

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

16 OCTOBER 2020

DAY 285



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 16 OCTOBER 2020

CHAIRPERSON: Good morning Mr Myburgh, good morning everybody.

ADV MYBURGH SC: Good morning Chairperson.

CHAIRPERSON: Yes.

MR MKWANAZI: Good morning Chair.

CHAIRPERSON: Good morning Mr Mkwanazi. Thank you for coming back to the commission even though virtually but I think you are not testifying for the first time.

10 **MR MKWANAZI:** Thank you Chairman.

CHAIRPERSON: Yes. Thank you. Okay Mr Myburgh. Yes thank you Chairperson. As you know our next witness is Mr Mkwanazi he is going to be giving evidence via Zoom.

CHAIRPERSON: Yes just one second Mr Myburgh. Where is this – that other light that is usually there? I think there would be two. I do not know I see it is a little dark but maybe I should not be concerned about it. But – ja well the technicians – the people who – who deal with it know what I am talking about. I think they will attend to it. Okay

20 Mr Myburgh.

ADV MYBURGH SC: Chairperson as you know Mr Mkwanazi is going to give evidence by way of Zoom by agreement with the parties and with your direction.

CHAIRPERSON: Hm.

ADV MYBURGH SC: Perhaps he could be sworn in as a

witness and then I will take him to his affidavit and that can then be admitted.

CHAIRPERSON: Oh okay alright.

ADV MYBURGH SC: I have been asked to enquire whether you happy with the arrangements?

CHAIRPERSON: Well I am happy with the arrangement I am just realising that you will be looking there – I will be – I wonder whether it was not possible to have this somewhere there where we could both see him. But it is
10 not a big deal if you ...

ADV MYBURGH SC: We have tried that there was really organised chaos before you arrived.

CHAIRPERSON: Oh is that so.

ADV MYBURGH SC: Chairperson I think this is probably the best that we can do.

CHAIRPERSON: Okay let us stick to this so long ja.

ADV MYBURGH SC: And so if I might just mention I think there is absence of lighting. The lighting has been moved to my left so that it does not shine directly in my face so
20 that I can look at the screen.

CHAIRPERSON: Oh okay.

ADV MYBURGH SC: So it might appear slightly darker to you.

CHAIRPERSON: Okay no that is fine. That is fine.

ADV MKHWANAZI: If I may good morning Chair, good

morning Phillip. Chair I would like to take the opportunity to place myself on record yet again. [00:02:43] I am a director at Mkhwanazi Incorporated and I [very distorted] Mr Mafika Mkhwanazi and once again thank you.

CHAIRPERSON: I am sorry. I think the reception is quite poor I cannot hear the speaker.

ADV MKHWANAZI: Oh okay. Chairperson.

CHAIRPERSON: Yes.

ADV MKHWANAZI:: I am sorry about that. I was saying at
10 the – from [00:03:19] on record again. My name is [inaudible].

CHAIRPERSON: Oh yes it is Mr Mkwanzazi the lawyer?

ADV MKHWANAZI: Yes Chair [inaudible].

CHAIRPERSON: Yes. No thank you very much. I do not know what it is but when you speak it is not as clear as it ought to be. I mention that so that when next time there is a need for you to speak hopefully whatever it is that may need to be attended to – will help being attended to.

ADV MKWANAZI: Okay.

20 **CHAIRPERSON:** Ja. I hope Mr Mkwanzazi will be clear when he speaks. Mr Mkwanzazi can you hear me?

MR MKWANAZI: Clearly Chairman.

CHAIRPERSON: Yes okay it looks like we can hear him. Okay Mr Myburgh.

ADV MYBURGH SC: Yes thank you.

CHAIRPERSON: Oh – administer the oath or affirmation first.

REGISTRAR: Mr Mkwanazi please stand up for the oath.

MR MKWANAZI: Okay. I am standing. He is witnessing oh I need to go back. Wait I need to remove this chair.

CHAIRPERSON: Ja. So.

MR MKWANAZI: Ja. Standing.

REGISTRAR: Please state your full names for the record.

MR MKWANAZI: Mafika Edmund Mkwanazi.

10 **CHAIRPERSON:** Do you have any objections to taking the prescribed oath?

MR MKWANAZI: I could not have an objection.

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

MR MKWANAZI: Yes.

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 me God.

20 **MR MKWANAZI:** So help me God.

REGISTRAR: Thank you.

CHAIRPERSON: I see you took off your jacket Mr Mkwanazi is it too hot where you are?

MR MKWANAZI: I can put it on Chairman.

CHAIRPERSON: Ja I think put it on if you do not mind.

MR MKWANAZI: Okay. Okay.

CHAIRPERSON: I was wondering – I was wondering whether you took your jacket off because it was already hot there or whether it was antici – in anticipation of eats.

MR MKWANAZI: Mr Chairman I think anticipation of eats.

CHAIRPERSON: Okay alright. Mr Myburgh.

ADV MYBURGH SC: Yes thank you Chairperson. Good morning Mr Mkwanazi.

MR MKWANAZI: Good morning Advocate.

10 **ADV MYBURGH SC:** You would have been provided with a bundle of documents I refer to as Bundle 4A.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Could I please ask you to turn to page 1 in that bundle?

MR MKWANAZI: Okay it is 4. Okay is it written Exhibit BB18?

ADV MYBURGH SC: Yes that is correct.

CHAIRPERSON: What...

ADV MYBURGH SC: If you go to...

20 **CHAIRPERSON:** What – I am sorry Mr Myburgh. On the spine the first writing should be Transnet Bundle 04A. Is that correct Mr Myburgh?

ADV MYBURGH SC: Correct.

CHAIRPERSON: Ja and then below that it says Exhibit BB18. Have you got the correct one Mr Mkwanazi?

MR MKWANAZI: Yes I have got the one Exhibit BB18 and then on the second page it is an index BB18 then...

CHAIRPERSON: Ja no, no it is the right one.

MR MKWANAZI: Then on the next page it is a declaration.

CHAIRPERSON: Ja it is the right one.

ADV MYBURGH SC: So Mr Mkwanazi during the course of your testimony when I refer to page numbers I am referring to the black page numbers here on this page – page 3 on the left hand side, do you see that?

10 **MR MKWANAZI:** No I see that Advocate.

ADV MYBURGH SC: I would like just to start off by asking you to confirm. Is this your declaration?

MR MKWANAZI: That is correct Advocate.

ADV MYBURGH SC: If you could then please turn to the end of your declaration at page 20.

MR MKWANAZI: 19, 20. Yes I am at page 20.

ADV MYBURGH SC: And do you confirm that you signed this declaration on the 31 August this year?

MR MKWANAZI: I do confirm.

20 **ADV MYBURGH SC:** And then I would ask you to confirm attached to your affidavit where a series of annexures we have A, B and C – C was the KPMG report.

MR MKWANAZI: Correct.

ADV MYBURGH SC: If you then turn all the way to page – right at the end of the flag to page 21.412. Are you there?

MR MKWANAZI: Not yet I am at 21.412 yes.

ADV MYBURGH SC: We received the annexures up to A, B and C we did not receive D and E.

MR MKWANAZI: Yes I see that.

ADV MYBURGH SC: Alright so you confirm that Annexures A, B and C were annexures to your affidavit?

MR MKWANAZI: I will confirm yes.

ADV MYBURGH SC: Alright. Thank you. Now Mr Mkwanazi if you could go back then please to page 3.

10 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: What I am going to do is I am going to lead you through your declaration.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And I am going to give you the opportunity of presenting the evidence that is set out here and after that I will have a series of questions for you and obviously the Chairperson would ask questions whenever he wishes to. You follow the process.

MR MKWANAZI: Yes I do.

20 **ADV MYBURGH SC:** Okay let us start off then with your personal details at paragraph 1.

MR MKWANAZI: That is true.

ADV MYBURGH SC: Were you an Executive Director of Transnet from 1996 to 2001?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: You were also a former Group Chief Executive Officer of Transnet and you held that position from 2001 to 2003?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And then I suppose importantly for present purposes you say:

10 “I am also the former Chairman of the board
 of Transnet having held that position for a
 period of four years from December 2010 to
 December 2014.”

MR MKWANAZI: That is correct.

ADV MYBURGH SC: You say that you were furthermore the Chairman of the Corporate Governance and Nomination Committee as well as a member of the Acquisitions and Disposal Committee during your tenure on the board.

MR MKWANAZI: That is correct.

20 **ADV MYBURGH SC:** You then go on to say at paragraph 4.1 that you were asked to provide this declaration essentially dealing with the decision to enter into a settlement with Mr Gama and reinstate him. Is that correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And you were also asked to deal with the Terms of that settlement agreement?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Perhaps I could ask you then to pick up at paragraph 4.2 and verbalise what is contained there about your meeting with Minister Gigaba?

MR MKWANAZI: Yes I think paragraph 4.2 confirms that I was approached by Minister Gigaba to join the board of Transnet sometime in December for a period of three years and also in that meeting with the – Mr Gigaba he indicated a few areas of concern.

One of those was a lack of transformation as there
10 were very few senior positions held by African women. The other she was under the impression that the procurement systems of Transnet was open to corruption by employees and other stakeholders.

He emphasised that as the incoming Chair of the board this must an area of focus. He also somehow was aware of problems in the procurement of suppliers and services for mega projects in Transnet.

These would have included Durban Harbour Entrance widening, the Cape Town Container Terminal, the
20 new multipurpose pipeline, the Ngqura Container Terminal, the coal line expansion, the iron ore expansion and the appointment of [00:13:21] for engineering procurement construction and management and other feasibilities and one or the others done.

He also was under the impression that the

disciplinary matter at Transnet were racially biased and that there was a condonation process at Transnet that was generally used to deal with divisions within Transnet. Yes.

ADV MYBURGH SC: May I just ask you to confirm when did you hold this meeting with Minister Gigaba?

MR MKWANAZI: I think sometime in October. I do not recall the date.

ADV MYBURGH SC: October?

MR MKWANAZI: 2010.

10 **ADV MYBURGH SC:** 2010?

MR MKWANAZI: 2010 yes.

ADV MYBURGH SC: Alright please carry on.

CHAIRPERSON: I am sorry. Is there a possibility that you might be mistaken with regard to the month and that the month might be November?

MR MKWANAZI: Sho I thought it was October it is a long time ago but I really thought it was October.

CHAIRPERSON: The reason I am raising that question is that in October 2010 Mr Gigaba was not Minister of Public
20 Enterprises as yet it was still Ms Barbara Hogan. And she was dropped from cabinet on the 31 October 2010. That is the evidence she gave. And her – and Mr Gigaba's appointment was announced – would have been announced probably on the 31 October or 1 November. So he – he only became Minister of Public Enterprises from 1

November. So I am – I am wondering whether it might be October or whether it might be November?

MR MKWANAZI: Chairman your observation is correct but my recollection it was sometime in October.

CHAIRPERSON: Sometime in October.

MR MKWANAZI: And – yes – and I am not sure if the Minister has put in his own affidavit. Maybe I am wrong Chairman.

CHAIRPERSON: Ja.

10 **MR MKWANAZI:** It is a long time ago.

CHAIRPERSON: He – he – well we have got an affidavit from him but I do not think it says anything about any date of your meeting.

MR MKWANAZI: Oh.

CHAIRPERSON: But I may be mistaken. But of course – of course it is maybe possible that maybe if he had been informed already before the end of October maybe confidentially that he would be taking over. Maybe he could start looking at matters that he thought they were
20 urgent I am not sure. But anyway your recollection is that it was in October?

MR MKWANAZI: That is my recollection Chair.

CHAIRPERSON: Yes okay thank you.

ADV MYBURGH SC: Thank you Chairperson. Mr Mkwanazi then could you deal with the next heading please

– Background to deviations in contracts at Transnet?

MR MKWANAZI: Yes Advocate unfortunately I have to read from this transcript.

“Transnet has always had a detailed procurement procedure manual. Even in 1996 there would have been a tender manual and tender board that gets amended from time to time. These guide the organisation on how to procure goods and services from time to time. Our board the December 2010 – December 2014 board also amended the procurement procedure manual in 2011. Transnet also has a delegation of authority frameworks for – that gets reviewed by a sub-committee and is approved by the Transnet board from time to time. This delegation of authority framework defines the powers of the board, all sub-committees and executives generally up to the Group Chief Executive. Then the Group Chief Executive has authority to sub-delegate to his or her executive committee. And these delegations of authority there are financial limits and other limits for all executives

including the Transnet board. Some matters get elevated to the shareholder for approval following the guidelines in a shareholder compact. In these financial limits executives can increase certain contract values by a defined percentage or not exceed contracts by a predetermined amount. There are financial limits on appointment of consultants and other service providers. Should these be exceeded during execution the responsible executive must report to his or her manager so that the issue can be referred back to the divisional or Transnet Acquisition Council or the Transnet board if it was the original approval. In most cases the Transnet internal audit gets involved to determine a fruitless and wasteful expenditure. This is how deviations in contracts are identified. The structure that approved that contract must determine if the condonation is granted or not. A line manager of the offender must take disciplinary action if warranted.”

Can I continue?

ADV MYBURGH SC: Yes please. So then in the next part of your declaration under heading 6 you deal with as you put it The history of deviations at Transnet. And that runs through pages 6, 7, 8, 9, 10, 11, 12 and then at 13 you deal with condonations at Transnet Freight Rail. At 14 Deviations in respect of mega projects and then one goes all the way to 17 before you then deal with Mr Gama.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: What is it that you want to say about
10 the history of deviations at Transnet?

MR MKWANAZI: I will not read the submission line by line but in a nutshell the – there was a strange – it is not strange it is part of the PPM by the way which the Procurement Procedure Manual which does allow for certain deviations but they need to be approved further up and also it allows for condonations.

So what I was trying to sketch here and by the way the things that I mentioned in my submission are events of from 2005, 2006, 2007, 2008 and 2009. I indicate that
20 there were many deviations. There were many condonations and there is three that comes to mind because they were major.

There is one on the appointment or the condonation of the VAE contract which somehow became irregular. Because when the approval was done I think it was done at

R980 million and by the time it reached my office as an acting Group CEO to – to for condonation the amount was R1.778 million which is R1.8 billion roughly.

Now – and funny enough that particular contract implicated a lot of people in some irregular behaviour. In that those people various teams in TFR, in Group kept on trying to fix this problem and they delayed. I do not know why it took so long for them to bring this thing up to the board for condonation.

10 But eventually it came to the Transnet board through my office for condonation and I then elevated the matter to the board and on elevating it I indicated that disciplinary action needs to be taken against – it was most probably plus or minus ten to twelve executives who had been involved in – some of it was worrisome. It bordered on doing things without authority etcetera, etcetera.

 So yes it was brought to the board and a condonation was given by the board. So that is a typical – but that is a big deviation. And that is why it needed board
20 approval.

 Another one which comes to mind besides the VAE contract is the HMG contract which the executives – it started as a flow contract. Then about a year and a half into a flow contract they then changed it to a – a HMG contract. But the processes followed were flawed and

therefore it became an irregular contract.

And in executing that contract certain elements of that contract were implemented irregularly and there is some element of fruitless and wasteful expenditure in that contract.

It came from a division called Transnet Capital Projects and the CEO was Ms Moira Moses. And of course even this contract the HMG had to come through certain processes and be looked at and a condonation sort of
10 required. Although the project itself was far bigger it is just the irregularity of it that required a condonation. And in that process they – the Group CEO Brian Molefe was instructed to take disciplinary actions against not only Ms Moira Moses but maybe three to four other executives within Transnet Capital Projects.

Then another big one which needed – now these condonations are now done in 2011 and yet these contracts were signed maybe in 2005/2006/2007.

Another big one was in AWP Arab Wally Passes
20 where for some reason they were also an engineering procurement construction management service provider.

The contract there increased from about R1.7 billion to over R3 billion and again the board sometime in 2011 had to take a decision to condone and also specify that disciplinary action must be taken on those involved.

Now I just mentioned these three but there were others. Not too many because I am focussing on the big ones. Small ones in the KPMG report are mentioned in – I am not sure how many in total there were but yes others condonation was granted others condonation was not granted.

ADV MYBURGH SC: Alright could I perhaps just take you back to the beginning.

MR MKWANAZI: Yes.

10 **ADV MYBURGH SC:** At paragraph 6.1 you say – this is at page 6.

MR MKWANAZI: Yes.

ADV MYBURGH SC:

“On 22 December and in February 2011 – sorry 22 December 2010 and in February 2011 the Public Protector made certain allegations about Transnet Procurement Procedures and the Gama matter.”

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:**

“The new board appointed this JV of KPMG and Nkonki to investigate a number of issues around the procurement at Transnet on the basis of the Public Protector allegations and Gama’s appeal on the

sanction of dismissal.”

MR MKWANAZI: Yes.

ADV MYBURGH SC:

10 “The first report was done quickly on the information – as the information was historical. It is that first report that was used by the board in its deliberations. A law firm Norton Rose was consulted by Transnet and a different law firm Webber Wentzel was used by KPMG and Nkonki. The final report was completed in November 2011 as there was a lot of resistance from executives in cooperating with the KMPG and Nkonki team.”

Would you confirm that?

20 **MR MKWANAZI:** Yes I would confirm that and maybe let me add something that is not clearly covered there. There were a few board meetings that were – happened in January. And I do not have minutes of those etcetera. But already before the end of January Transnet at the time had a funny environment where people were coming with allegations of this and the other. So yes the matter that Nkonki covered even though the report was published – the final report was published in November. The company knew already of some of these matters and I am also

looking for that information because I did present some of that information to the board or a board sub-committee even before the end of January in terms of some of these. And funny enough some of these are not even mentioned even in the KPMG report. But I am aware of them because I then forwarded typically there was one which I forwarded to the Group Chief Executive of an irregular consulting contract by – by the then Group General Manager. And yes I still do not have the list of all consulting contracts that
10 were entered into by – I still do not have it today. But at the time I was forwarded with what looked like an irregular contract and I handed it over to Mr Brian Molefe.

ADV MYBURGH SC: So Mr Mkwanazi what you then do at 6.2 is you start listing the findings of the KPMG Nkonki report.

MR MKWANAZI: Yes.

ADV MYBURGH SC: As you say which was finalised in November 2011.

MR MKWANAZI: That is correct.

20 **ADV MYBURGH SC:** Alright. And then over the page at 6.4 you deal with an internal audit report dated May 2011. Is that right?

MR MKWANAZI: Yes. That is correct.

ADV MYBURGH SC: And then I just wanted to make sure that I understand. I mean it seems to me that by and large

then the contents of this seven or eight pages is really taken from the KPMG report. Is that – is that fair enough?

MR MKWANAZI: Hundred percent correct but having said that there were reports like – there was a report published called by Transnet internal audit. It was called Transnet or TFR Procurement Irregularities I think it was done in 2008. I had seen that report. But now when I ask for that report it is not available. So the fact that I am using a November KPMG final report to me really is the fact that then KPMG
10 had to go back and dig deeper of what happened as early as 2005/06/07/08 and '09.

ADV MYBURGH SC: Alright. Then Mr Mkwanazi, just so that I confirm and understand your evidence. You say: Look, there was smaller issues but you have identified. And I suppose it is appropriate to look at the bigger issue. But you have identified three main examples.

MR MKWANAZI: Yes.

ADV MYBURGH SC: It is the VAE contract if I understand you correctly.

20 **MR MKWANAZI:** Yes, that is correct.

ADV MYBURGH SC: The HMG contract.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And what was the third one?

MR MKWANAZI: I think AWP, Alan Wally Parson.

ADV MYBURGH SC: AWP contract.

MR MKWANAZI: That is contract.

ADV MYBURGH SC: I just ask you to confirm. As I understand your evidence. You say that condonation was granted in respect of all of those irregularities but disciplinary action was not instituted against the managers involved.

MR MKWANAZI: Wait, wait. Condonation was granted on condition that the managers involved would be disciplined.

ADV MYBURGH SC: Yes.

10 **MR MKWANAZI:** Yes. Now, when an HMG condonation was granted, Brian Molefe was instructed to discipline Ms Mora Moses. And I am not sure of the dynamics of those discussions but Ms Mora Moses immediately resigned.

ADV MYBURGH SC: Alright.

MR MKWANAZI: Ja.

ADV MYBURGH SC: Just to ...[intervenes]

MR MKWANAZI: Also ...[intervenes]

ADV MYBURGH SC: Sorry.

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** Just to summarise then. In relation to each of these three big contracts ...[intervenes]

MR MKWANAZI: Yes.

ADV MYBURGH SC: ...VAE, HMG and AWP. Condonation was granted on condition, as you have put it, that disciplinary action be taken against the relevant member.

MR MKWANAZI: Yes, yes.

ADV MYBURGH SC: Alright.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: But could I take you please to page 10 of your affidavit?

MR MKWANAZI: [No audible reply]

ADV MYBURGH SC: And let me direct your attention to paragraph 6.5 where you deal with the VAE contract.

MR MKWANAZI: Yes.

10 **ADV MYBURGH SC:** And then at paragraph 6.5.1, the second portion of it, you say:

“The VAE contract of R 960 million in 2006, was subsequently increased to R 1.775 million...

Or billion actually.

“Condonation for contract extension and payments without a signed contract was only applied for in February 2011 and was granted by ME MKWANAZI in his capacity as acting GCCO, subject to disciplinary action been taken against those responsible.”

20

Is that correct?

MR MKWANAZI: Yes, that is correct but ...[intervenes]

ADV MYBURGH SC: So would ...[intervenes]

MR MKWANAZI: But let me... I might have elevated that one to the board. I do not recall now.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Ja.

ADV MYBURGH SC: But would you confirm then that condonation was applied for?

MR MKWANAZI: Yes, it was applied for.

ADV MYBURGH SC: Alright. And then if you go to page 14 of your affidavit, paragraph 8.2 deals with HMG. That is the other big contract that you spoke of. Is that correct?

MR MKWANAZI: That is correct.

10 **ADV MYBURGH SC:** Where do you deal with AWP?

MR MKWANAZI: It is somewhere in the report. I cannot... I am not sure but it is somewhere there. I will have to find it myself. Ja. It is somewhere in there.

ADV MYBURGH SC: Do you deal with it in your declaration?

MR MKWANAZI: Yes. It is actually in a board meeting... minute as well where... I think it was a June board meeting where now this condonation was elevated to the board and the board did condone the expenditure on AWP. But let us
20 come back to HMG. Yes.

ADV MYBURGH SC: Alright. I want to then, to take you to paragraph 9 and to focus then in... on the disciplinary action taken against Mr Gama. Is there anything else that you want to say in relation to deviations and condonation historical?

MR MKWANAZI: Not really. Let us go to then paragraph 9.

ADV MYBURGH SC: Alright. Thank you. So perhaps I could ask you to deal with this. Could you start with paragraph 9.1 and take the Chairperson through your evidence in this regard.

MR MKWANAZI: Yes. Should I read it?

ADV MYBURGH SC: Well, it would be better if you verbalise it but of course you are allowed to have regard to the text of the declaration.

MR MKWANAZI: Now, let me first... let me verbalise it.
10 From the view of... by the way, even this verbalisation, I think it maybe comes from the KPMG report, which was trying to indicate that on similar matters like Gama, the company was consistent in dealing with certain issues.

But then again, on similar matters like Gama, the company was not consistent in that there are other... Now these matters are not identical, by the way. We need to understand that.

Because if then you are looking for detail into what are these matters. They are not the same. They are not the
20 same. Ja. In a nutshell, that is it.

Now in a nutshell as well. What I am trying to indicate and not with certainty is that. Had Gama been given the opportunity to go through the condonation process, maybe the authority to condone might have come with a different sanction.

I do not know. Maybe demotion. Maybe dismissal. I really do not know. But there is that possibility that they are authorising individual, would have come to a different conclusion.

Same as, we had asked as a board that those who were guilty of certain irregular and certain fruitless and wasteful expenditure contracts, must be disciplined. I do not know the outcome of those disciplinary actions.

ADV MYBURGH SC: Alright. Well, let me take you to the
10 text.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You say at paragraph 9.2:

“I submit that with regard to the Gama matter and a review of similar fact matters. The board was of the view that disciplinary action instituted for the committed irregularities appeared rather to be an exception rather than the rule.

We further noted that the disciplinary process was not consistently applied to all transgressions but
20 rather a process of condonation is consistently applied with no disciplinary action being taken against offenders.

These observations are in line with Mr Gama’s view that “he was doubtful” that other employees who acted in a way similar to that way he had, had been

charged for tender irregularities and that there was a selective application of charges.”

You say then:

“Gama was not afforded the opportunity for condonement in his matter, based on the view that the transgressions were of such a serious nature that they warranted a disciplinary action.

10 However, evidence also suggests that other senior employees had in certain instances not complied with the necessary procurement procedures, yet, none of them were subjected to any disciplinary procedures as Mr Gama was.”

MR MKWANAZI: Yes.

ADV MYBURGH SC: That is what it states. And then in two, perhaps, important passages that I may ask you a number of questions about. You say:

20 “I personally fully agree with the disciplinary process and findings of the then Transnet Board. The only difficulty I have, is that there was this common process in the Transnet’s systems called condonation.

Based on the context of TFR on condonations, Gama should have by virtue of consistency of its application been afforded the opportunity to apply for condonation.

Gama was not given the opportunity to apply for this by Transnet Internal Audit and the then GCEO, Ms Maria Ramos.

The outcomes could have been different had he been afforded that opportunity.”

That is what you have said, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Can I comment?

10 **ADV MYBURGH SC:** Yes, certainly.

MR MKWANAZI: That is why I say the outcome could have been that no company have been the same. Even though it would have gone through whatever... ...[indistinct] application. It could have been the same.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Just incidentally. Did Mr Gama apply for condonation?

MR MKWANAZI: I do not know.

20 **ADV MYBURGH SC:** I see.

MR MKWANAZI: I really do not know, ja.

ADV MYBURGH SC: And then at paragraph 9...[intervenens]

CHAIRPERSON: I am sorry. Did you try and find out whether he had at any stage applied for condonation?

MR MKWANAZI: Chairman, I did not because, as you could

imagine, I am dealing with this matter almost seven months after Gama was dismissed. And there, I was not communicating with him or with anybody else. But that would have been the duty of KPMG in my interpretation to find out if he did. Ja, I do not know. Ja.

CHAIRPERSON: Now, is it not the position that an employee who seeks condonation must request condonation or apply for condonation?

MR MKWANAZI: That is correct.

10 **CHAIRPERSON:** Now Mr Gama was a very senior employee in the company.

MR MKWANAZI: Yes.

CHAIRPERSON: He, from what I understand and from what I heard in the past few days about TFR at Transnet, it seems that TFR, it was the largest division at Transnet.

MR MKWANAZI: That is correct.

CHAIRPERSON: Is that correct?

MR MKWANAZI: Yes, it is.

20 **CHAIRPERSON:** So we are talking here about somebody who was employed as CEO of the largest division within cabinet... within Transnet.

MR MKWANAZI: Within Transnet.

CHAIRPERSON: You are talking about somebody who was leading his division with a lot of people, employees and other managerial under him, who is supposed to have... to

have had knowledge of these policies and processes we are talking about. Is that not so?

MR MKWANAZI: That is correct, Chairman.

CHAIRPERSON: Because he would be needed... his job needed him to even guide those under him about... on these policies, is it not?

MR MKWANAZI: That is correct, Chairman.

CHAIRPERSON: Therefore, you are dealing with somebody whom you are supposed to expect to have known of the
10 existence of this condonation process and that an employee can apply for it if the employee wishes it to be evoked. Is that right?

MR MKWANAZI: He should have known, yes.

CHAIRPERSON: And if he did not apply for it, there may be no reason why you or the board should bother to come to his assistance when he elected not to use it when he knew about it, is it not?

MR MKWANAZI: Yes, Chairman.

CHAIRPERSON: You accept that?

20 **MR MKWANAZI:** Yes, I do Chairman.

CHAIRPERSON: Yes. So the question that arises is that when the issue of condonation arose within the context of his dismissal dispute.

I would have expected your attitude, as well as the attitude of the board to be that: Well, one, we are not here

dealing with a lonely employee. We are dealing with an executive who knows the policies of the organisation. First of all, did he apply for it? Did he want condonation?

Because if he wanted condonation, one would expect that would have applied. Did he apply for it?

And if the answer is he did not apply for it, then the next thing is: Why should we assist him with something that he was aware of and could have evoked and did not evoked? That is the attitude I would have expected.

10 Do you think that would... that is a fair expectation?

MR MKWANAZI: Chairman, I do not have facts whether he did or whether he did not.

CHAIRPERSON: H'm.

MR MKWANAZI: But when you look at the quantum of some of the condonations that we had to deal with which ran into billions of rands. And those were granted subject to disciplinary action. I do not have a record of whether did he or did he not. I really do not have that report.

CHAIRPERSON: No, no. I accept that you do not know
20 whether he did or he did not.

MR MKWANAZI: Yes.

CHAIRPERSON: But that is part of my question because I am saying. Since you knew as the board that you are dealing with an executive who ought to know the company policies and so on.

When this issue of condonation was raised in the context of his dismissal. My expectation is that the first reaction from you and the board ought to have been: Did he apply for it?

Because this condonation, you have to apply for it as an employee if you wanted to be evoked. And I am concerned about why you did not ask that question or you did not try to establish whether he did apply for it.

MR MKWANAZI: Chairman, my interpretation is that the
10 KPMG Forensic should have looked into whether he did or not. That is why there is an element of doubt as well, whether it would have been granted or not granted that condonation.

And whether he would have been disciplined or not disciplined based on the other similar matters of contracts which ran into billions and no disciplinary action was taken against those individuals except in 2011 when the offences were committed in 2005.

CHAIRPERSON: Yes, but maybe I am not articulating my
20 concern as clearly as I should. You... I accept that you say you do not know whether he did apply for condonation.

I accept that you say that you did not investigate that issue. I accept for present purposes that you think KPMG maybe should have looked into that issue.

My issue is. My expectation is that before you went to

look into any number of previous cases where condonation had been granted, I would have expected you and the board to say: Oh, there is this issue of condonation being raised. But condonation has to be applied for. We want to find out whether he did apply. And if he did apply, what was the outcome of that process?

Before you could go and dig and dig and dig. That is my question. I am wondering why that is not the attitude you and the board took?

10 And I am asking whether you think my expectation of what your board should have done is unfair or you accept that it is fair?

MR MKWANAZI: I think it is fair Chairman. And I emphasise with your position. And then, of course, these things happened many years ago. I still do not know if he did apply. It will be of interest to still get that information whether did he apply or not.

CHAIRPERSON: H'm, h'm.

MR MKWANAZI: And at Transnet, this application for
20 condonation was a strange thing because at times, it came via Transnet Internal Audit. And now, my recollection now as an executive which is maybe in 1996 of 1997.

CHAIRPERSON: H'm.

