Access Control Tender.
59. On **16 March 2005** the Bid Evaluation Committee (BEC) convened to commence with the evaluation of the bids. Patrick O'Connell Gillingham was the chairperson of the Bid Evaluation Committee.
60. On **16 March 2005**, an amount of R3 957.00 was paid into the bank account of Jenny's Travel in respect of the July 2005 overseas trip of Mr. and Mrs. Gillingham. **[Cash payment]**
61. The bid evaluation process in respect of the Access Control Tender commenced after a briefing session by Procurement Officials where the Code of Conduct and

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Declaration of Interest was signed by the members of the Bid Evaluation Committee. The evaluation processes were concluded on the **22 March 2005**. The Bid Evaluation Committee recommended that the highest scoring bidder namely **Sondolo IT** be accepted and that the total contract price (including maintenance) at the bid price of **R236 997 385.31**. [Rework – word sequence]

62. Erf **106, Midstream Estate**, was registered in the name of Patrick O'Connell Gillingham on **31 March 2005**. The commencement date in respect of the mortgage repayments was given as **15 April 2005**. Erf 106 was improved with the erection of a double story house with five (5) bedrooms to the value of R1 855 500.00. The relevant dates and activities in respect of the construction of the Gillingham residence are set out below.

63. On **6 April 2005**, the memorandum containing the BEC Recommendation mentioned above was signed by POC Gillingham the chairperson of the bid evaluation committee. [Rework]

64. The National Bid Adjudication Committee (NBAC) convened on **11 April 2005** to consider *inter alia* the approval of the Access Control Tender, bid HK 2/2005. The appointment of the recommended bidder namely **Sondolo IT** was approved by the NBAC. Patrick O'Connell Gillingham represented the BEC.

65. On **19 April 2005** the contract between DCS and Sondolo IT was signed in Pretoria. The bid required the supply, delivery, installation, commissioning, support and maintenance of the access control system. The value of the contract was R236 997 385.31. The first year required a payment of R88 794 800.31 whilst the remaining R 148 202 585.00 had to be paid in the remaining four (4) years of the contract. The advertised bid did not make provision for the staffing of the control rooms by the contractor.

66. During March / April 2005, Patrick Gillingham and his wife had various meetings with Mrs. Zietsman, an architect for plans for a residential dwelling on Erf 106,

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Midstream Estate. On **22 April 2005** she issued them with an invoice in the amount of R41 075.00.

67. The residential dwelling erected on Erf 106, was constructed on behalf of Mr. & Mrs. Gillingham by **R.R. Hoeksma** of Riekele Construction "CC". The Quotation/Specifications was dated **3 May 2005**. The estimated start date of the construction was given as **9 May 2005** and the estimated occupation date was **30 November 2005**.

68. On **23 May 2005** Linda Morris Mti, suggested to Senior Management, that they should meet away from Head Office and over a weekend. The task of obtaining private funding, was assigned to Patrick O'Connell Gillingham and it was noted in the minutes of the meeting that the "*CDC Finance would seek private funding*" for a retreat which would most likely take place after the vacancies of Regional Commissioners and Deputy Commissioners have been filled.

69. On **27 May 2005**, the property described as **Erf 61 Sagewood Extension 1** was registered in the name of Riekele Konstruksie BK.

70. Sondolo IT required 587 individuals to operate the approved access control system. The following is *inter alia* reflected in the minutes of the contract management meetings in relating to this contract: On the **30 May 2005**, DCS was informed that 443 operators and 144 supervisors would be required in order to staff all the control rooms. Both Angelo Agrizzi and Patrick O'Connell Gillingham attended this meeting.

71. On the **31 May 2005**, **Sondolo IT** undertook to provide DCS with options and motivation for outsourcing. These discussions continued until the mid July 2005.

72. On **9 June 2005**, a cheque issued from the account of BOSASA Operations (Pty) Ltd was paid into the bank account of Mrs. Zietsman the architect that assisted Patrick O'Connell Gillingham and Linda Morris Mti.

