

**COMMISSION OF INQUIRY INTO STATE CAPTURE**  
**HELD AT**  
**CITY OF JOHANNESBURG OLD COUNCIL CHAMBER**  
**158 CIVIC BOULEVARD, BRAAMFONTEIN**

**15 OCTOBER 2020**

**DAY 284**



**Gauteng Transcribers**  
**Recording & Transcriptions**

22 Woodlands Drive  
Irene Woods, Centurion  
TEL: 012 941 0587 FAX: 086 742 7088  
MOBILE: 066 513 1757  
[info@gautengtranscribers.co.za](mailto:info@gautengtranscribers.co.za)

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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**PROCEEDINGS RESUME ON 15 OCTOBER 2020**

**CHAIRPERSON:** Good morning Mr Myburgh, good morning everybody.

**ADV MYBURGH SC:** Good morning Chairperson.

**CHAIRPERSON:** I see that somebody has decided I should have no bundles here – I should have no file here. Good morning Mr Todd thank you for coming to the commission and to assist it.

**MR TODD:** Thank you Chairman.

10 **ADV MYBURGH SC:** Chairperson as you know Mr Todd is our next witness. He will give evidence in relation to Mr Gama's reinstatement. His affidavits are contained as Exhibit BB17 in Bundle 3 and he will also give evidence by cross-referring to documents contained in Bundles 1 and 2 similar to what Mr Mapoma did.

Exhibit BB17 you will see contains four affidavits 17.1 through to 17.4. 17.3 and 17.4 deal with GNS which we are not going to deal with now. I will after the witness' has taken the oath ask him to confirm that 17.1 and 17.2  
20 are his affidavits and then I would ask you to admit them formerly as exhibits.

**CHAIRPERSON:** Yes please administer the oath or affirmation.

**REGISTRAR:** Please state your full names for the record.

**MR TODD:** Christopher Francis Neale Todd.

**REGISTRAR:** Do you have any objection to taking the prescribed oath?

**MR TODD:** No I do not.

**REGISTRAR:** Do you consider the oath to be binding on your conscience?

**MR TODD:** Yes I do.

**REGISTRAR:** Do you swear that the evidence you will give will be the truth; the whole truth and nothing else but the truth; if so please raise your right hand and say, so help  
10 me God.

**MR TODD:** So help me God.

**CHAIRPERSON:** If I hear that noise coming from there you will be kicked out. If I hear that noise again you will be kicked out. Mr Myburgh.

**ADV MYBURGH SC:** Thank you Chairperson. Mr Todd you have in front of you Bundle 3 could I ask you to turn to Exhibit BB17 and to page 47.

**MR TODD:** I have it.

**ADV MYBURGH SC:** You confirm that that is an affidavit of  
20 yours?

**MR TODD:** Yes.

**ADV MYBURGH SC:** And may I ask you then to turn to the end of that affidavit which you find at page 64.

**MR TODD:** Yes

**ADV MYBURGH SC:** Is that your signature and do you

confirm that you deposed to this affidavit under oath on the 14 July 2020?

**MR TODD**: I confirm that.

**ADV MYBURGH SC**: Mr Todd you would know that attached to your affidavit is a series of annexures running from Annexure A to 8. Annexure A you find at page 65.

**MR TODD**: Yes.

**ADV MYBURGH SC**: And the end of Annexure 8 you find at page 155 you confirm that?

10 **MR TODD**: Yes I confirm that.

**ADV MYBURGH SC**: A to H.

**MR TODD**: That is correct.

**ADV MYBURGH SC**: End of H is at 155.

**MR TODD**: Correct.

**ADV MYBURGH SC**: And then if I could take you please to page 156 do you confirm that is a further affidavit of yours?

**MR TODD**: That is correct.

20 **ADV MYBURGH SC**: Could you then please go to the end of that affidavit which you find at page 167 confirm that you deposed to this affidavit under oath on the 29 September 2020?

**MR TODD**: Yes I did.

**ADV MYBURGH SC**: This affidavit also has a series of annexures from page F confirm that those annexures

commence at page 168 as A and Annexure F ends at page 485.

**MR TODD**: That is correct. You will appreciate I have not been through the bundle this morning.

**ADV MYBURGH SC**: Ja.

**MR TODD**: But I confirm that – those are the annexures to my affidavit yes.

**ADV MYBURGH SC**: It ends at 485 immediately before your next affidavit.

10 **MR TODD**: Correct.

**ADV MYBURGH SC**: Mr Chairperson we would then ask that you admit Mr Todd's affidavit of the 14 July 2020 as Exhibit BB17.1 and his affidavit of the 29 September.

**CHAIRPERSON**: Okay – okay let us deal with one at a time. The one you have just asked me to admit is it the one starting at page 47?

**ADV MYBURGH SC**: That is correct yes.

**CHAIRPERSON**: Okay. As Exhibit?

**ADV MYBURGH SC**: 17 – BB17.1.

20 **CHAIRPERSON**: Mr Christopher Francis Neale Todd's affidavit starting at page 47 is admitted and will be marked as Exhibit BB17.1. Okay then we can go to the next one.

**ADV MYBURGH SC**: The next affidavit deposed to on 29 September 2020 Mr Chairperson you will find at page 156.

**CHAIRPERSON**: 156. And that one I – you want me to

admit it as Exhibit?

**ADV MYBURGH SC:** BB17.2.

**CHAIRPERSON:** BB17.2. The affidavit of Mr Christopher Francis Neale Todd starting at page 156 is admitted and will be marked as Exhibit BB17.2.

**ADV MYBURGH SC:** Thank you Chairperson. Mr Todd let us then start with your first affidavit at page 47. From which firm of attorneys are you and what position do you hold there?

10 **MR TODD:** I hold the position of Director sometimes referred to as a partner of the firm Bowman Gilfilan.

**ADV MYBURGH SC:** And you deposed to this affidavit you deal with this at paragraph 3. What is the purpose or was the purpose of deposing to this affidavit?

**MR TODD:** It was in response to a request by the commission to assist with information that I had personal knowledge of concerning the matters dealt with in the letter.

20 **ADV MYBURGH SC:** We then follow the chronology of events in relation to your involvement and the involvement of Bowman Gilfilan. When was Bowman Gilfillan first instructed in the matter relating to Mr Gama?

**MR TODD:** So that was in May 2009. We were not the first firm to have given advise in relation to the matter and – but some prior advice had been obtained by members of

the board from another firm which had recommended that disciplinary proceedings be proceeded with against Mr Gama.

And when the board members then passed that matter onto the then acting Chief Executive who was Mr Wells the acting Group Chief Executive he decided that he would proceed with the benefit of legal advice himself and he – we were then instructed not specifically by Mr Wells he in turn engaged another executive Mr Maharaj he was  
10 the person ultimately responsible for Human Resources within the group.

And we were then engaged in May 2009 to advise initially on the question whether or not we agreed that there was a proper basis for the – for Transnet to take disciplinary steps against Mr Gama.

**ADV MYBURGH SC:** Now you were at all times the attorney that was then responsible for giving advice and rendering legal assistance to Transnet in this matter?

**MR TODD:** Yes I was. I – sometimes you refer to that as a  
20 lead partner or lead attorneys. There were other attorneys involved at different times and Counsel was briefed but I remained the person responsible for advising Transnet.

**ADV MYBURGH SC:** And throughout the time that you dealt with this matter Mr Todd who represented Mr Gama?

**MR TODD:** An attorney by the name of Themba Langa and



his firm was Themba Langa Attorneys.

**ADV MYBURGH SC:** At paragraph 7 of your affidavit you deal with the fact that after Transnet had instituted disciplinary proceedings against Mr Gama and on the 10 September 2009 he approached the high court?

**MR TODD:** Yes.

**ADV MYBURGH SC:** What – what did that litigation involve?

**MR TODD:** Once disciplinary proceedings were formally  
10 instituted and there were some – there were some prior steps. In fact what Mr Wells initially did was engaged with Mr Gama on a relatively informal basis and then also set out in a detailed written letter what the issues were and invited him to respond. And the purpose of that before disciplinary proceeding proceeded formally was in fact to establish whether Mr Gama was of a mind to agree that there had been serious problems and that he would commit to working to resolve them.

Maybe he said he had agreed that he had been  
20 negligent or that – a contract had been entered into irregularly and that he would work to resolve it. In fact unfortunately Mr Gama took the view that merely having those allegations raised with him was indicative of an ulterior purpose being pursued by Transnet and its group executives.

And so that – that attempt to engage on the disciplinary matters in a more informal manner did not succeed and a decision was then taken to – to formally institute disciplinary proceedings against Mr Gama. And the high court proceedings were effectively a consequence of Mr Gama's belief at the time that there was no merit in any concerns about his conduct and that the fact of bringing disciplinary complaints against him was indicative of a conspiracy against him being – and the language  
10 became quite florid.

There was a cabal within Transnet that was intent on undermining his aspirations to become the Group Chief Executive. That was in essence the thrust of his application to the high court and he asked to effectively – he also sought to challenge the authority of Mr Maharaj who had formally issued the disciplinary charge sheet or instituted proceedings.

But the primary thrust of his complaint in the high court was that there no underlying merit in concerns about  
20 his conduct and that it was part of a – there was ulterior purpose.

**CHAIRPERSON:** Well Mr Myburgh can I take one step back?

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** Of course we know that you know

disciplinary matters and unfair dismissal matters because you will deal with that at some stage. They fall within the field of labour law. How long have you been an attorney?

**MR TODD**: Around 25 years.

**CHAIRPERSON**: About 25 years.

**MR TODD**: Chairperson.

**CHAIRPERSON**: And labour law do you specialise in labour law?

10 **MR TODD**: Yes Chairperson throughout that period I practiced this.

**CHAIRPERSON**: You practiced labour law?

**MR TODD**: A specialist – I mean one evolves and some of the work I do would not be characterised as solely labour law. Many board conflicts involve company law and other areas of law but essentially I have been a specialist and a recognised specialist within our firm for 25 years.

**CHAIRPERSON**: Well I happen to know that you have acted as a Judge in the labour court as well I think a number of times. Is that correct?

20 **MR TODD**: That – that is correct.

**CHAIRPERSON**: Yes. So the field of labour law, unfair dismissals, disciplinary hearings is something that falls within your speciality as a labour law specialist?

**MR TODD**: That is so Chairperson.

**CHAIRPERSON**: Yes. Okay. Thank you.

**ADV MYBURGH SC:** Thank you. Perhaps to add to that have you published articles in books in labour law Mr Todd?

**MR TODD:** Yes I have Chairperson.

**CHAIRPERSON:** Yes. Well I thought that you know you might not have wanted all of these things to come out about you but it is important for – for your evidence to everyone to know that Transnet had the benefit a specialist in labour law – had the benefit of the services of a specialist in labour law. Ja okay.

**ADV MYBURGH SC:** Mr Todd just dealing with the high court litigation. Who were the respondents in that litigation?

**MR TODD:** Well it was a little unusual for me – I do not – it may have been a first. No it actually was not the first it does happen occasionally that a person dissatisfied with action being taken by the company seeks to identify and join individual board members to the litigation.

It is – ja – it does happen but it is unusual because there – the board effectively make decisions on behalf of the company. They represent the company. When they take decisions they do not do so in their personal capacity.

But Mr Gama because of his belief in a conspiracy obviously thought and his lawyers perhaps advised him that it was appropriate to join all of the individual directors

to the litigation as well and they in turn chose – in fact they were not initiating proceedings against Mr Gama the individual.

They had – they are the controlling mind of the company but the proceedings were being managed by the executive. Nevertheless board members were joined and they sought separate legal advice in those proceedings and sought to be represented separately which in fact occurred.

10 **ADV MYBURGH SC:** So who did Bowman...

**CHAIRPERSON:** What – I am sorry. What was the basis advanced in Mr Gama's application for sighting the individual directors? If you are able to remember.

**MR TODD:** Ja Chairperson I do not remember what he said and I have not recently read those papers.

**CHAIRPERSON:** Ja.

**MR TODD:** But I have always believed since then that that is a misjoinder an inappropriate. There was no – there were no grounds to identify conduct by individual directors.

20 But in essence it was part of the atmosphere of the complaint at the time was that Mr Gama believed that he was the victim of a conspiracy and Chairperson there – some litigants use that mischievously to seek to divide a board and to seek to open up differences in a board by and seeking to get board members to come out on affidavit

saying where they stand in relation to the matter.

But properly speaking although it had served at the board because a board sub-committee had had to decide how to deal with on the one hand a – a complaint that had originally come through.

I think the Public Service Commission via the then Minister concerning locomotives and a second complaint had been a whistleblowing complaint that had come through to the then Chief Executive who was leaving. A  
10 board sub-committee had had to decide what to do; had sought legal advice and they had then delegated that as they should have to the person then acting as the Group Executive.

It was really a company matter not a board – not a matter for individual board members to be singled out. So I cannot – I do not recall exactly why Mr Gama did it but in the circumstances where I have seen it done I am afraid to say that it usually represents either a deliberate stratagem to undermine the unity of the board or perhaps it is – it to  
20 be – to look at it more fairly perhaps a genuine belief that actually board members would not agree with or tolerate some sort of abuse that is happening and the person who is bringing the case is somehow seeking to elevate it to the attention of board members.

**CHAIRPERSON:** Okay. Thank you.

**ADV MYBURGH SC:** Mr Todd who did Bowman Gilfilan represent in that high court application?

**MR TODD:** We represented the company Transnet.

**ADV MYBURGH SC:** And who represented the directors?

**MR TODD:** The firm at that time was known as Eversheds. They were a – I do not recall if they are still exist in the same shape or form but it was a firm – ja I think it had previously been Routledge Modise and it was at that time called Eversheds.

10 **ADV MYBURGH SC:** And what was the result of this litigation?

**MR TODD:** The high court did not agree with Mr Gama's contentions and dismissed the application and it dismissed it with costs that becomes a relevant consideration later on. In litigation of this kind there is always an opportunity for the high court to perhaps it has not historically done so but in some circumstances it might say I am going to order limited costs or find that I should be careful or order only partial costs or something of that nature but in this case  
20 the court was satisfied that Mr – that the case should be dismissed with costs on both sides including the costs of senior counsel on both sides. That was a reflection of the court's approach to the litigation and in fact Mr Gama did apply for Leave to Appeal but that was refused.

**ADV MYBURGH SC:** Could I...

**CHAIRPERSON:** Did – was the position that Transnet opposed that application and filed papers to oppose it as well as the individual directors of the – of Transnet they also filed papers and all opposed or maybe some abided or some agreed with Mr Gama or what is your recollection?

**MR TODD:** My recollection is that if the tactic was to open a division it succeeded to a very limited extent. Two directors did dissent as it were or separate themselves out. Not in that they supported the litigation but they were  
10 – they dissociated themselves from the – from the general position that the board had adopted in the matter.

**CHAIRPERSON:** From opposing?

**MR TODD:** And Mr Chairperson I think it is bare saying it – when we come to the change in the board composition later – when the board composition was changed approximately – in any event shortly after Mr Gama was dismissed those two directors happened to be two of the three who were retained on the board.

**CHAIRPERSON:** Oh.

20 **MR TODD:** But the relevance that one can decide.

**CHAIRPERSON:** Yes okay.

**MR TODD:** But it – there were two directors but they did not – they did not join or agree with Mr Gama's contentions. They simply dis – they did not join in the general body of directors who were represented by



Evershed.

And my recollection is that the directors so represented did deliver confirmatory affidavits but the main answering affidavit for directors if my recollections serves me correctly was Mr Phaswana or who had been the – she was the Chair of the board at that time and Professor Everingham who I think was either the Deputy Chair but who had also been involved.

And the main reason for them delivering affidavits  
10 on the merits was that Mr Gama's contention was that he was imminently to be appointed as the Group Chief Executive. There was an on-going process at the time to appoint a Group Chief Executive.

My recollection and I did consult with Mr Phaswana and others at the time so I had some personal knowledge not of the recruitment process but in the affidavits they made it very clear that they had not considered Mr Gama suitable. That the selection committee had not considered Mr Gama suitable for appointment to the Group Chief  
20 Executive.

I think they – their affidavit said at this stage they did not rule out the possibility that he might at some point in the future but they certainly did not consider him suitable at that time. And they had recommended a different candidate to be appointed.

And so it was important for the conspiracy theory for them to say this is not a case where Mr Gama is about to be appointed or soon to be appointed as Group Chief Executive and somehow this – these disciplinary matters have been used to run interference. And he said – so – they delivered affidavits which effectively disabused that idea.

**CHAIRPERSON:** Well what you have just said in terms of what the position of the board was and what Mr Phaswana  
10 said in his affidavit about the conspiracy theory is consistent with the evidence given by Ms Barbara Hogan before this commission.

**MR TODD:** Yes Chairperson.

**CHAIRPERSON:** Either early last year or late 2018 I cannot remember. I think early last year. But also the commission tried to get Mr Phaswana last year and we established that or at least I was informed that he now lives somewhere else not in South Africa but visits South Africa from time to time.

20 We obtained an affidavit from him with regard to the issue of Mr Gama and the disciplinary hearing and his affidavit and the commission is in possession of his affidavit and it is exactly to that effect. So I thought I would mention to you that what you say is consistent with an affidavit that the commission has obtained from Mr

Phaswana.

**MR TODD**: Thank you Chairperson.

**ADV MYBURGH SC**: Thank you Chairperson. Mr Todd perhaps I could take you to the judgment. Could you please turn to Bundle 2 and to page 142 now we are using the black numbers.

**MR TODD**: Yes have it.

**ADV MYBURGH SC**: So you would have seen that we downloaded this judgment off Saflii. Gama versus  
10 Transnet Limited handed down on the 7 October 2009.

**MR TODD**: Yes.

**ADV MYBURGH SC**: May I take you please to page 161 the Chairperson asked you about the question of [00:24:58]. You say that you were of the view that it was irregular.

**CHAIRPERSON**: Mr Myburgh I know that I think your voice is soft by nature.

**ADV MYBURGH SC**: Yes I beg your pardon. I am looking down and not [talking over one another].

20 **CHAIRPERSON**: I keep on asking you to raise it.

**ADV MYBURGH SC**: Certainly.

**CHAIRPERSON**: Ja okay.

**ADV MYBURGH SC**: Mr Todd could we please go to page 161. The Judge deals with Spilg J deals with misjoinder at paragraphs 116 and 117.

**MR TODD:** Yes I see he in fact found there was misjoinder and he also answered my question my recollection about two of the directors and he said they did not oppose the application. He records that the 10<sup>th</sup> and 1<sup>th</sup> respondents did not oppose the application. But the other members had done so. Yes I see that. I remember that.

**ADV MYBURGH SC:** And you will see then at paragraph 119 under his conclusion. He say:

10            “I also find there has been an impermissible joinder of the 5<sup>th</sup> to 13<sup>th</sup> respondents since the 10<sup>th</sup> and 11<sup>th</sup> respondents have not opposed the application it is unnecessary to deal with any costs issue in relation to them.”

And then at paragraph 121 the court deals with costs:

20            “The application is dismissed with costs including the costs of the 1<sup>st</sup> to 3<sup>rd</sup> respondents and the 4<sup>th</sup> to 13<sup>th</sup> respondents excluding the 10<sup>th</sup> and 11<sup>th</sup>. Such costs to include the costs of two counsel.”

And then perhaps I could just ask you to confirm at page 163 there we see that Mr Gama was represented by Langa Attorneys. The 1<sup>st</sup> to 3<sup>rd</sup> respondents by Bowman Gilfilan Attorneys and the balance by Eversheds as you have said.

**MR TODD:** Yes. But there was one other slightly unusual

thing but again it – it seems to me that it was a tactical matter or maybe it was because he believed it appropriate is that in fact Mr Wells and Mr Maharaj were also joined – they are my recollection is they were response – respondent 1 was Transnet 2 and 3 wherein fact the acting Chief Executive and the Executive seeking to carry out the discipline. And that also being joined in their personal capacities in the manner which I thought was unusual.

**ADV MYBURGH SC:** If we then go back to your first  
10 affidavit and we are going to of course come to the detail of the disciplinary hearing. Perhaps I can direct your attention to paragraph 8 of your first affidavit at page 48 of Bundle 3. You say that:

“After the high court proceedings  
disciplinary proceedings then took place.”

Who was the chairperson of those proceedings?

**MR TODD:** Yes senior counsel at the Johannesburg Bar Advocate Mark Antrobus and I should just mention there there was some wrangling later about whether and in fact  
20 quite strangely to me Mr Gama later contented it had been unfair that we did not run this as an arbitration only as a disciplinary hearing.

I have never understood how that could be unfair to a person who effectively is given a second bite at the cherry being able to challenge the fairness of the outcome.

But anyway the point was when we were attempting to conduct an arbitration process Advocate Antrobus had been one of the arbitrators proposed by Langa Attorneys on behalf of Mr Gama.

**ADV MYBURGH SC:** And we might come to that in a little bit more detail in time but during the course of the disciplinary proceedings you say at paragraph 8 that both parties were represented by senior counsel, is that so?

**MR TODD:** That is correct.

10 **ADV MYBURGH SC:** You then go on to provide a thumbnail sketch of what was found and as I say we will come to the detail in a moment but what was the conclusion then of these disciplinary proceedings?

**MR TODD:** Mr Gama was found guilty of misconduct in respect of three – let us call it the three main charges. I do not actually recall but I recall the chairperson – we did not strongly persist with a fourth charge on the grounds it was abandoned but it really was ancillary to the other – to the main three charges and then there was a sanction after  
20 the hearing.

In other words after the chairperson in a rather lengthy 200 page finding found that Mr Gama was guilty on those three – of those three charges. There was then a sanction process what was the appropriate sanction? In that part of the hearing Mr Gama chose not to give evidence in

mitigation of sanction, and he elected to deliver written representation in relation to sanction which he did and those were considered by the chairperson.

And then he wrote a finding on sanction and his finding on sanction was that the appropriate sanction in respect of each of the three charges taken individually was dismissal and he then made that logical point, that taken accumulatively, even more so.

**CHAIRPERSON:** Ja, it is important of... it is important to  
10 make sure those who are listening know exactly what the charges were or what the conduct was that he was found guilty of that was said to unacceptable conduct.

**MR TODD:** Yes.

**CHAIRPERSON:** So if we can cover that. So. Particularly, because later on it becomes important.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** To say why was the conduct with which he  
was... misconduct with which he was found guilty, so serious  
as to justify dismissal. So that is important if we can deal  
20 with that.

**ADV MYBURGH SC:** Would you like us to deal with it now  
Chairperson? I tend to come to it in a moment when  
introducing Mr Todd's report where he then deals with it, you  
know, in much detail.

**CHAIRPERSON:** Okay if it is not going to be too far away

from now, that would be fine. It is just that, I am thinking people who are listening, they say: Well, we hear the sanction was dismissal but we do not know what he was guilty of, you know.

**ADV MYBURGH SC:** Yes. Well, perhaps I can take Mr Todd to his report so that he can highlight that.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** And then he can come back to the report in more detail.

10 **CHAIRPERSON:** Yes. No, that is fine. That is fine.

**ADV MYBURGH SC:** Mr Todd, if we could then fast forward? If I could you take you please to page 65 of Bundle 3. We are going to come to this report that you provided to Transnet and Deneys Reitz on the 2<sup>nd</sup> of February, it being Annexure A to your affidavit.

You know that in this report you deal with the findings of guilty made by Mr Antrobus. And perhaps I can take you to page 74 where you summarised those key findings.

20 And then to answer the Chairperson's questions, it will be apparent from that what precisely the charges were.

**MR TODD:** Yes. Maybe, Chairperson I can just before referring to at your findings, just describe what the issues were.

**CHAIRPERSON:** Yes, ja.

**MR TODD:** Ja. The first in time complaint that had arisen



and had arisen Chairperson, initially being referred as a complaint to the Public Services Commission or a body outside of Transnet and being routed through the then Minister Alex Irwin.

He was the then Minister of Public Enterprises and he referred it to the Transnet Board to investigate it. Concerned a contract for the... effectively to refurbish locomotives and it became known as the Fifty-Like-New contract.

10        Meaning it was a contract for the acquisition of 50 locomotives, train locomotives. And rather than buying a brand new locomotives, they were going to be refurbishing and therefore slightly, I think, more cost-effectively, it was hoped.

**CHAIRPERSON:** So the idea being, they are not new but they are like new.

**MR TODD:** Like new.

**CHAIRPERSON:** [laughing]

**MR TODD:** Ja.

20        **CHAIRPERSON:** Okay alright.

**MR TODD:** And the issue that had arisen there was that the source of the locomotives was the original manufacturers abroad but the refurbishment would require significant assemble work in South Africa.

And the proposal that had originally been taken to the

board was, that there would be an entity in South Africa outside of Transnet that would become involved in the assembly of these locomotives.

And there was a whole discussion at the board at the time which said: We do not want to create a new middleman, for want of a better word, or a new entity that we cannot hold accountable. We want to contract directly with the original manufacturer so that that is clear and nobody can say: Oh, it is somebody else's fault.

10 And the second important thing was, they said: We can do this assemble work ourselves. But what was then called Transnet Rail Engineering.

Transnet has its own engineer division in workshops in various places. And it was very important to the board that actually it utilise its own and build and extended its own productive capacity.

And so there was... when that contract was approved and it was roundabout R 800 million contract. When it was approved by the board, a particular condition after this point  
20 was discussed and there was strong... Mr Gama's... the Transnet, the team...

The Freight Rail Team were proposing a structure which the board pushed back against it and said: We do not want that. We want this manufacture work to be done within Transnet Road Engineering.

And what then happened was that Mr Gama effectively concluded a contract and it was implemented on the other basis that that this entity, STS which was then a joint venture with an overseas manufacturer, set up its own manufacturing operation at old Iscor premises and exactly what the board did not want to happen then happened.

**CHAIRPERSON:** Yes, yes, yes.

**MR TODD:** And it happened... that involved corruption. I say that quite simply because the project manger within...  
10 under Mr Gama, he was responsible for execution.

Yet it turned out had a personal interest or he and his wife had a personal interest in this entity which was being set up to manufacture in competition or in parallel to Transnet... oh, to assemble in parallel to Transnet's own operations.

And so that was clearly... and he was dismissed for that reason. But the accountability for Mr Gama came because the point was: We discussed this, Mr Gama.

And we specifically said it must not happen like that and  
20 yet it happens like that. You concluded a contract on that basis which undermined the company's interest.

And Transnet, in fact, had to go to great lengths to dismantle the contractual arrangements. They then had to compensate this third party for the costs it had incurred in setting up its own assembly facilities and so on.

So it had very significant consequences and Mr Gama's role was regarded by the board as having failed in his responsibility to conclude the contracts and oversee execution consistent with the board's resolution. So that was the locomotive contract.

**CHAIRPERSON:** Yes. Before you go to the other one. I just want to say. I am grateful that you have decided this information because it is quite important in regard to what were the facts, what was happening.

10 So in regard that transaction, because there was a charge linked to it, the idea was simply that Mr Gama and his team had been told in specific terms by the board that: When you do this transaction, you must use a Transnet facility and not an outside service provider. And he went against that.

**MR TODD:** Yes.

**CHAIRPERSON:** And used an outside entity instead of using an internal Transnet facility.

**MR TODD:** Yes, that is correct. Chair, and Mr Gama said:  
20 Oh, I... all the documents are a bit... I did not...

The lawyers were responsible for the legal documents which facilitated this and my project manager was responsible for the implementation.

But ultimately the board and the chairperson said those are not good explanations to defer a responsibility. You

knew the issue.

**CHAIRPERSON**: Yes.

**MR TODD**: It had been specifically discussed.

**CHAIRPERSON**: Yes.

**MR TODD**: And it was under your direct authority, both to sign the contract and to see that under your... that your management team execute it accordingly. And this was a complete deviation which was exactly what the board had said must not happen.

