

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

19 OCTOBER 2020

DAY 286



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 19 OCTOBER 2020

CHAIRPERSON: Good morning Mr Myburgh, good morning everybody.

MR MKWANAZI: Good morning Chairman.

CHAIRPERSON: Good morning you may be seated Mr Mkwanazi.

MR MKWANAZI: Thank you.

CHAIRPERSON: Thank you. Are you ready Mr Myburgh?

ADV MYBURGH SC: Yes thank you.

10 **CHAIRPERSON:** Yes okay.

ADV MYBURGH SC: Mr Chairperson I have just received I think what is referred to as a supplementary statement or affidavit which I understand Mr Mkwanazi wants – wants to hand up obviously with your leave. It is a short document – it is about five pages long. It addresses the things that he accepted were outstanding. We personally do not have any objection to its introduction. The Secretariat is in the process of making copies and will add it to the bundle at tea time.

20 **CHAIRPERSON:** Hm.

ADV MYBURGH SC: In my submission it need not hold up.

CHAIRPERSON: Ja.

ADV MYBURGH SC: The continuation of – of the questioning of Mr Mkwanazi.

CHAIRPERSON: Yes. No, no that will be in order. But in

the meantime we can continue.

ADV MYBURGH SC: Thank you. Good morning Mr Mkwanazi.

MR MKWANAZI: Good morning Advocate Myburgh.

ADV. MKWANAZI: Morning.

ADV MYBURGH SC: When we broke on Friday evening I was questioning you about the two bits of advice you received from [00:01:45] or advice with their input that being the memorandum of the 15 February followed by
10 their report on the 22 February. These are two bits of advises that came either side of the board meeting on the 16 February. Do you remember that?

MR MKWANAZI: Yes I do.

ADV MYBURGH SC: But perhaps I could just take you to that advice. If you turn please to Bundle 2.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And if you could turn up page 13 that is the memorandum of the 15th and then as you know at page 19 is the report of the 22nd. Correct?

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

ADV MYBURGH SC: Now I would just ask you to confirm that your evidence was that the first bit of advice in other words the memorandum of the 15th if my notes serve me correctly your evidence was that you accepted that that memorandum and the advice was poor, is that correct?

MR MKWANAZI: Yes I did admit that it was not thorough – it was poor yes.

ADV MYBURGH SC: Would you accept then that on the face of it when you say it was poor and not thorough it certainly was not persuasive?

MR MKWANAZI: Certain aspects of it were persuasive but if a better analysis could have been done it could have been a better advice for instance yes. But that analysis was not very clear at the time.

10 **ADV MYBURGH SC:** And it was on that basis if I understand your evidence correctly that you asked Deneys Reitz in the word that you used was to augment their advice, is that right?

MR MKWANAZI: Yes Chairman I think we did because even as a sub-committee and board when we got that initial advice we were not impressed.

ADV MYBURGH SC: But then why did you follow it? This is what I do not understand. Why – why did you think it was appropriate having received a piece of legal advice
20 that you were not persuaded by – why did allow Deneys Reitz the opportunity of augmenting it after the board meeting of the 16 February?

ADV MYBURGH SC: Chairman we did allow Deneys Reitz and also you – you – you will have to understand that there were three issues that sort of Deneys Reitz was trying to

give advice on. And they did not give advice specific to certain issues which frankly would have been a better approach.

Where they should have taken the first matter, second matter and third matter and gave advice on the three almost independently. They somehow tried to give summary advice on all three matters.

And in my interpretation the gravity of the three matters was not the same but having said that I do not
10 have a serious problem with the advice say on the first two offences which relate to procurement. But I have a problem with the advice on the third matter which related to the attack of Mr Gama on the executives and board of Transnet.

But on the first two other matters – because do not forget from – at the time from where I sat the issues – the focus was on procurement where the – irregular – other irregularities – yes the focus on procurement. But I truly say that advice did not address the issues individually and
20 I suspect the outcome could have been different.

ADV MYBURGH SC: You suspect the outcome could have been different?

MR MKWANAZI: Felt from the board as well?

ADV MYBURGH SC: Yes.

CHAIRPERSON: If the three – the three issues had been

handled specific.

ADV MYBURGH SC: But...

MR MKWANAZI: Yes.

ADV MYBURGH SC: Mr Mkwanazi really what I am driving at is you get poor legal advice; it does not deal with everything but you still take the decision on the 16 February. You do not wait for the augmented legal advice, correct?

MR MKWANAZI: That is correct.

10 **ADV MYBURGH SC:** Is that correct?

MR MKWANAZI: Ja – yes you are correct.

ADV MYBURGH SC: Right. So let us then go to this augmented legal advice.

CHAIRPERSON: I am sorry Mr Myburgh. Mr Mkwanazi you see if on 16 February you and the board realised that the advice from Deneys Reitz is poor advice; it needed to be augmented and you do not wait for them to augment their advice before you take a decision it gives the impression that you have made up your mind by the 16th
20 that irrespective of what whether the advice that gets augmented or the augmentation of the advice puts the advice at an acceptable level in terms of its legal strength you do not – when you do not wait for that it gives the impression that you have made up your mind and it does not matter what the augmentation will produce you are

going ahead because you are clear in your mind that this is the decision you must take.

Do you have something to say on that?

MR MKWANAZI: Chairman I am in agreement with your observation but again I need to sort of qualify it in that that advice although it was almost a generic advice was not thorough in dealing with the three matters separately that advice was required on.

On the procurement matters that advice somehow I
10 – I indicate that it could have been appropriate. But on the questioning of the attack on executives and the board that advice said nothing about that.

CHAIRPERSON: Yes.

MR MKWANAZI: And I think as I indicated it could have been oversight on the side of the board or not particularly following up on that issue of the attack on the executives and the board members.

CHAIRPERSON: Hm. Mr Myburgh.

ADV MYBURGH SC: Yes thank you. Now just to go to this
20 augmented legal advice that you receive on the 22 February which you find at page 19. Mr Mkwanazi it also does not deal with all three charges. Correct?

MR MKWANAZI: Advocate you are correct.

ADV MYBURGH SC: You still then do not go back to Deneys Reitz and say but what about charge 3 or where is

the analysis? All they do is they repeat the generic advice that they gave you before. Correct?

MR MKWANAZI: Advocate Myburgh you are correct.

ADV MYBURGH SC: But why did you not go back to them? I mean the truth is you had no sustainable legal advice. You had generic advice which did not deal with one of the charges at all. Correct?

MR MKWANAZI: I agree with you Advocate Myburgh.

ADV MYBURGH SC: And then there is a bigger problem
10 and that is you; yourself accept that Deneys Reitz' augmented legal advice was contradictory, correct?

MR MKWANAZI: I agree with you Advocate Myburgh.

ADV MYBURGH SC: But still you do not go back to them and say, but hang on I do not understand what you actually saying, correct?

MR MKWANAZI: I agree with you Advocate ja.

ADV MYBURGH SC: It really bears out your desire and the desire of the board to reinstate Mr Gama at all costs, does it not?

20 **MR MKWANAZI:** Maybe not but as you rightfully point out if ideally at the time in retrospect the board should have even sent back the second advice to say, hold it you are still not specific enough. Yes I agree with you.

ADV MYBURGH SC: But the board had already made up its mind by that time on the 16 February?

MR MKWANAZI: That is correct Advocate; ja.

ADV MYBURGH SC: So let us – let me press me if I might in relation to paragraph 1.1 at page 20 of Bundle 2.

MR MKWANAZI: I am there Advocate.

ADV MYBURGH SC: At paragraph 1.1 it says there:

10 “There is opinions that have been obtained from reputable firms of attorneys with regard to prospects of success of Mr Gama in successfully challenging his dismissal by the company. All the opinions 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.”

Did you receive that legal advice from Deneys Reitz?

MR MKWANAZI: Yes we – we did – we did Advocate yes.

20 **ADV MYBURGH SC:** Yes. And then after that did you receive the memorandum of the 15th that they gave input into?

MR MKWANAZI: No do not forget that memorandum of the 15th is earlier than this so call augmented advice. Yes we – ja.

ADV MYBURGH SC: So well let me – I am not sure.

MR MKWANAZI: This was done on the 22nd if I recall.

ADV MYBURGH SC: Yes.

MR MKWANAZI: And that other memorandum was prepared on the 14th or 15th February.

ADV MYBURGH SC: Yes but Mr Mkwanazi they dealing with the history here.

MR MKWANAZI: Yes.

ADV MYBURGH SC: They say:

10 “All the opinions including ours that we gave after perusing the documents pertaining to the disciplinary inquiry were of the view that Mr Gama’s chances of successfully challenging his dismissal are not good.”

 Had you seen that advice?

20 **MR MKWANAZI:** I am not sure if it was in the memorandum of the 15th but I see what you are saying post the first memorandum of the 15th then comes this advice on the 22nd. But their advice goes further to still create doubt that this matter in the Transnet Bargaining Council can go either way; yes.

ADV MYBURGH SC: But here they say...

MR MKWANAZI: I agree with your assessment.

ADV MYBURGH SC: Mr Mkwanazi here they refer to an opinion where they said that Mr Gama’s prospects of

success are not good.

MR MKWANAZI: I – I see what you are talking to.

ADV MYBURGH SC: You cannot explain this? Was that in their memorandum of the 15th or was it in some other document?

MR MKWANAZI: No I do not recall – it was their memorandum of the 15th I am not sure now what it said.

ADV MYBURGH SC: But just so that you understand.

MR MKWANAZI: Yes.

10 **ADV MYBURGH SC:** Just to refresh your memory. Remember the memorandum of the 15th it had...

MR MKWANAZI: Yes.

ADV MYBURGH SC: It was produced with the input of Deneys Reitz.

MR MKWANAZI: Yes.

ADV MYBURGH SC: But your testimony was that it was presented to the board or the committee as a memorandum from Group Legal.

MR MKWANAZI: That is correct.

20 **ADV MYBURGH SC:** So had you seen a prior opinion from Deneys Reitz that said that Mr Gama's prospects of success were poor?

MR MKWANAZI: I might have – I do not recall a specific one other than this one of the 22nd. But on that one of the 15th February or 14th February if that goes on to create

doubt about whether we will win at Transnet Bargaining Council. But again having indicted earlier that – even that memorandum that of the 14th or 15th February was not specific to the three items.

ADV MYBURGH SC: Yes.

MR MKWANAZI: That any unfairness could have been identified. That was not specific.

ADV MYBURGH SC: So I have got two more questions.

MR MKWANAZI: Depends of [00:14:47].

10 **ADV MYBURGH SC:** I have got two more questions for you before I move on here. Firstly why did you not go back to Deneys Reitz and raise with them the contradiction in this opinion? At 1.1 they are saying we have given you opinion saying his prospects of success are poor and then in their conclusion as you put it they raised out. Why did you not go to them and say, clarify this? What actually are you saying? Why did you not do that?

MR MKWANAZI: No at the time we did not do that Advocate; yes.

20 **ADV MYBURGH SC:** Yes but that – we know that. My question is, why did you not do that? It seems so obvious does it not?

MR MKWANAZI: No it does not.

ADV MYBURGH SC: Right. And then having specifically asked them to augment their advice you say because they

did not deal with the third charge they do not deal with it here you still do not go back to them and say, deal with the third charge, correct?

MR MKWANAZI: No – no we did not.

ADV MYBURGH SC: Why not?

MR MKWANAZI: We omitted that. No we did not at the time, yes.

ADV MYBURGH SC: It seems the obvious thing to do does it not?

10 **MR MKWANAZI:** Not really.

ADV MYBURGH SC: Mr Mkwanzazi please just let me understand. You go to Deneys Reitz you ask them to augment their opinion. Amongst the reasons that you want them to do that you say is that they do not deal with the third charge on 15 February. They then provide an augmented opinion and they still do not deal with it.

MR MKWANAZI: They still do not deal with it ja.

ADV MYBURGH SC: Are you suggesting to the Chairperson that you did not think it was the obvious thing
20 to do to go back to them and say, you have not done what I wanted you to do?

MR MKWANAZI: We did not do that on the 15th February yes and even on the 22nd we did not go back to them and say, but you have not dealt with the third matter in terms of the issues that you are supposed to deal with.

ADV MYBURGH SC: And you cannot explain why you did not do that?

MR MKWANAZI: No I know we did not go back.

ADV MYBURGH SC: Alright.

CHAIRPERSON: Did you and the board – when you were dealing with these matters – with this Gama matter – remember that there was a charge which had got nothing to do with procurement.

MR MKWANAZI: That is correct.

10 **CHAIRPERSON:** You did remember?

MR MKWANAZI: No I am aware yes Chairman.

CHAIRPERSON: Yes. Yes, no I am talking more then rather than now. You were aware at the time that there were three charges?

MR MKWANAZI: Chairman.

CHAIRPERSON: For which he was dismissed?

MR MKWANAZI: Chairman at the time the focus was on the procurement issues. The focus was not on the last matter of the attack by Mr Gama on the executives and the
20 board. The focus was on the procurement issues and I think if it was an oversight of the board not to have focussed even on the third and just thought that the procurement issues were sufficient to deal with this issue in a particular way. Ja it was an oversight.

CHAIRPERSON: Would you agree that it would appear

that it was – that Mr Gigaba if your evidence is true may have also suffered from the same oversight because when he – on your evidence instructed you to review Mr Gama's case he does not seem to have said anything about the third charge; he talked about condonation and procurement.

MR MKWANAZI: No Chairman your analysis could be correct but I assume that Mr Gigaba is also going to come and have his say and also Mr Gama is going to come and
10 have his say on these issues.

CHAIRPERSON: Yes.

ADV MYBURGH SC: But...

CHAIRPERSON: Ja, no, no.

MR MKWANAZI: I would sense that what you saying is true Mr Chairman.

CHAIRPERSON: Yes, yes. No Mr Gigaba will come also at some stage and give evidence. Okay thank you Mr Myburgh.

ADV MYBURGH SC: Thank you Mr Chairman. Could you
20 please go to the draft settlement agreement?

CHAIRPERSON: I am sorry Mr Myburgh. Of course Mr Mkwanazi is it not remarkable that so many people in the board overlook if it was overlooking something so important to say why do we not – why are we not talking about the charge that has got nothing to do with

procurement? And Deneys Reitz the attorneys also seem to – to lose sight of that. Why are they not – why is there not a single person in the board who say, but hang on we are talking about taking – reinstating Mr Gama on the basis of condonation but condonation has – does not apply to the other charge – what do we have to say about that?

MR MKWANAZI: Chairman your observation is spot on but then I just need to highlight one small matter that at the time when this matter was being dealt with the board's
10 focus was on procurement and the perceived unfairness of how Mr Gama was not afforded the other process of condonation.

In other words the – the focus was on the unfairness on the first two charges and that is why even maybe at board no board member then said, hold it but it is not only these issues there is this other major issue which was the third charge of him attacking the executives and the board?

Yes the board neglected that angle and in hindsight
20 the board should have – somebody should have said, hold it but these are not only the two issues that we are dealing with yes these are procurement but here is this other one of attacking the executives and the board.

CHAIRPERSON: Yes you see..

MR MKWANAZI: It was not raised by any board member at

the time.

CHAIRPERSON: Yes you see it is exactly that that I am asking – I am asking you about whether it is not remarkable? Namely that despite the fact that Mr Gama had been dismissed for three charges; despite the fact that the board had available to it a detailed rulings of the Chairperson of the disciplinary hearing which made it clear there were three charges and that one of them did not have anything to do with procurement. Despite the fact that the
10 board had available to it Mr Todd's opinion / report which made it clear that there were three charges one of which had nothing to do with procurement. Is it not remarkable that the whole board left out this particular charge which has got nothing to do with procurement? It is; is it not?

MR MKWANAZI: It is Chairman.

CHAIRPERSON: Yes.

MR MKWANAZI: It is a serious oversight.

CHAIRPERSON: Yes.

MR MKWANAZI: By that whole board and the – I admit
20 that it was a serious oversight.

CHAIRPERSON: Yes. Of course somebody analysing this or listening to the evidence relating to Mr Gama's reinstatement and so on somebody might say, well it was oversight and that is it. Somebody else might say, maybe it was oversight that happened because the board was too

keen to take Mr Gama back and that is why they overlooked something so – that was right there in front of them. Maybe somebody might say, you see they had found what they believed was an answer to procurement. There was no answer to the other charge. So focussing on this other charge would spoil the – the arrangement now. Because if we do not have an answer to this other charge how do we take Mr Gama back? So let us focus on procurement. You want to say something Mr Mkwanazi to
10 the various scenarios I am saying people listening to the evidence might think about?

MR MKWANAZI: Chair – Chairman your observation is correct but as I indicate that board for some reason I hope other people would come in and actually give more information on how the environment, the atmosphere etcetera on this matter was because particularly on procurement issues. There was a – a strange perception that maybe Mr Gama was targeted because there were certain similar – although they are not similar – in terms of
20 procurement there might be but this other last charge frankly was something unique and maybe the first time that – and that board should have looked into at the time to say, yes there are three issues; two are procurement, one is this attack on the executives. Unfortunately Chairman at the time that board did not focus on that matter because it

focussed on procurement issues thinking that there was no consistency in the organisation in dealing with procurement.

CHAIRPERSON: I see that almost all the members of the board who deposed to affidavits and that have been given to the commission say there was – they were not aware of any role played by anybody outside of the board or outside of Transnet in the reinstatement of Mr Gama.