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73. During the period 25 June 2005 to 9 July 2005, Megan Gillingham the youngest child of Mr. and Mrs. Gillingham went on a school tour to Europe. The trip arrangements were made by a Close Corporation known as **Travel Showcase**. The value of the tour package was R18 910.00.

74. During the period 8 July 2005 till 27 July 2005, Mr. and Mrs. Patrick Gillingham travelled to Europe on a Trafalgar Tour. The value of the Tour Package was R45 657.00. Jenny's Travel rendered the booking services in respect of this trip. The trip was planned months in advance.

75. On 12 July 2005, the contract management minutes reflect the following under **Staffing Options**: *"The document that was requested by the CDC: Finance (POC Gillingham), on the breakdown of staffing costs was made available to DCS and the proposal has been directed to the Commissioner for his approval"*.

76. On 13 July 2005, the Deputy Commissioner of Supply Chain Management addressed a memorandum to the Commissioner of DCS. In this memorandum, Linda Morris Mti was requested to give principle approval for the proposed solution of outsourcing the staffing of various control rooms to **Sondolo IT**.

77. On 4 August 2005, Linda Morris Mti, approved of a memorandum addressed to "Commissioner", in respect of the outsourcing of the staffing of various control rooms to Sondolo IT.

78. On 11 August 2005, Patrick O'Connell Gillingham had discussions about the utilization of capital funds which was previously earmarked for the building of 4 New Generation Prisons, and instructed the Deputy Commissioner Facilities and Security to approach the Commissioner for approval to utilize the said funds for the purposes of Security Fences at 48 Correctional Centre's.

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78A [Confirm series of cash payments preceding payment in (79) below from Audit Report]

79. During **August 2005**, Patrick O'Connell Gillingham and his wife contracted Sterlings Living (Pty) Ltd to install the kitchen at # 6 Marlboro Place, Midstream Estate (Erf 106). The value of the construction of the kitchen was quoted as R133 813.49, but kitchen appliances were added and the overall value of the services was thus increased to R185 810.41. On **20 August 2005**, Patrick Gillingham issued Sterlings Living with a cheque in the amount of R66 000.00. (Proceeds of Crime payments)

80. On **24 August 2005**, the Directorate Security Management Services issued a memorandum addressed to the Deputy Commissioner Facilities and Security, the CDC Finance (POC Gillingham) and the Commissioner of DCS (Linda Morris Mti). It was explained that the purpose of the memorandum was to obtain approval from the Commissioner to erect **security fences** at Centre's of Excellence and other high risk Correctional Centre's by utilizing funds under the Capital Budget that will not be spent in the 2005/2006 financial year as indicated by the DC Facilities and Security as per memorandum 4/1/9 dated 23 August 2005.

81. On **29 August 2005**, W.D. Mansell issued a cheque drawn on the bank account of Grande Four Property Trust. The said cheque bears the reverse side inscription **GIL 011, Electrical app, taps, basins & sink**. [See 84 below]

82. On **31 August 2005**, Patrick O'Connell Gillingham submitted a request for approval in respect of the installation of security fences at various correctional centers'. This request was submitted to Linda Morris Mti who approved the process resulting in the issuing a tender hereinafter only referred to as the Fencing Tender. (HK 24/2005)

83. During **May 2005**, the Commissioner suggested to Senior Management, that they should meet away from Head Office and over a weekend. The task was assigned to

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Patrick O'Connell Gillingham. On **2 September 2005**, the CDC Finance recommended that a "Donation to the State" in the amount of R15 000.00 be accepted. The money originated from Grande Four Property Trust and the cheque received by the Department was dated **1 September 2005**. The retreat was arranged at Karridene during the period 9 – 11 September 2005. [See 68 above]

84. On **5 September 2005**, Sterlings Living (Pty) Ltd received a cheque payment from Grande Four Property Trust in the amount of R50 396.92. (Compare paragraph 81 above for the issuing of the cheque)

85. On or about **8 September 2005**, Linda Morris Mti, informed the Department of Public Works that the lease period for the house situated at no. 50 Forbes Reef Road, in Waterkloof Heights, Pretoria due to expire at the end of October 2005, would not be renewed and that he would make the necessary alternative arrangements.