10 **CHAIRPERSON**: H'm. And he was CEO of TFR.

**MR TODD**: CEO of Transnet Freight Rail, yes.

**CHAIRPERSON**: Yes. Okay alright. Then the next one?

**MR TODD**: The second charge Chairperson related to another procurement transaction. This time I think there is no doubt that it was... it can be characterised as a fraudulent... exactly what words you use to describe but it is highly irregular.

A procurement contract under which Transnet Freight Rail engaged security services from a contractor who at the  
20 time, an entity at the time was known as General Nyanda Security or GNS.

The irregularity was stock. The manner in which this contract was entered into.

Because everybody agreed, including Mr Gama, that this kind of contract should only be engaged on an open public

tender process because there are many security companies out there who can do the work.

And in fact, Mr Gama himself had specifically instructed his team after approving an earlier, what is called a confinement, to a single service provider and a year earlier had said this must not continue.

We need a public tender process. And the public tender process was underway to appoint a security provider. And in... it was initially 11 contractors had put in their bids for  
10 services.

That had been whittled down to four who were the sort of four in the running for service providers who were in the running for this contract.

None of those were generally under security. It was not on the scene. It was not in the public procurement process and it was not one of the four, you could refer to a shortlisted bidders.

What then happened. For some reason that no one was ever able to give a sensible explanation for. That process  
20 was terminated.

The explanation that was given by officials in Transnet Freight Rail Security was that one of those four had been appointed on a different contract with Transnet in the interim and therefore was now disqualified from winning this contract.

Nobody could really explain why winning another contract would disqualify from this contract but most obviously, assuming they were disqualified, it did not prevent the procurement process from continuing with the other three shortlisted bidders.

So nobody ever gave a rational explanation for why that process was stopped. But what is apparent from the sequence of events within almost at the same time that it was stopped, General Nyanda Security made an unsolicited  
10 pitch.

And there were various documents on the computers of the Transnet officials managing this whole procurement process which showed that they were actually helping General Nyanda Security to draft their submission to Transnet.

And they then made a submission to say, and this was in September/October 2007. And General Nyanda Security made a submission.

It was rapidly approved by the officials inside the  
20 Transnet Freight Rail Security Division on the basis that General Nyanda Security will be appointed on consignment and that meant, a single source procurement and on the grounds that it was urgent.

**CHAIRPERSON:** H'm.

**MR TODD:** And so this was then... it went through various

committees within the Transnet Freight Rail Security to officials who were most instrumental where named Ms Khanya and Mr Senamela.

And I mention them because they were both dismissed for their role in this affair in proceedings that are in the papers here.

But Ms Khanya and Senamela and others put this through various hoops. The last leg of which was approval by Mr Gama as the Chief Executive of Freight Rail.

10 This could not proceed without his approval of this confinement and he had delegative authority to approve a single source confinement of this kind up to an amount of R 10 million. So that was then presented.

That document was then presented for Mr Gama's approval on the 5<sup>th</sup> of December that year, 2007. And Mr Gama signed it and approved it.

Right in the beginning, initially, it was thought that well what Mr Gama has done wrong and many people that what Mr Gama had done wrong is that he had exceeded his  
20 authority because the annual value of the contract was on a proper calculation R 18 million.

And whereas his delegative authority was R 10 million and so it was said: Well, you have exceeded your authority by R 8 million.

That was not the real problem here and that is not why



Mr Gama was actually dismissed. He was dismissed because the circumstances in which that happened could only be characterised and my submission to you Chairperson is that the chairperson of that inquiry, Advocate Antrobus was extremely generous to Mr Gama by characterising that conduct as serious negligence.

But the way it panned out is the following. First, in Mr Gama... in the course of the hearing, specifically put it through his counsel to Transnet's witnesses that he had no  
10 personal relationship with General Nyanda. And he did not like any inference that ...[intervenes]

**CHAIRPERSON:** Yes.

**MR TODD:** ...that this could have any... could have resulted from any personal relationship that he had with General Nyanda.

**CHAIRPERSON:** H'm, h'm.

**MR TODD:** Transnet then presented to him a serious of telephone records which showed a series of telephone calls between Mr Gama and General Nyanda in the weeks leading  
20 up to the conclusion of this confinement.

Mr Gama then were confronted and then said to the chairperson of the hearing: I must apologise to you. I have given incorrect instructions to my counsel. I do have a personal relationship with General Nyanda.

And he said so on... and he said: The reason I lied

about it was that I thought too much was being made of it. I thought that inferences were being drawn that were not warranted. So I downplayed it.

And so he said: My true relationship with General Nyanda is that we are not close friends but I occasionally play golf with him and we call each other when there is a family event and so on.

**CHAIRPERSON:** H'm, h'm.

**MR TODD:** The most recent call between them was on the  
10 1<sup>st</sup> of December 2007, four days before Mr Gama signed the contract in favour of General Nyanda Security.

So that was the deeply disturbing part of what emerged. Not just R 128 million over R 10 million.

The second deeply disturbing part of the contract was that it should never... Mr Gama himself and he said in the hearing: This contract of this kind should never have been approved on a confinement. So why was it?

Mr Gama affixed his signature to a document which, as the Chairperson pointed out, in 15 places, said this is a  
20 confinement. That is what the document was.

Mr Gama said: Well, I did not realise it was a confinement. And he was asked how that could possibly be? And he said there was an official who brought in a document to sign together with a pack of what he thought were tender documents.

And he said this official, who was now the Mr Khanya, Norma Senamela. His name was Beattie(?). And Mr Gama said that Mr Beattie had explained that it was urgent, important. That is had been through a full tender process. And so lied to Mr Gama. Misrepresented what was happening.

And said all that is required is, you sign it. Because it has been a full tender process, as you know it should be. And we selected a bidder.

10 And Mr Gama said took Mr Beattie's word for it and so did not even look at the document. He just appended his signature to the last page without in any way paying attention to the document.

Now that was also unsatisfactory and deeply troubling in the disciplinary hearing for a number of further reasons. One of which with Mr Beattie.

You would not be able to get him to this Commission because he immigrated to Australia and he immigrated after receiving a large severance package which Mr Gama also  
20 signed on the 5<sup>th</sup> of December 2007.

**CHAIRPERSON:** Yes, it was right before that, ja.

**MR TODD:** But we were never able to speak to Mr Beattie about that. But the second thing that was deeply worrying is what reason would Mr Beattie have to fundamentally misrepresent to Mr Gama and construct an entirely false

explanation for the document that Mr Gama was being asked to sign.

There has never been provided any rational reason why Mr Beattie would have sought to mislead Mr Gama in that way.

Thirdly, Mr Gama had said previously in during the investigation that all he was shown by Mr Beattie was the document.

It mentioned three names and this is the contractor you  
10 are going to appoint. Now that was completely inconsistent with the proposition that he just signed the last page.

But in the disciplinary hearing, after admitting his personal relationship with General Nyanda, he then said he did not even know who was being appointed when he signed that document which was also inconsistent with what he said previously.

But with respect Chairperson, he had put himself in a corner because having had his personal relationship exposed, he now felt it necessary to deny that he even knew  
20 that this confinement which should not have been granted in the first place was in fact being granted to a person with whom he had a personal relationship.

The irregularities in the tender processes, just to finish off Mr Chairperson, include one further one. And that is ...[intervenes]

**CHAIRPERSON:** Well, before you do that. You said that the chairperson of the disciplinary inquiry was quite generous to him in regard to a certain matter, I think under the first charge.

**MR TODD:** Yes, what ...[intervenes]

**CHAIRPERSON:** I... reading his judgment, ruling. I thought that he was quite generous in not concluding that Mr Gama had actually mislead the disciplinary hearing about his personal relationship with General Nyanda.

10 **MR TODD:** Yes.

**CHAIRPERSON:** I thought he was quite generous to him.

**MR TODD:** Chairperson, it was quite unusual. All of the points I have made are included in the chairperson's reasoning in his 200 pages.

And one would logically have expected into conclude that this was just a completely unsatisfactory explanation. In the end, when he whittled all of his reasoning down, he said: I will decide this on the basis that I accept Mr Gama's statement that he simply looked at one page.

20 He did not even know it was General Nyanda Security. And so he did not seek to draw adverse inferences from a series of difficulties with Mr Gama's evidence that were manifest in the proceedings.

So with respect, it was very generous but he said, if I accepting that version. And he made a number of

statements. Like, it may well be that this is a false version of Mr Gama but he did not go a step further.

But he then makes the point and this was always apparent that even on Mr Gama's own version: I am the Chief Executive of TFR signing a security contract for R 18 million. And you can just put anything in front of me. You say anything and put anything in front of me and I will ...[intervenes]

**CHAIRPERSON:** And you sign, you do not even know who  
10 this contract is going to. I mean...

**MR TODD:** How long it was for. How much it was. And that was the approach that Mr Gama took because once he said: I only saw the last page. It also followed that he did not even know how much it was for. And that also ...[intervenes]

**CHAIRPERSON:** Well, that is quite troubling. I mean, you can sign and give somebody an R 18 million contract without even checking who are you giving that contract to. Is that person suitable for that kind of contract? Have there been proper processes followed?

20 **MR TODD:** I mean, all of this is relevant Chairperson because Transnet accepted the disciplinary chair's finding but when that disciplinary chairperson says this is dismissible misconduct because it is serious and he explains why.

Even on his analyses it was serious and warranted

misconduct. You are not dealing with a disciplinary chairperson who was going off irrationally or aggressively to find against Mr Gama.

In fact, he think he was, if anything, extremely generous in his assessment of the evidence. But Chairperson, I was going to say, the other serious problem with this procurement process was that as it transpires, General Nyanda Security had no prior track record.

**CHAIRPERSON:** Of course ...[intervenes]

10 **MR TODD:** It was not registered ...[intervenes]

**CHAIRPERSON:** ...these kind of service.

**MR TODD:** No, not rendering this kind of service. Had its pitch document was full of language appropriate to American companies. Jury tampering and things like that it claimed to be experts in. It had no prior track record and it was not even registered with the Regulatory Authority which is called SIRA that private ...[intervenes]

**CHAIRPERSON:** Security ...[intervenes]

**MR TODD:** ...regulatory security body.

20 **CHAIRPERSON:** H'm.

**MR TODD:** Which is a necessary requirement for delivering. In fact, it was only registered in June the following year but only applied in June the following year. And it transpired that, more importantly, it had no employees.

**CHAIRPERSON:** H'm.

**MR TODD:** And what it was engaged to do was to supply security services through employees. One sees the invoices which show we are supplying so many employees, so many employees, so many employees.

**CHAIRPERSON:** H'm.

**MR TODD:** And it is said... it is said when pressed on that, he said: Oh, we procure those from other service providers. And so what really infuriated the chairperson who presided over the hearings of Khanya and Senamela is he said this,  
10 and he did not use the word fronting.

But he described and was clearly very confronted by the fact that this was a crude fronting transaction which in the procurement document said this is a black owned security company wanting to do business with Transnet but it transpired that it had no ability to do it.

And as one sees when Transnet sued for the money, the company said: Well, we were never... it was never us contracting.

20 Actually, it was consortium involving others and so on and so forth. But ultimately, this was a fundamentally flawed procurement process and Mr Gama's version on which, for a want of a better word, he was convicted of misconducted, was that he paid no attention to any of the detail and simply signed the last page when it was shown to him without even knowing that it was a contract in favour of General Nyanda.



In my respectful views, those that was very improbable but that was true. But even on that version which Mr Gama maintained, he was very seriously negligent in his duties as a Chief Executive of Transnet's largest division. That is ultimately what the chairperson said.

**CHAIRPERSON:** So. I mean, I am grateful you explain this because it is important that when later on your evidence deals with the question of his reinstatement and the settlement agreement.

10 It is known exactly what it is that he has... he had been found involved in because later on when the board, the new board reinstates him, one is bound to look at what... at his conduct for which he had been dismissed.

**MR TODD:** Yes.

**CHAIRPERSON:** To say, what is it on the part of this board that made them think it was fine to reinstate somebody who has been found guilty of this?

**MR TODD:** Yes.

**CHAIRPERSON:** Attached of misconduct. And of course,  
20 much later on the Commission will look at the fact that he ends up being appointed as Group CEO of Transnet.

**MR TODD:** Yes.

**CHAIRPERSON:** It is like a promotion despite all of this. And of course, the Commission is looking at it within the context that Ms Barbara Hogan gave evidence which said Mr

Gama was a candidate for the position of Group CEO together with other candidates in 2009/010.

**MR TODD**: Yes.

**CHAIRPERSON**: And of course, as you said, he was making allegations that he was being robbed from being appointed to this position. A candidate who was recommended by the board, Mr Sipho Maseko, against whom I have not had any witness saying anything adverse, was made to wait.

Was not appointed and ultimately had to abandon the  
10 whole thing and move on in his life. And the position of Group CEO for Transnet was left un field for more than a year. Maybe a year and a half.

And then Mr Brian Molefe was... who was appointed. But three years or so after Mr Gama had come back, then had been reinstated at TFR. Mr Brian Molefe was seconded to Eskom and Mr Gama was appointed to Group CEO.

And Ms Barbara Hogan's evidence had been that when she presented the case to the then President, Mr Zuma to say, the board has recommended Mr Mkhize as a candidate.

20 She said Mr Zuma had said: No, his only choice for the position of Group CEO for Transnet was Mr Gama. As I said yesterday, Mr Zuma has denied that.

So we do not know at this stage exactly what the position is but we are exploring all avenues to see what happened.

But in the end, Mr Gama does end up being Group CEO of Transnet against all of this background.

So the information you have provided as the attorney was representing Transnet, has been very helpful. Thank you. Thank you, Mr Myburgh.

**ADV MYBURGH SC:** Mr Todd, there was a third charge ...[intervenes]

**MR TODD:** Yes.

**ADV MYBURGH SC:** ...that Mr Gama was found guilty of.

10 Could you just summarise that for us?

**MR TODD:** In essence, that was a sequel to the litigation he brought against the company. And it primarily went like this. It says if you are being...

If you are approached by executives who were acting in accordance with their duties and they raise with initially in a very collegial and informal way concerns about your conduct and then ultimately charge you with misconduct and you go on the attack and you accuse them of all sorts of improper motives and you...

20 And that became very public and very charged and it was very directed at the executives and that they were involved, effectively, in the dishonest conspiracy against them. When you do that, if you do not have grounds to do it, you – between executives. You cannot conduct yourself in a way which say rather than saying I will – I do not believe

I should be charged but I will deal with the inquiry as quickly and expeditiously as I can and I will show you why I believe I am not guilty. That is what – that is actually the state of mind that an executive ought to demonstrate.

Of course, Mr Gama believed, apparently, that he was being persecuted. He clearly believed it wrongly, ultimately accepted that actually he was guilty of misconduct in all of the respects alleged.

10 So ultimately – but that third charge was really a sequel to a kind of litigation be brought against the company and its executive in an attempt to avoid having to answer these charges. I may just say, Chairperson, one thing ...[intervenes]

**CHAIRPERSON:** Well, I just – I wanted to say, you are saying Mr Gama believed, maybe he did believe but maybe he did not believe there was a conspiracy, maybe it was convenient that he should put up this, I do not know, but sometimes people say – put up conspiracy theories knowing that they have no basis.

20 Sometimes they put up conspiracy theories because they genuinely believe that there is a conspiracy. So we ...[intervenes]

**MR TODD:** It is unfortunate, Chairperson, as a – you know, you mention my experience, I have - unfortunately, lawyers are engaged and end up doing an enormous

amount of work at great cost to employers because executives do not sit down and say show me what it is you are concerned about, I will engage and deal with but instead bring all sorts of cases to try and – and litigation of this kind unfortunately, from senior executives is – I would not say pervasive but it is very common and it is really brought by executives who are not agreeing to follow the rules and say show me what I am said to have done and I will do my best to answer. I hope I will show you that I  
10 have done nothing wrong. You know, instead of adopting that sort of approach they adopt an approach which attempts to put an obstacle in the way of a company from actually dealing with a concern.

**CHAIRPERSON:** Yes.

**MR TODD:** But that was what happened here.

**CHAIRPERSON:** Yes.

**MR TODD:** Chair, just on your point about, if I may, Chairperson, about the governance point about putting Mr Gama back in his job later. Although the Chairperson of  
20 this hearing was, I have suggested, generous in his conclusions, he is very clear in the end as when he imposes the sanction of dismissal that he is dealing with a person who has to be entrusted with Transnet with a very high level of diligence, care and integrity in dealing with major procurement and, for that reason, he says what I

have seen leads me to the conclusion that actually Mr Gama cannot be trusted or relied on by Transnet in that context.

I mention that just because I read Minister – previous former Minister Hogan’s transcript of her evidence on Monday, it is in one of these bundles, and I saw that she said when she was attempting to appoint a new board of Transnet and when she was attempting to recommend a Chief Executive, one of the key things in her mind was, as  
10 the state, we have an ambitious capital expenditure programme that we are going to drive and use to drive economic growth and she says we were going to spend R84 billion in five years using Transnet’s balance sheet to drive economic growth through capital expenditure and we needed to have the right board members who would be ultimately the custodians or give the right oversight and over a programme of that important and self-evidently, similarly, you need executives who have demonstrated the ability to oversee things of that kind.

20 And when one sees the Gama charges and the reasons why the Chairman thought dismissal was appropriate in that context, it is really exactly why the Chairperson said, of the hearing, said Transnet cannot be expected to tolerate and entrust these kinds of responsibilities to an executive who has been shown to

have conducted himself as Mr Gama did.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** So, Mr Todd, there were then findings of guilt in relation and misconduct in relation to 50 like new locomotives GNS and criticism of the executives. The Chairperson of the disciplinary enquiry, did he recommend dismissal on a cumulative basis or did he recommend it in relation to each of the charges in our summation?

10 **MR TODD:** He recommended in each. He said having looked at each charge and what sanction would be appropriate, for each he went through it in a lot of detail and it was included in the report that you have referred me to but he concluded that dismissal was warranted on each one individually so that had I found him guilty only of charge 1 I would have recommended his dismissal. Had I found him guilty only of the second and only of the third, each one, in his view, was destructive of the employment relationship and he then made the point that taken  
20 cumulatively it goes without saying that dismissal – I recommend dismissal as the appropriate sanction.

**ADV MYBURGH SC:** Alright, we will come then to your report in time. Could I take you back please to page 49 of bundle 3 and to ...[intervenes]

**CHAIRPERSON:** I am sorry. As you give evidence, Mr

Todd, about the fact that the Chairperson of the disciplinary enquiry concluded that on each charge he would have recommended dismissal, my mind thinks about in the context of crime, criminal courts, about the passing of three life sentences on somebody or who may have been found guilty of some serious crime each time, you know, so in this case it seems, therefore, based on what you are saying and my understanding of the Chairperson's decision that in effect when Mr Gama was dismissed he could be  
10 taken to have carried three separate three separate dismissals each of which could stand on its own. But, of course, a dismissal, a dismissal. Is my thinking more or less in line with what the Chairperson was saying?

**MR TODD:** Yes, Chairperson, I think that is – if you put it slightly differently and said when Mr Gama challenged his dismissal, the fairness of it, and said he is challenging the appropriateness of the sanction, he would need - a bargaining council arbitrator would need to actually find that dismissal was not appropriate for any one of the three  
20 or for all three taken cumulatively.

So, in other words, it was ultimately they – if you showed that dismissal for the attack on your fellow executives, unwarranted attacks on your fellow executives, I would not have dismissed, I would have given you a final warning because apologised. That would not render



dismissal and inappropriate sanction nevertheless because there are still two charges which individually would carry a dismissal sanction and by the same token, even if on another one, the bargaining council arbitrator were to say for that charge, I also think you could have had a final written warning.

Still got to deal – you first of all would have to conclude that for all three and then he would also have to conclude that cumulatively even though – because what  
10 can happen, is if somebody commits a series of conduct which each of which warrants – is serious enough to warrant a final warning, for example, you might say cumulatively there is just too much going on here, I cannot give you - you know, say that there so many instances of conduct that ...[intervenes]

**CHAIRPERSON:** Anything else would be a slap on the wrist.

**MR TODD:** By itself would fall short of dismissal and then I have to take account of the fact that you have – there are  
20 a series of problems here and I have to consider the cumulative effect as well. So my main point there, not so much about the criminal analysis, but would be to say this is why, when it comes to the prospects of success in the bargaining council arbitration, it seemed to us that Mr Gama had an impossible mountain to climb. Impossible is

maybe too strong, a very, very steep mountain to climb.

**CHAIRPERSON:** Well, you see, there is something that is common, as I see it – I have not done a criminal case in the courts in many years, but I see it, there is a common feature in terms of the example of a criminal case as well as disciplinary case. If you were sentenced to three life imprisonments, terms of imprisonment for rape, murder and something else, you know, or two rapes, one murder or two or three murders, three rapes, or whatever, if you then  
10 appealed, went to an appeal court seeking and saying I accept that I was properly found guilty of these charges, my complaint is simply the sentence, you would have to – you would have your counsel, who is arguing the case, would have to say okay, let us take this charge and say well, if it stood alone, the probable sentence might be just a fine, you know? Another one – and show that if you were to look at them like that in all probability there would be no life imprisonment but having done that, it may be that one of these would qualify for life imprisonment. And if one of  
20 them qualifies, you end up with life imprisonment.

**MR TODD:** Yes, yes.

**CHAIRPERSON:** It might be that it is one life imprisonment and not three if you have been able to persuade the court that the other ones were not justified.

So if you look at a dismissals like this, Mr Gama's

counsel at the arbitration on the basis that ultimately his position was I am not challenging the finding that I was guilty of, these three acts of misconduct, maybe he was going to also concede that these are serious misconduct or maybe he was going to say they were not serious but he would then say I am saying that dismissal was too harsh, he would have to show effectively that each one of them did not deserve to – did not warrant a dismissal.

**MR TODD:** Yes.

10 **CHAIRPERSON:** But even if each one of them were – if he was lucky and the arbitrator said no, each one of them standing on its own did not warrant dismissal, the arbitrator would still have to ask the question, when taken together cumulatively, was the dismissal still not warranted?

**MR TODD:** Yes.

**CHAIRPERSON:** Now – so it is indeed – I think you are right in saying it was a very high mountain to climb if you have been effectively given three dismissals.

20 **MR TODD:** Ja.

**CHAIRPERSON:** To show that each one of them was unjustified and that these three acts of misconduct, even when taken together, would still not warrant a dismissal for somebody who is not just a lowly worker, was somebody who was CEO of a division of Transnet who was supposed

to, I take it, administer discipline to his own team who was supposed to be exemplary to his own team. You know, so I just mention that to one, indicate how I understand the situation to be, having read these in terms of what the situation was when he was going to the arbitration and the seriousness. Thank you, Mr Myburgh.

**ADV MYBURGH SC:** Mr Chairperson, what time do you intend to take the...?

**CHAIRPERSON:** I did not look at the watch. I think let us  
10 take the tea adjournment if that is fine?

**ADV MYBURGH SC:** Thank you.

**CHAIRPERSON:** We are at about eighteen minutes past, let us resume at twenty five to twelve.

**ADV MYBURGH SC:** Thank you.

**CHAIRPERSON:** We adjourn.

#### **INQUIRY ADJOURNS**

#### **INQUIRY RESUMES**

**CHAIRPERSON:** Okay, let us continue. Your mic, Mr Myburgh.

20 **ADV MYBURGH SC:** Thank you. We go back to your affidavit at page 49 at paragraph 10. You deal with Mr Gama's referral of his dismissal dispute to the Transnet bargaining council. Perhaps we could go to that referral. Could you please turn to page 91?

**CHAIRPERSON:** What is the page number?

**ADV MYBURGH SC:** Nine one, Chairperson, 91.

**CHAIRPERSON:** Nine one?

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** This is a referral. If you go to 97 you see that it is dated the 22 July.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Of some importance is the statement, annexure A, that was attached to the referral.

10 **MR TODD:** Yes.

**ADV MYBURGH SC:** Could you take the Chairperson through that? What was the case made out by Mr Gama in this statement?

**MR TODD:** In essence – and I do not recall and I have not read the statement very recently but I do not think he said it very explicitly but there was no suggestion here that Mr Gama disagreed with the conclusions that he had been guilty of misconduct and primarily it looked as though he is really complaining about the process that was followed and  
20 then he does rely on what I would call a substantive unfairness ground in 4.4 where he said his contract allows for termination in the event he is found guilty of serious misconduct and I was charged with misconduct. I suppose the assumption not serious misconduct, Presiding Officer found me guilty of misconduct and not of serious

misconduct and therefore I contend Transnet in violation of its own contract of employment. So – I mean, it was a very narrow argument really which went to sanction and then – ja, so that really is where he set it out. It was a little surprising because the disciplinary process had been fought very hard on every point and this referral seemed to suggest that there are going to be a far more limited grounds of complaint about fairness than might have been anticipated.

10 **ADV MYBURGH SC:** Then you mention also ...[intervenes]

**CHAIRPERSON:** Well, I see that on page 101 at the bottom it does submit that – well, he says:

“The disciplinary hearing was both substantively and procedurally unfair.”

I am not sure what that means. He may have intended to say his dismissal was substantively and procedurally unfair but he does not say that, he says his disciplinary hearing was substantively and procedurally unfair.”

20 **ADV MYBURGH SC:** Yes, I am going to come to that right now, Mr Chairperson.

**CHAIRPERSON:** Oh, okay, alright, yes.

**ADV MYBURGH SC:** Mr Todd, you say in paragraph 10 of your affidavit that the contentions in the statement were subsequently clarified and limited in a letter from Langa

Attorneys. Could I take you please to page 102?

**MR TODD:** Yes.

**ADV MYBURGH SC:** That is the letter from Langa Attorneys dated the 14 October. Could I please direct your attention to paragraph 3?

**MR TODD:** Yes. Yes, this is where the attorney representing Mr Gama clarified and it was the first time they made it explicit. It was a bit confusing from the initial referral because it did not seem to take squarely - take on  
10 the findings of guilt and he then clarified in this letter:

“Our client will not contest that he was guilty of the charges 1, 2 and 4 as found by the Chairperson of the enquiry. Our client, however, wishes to submit that dismissal was an inappropriate sanction.”

So that is where he said explicitly how he would narrow his case in the bargaining council arbitration.

**CHAIRPERSON:** Do they in this letter indicate what the grounds or bases would be for saying the sanction of dismissal was not appropriate? I ask that because when I  
20 was looking at his statement referring the dispute to the arbitration, it was – I did not – as I recall, it was not very clear what the grounds were. So you know whether in this letter they dealt with that part or not?

**MR TODD:** No, that is not elaborated upon there. There was – I mean, there was this point we had looked at, at

page 99, paragraph 4.4 where he talked about serious misconduct versus misconduct, but that was a kind of contractual argument and ...[intervenes]

**CHAIRPERSON:** Well, it amounted to saying the conduct of which I was found guilty is not serious enough to justify dismissal.

**MR TODD:** To justify dismissal.

**CHAIRPERSON:** Ja.

**MR TODD:** But other than stating it broadly along those  
10 lines there was not any direct explanation now. There were subsequently some submissions that were delivered in the bargaining council and I do not recall, I do not think I have submitted those but effectively - essentially Mr Gama's contention now was well, if you read the Chairperson's finding I accept I was guilty of what he says I was guilty of but I submit that I should not have been dismissed for that.

**CHAIRPERSON:** Yes.

**MR TODD:** It was not serious enough to warrant  
20 dismissal.

**CHAIRPERSON:** Yes. Was there in the statement or in the pleadings in the bargaining council, as you recall, was there a contention or allegation that he had not been treated consistently?

**MR TODD:** Ja.



**CHAIRPERSON:** In terms of, you know, discipline had not been consistent?

**MR TODD:** So there was ...[intervenes]

**CHAIRPERSON:** Or did that come some other time?

**MR TODD:** There was a statement in 4.5 of the – again, that is at page 100 where he says – it is again, it is not clear that he is suggesting inconsistency but if I may, Chairperson, he had reason in both the disciplinary hearing and the sanction submissions the contention that this – his  
10 conduct was of a kind which there were other people who did the same sort of thing as he did and they had not been disciplined.