MR MKWANAZI: In a situation like this, the request for a condonation would not just have come directly from the

individual. It would have come in partnership with the Transnet Internal Audit so that it is put on record that as you get this condonation you also get the final written warning. That was the culture then but that is many, many years ago.

CHAIRPERSON: H'm. Yes.

MR MKWANAZI: In Transnet itself.

CHAIRPERSON: Yes. Okay no, that is fine. My Myburgh.

ADV MYBURGH SC: Thank you. Mr Mkwanzazi, you say that KPMG should have looked into this but of course, you
10 agreed to reinstate Mr Gama long before KPMG completed its investigation.

MR MKWANAZI: That is correct. As I indicate, there was a preliminary report by KPMG. If you would recall, when Transnet responded to the Public Protector's letter in April of 2011. There was a preliminary KPMG report attached. Now, I have not seen that report.

And it is also true that even as early as... before the end of January, there was a KPMG preliminary report and other reports from Transnet Internal Audit on irregularities and
20 procurement. They are there. Those reports were there.

And they articulated these relevant irregularities and also they articulated the wrongdoings, the sanctions, the no sanction. So there was that element of doubt then that maybe there was a lack of consistency.

ADV MYBURGH SC: But Mr Mkwanzazi, you dealt with Mr

Gama on the basis that he had not offered or applied for condonation. That is the basis upon which you dealt with him.

MR MKWANAZI: I... yes ...[intervenes]

ADV MYBURGH SC: Yes.

MR MKWANAZI: In that, had he applied.

ADV MYBURGH SC: Yes. So let us go again ...[intervenes]

MR MKWANAZI: The outcome would have been different, ja.

10 **ADV MYBURGH SC:** Let us go to the last sentence of paragraph 9.4. You say, in effect, if he had applied, the outcome could have been different. Is that right?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Let us go to paragraph 9.5.

“The incoming Transnet Board of 2010 which was dealing with this mega projects that were frankly not managed well.”

Had you somehow tried and deal with the Gama matter on the assumption that he would have been granted
20 condonation?

I do not understand because... if you just bear with me. At the end of paragraph 9.4 you say: Well, you do not know if he would have. But then you treat him with the benefit of the doubt that he would have been.

MR MKWANAZI: That is correct. But then having said you

treat him with a doubt, you do not just do not leave it there. Then you have got to deal with what type of sanction. And would you then have given Mr Gama.

CHAIRPERSON: I am sorry, Mr Myburgh. Please do not forget your line of thought.

ADV MYBURGH SC: Yes, Chair.

CHAIRPERSON: there is something that I should have asked later... earlier but I thought I would ask later but I think I will canvas it now.

10 Mr Mkwanazi, if... I think we can accept that Mr Gama did not apply for condonation. Are you prepared to accept that or you think he probably did or you think he may or may not?

I think by now we would have known if he had applied for condonation. By the.. he... there was a lengthy disciplinary process. You remember that?

MR MKWANAZI: That is correct, yes.

CHAIRPERSON: At which he was represented, not just by an attorney, as I understand the position, by even senior
20 counsel. You remember that?

MR MKWANAZI: Yes, I do .

CHAIRPERSON: And that disciplinary hearing, I am told, the actual hearing took 14-days. And when you read the rulings of the chairperson, you can see that the matters were dealt with extensively. Now do you think that Mr Gama, if he

had applied for condonation, he would not have told his lawyers that he applied for condonation and it was granted if it was like that ...[intervenes]

MR MKWANAZI: He should have had.

CHAIRPERSON: ...or it was refused, if it was refused? He would have known?

MR MKWANAZI: He should have.

CHAIRPERSON: Yes.

MR MKWANAZI: Definitely, he would have disclosed it, ja.

10 **CHAIRPERSON:** Ja, it is anticipated that he would not have mentioned that he did apply for it, is it not?

MR MKWANAZI: Ja.

CHAIRPERSON: Ja. So we can accept that he did not apply for it. And actually, you do know, do you not, that the issue of condonation was raised at the disciplinary hearing by his lawyers. You know that?

MR MKWANAZI: Yes, I recall, ja.

CHAIRPERSON: So the lawyers would have dealt with all of those issues and they would have said he applied for
20 condonation and if he was granted condonation, they would have said that. We would be knowing it from the ruling of the chairperson.

Or if he was refused condonation and they thought he was unfairly refused, they would have told the chairperson of the disciplinary inquiry. You accept that?

MR MKWANAZI: That is correct.

CHAIRPERSON: So he did not apply for condonation, okay? And if... and you either knew that he did not apply or if you did not know, to get to know would have been the easiest thing, is it not, to find out, did he apply? One way is to ask him or ask his lawyers. You accept that?

MR MKWANAZI: I accept that, ja.

CHAIRPERSON: Yes. Now, as I understand your affidavit. The door that you or the board used in order to get to
10 reinstate him is to say Mr Gama was not offered the opportunity of a condonation. Is that... am I right?

MR MKWANAZI: You are correct, Chairperson.

CHAIRPERSON: Yes. Now, if... is it fair to put it that way, when you are dealing with an executive like Mr Gama because he did not need to be offered condonation? He knew there was this process. He knew he could apply for it. And he elected, for whatever reason, not to apply for that. You accept that, do you not?

MR MKWANAZI: I accept that, Chair.

20 **CHAIRPERSON:** And if there is any unfairness arising from that, it would be an unfairness that he brought it upon himself by deciding not apply for that process, is it not? You accept that?

MR MKWANAZI: Yes.

CHAIRPERSON: You accept that?

MR MKWANAZI: I accept that, Chair.

CHAIRPERSON: Once you accept that there was nothing unfair about him not having been offered the opportunity of condonation because he knew he could apply. He elected for reasons known to himself not to apply. Then, is it not the position that then there is no sympathy for him? There ought to be no sympathy for him.

MR MKWANAZI: Chairman, your observation is correct. And also, then Chairman, it is a stringent environment at
10 Transnet in that... I am not sure how many condonations were granted every year in that organisation.

CHAIRPERSON: H'm.

MR MKWANAZI: And I am not sure but it was quite common. But that he did not take that advantage in terms of that, I do not know why he did not do it. Ja.

CHAIRPERSON: But he cannot blame anybody and the board cannot and should not have relied on that to feel any sympathy for him because this is a senior executive. He knows the policies of the organisation. He knows these
20 processes.

And at the time, or after he had been told that he was going to face a disciplinary inquiry, he employed lawyers including senior counsel. He had no disadvantage in dealing with these charges. He had the advantage of a legal team at his disposal to advise him.

Therefore, the board – that is what I am putting to you – had... did not have grounds based on condonation to feel any sympathy for him. What do you say ?

MR MKWANAZI: Chairman, I agree with you but the board at the time, viewed a lot of other similar cases were done in 2005/2006 and they hung on unresolved with no condonation for five, six years and those condonations get applied for in 2011 because at that time in 2011 we pushed through a communication in the organisation that this
10 condonation must come to a halt and also we elevated the authority to allow condonations to the office of the Group Chief Executive only and on top of that we requested that each and every irregularity in procurement must be reported to the board and to the audit committee regularly because these things have got an impact on how we report our annual financial statements and also, if I recall in terms of these irregularities, we then even said that we will voluntarily report then to the shareholder because they were an embarrassment to the organisation.

20 **CHAIRPERSON:** Yes but all I am simply saying is, insofar as Mr Gama may have been complaining that his dismissal was unfair because of condonation, the board had no grounds to rely on condonation to come to his assistance in circumstances where he had elected, in circumstances where he had elected not to invoke that process. You

accept that?

MR MKWANAZI: I agree with you, Chair.

CHAIRPERSON: Okay, Mr Myburgh?

ADV MYBURGH SC: Yes, thank you. Mr Mkwanazi, before the Chairperson asked you that series of questions, do I understand your evidence to have been in effect that you said well, look, let us assume that he applied for condonation.

MR MKWANAZI: Ja.

10 **ADV MYBURGH SC:** The worst that would have happened to him is that he would have got a final warning because that was the precedent. Sorry ...[intervenes]

MR MKWANAZI: Worse than not, not necessarily a final written warning, maybe worse than that, maybe dismissal, maybe demotion, whatever the people dealing with it would have decided but maybe worse than that, yes.

ADV MYBURGH SC: But then why did you reinstate him?

MR MKWANAZI: The reinstatement comes from a view that there were similar cases or even worse cases where
20 no disciplinary action was taken for six year on these cases.

ADV MYBURGH SC: But, Mr Mkwanazi, you have just said that the result could have been worse, it might have involved a dismissal.

MR MKWANAZI: I do not know – I do not know in terms of

– I am losing my thoughts a little bit, can you come back, Advocate?

ADV MYBURGH SC: Yes, well, I mean the real problem you have is you do not know what would have happened but for some extraordinary reason you dealt with Mr Gama in the most generous fashion and you just divine that he would have somehow have been reinstated.

MR MKWANAZI: [inaudible – speaking simultaneously]

ADV MYBURGH SC: Well, that he somehow would have
10 not been dismissed.

MR MKWANAZI: That is correct at the time when this thing was being dealt with but, as I indicate, there were close to 22 other executives who maybe could have done something similar and based on that sentiment that here are these 22 other executives who have not even been disciplined and also based on discussions and engagements with the board then that decision was taken that maybe a reinstatement with a – ja, with a limited sanction is appropriate, ja.

20 **ADV MYBURGH SC:** But, Mr Mkwanazi, there were people who conducted themselves – certainly that is the finding of KPMG – in the same way as Gama and were dismissed. That was one of their findings.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Correct?

MR MKWANAZI: That is correct, yes.

ADV MYBURGH SC: Yes and in fact have you heard of Mr Salemela and Mr Khanya?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Do you know that they were the two people who signed the GNS confinement and then presented it to Mr Gama and then he signed it?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes. And do you know what
10 happened to them?

MR MKWANAZI: I think they were dismissed.

ADV MYBURGH SC: Yes, they were dismissed. Those are two person involved in the same misconduct as Mr Gama.

CHAIRPERSON: And he was their senior. You remember that?

MR MKWANAZI: Yes, I do, he was the CEO of TFR.

ADV MYBURGH SC: I beg your pardon?

CHAIRPERSON: He says was the CEO of TFR.

20 **MR MKWANAZI:** He was the CEO of TFR.

ADV MYBURGH SC: Yes and have you ever taken the time to read the finding of Nazeer Cassim SC in that case?

MR MKWANAZI: No, I have not.

CHAIRPERSON: He was Chairperson of the disciplinary enquiry relating to those two employees.

MR MKWANAZI: Okay.

CHAIRPERSON: You never read it?

MR MKWANAZI: I have not read it, ja.

ADV MYBURGH SC: You did not have any difficulty with them being dismissed, did you?

MR MKWANAZI: I am not sure if I was there at the time. What year was it, if I can be reminded?

ADV MYBURGH SC: It was in 2010.

MR MKWANAZI: I was not there.

10 **CHAIRPERSON:** But one would have expected that when you dealt with Mr Gama's matter the fact that two employees who were under him had been dismissed in connection with one of the tenders, for which he was dismissed, I would have expected that you would have been informed of that.

MR MKWANAZI: No, we were not informed of those two employees, yes.

CHAIRPERSON: Yes. Did you only get to know about them much later?

20 **MR MKWANAZI:** I did know about it much, much later, yes.

CHAIRPERSON: Yes, okay.

ADV MYBURGH SC: Mr Mkwanazi, let me just understand before I move on. You, as the Acting Group Chief Executive and the Chairperson, when you took a decision

to reinstate Mr Gama where he had been dismissed on one of the charges in relation to GNS, you did not even know that two other managers junior than him had been dismissed. You did not even know that?

MR MKWANAZI: No, I did not.

ADV MYBURGH SC: And if you had known that presumably your decision would have been different, of course.

MR MKWANAZI: It might have been, yes, because I would
10 have had to look at the facts, etcetera, etcetera and even the motivation to the board would have been different.

ADV MYBURGH SC: It might be.

MR MKWANAZI: But on the same matter these individuals already have been dismissed and the motivation would have been completely different.

ADV MYBURGH SC: Alright.

CHAIRPERSON: When you got to know about these two employees who were dismissed who were under Mr Gama would it have been a few months after Mr Gama had come
20 back or are you not able to indicate?

MR MKWANAZI: No, I do not recall but it would not have been a few months, it was much later when one was reading about some of the goings on in Transnet and in former employees because there were many others, by the way, there were many things going on there at the time.

CHAIRPERSON: Yes. Okay, alright. Mr Myburgh?

ADV MYBURGH SC: Well, it seems to me, Mr Mkwanazi, what you did is you focused on alleged inconsistencies instead of consistencies. I mean here were two people whose dismissals were consistent with Mr Gama's. Why did you look at it the other way? I mean, you had the benefit ...[intervenes]

MR MKWANAZI: Advocate, you are correct, I did focus on inconsistencies because my line of thinking was why is this individual – when we say my line, even my submissions to the board and discussions with the board, why is this individual unfairly prejudiced when there are 22 others who should have gone through the same experience and nothing has happened to these? That was my line of thinking at the time and that is the motivation I submitted to the board.

And also at the time, as well, I was getting dossiers, if I can use the word, on a lot of irregularities in the organisation during the month of January 2010.

20 **ADV MYBURGH SC:** Well, we will come to the 22 in time but perhaps I could just ask you, so why did you not just discipline the 22?

MR MKWANAZI: We – hold it, we did ask Brian Molefe to discipline them.

ADV MYBURGH SC: Yes, so?

MR MKWANAZI: As a board. I do not know if he did do that, I do not have feedback on that but I am aware he tried to discipline two and he did discipline one, Gary Kita(?) if I recall and I do not know about the others. We never followed up with Mr Brian Molefe.

ADV MYBURGH SC: Perhaps you miss my point. Why did you not just retain the dismissal of Mr Gama and then discipline and dismiss the other 22? Why not? Why did you do it the other way around?

10 **MR MKWANAZI:** The point is valid, we did it the other way around because we were sensing unfairness on the sanction of dismissal, yes.

CHAIRPERSON: But – well, let me just clarify something. This concept of condonation within Transnet, it did not mean that if condonation was granted the employee would not be disciplined, is that correct?

MR MKWANAZI: That is correct, Chairman.

CHAIRPERSON: Indeed you have testified that in respect of some of the condonations that the board dealt with in
20 2011 you specifically, as the board, instructed the Group CEO Mr Molefe to take disciplinary action against certain managers, is that right?

MR MKWANAZI: That is correct, Chairman, yes.

CHAIRPERSON: Now I must confess that when I first read – or for some time after reading about this point of

condonation, I thought that what it meant was if condonation is granted it means that whatever misconduct the employee may have committed in connection with that procurement will not lead to disciplinary action but Mr Todd's evidence and his affidavit made the distinction and I think your evidence seems to be in line with his to say condonation does not mean that you are not going to be disciplined, is that right?

MR MKWANAZI: I agree, Chairman, yes.

10 **CHAIRPERSON:** No my difficulty then is what then is the relevance of condonation where the issue is whether the employee was dismissed fairly or not. Why is condonation a relevant factor?

MR MKWANAZI: Chairman, you almost need to take the discussion a little bit back. I agree that Mr Gama was dismissed fairly in terms of the processes but the question is, had there been a process of him even applying for that condonation, the outcome might have been different. The outcome could have been the same, frankly, or the
20 outcome could have been he is demoted, the outcome – I do not know what the outcome could have been but because for whatever reason, his issue did not go through a condonation process. Yes, the outcome that came out, came out as per - Advocate [indistinct] 13.57.

CHAIRPERSON: Well, I do not understand. If the policy

of the company is that employees may not do a, b, c, d and if they do a, b, c, d they will be disciplined and the disciplinary process could lead to their dismissal.

MR MKWANAZI: That is correct.

CHAIRPERSON: And an employee is alleged to have committed that misconduct or acts of misconduct, a, b, c, d...

MR MKWANAZI: Ja.

CHAIRPERSON: And a disciplinary process is then
10 instituted, the employee, as I understand your evidence, cannot say as a defence to the charges or charges against him, I have been condoned or my noncompliance with the procedures has been condoned, is it not? That is not a defence to the charge.

MR MKWANAZI: I cannot say that, no, no. Ja.

CHAIRPERSON: So if it is not a defence to the charge, why is it relevant to the question of whether the sanction that gets imposed on the employee at the end of the disciplinary process for misconduct, a, b, c, d was fair?

20 **MR MKWANAZI:** Chairman, I think I will repeat myself. It is a what if. Typically – say Mr Gama had applied for condonation and say the outcome of that application was you are going to be disciplined and the outcome of that disciplinary process is a dismissal, that is fair, Chairman, because he had an opportunity to apply for that

condonation.

Your points about did he apply or did he not apply, was it was granted or was it not granted are valid, Chairman, I agree with you fully and being a senior executive, that he was, your points are valid.

CHAIRPERSON: You see – because part of what I am trying to understand and Mr Myburgh is also trying to do the same, is the reasoning of the board in deciding to reinstate him because when one looks at the charges of
10 which he was found guilty, I do not know in your mind but in my mind they are very serious for a senior executive in the position in which he was, so -.and when you look at the rulings of the Chairperson of the disciplinary enquiry both in regard to whether he was guilty of these charges or not and in regard to the sanction, they are very thorough, they are very, very detailed and then you can see that the Chairperson took care to consider the evidence and the arguments very carefully, you know?

And this was an independent Chairperson, it was
20 not somebody who might have been involved in any - maybe factions within Transnet, if there were factions. But it was somebody who was independent, a senior member of the bar.

So you then say but how could the board decide that this person must be reinstated? So you look for their

reasoning and central to the board's reasoning is the condonation process. So because that is central to the board's reasoning as to why they reinstated Mr Gama, once you say to me condonation does not mean that the employee's misconduct is condoned and he cannot be disciplined anymore, then I say but what was the relevance of condonation then because you have accepted that it was not a defence, it could not be a defence. You cannot say when you are charged for misconduct arising out of procurement processes and say well, I have been granted
10 condonation so you cannot charge me anymore.

So help me understand where it is relevant because it is not relevant to the issue of guilt, is it not? It is not relevant to the question whether the employee is guilty of the charges. Is that right?

MR MKWANAZI: Chairman, there are two stages that the board is trying to explain. The one is that there was a process of condonation within the Transnet but that condonation did not imply that you will not be disciplined.

20 Now knowing that there was this system of condonation then the question was when this Gama matter was dealt with, there were many other cases where condonation had not even been applied for, but I am going back to an argument that Advocate Myburgh touched on, that we do not know whether Gama would have been

granted condonation. Even if he would have been granted, it would have been subject to disciplinary action and the outcome of that disciplinary action, we do not know what it could have been. Could have been a demotion, a dismissal, etcetera.

So that was our thinking then. Now in fairness to what you are saying, the board would have had no ground if a condonation process had been done by Mr Gama to deal with these matters. That board would not have had
10 any grounds.

But that board, as well, would have had to deal with the 22 other cases which originate as early as 2005 and that board did try to do that. I am not sure how far Brian Molefe went but the board did try to deal with those.

CHAIRPERSON: You see, for me, once you say condonation does not mean that any allegations of misconduct or any misconduct by the employees condoned it actually means that those who have the power to make the decision whether the employee is charged or not, they
20 must do their job. What outcome happens, that outcome will happen, okay?

MR MKWANAZI: That is correct.

CHAIRPERSON: Now so when you – if you then say to time, you know, found as a board that, you know, Mr Gama was not offered condonation, my reaction is and so what?

He was not offered condonation and so what? That is my reaction.

MR MKWANAZI: No [inaudible – speaking simultaneously] to that.

CHAIRPERSON: Because I am saying condonation would not have changed anything.

MR MKWANAZI: I agree with ...[intervenes]

CHAIRPERSON: If he was guilty of misconduct the disciplinary process would have led to him being found
10 guilty and if the sanction of dismissal was found to be appropriate it would have been imposed irrespective of whether he was granted condonation or not. You accept that, do you not?

MR MKWANAZI: I accept that, ja.

CHAIRPERSON: So I go back to my question. He was not offered condonation and so what? That is my question because I do not see where it comes in.

MR MKWANAZI: It comes in, Chairman, in that - the process was incomplete in that the issue of condonation
20 should have been tabled by him post this matter being elevated but it looks like he did not and now then this board looks at this and says had he applied for condonation, the outcome have been different – it might not have been different, yes, I agree with you.

CHAIRPERSON: But the fact of the matter is he did not

apply and because he did not apply, he should not get the benefit that he may have got if he had applied. If you want the benefits ...[intervenes]

MR MKWANAZI: Chairman, I do not have my facts whether he applied or not. I do not have my facts.

CHAIRPERSON: Yes, if you want the benefits of condonation, whatever they may be, you apply.

MR MKWANAZI: That is correct, Chairman.

CHAIRPERSON: If you do not apply for condonation you
10 do not get the benefits that come with condonation. You accept that?

MR MKWANAZI: I agree, Chairman.

CHAIRPERSON: And, therefore, once the board accepted that he had not applied, it should not have sought to give him benefits of condonation that would only apply if he had applied. You accept that now?

MR MKWANAZI: Chairman, I do not know if he applied or not. I still do not know, Chairman. But based on the record of the proceedings and also maybe whatever
20 submission his attorney would have made, it looks like he did not apply.

CHAIRPERSON: Yes. So what I am saying is that the board should have sought to establish whether he applied.

MR MKWANAZI: Ja, I agree, Chairman.

CHAIRPERSON: And if it established that he did not

apply, it should not have sought to give him the benefits of something that he did not apply for. You accept that?

MR MKWANAZI: I agree, Chairman. Okay, alright. Mr Myburgh, I know that I interrupted you but I know that you have not forgotten your questions.

ADV MYBURGH SC: No, I have not, thank you.

CHAIRPERSON: But I see we are at twenty fast past, shall we take the tea break?

ADV MYBURGH SC: Certainly, thank you, Mr Chair.

10 **CHAIRPERSON:** Okay, alright, we will take the tea break for fifteen minutes we will resume at twenty to twelve. We adjourn.

MR MKWANAZI: Thank you, Chairman. Thank you, Chair.

INQUIRY ADJOURNS

INQUIRY RESUMES

MR MKWANAZI: I am there.

CHAIRPERSON: Okay let us continue Mr Myburgh.

ADV MYBURGH SC: Thank you Mr Chairperson, Mr Mkwanaazi before I finish off with your statement I just want
20 to confirm as I understand it that you make these two concessions in response to the Chairperson's questions. Firstly, you accept that you went wrong in giving Mr Gama the benefit of not having applied for condonation, correct?

MR MKWANAZI: Yes, that is correct, but also let us not forget that by the time we were dealing with this matter

Gama had taken the matter to the Transnet Bargaining Council and in view of that then the Board had engaged Deneys Reitz etcetera, etcetera, for advice on what you may call the winability of this case at the Bargaining Council, but yes I do accept that Gama should have applied for condonation, ja.

ADV MYBURGH SC: We are going to come to that advice that you received.

MR MKWANAZI: Okay.

10 **ADV MYBURGH SC:** The second concession that you made in response to the Chairperson questions is you accept that in any event condonation and disciplinary action are two different things. Correct?

MR MKWANAZI: I agree, yes.

ADV MYBURGH SC: And in fact as I understand you, you accept that whether or not someone is granted condonation does not necessarily have a bearing on the fairness of the sanction of dismissal. Correct?

MR MKWANAZI: That is correct, ja.

20 **ADV MYBURGH SC:** Thank you. Let us then move to your affidavit. So we have dealt with paragraphs 9.4 and 9.5, then you say at 9.6:

“Following a review of Mr Gama’s dismissal from Transnet the Board resolved that the sanction given to Mr Gama was too harsh given the circumstances.

As well as the fact that he should in fact been granted an opportunity to apply for condonation.”

Well we have dealt with that.

MR MKWANAZI: We have dealt with that, yes.

ADV MYBURGH SC: Then you go onto say at 9.7:

“In view of avoiding further litigation in respect of Mr Gama’s appeal of his dismissal the Board resolved that it would be in the best interest of Transnet to settle the matter by way of a settlement agreement.”

10

MR MKWANAZI: That is correct.

ADV MYBURGH SC: “The terms of which we are negotiated

through Transnet’s internal bargaining process.”

Is that what you say?

MR MKWANAZI: With the help of external lawyers, yes.

ADV MYBURGH SC: But you were actually the negotiator.

MR MKWANAZI: Not really I was the lead negotiator if I can put it that way but in the process I was advised by

20 Deneys Reitz.

ADV MYBURGH SC: I see; you were the lead negotiator?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And then you say:

“I wish further to confirm that neither the settlement nor the terms on which the settlement was made

were influenced by any member of cabinet at the time.”

Do you stand by that?

MR MKWANAZI: That is correct, yes I do.

ADV MYBURGH SC: Now you remember if we go back to the beginning you confirmed that you had been asked to explain the decision to settle with Mr Gama and the terms of the settlement agreement. Do you remember being asked to do that?

10 **MR MKWANAZI:** Yes, asked by who by the way?

ADV MYBURGH SC: By the Commission that is why you put up this declaration.

MR MKWANAZI: Oh, yes.

ADV MYBURGH SC: Why do you not deal in this declaration with what was paid to Mr Gama by way of salary, short term incentives, long term incentives, cost of his Bargaining Council referral, costs of his disciplinary hearing, costs of the High Court proceedings. Why do you not deal with any of that when you were asked to?

20 **MR MKWANAZI:** Why do I not deal with – are you talking about the letter from the Commission?

ADV MYBURGH SC: Yes.

CHAIRPERSON: Yes, he is talking about that letter.

MR MKWANAZI: Ja.

CHAIRPERSON: I am sorry Mr Mkwanazi, Mr Myburgh

you might wish to take him to the letter first.

ADV MYBURGH SC: Yes I will.

CHAIRPERSON: And just highlight the specific issues and then we can deal with a respond.

ADV MYBURGH SC: The letter is attached to your affidavit; you find that at page 21.1.

MR MKWANAZI: Oh, okay, yes I found it yes.

ADV MYBURGH SC: And you will see at page 21.3 there is a heading reinstatement 21.4 retrospectivity of
10 reinstatement these are all contentious issues.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Final written warning, costs those are all the terms of the settlement agreement. Then at 21.6 paragraph 7:

“Chairperson of the Commission has directed me to request you to furnish the Commission on or before 20 August 2020 with an affidavit or a firm declaration in which you explain why you and or the Board of Directors of Transnet considered it correct
20 or proper or justified to conclude the settlement agreement on the terms on which you concluded it.”

MR MKWANAZI: Yes.

ADV MYBURGH SC: So that is just not reinstatement that is why did you give him a final warning that had expired? Why did you pay him full back pay, LTI's and SDI's and why

did you pay his costs? Do you accept you do not address any of that in your declaration?

MR MKWANAZI: If I recall I might not have addressed it but if I recall I wanted to submit a supplementary affidavit here which I have not yet done and the idea was that I would deal with those issues in more detail.

ADV MYBURGH SC: So let us firstly deal with whether or not you dealt with it in this declaration can you please just give us an answer.

10 **MR MKWANAZI:** No, I do not think I have.

ADV MYBURGH SC: Have a look and tell us.

MR MKWANAZI: I do not think I have, yes.

ADV MYBURGH SC: Do you need an opportunity to look Mr Mkwanzazi because I would like a straight and a definitive answer please?

MR MKWANAZI: No, no I can look at the issues that are on that request for an affidavit, yes.

CHAIRPERSON: I think Mr Myburgh is inviting you to look at your affidavit to see whether you do deal with the issues
20 that he is raising with you.

MR MKWANAZI: In my affidavit that I have got in front of me I do not deal with those issues but I did indicate to my lawyer that I wanted to make a supplementary affidavit.

ADV MYBURGH SC: Mr Mkwanzazi you also do not say anything about wanting to put up a supplementary affidavit

in this affidavit, do you?

MR MKWANAZI: No, I did not say anything, yes.

ADV MYBURGH SC: Why not if that was your intention?

CHAIRPERSON: Or maybe let us ask when did you think of the idea of the supplementary affidavit?

MR MKWANAZI: A long time ago and in actual fact I have got a draft but my lawyers are supposed to have a look at it first before it comes to the Commission.

CHAIRPERSON: Oh but quite some time after you had
10 delivered this one to the Commission?

MR MKWANAZI: That is correct I do not know the date of that one but it is dated Chair.

CHAIRPERSON: Okay, alright Mr Myburgh.

ADV MYBURGH SC: Thank you and then at paragraph 10 you say and you have dealt with this already:

“When Brian Molefe joined the Transnet Board he was instructed to take disciplinary action against all officials implicated in the KPMG and the Nkonki report”

20 Correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And then you go and deal with that further you say at 10.5:

“The Board at the time left the rest of the disciplinary processes in the hands of Mr Molefe.”

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And here you say:

“There could have been another 12 senior managers who could have been disciplined.”

Correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Early on in your evidence you spoke about 22 can we reduce that to 12?

MR MKWANAZI: The number is actually higher but let us
10 remain with 12 but yes there could be 22 because then I have got to go back and take them out by line item or by name but I am happy with 12.

ADV MYBURGH SC: Well here you say 12.

MR MKWANAZI: Ja, I say 12 but I am saying it could be higher.

ADV MYBURGH SC: I see.

MR MKWANAZI: I will have to go back to the report and actually generate a list.

ADV MYBURGH SC: Then if we go over the page to
20 paragraph 11 your conclusion:

“The above factors information at the Boards disposal as well as the legal opinion sought by the Board were considered.”

Now we going to come to the sequence and chronology of events in some detail when I take you through it Mr

Mkwanazi but the opinion of which firm of attorneys are you referring to here?

MR MKWANAZI: It is Deneys Reitz.

ADV MYBURGH SC: Alright, so are you saying that Deneys Reitz opinion was before the Board on the 16th?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Alright.

MR MKWANAZI: There were two pieces of opinion by Deneys Reitz if I recall. There was one which you call an
10 abridged version and then there was another one which was a more detailed version substantiating what was in the abridged version, yes.

ADV MYBURGH SC: Alright, well then I think I understand it. So you are right there were Deneys Reitz opinion or certainly input from Deneys Reitz in a document dated the 15th of February the day before the Board meeting and then on the 22nd of February a few days later there was the more expanded version. Correct?

MR MKWANAZI: That is correct, yes.

20 **ADV MYBURGH SC:** So let me then – so is there anything else you want to say in relation to your declaration and your statement before I move into my questioning of you?

MR MKWANAZI: At this stage – you are going to come back to the Deneys Reitz and things, I take it?

ADV MYBURGH SC: Yes.

MR MKWANAZI: Okay good.

ADV MYBURGH SC: So let me start off and I am going to run through the chronology of events. Amongst the files that we have put up is a Bundle 2 where we have got a very long extract from the evidence of Barbara Hogan and perhaps I should start...[intervene]

MR MKWANAZI: Bundle 2.