86. On **15 September 2005**, an amount of R50 000.00 was deposited into the bank account of Amazing Sounds C.C. The money was for the credit of P. Gillingham. The amount of R50 000.00 originated from the bank account of Grande Four Property Trust.

87. On **19 September 2005**, Patrick Gillingham received specifications in respect of outer security and taut-wire detection fences previously obtained from the Department of Public Works. The said specifications were forwarded to H.A. Truter on the same date.

88. On **22 September 2005** W.D. Mansell transferred R29 545.00 via interbank transfer from his cheque account to the current account of Weylandts Furniture. The money was in respect of the interior finishing of the Gillingham residence. (Furniture and household appliances were bought with this money.)

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89. On **26 September 2005** an amount of R 30 095.00 was transferred via interbank transfer from the cheque account of W D Mansell to the current account of Studio Blue (Pty) Ltd. The reference reflected on the Bank statement of Studio Blue reflects "IB PAYMENT FROM PO GILLINGHAM". This payment was made in respect of an order for furniture and household items ordered by a Mr Gillingham from the Studio Blue branch situated at Atterbury Value Mart. The delivery address of the goods was specified as No 4 Marble Ave, Midstream Estate.
90. On **28 September 2005**, *DCS officials* received **verbal instructions** from Patrick O'Connell Gillingham to proceed with the invitation of bids for the supply, delivery, installation, commissioning and maintenance of television systems and monitors to all correctional centers within the department of correctional services, the system had to integrate into the local, regional and national control rooms and had to provide for effective video conferencing facilities.
91. The verbal instruction referred to above preceded an extended *Executive Management Meeting* of the Department held at Kievits Kroon, Pretoria, on **29 to 30 September 2005**. During this event, Patrick O'Connell Gillingham made a financial presentation. He *inter alia* explained that a projected surplus of R666 Million was available on the budget allocated for compensation of employees. He further informed the Meeting that the construction of the 4 New Generation Prisons (NGP's) were not on schedule. The Surplus Funds: Spending Proposals proposed by the CFO included an amount of R180 Million on Fencing, R70 Million on X-Ray Scanners and R60 Million on Televisions for Correctional centers. *[Rework]*
92. During September 2005 and more specifically on the **30<sup>th</sup> of September 2005** the electronic records of Wetherlys and Osiers Cane and Linen indicate that an amount of R 6 352.00 as well as an amount of R 12 371.00 was received in their account via interbank payments. Both amounts reflect a reference PO Gillingham. Both these amounts were paid over from the current account of Mr W D Mansell. The bank account of Mansell indicates the said payments to have taken place on the **26<sup>th</sup> of September 2005**.

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93. On the **3 October 2005** and on the instruction of Patrick Gillingham, the Budget Administration Section of the Department issued a *memo* with the title "*Re: 2005/06 Reprioritization Exercise: Executive Management Committee Meeting: 30 September 2005*". The memorandum was addressed to the Commissioner of DCS and requested approval of the re-allocation of the surplus funds mentioned above. The memorandum was signed by both Gillingham and Mti on **5 October 2005**.

Pursuant to the decisions taken at the *Executive Management Meeting* mentioned above and on 3 October 2005, the Budget Administration Office of the Department of Correctional Services drafted a memorandum seeking approval for surplus funds in the amount of **R641 954 000.00** to be re-prioritized. The memorandum was signed by both Gillingham and Mti on the 5<sup>th</sup> of October 2005.

94. On **3 October 2005** an amount of R19 152.00 was deposited into the bank account of RSA Stone Art CC for services rendered namely the supply and delivery of a granite kitchen top. The payment reference was given as "PO Gillingham". This payment did not originate from a bank account of Patrick Gillingham but from the Account of W.D. Mansell. The Mansell bank account reflects the payment as "IB payment to RSA Stone Art CC".

95. On **10 October 2005**, a customer visited the showrooms of Bakos Brothers in Dunkeld West (Johannesburg) and ordered a *Low Custom Designed TV Unit* in the amount of R8000.00.