**CHAIRPERSON:** Yes.

**MR TODD:** But the Chairperson dealt with that and said, you know, if you are going to say that, you would have to show me who those people are, what their conduct was for me to assess whether there was actually some similarity or some basis for me to say that you have been inconsistently treated.

20 **CHAIRPERSON:** Yes.

**MR TODD:** And ...[intervenes]

**CHAIRPERSON:** And he had not led any evidence to show those instances.

**MR TODD:** No, there had been no suggestion at all in the course of the disciplinary process that Mr Gama was aware

of similar facts.

**CHAIRPERSON:** Yes.

**MR TODD:** For similar situations or had already similar situations or the details of similar situations in front of the Chairperson and in fact the evidence before the Chairperson was that others had been dismissed, for example, in relation to the GNS contract.

**CHAIRPERSON:** Who were under him.

**MR TODD:** Who were under him and that Percy Mosweu  
10 had - was the individual who had been dismissed in connection with the 50 like new – so there were other people who had been dismissed but he never said if somebody who is guilty of similar conduct to what you have found me guilty of, then I can show you who they are so that the Chairperson could actually make an assessment and there was never any evidence like that.

**CHAIRPERSON:** So but are you saying that the complaint about him having been treated inconsistently or differently to others who may have been guilty of something similar,  
20 he raised that for the first time in relation to sanction, he had not raised in relation to the stage of the enquiry that related to whether he was guilty or not guilty?

**MR TODD:** No, he had raised it in both, Chair.

**CHAIRPERSON:** Oh, he had raised them both  
...[intervenes]

**MR TODD:** When the Chairperson ...[intervenes]

**CHAIRPERSON:** But he had had full opportunity to bring the evidence that would have shown those cases.

**MR TODD:** He raised it in both and the Chairperson, in dealing with it when he made written representations on sanction, Chairperson said but I have already dealt with this when - because you had an opportunity to bring evidence if you wanted to and I dealt with in the findings on guilt.

10 **CHAIRPERSON:** Yes.

**MR TODD:** And then he made similar submissions on sanction and said, you know, inconsistency. And the Chairperson said I have not got any information to work with, it is no different from what it was during the hearing itself.

**CHAIRPERSON:** Yes. And I do not know – I mean, the issue of – there is the issue consistency, there is an issue of condonation and it may be that the issue of consistency was dealt with separately and discretely from the issue of  
20 condonation but what you have said might be quite important because I think the board, the new board subsequently commissioned some investigations to look into whether he had been dealt with inconsistently and so on.

So that becomes important if they were

investigating something that he had had a opportunity to present fully before the Chairperson of the disciplinary enquiry and had decided not to present. Okay, alright.

**MR TODD:** Chairperson, to the best of my recollection the matters that were subsequently investigated by the new board were either not known to Mr Gama or he did not have any information about them that he presented in any way that would support a consistency argument in the disciplinary enquiry.

10 **CHAIRPERSON:** Well, that is quite important because when the board – or when you have to settle any matter, an important issue that you look at is how strong is my case?

**MR TODD:** Yes.

**CHAIRPERSON:** And you do that by looking at what are the issues and what are the issues being raised by the other side, what kind of evidence do they have or are they likely to have and therefore, it is important to look at what were the issues that he was raising in his pleadings and what was the ground on which he was subsequently raised,  
20 he restated and so on but we will deal with that at the right time. Mr Myburgh?

**ADV MYBURGH SC:** Thank you. Mr Todd, at paragraph 11 of your affidavit at page 49 you then sum up really what the state of play was further to the referral and Mr Langa's letter. Could you please deal with that?

**MR TODD:** Yes. So this was the first time, once this was clarified, since the very earliest conversations since we had been involved in May the previous year and advised Transnet to raise the issues with him in a detailed letter that he could have an opportunity to reflect on and respond and his response from outset had been absolutely no merit in any complaint against me, this is a conspiracy and for the very first time now in October 2010, actually about 18 months later, Mr Gama said fair enough, I am guilty of the  
10 misconduct.

That does have consequences in employment law because one of the ways when you deal with the question of sanction, people who understand what has gone wrong and commit to redress are much easier for an employer to accept might be suitable for future employment but at the time that Mr Gama the sanction was applied, he still vigorously resisted any suggestion that he had ever done anything wrong.

So I do not – I think this would have been an  
20 example of saying okay, I was guilty of misconduct, was rather late in the day to be able to say at the bargaining council I am actually accepting the wrongdoing but it was, in any event, it was the first time and he now said he would still say that dismissal was an unfair sanction in the circumstances and he would now raise procedural

complaints. In other words, he would persist in arguing that there had been procedural unfairness.

**ADV MYBURGH SC:** And what were those procedural complaints?

**MR TODD:** The first one was one I alluded to earlier that he said you should have run an arbitration and not a disciplinary hearing, a pre-dismissal arbitration of a disciplinary hearing.

Apart from the fact that on the face of it it is  
10 difficult to understand what could possibly be unfair about that. The truth was, if one looked at our report and the history of how we tried to do it, we actually tried on Transnet's behalf extremely hard to get an arbitration going and were met with serious resistance and opposition at every level by Mr Gama and his team.

So in fact Transnet had converted it to a disciplinary hearing which favoured Mr Gama by not making it final and binding in order simply to move the process forward. So it was not a point that anybody I  
20 thought had – was going to have any legs in an arbitration.

And then he also raised the point that the Chairperson had previously performed work for Transnet. That is a curious complaint. He had in fact proposed the Chairperson. But, you know, when you appoint an independent outsider you do so as a proxy for a manager.

Actually you can be employed fulltime by Transnet and fairly sit and preside over a disciplinary hearing. So the proposition that you had to appoint a Chairperson of a disciplinary hearing that had never done work for Transnet was a very weak one. And there is a – you know, that is the kind of argument that he brought on a procedural basis, we did not think there was much merit in any of that.

**ADV MYBURGH SC:** Even if Mr Gama had succeeded in establishing those procedural complaints would that have  
10 been enough to secure his reinstatement?

**MR TODD:** Well, no, in labour law if you show procedural unfairness it is very clear and for good reason. If you show procedural unfairness only, it is apparent that there was good reason to dismiss you but there is some procedural unfairness, you can expect of ask an arbitrator to give compensation. So your remedies are limited to some form of financial compensation to the maximum of 12 months pay but you cannot get reinstatement for a procedural unfairness.

20 **CHAIRPERSON:** What would have been the legal position at the time – I know that there was a time when if procedural unfairness had been shown the employee had to be awarded compensation and could not be awarded nothing but at the time when this happened could he have found himself in a situation where there is a finding of

procedural unfairness but because of the specific circumstances of the case and the seriousness of the misconduct and what Transnet may have lost financially as a result of his actions, could it have – was it possible that the arbitrator might well say he should get nothing?

**MR TODD:** Yes, the provision says just and equitable compensation.

**CHAIRPERSON:** Yes.

10 **MR TODD:** So there is no prescribed amount other than a cap at 12 months.

**CHAIRPERSON:** Yes.

**MR TODD:** So it is quite possible – whether, if as an arbitrator should say I am finding it unfair in giving you nothing or – and it is theoretically possible, he said you committed extremely serious misconduct with very serious consequences for the company. There was a procedural irregularity but it cannot be said to have affected you materially. So just and equitable, you do not get any compensation, it is possible to do that.

20 **CHAIRPERSON:** Ja because I am just thinking if, through your conduct, your employer has lost R100 million, for example.

**MR TODD:** Yes.

**CHAIRPERSON:** No it is shown that the employer, in running the disciplinary hearing, you know, has slipped up



a bit so there was procedural unfairness but when you look at what the employer has lost through your conduct, you say why should we say this employer must give this employee R100 000 because of that, you know?

**MR TODD:** Yes. And there are cases where that has happened and otherwise an arbitrator might give just a nominal compensation.

**CHAIRPERSON:** Ja.

**MR TODD:** Some arbitrators are anxious that if there has  
10 been an unfairness there should be a consequence but justice and equity mean that you must moderate and take into account all relevant factors.

**CHAIRPERSON:** Ja, ja, okay.

**ADV MYBURGH SC:** Perhaps, I could just ask you - Mr Todd, if you need to reflect on this, you can, but we know that currently there is a statutory bar to reinstatement if there is a finding only of procedural unfairness. Was that also the position in 2010?

**MR TODD:** Yes.

20 **ADV MYBURGH SC:** So in order to secure reinstatement – and you deal with this in paragraph 13 – what would Mr Gama have had to establish?

**MR TODD:** Well, he would have had to have establish what in labour law terms is called substantive unfairness, under the Labour Relations Act and in this particular

context his only contention that could have established substantive unfairness was that dismissal was too harsh a sanction or that - the proper language is dismissal was not an appropriate sanction for the misconduct.

**CHAIRPERSON:** Now – I am sorry, just on that, because that is important because when Transnet negotiates a settlement with him on the basis that there is this unfair dismissal claim pending before the bargaining council, one – it needs to be looked at how strong his case is. Is the  
10 position, as you understand it, that at the bargaining council at that time he was only complaining about sanction and he had stated the grounds why he was saying the sanction was unfair or inappropriate quite clearly or was this a situation where you knew that he was saying dismissal was not appropriate but exactly on what grounds he was saying it was not appropriate was not clear?

**MR TODD:** Chairperson, he had set it out in broad terms in some written submissions that had been delivered but this arbitration that was scheduled in January 2011 would  
20 have involved oral evidence. So Mr Gama was free to come to the arbitration and, as it were, lay out his story and say, you know, these are my reasons.

**CHAIRPERSON:** Yes.

**MR TODD:** And so we did not treat it as though he was limited but he had not in those written submissions or in

any way said anything that caused the legal team of Transnet to experience any anxiety that he might have a point. We were - you know, he had not said anything that suggested or that caused us to think that an arbitrator was likely to be persuaded.

**CHAIRPERSON:** Yes no, I understand that maybe he could add or whatever because this was an arbitration, it was not pleadings in a civil case or anything like that but in terms of his known case, known in terms of the  
10 documents that had been exchanged, are you clear or were you clear in your own mind what his grounds were for saying dismissal was not appropriate or because of the lapse of time your recollection might not be so clear.

**MR TODD:** I am afraid I cannot say in detail, Chairperson. There were two basis things. One was the proposition that the conduct was not serious enough and he had intimated if not said that explicitly.

And the second was that he felt and believed he had been signalled out and that sort of consistency theme  
20 still ran through his general complaints.

**CHAIRPERSON:** Okay, alright. Thank you, Mr Myburgh?

**ADV MYBURGH SC:** Thank you, Chairperson. At paragraph 14 you deal with something that you already had and that relates to the fact that at the disciplinary hearing when it came to the sanction stage Mr Gama decided not to

participate in the leading of evidence.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Just explain who that worked?

**MR TODD:** Well ...[intervenes]

**ADV MYBURGH SC:** How the hearing then panned out?

**MR TODD:** Well, the way it worked is that a hearing was scheduled at which you were entitled – the parties, both parties, were entitled to deliver oral, to lead witnesses and deliver evidence and raise any points that they believed  
10 were relevant to the question of sanction.

Transnet led the evidence of its then Acting Chief Executive, Mr Wells, who really dealt and took the Chairperson through primarily the seriousness of having a Chief Executive in Mr Gama's position doing what had happened in relation to all three charges separately and that evidence was led and recorded but Mr Gama has chosen that he would not and he would simply make written representations on sanction.

**CHAIRPERSON:** Do you remember whether Mr Gama or  
20 his lawyers stated what they were submitting would be an appropriate sanction if dismissal was not an appropriate sanction or did they not commit themselves to what the appropriate sanction would be for having been found guilty of these three acts of misconduct?

**MR TODD:** I cannot remember, Chairperson, it was in the

written submissions.

**CHAIRPERSON:** Yes.

**MR TODD:** But I cannot remember.

**CHAIRPERSON:** Okay, alright.

**ADV MYBURGH SC:** Mr Todd, you go on to explain that Mr Gama was dismissed at the end of June 2010. This is at paragraph 16. And then you go on to deal with the arbitration. You say it was initially scheduled during October 2010 and was postponed, is that correct?

10 **MR TODD:** Yes.

**ADV MYBURGH SC:** And when was it then rescheduled for?

**MR TODD:** So it was scheduled and I cannot remember why it did not go ahead in October. It is not uncommon that – and I recall that it may well be the bargaining council did what it normally does, is schedule something for one day and the parties agreed and said let us pick a week and it could be three or four or five days when we are all available and nobody wanted to delay it so January 20 2011 was picked as a date when all of the legal counsel and everybody was available to run it and then the parties agreed that it would be set down and disposed of in the week of 24 January 2011.

So that is fairly expeditiously, bargaining labour disputes are supposed to be resolved quite quickly, the

dispute having been referred in July, it pushed it into beyond six months but it was not unreasonable period and so but the parties certainly intended that it be disposed of concluded in January.

**ADV MYBURGH SC:** Was the whole week then set aside for the matter?

**MR TODD:** My recollection is the whole week, if it was – might have been four days instead of five but I think the parties had agreed that they should be available the whole  
10 week because they wanted to complete it in that week.

**ADV MYBURGH SC:** And was your view that this matter was capable of being completed in that time?

**MR TODD:** Definitely. With the relatively limited issues, with the admission of guilt on the charges, focus on sanction, there would have been a limited number of witnesses required and we had no doubt that it could be disposed of in that week.

**ADV MYBURGH SC:** You then go on to mention that in the interim in October 2010 a new minister was appointed.  
20 Could you deal with that please?

**MR TODD:** Yes. And so I do not – I know this from public statements but I have followed those public statements quite closely because they had very big bearing on our conduct of this matter and the – effectively the public events that impacted on this were that in October Minister

Hogan was replaced.

**CHAIRPERSON:** Yes, Mrs Hogan.

**MR TODD:** I have read in her evidence that she was appointed to be the ambassador of Finland.

**CHAIRPERSON:** Ja, she was dismissed on the 31 October 2010.

**MR TODD:** Yes.

**CHAIRPERSON:** And Minister Gigaba was appointed in her position with effect from the 1 November 2010. That is  
10 the evidence that Mrs Hogan gave.

**MR TODD:** Yes. And I think I also saw from then Minister Hogan's evidence that she had been – I referred to it earlier, had been for some time wanting to get a new board, there needed to be replacement, you know, terms of office come up and she had needed to get a board in place.

And, as I have said, she was obviously anxious to get a board replaced that was suitable, bit for purpose, and so one of the things – presumably one of the first things on the new minister's desk was to appoint new members to  
20 the board and so those appointments happened in early December 2010. They were publicly announced then, at least.

I do not know the details of how they were made but certainly I read the public announcements from the ministry about who had been appointed. There were twelve

new members and three members remained. Three of the existing members were reappointed.

**CHAIRPERSON:** Ja.

**MR TODD:** And then what happened is because this position of Group Chief Executive was still vacant, I do not know in exactly what circumstances Mr Wells ceased to continue to act in that capacity because he had been acting as Group Chief Executive since the previous Group Chief Executive had left which was probably 18 months or  
10 more prior to this. In fact it was probably two years prior, I have not looked at it exactly.

But Mr Mkhwanazi was appointed as Chair of the board and he assumed the role of acting Group Chief Executive Officer as well and so he was servicing in both of those roles which, from a corporate governance point of view, is not ideal but I understand it was intended to be a short time only until they had appointed a Group Chief Executive Officer.

**ADV MYBURGH SC:** So, Mr Mkhwanazi ...[intervenes]

20 **CHAIRPERSON:** Well, it would be interesting – well, I assume that Mr Wells must have left but it would be interesting to know whether he had not left or if he left the circumstances under which he would have left. Ja, okay.

**ADV MYBURGH SC:** Mr Todd, how before the scheduled arbitration commencing on the 24<sup>th</sup> of January was the new



Board and Mr Mkwanazi then appointed.

**MR TODD:** Yes sir they were appointed in December of 2010, so I think I suggested that was around six weeks before the arbitration was due to take place, and they – so it wouldn't – well it may or may not have surprised any need to know that they regarded this as a high priority, it could have been a low priority, it could have been one which they decided or they knew the Chief Executive said can I just check it is all in hand, anything I need to know  
10 about. I probably would have said to him no not really, everything is all in hand, you don't need to worry about it, but it is apparent and from the thing – from what followed for Mkwanazi this was a very high priority and he had a very particular desire to resolve or to deal with Mr Gama let's say.

**ADV MYBURGH SC:** So as of January 2011 what was the position in relation to the cost order that had been made against Mr Gama in the High Court application?

**MR TODD:** Well ja, it had not been paid and we had been  
20 instructed to recover the costs, it is a fairly standard procedure, one has a bill of costs, initially taxed, you then request that it be paid and settled and it hadn't been paid settled and around this time we had been instructed to proceed and you do by issuing a Writ through your Sheriff's office.

**CHAIRPERSON:** So there was a bill that had been taxed, so what was the total costs that Mr Gama owed Transnet, in terms of that cost order?

**ADV MYBURGH SC:** Ja, the cost order to Bowman Gilfillan was – it was taxed and allowed – in the amount of R426 000 666,37, R426 000.

**CHAIRPERSON:** There were other, there was a second team, director's team, Eversheds also had a bill and I don't know what, I was not responsible for recovering those  
10 costs.

**CHAIRPERSON:** Alright, so this amount related to seemingly Transnet's costs.

**MR TODD:** Transnet's tax costs in the high court litigation.

**CHAIRPERSON:** In the High Court application, excluding the costs granted by the High Court in favour of the individual directors.

**MR TODD:** Yes, that was the subject of a second cost order which would have been taxed – prepared and taxed,  
20 that was the bill of Eversheds.

**CHAIRPERSON:** So how far were you with trying to recover that amount at that time?

**MR TODD:** We had instructed the sheriff to attach and I think the property they had attached of Mr Gama was shares, certain shares that he owned, there are different

ways in which a sheriff attaches property but they can attach shares held in a company and they had attached some shares owned by Mr Gama.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** Thank you. Mr Todd could we then turn to the events of Friday the 21<sup>st</sup> of January, that's the Friday immediately preceding Monday the 24<sup>th</sup> when the arbitration was due to kick off.

**CHAIRPERSON:** I am sorry Mr Myburgh, do you intend to  
10 come back to asking him about what ultimately happened to their efforts to recover that amount?

**ADV MYBURGH SC:** Yes I do, it's part of the chronology that flows.

**CHAIRPERSON:** Okay, alright.

**ADV MYBURGH:** Mr Todd?

**MR TODD:** Well on that day, on Friday, the Friday before the Bargaining Council arbitration was to commence I received first a telephone call and then an email from a Transnet legal advisor who I knew, Mr Ndipiwe Salinga,  
20 and he very simply communicated instructions, he said the new chairperson of the Board and Chief Executive Officer, Mr Mkwanazi has instructed me to instruct you to postpone the Bargaining Council Arbitration pending settlement discussions and to allow settlement discussions to take their course and insofar as you have attached, are seeking

to recover the costs which – in which the Sheriff has made an attachment you are to immediately stop all further steps to recover those costs, so those were in essence the two instructions given. I don't recall whether I said please put that in writing or whether he volunteered to put it in writing, but he did immediately afterwards because they were serious instructions that had a big impact on matters that had been entrusted to us on behalf of Transnet.

**ADV MYBURGH SC:** Now perhaps in relation to the issue  
10 of costs, could I ask you please to turn to page 105 and to Annexure D.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** If you look at the foot of the page there is an email from Mr Salinga to you on this day, the 21<sup>st</sup> of January.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Could you just deal with that, what was the instruction that you received in this email.

**MR TODD:** Yes, that's the email that I was referring to  
20 when Mr Salinga put it in writing, I see he copied Zola Stephen and Siyabulela Mapoma in that email instruction to me, I think they were and in fact when I replied I did reply to both of them as well, but the instruction was to postpone the matter but then as regards the attachment of shares and the recovery of costs that any sale in execution be

cancelled forthwith, the attachment must immediately be released and the warrant of execution held in abeyance pending further instructions.

So in fact the appeal instruction followed regarding the – they call it – people call it appeal but actually it is not, it was an arbitration but – and then the instruction was to postpone it, *sine die* using the legalese which means without agreeing a further date, postpone it indefinitely to allow the negotiations between the parties to run their  
10 course.

**ADV MYBURGH SC:** And at the top of page 106 as you've said it says I confirm that the Acting Group Chief Executive and Chairman of the Board of Transnet, Mr Mkwanazi, has instructed as follows.

**MR TODD:** Yes, he specifically did.

**ADV MYBURGH SC:** Then if we come to the Monday the 24<sup>th</sup> what did you do then in relation to the arbitration?

**MR TODD:** Well we postponed the arbitration as instructed, and I confirmed that in writing to Transnet to  
20 the same, to Mr Salinga copying Ms Stephen and Mr Mapoma by email, you have just referred me to page 105, and attached a letter which I have prepared just very briefly and at this point in time really we were just very concerned, I was personally very concerned that the incoming Chairperson and Chief Executive had initiated a

settlement process without us even being aware of it, having advised Transnet through I was very concerned that he might not have been briefed on the matter, that he might not have information necessary for him to make – to enter into settlement discussions and make appropriate decisions and nobody was asking us for – to brief him so I thought it appropriate and sent a letter to them on the 24<sup>th</sup> of January saying please can you bring this to the Chairman’s attention and say that in essence what was  
10 communicated in the letter of that date, but I wanted to say please don’t enter settlement discussions on a wrong assumption that you have weak prospects of success in the your Bargaining Council matter but I don’t know if you want me to deal with that now.

**ADV MYBURGH SC:** Yes perhaps we can deal with this letter at this point, as you say that’s found at 107. Could you perhaps go through the letter?

**MR TODD:** Well we simply confirmed that we had carried out the instructions and then said in paragraph 3:

20 “To ensure that we carry out our professional obligations as legal advisors to Transnet and to enable Transnet to make a decision on possible settlement ...”

which we had now been made aware of for the first time.

“...with the benefit of full knowledge of the present

status of the dispute and the likely outcome of Mr Gama's challenge to the fairness of his dismissal it is appropriate for us to record that ...”

And then we record something, the first one that we are recovering from Mr Gama is actually due under a court order, it is not something that somebody just decided to recover from him, he has been ordered to pay that amount to Transnet.

The second thing was to record how the issues had  
10 been narrowed, his complaint was no longer that he hadn't been guilty of misconduct, and to say insofar as he is challenging the sanction we said the nature and seriousness of the misconduct on the part of a senior executive such as Mr Gama, and the effect of that misconduct on Transnet are set out clearly in a number of extracts in the written findings of the disciplinary chairperson.

The written findings also identify a range of  
20 concerns about the credibility of Mr Gama's version in the disciplinary process. Third, the legal team representing Transnet in the Bargaining Council Arbitration, including senior counsel, is satisfied that even on Mr Gama's own current version it is likely that the sanction and dismissal will be upheld as fair for the three separate charges of misconduct of which he has now admitted guilty.

The Chairperson of the inquiry who reads the conclusion is a highly respected senior counsel and labour arbitrator who was initially proposed as arbitrator by Mr Gama and whose integrity has never been called into question.

Four, in addition Transnet and its legal team are aware of and are ready to present in the Bargaining Council arbitration further facts and circumstances that show Mr Gama's current version is false in material  
10 respects. This significantly aggravates the seriousness of the misconduct and makes it more likely still that the Bargaining Council Arbitrator will find Mr Gama's dismissal to have been fair, and then we acknowledge that maybe prospects of success is not the only issue and it may for example make commercial sense to pay a certain amount to eliminate further legal costs and bring the dispute to an end.

There may be other considerations and we – but we also reminded Transnet that the Public Finance  
20 Management Act is also an issue where proceedings of this kind are mandated and require where public funds had been used or abused or improperly spent, and so we said that is also something the Board must take into account. Please bring it to the attention of the Chairman and Acting Group Chief Executive and we said we are willing, if



required, to meet to discuss the issues raised in this letter and the facts and circumstances relevant to the dispute.

So I wanted to make sure that the Chairman realised there is a channel to brief you if you want to use it, but I did not want him to proceed without knowing that there is a story here which should impact on settlement.

**CHAIRPERSON:** And in particular you make it quite clear in paragraph 3.3 page 108 that there is – was every reason to believe that the arbitrator would uphold the dismissal.

10 **MR TODD:** Yes, we were very clear on that point, and we tried to communicate it as crisply – you know Chairperson we accept lawyers can be overly optimistic about their cases.

**CHAIRPERSON:** Yes, yes.

**MR TODD:** So one has to be a bit careful but on the other hand if you learn in a case that you had advised your client it is most likely to win that your client without telling you is proposing to settle you get a bit worried that they might be settling on a wrong assumption about the strength  
20 of their case and that was what happening here and we were very concerned to make sure that it is possible that no such mistake should be made.

**CHAIRPERSON:** But of course it seems to me that this was an easy case for a lawyer to advise on, compared to many cases that lawyers in practice have to deal with and

give advice on, simply because by that time you had a situation where Mr Gama had – was admitting guilty in regard to the misconduct, acts of misconduct that he had been found guilty of so you knew that there was no risk that at the arbitration the arbitrator could find that he was not guilty.

**MR TODD:** Yes.

**CHAIRPERSON:** So you know whereas in other situations you might have that kind of situation to say well there  
10 might be a change of the finding of guilt but this was a case where, that he was guilty of these three acts of misconduct was not in issue any more, it was admitted, so all that was left was him being guilty of these three acts of misconduct.

Was there anything unfair about him being dismissed?

**MR TODD:** That's correct Chairperson.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** Mr Todd you mention in paragraph  
20 3.4 that you were ready to present evidence that would establish that Mr Gama's version was false in material respects, you have explained the impact of that in relation to sanction, but can you recall what evidence you are referring to here?

**MR TODD:** I cannot, I can't recall exactly what is being

referred to but certainly a material of our preparation for the arbitration was the point that I raised earlier that the Chairperson had been generous with Mr Gama, because there were a number of respects in which his evidence apart from the admitted false evidence about his relationship with General Nyanda there were a number of other areas in which on his own version he had contradicted himself to an extent that it simply wasn't possible that he had been telling the truth, and when you  
10 deal with whether dismissal is an appropriate sanction it is very important to deal – to know whether or not a person who is saying it is not appropriate is actually a truthful witness arbitration and we were confident that we should show that Mr Gama was not a truthful witness.

**CHAIRPERSON:** So in other words are you saying even though he admitted guilt in respect of findings that didn't go to his honesty and so on as made by the Chairperson of the disciplinary inquiry your approach as the legal team for Transnet was that you would see to show that his  
20 evidence, or some parts of his evidence in the disciplinary inquiry had been dishonest?

**MR TODD:** Yes, yes Chair.

**CHAIRPERSON:** Okay.

**MR TODD:** In simple terms if somebody is guilty of serious negligence, but in dealing with it they have told

lies, even dishonest or false or misleading evidence about their negligence in an attempt to conceal or cover it up it becomes a material aggravating factor, and you assess whether should you dismiss somebody for that negligence and you are comparing that to a person who says I see what has gone wrong, I am really sorry about that, I will do whatever I can within my power to fix it.

They are two very different types of situation and Mr Gama we were very confident was the former, the  
10 person who had told many untruths in an attempt to conceal the conduct that he had now admitted he was guilty of.

**CHAIRPERSON:** Yes okay.

**ADV MYBURGH SC:** Mr Todd did you ever receive a response to your letter of the 24<sup>th</sup> of January?

**MR TODD:** No.

**ADV MYBURGH SC:** Paragraph 24 of your affidavit at page 53 you go on to explain that you were contacted by Mr Gulay, could you deal with that please.