10 But Mr Mapoma did say there was pressure that was put on him by Mr Siyabonga Mahlangu the special advisor to Minister Gigaba. Of course Mr Mahlangu has denied that he put any pressure.

You did not have any pressure brought upon you to try and make sure that the board agreed to reinstate Mr Gama?

MR MKWANAZI: I would not call it pressure. Yes there was a request to review if the sanctions of dismissal were – were fair – that was by the shareholder. Yes there was a request that we review the sanction of dismissal. And –
20 and have I lost sound?

MR MKWANAZI: No we can hear you.

MR MKWANAZI: Then having said that that is why then even I think even when we looked at alternative advice the shortcoming of the advice we got it did not deal specifically with the three issues as the advice from Mr Todd did deal

with the three issues.

Now therefore the advice that we used from Deneys Reitz came with almost a general recommendation which I must say was not the best advice because they should have said you have got chances with one and two but you have got no chances with three.

Then that board I doubt if it would have come to the same decision.

CHAIRPERSON: Hm. Of course you know the – the
10 advice from Deneys Reitz one has got to go back to it. As
I recall it does not deal for example with the issue of
condonation if I recall correctly. It says:

“We have previously given an opinion that
says; Mr Gama has no good prospects of
succeeding in his dismissal claim – unfair
dismissal claim. But then later on it says
there is a probability that the Bargaining
Council or record also during the
appropriate correctness of the sanction of
20 dismissal may reach the conclusion that
dismissal was not appropriate having regard
to the challenge and sanction advanced by
him.”

And then it – I think the earlier one tells you about
– the one of the 15th tells you about different cases where

courts can come to different views on sanction.

So I do not know whether your recollection is different but my recollection is that they do not seem to talk about condonation – Deneys Reitz. Is your recollection different?

MR MKWANAZI: Chairman yes they do not talk about – they are not specific. That is why I say in hindsight it was not the best advice because they should have dealt with the three issues. And also, they should have dealt with even
10 this condonation matter as advisors because condonation, at the time, did not necessarily imply that then you are free from any potential disciplinary action post condonation.

Because my understanding of that condonation policy. There must be consequences for the fact that you even go to the extent of requesting condonation. Why did you not do your homework properly before? Yes.

CHAIRPERSON: Yes.

MR MKWANAZI: But yes, the advice from T Richard was not the best advice.

20 **CHAIRPERSON:** Yes. Mr Myburgh.

ADV MYBURGH SC: Yes, thank you. So Mr Mkwanazi, what you have accepted is that it was, as you put it, a serious oversight on the part of the board not to consider the third charge on the 16th of February?

MR MKWANAZI: That is correct ...[intervenes]

ADV MYBURGH SC: And you say if the board had done so, its decision might very well have been very different. Correct?

MR MKWANAZI: Actually, I agree advocate.

ADV MYBURGH SC: Is that correct?

MR MKWANAZI: That is correct, advocate.

ADV MYBURGH SC: But what I do not understand is that you knew of the shortcoming because you went back to Deneys Reitz so that they could augment their opinion in
10 respect of the third charge. That is your own evidence. You see the contradiction?

MR MKWANAZI: Advocate, maybe let me try and... We felt that as a board, the advice we had got on the 14th or 15th of February was weak and therefore we said augment it.

And funny enough, even after augmenting, they came back with what I can call weak advice because they did not deal with the specifics of the three issues and the possibilities of winning at the Transnet Bargaining Council or losing at Transnet Bargaining Council.

20 So yes, they did not touch on the third matter of an attack of executives.

ADV MYBURGH SC: Mr Mkwanazi, perhaps you are not following my question. It was not an oversight. You identified the failure and you asked Deneys Reitz to address it. When they did not address it, you just pushed on in any

case.

MR MKWANAZI: [No audible reply]

ADV MYBURGH SC: It was not an oversight. You are... on your version, you identified the failure.

MR MKWANAZI: Yes, that is correct. I do not know whether it is failure or weakness of their submission. I would call it more weakness because it did not deal with... my understanding, if you deal with, I want advice on this issue and these are the three issues.

10 Then the advice should have addressed the first issue, second issue and third issue. And Deneys Reitz' advise did not even articulate the three issues.

ADV MYBURGH SC: But then why did you not go back to them when they did not address the failure or the weakness that you had identified?

MR MKWANAZI: Chairman, at the time we... the doubt created of winning or not winning at Transnet Bargaining Council sort of played a prominent role in us making that decision then.

20 **CHAIRPERSON:** Why did you and the board not take the following position: We as the board know that we have received three opinions, legal opinions from three reputable law firms and they all say we have a good case. Mr Gama has a poor case.

They say Mr Gama has no reasonable prospects of

wining this case against Transnet. Having got those opinions from three different law firms.

We have one of the law firms which gave one of those opinion saying in this legal advice there is some... there is probability. They are coming up with something that seems to go against what they have already said.

And what they are saying is not persuasive this time around. It is not substantiated.

Let us take with the position given by three different law
10 firms, namely we have a good case and Mr Gama has a poor case. We have good chances of winning.

Let us make our decision based on that. Why did you and your board take that position?

Why did you take a position that is supported by a legal advice that contradicts legal advice that was given previously by the same law firm that is now weak, that goes against what has been given two other law firms and by itself?

Why do you choose a position that is not supported by
20 sound legal advice when you know you do have the benefit of sound legal advice?

MR MKWANAZI: Chairman, as I might have indicated in the past here. We did get good sound legal advice from a number of legal firms including Mr Todd's note. And at the time, we felt that hold it. Let us pursue, because we have

time to review the sanction.

Then we indicate that let us then get a different law firm with different legal advice because my sense, by the way, based on the legal advice that we have had before, I doubt if the companies that were involved in the actual disciplinary process in Transnet would have come with a different legal advice.

But yes, be as it may, we felt that let us test if is there a different legal advice out there.

10 Unfortunately, it came and it was not very strong legal advice because it did not touch on one of the key issues which is not procurement related.

CHAIRPERSON: But was that not the problem Mr Mkwanazi, namely ...[intervenes]

MR MKWANAZI: Chairman ...[intervenes]

CHAIRPERSON: Namely... I am sorry. Was that not the problem ...[intervenes]

MR MKWANAZI: Please continue, Chair.

CHAIRPERSON: Oh, can you hear me?

20 **MR MKWANAZI:** Yes, I can hear you Chairman.

CHAIRPERSON: Oh, okay. Is the problem... was the problem not exactly that, namely that you and the board were looking for a different advice?

You were not looking for another advice which could be the same as the advice that had been given before by

Bowman's and from Mr Todd?

So as long as you had not received a different advice, you would not be happy? You wanted a different advice and when you got it, even if it was poor, you were happy to rely on it?

Is that not the problem that you should not have been looking for a different advice? You could have been looking for a different law firm to give advice on the same issues that Mr Todd had given and mister...

10 I mean, Webber Wentzel had given but the advice did not need to be different from theirs. You should have simply been looking for another advice that may not be different. If it was different, fine.

Then if it was different you would compare its soundness with the soundness of the other advices that you had received.

Do you understand what I am saying? That maybe the problem is that you were looking for a different advice?

MR MKWANAZI: Chairman, what you are indicating could
20 be true but maybe let me retrace the process a little bit. On the procurement issues, the two procurement issues.

The advice could have been different in that the so-called similar procurement, the irregularities in Transnet had not been considered when that sanction was determined on the first two matters.

So on those two matters, I do think there was a need to get sort of a review of... on the similar case matters relating to procurement. What was done?

And these matters went back as early as 2005. So on those, there could have been a different legal opinion on review.

But on the third matter, irrespective of whatever review you would have had, my sense is that that review would have come out and said on the third matter, the sanction is a fair
10 sanction.

CHAIRPERSON: No. Thank you. Before I let Mr Myburgh continue, I just mention this. As I understand the position. Mr Gama has raised the issue of condonation at the disciplinary hearing.

He had raised the issue of inconsistency at the hearing. Now, one of the issues which I think, I if am correct in that, one of the issues that the board should have thought about was to say: Why should we as the board get involved in reviewing Mr Gama's case?

20 And maybe that is what you should have said to Mr Gigaba. Maybe on not on the day that he approached you but after you had fully informed yourself on the case.

Why should we as the board get involved in reviewing this case because Transnet has taken the trouble to offer to Mr Gigaba a very fair process which has got an independent

chairperson.

Transnet is going and spend money, paying senior counsel to sit as a chairperson in a disciplinary inquiry so that Mr Gama has got a fair process.

Because if maybe it was one of the senior executives chairing his disciplinary inquiry, he would complain that it was not fair. We have paid for senior counsel to sit at the disciplinary hearing.

And I take it that Mr Gigaba did not contribute, would not
10 have contribute to the cost of the chairperson, you know. Those costs were born by Transnet.

That chairperson sat for 14-days, hearing evidence. That is a lot of money.

Apart from that, there would have been a lot of time that is spend preparing for the hearing and afterwards preparing those very thorough and detailed rulings that he had prepared.

You did all of that as Transnet. It might have been the previous board. That was all done in order to advance
20 fairness and transparency.

So now, in that process, Mr Gama was free to bring whatever evidence he could bring to the disciplinary inquiry to show that he had been treated unfairly including the issue of condonation including the issue of saying there were other executives who had done the same thing but had been

treated differently.

He had the opportunity of bringing those cases before an independent chairperson. He was allowed to be represented by his own legal team.

I do not think every employee at Transnet gets allowed in a disciplinary inquiry to be presented by outside lawyers but he was allowed.

I am not saying he was the only one but he was allowed. Now why did you and your board not say: Here is a very fair
10 process and a very fair forum which had been provided to Mr Gama.

If he makes out his case there and wins, we as the board will accept that outcome and take him back. If he fails to make out his case in that forum, then we will abide. We will give effect to that decision.

Now he has failed in that disciplinary inquiry. He is going to the Bargaining Council. Even though that is called the Transnet Bargaining Council, it was still an independent body in the sense that the arbitrators who sit there are not
20 employees of Transnet. They are independent lawyers.

So why did you not say: Mr Gama has an independent and fair forum at which he can put his case. Let him put his case there and we will abide by whatever decision.

Why did you and your board not take that principled decision and say: We are not going to interfere.

MR MKWANAZI: Chairman, I need to go back a little bit and indicate that there was a Public Protector later, around the 22nd of December twenty... I do not know the exact date, 2010. Ja. Now ...[intervenes]

CHAIRPERSON: I think 22 December ...[intervenes]

MR MKWANAZI: In 2010.

CHAIRPERSON: 22 December 2010 is the letter.

MR MKWANAZI: Yes, yes. In 2010.

CHAIRPERSON: Ja.

10 **MR MKWANAZI:** Now in a way, it is that Public Protector letter which elevated the letter to the chairman's office. And your analyses is correct but then once this matter was then elevated to the chairman's office, the company then had to respond to the Public Protector and as part of that, certain allegations were made there.

And as part of that response, the initial process was to appoint KPMG and Nkonki to look into the facts now. And then they did and for some reason, if I recall, their first draft report was sometime in January.

20 But that draft report as... in retrospect, they sort of file on Monday once it was brought in by some staff members.

No, on Friday, last week Friday from the Zondo Commission. That first draft report did not contain the details I thought it did in terms of dealing with this issue.

But yes, what triggered the matter to go to board was

the Public Protector's complaint, if I can call it that.

CHAIRPERSON: Yes, but ...[intervenes]

MR MKWANAZI: And the, it became sort of a board member, a board matter, ja.

CHAIRPERSON: But even with that. I do not think that the Public Protector would have had any problem if the board said with regard to Mr Gama's dismissal, we have set up an independent forum and a fair process at which Mr Gama is ready to put his case as fully as he wants.

10 He has done so. This is the outcome. He is now going to another independent forum. There too, he will have a process where he can make out his case and we as the board will abide by the decisions of that independent forum.

Why did you and the board not take that principled approach?

MR MKWANAZI: Chair, at the time as a board we did not take that approach, yes.

CHAIRPERSON: Mr Myburgh.

ADV MYBURGH SC: Thank you, Mr Chairman.

20 Mr Mkwanazi, please just turn to page 6 of Bundle 2. The agreement of settlement.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Signed in draft form. Signed by Mr Gama on the 10th of February 2011.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You have said that you were the lead negotiator. Is that correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: So by the 10th ...[intervenes]

MR MKWANAZI: That is correct.

ADV MYBURGH SC: By the 10th of February, you had already, at least for yourself, decided that Mr Gama should be reinstated as the Chief Executive of TFR, correct?

MR MKWANAZI: That is correct, Chair.

10 **ADV MYBURGH SC:** That, of course, was before Deneys Reitz' advice?

MR MKWANAZI: That is correct, Chair. But let me qualify that. You know, these things, when you look at them ten years or nine year later, there were other reports that were produced in Transnet which were indicating...

I am focussing on the procurement matters, that there could have been unfairness on the procurement issues. That is correct Chair, yes.

20 And still today, I do not have those reports and hopefully, one day they will surface.

ADV MYBURGH SC: Yes, but the point is that your evidence has been that you appointed Deneys Reitz to bring fresh eyes to bear on this issue. What you land up doing is deciding for yourself that the man must be reinstated before those fresh eyes produced any advice, correct?

MR MKWANAZI: That is correct, Chair.

ADV MYBURGH SC: Yes. But does that not bear out then Mr Mkwanazi that, really what you were looking for is legal advice that accorded with your decision, correct?

MR MKWANAZI: You could be correct in indicating that but yes, I could... wrong legal advice at the ...[indistinct], yes.

ADV MYBURGH SC: Is it not so that you had decided to reinstate Mr Gama even before you went to Denys Reitz?

MR MKWANAZI: To say decide is too strong a word but we
10 were in discussions based on the information we had, even as early as the 1st of February, if I recall. I am not sure what sub-committee that was, et cetera. We were in discussions on some form of review of the Gama sanction issues, yes.

ADV MYBURGH SC: But you have repeatedly told the Chairperson that why you went to Deneys Reitz, is you wanted them to bring fresh eyes to bear. It does not seem to me that you waited for their advice. You had already decided. Certainly, you yourself had decided that Mr Gama was to be reinstated before that advice.

20 **MR MKWANAZI:** It was a consultation process at the time and with no final decision because only around the 14th, 15th of February, would then a final decision be taken by a sub-committee of the board and also elevated to the board.

ADV MYBURGH SC: Let me take you please to Mr Mhlango's affidavit.

MR MKWANAZI: Yes.

ADV MYBURGH SC: That you find in Bundle 1.

MR MKWANAZI: Bundle 1...

ADV MYBURGH SC: I would like you to turn to page 170.
One, seven, zero.

MR MKWANAZI: One, seven, zero. Ja, that is the one.
Okay. Thank you..

ADV MYBURGH SC: [No audible reply]

MR MKWANAZI: Yes, I have got that.

10 **ADV MYBURGH SC:** Alright. So on Friday, we dealt with
paragraph 7 at page 170. I want to direct your attention to
paragraph 6 and then I want us to read the two paragraphs
together. At paragraph 6, Mr Mhlango says:

20 “I was not involved directly or indirectly in the
settlement discussions leading to the reinstatement
of Mr Gama. The only insight I had on the
discussions was when I was informed by Nkomazi,
the then chairperson of Transnet and acting Chief
Executive Officer at the time that the company
intended to reinstate Mr Gama.”

So in that paragraph he says you informed him that the
company intended to reinstate Mr Gama. The next
paragraph says:

“Due to the passage of time, I cannot recall the
exact reason for or context of my discussion with

Mr Mkwanazi.”

In other words, the discussion that you had with him when you informed him of Transnet’s decision to reinstate Mr Gama, correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: That is what he is referring to. He goes on to say:

“He conferred with me on a variety of matters in my capacity as Special Advisor.”

10 And then the next sentence says:

“I recall that during my conversation with Mr Mkwanazi...”

Now when you read the two paragraphs together, he is talking about when you informed him that Transnet had decided to reinstate Mr Gama.

20 “I recall that during my conversation with Mr 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 was Mr Sbu Gule.”

So what I want to suggest to you. That when you read these two paragraphs, it seems to be Mr Mhlango’s recollection that even before you went to Mr Gule, you had

decided to reinstate Mr Gama.

MR MKWANAZI: I would not call that a decision. I would all that part of a review process which had been requested by the shareholder much earlier on.

And also, if I do recall, there was some other information that I had seen in January, much earlier in January on irregular procurement in Transnet. A number of cases.

It was a matrix of some Excel spreadsheet which indicated offences by certain executives, et cetera and
10 condonations granted, et cetera, et cetera. And the amounts involved but that information is not available.

So at... like knowing what the system information was at the time, I was aware that there was something not on about the fairness of the sanctions on Gama on the two procurement issues. That I was aware of.

And then of course, in discussing with the board even before the 1st of February, the board was then made aware that I was in consultation with Mr Gama on some of the issues that would have come out of his disciplinary process.
20 But having said I was in consultation.

Even at that time, the consultation was more of the procurement issues and, therefore, that is why some legal eyes were needed into looking into these issues.

And what is interesting even if it is legalised, it did not focus on the third issue or the third offence of criticising

executives. Yes.

ADV MYBURGH SC: Mr Mkwanazi, perhaps I could just ask you for a direct answer. Did you ...[intervenes]

MR MKWANAZI: Yes.

ADV MYBURGH SC: ...or did you not tell Mr Mhlango before you had even appointed Deneys Reitz that Transnet intended to reinstate Mr Gama, yes or not?

MR MKWANAZI: It intended to review, not reinstate.

ADV MYBURGH SC: So you did not tell him this?