ADV MYBURGH SC: ...there, yes.

MR MKWANAZI: Okay I have got Bundle 2 in front of me.

10 **ADV MYBURGH SC:** So could I take you please Mr Mkwanazi to page 216. This is an extract from the evidence of Ms Hogan before this Commission.

MR MKWANAZI: Page 216?

ADV MYBURGH SC: 216.

MR MKWANAZI: I have got it, yes.

ADV MYBURGH SC: I thought perhaps the one way to speed this up is for me to take you to page 250 and to read to you a paragraph from her affidavit or statement that was read into the record at page 250 line 10. Are you there?

20 **MR MKWANAZI:** I am there, yes.

CHAIRPERSON: I am sorry Mr Myburgh which bundle?

ADV MYBURGH SC: Bundle 2, Chairperson.

CHAIRPERSON: Bundle 2, yes okay.

ADV MYBURGH SC: From line 11:

“I was shocked and disappointed when President

Zuma informed me that he was adamant that Mr Gama was the only choice for the Group CEO.”

But just to place that in context Mr Gama was suspended on the 1st of September 2009. There was then an attempt to fill a vacant CEO position of Transnet and when Ms Hogan presented the name of Mr Maseko to former President Zuma her evidence was that he was insistent that Mr Gama be appointed and this is what she said:

10 “I was shocked and disappointed when President Zuma informed me that he was adamant that Mr Gama was the only choice for the Group CEO. I informed him that that was not possible and that Mr Gama was not the Board’s choice and I could not override the Board as they had undergone a very professional selection process. I further informed President Zuma that Mr Gama was the subject of an enquiry into procurement irregularities and that it would be very messy to appoint a Group CEO who could potentially be facing fairly serious charges.”

20 President Zuma said:

“That if that was my view no appointment whatsoever would be made at Transnet until Mr Gama’s disciplinary process was over.”

“We agreed that I would provide him with more information.”

You have no doubt heard this of this testimony before

MR MKWANAZI: Yes, I have never seen it in this way but I have read about it, ja.

ADV MYBURGH SC: Yes, you have read about it. So there was then a hiatus because Ms Hogan had to wait until the outcome of Mr Gama’s disciplinary enquiry and then let us go to that part at page 267 at line 22.

MR MKWANAZI: Okay.

ADV MYBURGH SC: “Now you know I waited for the

10 Outcome of the disciplinary hearing but once he was found guilty on three counts and he was dismissed on all three counts the Deputy Minister and myself initiated a process to appoint a new Transnet Board and that was, that was then a year after of this happening and it was then towards July, August 2010.”

Do you see that?

MR MKWANAZI: I see that.

ADV MYBURGH SC: And the if I can ask you to please to
20 go to page 277. Ms Hogan then attempted to constitute a new Board or have a new Board appointed but she says at line number 3 at page 277.

MR MKWANAZI: Which line is that, can I – advocate what paragraph?

ADV MYBURGH SC: Page 277, line 3.

MR MKWANAZI: Yes.

ADV MYBURGH SC: She says:

“Well Mr Gama was fired at the end of 2010 – we know that was in July – and I was fired by the President at the end of October.”

A few lines down...[intervene]

CHAIRPERSON: He was fired on the 29th of June?

ADV MYBURGH SC: 28th or 29th June, yes.

“I was fired by the President at the end of October.”

10 And then at line 10:

“Mr Molefe was then appointed as the CEO of Transnet.”

Line 14:

“Then Mr Gama was reappointed – so this is where you enter the scene – as the CEO of Transnet Freight Rail a couple of months later on the grounds that they had reviewed the sanction and that they had an independent review. I do not quite know what that was about.”

20 Chairperson says:

“This was now a different Board from the one that was in existence during your time.”

“This was a Board - said Ms Hogan – that had been appointed by Minister Gigaba who succeeded me.”

And you we know were the Chairperson, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Now Mr Mkwanazi this is also something I can take you to other passages in her evidence that received a lot of publicity Mr Gama's suspension and disciplinary action it was something of a political hot potato, not so?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And you knew about that?

MR MKWANAZI: Yes, I knew.

10 **ADV MYBURGH SC:** Did you know that Ms Hogan had been or lost her post as a Minister in these circumstances?

MR MKWANAZI: I did not know that in detail but I know it now having read what I am reading.

ADV MYBURGH SC: Now the new Minister, Mr Gigaba he was appointed as I understand it Chairperson you will correct me if I am wrong with the effect from the 1st of November.

CHAIRPERSON: Yes.

20 **ADV MYBURGH SC:** So you then met did you with the new Minister and the Chairperson has asked you and you confirmed you did that in October before he had even been appointed.

MR MKWANAZI: That is correct advocate, Chair.

ADV MYBURGH SC: Okay, and you set out in your declaration what it is that you discussed.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: If we go please back to your declaration Bundle 4A.

MR MKWANAZI: Bundle 4A?

ADV MYBURGH SC: Yes, I want to take you to page 4.

MR MKWANAZI: Okay thank you, yes I am on page 4.

ADV MYBURGH SC: You say at paragraph 4.3...[intervene]

MR MKWANAZI: Yes.

10 **ADV MYBURGH SC:** If I can ask you to drop down to 4.3.3:

“He was somehow aware of problems in the procurement of suppliers and services for mega projects in Transnet.”

Did it surprise you that he was aware of that?

MR MKWANAZI: The answer is no it does not surprise me because maybe some of these were already in the media or maybe he had some inside information say from Transnet on what could have been happening in procurement.

20 **ADV MYBURGH SC:** Mr Mkwanazi was it also in the media that former President Zuma was a devout supporter of Mr Gama?

MR MKWANAZI: Yes, it was and maybe even more in the media but yes it was in the media.

ADV MYBURGH SC: And you were aware of that?

MR MKWANAZI: Yes, I was aware of that.

ADV MYBURGH SC: So let us go to paragraph 4.3.4:

“He was also under the impression that disciplinary matters at Transnet were racially based.”

And it is the next part of the sentence that I want to focus on.

“And that there was a condonation process at Transnet that was generally used to deal with deviations within Transnet.”

10 He seemed to know a lot about this.

MR MKWANAZI: Yes I see that paragraph.

ADV MYBURGH SC: Yes, how do you think he came to know about that? You smile.

MR MKWANAZI: You know advocate you need to understand how State owned entities operate. They operate in very strange ways where within this entities some of these Ministers have got sources of information particularly these big SOC's like say Eskom, Transnet and I do not know who else but I suspect somebody inside the
20 organisation would have briefed the Minister about that or maybe even outside of the organisation in that case I am assuming that it could have been Gama himself.

ADV MYBURGH SC: Yes.

CHAIRPERSON: I am sorry; do you mean that even if a Minister is not a Minister of Public Enterprises very often

they have people within the different SOE's that maybe tell them some of the matters that are going on in those SOE's or what?

MR MKWANAZI: That is what I mean Chairman.

CHAIRPERSON: They have a lot of interest in the SOE's?

MR MKWANAZI: That is what I mean Chairman maybe to take it a little bit further Chairman you will have to understand that some of these Ministers and members of parliament have got companies that somehow I suspect
10 they have got an interest in what is happening in these companies.

CHAIRPERSON: Yes.

MR MKWANAZI: In these State owned entities so which is why they have an interest of tender opportunities if I can use the word of whether did they exist or not.

CHAIRPERSON: Yes, well obviously Mr Mkwanzazi you see I am laughing.

MR MKWANAZI: Yes.

CHAIRPERSON: So you, of course you were involved in
20 different also or is it different times and in different capacities so I take it you know what you are talking about. Is that right?

MR MKWANAZI: That is correct Chairman.

CHAIRPERSON: So you mean a lot of the Ministers would have companies and they would be looking at tender

opportunities in the various SOE's?

MR MKWANAZI: That is correct Chairman.

CHAIRPERSON: Yes, thank you.

ADV MYBURGH SC: Thank you Mr Chairman. Mr Mkwanzazi so just before the Chairman asked you a question I just want you to confirm that you said in fact that the Minister might actually have heard about this from Mr Gama himself. Correct?

MR MKWANAZI: Yes, I did let me maybe expand on this
10 the Chairman will recall that at some stage while Mr Gama was on suspension Mr Gama was lobbying virtually many Ministers. I do not know which ones now but yes therefore my assumption is that maybe he had shared this or if it was not him it could have been any other employee because the employees in these State owned entities are strange animals to a certain extent because they have got certain direct lines to Ministers to which even me as the Chairman at the time might not have had.

CHAIRPERSON: Well when Ms Barbara Hogan gave
20 evidence about the matter of Mr Gama she also did say that a number of politicians including Ministers went public while the process of recruiting of or appointing a Group CEO while it was underway and when there was talk of Mr Gama being suspended or being charged or when he had been suspended or was being charged there were some

politicians who went public calling for Mr Gama to be appointed as the Group CEO and saying that the charges against him were unfair or were trumped up or were intended to prevent him from being appointed as a Group CEO of Transnet Ms Hogan have that evidence and I think at the time when she gave evidence a newspaper clippings were included in the bundle that was used.

And indeed I think there was a newspaper article where I think Mr Mantashe was said to have made
10 statements as well supporting Mr Gama. I think Minister Nyanda, General Nyanda I think he was Minister at the time he was also reported in some article to have also come out as well as Minister Radebe so that is in the public domain and it is before the Commission in terms of the bundles relating to Ms Hogan's evidence so that part was referred to.

ADV MYBURGH SC: And as I understand it you knew about all of that?

MR MKWANAZI: It was in the news.

20 **ADV MYBURGH SC:** Perhaps if I could just ask you to turn to page 253 of Bundle 2, two five three.

MR MKWANAZI: Okay, two five three, wait two five three is it Ms Barbara Hogan's bundle?

ADV MYBURGH SC: Yes, at the top again it is quoting for her statement:

“Mr Gama was formerly charged by Transnet and later suspended on 1 September 2009 immediately before and in the days following his suspension.”

Minister Jeff Radebe:

“Gama will become CEO.”

Minister Simphiwe Nyanda:

10 “Gama is being persecuted like Jacob Zuma and also ANC, the SACP, the South African Transport Union and the ANC Youth League under Julius Malema at the time all issued strong and harsh statements in support of Gama accusing Transnet of persecuting him. This was reflected in numerous statements and reported in the media which I attach.”

Do you see that?

MR MKWANAZI: I see that.

ADV MYBURGH SC: Now are you suggesting to the Chairperson that when you met with the new Minister or soon to be appointed Minister he never spoke to you about
20 or mentioned Mr Gama?

MR MKWANAZI: He did.

ADV MYBURGH SC: Yes.

MR MKWANAZI: In my opening line or paragraph I do indicate that I met Mr Gigaba towards the end of October. And amongst a number of issues he was talking about

transformation in the context of black suppliers not been given an opportunity particularly black legal firms and also African women not being elevated to top positions. And of course he mentioned the Gama matter and felt that the sanction in the Gama matter was too harsh or something because there was this condonation process at Transnet that had not been followed. He did mention something.

ADV MYBURGH SC: Why did you not put that in your – in your declaration?

10 **MR MKWANAZI:** Yes I did.

ADV MYBURGH SC: Were you going to put that in your supplementary affidavit perhaps?

MR MKWANAZI: No it is there. Let me check. What folder it is in here.

CHAIRPERSON: I think Mr Mkwanazi what Mr Myburgh is talking about is that you did not mention in the affidavit that he raised the issue of the Mr Gama. You just said that he raised the issue of condonation from deviations.

MR MKWANAZI: If you read on page 4 of my submission.

20 **CHAIRPERSON:** Yes.

MR MKWANAZI: Paragraph 4.3.4.

“He was under the impression that these matters at Transnet were racially biased and that there was a condonation process at Transnet that was generally used to deal with

deviations within Transnet.”

CHAIRPERSON: He was talking about the Gama matter under that.

MR MKWANAZI: I – that is correct as one of the matters yes.

CHAIRPERSON: Yes. Oh okay. Well I must say that when I read your affidavit and I came to that because you did not refer to Mr Gama or his case as such.

MR MKWANAZI: Yes.

10 **CHAIRPERSON:** I had a strong suspicion that he must have been talking to you about the Gama matter but you are now confirming that there he was talking about the Gama matter. Is that right you are confirming that?

MR MKWANAZI: That is correct Chairperson yes.

CHAIRPERSON: And he said that the – the sanction of dismissal in the Gama matter was too harsh or something – the words to that effect.

MR MKWANAZI: He was basically trying to indicate that there was racial bias against African executives.

20 **CHAIRPERSON:** Yes.

MR MKWANAZI: In Transnet in that African executives.

CHAIRPERSON: Yes.

MR MKWANAZI: Were dismissed in disciplinary issues and yet white executives.

CHAIRPERSON: Yes.

MR MKWANAZI: Were not even charged or disciplined.

CHAIRPERSON: yes.

MR MKWANAZI: In procurement issues ja.

CHAIRPERSON: Yes. When he referred to the issue of condonation of the condonation process or a condonation process at Transnet under that 4.3.4 was he saying that condonation had not been used in regard to Mr Gama and that should be looked into?

MR MKWANAZI: He was not specific that it should be
10 looked into but he was generalising that there was this process etcetera, etcetera.

CHAIRPERSON: Yes.

MR MKWANAZI: And here is this executive who has now been dismissed.

CHAIRPERSON: Yes. Yes. Did – and when he said the sanction of dismissal in Mr Gama's case was too harsh.

MR MKWANAZI: He was basing it on the Public Protector letter as well if I recall.

CHAIRPERSON: Oh.

20 **MR MKWANAZI:** And yes there was by that time there was a Public Protector letter on the 22nd December.

CHAIRPERSON: Yes. When he spoke to you did he have that documentation with him or he was just referring to it because he knew it?

MR MKWANAZI: No he did not refer to it at all. No – I

might be mixing things here. Because the letter of the Public Protector only came out on the 22nd.

CHAIRPERSON: Oh okay.

MR MKWANAZI: And the letter from Member of Parliament Vytjie Mentoor came on the 4 December.

CHAIRPERSON: Oh.

MR MKWANAZI: So it – there would be no linkage.

CHAIRPERSON: Oh okay. But he – so what was he basing his view on that the sanction of dismissal in Mr Gama's case
10 was too harsh as you recall? What was he basing it on? On the racial issue?

MR MKWANAZI: In a nutshell what he was trying to say was white executives get away with serious – much more serious offences.

CHAIRPERSON: Yes. Okay and black executives would be dismissed for less serious.

MR MKWANAZI: That is correct.

CHAIRPERSON: Yes. And – okay alright. But all of these matters that you set out under 4.3 that is 4.3.1 up to 4.3.4
20 were matters that he was asking you as the....

MR MKWANAZI: That is correct.

CHAIRPERSON: Person he was offering the position of chairperson of the board he was asking you to look into seriously at Transnet?

MR MKWANAZI: As a board yes.

CHAIRPERSON: As a board yes, yes.

MR MKWANAZI: Yes.

CHAIRPERSON: Okay alright. Mr Myburgh.

ADV MYBURGH SC: So was it apparent to use that Minister Gigaba had been holding discussions with Mr Gama or not?

MR MKWANAZI: At the time no but I am aware that Mr Gama had met the other Ministers and even met the President if I recall based on even Ms Barbara Hogan's submission. I was aware that Mr Gama was running all over
10 the show trying to get sympathy from various organisations.

ADV MYBURGH SC: And when the Minister Gigaba told you that he thought the sanction of dismissal for Mr Gama was too harsh what sanction did he have in mind?

MR MKWANAZI: Oh please Advocate how could you [not audible].

CHAIRPERSON: You did not ask him? Or he did not offer?

MR MKWANAZI: No, no, no. I did not ask him, he did not volunteer as well, no.

CHAIRPERSON: Yes.

20 **MR MKWANAZI:** Got no clue.

CHAIRPERSON: Okay.

ADV MYBURGH SC: Was it clear to you though that Minister Gigaba would have been in favour of the reinstatement of Mr Gama from this discussion and his statement that he considered the dismissal too harsh?

MR MKWANAZI: No.

ADV MYBURGH SC: Was that clear to you?

MR MKWANAZI: Not necessarily reinstatement. The question was the fairness or unfairness of that process which I did then pose to my legal advisors later on and they looked at it from two ways if I recall who was Deneys Reitz the fairness of the process itself and they concluded that the process was fair. And then my legal advisors as well the fairness of the sanction and the fact that the matter was now
10 going through Transnet Bargaining Council and therefore weighing the odds of winning or losing at the Transnet Bargaining Council. Those are the two things that they said – Reitz helped me with if I recall and then later they helped to draft a letter to respond to the Public Protector on some of the related issues.

ADV MYBURGH SC: Mr Mkwanzazi that really does not answer my question. Let me perhaps put it another way.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Was it clear to you further to this
20 discussion with Minister Gigaba that he at very least would have been in favour of a settlement then with Mr Gama?

MR MKWANAZI: Not really it was not clear to me. You need to understand that in my negotiations with the sub-committee of the board of this so called settlement at some stage I wanted Gama to take a demotion and at some stage as part

of the negotiations. I put in various things. I had refused to offer him whatever positions he thought he would get. So I do not think that could have been something that he thought I would do. But yes I – as I looked into it on behalf of the board I had to look at the fairness, unfairness and the probability of winning or losing at the Bargaining Council.

ADV MYBURGH SC: But Mr Mkwanazi again that is not what I asked you. Could we just have a straight answer and then I will move on.

10 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: Was it clear to you further to this discussion that Mr Gigaba at least would have been in favour of a settlement with Mr Gama yes or no?

MR MKWANAZI: Not necessarily a settlement because [00:09:59] from where I sat I needed advice from legal experts on how to deal with this matter. Because now this matter was going to the Transnet Bargaining Council. So ja.

CHAIRPERSON: Well the one thing which you have said Mr Mkwanazi is that Mr Gigaba did say that the sanction of
20 dismissal against Mr Gama was too harsh, is that correct?

MR MKWANAZI: I think so. I think he did indicate that ...

CHAIRPERSON: Or was harsh?

MR MKWANAZI: It was – he felt it was unfair.

CHAIRPERSON: It was unfair.

MR MKWANAZI: Yes.

CHAIRPERSON: Yes. Now based on what he said to you which you understood to be the grounds for him thinking it was unfair – from what you said to me it seemed clear that he – it was implied that he thought that Mr Gama should not have been dismissed. Would you agree with that?

MR MKWANAZI: I would agree with it but he did understand the dynamics of a disciplinary process and also the outcomes.

CHAIRPERSON: Yes, no, no. All I am saying...

10 **MR MKWANAZI:** He did not understand that.

CHAIRPERSON: All I am simply saying is that based on his discussion with you.

MR MKWANAZI: Ja.

CHAIRPERSON: In regard to the matter of Mr Gama it seems that it was implied that his view was that Mr Gama should not have been dismissed because you said he referred to – he said white executives do more serious – commit more serious acts of misconduct and do not get dismissed but black executives get dismissed even if they
20 have done something less serious.

MR MKWANAZI: No. He did not say that he should not have been dismissed. It was ...

CHAIRPERSON: No, no. No.

MR MKWANAZI: It was questioning the fairness or unfairness of the process.

CHAIRPERSON: Hang on, hang on. I just want to make sure we understand. You have not said to me that he said Mr – he expressly said Mr Gama should not have been dismissed. You have not said that. Okay.

MR MKWANAZI: Ja.

CHAIRPERSON: And I understand that you have not said that but what I am putting to you is what seems to me to be what was implied. But you must – once I put the proposition to you you will indicate if you say you do not share my
10 thinking that it was implied. My...

MR MKWANAZI: No...

CHAIRPERSON: My – my thinking is that if he says the dismissal was harsh or was unfair because – and he advances as the reason that white executives do not get dismissed even when they have done or committed more serious offences. It seems to me that he was saying if Mr Gama was a white executive he would not have been dismissed. That seems to be implied to me. Do you think I am being fair to him?

20 **MR MKWANAZI:** Chairman I agree with your interpretation but then there is a different interpretation that then says even in reviewing that process with Deneys Reitz the outcome could have been different.

CHAIRPERSON: Yes. No but at this stage I just want us to stay with what we make of what he said to you that is Mr

Gigaba.

MR MKWANAZI: Ja.

CHAIRPERSON: So I understood you to be saying you agree with my interpretation of what seems to be implied.

MR MKWANAZI: Of racism?

CHAIRPERSON: Yes. You agree with that?

MR MKWANAZI: Yes.

CHAIRPERSON: Okay alright.

MR MKWANAZI: Yes.

10 **CHAIRPERSON:** Okay. Mr Myburgh.

ADV MYBURGH SC: Yes thank you. Just so that I have it clear in my mind he considered the sanction of dismissal too harsh, correct?

MR MKWANAZI: He did not choose those words, no.

ADV MYBURGH SC: Well that was the note I took of your evidence.

MR MKWANAZI: No unfair was the word.

ADV MYBURGH SC: I see. Because I was going to...

MR MKWANAZI: Unfair was the word.

20 **ADV MYBURGH SC:** Suggest to you.

MR MKWANAZI: And therefore that is why as well when I briefed Deneys Reitz I briefed him on the basis of unfairness on two issues. On the process itself which they came out and said it was fair. And then on the sanction itself then they – they also created doubt in view of the fact that this

thing was now going to the Transnet Bargaining Council.

ADV MYBURGH SC: Alright we will come to that. Let me then...

CHAIRPERSON: I just wanted to say I had also thought Mr Mkwanazi had used harsh or too harsh earlier on but I may be mistaken.

MR MKWANAZI: Let – let me explain where the harsh comes from.

CHAIRPERSON: Yes.

10 **MR MKWANAZI:** When we were deliberating at board in February or late January that is where the statement of harsh was coming from – from some other board members.

CHAIRPERSON: Okay.

ADV MYBURGH SC: You see...

MR MKWANAZI: Yes that statement did come up.

ADV MYBURGH SC: Mr Mkwanazi really what I wanted to put to you is that my note reflects that you said that Minister Gigaba said dismissal was too harsh and I wanted to put to you that that is precisely the basis upon which the board in a
20 few months' time reinstated him. The minute says dismissal was too harsh. Is that just a coincidence?

MR MKWANAZI: Maybe but I am aware that the board – some members of the board did propose that and even the resolution of the board did capture such a statement.

ADV MYBURGH SC: Alright. Let me carry on with the

chronology. So this is a meeting you had in October.

MR MKWANAZI: Ja.

ADV MYBURGH SC: There is some reference in the ...

CHAIRPERSON: I am sorry.

ADV MYBURGH SC: I beg your pardon.

CHAIRPERSON: Mr Myburgh please do not forget.

ADV MYBURGH SC: No I will not.

CHAIRPERSON: What you have in mind. Let me go back to
this issue of harsh. Mr Mkwanazi – there can be no doubt
10 can there be that Mr Gigaba must have thought that Mr – the
sanction of dismissal against Mr Gama was too harsh.

MR MKWANAZI: He might have thought that ja.

CHAIRPERSON: Because his – because the statement he
made to you when he said whites commit more serious acts
of misconduct and do not get dismissed. In the context it
could only have made that – he thought that dismissal was
too harsh.

MR MKWANAZI: He did Chair.

CHAIRPERSON: You agree?

20 **MR MKWANAZI:** He thought that yes I agree.

CHAIRPERSON: Yes okay alright.

ADV MYBURGH SC: Thank you Chairperson. Mr Mkwanazi
let us then move forward from October. There is a statement
in the papers that says that:

“The new board commenced its duties on the

13 December 2010”

MR MKWANAZI: What page is that?

ADV MYBURGH SC: I am asking you to confirm that the new board commenced its duties on the 13 December 2010, is that correct?

MR MKWANAZI: Is it Bundle 4?

ADV MYBURGH SC: No I am asking you. When did you commence your duties – the new board?

MR MKWANAZI: It could have been December 2010.

10 **ADV MYBURGH SC:** Yes.

MR MKWANAZI: Or December 13.

ADV MYBURGH SC: It was actually December 10.

MR MKWANAZI: I am not sure now.

CHAIRPERSON: But somewhere in around December 10, 13 or thereabout?

MR MKWANAZI: Middle of December.

CHAIRPERSON: Ja.

MR MKWANAZI: Yes.

CHAIRPERSON: Okay.

20 **ADV MYBURGH SC:** The middle of December?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Alright now if you go to Bundle 2 can I ask you please to turn to page 24.

MR MKWANAZI: Can I go to Bundle 2? Okay. Page 24.

ADV MYBURGH SC: Yes that is the Public Protectors

complaint.

MR MKWANAZI: Okay. Page 24.

CHAIRPERSON: What page?

ADV MYBURGH SC: Page 24 Chairperson.

CHAIRPERSON: Okay.

ADV MYBURGH SC: So this complaint you receive really within a week or two of commencing your duties as the new chairperson, correct?

MR MKWANAZI: That is correct.

10 **CHAIRPERSON:** I am sorry Mr Myburgh. You made a certain point about the use of the sanction being too harsh a few minutes ago. I just want to follow up on that before you proceed.

ADV MYBURGH SC: Certainly.

CHAIRPERSON: Otherwise I forget. Mr Mkwanazi Mr Myburgh just asked you a few minutes ago whether it was coincidental that you said earlier on that Mr Gigaba said the sanction of dismissal was too harsh and we know that later on you said no he said it was unfair. But he was asking
20 you...

MR MKWANAZI: It was unfair.

CHAIRPERSON: Ja.

MR MKWANAZI: To me he was questioning the unfairness.

CHAIRPERSON: Ja you said that afterwards. He was asking whether it was just coincidental that the board also

used the same terminology. You have responded to that I am not asking you to respond to that one. I want to put this to you that...oh you want to say something?

MR MKWANAZI: Yes.

CHAIRPERSON: Yes, ja. Say it.

MR MKWANAZI: No continue Chairman.

CHAIRPERSON: Oh okay alright. No I want to say when I saw that paragraph 4.3.4 of your affidavit where you say – where you say – have you lost connection? Mr Mkwanazi.

10 **MR MKWANAZI:** No I am there Chairman.

CHAIRPERSON: Oh okay. I just want you to get settled.

MR MKWANAZI: Paragraph 4.3.4.

CHAIRPERSON: Ja that is the one we were use – we were referring to.

MR MKWANAZI: Yes.

CHAIRPERSON: Ja.

MR MKWANAZI: Yes I have got it.

CHAIRPERSON: So where you said one of the issues that the Minister asked your board to look into was the issue of
20 condonation processes in relation to procurement matters, deviations and so on.

MR MKWANAZI: That is correct.

CHAIRPERSON: So – so I found it interesting that one of the issues Mr Gigaba raised at that first meeting was this issue of condonation from deviation in procurement

processes at Transnet. And the basis on which the board ultimately reinstated Mr Gama was condonation as well. Do you want to say something on that?

MR MKWANAZI: Chairman your analysis is correct. The basis was condonation and the fact that the matter now was going to the Transnet Bargaining Council and there was doubt whether we would win the case as it goes to the Bargaining Council. Yes.

CHAIRPERSON: Yes but what my context was here is Mr
10 Gigaba meeting with you – the first meeting he has with you where he offers you the position of Chairperson of the board of Transnet and conveys to you issues that he must have seen as issues of priority that your board should look at. He raises this issue of condonation and of course you have now confirmed that he did discuss the Gama matter with you and then a few months later the board.

MR MKWANAZI: That is correct.

CHAIRPERSON: A few months later the board uses condonation to actually justify its decision to reinstate Mr
20 Gama. So there seems to be a connection in my mind between his suggestion of condonation and the reinstatement. You agree?

MR MKWANAZI: There is a link yes.

CHAIRPERSON: There is a link. Okay thank you. Mr Myburgh.

ADV MYBURGH SC: Thank you. Mr Mkwanazi I was going to take you to the Public Protector's letter addressed to you at page 2 Bundle 2 on the 22 December 2010 a week or two?

MR MKWANAZI: Yes. I have got it in front of me.

ADV MYBURGH SC: A week or two after you took up your position as the new chairperson. I just wanted to...

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Confirm that in the second paragraph it reads:

10 “The complaint alleged irregularities in procurement at Transnet. Further that the then Transnet board had unfairly conspired to prevent Mr Gama from successfully applying for the vacant post of Group Chief Executive which was about to vacated by Ms Maria Ramos. In a meeting with him Mr Gama alleged that the motive for his suspension could only have been to scupper his chances of successfully applying for the post.”

And then the following – and if you go over the page 25.

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** If you look at Roman numeral iv “That there existed internally a procedure for condoning exceeding limits in respect of transactions etcetera.”

The very point that Mr Gigaba had raised with you, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Now I want to take you please to –

sorry.

CHAIRPERSON: You want to say something Mr Mkwanazi?

MR MKWANAZI: No, No Chairman nothing.

CHAIRPERSON: Oh okay. I thought you – there was something you wanted to add. Okay Mr Myburgh.

ADV MYBURGH SC: Yes thank you. Now we know that you then appointed in the next year – early in the next year KPMG and Nkonki to investigate this complaint, correct?

MR MKWANAZI: That is correct.

10 **ADV MYBURGH SC:** Could I take you please to Bundle 1 page 811, 811.

MR MKWANAZI: Bundle 1 page 800?

ADV MYBURGH SC: And 11.

MR MKWANAZI: I have got it here.

ADV MYBURGH SC: Now this is a letter from KPMG and Nkonki dated the 12 January 2011 setting out their ...[intervenes]

CHAIRPERSON: Just wait for me Mr Myburgh.

ADV MYBURGH SC: I beg your pardon I am so sorry.

20 **CHAIRPERSON:** I have not received the bundle yet. Yes you may proceed.

ADV MYBURGH SC: Thank you. This is a letter dated the 12 January 2011 from KPMG and Nkonki where they set out their terms and conditions of engagement. Do you see that?

MR MKWANAZI: I see that.

ADV MYBURGH SC: Now that letter is addressed to Mr Mapoma General Manager Legal Services. If I could direct your attention to paragraph 1 it says:

“Pursuant to our meeting on 11 January we confirm and thank you for requesting us etcetera.”

Did you attend that meeting on the 11 January?

MR MKWANAZI: I co-signed that document.

ADV MYBURGH SC: Yes I know that.

MR MKWANAZI: My signature is at the bottom yes. I do not
10 recall if I attended it but I co-signed that document.

ADV MYBURGH SC: Might you have attended the initial briefing meeting

MR MKWANAZI: Yes. I do not recall the meeting.

ADV MYBURGH SC: So what you presumably would agree is that you asked Mr Mapoma to assist you.

MR MKWANAZI: Yes.

ADV MYBURGH SC: With investigating the Public Protectors report, correct?

MR MKWANAZI: That is correct yes.

20 **ADV MYBURGH SC:** And that is presumably why he must have at least have attended this meeting and then the letter setting out terms of engagement is sent to him. Correct?

MR MKWANAZI: It is correct.