20 **MR TODD:** Yes so no response to the letter but it became apparent to us what Transnet and its chairman were doing for whatever reason they had decided, the Chairman had decided to appoint a new law firm and perhaps let's assume to bring a fresh set of eyes to the problem. I don't take these sort of things personally, feel personally

affronted, the Chairman might have his own trusted advisors or people that he feels that would be better and so – better suited to advice in this instance or he just wanted a fresh pair of eyes, so what we learnt between this letter and over the next few days is that the law firm, Deneys Reitz, had been appointed to advise Transnet and the Chairman on a settlement discussions effectively on dealing with the Transnet matter and the settlement discussions.

10           We were not told that they would be taking over the conduct of the arbitration so in my mind if they had advised the Chairman that settlement was not a good idea or settlement hadn't been possible it is quite – it was quite possible still at that stage that we would have continued to run the matter, but I understood Deneys Reitz had been briefed to advise the Chairman on the matter and so I communicated, and I don't remember whether the attorney at Deneys Reitz phoned or whether I was asked to call him, but certainly I subsequently sent him an email with as  
20 much information as I could, and said that if he had any questions or needed to be briefed or to understand anything about the matter please to let me know.

**CHAIRPERSON:** So at that stage your mandate had not been terminated to conduct their – or to present Transnet at the arbitration.

**MR TODD:** No.

**CHAIRPERSON:** Okay, alright, but of course it was strange, was it not, that while you were representing Transnet in relation to the arbitration and you were the law firm that had been involved for a few years in the matter, maybe two years or whatever, from the time of the disciplinary hearing when there were settlement negotiations you were not asked for anything about the settlement.

10 **MR TODD;** Yes.

**CHAIRPERSON:** You were not told anything, you just heard that another law firm would advise on settlement that must have been strange.

**MR TODD:** Chairperson it was very strange to us that we weren't even aware that settlement negotiations had been initiated without recourse to us.

**CHAIRPERSON:** Yes.

**MR TODD:** Now lawyers don't have a monopoly or control or the right to say I must control, but the reason I had  
20 written to the Chairman specifically was – or written the letter asking to be brought to his attention was at the very least we would have expected to be asked to brief the company or whoever was going to be looking at settlement so that they understand whatever, whatever we know about the matter Transnet has the right to know, and so it would

be very – it is very strange not to take the benefit of what your advisors who have represented the company throughout have learnt and can tell you about the matter and not to even engage with it or whatever your views are about who you would prefer to engage with and I meant here was no way in my view that Deneys Reitz could advise without a full briefing either.

How could they advise Transnet as fresh pair of eyes without a full briefing from the lawyers who had been responsible for managing the matter, but so effectively  
10 Transnet hadn't contacted us, they had appointed Deneys Reitz to look at the matter and then I really just tried to assist to brief them with as much information as possible so that they could execute their – you know that they could advise Transnet appropriately whatever they were being asked to do.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** Perhaps I could just ask you in that regard how long had the disciplinary inquiry gone on for?

20 **MR TODD:** Well the process had been instituted, I mean if you include the pre-charging engagement it dates back roundabout June the previous year, so June 2009, I think Mr Gama was formally charged in about August and then the inquiry eventually resulted in his dismissal in June 2010, so it had been going on for that period and then this

period of the dispute, the Bargaining Council dispute had stretched from June until it was about to be finalised in January 2011.

**ADV MYBURGH SC:** And Mr Todd can you recall how many days the disciplinary inquiry ran for?

**MR TODD:** Well I know that the finding records 14 days on hearing, I don't recall all 14 days but it was a long inquiry with lots of witnesses, stretching over 14 days of hearings over a period of a few months, stretched over a  
10 period of a few months.

**CHAIRPERSON:** Is your impression that it took longer than 14 days or less than 14 days?

**MR TODD:** No I think 14 days as it were in hearing of evidence ja it would be about right, yes.

**ADV MYBURGH SC:** I think we saw yesterday from some of the taxed bills that there were 14 days of hearing, so your evidence has been that you provided Mr Gulay with as much information as you could, amongst the things that you provided him was Annexure A referred to in paragraph  
20 25 of your first affidavit and that you find at page 65, it is headed "Report for Transnet on disciplinary process."

**MR TODD:** Yes.

**ADV MYBURGH SC:** Involving Mr Gama prepared on 2 February 2011. Now as you know Mr Todd this is an important document because at least some of the directors



accept that they had sight of it and it in fact served before the Board at a point. What caused you to write this report, a lengthy report.

**CHAIRPERSON:** What page is that report again?

**ADV MYBURGH SC:** 65.

**CHAIRPERSON:** 65, okay.

**MR TODD:** In fact I believe that I – that Mr Mapoma had said can I prepare a briefing note of some kind for the Board and I was delighted to have an opportunity to do that  
10 because for the same reason I had sent the letter on the 24<sup>th</sup> saying please don't take steps here without full information and had heard nothing between then and the 2<sup>nd</sup> of February, so by the 2<sup>nd</sup> of February the opportunity to communicate in more detail I wanted to take again to discharge what I thought were our responsibilities as lawyers to Transnet to ensure that they were properly briefed, so it may have some imperfections but what I wanted to do was to make sure that I dealt with matters that had found their way into Mr Gama's complaints in the  
20 Bargaining Council arbitration, the procedural complaints, the way, the reason why we ran a disciplinary hearing and not an arbitration, and so effectively I sent them what – and I also had the feeling that although our mandated hadn't been terminated our services didn't appear to be any longer required, so it was quite important to give a

detailed you could call it a handover note in the hope that somebody would read a detailed handover note on the basis of proper information.

**ADV MYBURGH SC:** I want to take you through this report, some of this stuff contained in it you have you have already dealt with and I won't then ask you to repeat it but you start out at pages 65, 66, 67 and 68 dealing with the investigations that preceded the disciplinary action is there anything in there – excuse me – that you would like to  
10 highlight?

**MR TODD:** My apologies, you said page – up to page ...[intervenes]

**ADV MYBURGH SC:** 65 through to 68.

**MR TODD:** No I think the reason for setting up that background was primarily because there had been so much noise at the beginning of these proceedings that there was ulterior purpose and that it was an attempt to thwart Mr Gama's ambitions to be made Chief Executive and it wasn't clear to me that the new Board would be properly cited on  
20 that and there was – there had been a lot of noise that it included political formations or politicians making very public statements that Mr Gama had been unfairly singled out and that he had been somehow the victim, really reiterating the case that he had brought and lost in the High Court, it was still very much alive in the public of

course, and so I thought it necessary to set out what we had really understood and had been put into the high court proceedings how did all this happen, it wasn't a conspiracy.

So those pages really deal with that.

**ADV MYBURGH SC:** Can I ask you to look at paragraph 16 where you mention that in March 2009 ENS was asked to advise on whether the conduct of Mr Gama justified disciplinary action.

10 **MR TODD:** Yes.

**ADV MYBURGH SC:** And provided a legal opinion.

**MR TODD:** Yes.

**ADV MYBURGH SC:** How did Bowman Gilfillan then come to be involved?

**MR TODD:** Well at that point in time and Mr Phiswana, who was then the Chair of the Board, had been discussing with other – and I knew this from their affidavits in the High Court litigation, had been discussing what to do about these complaints and how they should be managed.

20 The Chief Executive, Group Chief Executive had recently left and Mr Wells, who as an acting Group Chief Executive and they discussed it and they decided that they would like to get a legal opinion on whether this constituted misconduct that needed to be dealt with. I can't say exactly why, they probably were a bit cautious

because Mr Gama had put his hands in the ring, to become the Group Chief Executive Officer and they probably wanted to make sure that they proceeded with caution, I am surmising.

**ADV MYBURGH SC:** So in fact at paragraph 19 at the foot of page 67 you say in discussion with ENS and other executives Wells decided to seek his own independent legal advice as to whether to proceed with disciplinary action against Gama. Bowman Gilfillan Attorneys were  
10 then instructed in early May ...[intervenues]

**MR TODD:** Yes I apologise I didn't answer your question which was when did we get involve, that's when we got involved yes.

**ADV MYBURGH SC:** And then at paragraph 21 you say Bowman Gilfillan Attorneys provided a legal opinion dated 29 May 2009. The legal advice confirmed the early advice of ENS and was to the effect that the issues were serious and needed to be dealt with through an appropriate disciplinary process which would give Mr Gama an  
20 opportunity to respond, is that correct.

**MR TODD:** Yes that's right.

**ADV MYBURGH SC:** In the next part of your report you deal with initial attempts to convene the disciplinary process, I think you might have already touched on some of that, is there anything you wish to highlight?

**MR TODD:** No at that point it was our intention to follow the contract and set up a pre-dismissal arbitration process and initially it had looked as though that would be possible but then Mr Gama decided to attempt to interdict the process, which is what he then did.

**ADV MYBURGH SC:** At page 69 you then deal with Gama's high court application to interdict the inquiry, we have already dealt with this in some detail. Is there anything that you feel needs to be highlighted there?

10 **MR TODD:** No I think we have dealt with – I mean I had dealt there with the point about Mr Phaswana evidence in his affidavits saying that you know Mr Gama was elected for the appointment to the position of Group Chief Executive but there are important gaps reactive to the requirements of the position and he currently requires greater cognitive development to handle the complexity of this position.

And there were similar points made by Mr Phaswana and I think I referred to them earlier but that is really dealt with in the high court of proceedings.

20 **ADV MYBURGH SC:** The next part of your report deals with attempts to schedule a disciplinary inquiry by arbitration through Tukesos [?]

**MR TODD:** Yes. The contract of employment had provided for arbitration administered by Tukesos [?] which is a labour arbitration body. Tukesos [?] appointed initially one of their

most senior or their most senior labour arbitrator. He was initially accepted but the objected to and there was quite a lot of toing and froing in our attempts to arrange an arbitration.

**ADV MYBURGH SC:** Then you deal with Gama's subsequent objection to John Myburgh SC and the proposal of alternative arbitrators.

**MR TODD:** Yes. Effectively what happened is he initially accepted that John Myburgh would be the arbitrator.

10 **CHAIRPERSON:** Was that John Myburgh?

**MR TODD:** Yes. Advocate John Myburgh.

**CHAIRPERSON:** Okay.

**MR TODD:** He was the nominator – he was the arbitrator nominated by Tukesio [?] and as we – I pointed out in the report he was their most senior panellist and former high court judge former president of the labour appeal court. He seemed to be imminently suited to an arbitration if not rather over qualified for an arbitration of this kind.

20 But – and initially Mr Langa Gama's – Mr Gama's lawyer recorded that that was fine and we started setting dates. But then on 5 November as I indicate here then Mr Langa changed his tune and said, actually we still have to agree on the arbitrator and then proposed seven alternative arbitrators.

And we then – I record a few discussions where we

thought well we actually have an arbitrator. We do not have to now agree a new one but we eventually decided let us not kick off an arbitration with an argument.

There was a point about recusal that was raised by Langa that he had grounds to seek the recusal of Advocate Myburgh. It looked tenuous as a ground for recusal. But we thought why start off a disciplinary process like this and we clarified with Mr Langa you have proposed seven alternatives can we pick any one of those seven? And they  
10 said yes.

And we said well in that case let us avoid an argument and a recusal and we will pick one of your seven. And number 1 on the list was Advocate Antrobus who was subsequently appointed.

So we picked Advocate Antrobus and then an objection was raised to that too.

**ADV MYBURGH SC:** This you then...

**CHAIRPERSON:** He – he - he included Advocate Antrobus in the list of arbitrators that he was proposing?

20 **MR TODD:** That is right.

**CHAIRPERSON:** You said we are not going to come with our own list.

**MR TODD:** No.

**CHAIRPERSON:** We will pick one from your list?

**MR TODD:** Yes.

**CHAIRPERSON:** Is that fine and he said that is fine then you picked Mr Antrobus.

**MR TODD:** That is right.

**CHAIRPERSON:** Yes okay.

**ADV MYBURGH SC:** And then there was an objection to that. You deal with it at page 72 under the heading Gama's refusal to accept the appointment of Advocate Antrobus SC.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Could you deal with that please?

10 **CHAIRPERSON:** How could that happen?

**MR TODD:** And this was put here because this had been raised as one of Mr Gama's grounds of procedural unfairness that he was entitled to an arbitration not a hearing. And so I thought it important to include this background. So we then had a situation where they – as I have described it – repudiated the appointment of Advocate Antrobus SC and said no now they want us to agree – submitted – what – we want this one to be the arbitrator and then they submitted a further person.

20           And we discussed this with Transnet and said you know we actually cannot go on like this. We have – we are going to be – there is too much cloak and dagger about who the arbitrator is. All of these people are imminently suitable to arbitrate and we have picked one. We could have stuck to Myburgh we did not we said we will pick one from your list;



we did and he said it cannot be that we are going to – to recycle these kind of problems.

So we then decided then instead of continuing to change – try and further negotiate arbitrators to say we will proceed with a disciplinary chairperson who you chose as one of your arbitrators but we will accept that his decision is not final and binding.

So we will proceed with a person that we have got no doubt about and you will then be – you will not – because  
10 you have repudiated his appointment. I mean we could have taken a more legalistic approach and said, we holding you to it being final and binding. But we really wanted to hold the inquiry to get to the end of it to see what the outcome was not to get involved in these kind of procedural – this kind of procedural wrangling.

So that is the basis on which we proceeded with Advocate Antrobus as the chairperson and Mr – Mr Gama then accepted that and participated initially with a reservation of rights but subsequently we conducted the  
20 whole disciplinary process with – chaired by Mr Antrobus – Advocate Antrobus.

**ADV MYBURGH SC:** I think you have made the point before that if the pre-dismissal arbitration process had been followed then Mr Gama would not have been able to challenge the fairness of his dismissal he would have been

confined to a review application.

**MR TODD:** Yes. The reason we were not concerned about that is that we wanted a fair outcome and Transnet wanted one. They did not want – they were quite – they wanted the disciplinary they were not worried about the prospect of the find – outcome of the disciplinary chairperson being found to be unfair later. Because they wanted a fair outcome and were committed to being fair. They did not think there was a big risk that it could subsequently be found to be unfair.

10 **ADV MYBURGH SC:** At page 73 you have a heading Decision to Proceed by way of disciplinary inquiry instead of arbitration. I think you have dealt with that.

**MR TODD:** Yes.

**ADV MYBURGH SC:** And then at 74 the disciplinary inquiry and its outcome and we know that broadly. But I would like to now focus on if I may is a summary of the key findings. And this becomes important because what you have done is you have made the – the findings of the chairperson which as you have already mentioned are very long – quite  
20 digestible.

**MR TODD:** Yes.

**ADV MYBURGH SC:** At paragraph 55 you record that the finding set out a very detailed – the key findings were as follows: Perhaps you could take the Chairperson through this part of the report in slightly more detail please?

**MR TODD:** Yes so this – I did mention that there were a lot of obstacles. There were a number of preliminary and technical points raised in the disciplinary process and they are all dealt with in detail in the finding. But those were points it was alleged by Mr Gama that Ms Ramos had actually already considered and dismissed the allegations concerning fifty like new locomotives that the delay was unreasonable, that the charges were too vague and that there was inconsistency.

10           This is where it was raised upfront as a preliminary point that Mr Gama said I am being singled out in the inquiry.

          So they were all raised and dealt with at great length by the chairperson in the – of the disciplinary hearing and – and it was found that there was no merit in those points.

          And then turning to the specific charges he deals with the GNS charge and I do not know – I mean these are – these are fairly lengthy extracts from a very long finding. But they...

**CHAIRPERSON:** I think you can just mention the main  
20 features.

**MR TODD:** Yes. So in relation to the GNS charge the chairman makes the finding that clearly Gama ought to have known that what he was signing was a confinement. The document which he signed was headed GNS confinement. And it clearly reflects in no less than fifteen placed over

seven pages that it is a contract on confinement. Even as the busy CEO of a large organisation Gama was negligent if he failed to observe that what was presented to him was a document for the approval of a contract on confinement. And then...

**CHAIRPERSON:** Is that just to interrupt you. Is that one of the aspects where you seem to suggest that the – the chairperson of the disciplinary inquiry may have been generous in accepting that Mr Gama may have been negligent and did not see that what he was signing was approving a confinement route for the transaction?

**MR TODD:** Ja. It is Chairperson and in fact parts of the finding suggests in fact that the chairperson had reached a more serious conclusion and I extract that at page 11 as well where it says:

“Gama’s explanation for his”

Sorry it is at page 75 in the middle of the page.

“Gama’s explanation for his failure to properly read the document was that he trusted Beattie’s [?] explanation. This may of course be a false explanation in that Gama may well have known at the time that what he was approving was a service contract on confinement etcetera, etcetera and that the value of the contract exceeded

its delegated authority and that the contract was being awarded to GNS a company owned and controlled by a person with whom he was personally associated General Nyanda. These are all facts which a careful and non-negligent CEO should have known and could have ensured that he was aware of by the simple precaution of reading the documents placed before him.”

10 And then he says:

“Gama’s explanation about what occurred on the 5 December may be a false explanation. In this regard it is relevant to consider that Gama was not open about his relationship with General Nyanda. He initially downplayed and denied the fact that he was more than merely an acquaintance of General Nyanda. Gama put up a false contention during the hearing that he knew  
20 General Nyanda only as any other member of the public would.”

So these are all parts of the finding which – which show and tend to show that the chairman was heading in a conclusion in this direction. But he ultimately pulled back from it and said, you know on looking at all of this I am going to find Mr

Gama – I am going to accept effectively that Mr Gama did not actually know what he was signing and I am going to find though that for a Chief Executive of a – an important the largest division – operating division of Transnet that is just not acceptable.

**CHAIRPERSON:** Two things.

1. You said earlier on that ahead of the arbitration at the Bargaining Council the Transnet's legal team intended to show at the arbitration that Mr Gama had actually not been truthful in certain respects in his evidence. Was – was one of those the explanation that when he signed that document of confinement he was not aware that he was approving confinement. Was that one of the areas where?

**MR TODD:** Yes we were certainly going to show.

**CHAIRPERSON:** Yes.

**MR TODD:** To do our best to show through proper questioning of Mr Gama and through really just an analysis of what the chairman had established.

20 **CHAIRPERSON:** Yes.

**MR TODD:** That a better conclusion was that he did know.

**CHAIRPERSON:** Yes.

**MR TODD:** And that that ..

**CHAIRPERSON:** Yes. And that by saying that he did not know he was not being truthful.

**MR TODD:** Yes Mr Chairperson.

**CHAIRPERSON:** Yes.

**MR TODD:** And also that for example in other areas he – at other times he said that he had been shown the name of the successful bidder and yet he then denied it and said I only saw the last place. There were a number of points like that that simply were not credible and we thought impacted very negatively on Mr Gama's truthful you know perceptions of his truthfulness.

10 **CHAIRPERSON:** Of course you did say earlier on the other one – the other area where you intended to show that he had not been truthful was in relation to the relationship between himself and General Nyanda.

**MR TODD:** Yes.

**CHAIRPERSON:** And I see that here he – you quote the chairperson of the disciplinary inquiry as having said that in regard to that issue Mr Gama put up a false contention during the hearing.

**MR TODD:** Yes.

20 **CHAIRPERSON:** That he knew General Nyanda only as any other member of the public would. But your evidence earlier on was that once he was confronted with either telephone records or cell phone records which showed that there had been quite some interaction between himself and General Nyanda then his – the he changed his story.

**MR TODD:** Yes.

**CHAIRPERSON:** Is that right?

**MR TODD:** Yes that was found that it was apparent from the chairperson.

**CHAIRPERSON:** Yes.

**MR TODD:** In fact was aware of that and did make that point.

**CHAIRPERSON:** Yes. Okay alright. Continue Mr Myburgh.

**ADV MYBURGH SC:** Mr Todd unless there is something else  
10 that you want to highlight to the Chairperson I thought I  
would take you to paragraph 55.3 where you record:

“That the chairperson went on to consider whether it had been proved that Gama’s conduct in fact constituted wilful misconduct rather than simple hear and serious negligence. He concluded that it had not been shown on the probabilities that Gama acted wilfully rather merely negligently.”

**MR TODD:** Yes.

20 **ADV MYBURGH SC:** And then you go on to record:

“The chairperson concluded on this charge as follows:”  
Perhaps you could deal with – with that conclusion.

**MR TODD:** Yes. He found that he –

“That Mr Gama had negligently authorised the conclusion of a contract for the provision



of security services by GNS on confinement and failed to carry out his duties as CEO in the manner expected of him.

And secondly he negligently failed to take appropriate steps to investigate the irregularities associated with the halting of the open tender process and the replacement thereof with the GNS confinement tender process and the presentation to him of a document for approval which was the product of a confinement process that which was presented to him on the basis that it was an open tender process.”

Effectively what the chairperson was finding in that second part was it is another – it was another problem of – that Mr Gama faced but his explanation to the chair was that he had been seriously misled into doing something that was fundamentally wrong and yet he showed no interest or inclination to find out about it and correct it and investigate it or to take steps. It was ultimately the only – only after his own disciplinary proceedings that were initiated that Mr Khanya and Mr Senemala for example were charged. Because..

**CHAIRPERSON:** Oh that is – this is the one where I think I read I do not know whether it was in the disciplinary hearing

– the ruling that one of the issues was that he knew on his own version he knew that certain people under him had done wrong things.

**MR TODD:** Yes.

**CHAIRPERSON:** But no disciplinary action had been taken against them. That is one of those things.

**MR TODD:** Yes.

**CHAIRPERSON:** Ja. Okay. Did he have an explanation at the disciplinary hearing for not taking any action –  
10 disciplinary action against them in – timeously?

**MR TODD:** At one – he said that it was only after the investigation had started and he had been started to be shown the documents such as the confinement document that he said and in his evidence I – I would – can refer to it where he had said I then realised there was something fishy and I then started to realise what this scam was all about. But having realised there was something fishy and a scam he did nothing.

He did nothing and he did say once the investigation  
20 had started he thought it better to just wait and see what happened as an outcome of the investigation and he did not want to interfere. But effectively that is – we would submit – certainly have submitted in the Bargaining Council Inquiry indicative of a state of mind that is not outraged at what you have discovered has been done under your watch.

But indicative of a state of mind which will cautiously observe what emerges on the investigation which was not what one would expect of a Chief Executive who has been misled into signing a false procurement document under a fraudulent procurement process.

**ADV MYBURGH SC:** Mr Todd at page 80 paragraph 56 of your report you deal with the essence of the chairperson's conclusion of the fifty like new charge. Perhaps you could read that please – that paragraph?

10 **MR TODD:** Yes.

“I mean the chairperson in relation to that concluded the fifty like new was an important contract for a significant amount of money.”

He mentioned elsewhere that it was in excess of R800 million contract.

20 “The board had laid down only one single condition and had tasked Gama with executing the contract. He should in the circumstances have taken extraordinary care to ensure that he captured the import of the condition in the contract this he failed to do. On his own version Gama failed to read the fifty like new contract and make himself efficiently aware of its content and implications in order to ensure compliance

with the board resolution. There is no doubt that Transnet has established that Gama was negligent in failing to secure a contract in terms which provided for TER that is Rail Engineering to perform all the local work even though he had conferred with his legal department on some aspects but not on the critical aspect of compliance with the board resolution. This negligent failure does  
10 constitute misconduct.”

**ADV MYBURGH SC:** And then at paragraph 57 you deal with the key findings made in relation to the criticism charge.

**MR TODD:** Yes so that was the –

“The finding that the statements which were critical of Wells in particular but also infer a wider criticism of Transnet Executives and arguably even of the Transnet board for having an ulterior motive and conspiring in preferring the charges against Gama. These  
20 are serious allegations and alleged dishonest conduct. This constitutes serious disrespect and gross insubordination insofar as criticism were made of Wells who was then the acting Group Chief Executive Officer. Certain of the criticisms also constitute insulting behaviour

and conduct which is defined and provocative of persons in authority. TIA which was the Internal Audit Function was criticised as was the previous Group CEO, the chairman of Transnet and Transnet in general. The fact that Gama is blatantly prepared to apologise is belated prepared to apologise to Wells and discuss the issues with him whilst perhaps going some way to resolving their personal differences does not constitute a reason why this conduct should not be regarded as being misconduct as defined in the Transnet Code. In my view Mr Gama overstepped the mark with his trench and criticism which impugned the honesty of Wells and other senior executives.”

**ADV MYBURGH SC:** Then at pages 81 all the way through to 88 you deal with how the chairperson dealt with the question of sanction.

20 **MR TODD:** Yes. And we included there an important principle about sanction because ultimately people sometimes think of and still erroneously refer to a disciplinary sanction in a workplace context as a punishment. It has really got nothing to do with punishment and the chairman actually made that point where he – in – in

his approach to sanction is that – and he referred to labour appeal court authority.

It is about ultimately – it is about a sensible operational response to risk management in a particular enterprise. That is why you discipline people because their conduct in breach of the rules presents a risk to the correct operating operation of the business.

And so he says that is the frame work which I have got to look at this. I have got a Chief Executive of a – of  
10 Transnet's largest operating division and I need to assess whether this conduct can be tolerated by Transnet of a person in that position or whether it presents an unrealistic or unreasonable risk to the enterprise. And that is really how he deals with it.

He talks about then the – the negligence on Gama's part in signing the GNS confinement document. He is particularly inexcusable as he is the authorised person with delegated authority on behalf of TFR who as such is the gatekeeper tasked with ensuring the contracts of that nature  
20 can only be concluded for a value of more than R10 million if an open tender process has been undergone.

He is the key person in the procurement process whose duty it was to ensure. And he goes on and really I mean again it is – there are long extracts where the chairman wrestles with this problem.

But he says, ultimately this is – I found it is negligent not wilful but it is – it goes to the heart of whether this person can be trusted to do his job for Transnet.

**CHAIRPERSON:** So this is – this is where on his version he signed the documents on a transaction involving what R18 million?

**MR TODD:** Yes.

**CHAIRPERSON:** R18 million without reading them?

**MR TODD:** Yes without – on his version without seeing who  
10 it was in favour of. Without seeing if anything to do with the process that had been followed.

**CHAIRPERSON:** Without checking that the money or the contract would be going to the right person who entity and without checking that proper processes had been followed.

**MR TODD:** Right. On his version that they arbitrate effectively accepted. He simply signed the last page and did not look at anything else on the document. On the strength of what Mr Beattie had told him.

**CHAIRPERSON:** And that is quite risky for any company  
20 because somebody can sign away R100 million without reading what they are signing at that level.

**MR TODD:** This is really what the chairperson found and as we – we – as we said we would have gone into the Bargaining Council arbitration saying it is worse than that but even if that is all it was it was serious enough for this

chairman you cannot – it is inconsistent with the continuing relationship.

**CHAIRPERSON:** Ja. It might R10 million or R18 million now which is a lot of money but tomorrow or next week or next year it could be R100 million and the question is can you – can you keep a person in such a high position who does that?

**ADV MYBURGH SC:** Mr Todd in fact the – the Chairperson Mr Antrobus makes that very point at the foot of page 82.

10           “Transnet is placed in the position where it can really not be confident once negligence of this nature has occurred that Gama will in future be sufficiently careful to ensure that he knows whether what he is signing is a confinement or an open tender contract.”

So he goes on, is that correct?

**MR TODD:** Yes.

**ADV MYBURGH SC:** And then Chairperson I see that it is exactly one o'clock.

20   **CHAIRPERSON:** Okay let us take the lunch adjournment and we will resume at two. We adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES:**

**CHAIRPERSON:** Okay let us continue.



**ADV MYBURGH SC:** Thank you, Chairperson. Mr Todd, before lunch we were dealing with the finding by the chairperson of the disciplinary inquiry in relation to sanction in respect of charge 2.

Could I ask you please to turn to page 83 of Bundle 3? And now we deal with findings on the sanction in respect of charge 2. Fifty-Like-New contract.