96. The operational approval for the outsourcing of the Staffing of the Control Rooms given on **4 August 2005** was followed by the financial approval obtained from Patrick O'Connell Gillingham on the **10 October 2005**.

97. On **18 October 2005** the payment for the *TV Unit* mentioned above was made by way of an interbank transfer from Grande Four Property Trust.

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98. The "Request to Invite Bids (Tenders)" originated from the Office of the CDC Finance. Patrick O'Connell Gillingham signed the request on the **18 October 2005**.  
(Confirm – in respect of Fencing Tender) = TV Tender ??

99. On **25 October 2005**, Patrick O'Connell Gillingham issued the following certificate in respect of the **Fencing Tender**:

"The specifications for the bid were obtained from the Department of Public Works as a standard set of needs and it was then adapted to the specific circumstances of DCS. The specifications were previously used by DPW with a good response from a wide spectrum of bidders. To my knowledge the specifications were written in an unbiased manner."

100. On **25 October 2005**, Patrick O'Connell Gillingham acted as the chairperson in respect of an information session on the Fencing Tender. The minutes of the information session indicate that Patrick O'Connell Gillingham *inter alia* informed the prospective bidders that the contract would be awarded to **one bidder**. He further stated that the Department already had an integrated security system as well as the control rooms required. The new system had to provide the output to the existing security systems and had to be compatible with it.

101. On **25 October 2005**, Patrick O'Connell Gillingham issued the following certificate in respect of the **TV System Bid**:

"In accordance with Chapter 3, paragraph 3.3.1.2 of the Supply Chain User Manual, I hereby certify that the specifications of the mentioned bid were written in an unbiased manner to allow all potential bidders to offer their goods, works and services."

102. On **25 October 2005**, Patrick O'Connell Gillingham chaired the compulsory information session in respect of the fencing tender. He *inter alia* informed bidders

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that the bid will be awarded to **one bidder** (or a single group) for all the centre's listed in the bid.

103. During **early November 2005**, POC Gillingham placed orders for a variety of wooden shutters and doors with a company known as "American Shutters CC". The payments for the shutters and doors were later made by W.D. Mansell.

104. On **4 November 2005**, Patrick O'Connell Gillingham received a request for the approval to invite a bid for the supply, delivery, installation, commissioning and maintenance of Television systems and Monitors to all Correctional Centers' within the Department of Correctional Services. He did not forward the memorandum to Linda Morris Mti, but wrote the following: "The Commissioner already approved in principle on 5 October 2005." (HK 25/2005)

105. On **7 November 2005** an amount of R43 000.00 was paid into the bank account of American Shutters. This interbank payment originated from the bank account of W.D. Mansell with the reference "IB Payment to American Shutters" whilst the bank statement of American Shutters reflects the words "IB Payment from Patrick Gillingham".

106. On **9 November 2005**, Patrick O'Connell Gillingham, requested an updated cost evaluation on the Fencing Tender Project, the revised estimated cost amounted to **R347 383 550.00**. The memorandum with the aforesaid cost estimate was forwarded to the Commissioner on 15 November 2005.

Note – Milestone Report 9 November 2005 – **Sondolo IT (Pty) Ltd – Annual Progress Report – Conclusion** – paragraph 3 – "Sondolo IT also tendered on the supply and installation of **5674** television monitors in all **242 prisons nationally**. This is a fully integrated television and communication system that is operated by the IMIS integration software, with a Rand value of **R150 million**. This tender is **due to be awarded shortly** and **Sondolo IT are confident of winning this**".