ADV MYBURGH SC: Can we go to the end of that document at page 820. You confirm then that you ultimately signed

this document.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: On the 24 January.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: So Mr Mkwanazi Mr Mapoma agrees with you that you tasked him with assisting him with responding to the Public Protector's complaint and investigating it which related to Mr Gama.

MR MKWANAZI: That is correct. Yes.

10 **ADV MYBURGH SC:** What Mr Mapoma says is that right from the outset of his involvement in this project you told him that you had been instructed to reinstate Mr Gama.

MR MKWANAZI: Not in that fashion. The instruction was can you look at the fairness or unfairness of the Gama disciplinary.

ADV MYBURGH SC: So who told you to do that?

MR MKWANAZI: That was my understanding in terms of the shareholder instruction. It was not inviting.

20 **ADV MYBURGH SC:** Was that Mr Gigaba at the October meeting?

MR MKWANAZI: That is correct, Chairperson. That is correct.

ADV MYBURGH SC: So now we can add another paragraph to your affidavit?

MR MKWANAZI: You... I am not sure. Can you continue?

ADV MYBURGH SC: Well, so far you have told the Chairperson – and these are critically important things.

MR MKWANAZI: Yes.

ADV MYBURGH SC: So far you have told the Chairperson is that what we can add to your declaration is, that Mr Gigaba was of the view that Mr Gama's dismissal was too harsh.

Now, further questioning, what you say can be added to your affidavit is also that he asked you to review the
10 dismissal of Mr Gama, correct?

MR MKWANAZI: I am not sure. Is the fairness or unfairness. Yes, correct.

ADV MYBURGH SC: Tell us what instruction he gave you, please.

MR MKWANAZI: I think I touched on it a little bit in my opening remark in paragraph 1.3.4. Is that, he felt that the disciplinary process on Gama was unfair based on his assumption that white executives who did similar offences were never dismissed but he did not have facts. He was just
20 questioning the unfairness.

So then, I took that request to look at unfairness to Siyabola(?), Mapoma and also to Deneys Reitz. And also knowing very well that now there was this Transnet Bargaining Council.

Yes, I did have a meeting with Deneys Reitz [poor

connection – unclear] to look at that unfairness
...[intervenes]

ADV MYBURGH SC: Mr Mkwanazi, please can you just focus on what I am asking you?

MR MKWANAZI: Yes.

ADV MYBURGH SC: You said just now that you were asked to review the dismissal of Mr Gama.

MR MKWANAZI: I would not call it a review but
...[intervenes]

10 **ADV MYBURGH SC:** Well, how would you put it?

MR MKWANAZI: ...as a view to review the fairness or unfairness of the dismissal.

ADV MYBURGH SC: Well, then you and I agree with one another. So ...[intervenes]

MR MKWANAZI: [poor connection – unclear]

ADV MYBURGH SC: ...Mr Gigaba asked you to do that?

MR MKWANAZI: Yes.

ADV MYBURGH SC: And he was... his own view that it was unfair.

20 **MR MKWANAZI:** That is correct.

CHAIRPERSON: Before you proceed Mr Myburgh. You say Mr Mkwanazi he asked you to or he thought that he... he said that the process, the disciplinary process had been unfair but you say ...[intervenes]

MR MKWANAZI: That is correct.

CHAIRPERSON: ...what he put, what he told you in support of that was how white executives were treated ...[intervenes]

MR MKWANAZI: That is correct. He racialised it.

CHAIRPERSON: Yes, he racialised, ja.

MR MKWANAZI: That is correct.

CHAIRPERSON: Now, as I see it, that has got nothing to do with the process as such. Of course, he might have put it that way. I, obviously, I was not there. I do not know.

So you know, a process really is about whether the
10 procedure which was followed was fair. That is the process.

But it seems to me that as if his complaint was that white executives were treated favourable, black executives were treated less favourable in relation to disciplinary matters, it went to the substance of the dismissal.

You might be able to say yes. You might not be able to say yes. But I am just putting to you what... it looks like the reference to process might be a wrong terminology.

MR MKWANAZI: The reference to process?

CHAIRPERSON: Yes. Because it is not about whether he
20 was given a reasonable notice as to when the disciplinary hearing will start. It is not about whether he was given enough time to give his evidence at the hearing.

It is not about whether he was given enough time to cross-examine witnesses who were implicating him. It is not about whether he was allowed to call witnesses. It is not

about that.

It is simply to say you are treating black executives less favourable compared to white executives when it comes to disciplinary matters.

MR MKWANAZI: Chairman, that is a good summary. Thank you.

CHAIRPERSON: Yes. Okay alright. Mr Myburgh.

ADV MYBURGH SC: So he asked you then to look into fairness of Mr Gama's dismissal, correct?

10 **MR MKWANAZI:** That is correct, Chairman.

ADV MYBURGH SC: Did you feel that you were at liberty to refuse that request?

MR MKWANAZI: Maybe not because at times, this could have been a shareholder instruction. But then, that is why I had to follow a certain process to try and address his fairness or unfairness.

ADV MYBURGH SC: Did you construe it as a shareholder instruction, yes or no?

MR MKWANAZI: I think it was.

20 **ADV MYBURGH SC:** Thank you.

MR MKWANAZI: But having said that. You... we need to understand a certain technicality because he was not yet the minister or end of October. I think he became minister 1st of November 2010. Yes. But I construed it as a shareholder request.

ADV MYBURGH SC: Yes, but he could have had another meeting with you if you wanted.

MR MKWANAZI: [No audible reply]

ADV MYBURGH SC: Alright. So now ...[intervenes]

CHAIRPERSON: Sorry. One second Mr Myburgh. I had wanted to go back to that, the issue you have just touched upon, Mr Mkwanazi. I wanted to ask you the question whether at the time you were meeting with him, your recollection is that you were meeting the... somebody who
10 was Minister of Public Enterprises already ...[intervenes]

MR MKWANAZI: I was under that impression, yes.

CHAIRPERSON: Oh, is your recollection that ...[intervenes]

MR MKWANAZI: I was under that impression, yes.

CHAIRPERSON: You were under that impression? But ...[intervenes]

MR MKWANAZI: Yes.

CHAIRPERSON: Oh, okay alright. Okay. Thank you.

ADV MYBURGH SC: Let me take you please to Mr Mapoma's evidence. Could you turn to Bundle 3?

20 **MR MKWANAZI:** Okay.

ADV MYBURGH SC: And turn up page 30.

MR MKWANAZI: Page 30. Yes, I am on page 30.

CHAIRPERSON: When you met with Minister Gigaba in that October meeting, Mr Mkwanazi. Are you able to remember whether he may have said to you that he had a meeting with

Mr Gama or he had... or Mr Gama had discussed with him his matter? Or is that something you do not remember?

MR MKWANAZI: Not... I do not recall that.

CHAIRPERSON: Yes, okay alright.

ADV MYBURGH SC: So I wanted just to take you to what Mr Mapoma had to say at paragraph 8.

MR MKWANAZI: Yes.

ADV MYBURGH SC: He says:

10 “I mentioned in this regard that from the outset of my interactions with Mr Mkwanazi...

 And we know that they were around the Public Protector report.

 “...he made it clear to me that he had been instructed to reinstate Mr Gama and that he wanted to find a way to do so cleanly. Although I did not consider it my place to ask him who had instructed him, I assumed it must have been the former President Zuma.”

 Now do you agree or disagree with this statement?

20 **MR MKWANAZI**: I disagree with the statement in terms of a few issues. The word instructed is too strong a word. The word that maybe would be appropriate to review the fairness of the Gama matter. And also, the word to say that I assume that it must have been former President Zuma. It is his assumption.

ADV MYBURGH SC: Well, perhaps I can add to that.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The Chairperson asked him, what actually what words did you use that caused him to infer that. And he said that you said to him that it was an authority above the ministry.

MR MKWANAZI: No ...[intervenes]

CHAIRPERSON: Or that the instruction came from higher up.

10 **MR MKWANAZI:** No. Even if he had said that, I did not say that. And I do not operate... I do not name-drop, particularly President Zuma. I do not name-drop that person because I have never met him, et cetera, et cetera. Ja.

CHAIRPERSON: H'm.

ADV MYBURGH SC: But well that bears out his version because you did not name-drop. He says you did not. You did not use the name.

MR MKWANAZI: No, I did not, ja.

ADV MYBURGH SC: That is a fact. You understand?

20 **MR MKWANAZI:** I did not.

ADV MYBURGH SC: How would Mr Mapoma had got this so wrong? I mean, he is a lawyer. He is someone who you entrusted with responding to, it seems to me, the most important piece of work that landed on your desk literally immediately upon you becoming the chairperson.

MR MKWANAZI: No.

ADV MYBURGH SC: You went out, you sought his advice and assistance. You obviously thought of him highly. How does he get this wrong?

MR MKWANAZI: No, he got it completely wrong. He really got it completely wrong.

ADV MYBURGH SC: Yes.

MR MKWANAZI: I was close to Mr Mapoma. Let me admit that, ja.

10 **CHAIRPERSON:** Well, he did say that as well. So that you... the two of you ended up being quite close. So he is right about that.

MR MKWANAZI: He is correct. You need to understand the [poor connection – unclear] environment when that board came in. We must have interacted as board with Mr Mapoma in a period of maybe three months on 40 to 50 legal matters.

CHAIRPERSON: Yes.

MR MKWANAZI: And on all of these, we kept on working with him.

20 **CHAIRPERSON:** Yes.

MR MKWANAZI: And also requesting him to consult other lawyers to help us as a board to look into certain things. There were many, many matters.

CHAIRPERSON: Yes.

MR MKWANAZI: And what is interesting as well. For some

reason, I do not have records of the January interactions that the board had with Mr Mapoma.

CHAIRPERSON: Yes.

MR MKWANAZI: And of course, [poor connection – unclear]

CHAIRPERSON: Yes.

MR MKWANAZI: Ja.

CHAIRPERSON: Well, before Mr Myburgh continues. I note that in paragraph 8, you did not take issue with Mr Mapoma's statement where he said, you said you wanted to find a way
10 to do so cleanly. So you took issue with his use of the word instructed. And of course, his assumption that you had been instructed by former President Zuma.

MR MKWANAZI: Yes, but ...[intervenes]

CHAIRPERSON: So you might have passed that part of saying: I want to do this cleanly.

MR MKWANAZI: Let me indicate that the instruction was to review, not reinstate. And also, the word cleanly is almost like legally. Looking through the legalities of the issues.

CHAIRPERSON: Yes, okay. So where he says, you said
20 you wanted to do this cleanly. You have no problem with that as long as it is understood that cleanly refers to ...[intervenes]

MR MKWANAZI: Meant legally.

CHAIRPERSON: Yes.

MR MKWANAZI: That is correct.

CHAIRPERSON: Okay alright. Mr Myburgh.

ADV MYBURGH SC: Thank you. Mr Mkwanazi, we have seen that there was a meeting with KPMG ...[intervenes]

CHAIRPERSON: I am sorry Mr Myburgh.

ADV MYBURGH SC: Yes.

CHAIRPERSON: I thought you were... I was watching whether you are going to take this up. Mr Mkwanazi, just now you also said what you were instructed to do was to review. So I think that we can accept that you are saying
10 whatever it is you were to do, it was a result of an instruction. Is that correct?

MR MKWANAZI: The review, yes.

CHAIRPERSON: Yes, okay. So your query is. It was not... it was not an instruction reinstate Mr Gama?

MR MKWANAZI: No.

CHAIRPERSON: It was instruction to review his case?

MR MKWANAZI: That is correct.

CHAIRPERSON: Okay alright. Thank you.

ADV MYBURGH SC: Mr Mkwanazi, I just want to ask you,
20 why again, why did you not deal with this in your declaration? Because one of the questions you were asked to address was whether the settlement was influenced by any member of cabinet? Do you not think it would have been necessary for you to explain?

MR MKWANAZI: That is why I was indicating that there was

a supplementary affidavit which I had prepared many weeks ago and it was sitting with my legal advisor so that they review it and I submit it. I would have touched on those points there.

ADV MYBURGH SC: Well, let us just deal with it ...[intervenes]

CHAIRPERSON: So I take it that - and you must tell me if I misunderstand your evidence – I take it that as you give evidence today, you are able to answer that question which
10 was in the letter from the Commission, by saying: Yes, there was ...[intervenes]

MR MKWANAZI: It... that is correct.

CHAIRPERSON: ...a member of cabinet influenced the settlement.

MR MKWANAZI: I do want to submit... I still want to submit a supplementary affidavit which covers some of the points that I know I clearly had not addressed ...[intervenes]

CHAIRPERSON: Yes.

MR MKWANAZI: ...in terms of a memo I got on the
20 28th of July, if I recall.

CHAIRPERSON: Yes. No, I ...[intervenes]

MR MKWANAZI: I would like to do it, yes.

CHAIRPERSON: No, no. I understand that part. I am just basically putting to you the question that was in the letter. Is there a cabinet member who influenced the settlement?

MR MKWANAZI: No, not to my knowledge. No. No.

ADV MYBURGH SC: Well, in fact what you were asked Mr Mkwanazi is whether there was any member of cabinet who played any role directly or indirectly in the matter being settled?

CHAIRPERSON: Oh, yes, ja. Thank you, Mr Myburgh.

MR MKWANAZI: Ja, if you pose the question that way. Then definitely Mr Gigaba in my interaction with him end of October played the role that says: Can you review this
10 matter? But not necessarily the actual settlement agreement. No.

ADV MYBURGH SC: Then why did you, in fact ...[intervenes]

MR MKWANAZI: No ...[intervenes]

ADV MYBURGH SC: I am sorry.

CHAIRPERSON: No, no. I do not have anything.

MR MKWANAZI: No, but ...[intervenes]

ADV MYBURGH SC: Why did you not put that in your declaration?

20 **MR MKWANAZI:** Yes, I did indicate that there is a supplementary affidavit coming.

ADV MYBURGH SC: No, but Mr Mkwanazi in your declaration you answered that question in the negative. You cannot get out of this by saying you are going to put up another affidavit.

MR MKWANAZI: In my declaration, I do indicate that I did meet Minister Gigaba on a certain date. And also, in the declaration that you have, I did not address all the matters you raised in a memo of the 28th of July. I have got a draft. It is sitting with my lawyer right now.

ADV MYBURGH SC: Mr Chairperson, I see that it is one o'clock. If this is a convenient time?

CHAIRPERSON: Oh, yes. We will take the lunch adjournment and we will resume at two o'clock. We adjourn.

10 **ADV MYBURGH SC:** Thank you, Mr Chairman.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Continue.

ADV MYBURGH SC: Thank you, Mr Chairman. Mr Mkwanazi?

MR MKWANAZI: Advocate, I am here.

ADV MYBURGH SC: Good. Just before lunch I was about to ask you, we have established that KPMG were approached on the 11 January 2011 ...[intervenes]

20 **MR MKWANAZI:** Which bundle is it?

ADV MYBURGH SC: No, no, no, it is not in any bundle, it is something we have been over. You will remember that their engagement letter reflects that they were first approach on the 11 January 2011.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: What I just wanted to ask you, is did you approach Deneys Reitz and Mr Sbu Gule at about the same time?

MR MKWANAZI: I think so, just after, towards the end of the month.

ADV MYBURGH SC: Towards the end of what?

MR MKWANAZI: Of January.

ADV MYBURGH SC: So you say it was either at the same time or later in the month?

10 **MR MKWANAZI:** Later in the month, I think.

ADV MYBURGH SC: And how did you come to appoint Sbu Gule from Deneys Reitz?

MR MKWANAZI: Do not forget that besides the KPMG report there were other reports that I was privileged to at the time. That related to what you can call Transnet internal audit reports, one or two which I may not have right now. Yes.

ADV MYBURGH SC: Did you feel that you have answered my question?

20 **MR MKWANAZI:** Can you repeat?

ADV MYBURGH SC: How did come to appoint Mr Sbu Gule of Deneys Reitz, why did you go to him?

MR MKWANAZI: Oh. Let me explain it that when this matter started indicating that the matter must now go to the Transnet bargaining council, that was then but I only

appointed Sbu Gule fairly late in January but that matter of this thing going to the Transnet bargaining council was already there as early as 2010 or October. Yes.

ADV MYBURGH SC: Mr Mkwanazi, really what I am getting at is this. There are hundreds of attorneys in Johannesburg.

MR MKWANAZI: Oh.

ADV MYBURGH SC: How did you come to appoint Mr Sbu Gule of Deneys Reitz?

10 **MR MKWANAZI:** I must have advised by Mr Mapoma because I roughly – I am aware that he was running with a big panel of lawyers that can do work at Transnet.

ADV MYBURGH SC: So you must have been advised by Mr Mapoma?

MR MKWANAZI: That is correct. It is correct.

ADV MYBURGH SC: Well, are you sure that you were not advised by Mr Mahlangu the special adviser to Minister Gigaba?

20 **MR MKWANAZI:** It could have been as well but I do not recall because my linkages on legal issues were always with Mr Mapoma.

ADV MYBURGH SC: Well, let me then take you please to bundle 1.

MR MKWANAZI: Bundle 1, yes.

ADV MYBURGH SC: Page 170.

MR MKWANAZI: Page 170.

ADV MYBURGH SC: The affidavit starts at 169.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You know Mr Mahlangu?

MR MKWANAZI: Yes, I know Mr Mahlangu.

ADV MYBURGH SC: You knew him as the special adviser to Minister Gigaba.

MR MKWANAZI: To the minister, that is correct.

ADV MYBURGH SC: He says at page 170, paragraph 7.

10 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: “Due to the passage of time I

cannot recall the exact reason for context of my discussion with MKWANAZI. He conferred with me on a variety of matters in my capacity as special adviser to the Minister and in his capacity as Chairperson of Transnet on things that he needed me to convey to the Minister informally or prior to any formal process. I recall that during my conversation with MKWANAZI, I advised that it was prudent for Transnet to seek legal advice on the company’s proposed course of action. We discussed a few options on eminent labour lawyers that he could consult. One of the names that came up is that of Mr Sbu Gule who at the time was a partner or director at Deneys Reitz, now Norton

20

Rose. I offered suggestions because of my familiarity with the legal profession. It all remained with the Chairman on how he intended to proceed.”

Do you recall that discussion?

MR MKWANAZI: I think it could have happened, that is correct, ja.

ADV MYBURGH SC: So what we have here is the minister, as you put it, instructing you to undertake a review of Mr Gama’s case and you then landed up with the attorney suggested to you by the minister’s special
10 adviser, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Now what I want to then take you to is the chain of communication between the special adviser and Mr Gigaba. Can you please turn to page 178?

CHAIRPERSON: Of the same bundle?

ADV MYBURGH SC: Of the same bundle, Mr Chairperson.

MR MKWANAZI: Yes, 178, ja.

ADV MYBURGH SC: So this is an email from Mr
20 Mahlangu to Minister Gigaba.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And the second bullet point says – and that email, Mr Mkwanazi, you would have seen is dated as early as the 18 January.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The second bullet point says:

“I understand that Transnet may be nearing a settlement with Gama. I will obtain the details of the settlement and brief you accordingly. I suggest that you socialise the President and his key aides (formal and informal) on the proposed settlement . It is intended that the forthcoming board should consider and authorise it.”

MR MKWANAZI: I see that statement.

10 **ADV MYBURGH SC:** So you were nearing settlement, were you, as early as the 18 January.

MR MKWANAZI: I would not call it settlement because first I would have had to go through a review.

CHAIRPERSON: I am sorry, Mr Myburgh, my attention was on some other page on another bundle. Just remind me the page on this bundle?

ADV MYBURGH SC: The page is 178, Mr Chairperson.

CHAIRPERSON: 178?

ADV MYBURGH SC: Ja.

20 **CHAIRPERSON:** Of...?

ADV MYBURGH SC: Of bundle 1, it is the second bullet point. This special adviser, Mr Mkwanazi, reports to his boss, the minister, that he understands that Transnet is nearing a settlement with Gama on the 18 January.

MR MKWANAZI: I see what is written, yes.

CHAIRPERSON: I am sorry, you said you read from what bullet point?

ADV MYBURGH SC: The second bullet point.

CHAIRPERSON: Oh, okay. Thank you.

ADV MYBURGH SC: Mr Mkwanazi?

MR MKWANAZI: Yes.

ADV MYBURGH SC: This is a very troubling email.

MR MKWANAZI: I am there.

ADV MYBURGH SC: Yes, I know, I want you to answer to
10 what he says.

MR MKWANAZI: No, that statement is taking the matter ahead of where it was.

ADV MYBURGH SC: Where you [inaudible – speaking simultaneously]

MR MKWANAZI: The matter was maybe a week away from that date because the matter had to be dealt with by Deneys Reitz and Mapoma in terms of my understanding of what I was trying to do or what the instruction might have been to review.

20 **ADV MYBURGH SC:** Mr Mkwanazi, Mr Mahlangu says that he had conversations and discussions with you. Where would have got this from, if he did not get it from you?

MR MKWANAZI: He would have got it from me that the matter is going to be looked into by the firm and also by Mr Mapoma and the board.

ADV MYBURGH SC: So he falsely reports to the minister?

MR MKWANAZI: Ja but that is just premature in my interpretation.

ADV MYBURGH SC: Yes but it is a false report that he makes to the minister.

MR MKWANAZI: To a certain extent, as it stands here, it is premature. He could have said that towards the end of January after I had interacted the external legal advice.

10 **ADV MYBURGH SC:** Well, if it is premature then it is false, correct?

MR MKWANAZI: It is false.

ADV MYBURGH SC: Ja. Mr Mahlangu will come and give evidence on Monday.

MR MKWANAZI: Ja.

ADV MYBURGH SC: And then we will see what he has to say but certainly on the face of it what he reports to the minister is that you have already decided, have you not, to reinstate ...[intervenes]

20 **MR MKWANAZI:** No, we have not.

ADV MYBURGH SC: ...to settle Mr Gama, even before you had approached your board., correct?

MR MKWANAZI: No, we had not decided. Yes.

CHAIRPERSON: Well, when you say that what Mr Mahlangu says in that second bullet point was premature

are you saying that what he says was the position at that time was not the position or are you saying it may have been the position or was the position but that was not the right time for him to start telling the minister about it?

MR MKWANAZI: Do not forget even though we could have discussed a law firm, I could only do a law firm issue through Mr Mapoma and we only met with that law firm - that briefed that law firm, if I am not mistaken, after that date. So that is why I say his conclusion is seriously
10 premature.

CHAIRPERSON: But, Mr Mkwanazi, how could he just say to his minister, who is Minister of Public Enterprises and to the extent that you say the minister, Mr Gigaba, had instructed you to review Mr Gama's case - to the extent that that is so or maybe so, then it would be likely that Mr Mahlangu would know about that.

Now if he then reports to his minister on the 18 January, that he understood that Transnet was nearing a settlement with Mr Gama and if that was not the position,
20 why would he just get – decide to tell his minister something that he had no basis for? What would be his interest in telling the minister that he understood that a settlement was looming if actually ...[intervenes]

MR MKWANAZI: No, no, no.

CHAIRPERSON: That was not in the ...[intervenes]

MR MKWANAZI: I am not sure – Chairman, I do not understand what Mahlangu was indicating. Yes, he did suggest the law firms, Sbu Gule, and then I interacted with Mapoma because I do not deal with the law firm issues and a meeting was then set up between myself, Mapoma and that law firm to try and address this minister's instruction of was this process unfair.

So yes, I did meet Sbu Gule but at a later date than that.

10 **CHAIRPERSON:** Yes. And Mr Mahlangu himself, had you had a discussion with him before this date about the Gama matter whether in a meeting or in a telephone conversation?

MR MKWANAZI: It could have been in a telephone because I got the recommendation of Sbu Gule as a specialist lawyer because already I was asking around. So it could have been a few weeks before and then he suggested Sbu Gule and through that Mr Mapoma and myself approached Sbu Gule and we discussed the matter
20 but that was far later than the 18 January.

CHAIRPERSON: Yes but what I am talking about, prior to the 18 January had you had any discussion with Mr Mahlangu whether in a meeting or in a telephone conversation about the Gama matter?

ADV MYBURGH SC: I might have.

CHAIRPERSON: Might have.

MR MKWANAZI: Because you need to understand the funny dynamic with these special advisers, they phone you any time.

CHAIRPERSON: Yes, okay. Did he phone you quite regularly, Mr Mahlangu, by any chance?

MR MKWANAZI: He did. He did, ja.

CHAIRPERSON: And would he ask about Mr Gama's matter sometimes?

10 **MR MKWANAZI:** And other matters, yes, he did.

CHAIRPERSON: Okay, okay, alright. Thank you. At the date of the 18 January, that is the date on which he was writing to the minister...

MR MKWANAZI: Ja, to his minister.

CHAIRPERSON: Do you recall whether you had done quite some homework on this Gama matter? Remember, the minister had raised it with you for this first time in October of 2010? We are now about mid-January. Do you recall whether you had done quite some work to try and
20 understand what the issues were and to form a view one way or another as to whether this unfairness that the minister was talking about in October might be well-founded or not?

MR MKWANAZI: Chairman, it is not what you would call legal work, it was requesting information in the

organisation about certain matters of procurement relating to what you can call not following processes of proper procurement and there were a couple of reports already in the organisation. One was a 2008 report and it could have been another report which were addressing these procurement irregularities.

CHAIRPERSON: You talk about reports that you had asked for and had reached you?

MR MKWANAZI: I asked for inside the organisation.

10 **CHAIRPERSON:** Ja.

MR MKWANAZI: And I did get at the time.

CHAIRPERSON: Yes.

MR MKWANAZI: And yes, I did have some reports.

CHAIRPERSON: And by that time you would have read some of them, some of those reports?

MR MKWANAZI: Not in detail because they were fairly big reports, on average maybe 100 pages each and done by Transnet internal audit, so they were fairly detailed.

CHAIRPERSON: Oh, okay.

20 **MR MKWANAZI:** But they did articulate what you can call procurement irregularities that had taken place not just – that one report I recall spoke to 2008 or was published in 2008.

CHAIRPERSON: Ja.

MR MKWANAZI: And the other could have been another

report but I have asked for those reports, funny enough, recently, and nobody is giving me that report.

CHAIRPERSON: Yes. So do you recall whether by mid-January you might have formed a view on your own on whether there was some unfairness on Mr Gama's dismissal even if that was not based on legal advice, just for your own sense of fairness? Do you remember whether you might have got to that point?

MR MKWANAZI: On the dismissal matter, as I indicate
10 somewhere, I did not see any unfairness.

CHAIRPERSON: Oh, okay.

MR MKWANAZI: But what I was looking for was were there similar things done in the organisation. That is why that report talks to Transnet procurement – the title is irregular Transnet procurement of officer in time period.

CHAIRPERSON: Okay.

MR MKWANAZI: So it was more on the irregular procurement issues.

CHAIRPERSON: Okay, okay.

20 **MR MKWANAZI:** Not on the unfairness of the dismissal, etcetera, etcetera, ja.

CHAIRPERSON: Okay, alright. Mr Myburgh?

ADV MYBURGH SC: Thank you. Mr Mkwanzazi, perhaps I can just ask you again, I mean, is it possible that Mr Mahlangu could have just made this up? I mean, how?

Very strange.

MR MKWANAZI: I am not sure, hopefully he will answer. He is coming next week and he will answer. But yes, he did advise me to talk to Sbu Gule and I discussed that with Mr [indistinct] 20.23 Maponya(?) and we met with Sbu Gule at a particular time and we discussed various things with Sbu Gule.

ADV MYBURGH SC: Yes, you are very good at camouflaging and talking about things that are not related
10 to my question. It would be very strange behaviour, would it not be, for a special adviser to make up something and report it to his minister. It would, would it not?

MR MKWANAZI: I cannot talk for Mr Mahlangu.

ADV MYBURGH SC: Okay.

MR MKWANAZI: But yes, we met regularly, we spoke over the phone.

ADV MYBURGH SC: Alright, let us move on to something else.

CHAIRPERSON: Just one sec before you move on, Mr
20 Myburgh. Mr Mkwanazi, I asked you about ten minutes ago about whether Mr Mahlangu did regularly call you ...[intervenues]

MR MKWANAZI: Yes, he did.

CHAIRPERSON: And whether he discussed Mr Gama's matter and you said yes, you did. Now Mr Mapoma gave

evidence and said that Mr Mahlangu did also call him about the Gama matter.

MR MKWANAZI: Yes.

CHAIRPERSON: And he said he called him twice. He said in the first telephone conversation he was not pressurising him to do anything but he was enquiring about progress in the Gama matter.

MR MKWANAZI: Ja. Ja.

CHAIRPERSON: But he says when he called him for the
10 second time, Mr Mahlangu was definitely putting pressure on him saying that Transnet was delaying or he, Mr Mahlangu, was delaying the reinstatement of Mr Gama or the settlement, I am not sure, but he said he put pressure on him and he had to be firm with him and tell him that he must stop doing that. He was not reporting to him or the minister and he says he reported this to you, I do not know whether the following morning, because he suspected that Mr Mahlangu might tell the minister and the minister might call you. Do you recall him have mentioned – or having
20 received any calls from Mr Mahlangu about the Gama matter?

MR MKWANAZI: Yes, in terms of advice which legal firm to look into as one of the legal firms which advice I then discussed with Mr Mapoma and Mapoma then set up a meeting for me to meet Deneys Reitz or something, yes.

But I do not recall Mr Mahlangu giving me feedback that he has spoken to Mapoma, I do not recall.

CHAIRPERSON: No, no, no, not Mr Mahlangu. My question was whether you have any recollection of Mr Mapoma reporting to you or mentioning to you that Mr Mahlangu had called him about the Gama matter and they are trying to put pressure on him and he had to talk firmly to him.

10 **MR MKWANAZI:** Mr Mapoma might have said so, I do not recall.

CHAIRPERSON: Do not recall, okay, alright.

MR MKWANAZI: But yes, I did speak to Mr Mapoma actually once every two days.

CHAIRPERSON: Yes.

MR MKWANAZI: During conversation, ja.

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

ADV MYBURGH SC: I then wanted to move onto – so this is on the 18 January.

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** Let us move to the 21 January and could I ask you please to go file 3.

MR MKWANAZI: File?

ADV MYBURGH SC: File 3, page 105.

MR MKWANAZI: Bundle 3, okay. I have got it, what page?

ADV MYBURGH SC: 105.

MR MKWANAZI: Okay, I have got that.

ADV MYBURGH SC: So you see towards the foot of the page it is an email from Mr Selinga to Mr Todd at Bowman Gilfillan.

MR MKWANAZI: Ja.

ADV MYBURGH SC: Do you see that?

MR MKWANAZI: Yes.

ADV MYBURGH SC: And in summary what Mr Todd is
10 told, if you go over the page at 106. 106 says:

“I confirm that the Acting Group Chief Executive and Chairman of the board of Transnet, Mr Mkwanazi, has instructed as follows:

1. That any sale in execution of the shares or any property belonging to Mr Gama attached pursuant to the aforementioned warrant of execution be cancelled forthwith.”