10 **MR MKWANAZI:** It is a strong word. To review.

ADV MYBURGH SC: But how does he get it so wrong? Reviewing and reinstatement are two completely different concepts.

MR MKWANAZI: It should be. It is a review because yes that review that had been requested by the shareholder in October 2010. Yes.

ADV MYBURGH SC: Yes, you simply ...[intervenes]

MR MKWANAZI: Not reinstate.

ADV MYBURGH SC: You simply repeating your evidence.

20 Do you remember my question? My question is, how does he get it so wrong?

MR MKWANAZI: I am not sure. But he is coming, I am assuming, as well to have his say on the Zondo Commission.

ADV MYBURGH SC: And then if we go to his emails.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Page 178. I think ...[intervenes]

MR MKWANAZI: Page 178.

ADV MYBURGH SC: I think you have told the Chairperson as well that he got it wrong.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Where you told the minister on the 18th of January that you were nearing a settlement. He also got that wrong. Is that right?

MR MKWANAZI: If I got it wrong? Yes, he got it wrong.

10 **ADV MYBURGH SC:** I see. Were you... you say though that you were speaking to Mr Mhlango around this time. Is that correct?

MR MKWANAZI: Yes, that is correct. I am not sure around which time exactly but yes I would have been talking to him.

ADV MYBURGH SC: And did you speak to him about Mr Gama's reinstatement?

MR MKWANAZI: No, the review that had been requested by the minister, not the reinstatement.

20 **ADV MYBURGH SC:** Well, I think that is very important evidence. Did you speak to him about the fact that, on your version at least, the minister had instructed you to undertake a review of Mr Gama's dismissal. Did you talk to him about that?

MR MKWANAZI: Yes. Yes, I think I did. Yes.

ADV MYBURGH SC: Right. And if you go to page 181.

There is an email from ...[indistinct] to Mr Gigaba on the 4 February

MR MKWANAZI: Yes.

ADV MYBURGH SC: And he said:

“Dear Minister, my meeting with Cheer(?)...”

He is referring to you there, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: You had had a meeting with him about your negotiations with Mr Gama and his position in relation to applying for the GCE vacancy, correct?

MR MKWANAZI: Phew! Let me take out that piece of paper, for which Chief Executive. Yes, please continue?

ADV MYBURGH SC: Well you had a meeting with him dealing with two subjects, correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Now what gave rise to this meeting on the 4 February?

MR MKWANAZI: I do not recall – wait, wait, wait. I do not recall in the opening statement that he makes there but, if I do recall, at the time we might have already advertised for the filling of the vacancy of Group Chief Executive, yes.

ADV MYBURGH SC: So were you keeping Mr Mahlangu apprised of developments in the light of the instruction that you got from the minister to, as you put it, review Mr

Gama's dismissal?

MR MKWANAZI: I would have.

ADV MYBURGH SC: Is that what you were doing?

MR MKWANAZI: I am not sure what he says that advertising was a mistake. It was not a mistake.

ADV MYBURGH SC: Sorry, my question, Mr Mkwanazi, is were you ...[intervenes]

MR MKWANAZI: Yes, I was in discussions with him regularly, yes.

10 **ADV MYBURGH SC:** Yes but you were having these discussions with him in light of the instruction that you received from the minister.

MR MKWANAZI: To review

ADV MYBURGH SC: You say to review Mr Gama's dismissal, correct?

MR MKWANAZI: Yes, that is correct.

ADV MYBURGH SC: And this is a discussion that you were having with the very person that suggested that you should appoint Mr Sbu Gule, correct?

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

ADV MYBURGH SC: So let us go then please to the ...[intervenes]

CHAIRPERSON: I am sorry, Mr Myburgh, as I understand what you are saying, Mr Mkwanazi, and as I understand Mr Mahlangu's email to his minister, it appears that the two of

you, namely yourself and Mr Mahlangu had regular interactions about matters relating to Transnet and that included discussions relating to the matter of Mr Gama, is that correct?

MR MKWANAZI: That is correct, Chair, from the perspective that yes, the minister had requested a review, yes.

CHAIRPERSON: The interactions that you had with Mr Mahlangu, were they on the basis that he would convey to
10 the minister whatever you conveyed to him in regard to various issues at Transnet including Mr Gama's matter?

MR MKWANAZI: I am not sure if he would but if also I recall at the time the focus of the discussions were not necessarily – they were related at times generally to state owned entities, yes.

CHAIRPERSON: To state owned entities in general?

MR MKWANAZI: Under Public Enterprises.

CHAIRPERSON: Yes, okay. So are you saying that a lot of the discussions that you had with Mr Mahlangu related
20 to state owned enterprises under the Department of Public Enterprises?

MR MKWANAZI: Related to Transnet specific but occasionally other SOEs, yes.

CHAIRPERSON: Oh, okay, generally, the discussions related to Transnet matters but sometimes they would also

related to other SOEs, is that right?

MR MKWANAZI: That is correct.

CHAIRPERSON: Yes. But when you were having discussions with him relating to Transnet was it on the basis that he was, so to speak, the conduit for him to pass on to the minister the updates or whatever you told him, you were not just telling Mr Mahlangu in his personal capacity, you were telling him because he was special adviser to the minister.

10 **MR MKWANAZI:** When you say in personal capacity, in a way because he is special adviser to the minister my understanding was that then he would brief the minister because I never interacted with the minister a lot.

CHAIRPERSON: Yes, okay, ja. So the basis for your engagements with Mr Mahlangu was that he would brief the minister on your discussions, is that right?

MR MKWANAZI: That is correct, Chair.

CHAIRPERSON: Yes. Well, maybe you have answered the next question I was going to have. Namely, with the
20 Minister Mr Gigaba having instructed you, on your evidence, to review the Gama case whether you subsequently ever had a meeting with him where you told him how far you were with the review process either before it was completed or when it was about to be completed?

MR MKWANAZI: I do not recall sitting with the minister

briefing him in detail on progress on the matter. The only person who would have been briefed is Mr Mahlangu.

CHAIRPERSON: Ja, okay, and he would have – your expectation was that he would then share the briefing with the minister?

MR MKWANAZI: That is correct.

CHAIRPERSON: Okay, alright. Mr Myburgh?

ADV MYBURGH SC: Thank you, Mr Chairman. Mr Mkwanazi, I would like now to move to the board meeting
10 on the 16 February.

MR MKWANAZI: Yes.

ADV MYBURGH SC: I want to start off ...[intervenes]

MR MKWANAZI: Can you – wait, I am not sure that the page is correct, ja. What pack is it?

ADV MYBURGH SC: I will come to the minute in a moment but I want to start off just by finding out from you precisely what was before the board at this meeting on the 16 February. Let me start by asking you was Mr Todd's opinion before the board on the 16 February?

20 **MR MKWANAZI:** I do not think so, I do not recall that big submission of Mr Todd serving on the board or even serving in one of the subcommittees, ja.

ADV MYBURGH SC: You do not recall that?

MR MKWANAZI: I do not recall, no, because ideally if it had it would have been part of a bundle in terms of the

board pack and I do not recall how the board pack looked like at that time.

ADV MYBURGH SC: But, Mr Mkwanazi, you had received Mr Todd's opinion, as I understand it, you had read it as well.

MR MKWANAZI: My understanding, I had received it. If I recall, it was done on the 2 February and given to one of the group legal people. Yes, I would have received it and yes, I would have read it.

10 **ADV MYBURGH SC:** Do you not think it would have been important for it to have served before the board then on the 16 February? I mean, why did you not ensure that it was there?

MR MKWANAZI: If I recall, there was a subcommittee before that board and again these minutes – ideally it would have served there and also when I say served there, coming say from group legal because we worked very closely with group legal at the time. It would have served in a subcommittee, yes, but not necessarily a board, no.

20 Now, that subcommittee, I do not know if I have got a minute of it, but if I do recall, there was a subcommittee before the board meeting of the 16th, there was a subcommittee.

ADV MYBURGH SC: So you would have seen the affidavit from the company secretary who says that the Todd opinion

was part of the board pack of the 16 February. You have seen that affidavit, have you not?

MR MKWANAZI: I have not seen that affidavit, can you take me to it?

ADV MYBURGH SC: If we go to bundle 1, page 15.

MR MKWANAZI: Page 15, bundle 1.

CHAIRPERSON: That affidavit, Mr Mkwanzazi, would have been one of the affidavits that were sent to you together with the letter that invited you to depose to your first
10 affidavit.

ADV MYBURGH SC: Wait, let me go back.

CHAIRPERSON: Maybe find the bundle first.

MR MKWANAZI: I am going to do it. Page 15. Okay, dated 16th, a document dated that, okay.

ADV MYBURGH SC: So three lines down at page 12 – or paragraph 12.

MR MKWANAZI: On paragraph 12, yes?

ADV MYBURGH SC: “Therefore the said document...”

And there she is referring to Mr Todd’s report.

20 “...and the draft settlement agreement were tabled for consideration before the board. When the board authorised the finalisation of Mr Gama’s settlement agreement, a copy of this report is annexed marked MPM6.”

Now can I just take you to MPM6. That you find at page

42.

MR MKWANAZI: Page 42.

ADV MYBURGH SC: She has put up a board pack, it seems, Board of Directors Meeting 16 February 12.32.05, Royal Elephant Conference Centre, Centurion and then you will see that there was spiral binding on the left hand side of Mr Todd's report, you can flick through it and go all the way from 43 ...[intervenes]

MR MKWANAZI: To...?

10 **ADV MYBURGH SC:** To 68.

MR MKWANAZI: To 68. Okay. I see it.

ADV MYBURGH SC: So is it still your recollection that the Todd report ...[intervenes]

CHAIRPERSON: I am sorry, Mr Myburgh?

ADV MYBURGH SC: Yes.

CHAIRPERSON: I am sorry, I was still concerned about Mr Mkwanzazi's response that he did not get or see that affidavit of the company secretary [inaudible – speaking simultaneously]

20 **MR MKWANAZI:** No, no...

CHAIRPERSON: I will deal with it later. What page is – I missed the page numbers you were referring him to.

ADV MYBURGH SC: Yes, the page number ...[intervenes]

CHAIRPERSON: And the ...[intervenes]

ADV MYBURGH SC: Chairperson, I was referring to

...[intervenes]

CHAIRPERSON: The bundle 1, nè?

ADV MYBURGH SC: To annexure MPM6, that is at page 42.

MR MKWANAZI: Yes.

CHAIRPERSON: One second? That is on bundle 1, nè?

ADV MYBURGH SC: That is correct. And then Mr Todd's report, Chairperson, goes all the way up to 68.

CHAIRPERSON: Yes, okay, I have got it now.

10 **ADV MYBURGH SC:** Mr Mkwanazi, is it still your recollection and of course you can only testify to what you remember but is it still your recollection that the Todd report was not before the board on the 16th?

MR MKWANAZI: When you say it was not before the board I see it was before the board based on this document, yes.

ADV MYBURGH SC: Right.

MR MKWANAZI: But I did not recall it anymore but I had seen it before, by the way before the 16th.

20 **ADV MYBURGH SC:** Yes but I want to – I think it is very important for the Chairperson to know precisely what information was before the board on the 16th.

MR MKWANAZI: Ja.

ADV MYBURGH SC: Now I can take you to two affidavits by your fellow directors, Ms Gcaba and Ms Tshepe who

both confirmed ...[intervenes]

MR MKWANAZI: Yes.

ADV MYBURGH SC: And you might have seen that, who both confirmed that the Todd report was in fact before the board on the 16 February.

MR MKWANAZI: On the 16th, yes.

ADV MYBURGH SC: Do you need me to take you to those passages or would you agree with that?

MR MKWANAZI: No, no, I do believe that it did serve on
10 the board of the 16 February.

ADV MYBURGH SC: And you have seen those affidavits, I mean you were given all of these files over the weekend, correct? You have seen the affidavits of Gcaba and Tshepe?

MR MKWANAZI: Yes. Gcaba?

CHAIRPERSON: Gaba, Gcaba.

MR MKWANAZI: Yes, I did get them, yes.

ADV MYBURGH SC: Alright. So can the Chairperson
20 then accept on the strength of the board pack and on the strength of what they say that you then accept that the Todd report is before you on the 16 February?

MR MKWANAZI: Yes, on the 16th, yes, Chair.

ADV MYBURGH SC: Now you and other board members talk about legal advice that was before the board. Now do I understand you correctly that what you placed before the

board after the memos of 14 and 15 February was what Mapoma sent you on the 15 February further to the input of Deneys Reitz and you presented that memorandum as the opinion of group legal. Effectively, Mr Mapoma's opinion, is that correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: So when we look at these affidavits and reference is made to legal advice, that legal advice, and correct me if I am wrong, comprises the advice of Mr
10 Todd and effectively, the advice of Mr Mapoma, is that correct?

MR MKWANAZI: That is correct. That is correct.

ADV MYBURGH SC: And you have accepted previously that the advice of Mr Mapoma that you placed before the board ...[intervenes]

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Where you say some doubt was created, was entirely in conflict with the advice that he gave the Corporate Governance and Nominations
20 Committee on the 3 February when he told members of that committee, including a number of your directors, that Transnet had a very, very good case, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Right. You have accepted as well that as of the 16 February there was nothing before the

board from KPMG/Nkonki. You confirm that?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: What we have seen from the affidavits of Gcaba and Tshepe is that both of them say that you informed the board that you had a list of contraventions that were comparable to Mr Gama's case. Neither of them say you introduced this list, they simply say that you informed the board of a list of contraventions that were comparable to Mr Gama's case. Do you confirm
10 that?

MR MKWANAZI: Yes, I do recall.

ADV MYBURGH SC: And you have given evidence – and I think I have taken you to the relevant prior extracts where you seem to have talked about a list of 30, is that correct?

MR MKWANAZI: Yes, that is correct.

ADV MYBURGH SC: And, if I understand your evidence correctly, from what you have said earlier this morning and previously, that really was a list of persons in relation to whom condonation was granted, is that correct?

20 **MR MKWANAZI:** It could have been a list of procurement processes and also condonations granted, that is correct.

ADV MYBURGH SC: So you had this list?

MR MKWANAZI: Now when you say you had this list, at the time, frankly, there was a spreadsheet which had been developed which indicated some of these irregularities and

some of the condonations granted and in some areas not even granted, for that matter, but with notes that disciplinary action would be taken, etcetera, etcetera, yes.

Now subsequent to - that list would have been circulating sometime in January. Now having – I am also trying to find that list. I have not seen it since.

ADV MYBURGH SC: Yes, I would like just to take you please to page – it is Ms Gcaba’s affidavit at page – bundle 1.

10 **MR MKWANAZI:** Bundle 1.

CHAIRPERSON: That would be Gcaba, hey?

ADV MYBURGH SC: Gcaba, bundle 1, 224.

CHAIRPERSON: For the transcribers, Gcaba will be G-c-a-b-a. 224 you say, Mr Myburgh?

ADV MYBURGH SC: 224.

MR MKWANAZI: Yes.

ADV MYBURGH SC: If I could please direct your attention to paragraph 48.2?

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** She is here dealing with the board meeting of the 16 February and says:

“The Chairman furthermore informed the board that there was a list of contraventions that were comparable to the case of Gama.”

Do you see that?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Did you do that?

MR MKWANAZI: Yes, I did.

ADV MYBURGH SC: You told them that you have a list of contraventions that are comparable to the case of Mr Gama.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You did not – on her version, you did not share this list with your fellow board members, you
10 simply told them that you had this list, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Let us go please to page 785.

MR MKWANAZI: 785.

ADV MYBURGH SC: This is Ms Tshepe’s affidavit, she is also dealing with the meeting of the 16 February and at paragraph 37.2 – I beg your pardon, I want to take you to
784.

MR MKWANAZI: 784. Yes.

ADV MYBURGH SC: She also says at 37.2:

20 “The Chairman furthermore informed the board that there was a list of contraventions that were comparable.”

MR MKWANAZI: Yes.

ADV MYBURGH SC: So this is your list of 30, you say it was in the form of a spreadsheet.

MR MKWANAZI: That is correct, ja.

ADV MYBURGH SC: And what did it show? What did it reflect? So you have 30 names.

MR MKWANAZI: It would have been a couple of transactions, whatever they were and of course it would have covered a number of years, if I can use the word, maybe from 2005 to 2010. It would have covered the actual procurement, whatever that was, and the fact that it either exceeded the mandate or it was irregular. There
10 would have been columns with some analysis and it would have indicated whether condonation was granted or not granted. Yes.

ADV MYBURGH SC: This is important, Mr Mkwanzazi.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You have a list of 30 people, so from what you can recall, 30 names ...[intervenes]

MR MKWANAZI: Just [inaudible – speaking simultaneously]

ADV MYBURGH SC: If I can just summarise your
20 evidence and then you can either agree or disagree.

MR MKWANAZI: Ja.

ADV MYBURGH SC: You have a list of 30 names spanning the period 2005 to 2010.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: The list would indicated the

irregularity, as you put it, where the mandate may have been exceeded.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And then there was an indication of whether condonation was granted or not, is that correct?

MR MKWANAZI: That is correct, yes.

ADV MYBURGH SC: Now how were you on the face of that list in a position to tell your fellow board members that those contraventions were comparable to Mr Gama's case?

10 **MR MKWANAZI:** They are not hundred percent comparable because Mr Gama's case touched on two procurement issues and one non-procurement issues but where it touches on the two procurement issues, they are comparable but when it touched the third matter where Gama now attacks the other executives, there is no similar case to my understanding that is on record. Ja. So it is only on the two procurement cases.