Can I take you to page 84 at the top where the chairperson recorded that he was found guilty of negligent  
10 misconduct.

“For having failed to ensure that the contract complied with the board resolution.”

Could you please deal with the next paragraph?

**MR TODD:** Yes, in essence, the chairperson of this hearing, I think was reiterating a point that we mentioned before the break which is simply that it is fundamental to the successful operation of a company like Transnet that the head of its largest operation division can be relied upon and trusted to do what it is expected to do.

20 So in this passage, the chairperson said:

“One must have regard to the fact that the board needs to be able to be confident that when it delegates authority to a divisional CEO, subject to a particular condition, that he will take specific and reliable steps to ensure that condition is complied

with.

In fairness to the Transnet Board, it would be a big ask for the board to be required to continue and trusting Gama with large management projects when he had exhibit negligent failure of this nature and with these consequences.

Bearing all these factors in mind, the misconduct under this charge, you would in isolation, would probably be specifically gravely to warrant a  
10 sanction, a severe dismissal on the first offence.”

And that is what he then finds.

**CHAIRPERSON:** Is that at page 83, Mr Myburgh?

**ADV MYBURGH SC:** 84.

**CHAIRPERSON:** Sorry?

**ADV MYBURGH SC:** 84.

**CHAIRPERSON:** 84. Okay. Okay.

**ADV MYBURGH SC:** That then ties in Mr Todd with the evidence that you gave that the chairperson of the disciplinary inquiry right at the beginning, quoted that  
20 passage and give the chairperson a judgment.

I think it is from the NNAC’s judgment in *De Beers*, where the point was made that dismissal is not about retribution.

It is really about the sensible response to risk management.

And here, the chairperson, like in relation to the previous finding in regard to sanction, makes the point that it would be a harder call to expect Transnet to keep someone as a CEO in these sorts of circumstances.

Is that correct?

**MR TODD:** Yes, that is essentially what he was saying.

**ADV MYBURGH SC:** And then when we deal with charge 4, unwarranted criticism of the Transnet... oh, sorry. Of Transnet and its executives.

10 If I could just direct your attention to the top of page 85 where it is recorded that:

“Gama’s public statements demonstrate without doubt that there has been a total breakdown in trust and confidence between the parties.”

Is that correct?

**MR TODD:** Yes, that was the conclusion he reached. On grounds, I think.

**ADV MYBURGH SC:** And if you to page 88, just above paragraph 60, the chairperson of the inquiry finds:

20 “Transnet submits that no employment relationship can continue to exist in the circumstances of this public attack on its executives and on Transnet itself.

In short, whilst it is his evidence on this aspect set out above, is overwhelming and is uncontradicted.

This charge goes to the heart of Transnet's loss of faith in Gama and there can be no doubt that dismissal is the only appropriate penalty for Gama's conduct under this fourth charge."

You confirm that?

**MR TODD**: Yes, that is what he found. And again, you know, it is... it seems to me to be clear that when a senior person and you hold a senior position in the organisation, in this case not on the board itself.

10 But typically managers, a chief executive officer of a division of this size, holds judiciary responsibilities towards the company to launch in defence of your own.

Because you feel that you should not be charged with misconduct onto an attack against the company and its leadership, is completely at odds with your DG's to the employer.

**ADV MYBURGH SC**: Yes.

**MR TODD**: It is incompatible with... completely incompatible and at odds with those duties. So I think it  
20 would be a welcome change in our...

The culture of our public live if we found executive responding to this sort of situation in a more measured way without going onto the attack against the employer that they serve.

**CHAIRPERSON**: And I guess when you have attacked

senior executives, your colleagues like that for doing their job to bring disciplinary charges against you where they bona fide believe that there were proper grounds to do so and you attack them.

And you attack them publicly as people who were not bona fide in doing what they are doing but who were part of an agenda against you to drop you from appointment as Group CEO.

10 What you are actually saying when you make that criticism is. They know that they have got no case against me. They are doing this for other purposes, agendas.

**MR TODD**: Yes.

**CHAIRPERSON**: But later on when you admit that you are guilty of exactly the acts of misconduct that they brought against you, it raises question about you.

**MR TODD**: Yes, about your judgment.

**CHAIRPERSON**: About your judgment.

**MR TODD**: Yes, Chairperson.

20 **CHAIRPERSON**: I mean, you have attacked these people, your colleagues as pursuing some agenda against you in bringing these charges but later on you actually accept that you are guilty of all these three charges.

The only thing that you are complaining about is sanction. Ja, it is proper in that situation to ask the question, you know, how is your judgment?

And all of that would be things that I would imagine would be relevant if and when the same employer is asked to take you back.

**MR TODD:** Well, yes Chairperson because that is one of the questions that is always at issue here is. Can this relationship continue? What will happen if in future a board or colleagues raise with Mr Gama serious concerns about his conduct?

Is this... this is how he appears to react or articulate.  
10 And so that is the problem is that you effectively poison the relationship and cause a breakdown in confidence that that is how you are going to, you know, that you will behave as an executive should in the future.

**CHAIRPERSON:** Actually, it is raises other questions too even in terms of people under you. If you are taking back. If you want to discipline people who need to be acceptable to you for them to start accusing you of all kinds of things, when all you are doing is, you genuinely believe there should be charges against them.

20 Will you say: Okay, this is acceptable because I have done the same thing to other people. Okay Mr Myburgh.

**ADV MYBURGH SC:** Yes, thank you Chairperson. Suppose I just wanted you to confirm this. It should not be lost from sight that Mr Gama was a Divisional CEO and this charge relates to an attack on the Group Executive and the Group

Board.

**MR TODD**: Yes.

**ADV MYBURGH SC**: The chairperson of the disciplinary then makes his recommendations. That you find at page 88. I think Mr Todd you have already dealt with this. You have told the Chairperson that he recommended dismissal in respect of each isolated charge and more so collectively.

**MR TODD**: Yes, correct. Each of the charges viewed in isolation and the appropriate sanction is dismissal.

10 **ADV MYBURGH SC**: And as we have seen, in relation to the fourth charge, he had found that the only appropriate penalty was dismissal.

**CHAIRPERSON**: So effectively, was he saying. You cannot really impose any other sanction for this kind of conduct. Dismissal is the only one that would be appropriate. Is that what he was saying in effect?

**MR TODD**: Yes, it seems to go far and he goes further than say: I have hesitated. I am in two minds. This could go either way.

20 But I think on a balance, it is... dismissal would be appropriate. It is not that kind of finding. It is a finding which is very unequivocal in respect of each of the charges.

And then very decisive as regards to accumulative consequence. I think that is very clear from his decision making.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** In the next part of your report at page 89, you will deal with dismissal and dispute referred to the Transnet Bargaining Council. You have already given that evidence.

Could I perhaps then direct your attention to the heading towards the foot of the page, Gama's weak prospects of success in the Bargaining Council and arbitration.

10 Could you please take the Chairperson through those paragraphs In particular, 65 and 66.

**MR TODD:** Yes. I must just say, this largely repeats what I... we had communicated on the 24<sup>th</sup> of January in the letter that I referred to earlier when we had been instructed to postpone the arbitration pending settlement discussions.

And so it was again at the end of this report to the board. I was not sure.

I had no answer to the letter or further indication that our letter which we wanted the board to hear and receive what our views were around prospects of success.

20 We did not know whether they had landed and so I thought it important to repeat what I had said in that letter about prospects of success.

And so really repeating... some of it is verbatim what was said out in that letter that the legal team including senior counsel believes that the sanction of dismissal will be



found by the agreed Bargaining Council arbitrator to have been a first sanction.

And in addition, the additional point about Gama's dishonest evidence, we made again. And then further considerations. There were two additional points, I think, that we made here.

The point... oh, sorry. Well, actually, there are some additional points that we then added here and they were these.

10 The GNS contract which had been approved by Gama had resulted in Transnet instituting civil proceedings for repayment of the total amount of R 95 million.

The fact of the matter is that that irregular contract which purportedly was supposedly was authorised for R 18 million, very quickly ramped up, doubled in size in March, two or three months later under the watchful eye of Mr Senamela.

And a few months later in the following year, it got ramped up again so that the amounts being paid monthly to  
20 the security company had grown to and was... it reached R 95 million in just over two years.

And Transnet had looked at that. We advised on it. We sought advice from counsel and believed that there were grounds to the cover or seek repayment.

And so civil litigation had been instituted but... and

criminal charges had been laid in respect of that contract.

So we wanted to say to the board: Please know there are consequences of the comeback that Mr Gama has been dismissed for including this civil litigation, potential criminal proceedings, and do not overlook that.

We reiterated the point about the PFMA. The Public Finance Management Act. That these were obligations to take disciplinary steps in cases like this.

And then the point about consistency and which  
10 Chairperson, I think, you raised that just now. If you say internally that for conduct of this kind which this chairperson, Advocate Antrobus holds this view.

But that actually is okay. Then you were sending a message about future treatment of similar conduct which says: We will...

I did not know what was being proposed at that point in time. But whatever you settle, people will then expect, this is the standard that Transnet is setting for its senior executives as they go forward.

20 And not just for all of them. I mean, that would apply to everybody, you know. In particular, if you... whatever standard you now set for a senior person like this, he is going... you are going to be held to in future and expected to be held. You should be held to it.

So that was a big worry about, let us call it an easy way

out for Transnet here. That they are reacting under the Public Finance Management Act.

They are setting a standard. They got to be careful. And we then made the point that there would have to be compelling reasons not to abide by the outcome of the properly constituted disciplinary inquiry.

It is also... there is a public law element to this. We have authorised, delegated, mandated and it has been conducted properly.

10 And before we decide that we are not going to follow that, there have to be a very, very good reason. And we then again said that similarly, the outcome of the Bargaining Council are the impression.

We have not arrived yet but we fully expected that the Bargaining Council would confirm the decision. So, yes. Those were just points that we thought it important to bring to the attention of the board.

**CHAIRPERSON:** So when you ultimately... I know you still go to the issue of the settlement and the reinstatement.  
20 When Transnet had to consider the issue of resettling the matter or reinstating Mr Gama.

One of the things that it would have had to consider is how much trouble it had gone to, to try and make sure that Mr Gama had been subjected to a proper and fair disciplinary process.

And obviously, the money that had been spent on the lawyers and the arbitrator to do that. Because I mean, if this was an... I am saying arbitrator, I mean chairperson of a disciplinary inquiry.

If this was... it seems this inquiry took days in terms of the actual hearing. That is almost like a big trial, civil trial or criminal trial. That must have cost Transnet quite a lot of money.

So when you decide as Transnet not to follow the  
10 outcome of that very independent process, you have got think carefully about that.

Because you have spent so much money and if you do not have... if there is no criticism, justified criticism of how that process was conducted, you are going to have to answer why you did not follow it.

**MR TODD:** Yes.

**CHAIRPERSON:** Ja.

**MR TODD:** I agree, Chairperson. In simple terms. Transnet had gone to great lengths and it was much more  
20 difficult than it should have been but it had gone to... it take... it had gone through great lengths to establish the standard of conduct it expected.

And so, to just over to... you have to be very careful that you do not... for all the reasons you are going chairperson but also you would have to have compelling reasons to

depart from that.

**CHAIRPERSON:** Ja. H'm.

**ADV MYBURGH SC:** Mr Todd, if we could back to your affidavit at page 54 of Bundle 3. Having now dealt with Annexure A. Pick up at paragraph 26. Did you ever receive any response to your report or any enquiry in relation to your report?

**MR TODD:** No.

**ADV MYBURGH SC:** Were you involved in Mr Gama's  
10 matter at all after that?

**MR TODD:** No. Nobody came back with questions, queries, points of clarification or asked us just to brief anybody else beyond that.

**ADV MYBURGH SC:** And you go on to say that you then came to learn from public reporters that Mr Gama had been reinstated?

**MR TODD:** Yes.

**ADV MYBURGH SC:** And you then say, you have been provided with a copy of the settlement agreement that you  
20 noted it was signed by Mr Mkwanazi. You do not know whether the board was involved in taking the decision.

Perhaps I could ask you to expand upon paragraph 30 where you talk about a complete capitulation in the negotiation.

**MR TODD:** Yes. Yes, I have since been provided with

documents. Been provided by Transnet, the document showing a process under which that decision appears to have been... the route it followed. I just make that point. So when I deposed to this affidavit, I have not.

**ADV MYBURGH SC:** Yes.

**MR TODD:** Since then, I have. But yes, as regards to the settlement agreement itself. I mean, I think it is fair to describe it as a complete capitulation.

And in fact, as I point out here, Transnet went further  
10 than the absolute best case that Mr Gama could have got in the arbitration.

So in the arbitration that had just been postponed. If assume I and the rest of the legal team responsible for advising Transnet, had got this completely wrong and Mr Gama had won his case at the Bargaining Council. He could have secured retrospectively reinstatement.

So by giving him retrospective reinstatement, Transnet agreed to give him the best possible outcome that he could conceivable had got.

20 **CHAIRPERSON:** Yes.

**MR TODD:** So even if one assumes that this is one of those hard cases that was evenly done. Transnet abandoned its half of the odds in which it might have prevailed and decided simply to give in to what Mr Gama was seeking in the arbitration.

So that is the first point about retrospective reinstatement. And then there are other elements of it. I mean, there are agreements to pay costs that I can talk about.

But I mean, in essence, in a Bargaining Council arbitration, it is most unusual for a Bargaining Council arbitrator to award costs.

It would normally only do so, an arbitrator to show real disapproval of a party in labour arbitration. It is just part of  
10 the culture of the dispute resolution that parties should have access and should not be burdened unnecessarily with costs.

And the amount of costs that if you were in fact awarded costs in a Bargaining Council arbitration is extremely limited. It would be... it is... they are normally taxed on a magistrate's court tariff which makes the difference.

And so in general, the best case scenario for Mr Gama if Transnet's legal team had things completely wrong, was that he would be reinstated retrospectively and in the most  
20 unusual circumstances, get a very limited cost order in a Bargaining Council.

But instead, Transnet actually agreed to reverse even the orders that it had been made in its own favour in the high court litigation.

So whereas Mr Gama had completely unjustifiable

approached the court and criticised and attacked Transnet in the way that he had done, completely unjustified had been under a court order, ordered to pay Transnet's costs for doing so.

Transnet in this agreement, turned out on its head and said do not worry. Even though it did not say it expressly, I think it was implicit. Do not worry. You do not need to pay our costs after all.

And not only that. We will pay 75% of yours in the high  
10 court litigation. So we will actually pay for the pleasure of having had you bring completely unjustified litigation against us.

Well, that was more than a capitulation. That was a capitulation with a whole lot of benefits. And the most extraordinary thing about it to us at the time when we - well, certainly when I learnt of this – is that there was simply... it seemed to suggest a degree of bargaining power or some decision making ...[intervenes]

**CHAIRPERSON**: Yes.

20 **MR TODD**: ...that is completely unrelated to ...[intervenes]

**CHAIRPERSON**: Yes, to the merits.

**MR TODD**: ...the merits of the... of what... of the competing contentions in the dispute between the parties. And that is a mystery that I cannot answer.

**CHAIRPERSON**: No, you... I think you are right about that.



It is a very strange settlement agreement. But before one goes further. You were talking... you were saying that. Well, if Transnet reinstated Mr Gama with full retrospectivity, they would be giving him... they would have given him the best that he could ever think of. And I am putting it in my own words.

**MR TODD**: Yes.

**CHAIRPERSON**: Of getting in the arbitration. You said something about costs or maybe you do add costs but let me  
10 ask this question. You have been a labour lawyer, a specialist in labour law for many years as you have indicated.

On the facts of this case where he himself was admitting that he had been correctly found guilty of this three acts of misconduct what I think most people would regard as serious acts of misconduct.

They might not have regard than as serious. I do not know. But serious acts of misconduct. Was it even able that any arbitrator even if he or she found that dismissal was not  
20 an appropriate sanction, that in addition, he or she would order Transnet... she could order Transnet to pay costs, given the culture on labour law matters and arbitration and dismissals on your experience?

**MR TODD**: Chairperson, it would have been a most unusual outcome of the arbitration ...[intervenes]

**CHAIRPERSON**: Yes.

**MR TODD**: ...to have a retrospective reinstatement order in those circumstances.

**CHAIRPERSON**: Yes.

**MR TODD**: It is difficult to... that question is influenced of course by well what would the arbitrator be finding and what would be unfairness that the arbitrator was finding.

**CHAIRPERSON**: Yes. H'm, h'm.

**MR TODD**: But at the most... at the worst, it would say:  
10 Transnet, we accept that Advocate Antrobus... we accept all of his credentials and there is no legitimate criticisms of his views on this matter. And we accept that you acted on his views. But I am finding that it went too far.

**CHAIRPERSON**: H'm.

**MR TODD**: That is all an arbitrator could have done to find in favour of Mr Gama.

**CHAIRPERSON**: H'm.

**MR TODD**: It is most common in circumstances like that for an arbitrator potentially to grant a prospective reinstatement.  
20 So if an arbitrator feels this person should not have lost their job.

But yes, they actually were guilty of various acts of misconduct which they did not admit at the time and now admits.

Actually, it would be most unusual to have a

reinstatement in those circumstances.

**CHAIRPERSON:** H'm.

**MR TODD:** But even if there was. To reinstate retrospectively and say: I am going to treat this as if this never happened in itself. Chairperson, so the prospects of that happening were very slight. And the prospects of that decision was small. And the prospects of that remedy were even smaller. A fraction of a fraction.

**CHAIRPERSON:** No, no, no. That is fine. I hope Mr  
10 Mkwanzazi will come tomorrow and tell me why I should think that was thinking of it.

An arbitrator in a labour matter dealing with a senior executive who has been found guilty and accepts that he was found guilty of these types of misconduct had the possibility of not only getting reinstatement but also Transnet being ordered to pay costs.

**MR TODD:** But mister... with respect Mr Chairperson, this... Mr Gama could not have been reinstated because anybody thought that was a likely outcome of the arbitration.

20 **CHAIRPERSON:** Yes.

**MR TODD:** I say that because, why not let the arbitration takes its course?

**CHAIRPERSON:** H'm.

**MR TODD:** Even if you only believe you had a small chance of winning, ...[intervenes]

**CHAIRPERSON:** Yes.

**MR TODD:** ...you gave it up for nothing.

**CHAIRPERSON:** Ja.

**MR TODD:** So there was no... it is very difficult to work out why ...[intervenes]

**CHAIRPERSON:** The reasoning.

**MR TODD:** ...that... it could have been a response. Because it was never a rational response to the risk of the matter.

10 **CHAIRPERSON:** You see, it is possible. I mean, you made the point earlier on that. It is like there was some power somewhere ...[intervenes]

**MR TODD:** Yes.

**CHAIRPERSON:** ... in terms of bargaining. Well, it may be that the fact that settlement negotiations were decided upon by Transnet without Transnet talking to you when you were the attorney... their attorneys who had been handling this matter for about two years or more.

**MR TODD:** Yes.

20 **CHAIRPERSON:** Maybe it says something about whether the issues of the merits... whether the merits or the prospects of success was a relevant factor or not.

But I heard evidence yesterday and there is something that might go towards to what you are saying. Mr Mapoma said that after Mr Mkwanazi had a meeting with mister... a

one-on-one meeting with Mr Gama talking settlements.

Mr Mkwanazi reported to him that the two of them could not agree on a settlement because Mr Gama, instead of asking for reinstatement to the position from which he had been, namely CEO of TFR. He was actually wanting to be appointed as Group CEO of Transnet so the question that arises is how does an employee who has been dismissed from the position of CEO of TFR and has referred a dispute about being reinstated to that position to the bargaining council come to the negotiations for settlement and demand even a higher position? How is that – what is it that makes him even put that on the table?

So those questions arise as one seeks to try and make sense of what the board of Transnet did in this case in reaching the settlement that it reached on these terms. When one looks at all of these things and ask questions and answers are difficult to find. But Mr Mkhwanazi will come and he might well be able to throw light on some of the things that at stage I might have difficulty with and maybe he will be able to explain them and one will see matters the way they same them. Mr Myburgh?

**ADV MYBURGH SC:** Yes, thank you. Mr Todd, I just want to back to the issue of costs ...[intervenes]

**CHAIRPERSON:** I am sorry, before you do that, Mr Myburgh, I have just noted – you will remember that before

lunch at some stage I asked you, Mr Todd, whether in the statement, Mr Gama's statement that he relied upon at the bargaining council to set out his case whether the grounds of unfairness that he relied on were articulated clearly, I actually see that they were articulated at paragraphs 4.1 to 4.6 of that statement. The statement starts at page 98 and goes up to page 101. I thought I would just mention that for what it is worth, that I have identified that he did set out certain grounds there. Okay.

10 **ADV MYBURGH SC**: Thank you. Mr Todd, when it comes to costs in the CCMA or in a bargaining council, in your experience how often are they granted and what is the scale upon which costs are granted?

**MR TODD**: Very rarely, normally only in circumstances where a party has behaved abusively. In some way the language is frivolously or vexatiously. That is normally the only time when costs are awarded in those sorts of proceedings and when they are awarded on a Magistrate's Court tariff. I think there may be a special tariff now but  
20 essentially at that level it is not considered appropriate to award costs at a High Court level most often because the litigation is not involving high – it is not going to involve high stakes.

**ADV MYBURGH SC**: And would those costs run from the time of the referral, would they be costs in relation to the

arbitration?

**MR TODD:** Ja, costs in a bargaining council dispute might include completing a referral form and serving it but that is – those are minimal.

**ADV MYBURGH SC:** Yes.

**MR TODD:** So really the only cost that you would expect would be preparation for a trial, for a hearing and the hearing itself.

**ADV MYBURGH SC:** Perhaps this goes without saying but  
10 does a bargaining council arbitrator have the power to award an employee costs of his disciplinary hearing?

**MR TODD:** No, he would have no such power.

**ADV MYBURGH SC:** And presumably your answer would be the same if I asked whether he or she would have the power to disturb a High Court costs order?

**MR TODD:** He would have no such power to do that.

**CHAIRPERSON:** Actually, I have not checked Mr Gama's statement or referral to the bargaining council in regard to this but I have a suspicion that he did not ask for any costs  
20 in the arbitration because I think it would be unusual for anybody to ask costs but maybe he did. I did not seem to see anything in his referral that talked about him asking the bargaining council to award him costs.

**MR TODD:** Chairperson, there is a document missing which is a set of submissions that his counsel made in

October.

**CHAIRPERSON:** Yes, yes.

**MR TODD:** And it is possible that his counsel including a request for costs. I do not recall but ...[intervenes]

**CHAIRPERSON:** Yes, but that would be in the submissions.

**MR TODD:** In his submissions.

**CHAIRPERSON:** As opposed to the actual referral documents.

10 **MR TODD:** Yes.

**CHAIRPERSON:** Ja. It would be like an afterthought.

**MR TODD:** Yes.

**ADV MYBURGH SC:** But assuming that Mr Gama had gone to the arbitration and his position was consistent that he was prepared to accept the final written warning, what would the prospects have been of him getting any costs?

**MR TODD:** Negligible.

**ADV MYBURGH SC:** Yes.

20 **MR TODD:** I do not know if one can say zero, I think it is zero.

**CHAIRPERSON:** I can hear Mr Todd is very cautious.

**MR TODD:** Zero.

**ADV MYBURGH SC:** We have got the zero.

**MR TODD:** Zero.

**ADV MYBURGH SC:** So ...[intervenes]



**CHAIRPERSON:** He is not thinking of adjectives like unthinkable.

**ADV MYBURGH SC:** No, Mr Todd, perhaps whilst we are on the issue of a final written warning, you do deal with that at page 55 of your affidavit, paragraph 30(b). Would you speak to that please?

**MR TODD:** Yes. Well, this was not in a bargaining council but this was the final written warning that the board decided was an appropriate sanction.

10 **ADV MYBURGH SC:** Yes.

**MR TODD:** So effectively what the board says is there is admitted serious misconduct, it is – we have decided that cumulatively that misconduct should produce a final written warning from Mr Gama. A warning – a final written warning is – look, giving very senior executives final written warnings in itself is quite an odd thing but it is a competent message to send because it is basically saying you are actually on – borrowed might be the wrong thing but put another foot wrong of this kind and you are going to be  
20 dismissed.

So it means that they must have done something very serious to put them in that but you are just hesitating before saying that you are going to dismiss them but what you are trying to do is influence their conduct going forward. For some reason what the board thought was

appropriate was to give a final written warning that was valid for six months as at the date of his dismissal.

So they welcome Mr Gama back saying you have already served your warning time. So you are no longer on a final written warning. It was a very strange thing to do, it was very strange message to send and it went to the question of consistency of future conduct as well. It sort of said actually Mr Gama is back in full sway with no real consequence for his conduct.

10 **CHAIRPERSON:** Because if as a result of a disciplinary hearing an employee is given a final written warning and continues working - let us say the final written warning is for six months or one year, during that period the employee knows that there is an axe hanging over their head. You go through that situation but where you say we give you a final written warning but it started working the day you left the company and it lapsed while you were out of the company, the employee never goes through – there is no risk, never goes through that – when he comes back as in  
20 the case of Mr Gama it seems to me he comes back as an employee without any disciplinary – without any final written warning. Is that your understanding as well?

**MR TODD:** Yes, Chair, I would agree, Chairperson. And the other point is that for a senior executive to be told that your conduct is so serious, in our view, that we will dismiss

you if it occurs again but only if that is in the first six months. Even the principle that would say to a chief executive that that kind of – that message that we are communicating to you is only valid for a limited period of time, is just a very strange thing, it just literally shows they wanted, in my view, they wanted to put something down to say there was a consequence applied because otherwise, short of that, he was admittedly guilty of serious negligent conduct described by the Chairperson and had no  
10 consequence of whatsoever. I mean, that is the practical effect.

**CHAIRPERSON:** But practically, there was no consequence for him.

**MR TODD:** No, there was no consequence ja.

**CHAIRPERSON:** That was imposed other than that for the period that he was dismissed he was dismissed as in – but otherwise in terms of sanction. And then, of course, when he was reinstated then he was given full back pay and all benefits that kind of undid whatever the dismissal had  
20 done.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Well, of course, then I suppose it would follow that insofar as he applied for the position of Group Executive of Transnet, he would then be treated as someone with a clean record.

**MR TODD:** Yes, that is so. What the board was saying is we will treat you as having a clear record.

**ADV MYBURGH SC:** Yes.

**MR TODD:** From the date you come back. Quite, that is what they were suggesting.

**ADV MYBURGH SC:** Then perhaps before we move on, if a bargaining council arbitrator had found that the sanction of dismissal was inappropriate that a final written warning was warranted, when would that warning have run from typically?

**MR TODD:** No, that would run from after his reinstatement if he was reinstated.

**ADV MYBURGH SC:** Mr Todd, perhaps I could take you to page 56 of your affidavit and to paragraph 31. I think it is something that you have already mentioned where you say:

“It is manifestly clear, however, that the terms of the settlement agreement were materially adverse to Transnet and they bore no resemblance whatsoever to a proper or reasonable assessment of the respective legal positions of Transnet on the one hand and Mr Gama on the other.”

**MR TODD:** Yes, I stand by that statement.

**ADV MYBURGH SC:** And then you at paragraph 32 say that the settlement agreement was concluded approximately three weeks after your report, it is possible

that legal advice was obtained from other sources during that period that was manifestly different from our advice or alternatively that legal advice was considered irrelevant.

Have you in working up this case been exposed to the documents that are before the Commission, have you come across any materially different legal advice?

**MR TODD:** No, Chairperson, I have been shown in consequence of after deposing to this affidavit and perhaps because I raised the question seems to me we give our  
10 advice, hear nothing and then learn of a capitulation settlement.