That was the warrant of execution for the costs in the High Court. And:

20 2. That the shares or any property attached pursuant to the aforesaid be immediately released on judicial attachment.

3. That the warrant of execution issued in this matter be held in abeyance until further instructions.”

And then under that:

“Regarding Mr Gama’s appeal...”

Which is really the bargaining council arbitration.

“...against the decision of the disciplinary hearing that is set down for hearing before the bargaining council on Monday the 24th, your instructions are to postpone the matter *sine die*, to allow negotiations between the parties to run their course.”

Do you see that?

10 **MR MKWANAZI**: Yes, I see that.

ADV MYBURGH SC: So here on Friday the 21 January you put a halt to Transnet recovering its costs in terms of a High Court order. Why?

MR MKWANAZI: I did instruct Selinga in view of the fact that I wanted to entertain this meeting with this other company to look at the matter of this unfairness that was raised by the shareholder. That is why I did – just to put a stop into it until Deneys Reitz and others have looked into this matter.

20 **ADV MYBURGH SC**: But Mr Mkwanazi, this – the High Court litigation preceded the disciplinary hearing and the dismissal. And there was a court order which was being executed in favour of Transnet.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Why on earth would you want to

become involved in that and put a stop to that? It was money that was owed to Transnet.

MR MKWANAZI: Yes I did but I wanted to exploit almost the shareholder instruction of is this unfair, etcetera, and in view of time I had not yet met Deneys Reitz to look into that matter. Yes, I did request that [inaudible – speaking simultaneously]

ADV MYBURGH SC: So you did this – if I understand your evidence correctly, in acquitting yourself of the
10 shareholder instruction, that is what you have said, correct?

MR MKWANAZI: Can you repeat?

ADV MYBURGH SC: You have said that you put a stop to this ...[intervenens]

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And in so doing you acquitted yourself of the shareholder instruction.

MR MKWANAZI: To review the unfairness or fairness of that process, yes.

20 **ADV MYBURGH SC:** But the shareholder instruction related to Mr Gama's dismissal at a disciplinary hearing, this is High Court proceedings that were engaged in a year before where Mr Gama lost comprehensively and then sought leave to appeal and that was refused but somehow you found it to be your place to put this on hold.

MR MKWANAZI: I did put it on hold, yes.

ADV MYBURGH SC: Did you consult with your board or did you feel comfortable in taking this decision?

MR MKWANAZI: I felt comfortable in taking this decision, I did not consult with the board on that.

ADV MYBURGH SC: So – and you also then put a stop to the arbitration which was going to happen on the Monday the 24th.

MR MKWANAZI: To postpone, yes. It has not put a stop
10 to postpone so that I review this request of unfairness or whatever it was, yes.

ADV MYBURGH SC: But what I do not understand is a professional body was going to undertake an arbitration and rule on that very question within a few days, why did you allow that to happen?

MR MKWANAZI: I needed to be satisfied in addressing what I called that shareholder request of looking to the unfairness of that process.

ADV MYBURGH SC: But Mr Mkwanazi if it was unfair then
20 the arbitrator would have ruled on it.

MR MKWANAZI: Yes there was this new request which was saying please look into the unfairness or fairness of this process and in order to do that I have got to consult some legal opinion or firm and unfortunately the calendar of events were such that my consultation could only take

place towards the end of the month so that is why I had to request that they stop these processes until I had consulted Deneys Reitz.

ADV MYBURGH SC: I see. Alright well that was on the Friday and we can see that you were busy because on the Saturday you then engaged in a negotiation with Mr Gama didn't you, you wasted little time.

CHAIRPERSON: Maybe before that Mr Myburgh can I just go back to the issue of stopping the execution. Mr
10 Mkwanazi the process that you instructed Bowman Gilfillan Attorneys to stop that is the process of recovering from Mr Gama legal costs that the High Court had ordered him to pay to Transnet, that process could not possibly have anything to do with whether Mr Gama's dismissal was fair or not. That was – that order which was made in favour of Transnet by a High Court Judge was an order made because the High Court concluded that when Mr Gama launched an application to the High Court seeking a certain order against Transnet and the directors he had no proper
20 grounds he had no case, that is why the High Court dismissed his application and ordered him to pay costs in favour of Transnet and its directors. That was an application which happened before the disciplinary hearing began.

So I cannot see how it could have had any bearing

on whether his dismissal was fair or not. Are you able to see that it could have had some bearing?

MR MKWANAZI: Chairman I understand what you are saying and there is – but then from my looking at the Gama matter and maybe looking at some elements of his contract of employment I don't know if it is linked but yes I understand your interpretation of the court judgment yes.

CHAIRPERSON: Yes, yes, of course maybe in your favour I can say that at this stage we are talking about what
10 seems to have been an instruction to temporarily stop that process so that might – well maybe up to a certain level one can understand if you said I didn't understand what is going on, maybe let it stop, but when you later on then don't say continue that is what we will deal with in due course. Mr Myburgh?

ADV MYBURGH SC: Thank you. So that is the Friday, let's go to the Saturday. Could I ask you please to turn to Bundle 2.

COUNSEL FOR MR MKWANAZI: Excuse me Chair before
20 ...[indistinct – audio faulty] five minute comfort break just to help ourselves.

CHAIRPERSON: Ja, the reception is very poor when you speak Mr Mkwanazi, the lawyer.

COUNSEL FOR MR MKWANAZI: Oh I see Chair apologies for that ...[indistinct] I was just asking for a five minute

comfort break.

CHAIRPERSON: Ja, I cannot hear, I hear you are asking for something but I don't hear what it is you are asking for.

COUNSEL FOR MR MKWANAZI: ...[Indistinct] five minute indulgence, a comfort break if possible.

CHAIRPERSON: Were you asking for a break?

COUNSEL FOR MR MKWANAZI: five minute comfort break Chair yes please.

CHAIRPERSON: Oh, okay alright, Mr Myburgh?

10 **ADV MYBURGH SC:** Certainly.

CHAIRPERSON: Let us take a five minute break, okay we will take a five minute adjournment, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

ADV MYBURGH SC: ...page 3 of Bundle 2.

MR MKWANAZI: Wait Bundle 2, can we go back. Sorry bundle 2, I believe this is the one yes. Yes I am there.

ADV MYBURGH SC: This is a consultation note of your attorneys.

20 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: Of a meeting held at nine o'clock on Saturday the 22nd of January.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Paragraph 2 says Temba Langa and Siyabonga Gama were also in attendance but we initiated a

caucus meeting Sibona, Mr Mapoma, Mr Mkwanazi and myself, myself being Sibona Sangoli, do you recall attending this meeting?

MR MKWANAZI: Yes I do.

ADV MYBURGH SC: The next paragraph says during the course of that discussion Mr Mapoma confirmed that the proposal that had been made from the company, which had been rejected still stands. There is no counter proposal, so even by this time, the 22nd of January, already a
10 proposal had been made, is that right?

MR MKWANAZI: It is so.

ADV MYBURGH SC: Yes, well maybe Mr Mhlangu wasn't wrong with what he said to the Minister on the 18th of January.

MR MKWANAZI: He was ahead of himself ja, on the 18th of January.

ADV MYBURGH SC: Well when was the first proposal made?

MR MKWANAZI: I do not recall.

20 **ADV MYBURGH SC:** Well it would have been before Saturday the 22nd of January, correct?

MR MKWANAZI: It looks like it would have been but truly I do not recall, ja.

ADV MYBURGH SC: I see. And what was the first proposal?

MR MKWANAZI: I do not recall.

ADV MYBURGH SC: Sorry just so that I understand it, you were the lead negotiator in these negotiations?

MR MKWANAZI: I was the lead negotiator yes.

ADV MYBURGH SC: Right so you can't tell us what your opening gambit was?

MR MKWANAZI: I do not recall no, I do not recall, ja.

ADV MYBURGH SC: So let us go to the next paragraph then Mr Mkwanazi.

10 “Mr Mkwanazi explained that he would like to assist Mr Gama where reasonably possible.”

Do you see that?

MR MKWANAZI: Yes I see that.

ADV MYBURGH SC: Why would you want to do that?

MR MKWANAZI: My assumption was that again based on what I called the shareholder view was there an unfairness in the Gama matter, yes.

ADV MYBURGH SC: But why would you want to assist the man where reasonably possible. This is a – Mr Mkwanazi
20 this is a Chief Executive of Transnet Freight Rail that had been fired and his arbitration was supposed to have been the forthcoming Monday. You have a meeting with him on the Saturday and you tell him I want to assist you where – or you say to your lawyers that you want to assist Mr Gama where reasonably possible. Why?

MR MKWANAZI: Don't forget yes I did indicate that because also deep down in me there was an element of doubt on if – not of the sanction, not of the guilty or not guilty, or not guilty, that is fair, but of the sanction in view of the fact that by that time if I recall, and unfortunately these reports are still not available, there were many other cases where similar procurement irregularities were not even investigated, some they didn't even bother to apply for condonation, so that is the issue, the angle I was
10 coming from.

ADV MYBURGH SC: I see, well we are going to come to your description as you put it in inverted commas similar irregularities in a moment. But let's go on to see what you say. So you say ja there was information out there and that was your point of departure but then you say what's reported his intention, that being yours, is to bring him back into his, the Chairman's, office. He wants Mr Gama to assist him in a number of strategic issues. Did you say that?

20 **MR MKWANAZI:** I think I did.

ADV MYBURGH SC: Alright and then you say:

“He however needs a good motivation to do so.”

Did you say that?

MR MKWANAZI: I did ja.

ADV MYBURGH SC: And then it says:

“His view is that if he is provided with an opinion setting out that there was some unfairness towards Mr Gama at the board meeting on 16 February he would persuade the other members to make a decision to bring him back into the organisation.”

MR MKWANAZI: That is correct.

ADV MYBURGH SC: That is an astonishing statement to make, give me an opinion that shows some unfairness and I will use that to persuade my fellow board members on 16
10 February to bring him back. You said that.

MR MKWANAZI: Yes I did.

CHAIRPERSON: That suggests Mr Mkwanazi that at that time you had come to the conclusion that if at all possible you would like to bring Mr Gama back to Transnet, is that fair comment to say that – that looks like that was your attitude.

MR MKWANAZI: That was my attitude which needed support from a legal perspective that these were the unfairness, not the dismissal issue but the unfairness of
20 the whole process of other executives not even being warned, things just happened and things were forgotten for years and years on end.

CHAIRPERSON: So you did not think that he had been unfairly found guilty of the acts of misconduct of which he was found guilty, you had no problem with that.

MR MKWANAZI: The process was extremely fair, I don't have a problem with it.

CHAIRPERSON: The process was also fair.

MR MKWANAZI: On the facts in relation to the charges of which he was found guilty is the position that you accepted that dismissal was appropriate, the only thing that made you to want to bring him back was simply these other cases of other people, or is the position that you thought that the sanction of dismissal given the acts of misconduct of which
10 he had been found guilty was too harsh irrespective of what had happened to other people, or is the position that had there been no such other cases that you are talking about you would have had no problem with the sanction of dismissal for an executive found guilty of this?

MR MKWANAZI: I agree with you fully Chairman, it is a strange situation in that here is this individual, I don't know how many managers were there, maybe at the time maybe 2 000 managers who a few others like him had done similar things, not even a warning for years and years and
20 then here comes this individual who does something similar to what other managers have done and this particular – it was a question of consistency in that my interpretation was in that organisation there was no consistency at the time. Had there been similar cases which had been handled the same way as the Gama matter I would have had no

problem whatsoever.

CHAIRPERSON: Yes, so save for these other cases you were comfortable that Mr Gama's sanction of dismissal was fair?

MR MKWANAZI: From the individual handling of the matter it was fair.

CHAIRPERSON: Yes, yes, ja. Okay Mr Myburgh?

ADV MYBURGH SC: I am going to come to what you keep saying similar cases, but you said now if there was similar
10 cases to Mr Gama I would have had no problem at all, do you remember saying that, do you remember just saying that now?

MR MKWANAZI: Yes I do but ...[intervenes]

ADV MYBURGH SC: Let me give you an example of ...[intervenes]

MR MKWANAZI: But let me ...[intervenes]

ADV MYBURGH SC: Mr Mkwanzazi please let me finish. Two cases that were similar were Van der Meller and Khanya. You needn't look around.

20 **CHAIRPERSON:** Do you remember the two employees who worked under Mr Gama.

MR MKWANAZI: Oh yes I do.

CHAIRPERSON: Yes, we talked about them earlier.

MR MKWANAZI: Oh no I do remember, but now that is why at some stage I would like the Commission to call in

KPMG to present the report that I saw because in that report they spoke to 22 other individuals where nothing was done, I do agree that those are two individuals I agree, but I am saying what about the other 22 or more who were not dismissed or even a warning given against.

CHAIRPERSON: But Mr Myburgh asked you earlier before lunch the question if you saw that some of the employees had been dismissed just like Mr Gama, but you realised that there were others who had not been dismissed, why is
10 it that your attitude was not to say then the others the ones who were not dismissed should also be dismissed, should also be dismissed because it is wrong that they were not dismissed for such a thing. Why was your attitude that we must condone these serious acts of misconduct and allow Mr Gama back?

MR MKWANAZI: Chairman I did make a few examples of these big condonements, one was an increase in contract price from R980million to R1.8billion.

CHAIRPERSON: I am sorry, sorry, ...[intervenes]

20 **MR MKWANAZI:** One was an increase ...[intervenes]

CHAIRPERSON: I am sorry Mr Mkwanzazi I am sorry, I think my use of the word condone is going to confuse you, let me rephrase my question.

MR MKWANAZI: Yes.

CHAIRPERSON: Mr Myburgh's question before lunch one

of his questions was if you realised that in some cases dismissals had been effected but in others no dismissals had happened and indeed I think you say in some not even a warning, but in ...[intervenes]

MR MKWANAZI: That is correct.

CHAIRPERSON: ...Mr Gama's case there was a dismissal and there were some where there may have been a dismissal. Why didn't you say what is wrong here is Transnet's failure to dismiss these other employees, that is
10 what is wrong. What is wrong is not its dismissal of Mr Gama, what is wrong is its failure to dismiss the others because what they were guilty of was serious.

MR MKWANAZI: Chairman I cannot fault your argument, you are correct.

CHAIRPERSON: Mr Myburgh?

ADV MYBURGH SC: Yes thank you Mr Chairman. Could you please Mr Mkwanzazi go over the page to page 4, and there at paragraph 5 at the top it is recorded that he [being you] was to discuss the details of such return to Transnet
20 with Mr Gama in a one-on-one meeting to be held between them. Now we see that there is reference on more than one occasion to you holding one-on-one meetings, right, why did you not have other people present at meetings, negotiations with Mr Gama.

MR MKWANAZI: Let me indicate that yes there were

these one on ones, for some reason unknown to me Mr Gama was not comfortable to be in meetings with other people except myself and of course even in those one-on-one meetings we – me and Mr Gama didn't agree on a lot of issues.

ADV MYBURGH SC: So you go on to say in that paragraph:

“There are details however that he is unfamiliar with, such as when Mr Gama was fired, when Mr
10 Gama was suspended and the like ...”

You didn't even know that, correct?

MR MKWANAZI: Chairman let me – you know at times when you start a meeting you want some background information from the people who are presenting the information to you, so it was part of that, I knew what is happening but almost like sketch the background of this situation to me.

ADV MYBURGH SC: Mr Mkwanzazi you paint a picture that you had actually considered this matter, you were about to
20 reinstate the man yet you didn't even know when he had been fired or suspended.

MR MKWANAZI: I had a good idea.

ADV MYBURGH SC: Well it didn't matter did it really because you were going to reinstate him no matter what. You smile?

MR MKWANAZI: Not really.

ADV MYBURGH SC: Now tell me ...[intervenes]

MR MKWANAZI: Not really.

ADV MYBURGH SC: What is not included there you don't ask the questions what was he dismissed for. Did you know what Mr Gama was dismissed for?

MR MKWANAZI: Yes Advocate, Chairman I knew.

ADV MYBURGH SC: Well explain to us please.

MR MKWANAZI: It is the GNS contract where he
10 exceeded his authority in terms of a confining this thing to
GNS when it should have gone out on open tender and also
he exceeded his delegated authority on such matters. If I
recall his authority allowed him to only contract up to
R10million and if I recall that contract was close to
R90million, but the time it was terminated.

Then the other matter was the Fifty-like-new
locomotives where a Board decision was taken that the
refurbishment of these fifty like new locomotives would be
done by Transnet Engineering, and then he and I don't
20 know who else decided that it would be done by an outside
company which somehow from where I set it introduces
fruitless and wasteful expenditure because that company
must then set itself up when Transnet Engineering has got
all the infrastructure to handle a refurbishment of the 50
like new, those were the two occasions. Then of course

the third one was this issue of attacking his colleagues. Now let me just continue a little bit, if this was an isolated case and all other cases in the company were handled in a similar fashion I would have dismissed as well.

ADV MYBURGH SC: So you had other cases where a CEO had besmirched the Board of Transnet?

MR MKWANAZI: No, not really.

ADV MYBURGH SC: You say not really?

MR MKWANAZI: No not really.

10 **ADV MYBURGH SC:** Have you had any?

MR MKWANAZI: No when I saw other cases not related to the gravity of the offence but just related to the fact that he exceeded, he has done a lot of irregular things in those things. Now I am saying if it was a norm at Transnet to discipline people in that fashion not the two ...[indistinct] and the other, all the others from say 2005 to discipline them, to get rid of them, to do whatever I would have had no problem of Gama being dismissed.

20 **ADV MYBURGH SC:** Mr Mkwanzazi what about the third charge which had nothing to do with tender irregularities, contractual irregularities and nothing to do with condonation. It is very spurious isn't it, the third charge if you actually know what happened. I mean you have had the benefit of listening to Mr Todd.

MR MKWANAZI: No I have got an idea of the third charge

as well, where he publically started attacking other executives.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And you agreed ...[intervenes]

MR MKWANAZI: That is unacceptable.

CHAIRPERSON: I think and the Board ...[intervenes]

MR MKWANAZI: And the Board, that is unacceptable.

ADV MYBURGH SC: I need to deal with that if you don't
10 mind, if you just give me a second.

CHAIRPERSON: Well while Mr Myburgh is looking for something let me go back to an issue that he has dealt with, with regard to one on one meetings between yourself and Mr Gama, how many such meetings did you have with Mr Gama?

MR MKWANAZI: I wouldn't know, that you would have to ask Mr Mapoma because whenever I would meet, I never met Mr Gama alone outside of these meetings, so I will have to ask Mr Mapoma because for some reason I would
20 insist that Mr Mapoma comes with me to such meetings, I don't know how many meetings we had.

CHAIRPERSON: Well he – I have been under the impression when I read his statement that there had been two such occasions but when he gave his evidence he said no there was only one, namely he said the Inanda one, I

think which I think is when Deneys Reitz Attorneys were also present. Is it your recollection also that ...[intervenes]

MR MKWANAZI: Then that's the meeting yes, I wouldn't have met him even socially I wouldn't have met him.

CHAIRPERSON: Yes, now when Mr Myburgh asked you why you excluded other people from that meeting and met Mr Gama alone you say that it was Mr Gama who had discomfort in meeting with you together with other people,
10 is that correct?

MR MKWANAZI: That is correct Chair.

CHAIRPERSON: So he had asked that he wanted to meet you alone?

MR MKWANAZI: He did ask and I did agree.

CHAIRPERSON: Did you ever ask him why he did not want even your lawyers to be present. I don't understand what should make him uncomfortable because you have lawyers to advise you, he has got lawyers to advise him, if you are going to talk settlements both of you need legal
20 advice, so why should they not be present? Did you ask him?

MR MKWANAZI: No I did not, no I did not ask him but what I sense there, I am now assuming, there was a lot of media leakage around Transnet issues at that time and what I suspect maybe he was trying to do was to limit the

media leakage of some of these discussions.

CHAIRPERSON: Yes, but really if you negotiate the settlements in a legal dispute that is happening in a public forum like a Bargaining Council I am not sure that you would be so concerned about that, because in any event you know you hold your discussions until you sign there is no settlement. I just find it strange that there were these, there was this one on one meeting, particularly when the attorneys were around and you needed advice, I take it he
10 needed advice, his attorneys were around as well. I mean what is it that was so secret that he wanted to talk about. That is my ...[intervenes]

MR MKWANAZI: Chairperson I do not know because even my feedback to those meetings were actually feedback on what could have been discussed or what options are there, etcetera, etcetera.

CHAIRPERSON: Yes, yes. Well maybe Mr Myburgh is still going to ask you further about the content of the discussion but I heard from Mr Mapoma that you reported
20 to him after that one on one meeting with Mr Gama that the two of you could not reach agreement, because Mr Gama instead of asking to be reinstated in the position from which he was dismissed actually wanted you to agree that he would be appointed to the position of Group Chief Executive Officer of Transnet, is that true?

MR MKWANAZI: I suspect that – let me check – I suspect that Mr Mapoma might have got his facts wrong there, because that position of Transnet Group Chief Executive was a position where there was a parallel process to interview etcetera, etcetera, so I suspect what Mr Mapoma might have meant is a position of Chief Executive Transnet Freight Rail, I suspect that is what he meant.

CHAIRPERSON: Well no I don't think he confused that
10 because when he gave evidence he was clear because I even said – asked him, I said but Mr Gama had been dismissed from the position of CEO of TFR.

MR MKWANAZI: You did sir I recall.

CHAIRPERSON: Yes and he said yes but he – he said but Mr Mkwanazi told me that the reason why they didn't agree is that he was now, he now wanted to be appointed as – or he used the word reinstated, reinstated as Group Chief Executive Officer and Mr Mkwanazi said he rejected that, he wanted him to be reinstated to the position of CEO TFR,
20 which is the position from which he had been dismissed, that is what he said.

MR MKWANAZI: Well Mr Mapoma said that and I suspect Mr Gama might have said that but clearly Chairman I could never agree to a position like that. I know in actual fact I was looking at agreeing to something more etcetera,

etcetera.

CHAIRPERSON: Yes, yes, so is the position that you are not sure whether Mr Gama made this demand to be appointed to ...[intervenes]

MR MKWANAZI: I agree Chair I am not sure.

CHAIRPERSON: You are not sure okay, alright.

MR MKWANAZI: But I would not have agreed to it Chair.

CHAIRPERSON: Yes about that you are clear.

MR MKWANAZI: No, no Chairman I couldn't.

10 **CHAIRPERSON:** Yes, thank you Mr Myburgh.

ADV MYBURGH SC: Thank you chair. Mr Mkwanazi can I take you please back to Bundle 4A, your affidavit, page 18. 4A, 18, one eight.

MR MKWANAZI: Yes I on page 17, page 18. I am on page 18 Chairman.

ADV MYBURGH SC: If you will just bear with us for a second.

CHAIRPERSON: Okay, I am just getting there. Yes Mr Myburgh.

20 **ADV MYBURGH SC:** So it is paragraph 9.4, you have already confirmed this, but I just want to pick up what I said I needed to just look at carefully. You say at 9.4 I personally fully agree with the disciplinary processes and findings of the then Transnet Board, presumably you're talking about the findings of the disciplinary inquiry,

correct?

MR MKWANAZI: That's correct.

ADV MYBURGH SC: So you fully agree, the only difficulty I have is that there was this common process in Transnet Systems called condonation, that was your only problem as you put it, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Can I then ask you please to turn to Bundle 3.

10 **MR MKWANAZI:** Bundle 3?

ADV MYBURGH SC: Yes, page 88.

MR MKWANAZI: No this is Bundle 1, what bundle is that, this is Bundle 2, this is Bundle 3, yes I have got that.

ADV MYBURGH SC: Page 88.

MR MKWANAZI: Page?

ADV MYBURGH SC: 88.

MR MKWANAZI: Okay I have got it, okay. I am on page 88.

20 **ADV MYBURGH SC:** Do you see the last third of the page there is a paragraph number 60.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Just above that there's a quotation. This is the finding of the Chairperson of the disciplinary hearing on the third charge the besmirchment charge, and I want to take you one, two, three, four lines down in the

middle of the page, are you with me, there is a sentence saying “this charge”.

MR MKWANAZI: Yes can I – I am on page 88 above paragraph 60.

ADV MYBURGH SC: Yes, there is a quote, let me read the whole paragraph.

MR MKWANAZI: Ja, I see that line, I see that line yes, this charge.

ADV MYBURGH SC: This charge - says the Chairperson –
10 now you agree with this, goes to the heart of Trans ...
...[intervenes]

MR MKWANAZI: This charge?

ADV MYBURGH SC: This charge, being the third charge.

MR MKWANAZI: Yes.

ADV MYBURGH SC:

“Goes to the heart of Transnet’s loss of faith in Mr Gama and there can be no doubt that dismissal is the only appropriate penalty for Gama’s conduct under this ...”

20 It’s actually the 4th charge, you agree with that?

MR MKWANAZI: I agree with that.

ADV MYBURGH SC: And it has got nothing to do – condonation has no bearing on this, correct?

MR MKWANAZI: I agree with that.

ADV MYBURGH SC: Well then I do not understand on what

possible basis you could have reinstated Mr Gama? On your own version you are agreeing that the only appropriate penalty for the fourth charge is dismissal. Your only problem is there is this thing called condonation that has no bearing on this charge Mr Mkwanazi.

CHAIRPERSON: Advocate Myburgh you are spot on but there is a – it is a consequential thing.

ADV MYBURGH SC: Well I hope so.

MR MKWANAZI: In my interpretation.

10 **ADV MYBURGH SC:** Right.

MR MKWANAZI: In – it is consequential thing that came about because of the first two main charges. But I agree with that sentiment.

ADV MYBURGH SC: But then why did you reinstate him? Because your only problem was condonation.

CHAIRPERSON: In other words Mr Mkwanazi.

MR MKWANAZI: Yes.

CHAIRPERSON: What Mr Myburgh is saying.

MR MKWANAZI: Yes.

20 **CHAIRPERSON:** When you were – when you were looking at this issue you and the board and you sought to rely on condonation.

MR MKWANAZI: Yes.

CHAIRPERSON: You said Mr Gama was not afforded the opportunity of using condonation. That could only apply to

the other charges not this one. So that being the case you ought to have said as the board, you see this idea that Mr Gama was not afforded condonation – the opportunity to use condonation is not good enough to justify reinstating him. Because that ground only applies to two of the acts of misconduct of which he has been found guilty. It cannot apply to this third one.

And yet this third one is on its own so serious that a dismissal is appropriate. Therefore you as the board ought
10 to have said no we cannot find our way to reinstating Mr Gama because even if we were to use condonation there is this other act of misconduct to which condonation does not apply and it is an obstacle to us reinstating him.

That is what Mr Myburgh is putting to you. Why did you not adopt that approach?

MR MKWANAZI: Chairman my interpretation of the two main charges the GNS and Fifty like new. They then lead to this inappropriate behaviour by this executive and therefore I – that is why my focus was on the first two key charges and
20 because if then the first two had been dealt with in a particular route the third charge might not have arisen. That is where I come from.

CHAIRPERSON: I do have some questions Mr – but I want to allow you Mr Myburgh to take it further.

ADV MYBURGH SC: Very well. Mr Mkwanazi you have

agreed – firstly let me debunk this. There is not two main charges in this case. There are three. And you have agreed that the only appropriate penalty for the third charge – it was actually the fourth charge was dismissal. You have accepted that. And you have accepted that condonation has no bearing on that. I think you driven to concede that the reinstatement of Mr Gama just on that basis was a monumental failure of judgment on your part. Is that not so?

MR MKWANAZI: On the last point.

10 **ADV MYBURGH SC:** Yes.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The reinstatement.

MR MKWANAZI: On this unbecoming behaviour.

ADV MYBURGH SC: The reinstatement of Mr Gama was a monumental failure of judgment on your part. Correct?

MR MKWANAZI: On the last matter but on the other two matters there is ground to indicate that there could have been grounds for a different view in terms of the fairness of the system in handling the Fifty like new and the GNS
20 contract. But on the matter of how he then dealt with the executives and the board I agree my board did not apply a – a lot of – what you can call attention to that matter.

ADV MYBURGH SC: Well sorry that is being a bit generous. You applied zero attention. Because your – Mr Mkwanazi let us call a spade a spade. Because you were acting on

instructions. You just did what the shareholder Minister told you to do. That can be the only possible explanation because how else could you have just left out of account this critical fourth charge without having being grossly negligent in acquitting yourself of your duties. How?

MR MKWANAZI: I am not sure if – it is an oversight Advocate Myburgh but there was no focus on that third charge it is an oversight.

ADV MYBURGH SC: Would you – would you simply accept
10 please that you erred in reinstating Mr Gama then?

MR MKWANAZI: Not fully but in dealing with the third matter.

ADV MYBURGH SC: He should not have been reinstated.

MR MKWANAZI: Ja.

ADV MYBURGH SC: He should not have been reinstated, correct?

MR MKWANAZI: Advocate Myburgh that is your view.

ADV MYBURGH SC: I am asking you.

MR MKWANAZI: The question – do not forget now that after
20 taking the ill-advise from this firm who then told witnesses in our case at Transnet Bargaining Council and we then had doubt as the board that we could actually win this matter at Transnet Bargaining Council therefore we opted to – to settle.

CHAIRPERSON: Mr Mkwanazi which attorneys poked holes

into your case in the Transnet Bargaining Council? Because Bowman Gilfillan said you had a very strong case. I understand that Webber Wentzel said procedurally you had done everything properly and I have seen – I have seen a letter or letters from Deneys Reitz who said in relation to whether the dismissal was fair or not who say they also gave an opinion that this dismissal was fair. So which attorneys poked holes into your case that was going to arbitration?

MR MKWANAZI: They created doubt Chairman. Maybe I
10 used the – a strong word. It comprehensive Deneys Reitz legal opinion post the first summary one which had been given to the board.

CHAIRPERSON: Yes I think Mr Myburgh might take that...

ADV MYBURGH SC: Yes I can.

CHAIRPERSON: That further but let me go back to this question. I am concerned that you do not seem to be prepared to make the concession that I think Mr Myburgh thought you would make namely that the board should not have reinstated Mr Gama. Is my understanding of your
20 position correct? Namely your stand is...

MR MKWANAZI: That is correct my stand is that board applied its mind and it saw some elements of doubt that it would win at Bargaining Council and then took a decision to settle.

CHAIRPERSON: Okay alright. Now my difficulty with that

evidence is this. Mr Gama was found guilty of three acts of misconduct and I think you and I agree that each one of those acts of misconduct were serious – or was serious. I think we agree on that. I think previously you have agreed to that, correct?

MR MKWANAZI: Ja that is correct.