ADV MYBURGH SC: But even there you did not know whether they were actually comparable. You thought
20 broadly they were because they are now procurement irregularities but you did not know the detail of the 30, correct?

MR MKWANAZI: No, I would not know the detail, no, no, no.

ADV MYBURGH SC: So you really were not in a position,

Mr Mkwanazi, even to tell them in relation to the two charges that the contraventions on your list were comparable, were you?

MR MKWANAZI: In fairness, they are comparable from a procurement principle that certain things were not done according to the procurement procedure manual of the time. That is the only comparison, not the quantum and not a lot of other issues but the fact that they did not comply with the PPM at the time.

10 **ADV MYBURGH SC:** So they were at best broadly comparable.

MR MKWANAZI: That is correct but the third one was not even something that I would have submitted to the board in terms of comparability, there was no similar case.

ADV MYBURGH SC: Yes. So I suppose what you should have said – is you should not have said that the cases are comparable, you should have told them look, they are broadly comparable.

MR MKWANAZI: That is correct.

20 **ADV MYBURGH SC:** Because they are all involved in some or other way, procurement irregularity.

MR MKWANAZI: I should have said that, ja.

ADV MYBURGH SC: It is a different picture, is it not?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Yes, alright.

CHAIRPERSON: I take it that you approached those 30 names or so where condonation had been granted on their submission that the employees concerned would have applied for condonation, is that correct?

MR MKWANAZI: Chairman, some of them did, that is correct, yes.

CHAIRPERSON: Were there some who had not, as far as you know?

MR MKWANAZI: Chairman, some had not and for some
10 reason although they were in the minority, those that maybe might not have applied but nothing was done, etcetera, etcetera, yes.

CHAIRPERSON: As I understand the position, condonation was not supposed to be had for the asking. Was that your understanding at the time as well?

MR MKWANAZI: My understanding, Chairman, is that you could ask for condonation but when you say ask for it, you talk to your immediate supervisor about the issue and in most cases it involves Transnet internal audit and you then
20 talk to your boss about whatever you have done wrong and then your boss can then decide whether through the necessary counsel that had approved that transaction that the matter can go for condonation or you must discipline or whatever but it is through the approving authority, who would have been your supervisor.

CHAIRPERSON: Yes, no, what I mean is that the position, as you also understood it, I understand the position to have been that just because somebody, an employee asks for condonation, does not mean that they will get it.

MR MKWANAZI: No, no, no, Chairman.

CHAIRPERSON: It remained dependent on the merits of each request and the circumstances of the – of how the irregularity happened, is that correct?

10 **MR MKWANAZI:** Chairman, I agree with you, yes.

CHAIRPERSON: I also got the impression from some of the documents from Transnet that the idea was that condonation could be granted for non-serious irregularities if I understood correctly. Maybe non-serious is not the correct term, I do not know whether it is non-material, I am not sure, but I got the impression that there was a clear distinction made to say the more serious the deviation or the irregularity, the less likely that an employee would get condonation. Is my understanding the same as what your
20 understanding was at the time.

MR MKWANAZI: Chairman sort of but the question of seriousness is not an easy one to get into because how do you define the seriousness, is it a one billion, two billion, what's the quantum because some of these issues that eventually had to be condoned ran into billions of rands.

CHAIRPERSON: Yes but leaving out the question of whether it was a good idea to make a distinction between serious irregularities and maybe not so serious irregularities, or material irregularities and non-material irregularities, leaving aside the question of whether it was a good idea to make that distinction. Is it your recollection that there was such a distinction in terms of the policies?

MR MKWANAZI: Chairman there would have been, I am now trying to assume what I haven't read the PM, the
10 Policy Procedure of Manual of Transnet in a long time, but yes there would have been there because I am not sure where fraud comes in here because some of these things could have been fraudulent, and also I am not sure where fruitless and wasteful expenditure comes in on these, for some of them would have been fruitless and wasteful, they were of different categories.

CHAIRPERSON: Yes, but would it be correct to say that the authority considering a request or application by an employee for condonation would have had to take into
20 account among other factors the factor of how serious the irregularity was, would it be correct to say that

MR MKWANAZI: You are correct Chairman.

CHAIRPERSON: Yes, okay thank you. Mr Myburgh?

ADV MYBURGH SC: Thank you. Mr Mkwanazi just correct me if I'm wrong, but as I understand it on this list

of 30 people some of those people condonation had not been granted, is that correct?

MR MKWANAZI: That is my understanding at the time yes.

ADV MYBURGH SC: And if I understand your evidence correctly the list might also have contained names of people who were actually dismissed for procurement irregularities?

MR MKWANAZI: My understanding yes it would have
10 contained some people.

ADV MYBURGH SC: Importantly, and in fact if I understand it I think on Friday you talked about a list of 22 and then we've seen when Mr Molefe was appointed, your affidavit says he was instructed to deal with 12, so can you remember how many people on this list with reference to those figures that I have just given you, were in fact granted condonation? It wasn't all 30.

MR MKWANAZI: Maybe I need to state the scenario a little bit because the question of condonation is a strange
20 matter, let me make an example of one particular contract where I got directly involved. It was the VAE contract, I don't know what the company name was, but the increase in amount, the issue was people who kept on paying a supplier on what was then an irregular contract, and that made the contract value increase from 98million to about

1.8billiona and where now the question of the number of people, in fairness just that one contract alone, about plus minus eight other people were involved in making these adjustments where ideally some of these people should have called the process to a halt and say hold it we are busy making payments against an irregular contract.

I am trying to indicate that when I say the number is 30 that contract alone would have had about eight and another contract would have had a certain amount of people, that is how people got attached to an irregular contract.

ADV MYBURGH SC: I think really I am just looking for a number, because your evidence you've spoken about thirty, you've spoken about 22, you've spoken about 12, are you able to help us with a number or not?

MR MKWANAZI: Frankly that homework will have to be done, because these numbers that you are mentioning, I don't have an exact number, frankly at some stage while I was there we thought the number was even over 100 but through going back into the history of the various procurement irregularities the numbers in January 2011 would have been about 30 and some of those numbers interestingly enough are also calculated in the KPMG final report of November 2011.

ADV MYBURGH SC: Now Mr Mkwanazi as I understand

your evidence in response to questions from the Chairperson is that on the bare information that you had on the spreadsheet you weren't able to identify or determine the severity of each individual case, correct?

MR MKWANAZI: Not at the time yes.

ADV MYBURGH SC: But what we do know is that by way of comparison you were in a very good position to determine the severity of Mr Gama's misconduct, correct?

MR MKWANAZI: Yes, yes.

10 **ADV MYBURGH SC:** And why is that?

MR MKWANAZI: Hold it, don't forget Mr Gama's matter is threefold, two are procurement and one is non-procurement.

ADV MYBURGH SC: Yes but you were in a very good position to assess it, I was driving that, because Mr Todd had done that for you over a space of 25 pages, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Alright so let us go to the minute please of the meeting of the 16th of February.

20 **MR MKWANAZI:** What page is that?

ADV MYBURGH SC: The minutes appears in various places but the first time it was put up was by the company secretary. Let me take you please to Bundle 1, page 34.

MR MKWANAZI: Okay, page 34, my assistant has just gone to – okay I am on page 34.

ADV MYBURGH SC: Alright, Bundle 1, 34, now let us go to paragraph 2.1.2.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The Board had extensive deliberations on the matter, the following issues were highlighted in the deliberations; one, acknowledgement that Mr Gama was not challenging the finding of guilt against him, but the sanction imposed, correct?

MR MKWANAZI: Yes.

10 **ADV MYBURGH SC:** Secondly Mr Gama's sanction of dismissal was too harsh and the Board will support a sanction of a final written warning valid for a period of 12 months and from what you have told the Chairperson ...[intervenes]

CHAIRPERSON: Six months Mr Myburgh.

ADV MYBURGH SC: I beg your pardon, six months.

CHAIRPERSON: Yes.

ADV MYBURGH SC: For a period of six months, correct Mr Mkwanazi?

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

ADV MYBURGH SC: And from what you told the Chairperson fundamentally what led the board to that conclusion is that you informed the Board that you had a list of contraventions that were comparable to Mr Gama's case, where people had not been dismissed, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: You have admitted that you perhaps shouldn't have created the impression that they were like for like, correct?

MR MKWANAZI: Yes, yes, yes, I agree, they were not like for like.

ADV MYBURGH SC: And then you go on to – or it goes on to record appreciation that Mr Gama can still add value in the company, there was a minority not in support of the
10 reversal of Mr Gama's sanction.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The company was mandated to finalise Mr Gama's settlement agreement and then the condonation process is the norm within Transnet and to this effect the Chairman was requested to draft a memorandum to employees requesting that such conduct should cease.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: What does that mean?

20 **MR MKWANAZI:** It means that the – in the system there were too many condonations and authorities floating around requesting condonation, so what the company as trying to indicate is that it should cease and only one person would have the authority to condone and at the time the idea was that it would have been Brian Molefe, or the

Group CEO who would deal with those condonations. And yes subsequently if I recall I had to deal with one condonation, the VAE Condonation if I can mention it ja.

ADV MYBURGH SC: You have told the Chairperson on Friday that you accept that condonation and disciplinary action are two different concepts, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And then at paragraph 2.1.3 the Board was of the view that under the circumstances a final
10 written warning would have been given.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Would have been given, how would that have happened?

MR MKWANAZI: Chairman I am indicating that the Board was of the view that under normal circumstances a final written warning would have been given. It is not 100% correct statement because the authority, or authorising individual would have taken a view based on its case whether a written warning is taken or whether a
20 disciplinary – that sentence is incomplete, but ja, that's correct.

ADV MYBURGH SC: I mean what you say here is effective is that if Mr Gama had applied for condonation then this is what would have happened.

MR MKWANAZI: It could have been denied as well, yes.

ADV MYBURGH SC: But that's what you were forecasting.

MR MKWANAZI: ...[Indistinct] but it could have been denied.

CHAIRPERSON: You mean condonation could have been denied?

MR MKWANAZI: Denied yes.

CHAIRPERSON: Mmm, but whether granted or denied that would not impact on whether he should be disciplined
10 or not, that would be a separate issue?

MR MKWANAZI: Chairman there are certain circumstances where condonation would have been denied and therefore the next steps would have been disciplinary action needs to be taken. The question of whether you're condoned or not and therefore you are absolved never arose, except in situations where people do not even apply for condonation, which is different matter.

CHAIRPERSON: Yes, so as you said previously even if you are granted condonation you can still be disciplined.

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

CHAIRPERSON: Okay.

ADV MYBURGH SC: I just want to understand Mr Mkwanazi if you don't mind. When it says the Board was of the view that under normal circumstances a final written warning would have been given what do you mean by that,

when would it have been given? How would it have been given?

MR MKWANAZI: Chairman it depends on each individual case, because at times how these condonations were coming, they were coming through what you call divisional internal audit committee meetings, where you then review offences, procurement offences if I were to call them that, and then based on that divisional internal audit an opinion is then formed that these offences can apply for
10 condonation and these offences need to be elevated to the authority and some of them maybe they need disciplinary action, because offences are completely different, there's your theft for instance. I don't think any condonation would have been given for theft, and those who assault and a few other things, there's no condonation would have been given ja.

ADV MYBURGH SC: Sorry?

CHAIRPERSON: I was thinking of asking something, but I have decided to let you carry on.

20 **ADV MYBURGH SC:** Thank you Chairperson. Mr Mkwanazi what you don't see here is any consideration or undertaking by the Board of a review of Mr Antrobes' decision, correct?

MR MKWANAZI: Ja.

ADV MYBURGH SC: I mean no one says well this is what

Antrobes found, we think it's wrong for these reasons, the Board is just deciding this matter effectively afresh for itself isn't it?

MR MKWANAZI: No that is correct Chair although it had seen the Antrobes'...[intervenes]

ADV MYBURGH SC: Is that what you were told to do, then, and this is an important question, is that what you were told to do by the Minister? Is decide the matter afresh for yourself?

10 **MR MKWANAZI:** The request was a review, and upon that review the procurement issues there was some elements of unfairness on those two issues but the third matter of him ...[indistinct] Mr Chris Wells and the Board it was oversight on the part of the Board not to tackle that specific issue, because I do not think that that Board would have taken a different decision to what Mr – Advocate Antrobes and may Mr Todd had also recommended ja.

ADV MYBURGH SC: But Mr Mkwanzzi this minute does not reflect any application of the mind by the board to a
20 review of Mr Antrobes' decision. The Board just decides afresh what it thinks should have happened, correct?

MR MKWANAZI: No, no it does not refer to it yes.

ADV MYBURGH SC: But why not? Unless you were hell bent on having Mr Gama reinstated why didn't you undertake a proper objective review?

MR MKWANAZI: Chairman in hindsight that should have been done yes.

CHAIRPERSON: And isn't the position that actually the rulings of the Chairperson of the disciplinary inquiry, because there were two, one on guilt, the other one on sanction, isn't the position that the mere instruction that you must review Mr Gama's case had to start with a reading of those rulings and seeing whether they could be faulted, even before you can look at anything else.

10 Wouldn't you agree that ...[intervenes]

MR MKWANAZI: I agree with you Chairman.

CHAIRPERSON: Okay, alright, Mr Myburgh?

ADV MYBURGH SC: Thank you. Just one last question on the board meeting, Mr Mkwanazi Mr Malangani he says in his affidavit that you said that you had received legal advice to the effect that the sanction of dismissal was too harsh. Did you say that?

MR MKWANAZI: I wouldn't call it legal advice that said it was too harsh, all I was indicating, I might have said it, 20 was that if this thing is taken on the Transnet Bargaining Council process there were chances that the Bargaining Council could come with a different option of how the matter could have been handled.

ADV MYBURGH SC: Yes, because I mean in truth you hadn't received legal advice to the effect that the sanction

of dismissal was too harsh. At best you had received legal advice creating as you said many times “some doubt”, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Perhaps this is an opportune time for me to ask you, you do now that this settlement cost the taxpayer, and we will come to the figures in a moment, I think about R17million. Why do you settle a case just because there is some doubt?

10 **CHAIRPERSON:** I am sorry Mr Myburgh, you probably mean the R17million in terms of financial benefits to Mr Gama.

ADV MYBURGH SC: Yes I will come to that.

CHAIRPERSON: Of course the settlement agreement went even far beyond that, there’s legal costs and other things. You mean the financial benefits to Mr Gama?

ADV MYBURGH SC: Yes I think perhaps Mr Chairman I will come to that in a moment, but the – what was paid to Mr Gama was approximately R13million and then there was
20 about R4million in legal costs, you are absolutely right, it is the two together, but my figure of R17million includes the two.

CHAIRPERSON: Yes, no, no, no I think I understand what you mean, I think your statement, I understood your statement to be saying you wanted to confirm that he

knows that the settlement agreement cost Transnet R17million.

ADV MYBURGH SC: Yes.

CHAIRPERSON: And I was simply saying you haven't counted the legal costs that they paid to Mr Gama's, which would be far more, you probably are just talking about what you just said ja.

ADV MYBURGH SC: Yes, well Mr Mkwanazi we are going to come to the figures in a moment, but you know that this
10 was a very extensive settlement wasn't it?

MR MKWANAZI: I am aware yes.

ADV MYBURGH SC: So that is really what I am driving at, why do you settle where the cost is enormous, just because at absolute best for you there is some doubt, that's all.

MR MKWANAZI: That is correct chair.

ADV MYBURGH SC: Why didn't you just let the process run, you could have saved this money, potentially? Why were you so hell bent ...[intervenes]

20 **MR MKWANAZI:** In hindsight Advocate yes.

ADV MYBURGH SC: Yes but Mr Mkwanazi I am going to press you on this, because this is a very important issue. You have said time and time again to the Chairperson you settled because there is some doubt. Well there's doubt in all litigation.

MR MKWANAZI: Yes.

ADV MYBURGH SC: I just cannot understand even on your own version what is the basis for entering into this very expensive settlement when all there is, is some doubt. Why give away the money?

MR MKWANAZI: Chairman yes there was that doubt and on the procurement issues but in hindsight I don't have any doubt that on the third matter of attacking his executive sir had the Board applied its mind to that third
10 matter, I doubt if this – that Mr Gama would have been reinstated, no there I would have supported the dismissal as well.

CHAIRPERSON: Well Mr Myburgh's question is even with the two procurement issues.

MR MKWANAZI: Other matters?

CHAIRPERSON: Ja, why did you and the Board decide to settle the matter just because there is some doubt that was created by a poor legal opinion, or weak, I think that's the term you used, a weak legal opinion that was not reasoned
20 in any substantial way when you had about three legal opinions saying you are on strong grounds against Mr Gama in regard to this arbitration. So Mr Myburgh's question is help us understand why the Board thought it was the right thing to settle in circumstances where this settlement was going to be so expensive and yet the

prospects of Transnet winning the case were so good, to your knowledge in terms of the three legal opinions.

MR MKWANAZI: Chairman I have indicated that yes there was this review by this – which came in the form of this weak legal opinion, which then created doubt but unfortunately it was not part of it, because it was a general statement on doubt without looking at the three issues separately, because as I indicate just on the 3rd matter alone, which not procurement related a different decision
10 would have been reached by that Board, if there was more emphasis on that matter which is not procurement related.

CHAIRPERSON: Mr Myburgh?

ADV MYBURGH SC: Yes Mr Mkwanzazi I am not sure ...[intervenes]

CHAIRPERSON: I don't think you have got an answer.