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107. On **14 November 2005** Patrick O'Connell Gillingham requested his builder, Riekele Construction to refund him the amount of R7200.00 that was spent on door handles, tiles and bathroom accessories. The money had to be paid into his credit card account.
108. On **14 November 2005** Sterlings Living (Pty) Ltd received a cheque payment in the amount of R53 500.00. This cheque was also drawn on the Standard Bank account of Grande Four Property Trust. The cheque was signed by W.D. Mansell and bears the reverse side inscription **GIL 011**.
109. On **14 November 2005**, Grande Four Property Trust received a credit transfer in the amount of R570 000.00 from BOSASA Operations (Pty) Ltd.
110. On the closing date of the bid, namely on **14 November 2005**, Patrick O'Connell Gillingham submitted a request for the Appointment of a Bid Evaluation Committee in respect of this tender.
111. On **15 November 2005**, Linda Morris Mti, approved the appointment of a Bid Evaluation Committee to evaluate and recommend the service provider in respect of the Fencing Tender. He appointed Patrick O'Connell Gillingham as the Chairperson of the BEC.
112. On **15 November 2005** the credit card account of Patrick O'Connell Gillingham was credited with an amount of R7200.00. The transaction reference that was used was **"ABSA BANK RIAAN"**. [See 107 above]
113. On **17 November 2005** the Bid Evaluation Committee (BEC) convened to commence with the evaluation of the bids. Patrick O'Connell Gillingham was the chairperson of the Bid Evaluation Committee. [Fencing Tender]

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On this same date Patrick O'Connell Gillingham signed a declaration of interest and a code of conduct. The *declaration inter alia* required of him to indicate if "You, or any of your family members', friends or associates receiving, or agreement to receive, any gifts, favours, payments, sponsorships, subsidies or any benefits from any bidders, within the last 12 months of this date." *Sondolo IT* was indicated as a sub-contractor on the bid received from *Phezulu Fencing*.

114. The minutes of the Bid Evaluation Committee as well as the Recommendation was signed by Patrick O'Connell Gillingham on **23 November 2005**. The chairperson formally declared that "no Bidder was purposefully or unlawfully favoured or prejudiced during the evaluation process."

115. On **25 November 2005**, an interbank transfer in the amount of R10 000.00 was received into the ABSA Cheque Account of Patrick Gillingham. The funds originated from the Standard Bank Current Account of W.D. Mansell. The reference as reflected on the Mansell bank statement is "IB PAYMENT TO POC GILLINGHAM".

116. The National Bid Adjudication Committee convened on **29 November 2005**. Patrick O'Connell Gillingham attended the proceedings as the representative of the Bid Evaluation Committee. The chairperson of the NBAC confirmed with all officials present that no official has any financial interest in any of the bids serving before the committee "*since such persons should excuse themselves when the relevant bid is presented*". The bid for the Fencing Tender required of the successful bidder to supply, deliver, install and commission security outer perimeter fences with/or (without) taut wire detection inner fences and CCTV surveillance cameras at various centra. The bid also included a maintenance component. The National Bid Adjudication Committee approved the recommendation and awarded the contract to Phezulu Fencing (Pty) Ltd in the amount of **R486 937 910.35**

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117. On **30 November 2005**, Patrick O'Connell Gillingham, *inter alia* informed the Department of Public Works, that Linda Morris Mti "*has now identified a suitable furnished place which he is interested in and he indicated that this request should be submitted to you for approval of the lease for a twelve month period starting from 01 December 05*".

118. On **1 December 2005** Linda Morris Mti, took occupation of Erf 61 Sagewood Extension 1 (Savanna Hills Estate)

119. On **2 December 2005** the TV Unit and other furniture was delivered to the Gillingham residence at stand No. 106, Midstream Estate. POC Gillingham signed acknowledged receipt for the goods

120. On **8 December 2005** an amount of R7884.24 was deposited into the bank account of "Inspired Glass" for services rendered. The payment reference was given as "IB Payment from POC Gillingham". This payment did not originate from a bank account of Patrick Gillingham but from the Account of W.D. Mansell.

121. On **12 December 2005**, Patrick O'Connell Gillingham signed the request for the appointment of the Bid Evaluation Committee in respect of the TV System Bid he acted in his capacity as Project Manager. The approval for the appointment of the BEC was signed by Linda Morris Mti on the **21 December 2005**.

122. Departmental records indicate that Patrick O'Connell Gillingham signed his declaration of interest and a code of conduct on **13 December 2005**. The declaration *inter alia* required of him to indicate if "You, or any of your family members', friends or associates receiving, or agreement to receive, any gifts, favours, payments, sponsorships, subsidies or any benefits from any bidders, within the last 12 months of this date." The bid that was received from Sondolo IT, listed the bid price for this bid at **R224 364 480.00**.