CHAIRPERSON: Yes. You have also agreed or conceded to Mr Myburgh that the – the charge relating to the attacks by Mr Gama on the executives and the board was serious
10 enough to deserve the sanction of dismissal on its own. You remember that?

MR MKWANAZI: Yes I do.

CHAIRPERSON: That you accepted that. Now if you accept that what it means is that the chairperson of the inquiry relied on three grounds to say Mr Gama should be dismissed. Now two of these grounds namely the acts of misconduct had something to do with procurement which is where condonation may apply okay?

But this other one had nothing to do with
20 procurement and therefore condonation would not come in. Why would you and your board not say, but why must we reinstate Mr Gama when there is this one ground, one conviction if you like which on its own is sufficiently serious to justify the sanction of dismissal?

Why must we take him back because we cannot – we

cannot fault the chairperson of the disciplinary inquiry for having concluded that he should be dismissed even if it was this act of misconduct alone? Why do you not adopt that approach? That is the approach I would have expected from a board or from somebody who says this third charge or fourth charge that has got nothing to do with procurement is sufficiently – or is serious enough on its own to justify dismissal.

So that is what my logic would say. So you – you
10 would – I would go back to the Minister – I would go back to Mr Gama and say you may have had a case on the basis of the two serious acts of misconduct that are connected with procurement if those were the only acts of misconduct of which Mr Gama was found guilty maybe we could have done something.

But the problem is that there is third one which has got nothing to do with condonation and procurement and in our view it is sufficiently serious to justify dismissal therefore we cannot take him back on the basis of this third
20 one. What do you say? Is that not logical?

MR MKWANAZI: Chairman I understand where you come from. Now if you take the issue a little bit back that yes there were four charges. Yes the fourth one was this one of unbecoming behaviour by the executive. But then if you look at it from perspective that says what created that charge are

the first two charges which related to [00:14:04]. That is my argument or they say as you deal with those two maybe the other one falls away. That is my argument ja.

CHAIRPERSON: But...

MR MKWANAZI: But I agree with your analysis.

CHAIRPERSON: Yes but Mr Mkwanaazi maybe remotely you could apply that reasoning if you took the view that the board and the executives who were attacked by Mr Gama had something wrong.

10 But at the time when you were dealing with this matter you knew that even Mr Gama had admitted that he had been properly found guilty of these acts of misconduct relating to procurement. Therefore his attacks on the board for – and on the executives for pursuing him for misconduct was unjustified.

 That is the reasoning that I would have expected from you and the board. To say when – once you realised that this other charge had nothing to do with procurement you say but he is admitting that he is guilty. So he was
20 attacking these executives and the board for pursuing charges of misconduct against him saying that this was part of an agenda. He has now admitted that there was no such. He has now admitted that he was guilty.

 They had proper grounds to pursue him. So actually the fact that by now he was admitting that the – he was

guilty makes his attacks on them even more serious. Because he is now admitting in effect that these people were doing their jobs. So therefore he should never have attacked them. Do you not agree with that reasoning?

MR MKWANAZI: I agree with your analysis Chairman.

CHAIRPERSON: Yes. Okay alright. Mr Myburgh.

ADV MYBURGH SC: Thank you. I was at page 4 of...

MR MKWANAZI: Of which bundle?

ADV MYBURGH SC: Of Bundle 2. You then said at
10 paragraph 6.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Once you are clear on those details ...

CHAIRPERSON: Please wait for me Mr Myburgh.

ADV MYBURGH SC: Sorry.

CHAIRPERSON: Page 4 of Bundle.

ADV MYBURGH SC: Bundle 2.

CHAIRPERSON: 2. I am sorry Mr Myburgh. Just to maybe
complete what we were discussing Mr Mkwanazi. On this
reasoning that I was articulating to you it would therefore
20 seem to me that it would not have been right and it was not
right – it would not have been right to say we will reinstate
Mr Mkwanazi – Mr Gama nevertheless because even though
there is this charge of which he has been found guilty which
has got nothing to do with procurement when you look at the
situation in the way I am articulating.

It would seem to me that that should lead you to say no but we cannot really take him back because the fact that he admits guilt does not mitigate the situation. It makes it worse because he attacked people for doing their job and did so publicly. You understand?

MR MKWANAZI: I understand Chairman.

CHAIRPERSON: Yes okay alright.

ADV MYBURGH SC: So Mr Mkwanazi at page 4 paragraph 6 it is recorded that once he – that is you is clear on those
10 details about when he was fired, when he was suspended and the like he being you can then formulate a proposal.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And then if you drop down to paragraph 14 of the consultation note at the foot of the page it would appear that Mr Gama and Mr Langa do not take issue with the fact that Mr Gama is guilty of the complaints as charged all they intend to challenge is the sanction that was imposed. That you knew, correct?

MR MKWANAZI: That is correct.

20 **ADV MYBURGH SC:** And then at page 5 paragraph 16.

“At that point the caucus ended so that Mr Mkwanazi could meet alone with Mr Gama.”

MR MKWANAZI: On page 5?

ADV MYBURGH SC: Yes. So you could meet alone with him.

MR MKWANAZI: Right I see it. I see that.

ADV MYBURGH SC: Now I would like to take you please to File of Bundle 3.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And to page 107.

MR MKWANAZI: Page 107. I am there. Now Mr Mkwanazi I take it that you – you knew that Bowman Gilfillan were representing you and Transnet in the Gama litigation, you knew that?

10 **MR MKWANAZI:** Yes I knew that.

ADV MYBURGH SC: I beg your pardon?

MR MKWANAZI: When you say in the Gama litigation – this matter?

ADV MYBURGH SC: Well in the Gama arbitration as you call it an appeal.

MR MKWANAZI: Okay.

ADV MYBURGH SC: You knew that.

MR MKWANAZI: I am not sure if I knew that.

ADV MYBURGH SC: Mr Mkwanazi.

20 **MR MKWANAZI:** All I knew – yes.

ADV MYBURGH SC: You issued an instruction.

MR MKWANAZI: I knew that Bowman Gilfillan are representing us in this Transnet Bargaining process.

ADV MYBURGH SC: Bargaining Council.

MR MKWANAZI: Which has [00:21:28].

ADV MYBURGH SC: Yes.

MR MKWANAZI: Yes.

ADV MYBURGH SC: So you understood that Bowman Gilfillan were representing you in the Gama disciplinary – sorry Gama dismissal arbitration. The one that was supposed to be held on Monday the 24th you knew that.

MR MKWANAZI: I am not sure if I knew that.

ADV MYBURGH SC: Well that is astonishing. Who were you asking for help from?

10 **MR MKWANAZI:** From Bowman Gilfillan.

ADV MYBURGH SC: No I am saying when you [00:22:00] on the screen. Are you suggesting to us...

MR MKWANAZI: No, no.

ADV MYBURGH SC: Well let us decide who is going to...

MR MKWANAZI: No I am on my own here. There are two sort of matters. If I recall Bowman Gilfillan are representing us on the Transnet Bargaining Council matter of Gama.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Yes they are.

20 **ADV MYBURGH SC:** Right. Okay. So that was not too difficult.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And you know that they also represented you during the disciplinary hearing. You would have even a little investigation would have shown that,

correct?

MR MKWANAZI: Yes that is correct.

ADV MYBURGH SC: And you knew that that disciplinary hearing presumably you would have come to learn went on for a very long time.

MR MKWANAZI: That is correct but do not forget that disciplinary hearing would have taken place maybe some six to eight months before.

ADV MYBURGH SC: Yes.

10 **MR MKWANAZI:** And I was not there then and my – that is why engagement with them starts in January when this matter is being prepared.

ADV MYBURGH SC: Yes.

MR MKWANAZI: For the Transnet Bargaining Council process.

ADV MYBURGH SC: And you knew as well that Bowman Gilfillan had engaged a very pre-eminent senior counsel. Correct?

MR MKWANAZI: I do not know – ja is it Mr Todd?

20 **ADV MYBURGH SC:** You knew that the attorney was Mr Todd?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: You watched him on TV the whole of yesterday.

MR MKWANAZI: Yes I saw him yes. He is a good attorney.

ADV MYBURGH SC: So you knew that?

MR MKWANAZI: Yes.

ADV MYBURGH SC: So Mr Todd from Bowman Gilfillan and his senior counsel were steeped in this case, correct? They had worked on it for a very long time, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: But you never so much as picked up the phone and asked Mr Todd for his advice on your prospects of success, correct?

10 **MR MKWANAZI:** No I did not.

ADV MYBURGH SC: I suppose why you did not do so is quite obvious.

MR MKWANAZI: I do not know.

ADV MYBURGH SC: Well why did you not phone him?

CHAIRPERSON: It seems the – it seems...

ADV MYBURGH SC: Can I suggest to you why you did not?

MR MKWANAZI: When you say it is quite obvious?

ADV MYBURGH SC: Well let me tell you why you did not because he would have told you that you were going to win
20 the case. Correct?

MR MKWANAZI: I hear where you coming from yes.

ADV MYBURGH SC: You did not want to hear that did you Mr Mkwanazi? Correct?

MR MKWANAZI: Not really no.

ADV MYBURGH SC: Yes well precisely.

MR MKWANAZI: My interpretation of Bowman Gilfillan – by the way I never saw their correspondence prior to – to maybe the beginning of January 2010. So yes they would have been corresponding with my Group Legal but from where I sat I almost wanted a new pair of eyes to look into this matter as if getting to the Transnet Bargaining Council process.

ADV MYBURGH SC: Right so let us...

CHAIRPERSON: I do not understand that Mr Mkwanazi.
10 Please help me understand that. I do not understand that. You come to an organisation for purposes of being part of the board. You are new in this organisation. I know that previously you had been I think Group CEO and so on.

MR MKWANAZI: Correct.

CHAIRPERSON: But for purposes of being part of the board you are new. You come at a time when there is a matter that the Minister tells you about on the first occasion he meets with you and offers you to the position of chairperson of the board. So it is obvious an important matter and he wants
20 you – instructs you to review it. That means you must go into it and see whether you know there was fairness or not okay?

MR MKWANAZI: Hm.

CHAIRPERSON: Now the organisation has been using this particular law firm. This law firm has been handling this

matter over the previous two years or so from the disciplinary hearing they had represented Transnet even in the high court application which they won. They succeeded. It means even in the disciplinary hearing they represented Transnet successfully.

They won because Mr Gama was found guilty of three serious acts of misconduct and was dismissed. So these are attorneys or this is a legal team which you must have got to know had won the high court application for Transnet that Mr
10 Gama had brought against Transnet.

2. Had won the disciplinary hearing. So they served your organisation well. Now you want to understand whether there was some unfairness. You do not want to talk to them? You just wanted to get another law firm on what grounds? When you have not – they have not said anything you do not like.

They – they have not performed anything badly. On the contrary they have done very well for Transnet. But you do not want even to talk to them. You want to go to another
20 law firm. I do not understand that.

MR MKWANAZI: Chairman that is the decision we took at the time and in my interpretation we needed almost a different set of eyes. Ja.

CHAIRPERSON: Why do you change a winning team? This is a winning team.

MR MKWANAZI: I remain saying that we needed a different pair of eyes on this matter.

CHAIRPERSON: But..

MR MKWANAZI: And yes Mr Gule or Deneys Reitz or whatever they are called ja.

CHAIRPERSON: Well if you had had a discussion with this law firm which had been so successful with his legal team – if you had had a discussion with them and through the discussion you felt that they advises may be on some of the
10 issues on which you sought advice were not satisfactory I would understand wanting to say let me hear somebody else. But I have difficulty understanding the logic where you do not - had not even discussed with them and yet they have been successful. You understand where I am coming from?

MR MKWANAZI: I hear where you are coming from Mr Chairman.

CHAIRPERSON: Yes. It does seem to me conduct that is difficult to explain. As I say, if you have had a meeting with them and you have said:

20 Just brief me on this matter because you people have been handling it for a long time and I see that the disciplinary hearing, you handled it very well on the face of it, at least. The high court application, you have handled it very well. The...

You were busy seeking to recover for Transnet costs.

And I think it was about R 426 000,00 that ...[intervenes]

MR MKWANAZI: That is correct, Chairman.

CHAIRPERSON: ...Mr Gama owed costs. They were pursuing that. It looks like they were doing right. So if you had met with them that briefed you and you had raised certain questions and through that discussion when you felt that, you know, you wanted another perspective because you are now taken with their perspective.

That I could maybe understand but you did not talk to
10 them. You did not write to them, other than saying: Stop the execution, the recovery and postpone the arbitration.

So just have that difficulty.

MR MKWANAZI: [Indistinct]

CHAIRPERSON: You are not even saying other than that you wanted a different ...[intervenes]

MR MKWANAZI: A different set of eyes, yes.

CHAIRPERSON: Yes. Mr Myburgh.

ADV MYBURGH SC: Yes, the truth is. Mr Mkwanazi, I put
20 to you. That you wanted someone to give you some friendly legal advice which you could use the board meeting on the 16th of February to persuade your fellow board members to take back Mr Gama.

That is actually what happened, is it not? You wanted friendly legal advice. That is what the consultation note in effect says. Correct?

MR MKWANAZI: Is says that, yes.

ADV MYBURGH SC: Yes. Well, precisely. So because you wanted friendly legal advice, the last person you would go to is to Mr Todd who was going to tell you as it was that you had very good prospects of success of winning Mr Gama's arbitration. That you did not want to hear, correct? That would not help you ...[intervenes]

MR MKWANAZI: Not really but yes I did want a different set of eyes to look into this matter.

10 **ADV MYBURGH SC:** I see. So let us have a look then at Bundle 3, page 107.

MR MKWANAZI: Yes.

CHAIRPERSON: I am sorry, Mr Myburgh.

ADV MYBURGH SC: Yes.

CHAIRPERSON: Could it be that you wanted a law firm or an attorney who could you that there was some unfairness in this dismissal? Because Mr Todd had prepared an opinion or a report which he sent to, I think Ms Senamela or Mr Senamela to pass onto you to where he made it clear
20 that, in effect, Transnet had a very strong case in the arbitration.

MR MKWANAZI: [No audible reply]

CHAIRPERSON: Is it... could it be that you were looking for somebody who would tell you that there was unfairness in this dismissal.

MR MKWANAZI: Chair, you are heading in the right direction because even though the facts are not as clear as the time of these discussion but I think they do begin to indicate that maybe the sanction of dismissal who was inappropriate.

And I think that law firm, Deneys Reitz, does begin to indicate that there is risk of us losing this case if we take it to Transnet Bargaining Council.

CHAIRPERSON: Mr Myburgh.

10 **ADV MYBURGH SC:** Yes, thank you. So let us go onto Bowman Gilfillan's letter, dated the 24th of January at page 107.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And just to fast-forward. Let us go to 108 and to paragraph ...[intervenes]

MR MKWANAZI: Page 108?

ADV MYBURGH SC: Yes. To paragraph 3.3.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes.

20 "The legal team representing Transnet and the Bargaining Council Arbitration including senior counsel is satisfied that even on Mr Gama's own version, it is likely that the sanction of dismissal will be upheld as fair with the three separate charges of misconduct of which he has now admitted to guilt.

The chairperson of the inquiry who reached this conclusion, is a highly respect senior counsel and labour arbitrator who was initially proposed as arbitrator by Mr Gama and whose integrity has never been called into question.”

3.4:

10 “In addition, Transnet and his legal team are aware of and are ready to present in the Bargaining Council Arbitration further facts and circumstances that show that Mr Gama’s current version is false in material respects.

This significantly aggravates the seriousness of the misconduct and makes it more likely still that the Bargaining Council arbitrator will find Mr Gama’s dismissal to have been fair.”

And then at paragraph 5, Mr Selinga was expressly asked to bring this letter to your attention. Presumably he did so?

MR MKWANAZI: I think he did Chair.

20 **ADV MYBURGH SC:** Right. So here you know, the legal team representing Transnet at the Bargaining Council Arbitration including senior counsel is satisfied that you are going to win, correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: That was not music to your ears.

MR MKWANAZI: [No audible reply]

CHAIRPERSON: [laughing] It could not have been music in your ears Mr Mkwanazi. Could it have been?

MR MKWANAZI: No, Chairman maybe not but do not forget, the brief is different to what Bowman Gilfillan did. The brief is: Look at the unfairness of fairness of that process and the sanction. It is a different brief.

I suspect, Bowman Gilfillan would have stayed on this road and yet, a different...

10 That is why a different set of eyes is useful to say: Please, look into this. Was it unfair in terms of the process? It was fair. Was it unfair in terms of a sanction and look into it in terms of other similar case matters?

So this other... the other firm, Deneys Reitz, were not requested to do the same thing that Bowman Gilfillan had done.

CHAIRPERSON: Well, you know Mr Mkwanazi. By this time, you would have known... well, you knew that the chairperson of the disciplinary inquiry who had come to the
20 conclusion that Mr Gama was guilty of these three serious acts of misconduct and who had concluded that each one of these three serious acts of misconduct would have justified dismissal on its own, was a senior counsel.

You would have known that. Actually, this letter says so and says: An experienced senior counsel and arbitrator.

Now this letter tells you that Transnet's legal team that Mr Todd is talking about includes a senior counsel. And he says, they too are of the opinion that Transnet has a strong case.

So you already have those. They are saying the same thing. Why do you still want to look for somebody who says something else?

MR MKWANAZI: It is a different set of eyes on this at the particular time.

10 **CHAIRPERSON:** It is like Mr Mkwanzazi, you and the board were bending over backwards to try and accommodate Mr Gama. It is not like you were looking at the matter objectively. It is like you were bending over backwards to accommodate Mr Gama. Or maybe to accommodate the shareholder minister's inclination because he had already said that, you know, the dismissal was unfair. That is how it comes across. You want to comment on that?

MR MKWANAZI: No, Chairman. That is how it comes across as well. I agree with you.

20 **CHAIRPERSON:** You agree? Okay alright.

ADV MYBURGH SC: Well, then let me then deal with something else that happened on the 24th of January. Just to place in context. Could I ask you please ...[intervenes]

MR MKWANAZI: Which?

ADV MYBURGH SC: ...to go to File 4, Bundle 4?

MR MKWANAZI: Bundle 4.

ADV MYBURGH SC: Page 6 of your affidavit or your declaration.

MR MKWANAZI: Page 6, Bundle 4. [poor connection – unclear] Wait. Six...

ADV MYBURGH SC: Chairman, I am told there is a technical problem and we need to break for a while. Is that right?

CHAIRPERSON: Let us... is there an indication how long it
10 might take?

TECHNICIAN: [Indistinct]

CHAIRPERSON: Fifteen?

TECHNICIAN: Ten.

CHAIRPERSON: Ten. Okay we have to adjourn because apparently there is some technical problem. Mr Mkwanazi, we will adjourn and the technicians will tell us once the problem has been addressed. We adjourn.

MR MKWANAZI: Thank you, Chairman.

INQUIRY ADJOURNS

20 **INQUIRY RESUMES:**

CHAIRPERSON: Okay.

ADV MYBURGH SC: Thank you. Mr Mkwanazi, I want to take you to, please, to Bundle 4, page 6, part of your declaration.

MR MKWANAZI: H'm? Page 6... [poor connection –

unclear] Yes?

ADV MYBURGH SC: You see that at paragraph 6.1, you make reference there to KPMG and Nkonki.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And then the next sentence says:

“The first report was done quickly as the information was historical.”

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes.

10 “It is that first report that was used by the board in its deliberations.”

Do you see that?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Now, could I ask you then to turn please to Bundle 2?

MR MKWANAZI: Bundle 2.

ADV MYBURGH SC: And if you turn up please page 380? These are pages who would have been inserted earlier today.

20 **MR MKWANAZI:** 380?

ADV MYBURGH SC: Three, eight, zero.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Are you there?

MR MKWANAZI: yes.

ADV MYBURGH SC: So the Commission made a request

for information on KPMG and then issued a summons in order to obtain the various reports.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And the reports at KPMG produced... we know they produced a final report in November. That is attached to your declaration. They produced two other reports. The Progress Report on the 24th of January.

That you will find at pages 380 running through to 400. And then they produced, and this is referred to in your letter
10 to the Public Protector which we will come to in a moment.

They produced an Interim Report at page 401 dated the 26th of April 2011. So a Progress Report, 24 July. Oh, sorry 24 January. An Interim Report, 26 April and then a Final Report in November.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Now you say in your declaration that the first report was done quickly and it is this report that was used by the board. Presumably, you must be referring to the report of 24 January?

20 **MR MKWANAZI:** A report, they had done a report by then. But looking at what I am seeing here ...[intervenes]

ADV MYBURGH SC: Yes.

MR MKWANAZI: It looks likes it was not on the 24th of January.

ADV MYBURGH SC: Well, that is my very point.

MR MKWANAZI: Yes.

ADV MYBURGH SC: So what was the first report that was used by the board in its deliberations? Because this report would not have helped it. It is progress report that sets out the mechanics and the manner in which KPMG and Nkonki is going to set about their task.

MR MKWANAZI: My understanding, besides this report there was another report on Transnet's irregularities which is dated 2008 which I had at the time.

10 **ADV MYBURGH SC:** Mr Mkwanazi, I think you might be confusing yourself.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The paragraph that I have read to you, says that it was the first report of KPMG and Nkonki.

You know that ...[intervenes]

MR MKWANAZI: No, no. Ja, it is a long time ago, by the way, in terms of whatever we are talking about. It is now nine years or so.

ADV MYBURGH SC: Yes.

20 **MR MKWANAZI:** And I truly thought that this report here... by the way, I have never had this report. I only saw it today.

ADV MYBURGH SC: Sorry ...[intervenes]

MR MKWANAZI: I thought that this report from page 401 was actually published before the end of January. Yes, I thought that.

ADV MYBURGH SC: Well, that is completely wrong. You referred to this report in your letter to the Public Protector and that is in June.

MR MKWANAZI: Wait. To the first ...[intervenes]

CHAIRPERSON: Ja... I am sorry. I am sorry, Mr Mkwanazi. I am sorry. I think you ...[intervenes]

MR MKWANAZI: Yes, Chairperson.

CHAIRPERSON: I think you are on the same page up to a certain point. Mr Mkwanazi, you must tell me if I
10 misunderstand. I seem to understand you to see, you concede that the board could not have had this Interim Report which starts at page 401. It could not have deliberated on that in making the decision whether to reinstate Mr Gama.

MR MKWANAZI: I concede, yes.

CHAIRPERSON: You concede that?

MR MKWANAZI: Because I have never... I am seeing this for the first time.

CHAIRPERSON: For the first time, yes.

20 **MR MKWANAZI:** But I was under... yes. I was under the impression that there was a report towards the end of January 2011. And besides, there was another report from Transnet Internal Audit which I had at the time which talked about the so-called 30 individuals who had done various things. Ja, but even that, I do not have.

CHAIRPERSON: Okay, no, no. Let us take it step-by-step.

MR MKWANAZI: Yes.

CHAIRPERSON: Okay you concede that this is not the report that you ...[intervenes]

MR MKWANAZI: No.

CHAIRPERSON: ...the board could have deliberated upon in making the decision to reinstate Mr Gama.

MR MKWANAZI: Yes.

CHAIRPERSON: That is the Interim Report.

10 **MR MKWANAZI**: Yes.

CHAIRPERSON: You accept that your affidavit at page... paragraph 6.1 talks about an Interim Report of KPMG which might suggest it is this report.

MR MKWANAZI: That is correct.

CHAIRPERSON: But ...[intervenes]

MR MKWANAZI: Yes.

CHAIRPERSON: You accept that one. What the affidavit says, cannot be correct?

MR MKWANAZI: It is not correct, yes.

20 **CHAIRPERSON**: Okay alright. Then Mr Myburgh, you want to take it from there?

ADV MYBURGH SC: Thank you. Then you talked about an Internal Audit Report that you say you had. That is the one attached to your affidavit, correct? Is that ...[intervenes]

MR MKWANAZI: No, it is not there. It was... it is called

The Procurement Irregularities at TCP Procurement Irregularities at TFR, et cetera. It is a report around the 2008. I still do not have that report.

ADV MYBURGH SC: Yes but that was not before the board. So what we ...[intervenes]

MR MKWANAZI: I had the report.

ADV MYBURGH SC: Yes.

MR MKWANAZI: I had the report then.

ADV MYBURGH SC: Mr Mkwanazi.

10 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: What we do agree upon is that, as of the 16th of February – and we are going to come to that board meeting.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The 16th of February the board did not have any report from KPMG/Nkonki. Correct?

MR MKWANAZI: That is correct. I agree with you.

ADV MYBURGH SC: Alright. Now I want to ...[intervenes]

20 **CHAIRPERSON:** Did the board as at the 16th of February, have any report before it at all which talked about how any employees had been dealt with in terms of deviations or non-compliance procurement procedures?

MR MKWANAZI: Chairman, there was a report. For some reason, it has disappeared, the one I am talking to. Its title could have been Transnet... No. Transnet Irregularities by

Transnet Internal Audit done in two thousand - actually, two reports – done in 2008 and then there is another report.

Now for whatever reason, those two reports are missing. And at the time, if you recall, there was this supply of a lot of information to my office by the organisation. So I do recall having seen one or two of these reports.

CHAIRPERSON: Yes. Now, I understand your evidence insofar as it says you were aware of such reports, one or two. Or you were in possession of such reports. But are
10 you sure that those reports or one of them, those reports were or one of those reports was before the board at the meeting of the 16th of February?

MR MKWANAZI: My recollection, there was a report tabled to support certain statistics of allegations and condonements, et cetera, et cetera.

CHAIRPERSON: Ja.

MR MKWANAZI: I hope somebody could just [poor connection – unclear] that report.

CHAIRPERSON: Do you recall whether, if there was such a
20 report before the board, it did deal with the facts of those other cases in order to be able to compare like with like in regard to Mr Gama? Because it cannot be useful to just look at any case where there was non-compliance.

MR MKWANAZI: Ja, ja.

CHAIRPERSON: Each case has to depend on its own

merits, is it not?

MR MKWANAZI: Chairman, you are correct. If that report would not have compared... would not have listed this cases in comparison to Mr Gama.

CHAIRPERSON: Yes.

MR MKWANAZI: But it would have listed similar irregularities, the quantum of the condonements, et cetera, et cetera. It *does not* refer two reports, yes. Without referring to Mr Gama.

10 **CHAIRPERSON**: Yes. Okay Mr Myburgh.

ADV MYBURGH SC: Well, we are lucky because we have got affidavits from many of your fellow directors and we will see in time what they say.

MR MKWANAZI: Yes.

ADV MYBURGH SC: But let us start with the board meeting of the 25th of January just to follow the chronology. If you please go to 51.

MR MKWANAZI: Five, one.

ADV MYBURGH SC: Of Bundle 1 and to page 534.

20 **MR MKWANAZI**: 534... Page 543?

ADV MYBURGH SC: 543. That is part of the minutes of a board meeting on the 25th of January 2011.

MR MKWANAZI: Five, three, four...

ADV MYBURGH SC: And if you could please ...[intervenes]

MR MKWANAZI: 534. Okay.

ADV MYBURGH SC: Go to paragraph 4.1.6.

MR MKWANAZI: One point six...

ADV MYBURGH SC: There is says the chairman, which is you:

“The chairman stated that he was currently occupied with more than 30 cases with similar allegations to those levelled against Mr Gama.

He indicated that there was evidence that there is a culture of condonation of exceeding delegative authority within the company.”

So yes, that is what you said.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: But you gave no documents to your fellow directors. You told them that, correct?

MR MKWANAZI: There was. That is why I then... Also, I find it interesting that I get this minute today. I have never had it. That is why then, I am keen to get... what date was this thing? [poor connection – unclear]

I am keen to actually get those reports by Transnet Group Internal Audit. It was two reports.

And I do recall that I based my 30 cases or so, which were not identical to Gama’s because those cases never dealt with [poor connection – unclear], et cetera. Those cases were dealing more with procurement issues.

ADV MYBURGH SC: Yes. But the point that I make Mr

Mkwanazi is that you did not give your fellow directors any documents. You simply told them that you are occupied with these 30 cases, correct?

MR MKWANAZI: Call it a... on paragraph 41.4, there was this document.

ADV MYBURGH SC: Right?

MR MKWANAZI: Procurement Irregularities at Transnet. There was another document as well. But it is this document that I thought the board have had sight of. Where now I was
10 talking to this list of 30 similar cases, if I could use the word.

ADV MYBURGH SC: Alright. Then you could please go to paragraph 4.1.8? Because I want to come to an important meeting ...[intervenes]

MR MKWANAZI: But not hundred percent similar.

ADV MYBURGH SC: Well, 4.1.8 ...[intervenes]

MR MKWANAZI: 4.1.8. Yes.

ADV MYBURGH SC: Yes.

20 “The chairman assured the board that the company was cooperating fully with the Public Protector. He informed the board that he had a discussion with Mr Gama on 22 January on a proposed settlement agreement.”

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes.

“He advised the board that the matter will be

deliberated on, that the Corporate Governance and Nominations Committee and then recommend to the board for approval on 16 February.”

So that was the route to the 16 February meeting. First a meeting of the GCNC on the 3rd of February, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: So let us go then to that meeting.

MR MKWANAZI: Which meeting?

ADV MYBURGH SC: The meeting of the Corporate
10 Governance and Nominations Committee on the
3rd of February. Sorry, before I do that. There are a few
things I need to deal with. There was another board meeting
after the 25th of January. It was on the 1st of February.

MR MKWANAZI: Yes. What is its page?

ADV MYBURGH SC: Let me just take you there. Sorry, just
give me a second. Those minutes are at 916 of the same
file.

MR MKWANAZI: Page 916?

ADV MYBURGH SC: Yes.

20 **CHAIRPERSON:** 916. Not 8916, I think. 916.

ADV MYBURGH SC: Yes. And then if you could forward to
918.

MR MKWANAZI: Yes?

ADV MYBURGH SC: And if you have a look at paragraph
4.1.10 towards the top of the page.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes.

“The chairman stated that he was in settlement discussions with Mr Gama. He stated that Mr Gama was only appealing the sentence that was imposed. He added that the committee was currently reviewing Mr Gama’s sentence and the proposed settlement agreement will be presented to the board for approval on 16 February 2011.”

10 Now, what committee are you referring to there?

MR MKWANAZI: It would be... first, I suspect the Corporate Governance.

ADV MYBURGH SC: Right. So that is on the 1st of February.

MR MKWANAZI: Correct.

ADV MYBURGH SC: Now we know that something very important happened on the 2nd of February.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And that is, Mr Todd... Sorry, is there
20 something ...[intervenes]

MR MKWANAZI: Paragraph? What paragraph?

ADV MYBURGH SC: I am not referring to ...[intervenes]

MR MKWANAZI: 918?

ADV MYBURGH SC: I am off that document Mr Mkwanazi. Perhaps you can just concentrate on my question, please.

MR MKWANAZI: Okay.