ADV MYBURGH SC: I don't think I have got an answer.

CHAIRPERSON: But of course if Mr Mkwanzazi doesn't have an answer he doesn't have one. Feel free to deal with the issue the way you see it, it is an important issue.

20 **ADV MYBURGH SC:** Mr Mkwanzazi you accept that there is doubt and risk in all litigation.

MR MKWANAZI: Yes I do accept that.

ADV MYBURGH SC: And that doesn't drive the responding party to settle all litigation does it?

MR MKWANAZI: No it doesn't ja.

ADV MYBURGH SC: I am just going to ask you once more I mean this settlement we will go into the figures in a moment, cost anywhere between 10 and 20million, that's how much money you doled out to Mr Gama, and you did that simply because there was some doubt that was not even articulated in the opinion. That is surely not rational.

MR MKWANAZI: Advocate yes at the time that is the view we took as a Board and even that advice as I have indicated was not thorough particularly along the issue of
10 the third offence and that is why had it been highlighted this third offence, I doubt if the Board would have reached that decision, but on the other two matters there could have been some doubt, definitely yes.

ADV MYBURGH SC: Yes, but you are skirting around the question. I mean if there was some doubt there was also we know a prospect that you could win.

MR MKWANAZI: That is correct Advocate, Chair.

ADV MYBURGH SC: Correct but then why didn't you allow an arbitration to run its course then we could have
20 perhaps saved somewhere between ten and twenty million. I mean you knew there was a prospect of being able to do that, why did you not allow the process to run its course.

MR MKWANAZI: Chairman as you rightfully pointed out advocate the issues of litigation can go either way and at the time if I recall the Board could have been worried

about this thing taking abnormally too long and therefore the Board could have felt that it needs to be resolved but it is then wrong legal advice which is the basis of saying yes maybe on the first two issues there could have been some doubt, but on the third issue no, the Board didn't have good advice and also – ja. If basically the Board would have sustained the decision of the disciplinary committee.

CHAIRPERSON: What would you say if somebody said this decision by the Board is indefensible?

10 **MR MKWANAZI:** Chairman I would tend to agree with you because it is indefensible because the Board did not have the facts of the last matter in terms of that particular offence, it never surfaced on documentation that this third offence was almost a dismissible offence, under any circumstances Chairman I agree with that.

CHAIRPERSON: Mr Myburgh?

ADV MYBURGH SC: Thank you. Mr Mkwanazi what I now want to do is deal with relevant concept, condonation whether or not it was applicable and the like. Can I ask
20 you please to turn to Mr Todd's further affidavit, that is in Bundle 3 at page ...[intervenes]

MR MKWANAZI: Three?

ADV MYBURGH SC: Bundle 3, and it starts at page 156.

CHAIRPERSON: Okay.

MR MKWANAZI: I've got it in front of me.

ADV MYBURGH SC: So what Mr Todd does in this affidavit is if you have a look at paragraph 6, he deals with your reasoning and the decision to reinstate in the light of the issue of condonation, and then at paragraph 7 he says this explanation is in my respectful submission not rational, it does not ring true on its own terms. The explanation cannot be correct for the following reasons, and then he summarises four points that he then expands upon.

10 First condonation was not – sorry condonation was a procurement process entirely distinct from decision making about the consequences that should flow, sorry follow from employee misconduct.

Second, not one of the three instances of misconduct to which Mr Gama ultimately admitted and for which he was dismissed was capable of or suitable for condonation as an application of the procurement policy. Third, such contentions as Mr Gama sought to make during the disciplinary process concerning consistency of
20 treatment were fully, carefully and fairly considered by the disciplinary chairperson as appears from his lengthy findings and then fourth, as far as I am aware there was no report or evidence before the Board when the decision was taken to reinstate Mr Gama which showed a track record of condonation being granted etcetera.

Now I want to now go through each of those points, if I can take you please to the heading “condonation and procurement process distinct from decisions on employee conduct.”

Mr Todd says to the best of my knowledge condonation within the Transnet Procurement environment had nothing to do with condoning acts of misconduct by employees, and I understand you have accepted that.

MR MKWANAZI: Yes Advocate I agree with that
10 statement.

ADV MYBURGH SC: Condonation was a procurement procedure under which a person or body with authority to incur expenditure was permitted to – and now he is quoting from your manual:

“Condone non-compliance with the laid down policy and procedures and directives provided. Such non-compliance is submitted via the relevant line manager of the employee in a particular division.”

You would agree with that?

20 **MR MKWANAZI:** I agree with that ja.

ADV MYBURGH SC: I refer in this regard to the opening paragraph of the Transnet internal memorandum and we are going to come to that in a moment. Paragraph 10:

“In this way usually minor deviations ...”

Again the language of the memo;

“...from required procurement policies could be condoned after carefully consideration by the authorised person or body, so that if expenditure was approved or had been incorrect in these circumstances it would not constitute unauthorised or irregular expenditure for the purposes of the PFMA.”

You agree with that?

MR MKWANAZI: I agree with you Chairman.

10 **ADV MYBURGH SC:** And at 11 the distinction between condonation as a procurement procedure and disciplinary processes to deal with employee misconduct is a logical distinction which is apparent from Transnet policy directives at the time including Annexure A, you have already accepted that, correct?

MR MKWANAZI: Ja, I agree advocate.

ADV MYBURGH SC: That memorandum deals with the authority of what is referred to as the divisional acquisition council, the procurement body within a Transnet division to
20 condone non-compliance with prescribed procurement policies and procedures, do you accept that?

MR MKWANAZI: Okay.

ADV MYBURGH SC: As the memorandum makes clear condonations “are not there for the asking” correct?

MR MKWANAZI: I agree with you.

ADV MYBURGH SC: It will be as a general rule condonation should be given for relatively minor transgressions of procurement rules and procedures and that material non-compliance will usually not be condoned because these have “PFMA implications which could result in civil, criminal or disciplinary steps being taken”, you would agree with that?

MR MKWANAZI: I agree with that.

ADV MYBURGH SC: A condonation submission was
10 required to state whether disciplinary steps have been taken because of non-compliance, correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: And [d] ever matters have been submitted for condonation where certain individuals are found to be guilty of transgressions disciplinary action should be considered, you would confirm that?

MR MKWANAZI: I agree yes.

ADV MYBURGH SC: I summary said Mr Todd the two
20 processes, one condoning minor non-compliance with rules and procedures and 2 responding to employee misconduct were at all times, both as a matter of logic and as a matter of policy entirely distinct, correct?

MR MKWANAZI: They are distinct yes.

ADV MYBURGH SC: And then you will see, I will come back to the affidavit or the body of it in a moment, but

would you please go to page 168.

MR MKWANAZI: 168.

ADV MYBURGH SC: There is Annexure A and it is the PFM directive of March 2010 dealing with condonations and really what Mr Todd did is he analysed and quoted in his affidavit from this Annexure A, and you have agreed with his analysis, correct?

MR MKWANAZI: Yes I do agree.

ADV MYBURGH SC: So then if you go back please to
10 page 106 ...[intervenes]

CHAIRPERSON: Maybe before that Mr Myburgh Mr Mkwanzazi while on that page 168 won't you – or no it is at page 168 you will see at the bottom of that page that the memo says DAC's role:

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

1. The extent and cause of the non-compliance;
- 20 2. The seriousness of the non-compliance;
3. The reasonableness of the explanation for the non-compliance;
4. The effect of the non-compliance on the fairness of the procurement process;
5. Whether the matter would in all likelihood been

approved had the proper processes been followed;

6. Whether the DAC was approached for condonation as soon as possible [at the next DAC meeting] after business became aware of a non-compliance.”

You see that ...[intervenes]

MR MKWANAZI: I see it ja.

CHAIRPERSON: Those seem to be the factors which the memorandum says should be taken into account when considering whether or not to grant condonation, you accept that?

MR MKWANAZI: I agree Chairperson.

CHAIRPERSON: And on the next page, page 169, you will see a heading that says information to be contained in a condonation submission, can you see that heading?

MR MKWANAZI: I can see that heading.

CHAIRPERSON: And then it says:

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

1. When did the business first become aware of the non-compliance;
2. The nature of the non-compliance, including the provision of the PPN [or construction

procurement manual] that was not followed;

3. A full explanation for the non-compliance, ie why was the process not followed;

4. What steps will be taken to ensure that the non-compliance will not occur again;

5. Has any person been reprimanded or has disciplinary action been instituted against any person because of the non-compliance [including details thereof].

10 And if you go a little down you will see a paragraph that says:

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

You see that?

MR MKWANAZI: I see that Chair.

CHAIRPERSON: Now in relation to the thirty or whatever the number is of condonations that you said had been
20 granted in terms of the list that was – that you had before you in a spreadsheet you would not have had all of this information to see in which case in order to be able to compare with Mr Gama’s case, isn’t it?

MR MKWANAZI: I would not have had that.

CHAIRPERSON: You would not have had all of this

information regarding each one of them.

MR MKWANAZI: I would not have it.

CHAIRPERSON: Yes, Mr Myburgh?

ADV MYBURGH SC: Mr Chairman I see that it is quarter past eleven, is this a convenient time to take the tea adjournment.

CHAIRPERSON: Let us take the tea adjournment and we will resume at half past eleven.

We adjourn.

10 **REGISTRAR:** All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Thank you. You may seated Mr Mkwanazi. Let us continue.

MR MKWANAZI: Indeed Chairman.

CHAIRPERSON: Let us continue. Your microphone Mr Myburgh.

ADV MYBURGH SC: Thank you. Mr Mkwanazi – Mr Chairman I have been asked to face...

20 **MR MKWANAZI:** The page.

ADV MYBURGH SC: I have to fact this way.

CHAIRPERSON: Oh otherwise the TV people.

ADV MYBURGH SC: Yes. So I am sorry.

MR MKWANAZI: They want to see your face better.

ADV MYBURGH SC: Ja.

CHAIRPERSON: Okay alright.

ADV MYBURGH SC: Thank you.

CHAIRPERSON: Does that mess up your plan with your table there?

ADV MYBURGH SC: I will sort it out.

CHAIRPERSON: Ja.

ADV MYBURGH SC: At lunchtime but I am sure I can limp on.

CHAIRPERSON: Ja.

10 **ADV MYBURGH SC:** Mr Chairperson thank you. Mr Mkwanazi can I please then take you to the next topic that is dealt with by Mr Todd? And this is at page 160 of Bundle 3. He says:

“No condonation would or could have been applicable to Gama’s misconduct.”

Paragraph 13.

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

So [a] he deals with the Fifty Like New locomotives.

He says:

“The misconduct in relation to the Fifty Like New locomotives arose from Mr Gama’s conclusion of a major contract that had been authorised by the board that with Mr Gama failing to comply with the single important condition prescribed by the board which was that local [South African] work performed on refurbished locomotives should be done by Transnet itself and not by an external partner. Mr Gama’s conduct in concluding a contract that directly contradicted this condition was not a procurement irregularity that could be condoned. And more importantly it was not in fact condoned by the board. On the contrary the board required the contract to be cancelled with Transnet incurring various significant costs as a result. No question arose of irregular expenditure that could be condoned on application by Mr Gama. Mr Gama did not in fact apply for condonation and this would in any event not have mitigated or detracted from the serious concerns about his conduct which the disciplinary Chairperson found to have justified his dismissal.”

So the long and the short of what Mr Todd is saying is that Mr Gama could never have got condonation because this irregularity was not condoned in fact to the contrary. What the board required was the cancellation of the contract resulting in Transnet incurring various significant costs. You wish to comment on this?

MR MKWANAZI: I – I understand fully the argument of Mr Todd. Having said that though and as he rightfully points out in terms of that board decision. I am also now not sure if
10 this matter is actually meaning in retrospect a condonable matter. I am not sure.

ADV MYBURGH SC: Ja well I think that is a concession fairly made.

MR MKWANAZI: I am not sure.

ADV MYBURGH SC: Well let me then deal with that.

CHAIRPERSON: Well Mr Todd says clearly – he clearly says it was not a matter that would fall under condonation that would attract condonation. As I – as I understand his argument maybe not just based here but maybe based
20 elsewhere in his affidavits as well. This was a case where the board had given in effect an instruction and that instruction was effectively defied by Mr Gama. Condonation has got nothing to do with that does it?

MR MKWANAZI: It does not.

CHAIRPERSON: Yes.

MR MKWANAZI: I agree Chairman.

CHAIRPERSON: Yes. Okay alright.

ADV MYBURGH SC: Then just to add to that Mr Mkwanazi so that deals with the misconduct side of it but on the condonation side of it Mr Todd says well condonation could never have been granted because this actually was not condoned. What happened is that the contract was cancelled by Transnet and it incurred various significant costs. Correct?

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

ADV MYBURGH SC: Alright. Let us then go to page 161.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Paragraph 3. We are now dealing with GNS.

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

20 1. First that procurement process was so seriously flawed that no rational person could have attempted to use the condonation procedure to seek to regularise it. I refer to the multiple and serious respects in which the process was found to be deviated – oh sorry defective by the Chairperson of the disciplinary proceedings

brought against Messrs Khanya and Senemala. As appears from the copy of the findings.”

Now I have taken – you mentioned those before.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Those are the findings marked B the findings of Nazier Cassim SC you would have read them no doubt?

MR MKWANAZI: I know [00:06:05] issue yes.

10 **ADV MYBURGH SC:** Yes. And you will see that that finding tabulates an absolute litany of irregularities caused and affected by these two employees who were then dismissed. Correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Mr Todd goes on to say:

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

You accept that?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Mr Todd goes on to...

MR MKWANAZI: I accept that.

ADV MYBURGH SC: Mr Todd goes on to say:

10 "I attach marked C a transcript of part of the disciplinary proceedings that took place on 10 February 2010. As is apparent from the transcript Mr Gama stated that when he had later seen the confinement document after an investigation into the matter he had realised that there were "quite a few gaps and loopholes". He had begun to smell "something fishy". Stated that if he had known that it was confinement he would probably not have approved it. Confirmed that it had been improper to stop an existing tender process when GNS came into the picture. Confirmed that what the relevant
20 official had done by representing to him that a tender process had been followed "was a complete fraud" and stated that "once you get all the documentation it becomes clearer what was happening." And stated that at the time when he received all the relevant

documents in June “it became clearer to me in terms of what this scam was all about.” It makes no sense says Mr Todd when this was Mr Gama’s own stance on the matter to suggest that the procurement condonation procedure would have been appropriate in these circumstances.”

Would you agree with that?

MR MKWANAZI: No I agree with that ja.

10 **ADV MYBURGH SC:** So we two down. And then what Mr Todd says in C is:

“The third charge of misconduct as you have accepted for which the sanctioned dismissal was also imposed on Mr Gama had nothing to do with procurement at all.”

So on this affidavit and these paragraphs 13 through – paragraph 13a, b and c. you accept Mr Mkwanazi I take it that there was simply no basis to come to the finding that the committee did.

20 **MR MKWANAZI:** The – the committee yes applied its mind and looked at the two issues as I indicated. And the – there was nothing wrong with the finding of that particular committee meaning the Antrobus processes. There was nothing wrong with them yes.

ADV MYBURGH SC: Oh sorry what I meant to say is that

one simply cannot justify the conclusion and decision of the board can you to reinstate Mr Gama on the basis of these paragraphs it is just impossible.

MR MKWANAZI: Chairman based on Mr Todd's submission which is what we have got now there could have been a different interpretation of whether the condonation could have or could not have been granted. But Mr Todd's analysis indicates that no condonation would have been granted under these circumstances.

10 **ADV MYBURGH SC:** Yes. And you accept that?

MR MKWANAZI: Based on his submission I accept that but the thing was not tested. When I say not tested at the time I am not sure if did Mr Gama discuss some form of condonation. I am not Mr Gama's representative.

Because based on – on a different type of – the first one by the way on the Fifty Like New was a strange one. He basically did not follow a board process.

But then the question then becomes did he do a confinement in terms of discussions with the authority that
20 had approved this? That is on the first one.

The same on the second one did he do a confinement on the GNS I do not know but based on what he then said as well that this thing was wrong etcetera, etcetera.

But he did not test condonation on the two issues. The last one of misconduct I – I – the dismissal was a fair

assumption.

ADV MYBURGH SC: Yes but let me put it this way Mr Mkwanazi. Let us just take the Fifty Like New.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You fairly conceded to the Chairperson that – well we know that condonation would never have been granted – that we know. Because the contract was not condoned; was not regularised; it was cancelled. But leaving condonation aside you have conceded to a question
10 by the Chairperson that it did not detract from his misconduct. That what had happened here is that Mr Gama had defied an instruction of the board. Correct?

MR MKWANAZI: I agree with you.

ADV MYBURGH SC: And important instruction and his misconduct is serious, is it not?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Right so that is Fifty Like New. Now GNS just so that you – you follow. Mr Todd accepted the proposition that I put to him that Mr Gama's case in relation
20 to GNS is that he signed what was a confinement blind without having any regard to anything and allowed a fraud to be perpetrated on Transnet. That is his own case. But you are not going to condone that are you?

MR MKWANAZI: No you cannot condone that either.

ADV MYBURGH SC: And you would accept.

MR MKWANAZI: Ja.

ADV MYBURGH SC: Yes sorry I did not want to – I do not mean to interrupt you.

MR MKWANAZI: No, no please continue. No, no continue.

ADV MYBURGH SC: And you would accept that for a CEO of a major division of Transnet to conduct himself in that way is quite appalling is it not? To blindly sign a document that allows a fraud to be perpetrated on the company. Correct?