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123. On **22 December 2005**, the Service Level Agreement between Sondolo IT (Pty) Ltd and the Department of Correctional Services, was signed by the parties. The agreement in respect of the Staffing of the Control Rooms was set to end on the 31<sup>st</sup> of March 2009. The agreement had a financial implication of **R 208 739 00.00** for the Department. [Rework]

124. The National Bid Adjudication Committee convened on **24 January 2006** to adjudicate on the TV System Tender. Patrick O'Connell Gillingham attended the proceedings as the representative of the Bid Evaluation Committee. The chairperson of the NBAC confirmed with all officials present that no official has any financial interest in any of the bids serving before the committee *"since such persons should excuse themselves when the relevant bid is presented"*.

125. On **21 February 2006**, the Department of Public Works informed **Riaan Hoeksma** of Riekele Konstruksie BK that the lease agreement in respect of the property is ready for signature. (The property was rented by the Department of Public Works for a period of thirteen (13) months starting from the 1<sup>st</sup> of December 2005 until 31 December 2006) The consolidated amount that was paid in respect of monthly rental amounted to **R208 000.00**.

126. On **24 February 2006**, Patrick Gillingham made a payment of R350 00.00 to the Grande Four (Property) Trust, shortly thereafter and on **27 February 2006**, W.D. Mansell made a payment in the amount of R392 000.00 to **LC Viljoen inc 912838175**. This amount being a part payment for the purchase of Erf 971, Midstream in the name of POC Gillingham (Junior)

127. During **April 2006**, Gert van de Merwe, of Gert van de Merwe Couturier C.C. consulted with Miss Megan Gillingham. Miss Gillingham required the services of Mr. van de Merwe in the design and make up of a dress for the occasion of the Matric farewell of her school.

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128. On **12 April 2006**, Frans Vorster of BOSASA Operations (Pty) Ltd, made an offer to purchase in respect of a Volkswagen Polo. The vehicle was subsequently purchased from "Lindsay Saker Krugersdorp" and later registered in the name of Ryan Albert Gillingham who is the second child of Patrick O'Connell Gillingham and his wife, Theresa Gillingham. [The signature of Frans Vorster appears on the New Vehicle Delivery Check Sheet dated **18 April 2006**]

129. The payment in respect of the Volkswagen Polo mentioned above was received on **19 April 2006**. [Confirm transaction history from Audit report]

130. The cost involved in the commissioning of the Matric farewell dress mentioned above, was R10 000.00. On **26 April 2006**, the bank account of Gert van de Merwe, was credited with the amount of R10 000.00 against the reference "M. Gillingham". The money was received by way of an interbank payment from the bank account of Grande Four Property Trust. The date of the transaction is given as **26 April 2006**. The Grande Four bank account gives the reference "IB Payment to Gert van der Merwe 912838175".

131. The Lindsay Saker Volkswagen Polo with vehicle register number GWM439S and license number TMR507GP was registered in the name of RA Gillingham on the **2 May 2006**.

132. On **13 May 2006**, Megan Gillingham, visited the premises of Gert van der Merwe, in connection with the Matric farewell dress mentioned above.

133. During late 2005, early 2006, Mrs. Zietsman, the architect that previously assisted Patrick O'Connell Gillingham (Senior), were introduced to Patrick O'Connell Gillingham (Junior) and proceeded to draft sketch plans and final drawings for a Tuscan Style House to be erected on **Erf 971 Midstream Estate, Extension 8**. The architectural and related fees required by Mrs. Zietsman amounted to R50 589.12

MCDK  
RA

PROVISIONAL LIST OF RACKETEERING ACTIVITIES – POC Gillingham + L.M. Mti – NOTE – THIS LIST IS STILL INCOMPLETE and SUBJECT to AMENDMENTS – DRAFT DOCUMENT ONLY – CONFIDENTIAL – For attention of Adv. Mrwebi / Adv. Mosing and the ANDPP only. (8 August 2013)

This amount was paid from the bank account of Riekele Construction on the **31 May 2006**.