So the question is well, was there different advice or was the advice regarded as irrelevant and in the consequence of that we have learnt that advice was given from – a very detailed piece of advice on the procedure that was followed, was given by another firm and their conclusion was – and that was – it does not matter whether it is a big or a small firm but a very reputable firm, Webber  
20 Wentzel gave legal advice which confirmed that the procedure was fair and, as I understand it, I have seen correspondence from Deneys Reitz, which was the firm most immediately advising Mr Mkhwanazi on this question that it also regarded the dismissal to have been fair.

So it does appear very clear to me that no legal advice contradicted what we were saying to the company. I

did not – I am not aware of anybody saying that there was any different assessment of the legal position which again seems to indicate to me that whether the strength of Transnet’s legal position or otherwise was not considered relevant to the decision to reinstate Mr Gama.

**ADV MYBURGH SC:** Then at paragraph 33 you say that:

10 “The decision to conclude the agreement and the terms upon which it was concluded could not rationally have been motivated by Transnet’s legal position in the arbitration...”

The point you make now.

“...by Transnet’s financial interest or by the requirements of good governance.”

And then you redress each of those points.

**MR TODD:** Yes.

**ADV MYBURGH SC:** I think you have probably dealt with the prospects of success issue. Is there anything you want to highlight in that paragraph 33(a)?

20 **MR TODD:** Yes, I think the only point that I would reiterate is that if people were concerned that the possibility that a bargaining council arbitrator might reinstate Mr Gama, why fulfil that possibility voluntarily? In other words, if you feared that it was a possibly even or probability, why not let the bargaining council arbitrator decide it and then say we will accept the outcome whatever

it is? In other words, it was – it actually clear to me that the decision-makers did not want the arbitration to take place because the likelihood was that his dismissal would be found fair and that would make it impossible – if Transnet won the arbitration, it would have been very difficult to see on what basis Gama [inaudible – speaking simultaneously]

**CHAIRPERSON:** It would have been a disaster.

**MR TODD:** And so consequently it strongly supports an  
10 inference that a decision had been taken to reinstate Mr Gama and what was happening now were arrangements to try and make that happen, not the other way around.

**CHAIRPERSON:** Well, what you have just said, it is quite important, Mr Todd, and maybe there is merit in it because when you think about the merits of Transnet's case it is difficult to rationally conclude that a settlement that included reinstatement, particularly fully retrospective reinstatement was justified and then I am not even talking about the costs, you know, that is just something else.

20 **MR TODD:** Ja.

**CHAIRPERSON:** So ...[intervenes]

**MR TODD:** If the – sorry...

**CHAIRPERSON:** Yes, so – but do not forget your point. Since I got to know about this settlement I keep on trying to see whether there is a way of seeing this settlement

from another angle and not in this manner that I am seeing it. I am trying to see if there is a way of seeing it from the angle of the board and saying okay, no, maybe I can see this, I can see that, and it is so difficult. But Mr Mkhwanazi will come here tomorrow and maybe he will be able to say that.

But when you think about the merits of the case, the prospect of success, it is difficult to understand it and then when you go to the issue of them paying costs, it just  
10 complicates the whole thing further. So there may well be – it may well be that the question of the prospects of success, the strength of Transnet case was simply not a relevant factor for the board.

But I know that yesterday Mr Mapoma gave evidence which said that at some stage Mr – at some meeting which involved Deneys Reitz or Norton Rose, Mr Mkhwanazi said that if he could get an opinion, a legal opinion that said there was some unfairness in the dismissal of Mr Gama, he could then – he thought he could  
20 succeed in persuading the rest of the board members to settle or to reinstate Mr Gama and I said to Mr Mapoma it gives me the impression of somebody who is keen to just find something to cling onto in order to justify the reinstatement. Yes, you wanted to make some point, Mr Todd?



**MR TODD:** Yes. Chairperson, just on that point, I have not seen, unless I have not been shown any legal opinion that says there was some unfairness towards – any legal opinion that there was some unfairness towards Mr Gama that could have prompted the board to make that decision.

But the point really is this. If the board's mindset was if Mr Gama is reinstated, well, we can work with him, we do not mind him very much but let us see what happens, the logical would be to do, would be to let the  
10 arbitration decide and then you say well, either we will win the arbitration, as our lawyers say we will, or if we do not, we will make do with it, it is fine.

But the fact that they decided not to run arbitration and then to capitulate indicates that actually they wanted Mr Gama to be reinstated irrespective of the outcome of the arbitration. Did not matter what outcome the arbitration was going to deliver, they wanted Mr Gama to be back in the business. That is the only logical conclusion to draw in these circumstances, with respect.

20 **CHAIRPERSON:** And, of course, once – if that was their position, the question that arises which out to have troubled a board like Transnet board, would be how will we ever be able to discipline any other executive if similar things happen? How will we ever be able to dismiss any executive or even lower-ranking employees and officials if

we reinstate a senior executive who accepts that he was correctly found guilty of these very serious acts of misconduct because every other executive, every other employee will say well, no problem, what I have done is less serious than what Mr Gama did, so you cannot fire me.

**MR TODD:** Yes, Chairperson.

**CHAIRPERSON:** Yes, Mr Myburgh?

**ADV MYBURGH SC:** Mr Todd, at page 58 you then deal with financial interests followed by governance. Do you  
10 want to reiterate that?

**MR TODD:** Yes, financial interest really – just the point was the settlement was much worse for Transnet than the worst case scenario in a litigation and financially.

So if you are the stewards of - you govern – if you are on the board or you are the Chief Executive Officer, on what possible basis would you do that? I do not know. It was not in the financial interests of Transnet.

And third, as regards governance, we have been through it at length, I mean, I have thought about this a lot  
20 because it goes back to the former Minister Hogan's – exactly what she wanted was levels of governance appropriate to manage massive capital expenditure and infrastructure development. What – who were the people we need to steer this ship? And at every level, when you read the Chairperson's findings and his reasons for

deciding that dismissal is the appropriate sanction, it is all about what expectations Transnet can have of its senior executives and effectively the settlement – the reinstatement of Mr Gama completely unravelled all of those considerations.

So nobody could be sitting there saying I think what we need to do to improve governance is bring Mr Gama back. It could not have been what they were trying to look after. They were not trying to look after good governance and how to get the right people in the right places. That consideration was not there either.

So when – if you discount those three, your legal risk and your financial interests and your governance considerations, I am left without thinking of a single reason why a board would do this.

I do not – I cannot think of a single reason other than – I cannot think of a reason why a board acting in a manner which is in the best interests of the company would ever do it which must then, as matter of logic, lead to the conclusion that the reason lies elsewhere.

**CHAIRPERSON:** Yes, yes. Well, it is difficult to look at how the board handled Mr Gama's matter, this board that reinstated and reinstated him and then later on promoted him to the position of Group Chief Executive of Transnet. Difficult for me to listen to all of this evidence without

remembering Mr Koloane in relation to the Waterkloof plane landing. I heard the evidence, I heard evidence last year, I think, where he – it was accepted that he – or rather, he had said he had been instructed by the former President, Mr Zuma, or Mr Zuma wanted everything to be done to facilitate the landing of that Gupta plane and then later on he said no, he had lied to involve – to say Mr Zuma knew about that, Mr Zuma did not know about that.

10 But then – and he had been found guilty in a disciplinary enquiry. Strangely, he was not dismissed, you know, but then in a few months time, maybe nine months, he was promoted to the position of ambassador on the recommendation of the Minister of International Relations to Mr Zuma and Mr Zuma appointed him an ambassador and at that time my question was, I would have thought that Mr Zuma would have been very unhappy about this person if this person had lied about him like that but now he was – this person was being promoted.

20 So here you have this situation, Mr Gama is reinstated and later on he gets to be made Group Chief Executive of Transnet.

So when you keep on trying to understand some of these things you have challenges, you try to follow and you want to try and understand, you want to try and look at things from the point of view of other people involved so

that you can end up with a balanced and correct view.  
Okay, alright.

**ADV MYBURGH SC:** Thank you. Mr Todd, at paragraph 35, page 60, you in fact deal with this issue and you mention at (b) that Mr Gama went on, as we know, to become the Group Chief Executive and then in the balance of your affidavit you deal with the consequences of the decision to reinstate Mr Gama. You see at the end of the text at paragraph 37 you say:

10           “I do, however, have some knowledge of the  
                  consequences of Mr Gama’s subsequently admitted  
                  misconduct in approving the appointment of GNS.”

And then you set out some evidence in that regard over the space of two pages or so. I think this is something you have already raised in your evidence. Is there anything you wish to reiterate in that regard?

**MR TODD:** No – well, I will say this, Transnet had instituted proceedings, as I said, for just over R95 million for a repayment of the amounts it had paid to GNS,  
20   General Nyanda Security and one of the consequences of reinstatement of Mr Gama – it may not be a consequence, you may say it was caused by something else, was that the management of TFR, now again led by Mr Gama, became – lukewarm would be probably the wrong word, became positively unenthusiastic about pursuing that litigation and

in fact they came up with a number of different explanations why that litigation should no longer proceed and ultimately they persuaded further advisers, other outside legal advisers and the board to withdraw that litigation and not persist with it. But that is an example of a consequence and I think I deal with that in a separate affidavit where effectively over a period of time management make points and it is under the leadership of Mr Gama.

10           Mr Gama arranges for management to make a presentation to the board saying that actually, Transnet got value for this contract. And so whereas in his disciplinary proceedings Mr Gama said this was fishy and a scam, once he is reinstated the idea of persisting with this litigation to recover the 95 million would be deeply uncomfortable for Mr Gama and consequently, whether it is consequently or just a coincidence, for me, I do not accept that it was coincidentally, managers under Mr Gama's authority then set up effectively obstacles to pursuing that litigation and  
20 ultimately produced a decision that the litigation should not be proceeded with.

But that is an example not just about governance generally but that decisions to in this case bring back a very senior leader and then escalate that leader within the business has very, very far-reaching governance very

practical consequences for Transnet's operations.

So in that sense I suppose the only point I make, Chairperson, is that it is a matter of common sense. These decisions, it is not reinstating a shop floor worker, not in any way to disrespect a shop floor worker but who is one of 50 people on the shop floor in a manufacturing facility, it is the Chief Executive of your largest division. So it has far-reaching consequences for the whole business.

**ADV MYBURGH SC:** Mr Todd your second affidavit, that  
10 you find at page 156; you say at paragraph 4 that I have been provided with a copy of an affidavit deposed to by Mr Mkwanzazi on 31 August and have been requested to comment on the statements in paragraph 9 of that affidavit and the reference there to the concept of condonation of procurement irregularities.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Now perhaps I could start by asking  
20 you to turn to Bundle 4 and to page 18, one eight. Bundle 4A,18. Now Mr Todd you do in your affidavit and we will come to that in a moment analyse various statements made in paragraphs 9.4 and 9.5, this is from Mr Mkwanzazi's affidavit.

**MR TODD:** Yes.

**ADV MYBURGH SC:** And perhaps you can have regard to those paragraphs and then at the same time to your

analysis in paragraph 5 of your affidavit.

**MR TODD:** Yes, I mean I was surprised to read this affidavit when I was provided with a copy of it and I noted in paragraph 9.4 Mr Mkwanazi's says:

“I personally fully agree with the disciplinary process and findings of the then Transnet board.”

So he personally fully agreed with, associates himself with everything which advocate Antrebus has said it is what I understand him to be saying and then he says but the  
10 issue was that there is a process called condonation and he then says in 9.5 that we as a board had to somehow try and deal with the Gama matter on the assumption that he would have been granted condonation had it been offered and therefore had to try and put him in a position that he could have been in had a condonation been offered. So that didn't make any sense to me for a number of reasons which I have explained but I can just summarise very briefly.

**ADV MYBURGH SC:** Yes, please go ahead.

20 **MR TODD:** I mean the first point is that condonation as the Transnet's own internal document show is a procedure that is possible to avoid a finding of unauthorised expenditure when a person has exceeded his or her authority but there are good grounds for the expenditure and he or she approaches the person who has the authority



and says I exceeded my authority will you agree that this is good expenditure.

Now that is a simple example of when the concept of condonation going to the level which has the authority to ensure that you regularise something which where you have exceeded your authority. It is completely different from the question of how blameworthy or culpable the employee was who exceeded authority. So if that employee had decided to do so deliberately ignoring  
10 knowing that he did not have authority but had decided to ignore it and ask people to cover it up and later it was found out it is quite possible that expenditure could be regularised because the higher authority agrees that it is good expenditure but that you would discipline the person below who had knowingly exceeded their authority and had tried to hide the fact that they had done so.

So in other words there is no relationship direct relationship between condoning unauthorised expenditure and whether you accept or do not accept the conduct or  
20 behaviour of the person who caused that expenditure to be exceeded and I think that is absolutely clear from Transnet's policies and it is completely clear. In fact, even from Mr Mkwanazi's affidavit himself where he at some point refers to some procurement which he considered ought to be condoned but he instructed that the people

responsible be disciplined in consequence.

So it really makes no sense to say we have – so the first point is condoning expenditure does not have anything to do with how culpable or blameworthy the conduct was of the person who caused it and then the second point is that - there are a few points but the second one which maybe most obvious none of the three instances of misconduct were in anyway suitable for condonation because if one starts with the fifty like new contract what had happened  
10 was a complete deviation from the board authorised process which actually had to be unwound.

In other words, the board far from saying it is okay let us leave this aside that you have implemented the fifty like new transaction in the very way that we said you must not and we will condone it. No they actually unwound that and went back to their original – so there is nothing to condone irregular or an unauthorised expenditure in any case.

**CHAIRPERSON:** Because if you condone you then leave  
20 as is, is it not?

**MR TODD:** Yes, you really saying that the expenditure was properly incurred and it was authorised at the wrong level and in fact fifty like new misconduct had nothing to do with exceeding authority or irregular expenditure in that sense.

**CHAIRPERSON:** It was like you defied the instruction of the board.

**MR TODD:** Correct you implemented...[intervene]

**CHAIRPERSON:** To say when you do this job this is the condition that you must comply with.

**MR TODD:** Yes, and it is ignored and in fact did exactly what the board did not want to happen.

**CHAIRPERSON:** Yes.

**MR TODD:** And so there was nothing for the board then to  
10 condone that arrangement or if it had you would have expected the board okay you disregarded us but we are happy with the arrangements you have set up we will leave them in place and in fact they would still be entitled to say but we are very upset that you have put us in this position and we going to charge you with misconduct.

**CHAIRPERSON:** Is it a conduct like that it is disobeying an instruction in some way or another.

**MR TODD:** Yes, I think that is how the board, how it was characterised and that is what was serious that is why that  
20 fifty like new contract was found to be serious misconduct by Mr Gama and Chairperson you often do not know what all of the reasons are that underlie these things but the Transnet board was alerted to the risk that if you introduce a parallel set or yard workshop assembling our locomotives which we could be doing ourselves, there is another whole

area where value leaks out of Transnet I am just putting it in plain words and that is what they did not want to happen and that is what Gama allowed to happen.

So yes there is no question of condonation arises there. As regards the GNS contract I have referred to how completely fundamentally fraudulent that contract and that procurement process was from the outset.

It would never have qualified for condonation nor even did Mr Gama himself believe it because he called it a  
10 scam. So there is no question of saying well could Mr Gama have gone and said I exceeded my authority I have spent instead of R10million we actually spent R95million in two years, these put Transnet at a higher level approve that, he said it should never have incurred in the first place. He said that he would never have approved a condonation in those circumstances and he should not have.

So that case situation too so you could not have said oh well let us treat this as expenditure that was  
20 condoned and then wave Mr Gama contribution or blameworthy conduct and the third thing of course had nothing to do with procurement at all the attack on Transnet and its executives unwarranted attacks on a team who had nothing to do with this.

So for Mr Mkwanazi to say we were under a duty

effectively to treat the conduct as all accepted by Transnet and the board there is no foundation in the policies nor any factual basis on any of the incidence of misconduct to justify that statement. Yes, so I found it quite bewildering actually that he would suggest that.

**ADV MYBURGH SC:** So that was the second point and we will come to the detail in a moment, if you go to page 158 you say that:

10           “Condonation was a procurement process entirely distinct of the decision making about the consequences.”

You have dealt with that.

**CHAIRPERSON:** So I am sorry Mr Myburgh I am sorry. Mr Todd let me go back to your point that the third charge had nothing to do with procurement. If the board used condonation as justification for saying that the appropriate sanction was a final written warning and condonation did not apply to the third charge, does it seem like therefore they can only be said to have applied that final written  
20 warning – they could only apply that final written warning on whatever charge they believed related to procurement but it cannot be the third. So even on their reasoning it means they did not give a sanction for the third.

**MR TODD:** Yes.

**CHAIRPERSON:** So if they had given a sanction for the

third were they going to give two final written warnings or would they have fired him?

**MR TODD:** Chairperson if condonation meant treat as if we treat it as it is all okay then you would not apply sanction at all but they did not do that they obviously thought that Mr Gama needed a sanction. So it is not a plausible explanation.

**CHAIRPERSON:** It is difficult to explain.

**MR TODD:** But there is also a different reason I mean  
10 there is a more obvious reason why it is not plausible is that I have been shown the memorandum that was prepared for Mr Mkwanazi to submit to the board meeting when Mr Gama when the board considered reinstatement and it makes no mention of this topic at all. So as a matter of fact I mean I am not sure you cannot just decide as a board that you must grant condonation for these three acts of misconduct without this very discussion that we are having now and without some analysis and recommendation of how it applies in Mr Gama's case but  
20 there was not anything like that. So as a matter of fact it seems to be something that Mr Mkwanazi has misremembered.

**CHAIRPERSON:** Actually as I read the Transnet policies or manual that has got something on condonation it seems that the employee has to apply for condonation or

somebody must apply for condonation or request condonation and here it does not look like Mr Gama ever requested condonation in terms of what we have on records.

**MR TODD:** No.

**CHAIRPERSON:** And I would imagine and I seem to have come across something that suggested that even where condonation applies you do not get it for the asking and if that is so it would mean that there would have to be a  
10 motivation or why should condonation be granted in a particular case and if that is so it does not look like the board had anything in front of it which motivated why condonation should be granted.

**MR TODD:** Ja, all of that is true Chairperson, all to the best of my knowledge all of what you have just said is correct.

**CHAIRPERSON:** Ja, Mr Myburgh.

**ADV MYBURGH SC:** Yes, thank you. So your second  
20 point is that in none of the three instances of misconduct are capable of condonation. Then you make two other points which you expand upon later in your affidavit. Third such contentions as Mr Gama sought to make during his disciplinary enquiry process concerning consistency of treatment were putting fairly, carefully fairly considered by the disciplinary Chairperson as appears from his lengthy

finding. So as I understand the point that you make is that the Chairperson considered this issue in any case.

**MR TODD:** Yes, I mean it had been raised as a preliminary point during the enquiry and in relation to sanction and what the Chairperson said or Mr Gama says there is inconsistency but there is no evidence of another set of similar never mind identical circumstances in which Transnet made different decisions or adopted a different approach to disciplining its employees from their approach  
10 adopted in Gama's case.

So that is what the Chairperson was saying in Gama's case and it is inconceivable that a board could conclude this but I mean this is about consistency now, I do not know it is inconceivable that a board could have decided that condonation is normally granted to other people it was not granted to Mr Gama therefore Mr Gama needs to be reinstated unless somebody had put in front of the board facts which said this is how we normally deal with this and here are other cases where we would deal  
20 with it in this way that would be what I would expect if the board was going to be acting on that information.

**CHAIRPERSON:** Actually it says - one cannot stop picking up things that are difficult to follow here in this case. I have not come across throughout all these bundles and a lot of documentation that the Commission obtained



from Transnet and from your firm and from Deneys Reitz or Norton Rose, I have not come across any document whether memo or affidavit or a letter where Mr Gama or somebody on behalf of Mr Gama puts this case of condonation during the settlement negotiations, and says here is the motivation which one would if there had been such a document then one would say the board in pursuing this issue of condonation was acting as a result of this documentation that was furnished by Mr Gama or by his  
10 lawyers but it is difficult to see anything.

It is like it came from the board it came from Mr Mkwanzazi and then it was pursued.

**MR TODD:** Yes, I mean Chairperson I have only seen - I have not seen any legal advice that suggests that this was a problem and I had seen the board memorandum that went - the note that was prepared by Mr Mapoma to the board it makes no mention of this topic at all.

**CHAIRPERSON:** Yes.

**MR TODD:** And then there is later work done by Nkonki  
20 which was only commenced in January and had not been reported until the middle of the year on an interim basis and then finally at the middle of the year which could not possibly have had a bearing on the decision that Mr Mkwanzazi and the board were taking in February, middle of February 2011.

**CHAIRPERSON:** Yes.

**MR TODD:** So it is very hard to believe that these are not – it is possible that as I say misremembered I think another board member also says that she thought this was the issue but it is difficult to see how it could have been if you see what documents were being presented to the board when it made the decision to reinstate Mr Gama.

**CHAIRPERSON:** Of course you might not be aware of this but I think Mr Myburgh is probably aware, the is an – oh in  
10 his affidavit well you would be aware as well because it is Mr Mkwanazi's affidavit to the Commission.

One of the things he says is that he met with Mr Gigaba in October 2010, he had a meeting with Mr Gigaba in October 2010 and it is at that meeting that Mr Gigaba offered him the position of Chairperson of the board, of the new board that was going to be appointed for Transnet which he says he thought about and then later accepted. He says in that meeting Mr Gigaba mentioned certain matters which he asked or which he said he thought the  
20 new board must focus on or the Chairperson must focus on. One of the items he puts in his affidavit is that Mr Gigaba said he was concerned about procurement issues at Transnet and he said there is this thing called condonation at Transnet where deviation from procurement can be condoned. He raised that issue and then we see

that it seems when Mr Gama ultimately gets reinstated that is the issue relied upon to justify bringing him back, but we do have an affidavit, also that the commission of Mr Gigaba saying he played no role in the settlement agreement or relating to Mr Gama and his reinstatement although yesterday Mr Mopoma gave some evidence to say that the Mr Gigaba special advisor, Mr Mhlangu, put some pressure on him to say Transnet was delaying reinstating Mr Gama, so there are those issues.

10 **MR TODD:** Chairperson I have been given the legal opinions and the Board memorandum that are available that served before the Board but none of them are able to explain is how Mr Mkwanazi reached the conclusion or in what conversation or discussion or meeting he reached the conclusion that Mr Gama should be reinstated, which led him to instruct Deneys Reitz in the middle of January ,within a month of being appointed and to offer reinstatement to Mr Gama.

So something, there is still something missing.  
20 What I had is what he and Deneys Reitz did after that, I have seen what they said to the Board and how they – in what why they sought to persuade board members that it was a good idea, but something – you don't just wake up one day and say Mr Gama needs to be reinstated.

If you are a – if you take up the position you might

get a briefing from an in-house legal person or your predecessor and that leads you to conclude that there is a big risk here or a reason for something to happen, but Mr Mapoma says there was no briefing, Mr Mkwanazi doesn't refer to any briefing from anybody and it is apparent when he is dealing with Deneys Reitz that he actually hasn't yet been briefed on the Gama matter, but yet he has an instruction for Deneys Reitz to offer reinstatement by January, so it does seem, I mean really these are matters  
10 that I don't have personal knowledge of but one just has to apply a matter of logic and say that a conversation, discussion or series of discussions caused Mr Mkwanazi to reach the conclusion by mid-January that Mr Gama should be reinstated and where that happened it is not minuted and I do not believe it is at the Board or that it was within Transnet because otherwise you would know about it.

**CHAIRPERSON:** And of course I said yesterday Mr Mapoma testified about the fact that Mr Mkwanazi told Mr Mapoma and the legal team from Deneys Reitz who were  
20 assisting him, Transnet, told them that he wanted to have a one on one meeting with Mr Gama to talk settlement ,so there is that one on one meeting that took place, only the two of them know what they discussed. Of course Mr Mapoma did say that one of the things that Mr Mkwanazi told him about that meeting is that they could not reach

agreement because Mr Gama was demanding in effect appointment as Group CEO of Transnet as opposed to demanding reinstatement as CEO of GFR.

Yes, I mean part of the reason why one is mentioning some of these things is because one knows Mr Mkwanazi is probably listening, so when he comes he knows what are the issues that worry me and he can explain, he can deal with issues properly.

**ADV MYBURGH SC:** Thank you Chairperson. Mr Todd I  
10 am going to see if I can walk you through your affidavit to the end, because I have got a lot of other important questions I want to ask you whilst you are here and in particular to comment on the various versions of the directors, and could I ask you please to go back to page 158 of your affidavit and then you flesh out your four points, you say condonation of procurement process distinct from decisions on employee conduct.

Now much of this you have mentioned, but over the page at 159 you deal with an internal memorandum on the  
20 issue of condonation and you then explain at paragraph 11 and here you're quoting from the memorandum that condonations are not there for the asking, as a general rule condonation should be given for relatively minor transgressions on procurement rules and procedures, material non-compliance will usually not be condoned

because these have PFMA implications and result in civil criminal and disciplinary steps being taken and that you are quoting from the memorandum.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Over the page ...[intervenes]

**CHAIRPERSON:** I am sorry, where are you reading from Mr Myburgh?

**ADV MYBURGH SC:** At 159, at the foot of the page, Bundle 3.

10 **CHAIRPERSON:** On ...[intervenes]

**ADV MYBURGH SC:** Mr Todd's affidavit.

**CHAIRPERSON:** Oh, okay.

**ADV MYBURGH SC:** I'm sorry I should have alerted you to the fact that I was going back to that.

**CHAIRPERSON:** Okay thank, I have got it.

**ADV MYBURGH SC:** And then at page 150 still dealing with that – sorry 160, at the top, still dealing with the memorandum, you record a condition submission was required to state whether disciplinary steps had been taken  
20 because of non-compliance and even where matters have been submitted for condonation where certain individuals are found to be guilty of transgression disciplinary action should be considered.

That you all take from the memorandum that one finds at page 168.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Then if we go back to 160 you then flesh out no condonation would or could have been applicable to Mr Gama's misconduct and you at 13A deal with the 50-like new locomotives, that I think you have covered and then at B you deal with GNS.

Is there anything there that you wish to highlight or reiterate.

**MR TODD:** No, other than to emphasize that in his own  
10 version Mr Gama believed that that procurement process was a fraud, a scam, and so the idea that he would have asked somebody to condone it is completely, that would make no sense.

**ADV MYBURGH SC:** Perhaps – can I ask you is this an accurate description of Mr Gama's misconduct in relation to GNS. That on his own version he signed blind a ...[indistinct] that allowed a fraud to be perpetrated on Transnet?

**MR TODD:** Yes.

20 **ADV MYBURGH SC:** Is that his case?

**MR TODD:** Yes.

**CHAIRPERSON:** Now that reminds me I am going to put a question to you Mr Todd, just think it through carefully, you have been very careful about certain things, so continue in that way, but I just want to see whether it is your

understanding of this situation.

Would it be justified or correct to say if Mr – if the acts of misconduct that Mr Gama had involved himself in that led to his dismissal, were not intentional including fraud, and maybe corruption I don't know, but if they were not intentional, because the Chairperson of the disciplinary inquiry said he was negligent, then that kind of negligence that was involved would show him to have been very incompetent. Would it be justified to describe it like that,  
10 or would that be going too far?

**MR TODD:** No Chairperson, I would go as far as to say they showed him to be completely unsuitable to hold the office of a Chief Executive of a division such as TFR, and I say that particularly because of the surrounding circumstances. In other words it is presented as – if you present it as the finding was just mere negligence. The finding was negligence of a most serious kind precisely because it fell completely short of what was expected of somebody like Mr Gama.

20 So the lack of that finding of the Chairperson does not mean that we now treat it as something benign or something which we should be able to accept. So I strongly would endorse and argue that the chairperson's findings on sanctions were entirely justified in all of their respects. Unless you were setting a completely standard for Transnet.