MR MKWANAZI: No correct.

10 **ADV MYBURGH SC:** You are not going to condone that and you accepted that is serious misconduct. Correct?

MR MKWANAZI: It is – now in hindsight the – if I was the authority to look at condonement and things I would – I would not have condoned that TNS thing as well. Also based on his own admission when this matter was brought into the disciplinary inquiry..

ADV MYBURGH SC: Correct. Because we know that you treated him on the basis as if condonation had been granted.

MR MKWANAZI: Ja that is correct Chairman yes. Advocate.

20 **ADV MYBURGH SC:** Mr Mkwanazi you say in hindsight and you make fair concessions here today.

MR MKWANAZI: Yes.

ADV MYBURGH SC: But in hindsight because what Mr Todd is saying here is really no different to what was Mr Antrobus said in his findings. The reality is that you did not come to

the decision that you say you would have come to today simply because you did not apply your mind. You had an ulterior purpose Mr Mkwanazi surely you must concede that?

MR MKWANAZI: Not really because still at the time when even I looked at my own submissions to this process I did indicate that there was serious oversight on the type of the advice and the recommendation to the board that the last matter which I viewed almost as a serious misconduct of attacking his colleagues is not a procurement matter and is
10 not condonable – that matter.

ADV MYBURGH SC: Hm.

MR MKWANAZI: That matter definitely he should have been dismissed. Now at the time of writing my first affidavit I interpreted the first two matters as procurement matters. But now as we go through that process – this process I can see that he conceded – him; himself as well that there were not necessarily hard-core procurement issues.

Which is why the Fifty Like New the board had to cancel that contract with the suppliers. And also he himself
20 as well admitted that on this TNS contract according to what you are indicating that there was something fishy about the contract.

But myself at the time of doing my affidavit I just viewed these two items as procurement – the first two items as procurement, irregularities or as – as issues relating to

procurement and no necessarily even issues relating to misconduct as is indicated by the Fifty Like New in not following a board instruction.

And also even the second one of him signing that GNS contract where from what I pick up – I am not sure if it was a confinement or what but there is no clear submission that this should have been condonable as a confinement, I do not know ja.

CHAIRPERSON: Well you do recall Mr Mkwanazi do you not
10 that when you did your first affidavit.

MR MKWANAZI: Yes.

CHAIRPERSON: The commission had taken trouble to make available to you the two rulings of the Chairperson of the disciplinary inquiry as well as...

MR MKWANAZI: They did.

CHAIRPERSON: As well as Mr Todd's affidavit as well as Mr Todd's report that was before the board.

MR MKWANAZI: The board yes.

CHAIRPERSON: To make sure you could refresh your
20 memory, you remember that?

MR MKWANAZI: Yes I do.

CHAIRPERSON: Yes okay alright. Mr Myburgh.

ADV MYBURGH SC: Then in conclusion Mr Mkwanazi what – what Mr Todd says at paragraph 14 of page 162 is to state in his circumstances that the board – and this is what you

had said

“Had to somehow deal – sorry – had to somehow try and deal with Mr – with the Gama matter on the assumption that he had been granted condonation had it been offered and therefore had to try to put him in a position that he could have been in had condonation been offered simply cannot be correct.”

10 And I think you concede that, correct?

MR MKWANAZI: Ja I concede that yes.

ADV MYBURGH SC: But Mr Mkwanazi I am going to press you on why did you not come to that conclusion at the time? It seems to me you could not have read Mr Antrobus’ finding. It seems to me that you could not possibly have read Mr Todd’s report.

CHAIRPERSON: Or if you did read them you may have decided to disregard them.

MR MKWANAZI: It is not a question of...

20 **CHAIRPERSON:** Either you read them – or either you did not read them or if you read them for whatever reason you may have decided to ignore them. Okay.

MR MKWANAZI: Chairman I – I did read Mr Todd’s submission of the 2 February 2010 if I do recall.

CHAIRPERSON: Yes.

MR MKWANAZI: But the – I did read Mr Todd’s submission but at the time the – that is why even my analysis of what I called similar procurement issues they are not identical to this.

CHAIRPERSON: Yes.

MR MKWANAZI: The other similar procurement issues could be minor but again somebody must look into them compared to what is sitting in front of us.

CHAIRPERSON: Do you have a clear recollection that you
10 had read the two rulings of the disciplinary Chairperson –
the Chairperson of the hearing?

MR MKWANAZI: Chair I would have read these but the one I do recall ...

CHAIRPERSON: Is Mr Todd’s one.

MR MKWANAZI: A little bit more is the Mr Todd one of – which was submitted to the board of the 2nd February or around that time I do recall that one.

CHAIRPERSON: Well – well you see those two rulings are quite comprehensive. It seems to me that anyone who has
20 read them will not forget that they had read them. They are quite comprehensive you have to put aside time to really read them.

MR MKWANAZI: Not to – I do recall Chairman.

CHAIRPERSON: Do you recall that you did read them?

MR MKWANAZI: Chairman not as comprehensively as Mr

Todd's submission of the 2nd February.

CHAIRPERSON: Yes. Okay alright. Mr Myburgh.

ADV MYBURGH SC: Yes thank you. And then Mr Todd goes on at page 163 to deal with the contention that Gama's own contentions on consistency were fully and fairly considered in the disciplinary process. I mean did you notice that when you read when Mr Todd's report that the concerns that you say you had about condonation and inconsistency those were considered by the Chairperson. Did you see that?

10 **MR MKWANAZI:** Yes they were considered.

ADV MYBURGH SC: Why did you not then simply leave things be? He had considered it. He had applied his mind to it. He concluded that there was no merit in it. Why did you just override that?

MR MKWANAZI: Chairman I did need almost what you can call a – a separate and different view of these issues particularly in view of the Public Protector matter etcetera, etcetera which would have come much later compared to all these other processes that had been going on. So in trying
20 to – to – to look at the Gama matter there were some un – un – and I view them almost as not identical. There were some areas where Mr Gama or whoever would have thought that the processes that dealt with him were unfair but looking at the issues themselves the – they were not that unfair. But they were some procurement processes which were not

handled the same way as Mr Gama's matter was handled.

ADV MYBURGH SC: Yes but Mr Mkwanazi I think you are missing my point. Mr Antrobus had applied himself to that contention that was made by Mr Gama and he had rejected it.

CHAIRPERSON: He is a senior counsel, he is a labour lawyer from what I have read, he had been – he was acceptable to all sides to run the disciplinary hearing. When you look at his rulings you can tell that he took time to deal
10 with issues that had been raised very, very thoroughly. So Mr Myburgh's question is, why did you and your board think that you could just override his decision when these very issues had been raised with him and he had considered them thoroughly?

MR MKWANAZI: I would not call it override except that we do – we did look for another opinion particularly in view of the Transnet Bargaining Council process and this other opinion looked at this issue and created some doubt that we could or could not sustain our case at the Transnet
20 Bargaining Council.

CHAIRPERSON: Mr Myburgh has at some state effectively said to you; you could not settle because there was some doubt because in litigation in arbitration there is always some doubt. There is no hundred percent guarantee that you are going to win. Even when you have a strong case

there is always some doubt.

Therefore when you were told – when you were given an opinion that in your view created some doubt that should have been neither here nor there until the doubt that was created said to you we do not have reasonable prospects of success. As long as it was just some doubt that is like any other case.

That should not have weighed with you at all because there is always doubt in arbitration. There is always doubt in
10 litigation. So what he put you – to you is that should not have swayed your view of what you should do. What do you say?

MR MKWANAZI: In hindsight Chairman I would agree that that doubt should have been examined further to look at the actual risks and which might have come back and said that risk is – there is actually no risk.

CHAIRPERSON: Hm.

MR MKWANAZI: Ja I agree with your input Chairman.

CHAIRPERSON: Mr Myburgh.

20 **ADV MYBURGH SC:** Yes thank you. Mr Mkwanazi you see how you fall back now on the Deneys Reitz advice but the Deneys Reitz advice does not say anything about condonation or inconsistency; nothing.

MR MKWANAZI: No. Yes.

ADV MYBURGH SC: Well then explain to ...

MR MKWANAZI: I agree Advocate ja.

ADV MYBURGH SC: How did you do this?

MR MKWANAZI: Advocate I did indicate that the Deneys Reitz advice was frankly very weak. Because it did not focus on the specifics like Mr Todd did the Deneys Reitz was a weak legal advice as I indicated even though there were these three issues the last issue of misconduct by Mr Gama in terms of attacking his executives is almost non-confirmable if I can use the word.

10 But because of the interpretation at the time of thinking that these other two issues are actually procurement issues and therefore when the statements were made on unfairness either to the Public Protector or to whoever and things were looked at we thought that there could be a slight risk in those first two. But now in hindsight looking at the submission by Mr Todd again those were not necessarily procurement irregularities they – they were almost misconduct of – of not following board resolutions that is the first one; the Fifty Like New.

20 And the second one as well the GNS was a different type of misconduct looking at it now where the individual concerned did not apply his mind thoroughly before signing whatever documents that he might have signed. Yes.

ADV MYBURGH SC: You used the words a slight risk. Are we down to that now? You settled because there was a

slight risk. That is what you said right?

MR MKWANAZI: Yes I might have said that yes I agree.

ADV MYBURGH SC: So this cost the taxpayer somewhere between 10 and 20 million because you and your board said well there is a slight risk so let us just pay him that. Correct?

MR MKWANAZI: Let us settle yes. Paying the quantum you have mentioned at the time I am not fully aware of the exact quantum but it would have come to that based on the detail
10 then that had to be entered into to quantify whatever settlement amount was involved.

ADV MYBURGH SC: We going – we going to come to that. Just to end off on this topic about the fact that the Chairperson had dealt with this. Can I ask you please to go to page 86 of Bundle 3.

MR MKWANAZI: Page 86 okay. I have got page 86. Yes.

ADV MYBURGH SC: So I would like to take you to the middle paragraph. This is a finding by Antrobus SC.

20 “It was contended that the first and second charges are an entirely new formulation at Transnet. This is Mr Gama’s contention. As it has never occurred in the history of that company that a CEO or Senior Executive for that matter has been held to have committed misconduct for activities and practices that

are usually automatically condoned and accepted by various mechanisms and committees within Transnet.”

So that is what Mr Gama and that is also what you found.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And the Chairperson goes on to say:

10 “Apart from the fact that there is no evidence to this effect it seems to me that if the conduct in question amounts to misconduct and then it is misconduct quite regardless of what mechanisms and committees within Transnet may have to say about that.”

I understand you to have accepted that now.

MR MKWANAZI: No I do accept.

ADV MYBURGH SC: A misconduct of different things.

MR MKWANAZI: Ja.

ADV MYBURGH SC: And then he goes on to say:

20 “If the submission is an attempt to make out a case of inconsistency, then it is necessary to say no more than I have already concluded in the previous findings that is no merit in the case of alleged inconsistency.”

But you just came to a different conclusion, right?

MR MKWANAZI: Yes.

ADV MYBURGH SC: So let us go perhaps closer even to the mark, to page 164 forward in this file.

MR MKWANAZI: 164...

ADV MYBURGH SC: One, six, four.

MR MKWANAZI: Okay I am there.

ADV MYBURGH SC: So I want to take you to the quotation at the foot of the page.

10 “It is further contented that I should take into account the fact that there were in the same financial year in which Mr Gama committed his acts of misconduct, some 42 incidents and transgressions of corporate non-compliance or irregularities in respect of which nothing was done “presumably” by way of taking disciplinary action.”

MR MKWANAZI: H’m?

ADV MYBURGH SC: So Mr Gama made a list of 42. You had a list of 30, right?

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** So he made this case Mr Mkwanazi. You laugh. But he made the case that you made at the board at the disciplinary hearing.

MR MKWANAZI: That is correct. Yes.

ADV MYBURGH SC: And the chairperson says:

“It is not clear to me to precisely what evidence reference was been made in this regard. However,

insofar as it refers to the report of the tender process audit, this is no more than a recasting of the alleged inconsistency issue which has already been rejected in the previous finding.

In any event, even if there is other evidence to which reference is been made in this regard, it was certainly not to establish that the other incidents were of a similar factual nature or similarly committed by a senior executive.”

10 And you have conceded that too that you have your list
...[intervenes]

MR MKWANAZI: [Indistinct]

ADV MYBURGH SC: ...but you could not establish like-for-like similarity, could you?

MR MKWANAZI: That is correct, advocate.

ADV MYBURGH SC: So here is the irony. The very basis upon which the board makes its decision is rejected by the chairperson and you accept that it was correctly rejected now in your evidence, correct?

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

ADV MYBURGH SC: Well, Mr Mkwanazi I am going to put to you again. Surely, the only rational explanation for the manner in which you and your board conducted yourself is that you had an ulterior motive. You were carrying out the instruction of the minister to have Mr Gama reinstated. Is

that not true?

MR MKWANAZI: The instruction was a review and somehow at the time, also based on some information which I had, this 30 or whatever list of people which I had seen in January of 2011. And although, as I have indicated, they are not like-for-like to even the first two matters, it did create some doubt on fairness ...[intervenes]

CHAIRPERSON: I am going to... I am going to ...[intervenes]

10 **MR MKWANAZI:** ...of the ...[indistinct] ...[intervenes]

CHAIRPERSON: Mr Mkwanazi, I am sorry. I am going to stop you there. Go back to Mr Myburgh's question.

MR MKWANAZI: Yes.

CHAIRPERSON: And just answer that question. Mr Myburgh, do you want to repeat the question?

ADV MYBURGH SC: Yes, I... essentially, what I am putting to you Mr Mkwanazi is the fact shows that you and your board acted so irrationally, that the only reasonable explanation is that you must have been carrying out an
20 instruction from the minister to reinstate Mr Gama.

MR MKWANAZI: Not that... it was not an instruction to reinstate. It was an instruction to review. Yes, we did look into that but based on this latest information that one keeps getting.

Even that review would have been fault or false review

in that some of the matters that Mr Gama was charged for, he was dismissed and even that board, had it had that information, would have confirmed the dismissal.

CHAIRPERSON: Well, you have an issue that has... that had been dealt with by the chairperson of the disciplinary inquiry which Mr Myburgh you to at page 164. So it is quite clear the chairperson dealt with this issue of inconsistency. He says reference was made to 42 instances, incidents or transactions. So he...

10 Mr Gama had the opportunity to present his case that he had been treated inconsistently to present it before an independent forum chaired by as senior member of the bar paid for by Transnet.

He was allowed to use his own team of lawyers. Lawyers of his choice so that he could... they could present the best case that they could for him.

He says – and then you are instructed to review his case. You come back. You review his case. You do not say to the minister:

20 But there is a forum where Mr Gama got a chance to present his case. We should not interfere. We as the board will accept the outcome whatever it is.

If the... that forum says we must reinstate him, we will reinstate him. If it dismisses its claim, that will be it. We should not interfere minister. Why did you not say that?

MR MKWANAZI: At the time, I did not say that to the minister, yes.

CHAIRPERSON: But you agree or do you not agree that that should have been your attitude? Then that should have been your board's attitude?

MR MKWANAZI: At the time, based on whatever review that could have been done, that review would have highlighted that the Transnet Bargaining Council could have dealt with this issue in a particular way and even confirmed some of
10 the sanctions that were applied by... into that process.

CHAIRPERSON: So do you agree or do you not agree that at the time of the settlement, the correct approach on the part of your board should have been: Minister, there is an independent forum, the Bargaining Council which sits with this matter.

It has been dealt with by another independent forum. Chaired by an independent chairperson. Mr Gama presented his case. He failed.

We did not interfere with the chairperson of that forum.
20 He will go to another forum now. It is independent. We will not interfere. We will abide the decision of that outcome. That...

Do you not agree that should have been your approach at least?

MR MKWANAZI: Chairman, that could have been the

approach. I do agree with you. But for some reason and in view of an element of certain allegations in the Public Protector's letter, then that review made sense.

But even though that the view made sense, the legal advice we got was extremely weak. And also, the so-called procurement irregularities that were sort of alleged to have happened. In Mr Gama's case.

The two key matters, the ...[indistinct]. It is not a procurement matter anymore rather than be a... not following
10 board instruction but that is different to procurement.

And even the Genis(?) matter, from what I pick up here, he himself did agree that it is... that procurement process was faulty, et cetera, et cetera.

Now at that time, as looking at that review, we... even the advice we got, did not fundamentally go to the source of where this alleged procurement is coming from.

Because if you go to the source of where this alleged procurement is coming from, the complexion of the matter differs completely.

20 Because yes, that should ...[indistinct] issues and then there is an issue of fair, what I will call misconduct, ja.

CHAIRPERSON: But of course, you will concede, will you not, that you should not put yourself and the board and your board... you should not put the matter as if you and your board were the victim of some poor legal advice.

Because you did have sound and strong legal advice at your disposal that had been given by Mr Todd and you chose to follow what you call the poor legal advice.

It was your choice. It was your board's choice. It is not as if there was no choice to follow sound legal advice. You agree?

MR MKWANAZI: I agree with you, Chairman.

CHAIRPERSON: Yes. Mr Myburgh.

ADV MYBURGH SC: Yes, thank you. Mr Mkwanazi, you
10 repeatedly say that before the decision was taken there was a review. There was no review Mr Mkwanazi. There was no review at all.

To undertake a review, you first have to understand and appreciate what Mr Antrobus did. And then you have got to understand and appreciate why... what he did was wrong. You did not do any of that. There was no review.