134. On **2 June 2006**, Megan Gillingham once again, visited the premises of Gert van der Merwe, in connection with the Matric farewell dress mentioned above.

135. On **21 August 2006**, an amount of R80 000.00 was received into the bank account of Booysen, Dreyer & Nolte Incorporated Attorneys and Conveyancers. The payment in the amount of R80 000.00 was received as a deposit on a property purchased by Patrick O'Connell Gillingham. The money originated from the bank account of Grande Four Property Trust. The payment was made by W.D. Mansell. ("Protea Aftree Oord" Property)

136. On **28 August 2006**, Megan Gillingham had an interview with a representative of Inscape Design College with the view of enrollment with the College. Her interview was successful and on the **6<sup>th</sup> of October 2006**, she received confirmation of enrollment at the College for an Interior Design Diploma Course. The tuition fees for the Diploma Course amounted to R27 600.00.

137. On **30 August 2006**, Mrs. Zietsman, received a payment for the (architectural drawings) construction plan of the Tuscan Style House referred to above. The payment was received from Riekele Construction and amounted to R70 165.20

138. The Matric farewell dress ordered during April 2006 was collected from Gert van der Merwe Couturiers' on **1 September 2006**.

139. On **16 September 2006**, a cash deposit in the amount of R27 600.00 was made into the bank account of Inscape Design College. The funds were deposited into the account using the reference "POC Gillingham".

140. On **20 September 2006**, a document described as an "early bird" contract of enrollment for the Inscape Design Course mentioned above was faxed through from

*Wade  
RA*



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the office of the Chief Financial Officer ("CFO") of the Department of Correctional Services.

141. On the **7<sup>th</sup> of November 2005** an amount of R25 600.00 was electronically transferred into the bank account of **Bundu Blinds & Interiors C.C.** The amount originated from the bank account of W.D. Mansell. The reference appearing on the account of Mr. Mansell is **"IB PAYMENT TO BUNDU BLINDS & INTE 912838175"** [Move 2 2005]

142. Megan Gillingham the third child of Patrick O'Connell Gillingham and his wife, Theresa Gillingham received a Volkswagen Polo 1.6 with vehicle register number HPL430S and license number VLZ368GP to the value of R131 367.99. The vehicle was purchased from a dealer known as "The Glen Volkswagen" as a result of a quotation dated **21 December 2006**.

143. The payment in respect of the Volkswagen Polo mentioned above was made on **21 December 2006** and the customer invoice was also issued on this date.

143A The Glen Volkswagen file gives the customer contact email address as [andries@bosasa.com](mailto:andries@bosasa.com) [Andries van Tonder]

144. On **15 March 2007**, Frans Vorster of BOSASA, ordered a Mercedes Benz E230 CDI from the Constantia Kloof branch of Mercedes Benz.

145. On **11 April 2007** an amount of R180 000.00 was transferred from the FNB account of BOSASA Operations (Pty) Ltd with number 62053735290 into the FNB structured facility account of Angelo Agrizzi, account number 62091005217.

146. On **11 April 2007** Mr. Agrizzi transferred the amount of R180 000.00 with the reference **Trf Poc** into the FNB Money Market Account of Carlos JDCM Bonifacio, account number 62012712411.

Weak  
NA



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147. On **11 April 2007** Mr. Bonifacio issued a cheque from this account payable to C. J. Bonifacio in the amount of R180 000.00. The said cheque was deposited into his current account at Nedbank with the account number 1988251273.

148. On **11 April 2007** Mr. Bonifacio instructed Nedbank to transfer the amount of R180 00.00 from the said current account to "Sandown Motor Holdings, Nedbank Westgate Acc. No. 1454045833, Branch Code 145 405" with reference GILLINGHAM. Mr. Bonifacio added the further and following instruction: "Please confirm transfer by fax for attention of **KOBUS** – 086 686-1240"

149. On **23 April 2007**, the Mercedes Benz E320 CDI with vehicle register number JVX526S and license number (VVL275GP) PG01GP to the value of R555 150. 02 purchased from Mercedes Benz Constantia Kloof (Roodepoort), was registered in the name of Patrick O'Connell Gillingham.

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