Unless the board had decided you know what let us have Chief Executives who do not read documents or who do not mind and who try and cover it up and who fights like crazy when held to account. Because that is the bottom line – that is what Mr Gama did. So I am quite confident and comfortable to say Mr Chairperson that the – the sanctions were fully justified for he reasons set out in the Chairperson’s finding and more for concluding that a dismissal was the appropriate sanction for negligence. And  
10 negligence was of such a serious nature that is complete – the person – rendered Mr Gama unsuitable to hold office that he held.

**CHAIRPERSON:** Okay. Yes Mr Myburgh.

**ADV MYBURGH SC:** Thank you. And then at 162 Mr Todd the point you have made on multiple occasions that it will see of course the third charge of misconduct that had nothing to do with condonation at all?

**MR TODD:** No.

**ADV MYBURGH SC:** Then in the next heading Gama’s own  
20 contentions at page 163 on inconsistency were fully and fairly considered in the disciplinary process. I think that is a point you have already made?

**MR TODD:** Yes.

**ADV MYBURGH SC:** And you quote here from the findings of the chairperson where he dealt with those things?

**MR TODD:** If a board member was going to take a different view I would have assumed that they have a lot more information available to them than the disciplinary chairperson had who had sat over fourteen days of hearing and multiple files of relevant documents.

But I mean that is really the point is that this – to the extent that it is was ventilated by Mr Gama as an issue in the disciplinary hearing he did his best – he had senior counsel representing him and the chairperson reached a  
10 conclusion that I think is entirely right.

So a board member to say oh but actually I am going to take a different decision for this reason must have had materially different information in front of him to reach a different conclusion on this topic.

**ADV MYBURGH SC:** The next thing you deal with at page...

**CHAIRPERSON:** Oh did you want to add a point here?

**MR TODD:** No I actually said that is the next point that I made in the document that Mr Myburgh is going to refer me to.

20 **CHAIRPERSON:** Oh okay.

**ADV MYBURGH SC:** Oh. Now can we then deal with the heading No Evidence of a report or other credible information before the board at condonation would have been applicable to Mr Gama's response. Well that is respectively the point you have made now?

**MR TODD:** Yes.

**ADV MYBURGH SC:** You have not come across anything, no?

**MR TODD:** And on the contrary what has been shown to me that was put in front of the board says nothing about this. So one can reasonably infer from that that there was not – unless there is another report that Mr Mapoma did not think was necessary to refer to when he did a two page memorandum for the board and nor did Deneys Reitz who  
10 was settling that memorandum they were not aware of this evidence or argument because they did not think it appropriate or necessary to put it in front of the board. So I really think one can conclude safely that there was no such evidence or report put in front of the board when it made this decision.

**ADV MYBURGH SC:** Then perhaps finally Mr Todd on this affidavit could I just ask you to deal with the point that you make at paragraph 23 and further in concluding your affidavit?

20 **MR TODD:** Yes. There is a minute of the Transnet Corporate Governance and Nominations Committee held on the 11 April and that is around two months a little under two months after the Transnet board has decided to reinstate Mr Gama. And one of the things that minute records is that management is requested to prepare a presentation to that

Corporate Governance Committee about how the system of condonation works in Transnet two months after this decision was supposedly taken.

So it is very difficult to believe that the board was properly informed and understood and knew about how condonation may or may not have impacted on Mr Gama's case – I – back in February. It really makes the same point. There is no evidence that any such knowledge or report had been presented to the board and on the contrary it appears  
10 that two months later the Corporate Governance Committee are saying can somebody educate us on this topic?

**CHAIRPERSON:** So after – after the fact.

**MR TODD:** Two months later.

**CHAIRPERSON:** Ja they are asking to be told how condonation is used – how it works.

**MR TODD:** What it is, where it originates, where matters get approved and regularised. Very basic questions. Those are the questions.

**CHAIRPERSON:** Is that in Annexure F?

20 **MR TODD:** Yes.

**CHAIRPERSON:** Can we just go there?

**ADV MYBURGH SC:** Page 479 Chairperson.

**CHAIRPERSON:** Page 179.

**ADV MYBURGH SC:** 479.

**CHAIRPERSON:** 479. Yes. Oh no I am sorry. I am now

looking at the red numbers instead of black numbers. 479.  
Are you able to guide me as to where in particular? Is it on  
page – oh is that 479 is just where the...

**ADV MYBURGH SC:** 479 is where the minute starts.

**CHAIRPERSON:** Minute starts ja.

**MR TODD:** If I may assist Chairperson there is what is  
confusing about these minutes is that I have referred in my  
affidavit to paragraph 5.2.3.4.

**CHAIRPERSON:** Ja.

10 **MR TODD:** They have got two such paragraphs on different  
pages of the minute.

**CHAIRPERSON:** Yes.

**MR TODD:** But it is the second one of those. It is at page  
482.

**CHAIRPERSON:** Yes.

**MR TODD:** There is a paragraph 5.2.3.4

**CHAIRPERSON:** Yes. Oh.

**MR TODD:**

20 “The committee request management to  
make a presentation covering amongst other  
things the following issues:

What is a condonation process?

Where does it originate from?

Where does it get approved and  
regularised?”

**CHAIRPERSON:** I mean the – this committee – the members of this committee would have been – are also members – were also members of the board?

**MR TODD:** Yes.

**CHAIRPERSON:** That on Mr Mkwanazi's evidence in his affidavit would have decided on the basis of the condonation process to reinstate Mr Gama and the point you were making is how could they have been influenced by the issue of condonation in February to reinstate Mr Gama if in April they  
10 are asking management to tell them what is a condonation process? Where does it originate from? Where does it get approved and regularised?

**MR TODD:** But it is the – there is no doubt that this was an important topic for the board the Risk Committee or the Corporate Governance Committee get on top of. But there is no way that it was the issue that motivated them to – or could not have provided a rational basis for them to act in February.

**CHAIRPERSON:** Yes. Because those questions are  
20 questions they would have been expected to ask before they used condonation to bring back Mr Gama if indeed they did use condonation.

**MR TODD:** Yes.

**CHAIRPERSON:** But you – part of the point you make is they could not have used condonation given what we see?

**MR TODD:** Yes.

**CHAIRPERSON:** Ja.

**MR TODD:** And in fact there is no document indicating.

**CHAIRPERSON:** And there is no document indicting that they relied on condonation. Okay.

**ADV MYBURGH SC:** Mr Todd I want to take you to the various opinions that there are and statements how the company and its attorneys on prospects of success in this matter. Could you please go to Bundle 2 that is the thinner  
10 bundle. And could I ask you to start by going to page 13 – 13. Now this is the memorandum prepared by Mr Mapoma and then settled or finalised by Deneys Reitz on the 15 September – oh sorry the 15 February 2011. You will know that the board meeting was the next day.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Could I take you please to page 15 and ask you to direct your attention to paragraphs 10 and 11 and to comment on them?

**MR TODD:** Is this page – the paginated page 17?

20 **ADV MYBURGH SC:** I beg your pardon 17 yes.

**MR TODD:** Yes I have seen these. They referred here the paragraph refers to the fact that in the arbitration before the Bargaining Council Mr Gama has challenged the appropriateness of the sanction of dismissal.

**ADV MYBURGH SC:** Yes.

**MR TODD:** Now – yes that is so.

“The issue of sanction is a very complex and perplex matter to which there is no clear and straightforward answer.”

Well that really is a very strange statement because any sanction what is appropriate depends on the facts. You cannot say that in principle what is an appropriate sanction is an incredibly complicated question. It all depends on the facts.

10           This is demonstrated by the celebrated cases of Seduma and Shoprite/Checkers cases. What is being – apparently being pointed out here is that it is possible to have cases in which two quite experienced properly carefully thinking people might reach different conclusions on the question of what is an appropriate sanction.

          That is undoubtedly true. No doubt that is true. That does not illustrate that it is very complex but it does illustrate that experienced people applying their minds properly might reach different conclusions depending on the  
20 facts.

          If there is no doubt there are many cases where all right thinking people would reach the same conclusion. Serious sexual assault in the workplace. I do not think anybody would say sanction is very complex because people could think – reach different conclusions follows.



**CHAIRPERSON:** Fraud.

**MR TODD:** Yes. So once – so the fact that it is possible that there are hard cases where right thinking people might reach different conclusions is self-evident and yes it has been confirmed.

It was not the principle established in these cases but these cases illustrated they were about the standard of review you should apply when a reviewing court does not agree with the assessment of an arbitrator on the  
10 appropriateness of sanction.

But – yes so if you want me then to comment – so actually that paragraph says nothing really intelligible or useful to anybody who is wanting to know but what about the appropriateness of a sanction in Mr Gama’s case? It does not really tell us anything about that.

But it seems to lead to a conclusion which is an extraordinary conclusion in paragraph 11 because paragraph 11 starts:

“It is accordingly our view”

20 So it cannot still – it appears to – that the authors of this paragraph are saying because different people could reach different conclusions it follows in our view that there is a probability that the Bargaining Council or a court considering the appropriateness of the sanction of dismissal of Mr Gama may reach the conclusion that dismissal was not

appropriate having regard to the challenge on sanction advanced by him.

Now that is legally Chairperson if you will indulge me. You said I have been very careful with my choice of words. It is nonsense.

**CHAIRPERSON:** Yes.

**MR TODD:** It does not make any sense. It first of all does not follow from paragraph 10 which is merely a general sort of statement that it is theoretically possible. And no person  
10 could express a view on the probabilities in Mr Gama's case without reference to the facts of Mr Gama's case and why it is that there may be a possibility or a probability that a different decision maker might reach a different conclusion from the one reached by Mr Antrobus – Advocate Antrobus.

So – and then there is also problems with the language to say there is a probability that someone may reach a decision is also not the way a lawyer could ever talk about assessing probabilities.

Because I do not know if that means – that certainly  
20 does not mean it is probable. Because probably may just means may. Or – so there is – it seems to be something similar to a possibility.

When I read it Chairperson I have to say it leads to a very uncomfortable conclusion that this is deliberate obfuscation. It may be accidental but it is using a word like

probability completely out of place without an assessment of the facts of the case or why that conclusion would be reached. Because probability include [00:14:57] minds suggests that that is a likely outcome.

Then qualified by the word may which means it is not really probable at all. It is just a possibility and effectively what these two paragraphs say is there is a theoretical possibility that one decision – a decision maker could reach a different conclusion [00:15:10] says nothing more than  
10 that.

Whether that is a useful thing to tell a board or not I do not know. I would not pay anybody a fee – professional fee to tell me there is a possibility that something may happen.

**CHAIRPERSON:** But also there is nothing stated as to why the probabilities are as stated in that paragraph - in other what is the basis for that unless – for that conclusion – for that view unless the idea is that the basis for that view is what is said in paragraph 10.

20 **MR TODD:** Yes. It surely does not say on any assessment of Mr Gama's case there is any unfairness.

**CHAIRPERSON:** Yes.

**MR TODD:** Or let me even say there is a risk.

**CHAIRPERSON:** Yes.

**MR TODD:** Of such and such being found to be unfair.

**CHAIRPERSON:** Yes.

**MR TODD:** It merely says it creates this – it is obfuscatory – it is – this is complicated therefore you are probably going to lose – you probably may lose your case.

**CHAIRPERSON:** Hm.

**MR TODD:** I do not know if you can put it any higher than that.

**CHAIRPERSON:** Hm.

**MR TODD:** But anyway I do not know if that – what I – the  
10 reason why I said I – it worries me is that it is deliberate.

**CHAIRPERSON:** Yes.

**MR TODD:** The way this is worded is the – I probably am thinking of the request that I have seen from a file note from these attorneys meeting with Mr Mkwanazi when Mr Mkwanazi said he would need something indicating some unfairness.

**CHAIRPERSON:** Unfairness.

**MR TODD:** Which could lead him to persuade the board.

**CHAIRPERSON:** Yes.

20 **MR TODD:** But if this is the paper that went to the board whether or not they considered our paper.

**CHAIRPERSON:** Hm.

**MR TODD:** This would be an extraordinarily – it would be an extraordinary basis on which to reach a conclusion to reinstate Mr Gama.

**CHAIRPERSON:** Hm.

**MR TODD:** I do not know if I can put it any differently from that. But I do not know if anybody – in fact interestingly and maybe you will show me Mr Myburgh if there are any board members that say this is what influenced them I do not know. Because they seem to say other things. They say condonation influenced them, they say other things influenced them nobody says this is what influenced them.

**MR TODD:** Well Mr Mkwanazi – I do not remember him  
10 saying that this is what influenced him. What he does say in his affidavit if I remember correctly is that KPMG and Nkonki I think who were asked to investigate something about I think the condonation issue or consistence in treatment he says they gave an interim report and it was on the basis of that report that the board deliberated. He says they gave their final report much later in the year but that interim report I think he says in his affidavit he has not found and I have been trying to see if we have got it. I do not think we have got it and I think attempts have been made if I am not  
20 mistaken to find it and it seems difficult to find. Mr Myburgh.

**ADV MYBURGH SC:** Yes we made a request for information on KPMG and we then subsequently issued a summons. We have not yet received an answer. It is something that I asked the investigators to chase up today because we would ideally like that information before Mr Mkwanazi gives

evidence. But...

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** But Chairperson your recollection is entirely correct. He talks about a first and a final KPMG report. He said consideration was given to this first stab at the report and also to a legal opinion. He refers to that but we do not know what legal opinion he is talking of. He will have to tell us tomorrow.

**CHAIRPERSON:** Yes, yes. I saw that also. But also I kind  
10 of – found it strange that there had been according to I think a letter or memorandum from Deneys Reitz/Norton Rose and I think from what Mr Todd said there had been about three opinions from law firms Bowmans, Webber Wentzel. I have not seen Webber Wentzel's opinion – I do not think I have seen it. I do not know if we have got it here?

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** But it has been mentioned and – and Deneys Reitz opinion about the fairness of the dismissal and that they all came to the conclusion that the – Mr Gama's  
20 dismissal was fair. So it does seem strange to me that you – if you want to – if you still want an opinion you are going to leave law firm – leave lawyers and go to KPMG for a legal opinion on this issue.

Of course KPMG might have lawyers or would have some lawyers within but I thought that you would stick to

practicing law firm – lawyers for such an opinion.

**MR TODD:** If I may just say Chairperson that whatever – I mean I understand one might ask Mr Mkwanazi for that report but if the internal lawyer advising Mr Mkwanazi was Mr Mapoma and the day before the board meeting Mr Mapoma prepared a two page document which makes no reference to any preliminary findings or any work or any consistency issue raised by Nkonki, KPMG or anybody else. So Mr Mapoma who is the closest internal legal advisor to  
10 this and on the 22 February which is the date that Mr Mkwanazi signed the agreement and he is furnished with an opinion or a report by Deneys Reitz which – which is – I have also been shown dated the 22 February that document – so the lawyers advising Mr Mkwanazi also makes no reference to any preliminary work, findings, submissions, representations on any other matters that would affect the consistency or fairness of Mr Gama’s case. In fact they say on the 22 February we have advised that the dismissal was fair. So it is very hard to believe that Mr Mkwanazi is not  
20 misremembering when he got reports from in – on – in the basis of any subsequent investigations of executives. I do not believe it possible that – that it was put – that was put in front of the board. Because the people most closely advising on the 15 ...

**CHAIRPERSON:** Do not talk about such a report.

**MR TODD:** 15<sup>th</sup> and the 22 February. So on either side of the board meeting.

**CHAIRPERSON:** Hm.

**MR TODD:** The internal and external legal advisors advising on settlement make absolutely no reference to any such thing.

**CHAIRPERSON:** Hm. Yes.

**ADV MYBURGH SC:** Mr Todd in fact I wanted to take you then to the Deneys Reitz report of the 22 February that being  
10 at page 18 of Bundle 2.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Could I direct your attention please to paragraph 1.1 over the page at page 20.

20 “There are various opinions which have been obtained from reputable firms of attorneys with regard to the prospects of success of Mr Gama in successfully challenging his dismissal by the company. All the opinion including ours which we gave after perusing documents pertaining to the disciplinary inquiry were of the view that Mr Gama’s chances of success be challenging his dismissal are not good.”

As you say either the same day or the day before Mr Mkwanazi signed the settlement agreement.



**MR TODD:** It is very hard to believe that there was any other advice being given to Transnet at this point in time.

**ADV MYBURGH SC:** And then if I could direct your attention to page 21 under the heading Sanctioned. You will see that that is a reproduction of paragraph 10 of the note of the 15 February.

**MR TODD:** Yes.

**ADV MYBURGH SC:** And that the advice then ends with reproduction of what was paragraph 10 of – or sorry 11 of  
10 the note of 15 February. It is the same wording.

**MR TODD:** Yes unfortunately I regret to say that there is that wording on the attorneys report saying

“It is accordingly our view that there is a probability that the Bargaining Council or a court considering the appropriateness of the sanction or dismissal may reach the conclusion the dismissal was not appropriate.”

It is irreconcilable as far as I am concerned with the  
20 proposition that Mr Gama’s prospects are not good unless it means there is a remote possibility. But that I do not understand ...

**CHAIRPERSON:** But it cannot be saying there is a remote?

**MR TODD:** But I – it is also questionable what the purpose is? I mean it says it is a report but – and what purpose it is

serving is setting out – I am not sure Mr Mkwanzazi can explain whether it was considered useful after the board had reached a decision to settle that there must be a report of this kind I do not know.

**CHAIRPERSON:** Well also –

**ADV MYBURGH SC:** And then I would like...

**CHAIRPERSON:** Also that paragraph now it seems that what it is saying is that the view expressed there is based on the challenge on sanction advanced by Mr Gama. So one goes  
10 back to saying what is the – what was Mr Gama's challenge on sanction that they are talking about?

Now of course in terms of the statement that went to the Bargaining Council we can look at that and see what that challenge was and if there was something else that we know nothing about maybe the written submissions that you – or heads of argument that you mentioned Mr Todd maybe that is what they are talking about – I do not know.

**ADV MYBURGH SC:** And then Mr Todd I just wanted to take you to both Deneys Reitz' and Mr Mkwanzazi's response to  
20 the Public Protector. Just to place that in context whilst – why they may be of some importance is because they were written later in the day. Some months later no doubt upon a fuller reflection of the facts.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Let me take you please to page 41.

This is Deneys Reitz to the Public Protector on 6 April. Could I ask you please to turn to page 44 and to paragraph 10.

**MR TODD:** Yes.

**ADV MYBURGH SC:** There it is recorded to the Public Protector.

10 “In addition to the findings made by Antrobus SC at the disciplinary inquiry and the grounds on which Mr Gama has referred the matter for arbitration there are legal opinions that have been furnished by two reputable firms of attorneys relating to the procedural and substantive fairness of Mr Gama’s dismissal. These firms are Webber Wentzel and Deneys Reitz Incorporated. All these opinions confirm that Mr Gama’s dismissal was substantively and procedurally fair.”

You confirm that?

20 **MR TODD:** Yes I mean I note they do not refer to our advice to the company but – which was to the same event they could add us to the list of law firms that are advising this. But it is to the same thing – same extent. Substantively and procedurally fair.

**ADV MYBURGH SC:** And then at paragraph 12 they say well in any event the dismissal dispute referred to the Bargaining

Council has been settled amicably.

**MR TODD:** Yes.

**ADV MYBURGH SC:** And that the terms of the settlement are confidential. So let us go then to ...

**CHAIRPERSON:** I am sorry Mr Myburgh did you – you say something about whether we have obtained Webber Wentzel opinion?

**ADV MYBURGH SC:** Yes I do have the opinion Chair but the point I wanted to make is this. Webber Wentzel were one of  
10 the attorneys that were instructed at the time that the KPMG report was prepared and they were instructed to advice on the procedural issues that had been raised by Mr Gama. It does not relate to substance. I have the opinion it is very lengthy. I am not sure that it adds much to this matter because it does not deal with substance.

**CHAIRPERSON:** But it is in the bundles?

**ADV MYBURGH SC:** It is not in the bundle I can...

**CHAIRPERSON:** It is not in the bundles.

**ADV MYBURGH SC:** I can...

20 **CHAIRPERSON:** Yes. No, no that would be...

**ADV MYBURGH SC:** Provide it to you tomorrow if...

**CHAIRPERSON:** That - that is fine. I just wanted to make sure whether that we have got it. Maybe – maybe it might be appropriate to just put up the relevant page.

**ADV MYBURGH SC:** Certainly.

**CHAIRPERSON:** Or pages to say this is the conclusion they reached. This is what they were looking at namely procedural fairness and this is the conclusion they reached even if we do not put up the whole opinions.

**ADV MYBURGH SC:** We will do that. The other thing – another reason why it was not put up here is that in the KPMG report itself it actually refers to the Webber Wentzel opinion and it sets out the advice.

**CHAIRPERSON:** Oh.

10 **ADV MYBURGH SC:** That is how..

**CHAIRPERSON:** Oh you have got it somewhere?

**ADV MYBURGH SC:** Yes it is.

**CHAIRPERSON:** Okay no if we have got it somewhere that is fine.

**ADV MYBURGH SC:** Alright.

**CHAIRPERSON:** That is fine. Of course – of course part of the reason why maybe it might be said that we might not need to take much trouble to get the whole opinion is that at the arbitration Mr Gama was not relying on procedural  
20 unfairness anymore. He was relying on whether the sanction was – was appropriate. As I understand the position. In the – in the statement that he filed at the arbitration – at the Bargaining Council he sought to challenge the substantive and procedural unfairness. But based on the letter that his attorneys sent to Mr Todd in October 2010 it seems that he

nailed his colours on the past and said it is just a sanction that I am challenging. Is my understanding correct?

**ADV MYBURGH SC:** I think I have a different recollection perhaps Mr Todd can assist us. But I have always understood that he had two – this is what Mr Todd I think has in his affidavit. That he had two procedural challenges. They were not of the ordinary sort that we might be used to. The one is he contended that there should have been a pre-dismissal arbitration and not a disciplinary hearing. And  
10 then there was also some reference to him being concerned about the appointment of Mr Antrobus. But Chairperson I will put up the opinion I have it. No problem.

**CHAIRPERSON:** Yes. Yes. Mr Todd what is your understanding of...

**MR TODD:** Yes he was raising those two. I did deal with them Chairperson. He did persist with the two.

**CHAIRPERSON:** Oh that is right...

**MR TODD:** Procedural points.

**CHAIRPERSON:** Right up to when your firm withdrew?

20 **MR TODD:** Yes.

**CHAIRPERSON:** Oh okay alright.

**MR TODD:** When the matter was – up to when the matter was settled.

**CHAIRPERSON:** Okay then in that event maybe it is important that – at least it...

**ADV MYBURGH SC:** I will do so.

**CHAIRPERSON:** The conclusion of that opinion should be somewhere. Okay.

**ADV MYBURGH SC:** Then Mr Todd something that is a – I did not deal with yesterday with Mr Maona but it seems an important document. If you go to page 48. This is now Mr Mkwazi's response to the Public Protector. If you have a look at page 55 it is dated the 30 June 2011 – sorry 55.

**CHAIRPERSON:** I am sorry what page?

10 **ADV MYBURGH SC:** It is at page 48.

**CHAIRPERSON:** 48.

**ADV MYBURGH SC:** And...

**CHAIRPERSON:** Mr Myburgh we – we are at a few minutes past four. We must talk about how much more time we need just so that we might take a break if we still need some time. But if we are about to finish in a few minutes then obviously we might not wish to take a break. So what is your indication?

20 **ADV MYBURGH SC:** Chairperson I think we would probably need not more than another hour.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** I do intend to take Mr Todd.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** To the individual affidavits of the directors.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** And to ask him to comment on them.

**CHAIRPERSON:** Ja. No, no that is fine. Then maybe we should take a short break now and then return and continue.

**ADV MYBURGH SC:** Thank you.

**CHAIRPERSON:** We will take a short break and resume at quarter past four. We adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

10 **INQUIRY RESUMES**

**CHAIRPERSON:** Maybe I must mention this for the benefit of Mr Todd and you, Mr Myburgh. I think I have come across minutes - I do not know if they are here - of the Board of Transnet where there was reference or reference to condonation in discussing the matter of Mr Gama and his possible reinstatement.

Although the discussion was not detailed, I think, but I think I have come across those. So to the extent that Mr Todd was saying and I may, at some stage, seemed to have  
20 thought maybe that is true it is unlikely that the board may have relied on condonation to reinstate him.

I think there is some reference somewhere, even though it might not be detailed. But I think also, it may be that in the affidavits of various board members that they maybe be saying they relied on that as well.



So I thought I would mention that for what it is worth.

**ADV MYBURGH SC:** Yes, thank you Mr Chairman. You are quite correct. In fact, it is mentioned in the board minute of the 16<sup>th</sup> of February.

**CHAIRPERSON:** Ja. Okay alright.

**ADV MYBURGH SC:** Mr Todd, I... the last document that I want to take you to before moving to the affidavit of the directors, is Mr Mkwanazi's response to the Public Protector. That you will find at page 48 of Bundle 2.

10 You will see at page 55, that he signs this on the 30<sup>th</sup> of June 2011. So it is a long time after the reinstatement of Mr Gama.

I just want to direct your attention please to two paragraphs. At page 55 under the heading Substantive and Procedural Fairness.

If I can ask you to drop down to number 2. There it is recorded that:

20 “However, there are matters which the auditors discovered where certain employees of the company may have been guilty of offences similar to the offence with which Mr Gama was charged with and yet, no disciplinary action was taken against them. In such instances, there is an argument that Transnet may have acted inconsistently.”

You can now drop down to 4 at the foot of the page.

“It would therefore appear that to the extent that no disciplinary action was taken in these matters. Mr Gama may have been able to sustain the argument on inconsistent treatment.

Such inconsistency may have had the bearing, not only on the decision to charge Mr Gama but also on the sanction of dismissal.”

May I ask you for your view on this? Is this a rational basis upon which to settle a case that fact that where this  
10 may have had an impact? There may be an argument of inconsistency.

**MR TODD**: Well, Chairperson it looks as though Mr Mkwanazi is expressing what is in June. Just a very preliminary sense of these matters. Because he says there is a preliminary, an interim report now in June. And it is possible, no doubt he says he is attaching it.

And but... but there is also no indication that I can comment on whether actually you are dealing with like-for-like.

20 In other words, are you comparing similar conduct of which employees’ conduct is being compared in respect of what.

So it is very difficult to comment on whether what has been identified. Is that there are two examples of matters where there was serious executive misconduct.

If so, what was it and so on. But I have to say, the rational response. If a board...

If further investigation delivers to the board evidence of conduct of the kind committed by Mr Gama, the logical thing for the board to do, if it is acting in the interest of the company, is to deal with that misconduct of these other individuals who are brought to the board.

It would be absolutely extraordinary if you said: We have now uncovered examples of serious misconduct and we  
10 have decided, instead of dealing with them for what they are and show Ms Gama's dismissal as an example of how you treat people who commits serious misconduct.

Let us find them and say: Well, anyway. We do not deal with you because the new standard we have set is that we do not dismiss for things like this.

So it really... I mean, I am not sure what to make of it. It looks preliminary interim. But it certainly is not... it does not produce a basis to, as it were, called out by its bootstraps the decision to reinstate Mr Gama.

20 **ADV MYBURGH SC:** But Mr Todd, my question... I am driving in a different place. It is preliminary. You are right. It is littered with may. But this was four months after the man had been reinstated. That is what I am looking for you to comment on.

**MR TODD:** Yes, well four months later, there is still no...

nothing that persuades mister ...[intervenes]

**ADV MYBURGH SC:** Yes.

**MR TODD:** ...Mr Mkwanazi that there was actually any inconsistency. So by doom, he still thinks there might possible have been inconsistency but he is not sure

**CHAIRPERSON:** H'm.

**MR TODD:** That also would rather... be rather fatal to the contention that this was the reason why the board reached the decision.

10 **ADV MYBURGH SC:** Alright. If I can then take you to the last part of your evidence and I am thankful that you are able to stay with us until we complete it. Could I ask you please to turn to Bundle 1? That is the bundle containing a collection of affidavits.