CHAIRPERSON: Yes. One second, Mr Myburgh. Mr Mkwanazi?

MR MKWANAZI: Yes, Chair?

CHAIRPERSON: Mr Myburgh just read from paragraph 4.1.10 at page 981.

MR MKWANAZI: Yes.

CHAIRPERSON: But I think arising from that, he has a question for you.

10 **MR MKWANAZI:** Yes.

CHAIRPERSON: Mr Myburgh.

ADV MYBURGH SC: My question was. What committee are you referring to there?

MR MKWANAZI: It would have been the Corporate Governance to then come back to the board.

ADV MYBURGH SC: Okay thank you. So Mr Mkwanazi, that is on the 1st of February. I now want to move to the 2nd of February. I am off that minute now.

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** Alright. On the 2nd of February, Mr Todd produced his report. You have seen that report?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Could we please go to Bundle 3?

MR MKWANAZI: Bundle 3. I do not have this, the previous minute. Bundle 3? [witness in conversation with another

party]

ADV MYBURGH SC: Page...

MR MKWANAZI: Bundle 3, page 16?

ADV MYBURGH SC: Page...

MR MKWANAZI: 16?

ADV MYBURGH SC: 65.

MR MKWANAZI: Oh, page 65. Okay. Keep the notes of that bundle of that meeting. [witness in conversation with another party] 65, yes?

10 **ADV MYBURGH SC:** I take it you received a copy of this report?

MR MKWANAZI: Yes, I think I did. Ja.

ADV MYBURGH SC: Well, what you mean you think you did?

MR MKWANAZI: Yes, I did.

ADV MYBURGH SC: Right. So you will see that it expands from 65 all the way through to 90.

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** Twenty-five pages of the report, correct?

MR MKWANAZI: Yes, that is correct.

ADV MYBURGH SC: A very comprehensive and detailed report.

MR MKWANAZI: Yes.

ADV MYBURGH SC: This also was not music to your ears

because at this point in time, you were opposed to reinstating Mr Gama, correct?

MR MKWANAZI: [poor connection – unclear] Yes.

ADV MYBURGH SC: Ja. Did you ever read this report?

MR MKWANAZI: Yes, I did.

ADV MYBURGH SC: H'm. And what impression did you gain? Was this a report of a competent attorney, someone who obviously who had a handle on the matter?

MR MKWANAZI: Yes, it was. It was. It was, ja.

10 **ADV MYBURGH SC:** Was there anything missing from this report that you ...[intervenes]

MR MKWANAZI: It is comprehensive.

ADV MYBURGH SC: It is all there?

MR MKWANAZI: Yes.

ADV MYBURGH SC: When you read this report, did it leave any room to conclude that you were going to actually lose the arbitration?

MR MKWANAZI: No, but then that did not stop me from getting a second opinion on it.

20 **ADV MYBURGH SC:** Yes.

MR MKWANAZI: Which is why then I approached [poor connection – unclear]

CHAIRPERSON: Did you note that last paragraph Mr Mkwanazi on page 90, namely paragraph ...[intervenes]

MR MKWANAZI: I did Chair.

CHAIRPERSON: Page 90, same page?

MR MKWANAZI: Yes.

CHAIRPERSON: Paragraph 67.4.

MR MKWANAZI: Yes.

CHAIRPERSON: Where Mr Todd says:

10 “There would have to be compelling reasons not to
abide by the outcome of a properly constituted
disciplinary inquiry and the outcome of the
Bargaining Council Arbitration mechanism that is
prescribed by law to determine a dispute about the
fairness of a dismissal.”

You ...[intervenes]

MR MKWANAZI: I read that paragraph as well. Yes.

CHAIRPERSON: You did?

MR MKWANAZI: Yes.

20 **CHAIRPERSON:** Having read that, would you accept that,
at least what these attorney was telling Transnet and the
board was, the outcome of the disciplinary inquiry is one that
is fully justified and to do anything to undo that, you would
need very compelling reasons. Is that how you understood
it?

MR MKWANAZI: That is correct.

CHAIRPERSON: Yes. Okay alright. Mr Myburgh.

ADV MYBURGH SC: Yes, thank you. So that is on the
2nd of February. I now want to come to the meeting of the

Corporate Governance and Nominations Committee on the 3rd of February.

MR MKWANAZI: What page?

ADV MYBURGH SC: I would like you please to go back to Bundle 1 and to turn up page 827.

MR MKWANAZI: Can you help me with Bundle 1? [witness in conversation with another party] Okay. Page 827?

ADV MYBURGH SC: [No audible reply]

MR MKWANAZI: [witness in conversation with another party] Yes, I see this.

CHAIRPERSON: Ja, those are minutes of the meeting of the Corporate Governance and Nominations Committee on 3 February 2011.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Alright. Now Mr Mkwanazi, you were the chairperson of that committee?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: The other members were Ms Nyaka, Ms Tshepe and Mr Shaba, correct?

20 **MR MKWANAZI**: That is correct.

ADV MYBURGH SC: And we see under partial attendance, Mr Mapoma was present, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Now if you go to page 828 over the page, you will see there is a heading.

MR MKWANAZI: Turn over the page. [witness in conversation with another party]

ADV MYBURGH SC: You will see ...[intervenes]

MR MKWANAZI: It is 808.

ADV MYBURGH SC: Yes, over the page, please.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You will see there is a heading, 6.7, report back from the advert process. I mean, what was happening here is the position, the vacant position of
10 Transnet GCE was being advertised.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: And you would accept that much of this meeting was dedicated to whether or not Mr Gama should be allowed to put forward an application.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Or for his application to be ...[intervenes]

20 **MR MKWANAZI:** That is correct. Yes.

ADV MYBURGH SC: If we could then please go to page 830?

MR MKWANAZI: Yes.

ADV MYBURGH SC: And there at paragraph 6.9 about halfway down, investigation by the Public Protector.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes.

“Mr Mapoma took the committee through senior counsel’s opinion that was obtained with regard to Mr Gama’s application for the GCE position. He highlighted that the legal opinion was based on the following three issues.

- 10
1. Does the guilty verdict against Mr Gama exclude him from being considered in the current GCE selection process underway?
 2. How does the pending appeal decision affect the board decision to interview or not?
 3. Does the Public Protector complaint currently being dealt with have a bearing on the selection process?”

Do you confirm that?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Then the sub-paragraph:

20 “Mr Mapoma informed the committee that senior counsel’s opinion was that Mr Gama should not be excluded from the current GCE selection process. Ms Tshepe indicated that senior counsel’s opinion was not the same as the lawyers’ opinion. She stated that the general rule was that, in terms of Clause 4.8.4 of the company’s recruitment

procedure, the company may deviate from the policy if there are exceptional circumstances that warrant a deviation.”

Do you see that?

MR MKWANAZI: I see that, Chair.

ADV MYBURGH SC: And then I am going to come back to that opinion and that clause.

10 “Mr Mapoma further took the committee through the proposed settlement agreement between the company and Gama, stated that there was no agreement on the following issues, the date of reinstatement, the position to which Mr Gama would be reinstated, et cetera.”

So essential to the business of this committee on the 3rd of February was this issue of Clause 4.8.4 of the recruitment policy, correct?

MR MKWANAZI: That is correct.

20 **ADV MYBURGH SC:** Now could I ask you please to now turn to Bundle 2? Keep this bundle open where you are at file or Bundle 1 but then open as well ...[intervenes]

MR MKWANAZI: Bundle 2, yes.

ADV MYBURGH SC: Bundle 2.

MR MKWANAZI: Yes. Bundle 2. What page?

ADV MYBURGH SC: Page... let us first go to page 302.

MR MKWANAZI: 302... [poor connection – unclear] 302.

302, yes.

ADV MYBURGH SC: Yes. Are you there?

MR MKWANAZI: Yes, I am there.

ADV MYBURGH SC: So this is the recruitment and selection policy.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And let me take you to... no doubt you are familiar with this. Let me take you please to Clause 4.8.4 at page 307.

10 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: It says that at 483, just above that:

“When determining whether a person is suitable qualified for a job, steps must be taken to determine whether...”

And then it sets it out. And then 4.8.4.:

“The candidate must not have been previously dismissed from Transnet or reasons relating to incapacity or misconduct.”

Correct?

20 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: And of course, the problem was that Mr Gama had been dismissed for conduct, right?

MR MKWANAZI: Yes.

ADV MYBURGH SC: And the issue that then arose before the committee is whether one could depart from 4.8.4 on the

basis of Clause 2. And Clause 2 you will find at page 304.

MR MKWANAZI: Three, zero, four?

ADV MYBURGH SC: Three, zero, four.

MR MKWANAZI: Yes, I see Clause 2.

ADV MYBURGH SC: Under the heading scope.

“This policy applies to all job applicants and employees of Transnet. Transnet may, however, at its sole discretion deviate from the policy where necessary in respect of executive appointments.”

10 So that was really the debate. Do you remember that?

MR MKWANAZI: Yes. Yes, I do.

ADV MYBURGH SC: Now Mr Mapoma in his report to the committee, as we have seen, spoke of a senior counsel’s opinion. Let me take you to that opinion. You find that at page 293 of the same bundle.

MR MKWANAZI: Of the same, 293. I have got this, yes. 293, yes.

ADV MYBURGH SC: If we go to paragraph 13 at page 297.

20 **MR MKWANAZI:** I see it.

ADV MYBURGH SC: Counsel said:

“However, clause 2 of the recruitment procedure provides that Transnet may at its sole discretion deviate from the policy where necessary.”

The next paragraph:

“However, the discretion to deviate from clause 4.8.4 is not an unconstrained one. This discretion must be exercised after consideration of all the relevant circumstances. Furthermore, since Transnet is an organ of state, decisions taken by Transnet are exercises of public power and therefore need to comply with the minimum threshold of rationality. This requires a rational connection between the decision taken and the reasons given for it.”

10

Do you see that? And then if I could take you please to paragraph 19, over the page, one nine. Are you there?

MR MKWANAZI: Yes, I am there but there is a problem with the system. It keeps dropping.

ADV MYBURGH SC: Alright.

MR MKWANAZI: Yes, I am there, I am on page – you said 297?

ADV MYBURGH SC: 298.

MR MKWANAZI: 298.

20 **ADV MYBURGH SC:** Paragraph 19.

MR MKWANAZI: I am there, yes.

ADV MYBURGH SC: Counsel said:

“A crucial fact to be taken into account in exercise of this discretion is Mr Gama’s failure during the arbitration proceedings to challenge the findings of

misconduct made against him by Entrobus(?) SC. By not challenging these factual findings Mr Gama impliedly concedes that he was guilty of misconduct. It may well not be rational for Transnet to interview a candidate who has conceded to having misconducted himself in carrying out of his duties as Chief Executive.”

Do you see that?

MR MKWANAZI: I see it.

10 **ADV MYBURGH SC:** May well not be rational.

MR MKWANAZI: I see that.

ADV MYBURGH SC: Correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: And would you agree with that?

MR MKWANAZI: Yes, I do.

ADV MYBURGH SC: Okay. So let us then have a look at the decision of your committee.

MR MKWANAZI: Okay, that is file ...[intervenes]

20 **ADV MYBURGH SC:** For that you need to go to ...[intervenes]

MR MKWANAZI: File 1.

ADV MYBURGH SC: To bundle 1, yes.

MR MKWANAZI: Yes.

ADV MYBURGH SC: If I can please ...[intervenes]

MR MKWANAZI: Page 830.

ADV MYBURGH SC: ...direct your attention – yes, we have looked at 830, I would like to go 831.

MR MKWANAZI: There is a problem with sound.

CHAIRPERSON: Oh. Can you hear me now?

MR MKWANAZI: Can you hear?

CHAIRPERSON: Can you hear me now?

MR MKWANAZI: I cannot hear Advocate Myburgh. I can hear the Chairman.

CHAIRPERSON: Oh.

10 **ADV MYBURGH SC:** Well, I am not speaking. Can you hear me?

MR MKWANAZI: Advocate I can hear you.

ADV MYBURGH SC: Alright, so let us go please to 831 and to paragraph 6.3.13. Are you there?

MR MKWANAZI: Yes. Yes, I am there.

ADV MYBURGH SC: Deviation from clause 4.8.4:

20 “Ms Tshepe and Ms Nyaka stated that the current settlement negotiations with Mr Gama were rationale for deviation from clause 4.8.4. Mr Sharma disagreed and stated that it was not in the best interests of the organisation to deviate. Mr Sharma’s statement that he was unhappy with how Mr Gama’s matter was being handled. He indicated that he was of the view of that the committee was not considering the best interests of the company

but that of an individual. The committee voted on whether it should deviate from clause 4.8.4, there were three votes against one in favour of deviation.”

So what we know...

“...and then it was resolved...”

I beg your pardon.

“...that the committee recommends that Mr Gama be considered for the GCE selection process.”

10 So who voted in favour of deviation was you, Ms Nyaka and Ms Tshepe and against it was Mr Sharma.

MR MKWANAZI: Yes.

ADV MYBURGH SC: is that right?

MR MKWANAZI: That is correct..

ADV MYBURGH SC: Now does this minute reflect any consideration of the advice that you received from counsel that to interview someone who had admitted guilt ...[intervenes]

MR MKWANAZI: It does not at face value, yes.

20 **ADV MYBURGH SC:** Right.

MR MKWANAZI: Yes.

ADV MYBURGH SC: It does not at face value?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Is it something that you considered?

MR MKWANAZI: Because, Advocate, on the other side –

no, I do concede that at face value it does not but there was this subcommittee which was debating this matter.

ADV MYBURGH SC: Right.

MR MKWANAZI: And that subcommittee then took a certain view that this person can be allowed to be interviewed.

ADV MYBURGH SC: Yes because of the settlement negotiations, correct?

MR MKWANAZI: That is correct.

10 **ADV MYBURGH SC:** But there is just a consideration of the settlement negotiations, there is no consideration of the fact that it may not be rational to interview a candidate who has conceded to having misconducted himself in his capacity as a Chief Executive Officer. It is a great irony, you are actually settling with that person. Now consideration is given to that, is it?

MR MKWANAZI: No, I agree with you, Advocate.

ADV MYBURGH SC: But, you see, Mr Mkwanazi, is this not really the game, I mean was the truth not of the
20 position that former President Zuma still wanted Mr Gama to be the Chief Executive of Transnet and in order to allow him to throw his hat into the ring, the first thing he needed to do was to deviate from 4.8.4 and that that is actually why you were settling with him, you were getting him back so he could go to this high office. Is that not actually the

objective?

MR MKWANAZI: I would disagree with that simplicity.

ADV MYBURGH SC: Right?

MR MKWANAZI: Because you put it as if because President Zuma at some stage had wanted him in that top position but this position at that current time, there was a head hunter who had been appointed to deal with the candidates who were keen to be considered for that position, so he would have competed with other candidates
10 in terms of suitability. Yes, from clause 4.8.4 I understand fully what you are saying.

ADV MYBURGH SC: But I just cannot understand how you could deviate from it in the circumstances of this matter.

MR MKWANAZI: We did deviate.

ADV MYBURGH SC: I see.

CHAIRPERSON: Well, you see, Mr Mkwanazi, I mean you did indicate that you were listening to Mr Todd's evidence yesterday so you know all the things that I was saying and
20 at some stage I did say that part of the reason why I was articulating some of the thoughts that were crossing my mind was precisely so that somebody like you who could be listening, who would still be coming to give evidence, could know what sort of issues were troubling me so that when you come to testify, you know, you might have thought

about them and can address them.

So it is a transparent way of looking at issues, so you know what is going on in my mind, you can address it head on if you can and if you cannot, you cannot, but I am not hiding from you what is going on in my mind.

So I have difficulty with the – I have serious difficulty with the whole idea of the board reinstating somebody who had occupied such a senior position in the organisation and who had been found guilty of such
10 serious acts of misconduct and was not challenging those findings, you know, accepted that they were correctly made but with the board thinking of reinstating that person.

But now, you are already here, as this committee, are doing something that contemplates that this person could actually be promoted. I cannot understand the logic unless there is something else.

But in terms of the facts of the case, in terms of the process, fair process to which Mr Gama had been subjected and looking at the seriousness of his contract, I
20 am looking at this committee and I am saying not only is this committee thinking of reinstating Mr Gama, actually it is thinking of – it seeks to give him a platform to go and occupy an even higher position despite the failures in his conduct. How is that possible?

How is it possible that so many people – or the

people in this committee and subsequently in the board would think that this is correct? That is my thinking, you know, as I say even yesterday and on other days, I say in the hearing what is going on in my mind because I am being transparent.

If somebody want to address it and they can address it and say Chairperson, I see this is how you are thinking but here is another angle from which you must look at it, then I can look at it but when it comes to this
10 issue I have this serious difficulty, what can you say to me about it?

MR MKWANAZI: Chairman, I fully understand where you are coming from and yes, we did debate this clause 4.8.4 and yes, Mr Sharma was not supportive but yes, the other three board members, including myself, were supportive of Gama being interviewed.

CHAIRPERSON: Upon reflection, because you have had many years since this thing happened, upon reflection, as you look at it now, look back, did you think it was the right
20 thing for this committee to do?

MR MKWANAZI: Chairman, I would have followed the advice of Advocate [indistinct] 13.03.

CHAIRPERSON: Yes, okay, alright. Thank you.

ADV MYBURGH SC: But why did you not follow it at the time? I mean, you asked for his advice.

MR MKWANAZI: No, we did ask for the advice and the time through debate and looking at various issues of debating that letter. I was of the view that he must given that opportunity but do not forget it is now nine years later or ten years later and then I am asked the same question and I am saying hold it, I might have a different view.

ADV MYBURGH SC: Well, perhaps you are not in the same position and that you are not as compromised as you might otherwise have been ten years ago. Is that not so?

10 **MR MKWANAZI:** I understand, Advocate, I understand.

ADV MYBURGH SC: Alright. Well, let us then go to this debate and I assume you watched Mr Mapoma's evidence on television because we are coming to that part of the transcript that he testified about. Could you please turn to page 854 of bundle 1? Eight five four.

MR MKWANAZI: 854? Okay, I have got that.

ADV MYBURGH SC: And let me ask you to drop down to – you see on the left hand side there is numbering?

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** There is a 685 towards the bottom. Can you just go up two lines from that and you see, Chairperson, who is yourself, you say:

“Can you comment on that, the appeal process?”

Do you see that?

MR MKWANAZI: Yes, I see that.

ADV MYBURGH SC: And you are asking Mr Mapoma to comment on that, correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Okay. Then let us go over the page to 855 and Mr Mapoma says he is not appealing against the finding of guilt, he is appealing against the dismissal, now I said. Do you see that?

MR MKWANAZI: I see that.

ADV MYBURGH SC: Ms Tshepe says:

10 “Which is the disqualifications. Sorry, Sachs, I just want to understand which is the disqualification?”

And then Mr Mapoma says:

“Right, now advised the Chair to say if we, as Transnet, go to the appeal...”

That we know is the arbitration.

20 “...and oppose the appeal, we stand a very good chance of winning that appeal. That was my view at the time. Where I am saying we are not strong, Doris, is if we have to explain the rationality of why we are settling. I do not think we are on very strong grounds on that. That is my view but on the disciplinary process itself and if we go and argue the matter on appeal we stand a very good chance of succeeding. Siya can win but we can also win as Transnet but we have a very, very good case

against him there. That is why we said let us rather postpone to 24 April, Chair, after another hearing so that we pursue the settlement process so the dismissal...”

And then Ms Tshepe jumps in.

“Sorry, Chair, I am confused. Then you have to explain to me why are we settling if we are going to win this case?”

And what do you say, Mr Mkwanazi?

10 **MR MKWANAZI:** It looks like I said:

“We do not know.”

ADV MYBURGH SC: Yes, well...

CHAIRPERSON: Did you mean you did not know why you were settling?

MR MKWANAZI: Chairman, I do not remember.

CHAIRPERSON: Yes?

MR MKWANAZI: I do not remember saying that but yes, this was taped.

CHAIRPERSON: H’m. So you must have said so.

20 **MR MKWANAZI:** I must have said so, ja.

ADV MYBURGH SC: So what ...[intervenes]

CHAIRPERSON: And in the context it could only mean you did not know why you were settling. Is that right? In the context ...[intervenes]

MR MKWANAZI: Yes, I ...[intervenes]

CHAIRPERSON: Because the question which had just been asked ...[intervenes]

MR MKWANAZI: I knew what we were trying to settle. The issue was he was – there was a contention on the sanction. So we were dealing with the sanction. So yes, I knew that.

CHAIRPERSON: Yes.

ADV MYBURGH SC: Ja.

CHAIRPERSON: Yes, but I am saying in the context of
10 this discussion, if the recording is correct that you said we do not know, could it ...[intervenes]

MR MKWANAZI: Chairman, I do not recall why I could have said that, ja.

CHAIRPERSON: Yes, okay, alright.

ADV MYBURGH SC: Well, Mr Mkwanazi, is it not perhaps that you were caught off guard? I mean, what you could not tell your fellow directors here is why you were settling. Is it not because you did not want to tell them I am doing this because I have been told to by the minister. You could
20 not tell them that. So you literally were gob smacked, you did not know what to say because here your legal man had said we are going to win this case and in fact he appears to have said well, that is why we postponed because we do not want that.

CHAIRPERSON: Well, I do not know, Mr Myburgh,

whether you want to take him step by step. I think all of the points you are making are important but you have got all of them together.

ADV MYBURGH SC: Alright. Ja. No, it is also late in the day, I do apologise.

CHAIRPERSON: H'm.

ADV MYBURGH SC: Mr Mkwanazi, you were caught here, were you not, because Mr Mapoma, the person who you had brought in to deal with this, had now told your fellow
10 board members you are actually going to win this case. It put you in a bit of an awkward position, did it not, because of course you had already negotiated.

MR MKWANAZI: It is correct.

ADV MYBURGH SC: Yes, so you were in an awkward position, right?

MR MKWANAZI: Ja, true.

ADV MYBURGH SC: and you were literally gob smacked, you did not know what to say. You were caught off guard, correct?

20 **MR MKWANAZI:** I would agree with you, ja.

ADV MYBURGH SC: Yes, absolutely. And then what is insidious, I put to you, is look how you changed so quickly after you give it thought. Though Tshepe says – you say we do not know why we are settling, Tshepe says:

“But Sachs says we stand a very good chance of

winning.”

And all of a sudden you say:

“No, it is fifty/fifty”

I mean really, Mr Mkwanazi. I mean honestly, it must be embarrassing to see this.

MR MKWANAZI: Do not forget, my saying fifty/fifty comes from a Deneys Reitz opinion which we had seen. I am not sure of the time, ja. I am not sure of the dates as well, ja.

ADV MYBURGH SC: But that is really not my point, you
10 went from I do not know to fifty/fifty within a sentence.

CHAIRPERSON: Which means Mr Mkwanazi you were saying the strength of your case and the strength of Mr Gama’s case was more or less the same and yet Mr Mapoma, a senior legal person within Transnet, had just finished saying we have a very, very strong case and he is a lawyer.

MR MKWANAZI: Yes, he is.

CHAIRPERSON: Yes. And then Ms Tshepe says:

“Then I do not understand why we are settling.”

20 Then you say:

“We do not know.”

Then she says:

“But Sachs says we stand a very good chance of winning.”’

Then you say it is fifty/fifty. So fifty/fifty is contrary to

what Mr Mapoma is saying.

MR MKWANAZI: I agree, Chairman.

CHAIRPERSON: Yes.

ADV MYBURGH SC: You see, Mr Mkwanazi, you had a different agenda here because settlement was not rational, it certainly was not rational in relation to your prospects of success, you had a different agenda, did you not?

MR MKWANAZI: Not really.

ADV MYBURGH SC: I see. Now what really shows up the
10 board is the next paragraph.

CHAIRPERSON: Well, maybe before that, Mr Myburgh, just in the paragraph, Mr Mkwanazi, that Mr Myburgh read to you where Mr Mapoma is saying that Transnet has got a very, very good case against Mr Gama, what do you say about this statement by him where he says – after saying how strong Transnet case is, he says:

“That is why we said let us rather postpone to the
24 April, Chair, after another hearing so that we
pursue the settlement process.”

20 What do you say – or what is your comment about that statement?

MR MKWANAZI: It sounds like a contradiction, Chairman, because although he does indicate that we have a good case, he then says let us rather postpone. It sounds like a contradiction.

CHAIRPERSON: Because when you have a good case you do not want to postpone, you want to finalise the case.

MR MKWANAZI: I agree with you, Chairperson.

CHAIRPERSON: You are ready.

MR MKWANAZI: I agree, ja. It is a contradiction.

CHAIRPERSON: I am leaving it to you, Mr Myburgh.

ADV MYBURGH SC: Yes.

CHAIRPERSON: To say the next point.

ADV MYBURGH SC: Well, it is a contradiction unless you
10 know what was happening and the last thing you wanted to
was to go to arbitration and win because you wanted the
man not only reinstated but you wanted to give him a shot
at becoming the Group Chief Executive and when you see
it that way, it is not a contradiction at all.

MR MKWANAZI: But that is not my statement, that is
Siyabulela Mapoma's...

ADV MYBURGH SC: yes.

MR MKWANAZI: He is being quoted, yes.

ADV MYBURGH SC: But you see, Mr Mkwanazi, he knew
20 what you were up to, he knew the game because you had
told him right at the outset you had told him.

MR MKWANAZI: I understand where you are coming from.

CHAIRPERSON: Ja.

ADV MYBURGH SC: And that was his mindset, he knew
what you were doing.

MR MKWANAZI: I understand that.

ADV MYBURGH SC: He knew that you told him that you had been instructed by someone above the ministry to reinstate Mr Gama.

CHAIRPERSON: And therefore, winning the case at the arbitration would defeat the whole object of Mr Gama being reinstated as you had been instructed according to Mr Mapoma, therefore it had to be postponed to try and settle because otherwise we are going to win this case and Mr
10 Gama will not come back. What do you say?

MR MKWANAZI: I understand, Chairman.

CHAIRPERSON: You understand.

MR MKWANAZI: Your logic, Chairman, makes – logical.

CHAIRPERSON: Yes, okay.

ADV MYBURGH SC: Mr Mkwanazi, you are very good at sidelining issues. I mean, the point is, it is not – the importance is not that it is logical, the importance is that it is also true, correct?

MR MKWANAZI: Also, funny enough, I still do not
20 understand what Mr Mapoma was saying with this sentence.

ADV MYBURGH SC: Yes. Well, let me ...[intervenes]

MR MKWANAZI: I fully do not understand.

ADV MYBURGH SC: What I understand Mr Mapoma to be saying is that you could not go to arbitration because Mr

Todd and his senior counsel was going to win that and that then would have thwarted the plan to get Mr Gama reinstated and also to allow him to have a shot at becoming the Group Chief Executive. That is what he is saying, in effect.

MR MKWANAZI: No, I understand what you are saying.

ADV MYBURGH SC: Right. And now only is it logical but it is also true because you had been instructed to reinstate Mr Gama, correct?

10 **MR MKWANAZI:** Reinstate is a strong word. Yes, I had been instructed to look into the fairness/unfairness.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Of particularly the sanction, yes.

ADV MYBURGH SC: Correct. And here your chief legal adviser was telling you that you have got a very, very case. In other words, that the sanction is fair.

MR MKWANAZI: It is.

ADV MYBURGH SC: So you had looked into it together with him and there is his conclusion, right? So where to
20 from here?

MR MKWANAZI: Come again? I am not sure what you want me to say.

ADV MYBURGH SC: Let me take you to the next paragraph. You have said – so Mr Mapoma says got a very, very good case. Ms Tshepe says well, then I am

confused, you say I do not know, then you say we have got a fifty/fifty chance. Ms Nyaka chips in by saying:

“I think, Chair, let us move from legal now. Because that is the problem, I think let us move it from legal. He has given his opinion which, by the way, I do not agree with necessarily, it is his opinion. I have an opinion, he shares an opinion. Everyone here has an opinion. Now the accountability and decision-making comes from this committee and let us decide at this committee what we are deciding on this deviation.”

Straightaway you say:

“Colleagues, I will deviate from clause 4.8.”

Nyaka says:

“I will do the same.”

Sharma says:

“I will not.”

You say:

“We will record it.”

20 And there we go, three against one. Now this Ms Nyaka, is she a lawyer?

MR MKWANAZI: No, I do not think so.

ADV MYBURGH SC: I see. Is that how things really worked, Mr Mkwanazi? I mean, here you have a person saying look, we have got a very, very good case. You get a

board member saying:

“I am really confused.”

You say I do not what is going on. Then it down to fifty/fifty and the next person says let us just leave aside this legal advice, let us vote in favour of deviation. That is what happened here. It is incredible what ...[intervenes]

MR MKWANAZI: I agree with you, ja.

ADV MYBURGH SC: Do you accept that upon reflection and reading this it truly is incredible? I mean, this is – this
10 is the work of the Corporate Governance and Nominations Committee of Transnet.

MR MKWANAZI: That is correct, Chairman.

ADV MYBURGH SC: Of which you were the Chairperson.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: You could only have conducted yourself, I want to put to you in this way, if you had another objective. Is that no so?

MR MKWANAZI: No because still even if we had deviated from clause 4.8.4 there was a recruitment process where
20 this individual would have competed against a lot of other individual.

ADV MYBURGH SC: Well, at ...[intervenes]

CHAIRPERSON: You see, when you try and find a rational explanation for something, for some decision and you cannot find it, you are bound to look elsewhere and

say okay, there is not logical explanation for this decision, so why would these people have done this. I mean there are a number of things that since this morning we have asked you and you have responded, we have discussed which it seems to me step by step make the Board's decision to reinstate Mr Gama seem very irrational. We will see by the end of your evidence whether that's where e will be or whether we will be at a point where it seems rational, it can be understood and so on, but we go back to
10 this position, I mean when we read this statement by Mr Mapoma here at page 855 where he tells the committee how strong Transnet's case is, how good the chances are that Transnet is going to win this arbitration, and then he says that is why we said let us rather postpone the matter to the 24th of April, so that we can pursue a settlement process.

Obviously that means as far as he knows, to say the least, he thinks we think this case is not a good idea, because otherwise when you think you are going to win and
20 you want to win, you are going to say I want the arbitration tomorrow, I am ready you know, but now the way he talks it is like that would be bad news if we win, so that is why we have postponed, we want to try and settle the matter.