MR MKWANAZI: [No audible reply]

ADV MYBURGH SC: Correct?

MR MKWANAZI: [No audible reply]

20 **ADV MYBURGH SC:** So insofar and I have put to you this already, insofar ...[intervenes]

MR MKWANAZI: Advocate ...[intervenes]

CHAIRPERSON: Ja, let us just get that one. So what is the answer to that Mr Mkwanazi?

MR MKWANAZI: The advocate's question is correct

because when you do... when you ask somebody to do a review, be it that legal firm, whatever the case.

They must go back to the actual outcomes and then do a proper review. I do not think they did. They just came with a very weak document indicating doubt on the process going forward, ja.

CHAIRPERSON: But he is talking about you and your board. He says it is not correct that you and your board did a review. Because when you do a review in a matter like
10 this, you would have had to go to Mr Antrobus' rulings and look at them carefully which does not appear ...[intervenes]

ADV MYBURGH SC: Yes, I concede that. But my board did not do a thorough review. It just went for a different legal opinion on the fairness of the sanction, et cetera, et cetera, on the two offences. And yet, in hindsight, looking at even those three offences now, the legal review report was exceptionally weak, ja. Or opinion was exceptionally weak.

CHAIRPERSON: H'm. Mr Myburgh.

ADV MYBURGH SC: Yes. So I think I have already put to
20 you that insofar as the minister's instruction was that you should undertake a review, you did not do that. Correct/

MR MKWANAZI: It is not a thorough review. I concede to that as we are talking to now.

ADV MYBURGH SC: But insofar as the minister's instruction was that you should simply reinstate the man, you

certainly fulfilled that instruction.

MR MKWANAZI: It was not the instruction to reinstate. It was an instruction to review the dismissal sanction on the man.

ADV MYBURGH SC: I just want to then end off this by referring you to, I think three parts of Mr Todd's report again. Under the heading: Dealing with Sanction.

CHAIRPERSON: I am sorry, Mr Myburgh. I just want to follow up on your last question.

10 **ADV MYBURGH SC:** Yes.

CHAIRPERSON: Mr Mkwanazi, sorry. I am just interrupting Mr Myburgh.

ADV MYBURGH SC: Not a problem.

CHAIRPERSON: Understanding that Mr Gigaba had, according to your evidence, instructed you to conduct a review of the Gama matter and understanding that he had said that, on your evidence, there was unfairness.

Understanding that he had given a list, a basis for his thinking that there was unfairness, namely, as I understand
20 your evidence, some executives were treated less... more leniently or less harshly than black executives.

And yet, he had almost mentioned the issue of condonation. Are you able to say what outcome of the review would have addressed his concerns on your understanding?

MR MKWANAZI: Chairman, my understanding. That outcome would have addressed a few concerns that he might have had. That review would have looked at whether the Gama was fair and they were all aware that a process was very fair. And also then, that review would have looked into what similar offences were committed ...[intervenes]

CHAIRPERSON: I am sorry, Mr Mkwanazi. I am sorry, Mr Mkwanazi.

MR MKWANAZI: Yes?

10 **CHAIRPERSON:** I might not have articulated my question as clearly as I should have. The question is not about features of the review process, okay?

MR MKWANAZI: Okay.

CHAIRPERSON: It is not about that. It is about what outcome of that review process would have addressed his concerns that there had been unfairness on your understanding?

20 **MR MKWANAZI:** Now, my interpretation of whatever outcome. It could have indicated that yes there was unfairness in how the Gama matter was handled. But that outcome did not even go to the detail of some of the so-called perceived unfairness around how the Gama matter was dealt with.

CHAIRPERSON: Mr Myburgh.

ADV MYBURGH SC: Yes, thank you. Mr Mkwanazi, let me

just end off by referring you to three passages. If you go to page 81 of Bundle 3.

MR MKWANAZI: Page 81... Yes, I am there.

ADV MYBURGH SC: So this is where Mr Todd deals with how Mr Antrobus dealt with sanction and you see at the foot of the page, he deals with charge one.

MR MKWANAZI: Yes.

ADV MYBURGH SC: He says:

10 “The negligence on Gama’s part in signing the GNS
 Confinement document is nevertheless particularly
 inexcusable.”

Do you see that?

MR MKWANAZI: I see that.

ADV MYBURGH SC: And then if you go over the page to page 82 at the bottom.

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

Game is the CEO of the largest division in Transnet and in fairness, the company cannot be expected to continue to employ him in this role while the company lives with the doubt as to whether or not

he will again in future make an error of this nature.”

It is compelling, is it not?

MR MKWANAZI: It is compelling, yes.

ADV MYBURGH SC: I mean, you cannot have a CEO who signs a document blind and allows a fraud to be perpetrated on the company, can you?

MR MKWANAZI: You cannot, yes.

ADV MYBURGH SC: And then charge two. If you go to page 84.

10 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: So now we are dealing with the Fifty-like-New. The second paragraph at 84:

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

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

Compelling, is it not?

MR MKWANAZI: It is compelling, yes.

ADV MYBURGH SC: And then, in dealing with the unwarranted criticism of Transnet and its executives. At the top of page 85:

“Gama’s public statements demonstrate...

And this stuff you all agree with, at least.

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

Do you accept that?

10 **MR MKWANAZI:** [No audible reply]

ADV MYBURGH SC: Mr Mkwanazi?

MR MKWANAZI: I do accept that.

ADV MYBURGH SC: Yes. And then, the damning finding which I have already taken you to earlier in my questioning at page 88.

MR MKWANAZI: Page 88.

ADV MYBURGH SC: Just above paragraph 60.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Halfway through that quote.

20 **MR MKWANAZI:** Yes.

ADV MYBURGH SC: This is now dealing with charge four.

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

And you have accepted that on many occasions.

MR MKWANAZI: I agree, Chairman.

ADV MYBURGH SC: Right. Let me then move to another issue and that is the terms of the settlement agreement itself.

CHAIRPERSON: Before that Mr Myburgh. We have the situation Mr Mkwanazi that although you make the concessions that you have made and I think they are properly made about the matters that Mr Myburgh has just
10 raised with you with regard to the findings of the chairperson of the disciplinary inquiry.

You and your board in effect said: We want a CEO of a large division of Transnet who signs documents without reading them and thus places Transnet in a serious financial risk. That is the CEO we want. We want him to be reinstated.

Do you agree that that is the effect of your decision and your board?

MR MKWANAZI: Chairman, I agree with you or your
20 comments. Yes.

CHAIRPERSON: Yes. And you said in effect by your decision: Ja, we... this CEO defied an instruction of the previous board but we want him back. We want him back. And of course, the other charge has been dealt with.

A CEO who publicly criticises other executives as well

as the board. We want him back. And we will pay him full back pay. It is inexplicable, is it not? You would accept that?

MR MKWANAZI: Chairman, in hindsight as you articulate these, it is inexplicable particularly, as I have indicated earlier on, the last charge ...[intervenes]

CHAIRPERSON: Yes.

MR MKWANAZI: ...of fighting the CEO and your board.

CHAIRPERSON: Your board.

10 **MR MKWANAZI:** It is totally unacceptable.

CHAIRPERSON: Yes, yes. Mr Myburgh.

ADV MYBURGH SC: Thank you. Mr Mkwanazi, please could you turn to File 1?

MR MKWANAZI: File 1... I am not sure.... Okay, let me put ...[intervenes]

CHAIRPERSON: That is Bundle 1.

ADV MYBURGH SC: Bundle 1.

MR MKWANAZI: What page?

ADV MYBURGH SC: Page 36, the settlement agreement.

20 **MR MKWANAZI:** Page 36...

ADV MYBURGH SC: So as you know that the settlement agreement is found in many places in the documents but it first came to light ...[intervenes]

MR MKWANAZI: Yes.

ADV MYBURGH SC: ...or was officially provided by the

company secretary and that you find at page 36.

MR MKWANAZI: Yes.

CHAIRPERSON: I am sorry. You said we must go to the settlement agreement at page 36?

ADV MYBURGH SC: [No audible reply]

CHAIRPERSON: Mr Myburgh?

ADV MYBURGH SC: Yes, yes Mr Chairperson.

CHAIRPERSON: Okay alright.

ADV MYBURGH SC: That is the one that you signed on the
10 22nd of February, correct, at page 41?

MR MKWANAZI: Page 41. Let me go back there. Just...
Yes, on the 23rd of February. That is correct.

ADV MYBURGH SC: Now ...[intervenes]

CHAIRPERSON: Well, you signed on the 22nd of February.
Mr Gama signed on the 23rd.

MR MKWANAZI: On the 22nd of February.

CHAIRPERSON: Ja.

MR MKWANAZI: Okay, the 22nd... I think it is the 22nd here.
I cannot see. Ja, the 22nd of February.

20 **ADV MYBURGH SC:** And Mr Gama signed it the next day it
appears.

MR MKWANAZI: It appears that, yes.

ADV MYBURGH SC: I am going to come to the terms of this
in more detail but Mr Mkwanazi what I am... I have always
been intrigued to find out from you is.

Would you accept that Mr Gama during these negotiations took you to the cleaners? That you on behalf of Transnet completely capitulated during the course of the negotiations? You could not have done a worse deal for Transnet.

MR MKWANAZI: In hindsight, Mr Myburgh, Advocate Myburgh. Just based on that last item we have been discussion of misconduct to his colleagues, the CEO and the board.

10 There would have been no such settlement agreement because I would have supported the view of a dismissal.

But on what I can then define as a preconceived interpretation of procurement irregularities on those two other matters which now in hindsight, some of them are not even procurement irregularities.

If you look at the Fifty-like-New, he basically did not follow a board instruction. Then on the Genis contract, there is an element of a procurement irregularity because he confined something that he had not applied his mind too.

20 Yes.

But based on that last matter of taking his colleagues, this thing would have not been even negotiated and I would not have accepted such an agreement.

ADV MYBURGH SC: You see, I think you might misunderstand my question. I am dealing with a very

generous terms of the settlement agreement.

MR MKWANAZI: Oh, yes, yes.

ADV MYBURGH SC: The represent ...[intervenes]

MR MKWANAZI: Please continue.

ADV MYBURGH SC: ...complete capitulation and the bounty of benefits for Mr Gama. So let me start by asking you the question again. Do you accept that during the negotiations – and I am talking about the terms and conditions that we agreed upon, the payments that you
10 undertook to make him, the costs contribution that you undertook to make – you completely capitulated during the negotiations, correct?

MR MKWANAZI: A complete capitulation is a strong word but yes I would accept it.

ADV MYBURGH SC: Well ...[intervenes]

CHAIRPERSON: [laughing] Well, Mr Mkwanazi. I am thinking of a stronger word. I think Mr Myburgh is being very kind to you ...[intervenes]

MR MKWANAZI: Ja. Maybe ...[intervenes]

20 **CHAIRPERSON:** ...and your board.

MR MKWANAZI: No. Ja. Maybe advocate, as you take me through some elements of this settlement agreement, I can explain the thinking at the time.

ADV MYBURGH SC: Sorry, Chair. Alright. So you accept that it was a complete capitulation?

MR MKWANAZI: Complete is a strong word but I accept that it looks like it was more in favour of Mr Gama than in favour of Transnet.

ADV MYBURGH SC: Well, could you do... could you have done a worse agreement for Transnet?

CHAIRPERSON: [laughing]

MR MKWANAZI: I do not know.

CHAIRPERSON: Mr Mkwanazi ...[intervenes]

MR MKWANAZI: That would be speculation in 2020. Where
10 are we now? 2020. This was 2011, yes.

ADV MYBURGH SC: Mr Mkwanazi, I do not want to be flipper but how could you have done a worse deal for Transnet?

MR MKWANAZI: Now, when you say a worse deal. You would have to think about the circumstances at the time in terms of whether there could have been a worse still?

The answer is maybe is yes. I do not know. But that questioning might be asked and I might have to respond, inviting ...[intervenes]

20 **CHAIRPERSON:** Mr Mkwanazi.

MR MKWANAZI: Ja.

CHAIRPERSON: Mr Mkwanazi, you called this is a settlement agreement.

MR MKWANAZI: Yes.

CHAIRPERSON: Is it not?

MR MKWANAZI: Yes.

CHAIRPERSON: You sought to settle a dispute, is it not? And that dispute was Mr Gama's unfair dismissal dispute with Transnet, is it not?

MR MKWANAZI: That is correct.

CHAIRPERSON: He had referred his dispute to the Transnet bargaining council to try and get relief from his grievance, his feeling that he had been treated unfairly, is it not?

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

CHAIRPERSON: And if he got what the bargaining council could give him, what he would have called his first prize there, he would have been very happy, is it not? If he got his first prize.

MR MKWANAZI: I do not know, Chairman

CHAIRPERSON: He had a first prize obviously.

MR MKWANAZI: Yes.

CHAIRPERSON: You go to court, you have a first prize, you go to arbitration, you know what you would like to get.

20 If you do not get your first prize, you might have your second prize.

MR MKWANAZI: Yes.

CHAIRPERSON: If he got his first prize he would have been very happy.

MR MKWANAZI: Yes.

CHAIRPERSON: Now his first prize would have included reinstatement, is it not?

MR MKWANAZI: Yes, Chairman.

CHAIRPERSON: And reinstatement with full back pay and benefits, that would have been, I guess, his first prize. Maybe he – well, having looked at his statement that he sent to the bargaining council, I did not see anything that says he was seeking costs from the bargaining council. It may be that that may have been dealt with in some other
10 document but that was not there. But you gave him much more than the bargaining council could have given him. At least that much you know, do you not?

MR MKWANAZI: Chairman, yes, although myself too I am not sure now what the bargaining council could have done or whether would the bargaining ruling would have covered coverage of costs, etcetera. As I sit here, I do not recall the exact documentation after he had submitted, ja.

CHAIRPERSON: Well, the bargaining council, if it found that he had been – his dismissal was substantively unfair,
20 it could have ordered his reinstatement which could have meant full benefits and back pay but it could also have meant he would get reinstatement but no back pay because it might say it is not as if he was innocent, he had done something terribly wrong. You are admitting ...[intervenes]

MR MKWANAZI: I agree with you, Chair.

CHAIRPERSON: So it might have said no back pay, you know? It might have said not even reinstatement but maybe should be given some compensation, maybe six months compensation, maybe one year, but no reinstatement because it might say this person was a CEO of the largest division in Transnet, he was found guilty of serious acts of misconduct, he admits that he was properly found guilty, this person should not be taken back or it might have said let him go back but not with full back pay.

10 I doubt that it would have ordered costs but maybe it would but you gave him much more than that. That you do know, do you not?

MR MKWANAZI: Yes, I do know, Chairman.

CHAIRPERSON: Yes, Mr Myburgh?

ADV MYBURGH SC: Yes, thank you. And we will come to the detail. But why did you treat him so generously?

MR MKWANAZI: Chairman, my understanding at the time, as we were discussing this settlement, the other route could have been coming out of that Transnet bargaining
20 process could have led to further litigation and I am not sure in terms of the legal route but it would have taken – it could have taken quite a long time in terms of settling the matter and yet the business at the time was not doing that well, too many Acting CEOs, etcetera, it had its own internal problems which needed to be tied down.

ADV MYBURGH SC: So do I understand you to be saying that you were – your desire or need to have Mr Gama was so strong that you simply paid him whatever he asked for? Is that what you say?

MR MKWANAZI: Not really. I would have to go back to the history of the documents that were circulating and see what he had asked for. I do not recall, Chairperson.

ADV MYBURGH SC: But, Mr Mkwanazi, what you do not see here is any give and take, so when you settle litigation
10 of this nature, especially where someone is accepting a final written warning and they are accepting that in part they are to blame for their dismissal as a consequence, it is most unusual for the employer then to give the employee everything other than the kitchen sink by way of a settlement. I mean, are you able to explain why you treated him so generously?

MR MKWANAZI: Chairman, yes, it might on the face of it looks like a generous settlement but there are some elements of it which are not that generous.

20 **CHAIRPERSON:** Mr Mkwanazi.

MR MKWANAZI: Yes.

CHAIRPERSON: Mr Mkwanazi, sorry, but you cannot – it does not just look like it is a generous, it is an extremely generous settlement to him. I thought you would make that concession at least. It is not that it looks like, it is an

extremely generous settlement.

MR MKWANAZI: It is, Chairman, ja.

CHAIRPERSON: Yes, okay, continue.

ADV MYBURGH SC: Why did you want to treat Mr Gama so generously? Why?

MR MKWANAZI: The word generous ignores the fact that when we looked at his legal fees from the two separate processes, that he must be refunded 75%, he still was liable for the 25%. That is maybe on the legal fees. Now
10 on the other matters that dealt with that settlement, the assumption would have been that if you look at the Transnet remuneration policy or whatever at the time, I am not sure then what other benefits as this final written warning would have meant in terms of him recouping some of the lost income that he lost due to suspension, yes.

ADV MYBURGH SC: But, Mr Mkwanazi, let me ask you this way. Why did you capitulate in the negotiations as you accept you did. Why?

MR MKWANAZI: Chairman, I do not think it is an easy
20 word to say, capitulation. My understanding, he might have been asking for more. I do not have the audit trail of some of whatever he might have been asking for, I do not have it in black and white.

ADV MYBURGH SC: Mr Mkwanazi, just at - we understand, I mean, you were at the time and remain a

very experienced business person, not so?

MR MKWANAZI: Ja.

ADV MYBURGH SC: No doubt you have negotiated many deals in your time.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And what we do know is you were the lead negotiator here, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And what we also know is that when
10 you negotiated with Mr Gama you did that behind closed doors, one-on-one with him, correct?