**CHAIRPERSON:** Well... I am sorry, Mr Myburgh. Do not forget where you were... wanted us to go.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** I just see at the end of that letter by Mr Mkwanazi to the Public Protector at page 55 under  
20 condonation, I see what I referred to earlier where he says:

“Insofar as the issue of condonation is concerned, we advise that Transnet has a policy for condonation available to all employees on application by the employee concerned.”

That part of... even in his own letter, he says it is

available if an employee applies for it. And I do not remember him pointing out in this case where the proof is where Mr Gama had applied for condonation.

**MR TODD**: To my knowledge, he have not.

**CHAIRPERSON**: Ja.

**MR TODD**: And for reasons I have said, he could not have that.

**CHAIRPERSON**: Yes, yes. Mr Myburgh.

**ADV MYBURGH SC**: Sorry. Chairperson, what page were  
10 you referring to?

**CHAIRPERSON**: [microphone not switched on]

**ADV MYBURGH SC**: Yes, towards the end?

**CHAIRPERSON**: [microphone not switched on]

**ADV MYBURGH SC**: Yes, I have got. Thank you. So, Mr  
Todd can I take you to Bundle 1?

**MR TODD**: [No audible reply]

**ADV MYBURGH SC**: And I would like to deal first with the  
affidavit of Ms Nolwazi Gcaba. which you will find at page  
199. And I am going to take you to a few highlighted  
20 passages.

If you turn please to paragraph 41 at page 220. Now before that, she deals with the principle of consistency and at 41 she says:

“I mention these principles because they are directly relevant to what informed the decision to reinstate

Mr Gama pursuant to the settlement agreement.

Indeed, the chairperson furnished the board with a list of 30 similar transgressions at the time that I decided to support the decision.

Although the KPMG and Conte(?) report was not before us at the time, the decision was made ...[intervenues]

**CHAIRPERSON**: I am sorry. I am sorry, Mr Myburgh. Did you say 222 page?

10 **ADV MYBURGH SC**: 220.

**CHAIRPERSON**: 220?

**ADV MYBURGH SC**: Yes.

**CHAIRPERSON**: Okay. paragraph 41?

**ADV MYBURGH SC**: Yes.

**CHAIRPERSON**: Okay alright.

**ADV MYBURGH SC**: So there, she says:

“The chairperson furnished us with a list of 30 similar transgressions...”

And she said:

20 “Although the KPMG and Conte report was not before us, it is illuminating...”

And she goes on to deal with it. And then in relation to this list of 30. If I could ask you please to go to paragraph 44 over the page.

“The issue of Mr Gama’s reinstatement was first

raised with the board to the best of my recollection at a board meeting on the 25th of January.”

And she says that:

“Mr Mkwanazi indicated...”

And then if you drop down to the foot of the page, she says:

“In response, the chairperson stated that he was occupied with 30 cases with similar allegations as those levelled against Mr Gama by Transnet and he  
10 furnished the board with the list.”

Then she says at 48 over the page:

“The board met again on 16 February...”

And if you go over the page to 224 at paragraph 48.2, she says:

“The chairperson, furthermore, informed the board that there was a list of contraventions that were comparable to the case of Mr Gama.”

And then at sub-three:

“The board resolved that it supported the acting GC  
20 in its endeavours to settle with Mr Gama.”

So I wanted you to comment on this version that the chairperson informed the board that there was a list of contraventions that were comparable to the case of Mr Gama.

**MR TODD:** Ja.

**ADV MYBURGH SC:** And that it was then on that basis that a decision was made.

**MR TODD:** Yes, it is quite extraordinary. It refers to a list. I am assuming that if the board was informed that there is a list. I am not seeing a list. I am not sure whether...

On what basis Mr Mkwanzazi reached the conclusion that the list related to cases similar to Mr Gama's or what he thought would happen.

But I am afraid it leads to a rather important question  
10 that the chairperson of the disciplinary inquiry said which is:  
What is the information? What are the facts? Can you  
please show me what it is show that so and so is said to  
have done? And what do you going to...?

So that you can make an appropriate decision what to do  
it about it. I mean, it is very... I see that that is what is said  
here.

It looks as though these are things that might have been  
tabled at the board. They are not referred to in the board  
paper that was prepared by Mr Mapoma or Denys Reitz.

20 But perhaps it is information that Mr Mkwanzazi was  
chairing as in tabling at the board or telling them orally. It is  
possible. I do not know.

**CHAIRPERSON:** But also, what is strange. Even assuming  
that there were such cases. What is strange is, it is not Mr  
Gama or his attorneys approaching the board and saying:



Here are the cases I am relying on the inconsistency which make my dismissal unfair.

It looks like the board is going out of its way to go and try and dig up as many old cases as possible and say: Are they the same as Mr Gama's? Oh, yes, they are the same. And therefore, we must settle.

But one does not see any document from Mr Gama whose attorneys are saying: Here is our case on inconsistent discipline or treatment.

10 But also, another problem. The board does this in circumstances where Mr Game being represented by attorneys and senior counsel before a disciplinary inquiry, chaired by an independent chairperson has had the full opportunity to present his case on inconsistency before the chairperson of that disciplinary inquiry.

**MR TODD:** Yes, Mr Chairperson. And that is my assessment either of how this might impact. In fact, what it seems to be the case is, that this board member said: Oh, I accept this as indicating unfairness. Therefore, I believe the  
20 appropriate thing is to reinstate Mr Gama.

And I am not sure if their reasoning was that simple. But it looks that simple which to my mind would represent a rather sorry state of diligence regarding the potential risks associated with the reinstatement of Mr Gama.

**CHAIRPERSON:** And it also seems that, if this was the

approach there, it seems there was no attempt to say: If we do settle, what are the options? Compensation, reinstatement, prospective reinstatement, retrospect if... partial retrospective reinstatement, full retrospective reinstatement.

There seems to have been, if we reinstate, we just reinstate with full retrospectivity. Mr Myburgh.

**ADV MYBURGH SC:** And then Mr Todd, at page 225, paragraph 49, the third sentence, the director says:

10           “I acknowledge that the Commission takes issue with this decision in the request but I can confirm that I did so in the following circumstances. One, having considered Mr Todd’s written advise which was before the board. And two, in the light of all the information available to the board at the time, which as I have said, went beyond Mr Gama’s case in isolation.”

You wish to comment on that?

**MR TODD:** Well, it appears that she is saying that they...  
20 the board do in fact have before it my written report of the process. And I do not know what else they had in front of them but they say all the information available to the board. If they had our written advice and the list of 30 people who the chairman said were similar cases. I do not know. I am not sure what they had in front of them.

**ADV MYBURGH SC:** From what you have read here, was this department even in possession of this list?

**MR TODD:** It does not say so. It does not say so here. She says elsewhere at 48.2 for example on page 224:

“The chairman further informed the board that there was a list of contravention that were comparable to the case of Mr Gama.”

**ADV MYBURGH SC:** Yes.

**MR TODD:** So it appears to be that the chairman was  
10 speaking, not even laying documents on the table but referring to information that he has at his disposal. Perhaps that is what was used to persuade the board and that is how the board was persuaded that this was a good idea.

**ADV MYBURGH SC:** Alright. And then let me take you to the next affidavit. It is the affidavit of Doris Tshepe. Now the affidavit of the director you are dealing with now and Tshepe’s affidavit are very similar having... they are both represented by the same firm of attorneys.

**MR TODD:** Ja.

20 **ADV MYBURGH SC:** And her affidavit starts, and this is Tshepe, at 763. If you perhaps just deal with one or two parts that are different. Could I ask you please to go to page 783?

**MR TODD:** [No audible reply]

**ADV MYBURGH SC:** At paragraph 36, you will see four

lines down, there is the date referenced to the board on 16 February. She says:

“The information that was considered at the meeting, justified my support of the settlement as I explain in more detail below. In summary, I considered Mr Todd’s memo and noted that it did not address the issue of inconsistency of discipline and the facts raised by the chairperson on this issue.

10 I was satisfied that the issue of inconsistency of discipline was weighty enough to justify settlement.”

And she also then goes on to explain at 37 and over the page at 37.2 that there was a list.

“The chairperson further confirmed that there was a list.”

You want to comment on that?

**MR TODD:** Well, it appears to bear out the fact that the chairperson was informing board members that there is a list of matters and that he had satisfied himself that they were all, as it were, on all fours with Mr Gama’s case.

20 **CHAIRPERSON:** Yes.

**MR TODD:** That is what it appears to tell me and it appears to say that the board members... this board member was satisfied with that explanation from the chairperson.

**ADV MYBURGH SC:** Now in your evidence earlier, I purposely did not ask you to deal with this paragraph in your

opinion or memo as she calls it. Here she states that you did not deal with the issue of inconsistency of disciplinary. We know that that is ground up with the issue of condonation.

Could I ask you please to go back to File 3. You could keep that file open where it is. But go to back to File 3 and turn up page 86.

**MR TODD:** Yes.

**ADV MYBURGH SC:** And I would like to direct your  
10 attention please to the second paragraph where you quote this finding by Mr Antrobus.

“It was contended that the first and second charges are entirely new formulation of Transnet as it has never occurred in the history of that company that a CEO or a Senior Executive, for that matter, has been held to have committed misconduct for activities and practices that are usually automatically condoned and accepted by various mechanisms and committees within Transnet.”

20 Precisely the issue that was been dealt with there.

“Apart from the fact that there is no evidence to this effect, it seems to me that if the conduct in question amounts to misconduct and then it is misconduct quite regardless of what mechanisms and committees within Transnet may have to say about

that.

If this submission is an attempt to make out any case of inconsistency, then it is necessary to say no more than have already concluded in the previous findings and that there is no merit in the case of allegedly inconsistency.”

So what do you say then to what Ms Tshepe has to say that you in your memo do not address the issue of inconsistency?

10 **MR TODD**: Yes, I mean one... she may have not read it very carefully. She may have thought that... it sounds as though what the chairperson is saying to board members is: Yes, yes, yes. It is all well and good. I even agree with everything that was done.

But there is a whole lot of new stuff that you guys do not even know about and that it is actually exactly the same and we must retro fit that and assume that actually that was all applied and considered and you do not need to know all the detail.

20 In fact... Well, I do not know. He will have to say how he knew the detail of these 30 cases. Look, it sounds very implausible to me.

Doris Tshepe is saying: Well, I read this report but I did not think it dealt with those other 30 cases. Chairperson, I do not really have much to add but it is not a sort of decision

making that one would hope for from a board in these circumstances.

But if I can just say this. By June, when in their letter you have just referred me to a short while ago which Mr Mkwanazi wrote to the Public Protector, there are two paragraphs. And I am afraid I do not have the page in front of me

One, which deals with that idea that there a whole lot of cases where there has been disciplinary action taken and therefore that is... that appears all to be in order that Transnet has acted consistently.

But then there are cases where disciplinary action has not been taken and that there has been some preliminary establishment of this.

And then he refers to two examples, not 30. But by June, maybe the list of 30 had been whittled down to two. I am not sure what the... how... what to make of that.

But it seems to be extremely implausible that Mr Mkwanazi could have identified 30 cases of similar facts. And similar facts...

Also what is extraordinary about that is, as he is talking about one thing that went wrong with Mr Gama. There were three charges. We have looked at them.

So what he has to be saying is: I have looked at 30 cases. Or somebody has. And ...[intervenes]

**CHAIRPERSON:** And say how they compare or relate to Mr Gama's case.

**MR TODD:** Can they show that they are on all fours with Mr Gama's case and those 30 cases.

**CHAIRPERSON:** H'm, h'm.

**MR TODD:** If he said that to me as a board member, I would say: Mr Chair, I find it very hard to believe this. I am sorry. I do not mean to disbelieve that you think that but could you please provide us with some granularity to that assertion  
10 because it sounds implausible.

And in fact, it sounds... although later it was said that it had subsequently been established that there were cases where action should have been taken.

It does not look like 30 or any remotely similar. So it is very hard. It really does Chairperson look like this an attempt to retro fit an explanation for a decision which was championed by Mr Mkwanazi on this ground and board members accepted it.

**CHAIRPERSON:** Now in October 2010 and January 24,  
20 2011, on all sides the legal teams must have been ready. At least 24 January, they were ready to go until there was a request for a postponement.

**MR TODD:** Yes.

**CHAIRPERSON:** Now at that stage, on your understanding, that is a few days before January 24, when the arbitration



would have started, had Mr Gama's attorneys provided your team with any 30 cases on any inconsistency that they are going to rely on?

**MR TODD**: In preparing for the case? I go by recollection. I do not believe that anything had been brought to our attention that had not, on this topic, that had not already been argued by Mr Gama previously.

**CHAIRPERSON**: Yes.

**MR TODD**: But in fact, what mister... what the finding of the  
10 disciplinary chairperson does show is that reference had been made by Mr Gama to a list of 45 condonations. There is reference to it in one of the findings.

So that is one of the way that Mr Gama had attempted to present his case is, he says: Look, here is a list showing that there had been 45 condonations granted for irregular expenditure.

To which this chairperson said: Well, that well but that is not a basis for me to conclude anything. These might be minor transgressions exactly within the ambit of the policy  
20 which should be condoned.

Or they might be something else. But, you know, you are going to have to share with me a bit more about your contentions rather than just say that condonations have been granted across the business.

**CHAIRPERSON**: H'm.

**MR TODD:** So whether it is that list that had been whittled down to 30 that Mr Mkwanazi had, I do not know.

**CHAIRPERSON:** No, it is quite interesting also because even on Deneys Reitz' correspondence this does not seem to be much of that one can see in the correspondence about this condonation issue and consistency.

So mister... in any event, Mr Gama and his attorney do not appear to have worked hard to try and find cases on which to rely on.

10 But the board seems, if there were 30 cases, seemed to have been the one doing that job.

**MR TODD:** Yes, Mr Chairman it is very strange again for that reason. If Mr Mkwanazi was presenting the board with... it does not sound like evidence. It was just he was telling them.

**CHAIRPERSON:** Yes.

**MR TODD:** He did not tell his lawyers and he certainly did not seek their advice ...[intervenes]

**CHAIRPERSON:** Yes.

20 **MR TODD:** ...on whether this was a good ...[intervenes]

**CHAIRPERSON:** Yes.

**MR TODD:** ...argument or not. Otherwise, I would have expected to see it in a Deneys Reitz memorandum that we saw.

**CHAIRPERSON:** Ja.

**MR TODD:** Unless, he is... they do not refer to it and I do not believe lawyers would have given advice that this an issue without understanding what those matters are and on what basis it is suggested that they are actually compatible to Mr Gama's conduct.

**CHAIRPERSON:** H'm, h'm. Actually, as we talk. Mr Myburgh, I am going back to Mr Mapoma's evidence yesterday.

**ADV MYBURGH SC:** Yes.

10 **CHAIRPERSON:** I cannot remember but it will be interesting to see what the date was of the meeting that Mr Mkwana had, I think, with Deneys Reitz' legal team and Mr Mapoma when he said: If I can get a legal opinion ...[intervenes]

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** ...that says there was some unfairness.

**ADV MYBURGH SC:** I was about to ask Mr Todd that. That is on the 22<sup>nd</sup> of January 2010.

**CHAIRPERSON:** Yes.

20 **ADV MYBURGH SC:** Mr Chairperson, where you are quite correct. He actually stated that his intention was to persuade the board ...[intervenes]

**CHAIRPERSON:** Yes, yes.

**ADV MYBURGH SC:** ...on the 16<sup>th</sup> of February ...[intervenes]

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** To bring Mr Gama back.

**CHAIRPERSON:** Yes. Because if at that date he had those 30 cases, one would have thought that he would say: I know that there was unfairness because I found these cases. But if he was still looking for some unfairness at that time, it is interesting.

**MR TODD:** Sorry, I did not have the 30 cases by then. He did not know the issue because otherwise he would have  
10 explained it to Deneys Reitz.

**CHAIRPERSON:** Yes.

**MR TODD:** And in... then it means that he came across that issue sometime after the 22<sup>nd</sup> of January but by which time he had already decided to reinstate Mr Gama and was simply looking for a basis to persuade the board and sometime between the 22 January and the 15 or 16 February he came into possession of information which he believed would persuade the board but he did not refer it to his attorneys and ask their advice on it.

20 **ADV MYBURGH SC:** Then the next affidavit I would like to take you to is the affidavit of Mr Malungani at page 861.

**CHAIRPERSON:** Page?

**ADV MYBURGH SC:** 861.

**CHAIRPERSON:** 861.

**ADV MYBURGH SC:** Now Mr Malungani is one of the

dissenters ...[intervenes]

**CHAIRPERSON:** I think it is another bundle?

**ADV MYBURGH SC:** It is bundle 1, Chairperson.

**CHAIRPERSON:** Oh. And page 861?

**ADV MYBURGH SC:** The affidavit starts at 861, I would like to go to page 865 please.

**CHAIRPERSON:** Okay, you may proceed.

**ADV MYBURGH SC:** At paragraph 16, different to the two previous directors that we have dealt with, he says:

10            “I cannot recall the precise detail of the debate that then ensued but I did clearly remember that I was opposed to the resolution insofar as settlement was concerned.”

17.         Despite the limited information in and before the board meeting, the motivation for settlement of the dispute was which effectively would do away with the legal processes and recommendations made by independent parties and (what seemed to me) the one-sided demands made by Mr Gama which were  
20         set out in the draft settlement agreement simply did not seem right and I, together with others, who I cannot recall offhand, opposed the resolution. The minutes of the meeting...”

Annexure so and so.

“...correctly records that there was a minority not in support of the reversal of Mr Gama’s [indistinct – dropping voice]”

I do not know if you have any comment on that. He does not talk about ...[intervenes]

**MR TODD:** No, it is – my only comment is I am surprised that this view was the minority and not the majority view but I do note – and I mean, it is from his recollection, but he says at paragraph 15.2 on page 864 that the  
10 presentation – part of the presentation he recalls is that the Chairman had received legal advice that the sanction of dismissal was too harsh. I mean, I do not know if he is misremembering or whether that was the sort of thing which the Chairman was saying in the meeting but it is clearly untrue if that is what the – if the Chairman – either the Chairman did not actually say that or he did say it and what he said was patently untrue. The advice given to the Chairman was the opposite.

**ADV MYBURGH SC:** And then the next affidavit and they  
20 increasingly become shorter really is the affidavit of Mr Sikisana(?) at page 873. There you will see at 876 the deponent attaches some wait to the KPM report at paragraph 6.5, 6.6:

“The evidence in KPMG Nkonki report shows that in respect of the procurement irregularities which Mr

Gama was found guilty of, charge 1, he was not given opportunity to apply for condonation.

And at 6.7:

“Notwithstanding the fact that the conduct was in fact irregular Transnet had a history of condoning such irregularities and furthermore, no disciplinary action was taken against individuals.”

Do you have anything to say about that?

**MR TODD:** Well, I ...[intervenes]

10 **CHAIRPERSON:** I am sorry, you were reading from what page, Mr Myburgh?

**MR TODD:** Page 876, paragraphs 6.6 and 6.7.

**CHAIRPERSON:** Oh.

**MR TODD:** Well, in his own evidence Mr Gama himself described the GNS contract as a fraudulent scam. So I find it very difficult to accept that this board member was genuinely of the view that there would have been condonation granted but perhaps this was the sort of thing which the board members believed. I find it hard to  
20 believe.

**ADV MYBURGH SC:** And then at the end of the affidavit, 878, under the heading Conclusion, 8.1:

“The above factors information at the board’s disposal as well as the legal opinions sought by the board were considered during the board resolution

to enter into the settlement agreement with Mr Gama.”

Have you come across any legal opinion that supported that?

**MR TODD:** No.

**ADV MYBURGH SC:** Then if I can take – we have got only two more affidavits, to the affidavit of Mrs Tshabalala at page 891. Have you had an opportunity of studying this affidavit?

10 **MR TODD:** I have not studied it. I believe it was furnished to me, I may have read it.

**ADV MYBURGH SC:** Well, Ms Tshabalala at page 899 at paragraph 23 says that:

“Mr Todd was a lawyer from Bowman Gilfillan during the disciplinary hearing.”

Then if you drop down to the last five lines she says that:

“In any event, at a point in December and January the Transnet board had sought independent legal advice from another international reputable firm to  
20 advise on the matter.”

Presumably that was Deneys Reitz.

“The board had seen it fit to take out emotions and bias in the matter and try and evaluate the matter in totality for Transnet.”

Want to comment on that?



**MR TODD:** Well, that looks like a way of saying what I described earlier was asking for a fresh pair of eyes on the matter.

**ADV MYBURGH SC:** Yes.

**MR TODD:** But which it is – I do see that she says also at paragraph 9 at page 893 that naturally the board had sought legal advice and opinion based on Mr Gama's pleadings lodged at the bargaining council and she says she does not have the legal opinion in her possession but  
10 the Group Executive would have secured same for discussion by the board.

Again, I do not know what opinion is being referred to, the only ones I have seen are Deneys Reitz's statements that it had advised that dismissal was fair and I have not seen any legal opinion that deals with condonation or the 30 cases or anything else that seems to have been discussed at the board meeting. So it seems that she intended to rely on legal advice but it is mystery what legal advice that was or how it supported the  
20 decision.

**ADV MYBURGH SC:** And then in paragraph 24 in the last three lines on page 899 she talks of the fact that the board appointed Nkonki and KPMG to look into matters and then she reports on what they found. Of course we know that that came later.

**MR TODD:** Yes.

**ADV MYBURGH SC:** At 25:

“The board of Transnet took its fiduciary duties very seriously in the Gama matter. It stopped an injustice that was being performed when there was an overzealous pursuit of one individual.”

Do you want to comment on that?

**MR TODD:** Well, she clearly differs with the decision of the High Court on this topic and I do not know if she had  
10 read my report on it but is really – appears to associate herself fully with Mr Gama’s perception on the matter.

**ADV MYBURGH SC:** And then finally we have the ...[intervenes]

**MR TODD:** I mean - If I may just add?

**ADV MYBURGH SC:** Yes.

**MR TODD:** She goes further in paragraph 26 to say that it cannot be that those who are being persecuted for being upright and standing up to bullying like Mr Gama. So she is convinced that Mr Gama was being bullied for – Mr  
20 Gama was being persecuted for standing up to bullying.

**CHAIRPERSON:** Yes.

**MR TODD:** And ...[intervenes]

**CHAIRPERSON:** I wonder what she would say if she – well, that interesting because she would have been part of the board when Mr Gama had accepted that he was

properly found guilty of these acts of misconduct. Where would the bullying have been?

**ADV MYBURGH SC:** You mentioned earlier in your evidence there were three directors who reappointed on the new board.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Now can you remember the names of those people?

**MR TODD:** I believe that one of them was Mr Peter Moyo.

10 **ADV MYBURGH SC:** Yes.

**MR TODD:** And one Ms Ntjingela. I cannot remember who the third was because those were the two who did not oppose the litigation brought by Mr Gama to interdict the disciplinary process.

**ADV MYBURGH SC:** The last affidavit then is the affidavit of Mr Moyo, that you find at page 903.

**MR TODD:** Yes.

20 **ADV MYBURGH SC:** Now Mr Moyo adopts a slightly different approach and that is, I suppose, in summary, that he was always of the view right from the very outset that Mr Gama's suspension and dismissal was unfair. Do you confirm that?

**MR TODD:** Yes, he does say that. I did not know that, I knew that he had not joined the litigation but I did not know that...

**ADV MYBURGH SC:** Is there anything in that affidavit that you wish to highlight?

**MR TODD:** Ja, I mean, he says at paragraph 10 that on the issue of a security contract it was normal for Transnet to go through a condonation process if an executive exceeded the limits of their authority and he was aware that the Exco and the Group CEO had condoned conduct from other executives and in some instances for larger amounts. But he does not seem to have read either the  
10 full transcript of the disciplinary hearing of even a summary of it to – if that is the view that he is able to take of the GNS conduct for which Mr Gama was charged and he certainly has not read enough to realise that Mr Gama himself regarded the contract as completely fraudulent and a scam.

So I see that and – but it is no doubt so, it must be so that Mr Moyo did not believe that it was appropriate to discipline Mr Gama. That is what he really says. He refers to Ms Ntjingela at paragraph 15, that was the other board  
20 member who chose to be represented by different lawyers from the rest of the board. because we did not fully agree with how the disciplinary process had been handled. That is at page 906. And he then says that when a new board was appointed he reiterated his views.

**ADV MYBURGH SC:** In this affidavit of Mr Moyo he

appears only to deal with the security contract and the 50 like new locomotives. Do you find any reference here to third charge, dismissal for having criticised the board and executives?

**MR TODD:** No. It is possible that he regards that as entirely justifiable if his view was that Mr Gama was being unfairly disciplined, I do not know, but he does not seem to refer to it, you are right.

**ADV MYBURGH SC:** Then, Mr Todd, I want to end off your  
10 evidence or subject to any questions the Chairperson may have, by taking you back to Mr Mkhwanazi's affidavit and this is in bundle 4A.

**MR TODD:** Yes.

**ADV MYBURGH SC:** 4A. Could I ask you to turn to page 19 please, one nine. Paragraph 10.1, Mr Mkhwanazi says that:

“When Brian Molefe joined the Transnet board he was instructed to take disciplinary action against all officials implicated in the KPMG and Nkonki report.”

20 Now I just wanted to get your view, is that a way that you can deal with inconsistency if it arises? I mean, does it necessarily follow that the only way to deal with inconsistency is to not take disciplinary action against an offender or to reinstate an offender?

**MR TODD:** Certainly, this is what – if my advice had been

sought I would have advised them that if you find conduct that warrants disciplinary action by senior executives and if you find conduct similar to that of Mr Gama then you are dealing with executives who are not fit for officer and should be removed from office in the same way. So that would have been the advice I would have given and I think that is good to see. What is surprising is that you would first reinstate Mr Gama...

**MR TODD:** Yes.

10 **CHAIRPERSON:** And then take actions against others.

**MR TODD:** And then take steps against others who, in respect of whom, you now set – I mean it is – you get into an chicken and an egg because if in fact you should be disciplining and dismissing the others then you think oh, well now I have reinstated Gama to be consistent with this but I had better dismiss him again because I actually want to dismiss this person. I mean it really just does not make any sense.

20 Well, 10.1 makes a lot of sense but it completely undermines any explanation that these investigations warranted the reinstatement of Mr Gama.

**ADV MYBURGH SC:** And also, I mean, to your consistency point, would it have been possible to dismiss any of these people given what happened to Mr Gama?

**MR TODD:** You found conduct on all fours of Mr Gama,

your own devotion to consistency would require you to give them a final written warning for six months.

So that is the problem that we had highlighted to them, you set a new standard within Transnet of conduct within Transnet of senior executives and how we treat conduct of that kind and that is what they did when they chose to reinstate Mr Gama.

**MR TODD:** Mr Chairman, that completes my examination of Mr Todd. Thank you.

10 **CHAIRPERSON:** Thank you very much, Mr Todd, and thank you for being available till this time to assist the Commission, we appreciate it very much. I think your evidence has really helped to enlighten some of the areas that might have been unclear particularly because you have the background of having been the attorney who was involved at the time. Thank you very much, you are now excused.

**MR TODD:** Thank you very much.

**CHAIRPERSON:** We will adjourn now.

20 **ADV MYBURGH SC:** Thank you, Chair.

**CHAIRPERSON:** And then tomorrow we will hear Mr Mkhwanazi's evidence.

**ADV MYBURGH SC:** Yes, Chairperson, you will recall that he is going to give evidence by way of a video link. Arrangements have been put in place.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** And we are going to have a test run at nine o'clock tomorrow morning so hopefully we will be ready for you at ten.

**CHAIRPERSON:** Yes, okay, alright. Okay, we adjourn.

**INQUIRY ADJOURNS TO 16 OCTOBER 2020**