And then you go back to me sitting here who have heard evidence of Ms Hogan, I have heard part of the

evidence of Mr Zuma, Ms Hogan said to me the Board, which is the Board before your Board, interviewed various candidates for the position of Group Chief Executive Officer for Transnet, it was a rigorous process, they recommended, they came up with a candidate, they recommended the candidate, the candidate was Mr Sipho Masego, and Ms Hogan put the candidate before Mr Zuma and said I support this candidate, the Board says this is the candidate, and she says Mr Zuma said my only choice
10 for the position of Group Executive Officer for Transnet is Mr Gama and she said but Mr Gama has not been recommended by the Board, the Board thinks he still needs some more experience and in any event Mr Gama is facing some investigation, or some allegations, there could be a disciplinary process, there are serious allegations against him, and then Ms Hogan says Mr Zuma said well in that process, in that case the position will have to remain unfilled until those processes have run their course and Ms Hogan wrote a memo or a letter to Mr Zuma which set out
20 exactly what the process had been, but the position remained unfilled until of course your Board came in, but Ms Hogan gets dropped from cabinet at the end of October.

This is at a time when Mr – those processes that Mr Zuma had spoken to Ms Hogan about, if Ms Hogan's evidence is true, had run its course, Mr Gama had been

found guilty and had been dismissed, but he had referred this dismissal dispute to the Bargaining Council. Ms Hogan gets dismissed, another Minister gets appointed, Mr Gigaba, and on your evidence it looks like even before he officially starts as Minister of Public Enterprises on the 1st of November, he meets with you, but even if you are mistaken that it was in October, maybe it was early November, it looks like one of the first things he does, the new Minister, on your version, is to call you and raise
10 among other matters the Gama matter with you and says Mr Gama's dismissal was unfair and on your evidence he instructs you to review the Gama matter.

Obviously the review could lead to Mr Gama being reinstated, of course it could lead to something else, other than reinstatement, but reinstatement is one of the things that it could lead to. You agree?

MR MKWANAZI: I agree Chair.

CHAIRPERSON: So Mr Gigaba on your evidence initiates a process in terms of which your Board must relook at this
20 case of Mr Gama. You relook at that case, you look, you ask for legal opinions, most, if not all, say this dismissal was fair but of course the Deneys Reitz one has got a paragraph which says anything can happen when it comes to sanction, and then I said to you earlier on the way you and your Board were handling the matter it appears like

you were bending over backwards to accommodate Mr Gama, you understood when I said that, and then you are now in this committee, the Governance and Nominations Committee, what are you talking about? You are talking about whether this man, who was found guilty of such serious acts of misconduct, by an independent Chairperson, who could not have been part of any factions within Transnet, Senior Counsel, who ran what appears to have been a very thorough process, and Mr Gama being
10 represented by a strong legal team, including senior counsel in that process, and he was found guilty out of that process.

You are now saying in effect look even if we have not taken him back yet, let him run for the higher position. You have not even taken him back to his old position, but you are talking about saying let him run for a higher position, it does not make sense to me, unless there was really an agenda to bring Mr Gama back, that is what – those are the thoughts that are in my mind, and I mention
20 them to you so that if you have anything to say to me that could influence me differently you can say so, but that's what seems to come to my mind to say the way this committee is acting, the way this Board is acting, it is like it is hell-bent to get Mr Gama back, not only to his previous position, but they want him at the top, they want

him to run for this position.

Now how do you seek to be party to the possibility of promoting to the highest executive position in the company somebody that has been found guilty of such serious acts of misconduct, how do you do that as a Board.

That is what I cannot understand, if you are able to make me understand it tell me.

MR MKWANAZI: Chair I cannot make you to be able to understand it, but your analysis is very good.

10 **CHAIRPERSON:** You agree with the analysis, or you understand it?

MR MKWANAZI: Yes fully Chair, I understand it and I agree with it.

CHAIRPERSON: And you agree with it, okay. Mr Myburgh.

ADV MYBURGH SC: Thank you. So that is then the 3rd of February. I would like now to take you back to Bundle 2.

MR MKWANAZI: Two, okay it must be that one.

20 **CHAIRPERSON:** Mr Myburgh and Mr Mkwanazi the witness and Mr Mkwanazi the lawyer we are at about quarter past five, let us talk about how far we can go, I can still go on up to six if everybody is happy that we do that, I am happy to do that, and then maybe at six we can – if we haven't finished we can talk about the way forward at that stage.

Are you happy to go up to that point?

ADV MYBURGH SC: Yes certainly from my side.

CHAIRPERSON: From your side, Mr Mkwanazi lawyer what is your situation? You are fine with that okay alright, thank you. Let us continue then, what page of what bundle?

ADV MYBURGH SC: Bundle 2, I want to go to page 6 please, Mr Mkwanazi.

MR MKWANAZI: Page 6?

10 **ADV MYBURGH SC:** Yes.

MR MKWANAZI: Page 6, okay.

ADV MYBURGH SC: This is a draft settlement agreement, if you go to page 10 you will see it was actually signed by Mr Gama on the 10th of February. There were a couple of ...[intervenes]

MR MKWANAZI: I see that.

ADV MYBURGH SC: A couple of minor amendments were made and it was subsequently signed, but the point is that it was signed before the Board meeting on the 16th of
20 February, correct?

MR MKWANAZI: That is correct.

CHAIRPERSON: I am sorry Mr Myburgh, please don't forget your point that you want to ask, I just want to mention one thing arising from what I said to Mr Mkwanazi. You see Mr Mkwanazi going back to what I said last time I

said Mr Zuma has denied Ms Hogan's version that he said his only choice for the position of Group CEO is Mr Gama. I don't know what finding I will make in the end, but if Ms Hogan's version is true then it seems that there may be room for somebody to say Mr Zuma would have been quite disappointed in the fact that Mr Gama was dismissed, and had been dismissed because that ruled him out of the running for the position of Group CEO, and it may well be that the new Minister had a discussion with him and he
10 might have mentioned that there was this issue of Mr Gama, and he needs to look into it. He might not have said he should be reinstated, but he might have said he should look into it and maybe that is why he instructed you to review it.

You understand that? But I am not ...[intervenes]

MR MKWANAZI: I understand fully.

CHAIRPERSON: I am not saying that is so, but I am looking simply at the various versions and looking at what was happening and trying to make sense of what seems to
20 have been happening.

Thank you, Mr Myburgh?

ADV MYBURGH SC: Yes thank you.

MR MKWANAZI: Thank you Chair.

ADV MYBURGH SC: So the point I was making is that this agreement is signed by Mr Gama on the 10th of

February, now you need of course some legal advice to sell this to the Board, it is to that legal advice that I want to turn now please. Would you go to page 12, and you would have seen these documents, on Monday the 14th of February, so the Board meeting was on the 16th.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Mr Mapoma sends to Sbu Gule this email:

10 “Sbu the Chair has asked that we prepare a two-pager for him for the Board meeting. I have started the process, please look at the attachment and finalise/settle.”

Do you accept that you asked for this two-pager?

MR MKWANAZI: Yes I did.

ADV MYBURGH SC: And do you also Mr Mapoma’s evidence that that was the two pager, and you can turn to page 3 earlier in this bundle, that was the advice that you sought if you look at paragraph 4 of the consultation note where you had said that what you were looking for was an
20 opinion setting out that there was some unfairness towards Mr Gama.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: You said he was trying to find here in this memo some unfairness.

MR MKWANAZI: That is correct Chair.

ADV MYBURGH SC: Well what we do know is that Mr Mapoma in his two-pager does not deal with the unfairness of Mr Gama's dismissal, does he?

MR MKWANAZI: Chairman can you repeat, the sound was a little bit poor there.

ADV MYBURGH SC: If you have regard to Mr Mapoma's two-pager

MR MKWANAZI: There is a problem with sound.

CHAIRPERSON: Let us take a short break while they are
10 attending to the sound.

ADV MYBURGH SC: Certainly Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes continue Mr Myburgh, I am told the sound is fine now.

ADV MYBURGH SC: Sorry I beg your pardon. Mr Mkwanzazi what I wanted to explore with you is that in Mr
20 Mapoma's two pager nowhere does he say that Mr Gama's dismissal was unfair.

MR MKWANAZI: I do not think he says that.

ADV MYBURGH SC: Yes, alright, I would like to take you please to paragraph 7 of his two pager at page 13.

MR MKWANAZI: Page 13, okay I am there.

ADV MYBURGH SC: So it says:

“The current Transnet Board commenced its duties on 13 December. The Chairman of the Board with the support of the shareholder Minister has within his rights and obligations decided to revisit the matter of the disciplinary proceedings against Mr Gama. This decision was informed by a number of reasons.”

And then ultimately those reasons lead to the solution
10 being a proposed settlement and we know that the proposed settlement was reinstatement. Correct?

MR MKWANAZI: Well what page is that, Bundle 2 page 13?

ADV MYBURGH SC: Yes.

CHAIRPERSON: Paragraph ...[intervene]

MR MKWANAZI: 4 at the bottom there?

ADV MYBURGH SC: Yes.

MR MKWANAZI: Okay, yes I see it. I see it, thank you.

ADV MYBURGH SC: But the point is that the decision to
20 revisit the disciplinary proceedings was done not to review or to look at but to revisit was done with the support of the shareholder Ministers. Is that right?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And then what Mr Mapoma does is he lists a whole lot of things, there was a Public Protector

complaint, 9, there is risk of litigation 10, a judicial process he says it is extremely slow, 11, there have been acting appointment, 12, acting appointments good corporate governance relating to acting appointments. Mr Gama is a highly experienced executive. And 15, we continue to incur legal costs.

Nowhere does he say this dismissal is unfair, does he?

MR MKWANAZI: He does not, yes.

10 **ADV MYBURGH SC:** Is that – were you surprised or are you surprised?

MR MKWANAZI: No, I am not surprised yes.

ADV MYBURGH SC: Okay, so now this was not the two pager you were looking for, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Yes, so he passes it on someone then had to fill in the gaps. So he passes this onto Deneys Reitz we know, alright ...[intervene]

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** And then at page 13 they were asked to settle or finalise it and the next day Mr Sangoni says:

“Dear all please herewith the document which Mr Mapoma sent us yesterday with our amendments.”

Now the only difference between Mr Mapoma’s two pager and Deneys Reitz’s now two and a half pager are the

additions of new paragraphs 10 and 11 which you find at page 17. Would you agree with that?

MR MKWANAZI: Yes, I agree.

ADV MYBURGH SC: So this is what they say at 10:

10 “In the arbitration before the Bargaining Council Mr Gama has challenged the appropriateness of the sanction of dismissal. The issue of sanction is a very complex and perplex matter to which there is no clear and straight forward answer. This is demonstrated by amongst other cases the celebrated case of Siduma vs Rustenburg Platinum Mines in which the Labour Courts and the Constitutional Courts on the one hand, Supreme Court of Appeals on the other came to a different conclusion on sanction. The other cases dealing with the issue of sanction which also demonstrate the complexity of consideration for an appropriate sanction of the Shoprite/Checkers cases in which the facts in the two separate cases we similar but
20 the Labour Appeal Court in each case came to a different conclusion. In one case the finding of the Labour Appeal Court was endorsed by the Supreme Court of Appeal.”

Well that is not particularly helpful by itself, is it?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: It is just like what you might find in textbooks, it says well reasonable people may emotionally have different views of sanction in given a particular set of facts. Correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: But it does not say anything in relation to Gama's case. Correct?

MR MKWANAZI: No it does not, yes.

ADV MYBURGH SC: So then we are down to one single
10 paragraph and it comprises of two sentences:

“It is accordingly our view.”

Now I do not know where the accordingly comes from because I cannot see how it can follow from 10:

“But it is accordingly our view that there is a probability that the Bargaining Council or a court considering the appropriateness of the sanction of dismissal of Gama may reach the conclusion that dismissal was not appropriate having regard to the challenge on sanction advanced by him. In that
20 instance the court may either award compensation to Mr Gama or find that a lesser sanction ought to have been imposed and therefore order reinstatement.”

There is no definitive advice there at all, is there? They say well X may happen or Y may happen. Correct?

MR MKWANAZI: It creates doubt, yes.

ADV MYBURGH SC: So but that is the point and you landed up opting for an opinion of two sentences really that at most creates doubt and you opted to follow that opinion instead of the 25-page opinion of Mr Todd understandably. Correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Yes, so at most all this does is create doubt but it does not tell you why, it does not say
10 why.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Mr Mkwanazi it is extraordinary are you going to advance before this Commission that you legitimately and honestly settled Mr Gama's case because you thought you had prospects of success at arbitration surely you cannot advance that proposition, on the strength of this two sentence "opinion". Mr Mkwanazi?

MR MKWANAZI: Ja, no, no I am there and also do not forget it continues to indicate paragraph 12, 13 etcetera in
20 terms of the need to come to something.

ADV MYBURGH SC: Yes, but none of that has any bearing on prospects of success. What you were looking for was an opinion that shows some unfairness so that you could persuade your Board members to agree to the reinstatement of Mr Gama at the Board meeting of the 16th

of February you yourself said that. This is the best
...[intervenes]

MR MKWANAZI: Not true.

ADV MYBURGH SC: It does not show unfairness it shows
some doubt. Correct, that is all?

MR MKWANAZI: That is correct.

CHAIRPERSON: Hmm, oh Mr Myburgh?

ADV MYBURGH SC: No Mr Chair.

CHAIRPERSON: Okay alright, you get this opinion being
10 expressed in this paragraph. It is – is does not say - well
when you look at it sometimes it is difficult to say what it
does say and what it does not say but on the one hand it
says:

“There is a probability that the Bargaining Council
or Court considering the appropriate method of the
sanction of dismissal of Mr Gama may reach the
conclusion that dismissal was not appropriate.”

But it does not tell you why there was a probability.

MR MKWANAZI: It does not, yes.

20 **CHAIRPERSON:** It is just an unsubstantiated statement
there was a probability but it does not say what is the
basis for the view that there was a probability, it does not
tell you that.

MR MKWANAZI: No it does not, yes.

CHAIRPERSON: And then of course it says:

“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.”

It does not even begin to say here are some of the things which if the Bargaining Council or a Court were to go that route that it would base its view on. It does not even begin to say that. You accept that?

MR MKWANAZI: I accept that Chairperson.

10 **CHAIRPERSON:** So then one is bound to say why would somebody of your experience, because you were quite experienced you had even been corporate executive of this entity yourself many years previously, you are experienced in corporate matters you are experienced in dealing with issues, I am sure you would have dealt with lots of dismissal matters at one stage or another as executive or group executive.

20 Why would you prefer this opinion as the opinion on which you would base your decision to reinstate Mr Gama as opposed to, one, the opinion given by Mr Todd, you would have heard when he gave evidence here, he is a specialist labour lawyer. Of course I think Deneys Reitz also are specialists, but he gave an opinion that you read and you see as reflecting quite an application of mind on various issues. Do you agree?

MR MKWANAZI: Agree Chairperson.

CHAIRPERSON: Yes, and you were also aware of the opinion from Webber Wentzel which said the process was fair.

MR MKWANAZI: I am aware of that.

CHAIRPERSON: You were aware that the Chairperson of the disciplinary enquiry who came to the conclusion that Mr Gama's sanction, the sanction of dismissal was a fair one, was a senior counsel, a labour lawyer himself.

10 You were aware of all of that, so the question that Mr Myburgh was asking is how does one explain your reliance on this questionable opinion which is not motivated in any way when you have this other certainly looking at Mr Todd's one because it is here well I have read it is you know it shows somebody who has applied his mind to all the issues and of course he had the benefit that he had been handling this matter for about two years or so. So why would you prefer this one?

MR MKWANAZI: Chairman as I indicated much earlier
20 that one set of eyes with that was needed I tend to agree with you that this was a weak submission and I think we gave Mapoma that feedback as well and which is why then tried to augment it but even the augmented one Chairman it is a weak submission.

CHAIRPERSON: But again it is like you know that there is

this opinion which is correct which say this dismissal was fair but it is like you keep on wanting another one that will allow you to reinstate Mr Gama that will say something else. You know you see this one it says that there is this probability, you see it provides no reasons for this probability, provides no basis but nothing says to your mind look let us go back to that opinion which we cannot fault, Mr Todd's one, we cannot fault because as I understand it you have not been able to say we had a
10 problem with that opinion, isn't it?

MR MKWANAZI: No.

CHAIRPERSON: You could not fault it.

MR MKWANAZI: No I could not fault it.

CHAIRPERSON: Yes, so one asks the question why did you not and the Board act on the basis of this opinion from Mr Todd that you could not fault?

MR MKWANAZI: Chairman as I have indicated we needed a set of different eyes because true had we asked Mr Todd my interpretation is he had an opinion already and because
20 we wanted a different set of eyes we then asked Deneys Reitz and yes it is not a detailed opinion but it created some doubt as to when we go to the Bargaining Council process of whether we will win or not, ja it did that.

CHAIRPERSON: But the difficulty is that you yourself have indicated that this opinion was weak.

MR MKWANAZI: Yes, I agree Chairperson.

CHAIRPERSON: It was weak you have accepted that.

MR MKWANAZI: I have accepted.

CHAIRPERSON: It was not motivated it did not provide a basis you know for or it did not show you this is the basis on which it is grounded you know and I would have thought that if you and the Board in seeking to get somebody else's opinion other than the opinions that you already got which we saying the dismissal was fair.

10 I would have thought that if you remained open minded as to whether you would reinstate or you would settle or you would not settle I would have thought that when you got this opinion you realised that it was weak compared to this other opinion from Bowman Gilfillan and you saw that it was not even motivated I would have thought that you would say look if we act on the basis of this opinion we are opening ourselves to serious attack. The opinion that we should act on is this one that we cannot fault that is what I would have expected you go
20 along with that that would be a reasonable thing to do.

MR MKWANAZI: Agree Chairman.

CHAIRPERSON: Yes, but the Board did not do this.

MR MKWANAZI: The Board went with its opinion, yes.

CHAIRPERSON: Yes, okay Mr Myburgh.

MR MKWANAZI: And even their augmented opinion was

still weak.

CHAIRPERSON: Yes, but of course surely sitting here now looking at this you would accept would you not you ought have to acted in terms of the opinion given by Mr Todd.

MR MKWANAZI: Chairman maybe not because as a new Board coming in you needed a different set of eyes on this issue particularly on the issue of sanction ja and that is all that the Board was looking at.

10 **CHAIRPERSON:** No but I am not sure that I understand that you see when you put it like that it gives the impression that you wanted a different set of eyes so to speak and you were going to take what they say, what those lawyers say take their view without evaluating it yourself and seeing whether it was sound. Whereas if the approach was we want to hear what they have to say but we are not going – we will only act we will evaluate both options if they are not they are not the same. We will evaluate both and we will act on what we believe is sound
20 that is what I would have expected. I should not have expected that of the Board?

MR MKWANAZI: Chairman I agree with your analysis we did not take the two opinions and put them side by side and debate them side by side, we debated this one.

CHAIRPERSON: And well I guess – and decided to go

along with it even though you realised it was weak and it was not resonating.

MR MKWANAZI: Yes, Chairman.

CHAIRPERSON: Yes, okay Mr Myburgh.

ADV MYBURGH SC: Ja thank you alright well so now we know that this is weak. I just wanted to find out from you what did you do with this weak opinion did it serve before the Board because that is not something that is clear to me?

10 **MR MKWANAZI:** If I recall it would have served in the corporate governance committee.

ADV MYBURGH SC: Well there is no corporate governance committee before the 16th you prepared this for the meeting of the 16th. Could this serve before the Board ...[intervene]

MR MKWANAZI: There was a meeting on the - wait there is two meetings on the 16th, there was a meeting, a very short meeting it could have been a corporate governance just before the Board to consider this report.

20 **ADV MYBURGH SC:** Could this opinion serve before the Board on the 16th...[intervene]

MR MKWANAZI: On the 16th, that is correct.

ADV MYBURGH SC: Remember your objective you told your attorneys on the 22nd of January is that you need some friendly advice so that you can persuade the Board

to reinstate Mr Gama at the meeting of the 16th of February.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Did you present this two and a half pager to the Board at the meeting of the 16th of February?

MR MKWANAZI: Chairman I think I did or even at the corporate governance meeting just before the Board.

ADV MYBURGH SC: You think you did?

10 **MR MKWANAZI:** Yes, I would have to follow the audit trail.

ADV MYBURGH SC: But this is very important Mr Mkwanazi because we need to know was it on the strength of this opinion and I am loathed to call it that because the advice is two sentences and it is unreason ...[intervenes]

MR MKWANAZI: Chairman it was on the advice of this opinion, yes.

ADV MYBURGH SC: Just bear with me so the Board decided to reinstate Mr Gama on the strength of this opinion. Is that right?

20 **MR MKWANAZI:** That is correct, yes.

ADV MYBURGH SC: So was this ever then put onto - I have not seen it in its final form was it put onto the Transnet letterhead or – I mean you can tell us what did you do with this because Mr Mapoma said he sent it to you.

MR MKWANAZI: Yes, it was tabled I do not recall in what

form but it was tabled.

ADV MYBURGH SC: Yes, but was it tabled as a Transnet opinion, your opinion, was it tabled as a Deneys Reitz, in what form was it tabled?

MR MKWANAZI: I am not sure now I will have to ask Mr Mapoma myself or try and look at the audit trail of the documents.

ADV MYBURGH SC: Bearing in mind Mr Mapoma was not at the Board meeting Mr Mapoma's evidence is that he
10 gave it to you. So what did you do with it?

MR MKWANAZI: It was tabled.

ADV MYBURGH SC: Okay and you say...[intervene]

MR MKWANAZI: I am not sure in what form whether as a Deneys Reitz opinion or as an email from Mr Mapoma but it was tabled.

ADV MYBURGH SC: But you see that makes it so much worse. Are you suggesting that the committee may have decided this matter on the strength of his advice which was not even on Deneys Reitz letterhead?

20 **MR MKWANAZI:** That is correct.

ADV MYBURGH SC: So who was – so you present this opinion to the Board and I am sorry I am pressing you on this but whose advice did you present it as?

MR MKWANAZI: I would have presented it as advice through group legal but I was aware that it came through

Deneys Reitz.

ADV MYBURGH SC: So you presented it as the advice of group legal?

MR MKWANAZI: Yes, who had consulted Deneys Reitz.

ADV MYBURGH SC: It was only a few days before that Mr Mapoma had told some of those very directors the same directors that you had a very, very good case.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: I mean honestly Mr Mkwanazi this is
10 not legitimate is it not I mean I do not know why you do not just accept that you had another agenda.

MR MKWANAZI: No, no that is what was presented to the Board.

ADV MYBURGH SC: Sorry?

MR MKWANAZI: This is exactly what was presented to the Board, Mr Mapoma's submission.

CHAIRPERSON: Do you accept Mr Mkwanazi at least now you know we have been dealing with this from this morning but you were listening to Mr Todd's evidence yesterday I
20 mean the questioning you followed it and maybe you listened to Mr Mapoma's evidence as well. At least as you sit there now do you accept that the Board's decision and your decision to reinstate Mr Gama in these circumstances does not make sense.

MR MKWANAZI: Chairman we appointed Deneys Reitz to

look into certain aspects of the sanction in terms of the Transnet Bargaining Council processes and this is the opinion they came up with. I had a consultation with them and this is the opinion they came up with and I used that opinion even at Board level. I agree with you that the opinion compared to the opinion of Mr Todd is weak I fully agree with you and which is why then we requested that there must be a follow-up submission based on the same opinion which came in something that is dated 22nd
10 February 2011 but it is basically the same opinion.

CHAIRPERSON: Oh, you must be talking about Deneys Reitz report dated 22 February 2011.

MR MKWANAZI: It is trying to supplement what they had given to Mr Mapoma.

CHAIRPERSON: Go to page 19 of the same bundle.

MR MKWANAZI: Yes I am on page 19.

CHAIRPERSON: You see that I a report, it says report for Transnet on settlement.

MR MKWANAZI: That is correct.

20 **CHAIRPERSON:** It is on a Deneys Reitz letterhead and it is dated 22 February and it goes up to page 22. Is that the document that you say augmented these two...[intervene]

MR MKWANAZI: After the Board meeting, yes.

CHAIRPERSON: After the Board meeting?

MR MKWANAZI: That is correct.

CHAIRPERSON: Okay so before the Board meeting the augmentation was not there.

MR MKWANAZI: It was not there, yes Chairman.

CHAIRPERSON: But you see now it seems to me that you and your Board were so hell bent on reinstating Mr Gama that when you had the other document that had this opinion saying:

10 “That there is a probability that the Bargaining Council or a Court considering the appropriateness of a sanction of dismissal of Mr Gama may reach the conclusion that dismissal was not appropriate.”

That when you had an opinion this opinion which was in your view giving you some leeway to settling the matter and getting Mr Gama back but you realised that it was weak, you thought no there needs to be augmentation of this opinion but we will make the decision to reinstate him, Mr Gama, the augmentation can come back that can be done later. Is that right?

MR MKWANAZI: That is correct Chair.

20 **CHAIRPERSON:** Ja, okay.

ADV MYBURGH SC: And then of course the augmentation really makes your case worse and not better now let me show you why. So if you go to page 19 this is where you find the augmented opinion 22 February.

MR MKWANAZI: Yes.

CHAIRPERSON: What page, Mr Myburgh?

ADV MYBURGH SC: Page 19 of Bundle 2.

CHAIRPERSON: One nine?

ADV MYBURGH SC: One nine, so the first one and a half pages just sets out what happened during the negotiations then have a look at and read into the record please paragraph 1.1.

MR MKWANAZI: Paragraph...[intervene]

ADV MYBURGH SC: This is now the augmented improved
10 opinion. Please read that paragraph.

MR MKWANAZI: That is correct. I must read that paragraph?

ADV MYBURGH SC: Yes please into the record.

MR MKWANAZI:

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 successfully challenging his dismissal are not good.”

ADV MYBURGH SC: So here you are told.

MR MKWANAZI: I have read.

ADV MYBURGH SC: Ja. Well that is what I am saying it makes your case so much worse because in the augmented opinion now Deneys Reitz tell you about opinions from reputable firms all of which have come to the conclusion that Mr Gama's prospects of success are not good.

CHAIRPERSON: Effectively saying Mr Gama has no case.

ADV MYBURGH SC: But that still you carried on.

CHAIRPERSON: How do you settle? How do you reinstate
10 him? How do you give him full back pay? Of course how do you even undertake to pay his legal costs? It is – it is just something that is so difficult to understand Mr Mkwanazi. Except if one says there was some other agenda that the board was pursuing in wanting to get Mr Gama back. It was not the question of was there some unfairness in his dismissal? It was not just a question of are we likely to lose the case in the arbitration? It was other considerations. Can you understand why – what I am saying?

MR MKWANAZI: I understand what you are saying
20 Chairman.

CHAIRPERSON: Can you fault it?

MR MKWANAZI: I cannot fault it Chairman.

CHAIRPERSON: Yes.

ADV MYBURGH SC: And then...

CHAIRPERSON: Mr Myburgh.

ADV MYBURGH SC: Mr Mkwanazi just to finish on this. If you go to page 21 you say this is an attempt to augment.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: But under the heading of Sanction that is precisely the same paragraph that was in – that was – that paragraph there is paragraph 10.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And the last paragraph was paragraph 11. There is no improvement.

10 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: It seems that Deneys Reitz were not able to improve their advice.

MR MKWANAZI: But there is no improvement. I agree.

ADV MYBURGH SC: Did you know why?

MR MKWANAZI: I agree there is no improvement – it is the same.

ADV MYBURGH SC: But it could not be improved upon because it seems that they were not of the mind that the dismissal was unfair. In fact there is a massive contradiction
20 is there not between what you find in 1.1.

MR MKWANAZI: There is.

ADV MYBURGH SC: And what you find in 4.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: But despite that you pushed on.

MR MKWANAZI: That is correct Chairman.

ADV MYBURGH SC: Mr Chairperson I see that it is now six o'clock.

CHAIRPERSON: Yes how much more time do we still need?

ADV MYBURGH SC: I think I still need quite a bit of time.

CHAIRPERSON: Quite some time.

ADV MYBURGH SC: Because I have yet to go to the essence really of Mr Todd's evidence.

CHAIRPERSON: Yes.

ADV MYBURGH SC: And that is that.

10 **CHAIRPERSON:** Yes.

ADV MYBURGH SC: None of these three charges were the things that were really capable of being condoned.

CHAIRPERSON: Yes.

ADV MYBURGH SC: And in order to pursue that examination I would obviously need to analyse the findings of the Chairperson.

CHAIRPERSON: Ja.

ADV MYBURGH SC: And then go and deal with that. So...

CHAIRPERSON: Yes.

20 **ADV MYBURGH SC:** If Mr Mkwanazi can come back on Monday.

CHAIRPERSON: Well let me – let me first check with – from yourself. From your side are you still able to maybe add another hour or another thirty minutes or you have been standing the whole day.

ADV MYBURGH SC: Yes.

MR MKWANAZI: I must think about that.

ADV MYBURGH SC: It is becoming increasingly difficult Mr Chair I must be honest.

CHAIRPERSON: Okay. No, no that is fine. So you would suggest that if possibly he comes back on Monday?

ADV MYBURGH SC: Yes.

CHAIRPERSON: Okay alright maybe we could start early?

ADV MYBURGH SC: That would be.

10 **CHAIRPERSON:** Yes. Yes.

ADV MYBURGH SC: [Inaudible].

CHAIRPERSON: Mr Mkwanzazi the attorney and Mr Mkwanzazi the witness it seems that we should adjourn now. I know that – I think we are all seated except Mr Myburgh he is the only one who has been standing the whole day. We need to think about that. But he – he suggests that we could continue on Monday morning. Would that be fine with you? Let us start with the lawyer.

20 **ADV MKWANAZI:** Obviously we have not consulted on this and I wonder Chair if perhaps you could give us a five minute break just to clarify our [00:05:18].

CHAIRPERSON: Okay.

ADV MKWANAZI: Just three minutes here nothing longer than that.

CHAIRPERSON: Mr Mkwanzazi the witness you are fine –

you would be fine with that?

MR MKWANAZI: I think I am available Chairman yes.

CHAIRPERSON: Yes okay alright. Okay.

ADV MKHWANAZI: Chair can I suggest that the reason I wanted to consult was actually [not audible]. But if he is available Chair we will by all means avail ourselves because [not audible].

CHAIRPERSON: Ja I do not know why there is always difficult in hearing you. The line or reception is bad but you
10 still require – you still – you are still asking for a five minutes break or you say

ADV MKWANAZI: No Chair.

CHAIRPERSON: It is fine.

ADV MKHWANAZI: No Chair we are confirming that we will avail ourselves.

CHAIRPERSON: Oh you are confirming okay.

ADV MKHWANAZI: In the interest of [inaudible].

CHAIRPERSON: Okay alright.

ADV MKHWANAZI: The only suggestion we would want to
20 add Chair is that we would require additional information from the commission. But could [inaudible]. We will be available for that thank you.

CHAIRPERSON: Okay shall we start at 9:00 on Monday is that fine?

ADV MYBURGH SC: Yes certainly Chair.

CHAIRPERSON: Okay alright. We are going to adjourn then and then we will continue on Monday at nine o'clock. We adjourn.

MR MKWANAZI: Thank you Chairman.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 19 OCTOBER 2020