MR MKWANAZI: There was only meeting, if any, but I would like him as well at some stage because this thing of these closed door assumptions, it is a long time ago. I do not even recall really if we had that one-on-one even though I accept that it might have happened. But ja, let us assume that it did happen but I hope at some stage he as well will make his own affidavit, ja.

ADV MYBURGH SC: Well, the point is there is no one
20 that can tell us why you capitulated other than you because you brought no witnesses to the negotiations.

So let me just refresh your memory. The Deneys Reitz consultation note of the 22 January reflects that after the caucus you then met privately with Mr Gama, correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Mr Mapoma's evidence about – and that was on a Saturday, Mr Mapoma's evidence about another meeting on the weekend at the Inanda Country Club is that he sat waiting while you and Mr Gama negotiated privately, correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: I see.

CHAIRPERSON: Well, Mr Mkwanazi, let us – I just want to mention something. You said sometime, I think on
10 Friday, that Mr Gama wanted – was the one who came with the idea of having a one-on-one meeting with you. You remember that?

MR MKWANAZI: I do recall and his argument then, that is why - this thing happened nine and half years ago, his argument then was he did not trust the confidentiality of our discussions if there were too many people in that room.

CHAIRPERSON: Well, maybe Mr Myburgh will deal with that in due course but in the – I think in the consultation note from Deneys Reitz, either that or another letter of
20 memo, it is said that you said you want a one-on-one meeting with Mr Gama. That does not suggest that you were saying Mr Gama wants a one-on-one meeting with you, it suggests you were the one who wanted the one-on-one with him. Do you remember seeing that note?

MR MKWANAZI: Chairman, I do not recall saying I wanted

a one-on-one but I do recall Gama requesting a one-on-one.

CHAIRPERSON: Yes, okay, alright. Mr Myburgh?

ADV MYBURGH SC: Thank you, Mr Chairman. So let us go to this settlement agreement, so as to speak. At paragraph 3:

“Mr Gama returned to Transnet with effect from 23 February 2011 and is to resume duties as the CEO of TRF on 1 April.”

10 Is that correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: So, I mean, a strange feature of this is that Mr Gama signs the agreement on 23 February and his duties then resume with effect from that day. That we – I understand. Then it says:

“Any employment benefits that were due to him for the intervening period 30 June 2010...”

When he was dismissed.

20 “...to 23 February 2011 in terms of his employment contract will be deemed to be fully restored.”

Is that right?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: So there was no compromise, he did not give an inch and you did not require any compromise, is that correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Ja.

CHAIRPERSON: It is as if you are dealing with somebody that had done absolutely nothing wrong and was just dismissed by Transnet, somebody who is innocent, completely innocent. You understand that?

MR MKWANAZI: I understand, Chairman.

CHAIRPERSON: Yes. Mr Myburgh?

ADV MYBURGH SC: Thank you. Then it says:

10 “The full restoration of benefits entails the following.

1. Payment of Mr Gama’s short term benefits which were due to him in the intervening period.
2. Payment of Mr Gama’s long term benefits which were due to him in the intervening period.
3. Restoration of Mr Gama’s salary for the intervening period.”

And then a provision as to where the amounts must be paid. So he gets all of his short term benefits, all of his
20 long term benefits and his full salary, is that correct?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Now if I could just ask you to turn forward to page 80 of bundle 1, the last page of the company secretary’s second affidavit.

MR MKWANAZI: Page 80.

ADV MYBURGH SC: And you see at the foot of the previous page 79, she records:

“:The table below as provided by human resources provides a detailed breakdown of what was paid.”

So Mr Gama got by way of back pay full salary of R2.8 million, STI benefits of R2.5 million, LTI payments of R2.9 million, a Transnet refund saving of 24 000 and then LTI payments of another 4.7 million and you add all of them up, that comes to 13 million, a full restoration of every cent
10 without any compromise on his part and without any reduction having been secured by you during the negotiation. Is that right?

MR MKWANAZI: That is correct, Chairman.

ADV MYBURGH SC: And just to confirm, you did all of this because where we landed up in your evidence is that you were convinced that there was a slight doubt that you could lose the litigation.

MR MKWANAZI: That is correct, Chairman.

ADV MYBURGH SC: I mean, Mr Mkwanazi, that is
20 astonishing. This is – we have not gone to costs yet, but the taxpayer forked out 13 million here because you concluded there was a slight doubt you could lose the litigation.

MR MKWANAZI: That is correct, Chairman.

ADV MYBURGH SC: Does that accord with your

principles and knowledge of sound corporate governance?

MR MKWANAZI: Chairman, the question of sound corporate governance, what one was trying to do here was to restore to the individual what he might have had had this process of - that led to his dismissal would have been found wanting or unfair but then again, based on my submission that this individual would not have been reinstated if charge 4 of attacking his colleagues had surfaced strongly in the legal advice that one had got then.

10 So all this found not have been paid and all this type of settlement would never have happened.

ADV MYBURGH SC: Alright then, Mr Mkwanazi, let me also then deal globally with the issue of costs and we will come to the detail perhaps after lunch. Could you please turn to page – I want to take you to bundle 2 now and ask you to turn to page 164.

MR MKWANAZI: Chair, I am being assisted here. Page 164. Okay, I need to take it out, the writing is quite small. Chairman, I have got this document page 164.

20 **CHAIRPERSON:** Yes.

ADV MYBURGH SC: Alright and that a schedule in blue, is that right?

MR MKWANAZI: It looks like a schedule in blue, yes, it is.

ADV MYBURGH SC: Alright. So if you look – and I will

take you to the detail after lunch but if you look on the far right hand side, the last three lines of the last column.

MR MKWANAZI: The last three lines, yes.

ADV MYBURGH SC: What you see is that there were three payments that were made to Mr Gama and/or attorneys of costs. The first was for 1 million or so.

MR MKWANAZI: Yes.

ADV MYBURGH SC: The second for 1.7 million and the third for 1.4 million. So if you add those up, in addition to
10 the 13 million that Mr Gama got by way of back pay, short term benefits and long term benefits or incentives, he was also paid R4 million in costs. Do you see that? R4 million.

MR MKWANAZI: I see it as the document indicates here.

ADV MYBURGH SC: Okay.

MR MKWANAZI: Ja, I see it, Chairman.

ADV MYBURGH SC: I see you – I see you are a little stunned. I understand ...[intervenes]

MR MKWANAZI: Yes, I am, Chairman.

ADV MYBURGH SC: Ja.

20 **MR MKWANAZI:** I am because my interpretation of his so-called legal costs and that me that do not understand – ja, I am stunned, yes.

ADV MYBURGH SC: But you were the negotiator. You were ...[intervenes]

MR MKWANAZI: Not true, Chairman. At the time this

detail was not in front of me, yes, true.

CHAIRPERSON: But, of course, if you agree on paying somebody 75% or whatever cost ...[intervenes]

MR MKWANAZI: Yes.

CHAIRPERSON: ...you would have an idea what the total cost would be and what therefore 75% will be.

MR MKWANAZI: I did not have a full picture of it and funny enough, looking at this schedule from Advocate Myburgh, I see he was paid something on the 16 April
10 2015. I do not know what that payment was for because whatever payment that should have been done, they should have been done in 2011 and no payments should have been done in 2015. I truly do not know what these payments are for.

ADV MYBURGH SC: We will come to the detail in the moment, Mr Mkwanazi, but do I understand from your answer to the Chairperson's question that when you negotiated and you agreed on this 75% contribution, you did not even know how much it was going to cost Transnet?

20 **MR MKWANAZI:** At the time, Chairman, yes, I did not know because I did not have the information in front of me.

ADV MYBURGH SC: But that is unbelievable. Are you now conceding before this Commission that you entered into an agreement with Mr Gama when you did not even know how much it was going to cost Transnet? That is how

generous you were. That is how anxious you were to for some reason settle with this man. Mr Mkwanazi.

MR MKWANAZI: Okay, Advocate Myburgh, I am there.

CHAIRPERSON: Do you want to comment on what Mr Myburgh has just put to you?

MR MKWANAZI: I would like to comment. For whatever reason, I was under the impression that the so-called Gama's costs were far lower than this and also some of those that were paid in 2015, it is like I do not how many. I
10 do not know what they are but even those that would have been paid earlier on, my assumption was that the people processing, which would have been in Group Finance and Group Legal, would have looked at the validity of each invoice before paying, yes.

ADV MYBURGH SC: Alright. Well, we will come to that. Now let us carry on with the settlement agreement back at page 38 please of bundle 1.

MR MKWANAZI: 38 of bundle 1. I think it is this one. Page 38, I am there, Chairman.

20 **ADV MYBURGH SC:** Can I ask you please to have a look at paragraph 3.3:

“Mr Gama is deemed to have served the six months final written warning. The final written warning will be deemed to have been effective from 29 June to 28 December 2010.”

Correct?

MR MKWANAZI: Correct, Chairman.

ADV MYBURGH SC: So by the time Mr Gama came back into the employ of Transnet with effect from 23 February 2011 this final warning had come and gone.

MR MKWANAZI: That is correct, Chairman.

ADV MYBURGH SC: Is that really the best you could do, Mr Mkwanazi?

CHAIRPERSON: In regard to somebody who had been
10 properly found guilty of three very serious acts of misconduct?

MR MKWANAZI: Chairman, that was the proposals at the time and in retrospect it should have been different, ja. Should have been different, I agree.

ADV MYBURGH SC: But why were you so weak in the negotiations?

CHAIRPERSON: You are Chairman of a very large state owned entity, Transnet.

MR MKWANAZI: Yes.

20 **ADV MYBURGH SC:** You are Chairman of its board. Why were you so weak at the negotiations? Why did you not say to Mr Gama, Mr Gama, you admit yourself that you were properly found guilty of three serious acts of misconduct.

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

CHAIRPERSON: [inaudible – speaking simultaneously]
you must have a final written warning that will start
operating when you written. Why do you not say that?

MR MKWANAZI: Chairman, I could have said that but at
the time that is the view that I took and – ja.

CHAIRPERSON: I do not normally use strong language,
Mr Mkwanazi, but what would you say if somebody says
this was a nonsensical final written warning?

MR MKWANAZI: Chairman, at the time this was discussed
10 in one of the other committees, we did discuss other types
of final written warning but eventually we agreed on doing
it this way.

CHAIRPERSON: Yes but my question is, you are
negotiating a settlement of a dispute, a dismissal dispute,
the employee concerned is a former CEO of the largest
division of Transnet, he has been found guilty of three
serious acts of misconduct. By this time he accepts that
he was guilty of these. Now you are saying okay, we will
reinstate you but there must be some sanction for your
20 misconduct.

I take it that you must have said – or when you
spoke about a sanction, a final written warning with Mr
Gama or his lawyers, you must have been talking about a
final written warning that would be operative when he came
back and would be operative for six months.

You were not – when you started talking about it, you were not talking about a warning that would have expired by the time he came back, were you? When you [inaudible – speaking simultaneously] the issue for the first time because I assume it came from your side.

MR MKWANAZI: Chairman, it was debated in one of the subcommittees and I will now put some other thinking of what maybe could have swayed that subcommittee to look at it this way. Maybe it was to try and get Mr Gama back
10 and almost operative from day one so that he does not sit in such a key position with a final written warning on his back.

CHAIRPERSON: But, Mr Mkwanzazi, if he deserved a final written warning it should be there when he comes back. How can you say he should not sit there with a final written warning? That is what happens with every employee, why should he be treated differently?

MR MKWANAZI: No, Chairman, I understand your anxiety.

CHAIRPERSON: Actually you should be stricter, should
20 you not with senior people than with junior employees because senior people cannot plead ignorance, they know – they know the rules, they know the policies, they are supposed to be exemplary to the junior employees, is it not?

MR MKWANAZI: Chairman, I agree with you fully.

CHAIRPERSON: So I come back to my proposition or my question, what do you say if somebody says this final written warning that you agreed to as the chief negotiator for Transnet for Mr Gama, is a nonsensical final written warning because it is February 2011 when you are negotiating and you are agreeing to an arrangement in terms of which Mr Gama will be deemed to have carried this final written warning from end of June 2010 to December 2010 when he was not at Transnet. What do you
10 say when somebody says it was a nonsensical final written warning?

MR MKWANAZI: Chairman, I concede. Even as I read it, it does not look right, Chairman.

CHAIRPERSON: Yes. Mr Myburgh?

ADV MYBURGH SC: Mr Chairman, I see that it is one o'clock, would this be an appropriate time to break for lunch?

CHAIRPERSON: Yes, let us take the lunch adjournment, we will resume at two. We adjourn.

20 **INQUIRY ADJOURNS**

INQUIRY RESUMES

CHAIRPERSON: Let us proceed.

ADV MYBURGH SC: Thank you Chairperson. Mr Mkwanaazi before lunch we were dealing with the final written warning, do you recall that?

MR MKWANAZI: That is correct yes.

ADV MYBURGH SC: And I had directed your attention to page 38 of Bundle 1.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: We dealt with Clause 3.3.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: If I understood your evidence correctly you say that you agreed on this so that effectively Mr Gama wouldn't have sword hanging over his head once
10 he resumed his position as Chief Executive, correct?

MR MKWANAZI: Yes.

ADV MYBURGH SC: But again then, when your own evidence demonstrates that this is yet, another incident of you acting in the interest of Mr Gama as opposed to the interest of Transnet, correct?

MR MKWANAZI: Ja, you may put it that way.

ADV MYBURGH SC: Precisely, Mr Mkwanazi, the very reason that you, as an employer put an employee on a final written warning is to protect yourself as employer against a
20 repetition of the misconduct and you were prepared, in this case, to forego that protection, why? Well we know Mr Gama didn't like it but why did you forego the protection of the organisation?

MR MKWANAZI: Chairman, at the time, that's sort of the legal advice we got on how to phrase that thing.

ADV MYBURGH SC: You haven't given that evidence at all up to now, in fact...[intervenes].

MR MKWANAZI: Ja, I might not have.

ADV MYBURGH SC: Before lunch you said, well this was a decision of the sub-committee.

MR MKWANAZI: Deliberation in that sub-committee which then made a recommendation to the Board ja.

ADV MYBURGH SC: Well, the way that I read the affidavits of your fellow Directors, Mr Mkwanzazi, and you
10 can correct me if I'm wrong, is that almost to the man and woman they say that you were the one who was responsible for the negotiation of the actual terms of the agreement.

MR MKWANAZI: Well, understand, I was the lead negotiator that is correct.

ADV MYBURGH SC: So why did you, again, act in the interest of Mr Gama and sacrifice the interest and protection due to Transnet?

MR MKWANAZI: Just remember at the time that's the
20 advice I would have got from my internal legal people yes.

ADV MYBURGH SC: Then what do we do with your evidence before lunch when you said, I did this because then at least Mr Gama didn't have a sword hanging over his head when he resumed his duties as Chief Executive?

MR MKWANAZI: That is also true, I don't deny that yes.

CHAIRPERSON: One second, Mr Myburgh, has that supplementary affidavit arrived?

ADV MYBURGH SC: Yes, it has.

CHAIRPERSON: May I have a copy while you are questioning.

ADV MYBURGH SC: It's in your Bundle.

CHAIRPERSON: Oh, is it in.

ADV MYBURGH SC: If you just give me a second.

CHAIRPERSON: Oh, don't forget your line of questioning.

10 **ADV MYBURGH SC:** Mr Chairperson, you find that at Bundle 4A.

CHAIRPERSON: Just after his main affidavit?

ADV MYBURGH SC: 4A – Bundle 4A.

CHAIRPERSON: Yes.

ADV MYBURGH SC: Yes, you're correct, it has Mr Mkwanazi's main affidavit. His supplementary affidavit appears at page 414, just before the tab BB19.

CHAIRPERSON: Oh, okay.

20 **ADV MYBURGH SC:** Mr Mkwanazi the point that I was making is, the whole point of a final written warning is so that the employee does have a sword hanging over his head, that's the whole point of it.

MR MKWANAZI: Yes.

ADV MYBURGH SC: But you're prepared to forego that, correct?

MR MKWANAZI: No – yes.

ADV MYBURGH SC: Right, let's then deal please with clause 3.5. What you will ...[intervenes].

MR MKWANAZI: Yes.

ADV MYBURGH SC: ...see Transnet will make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council. Now, let's take the High
10 Court costs.

MR MKWANAZI: Sorry what bundle was it again?

ADV MYBURGH SC: It's Bundle 1 page 38.

CHAIRPERSON: It's the settlement agreement.

MR MKWANAZI: Yes, I see that.

CHAIRPERSON: At page 38 of Bundle 1 and he was reading paragraph 3.5.

MR MKWANAZI: Six now, but we're at paragraph 3.5 yes.

CHAIRPERSON: No, no he's still at 3.5.

MR MKWANAZI: 3.5, yes.

20 **CHAIRPERSON:** Ja.

ADV MYBURGH SC: So, Mr Mkwanazi you were familiar with the High Court application, were you?

MR MKWANAZI: Yes, I am familiar.

ADV MYBURGH SC: So, Mr Gama brought an application in an attempt, really, to put a stop to his disciplinary

hearing and Transnet and certain Executives were represented by Bowman Gilfillan and a strange feature of the litigation is that Mr Gama then joined a whole lot of Directors in their personal capacity and they were represented by Eversheds. Ultimately Mr Gama's application was dismissed, there was found to be no merit in it at all and he was ordered to pay the costs then of Transnet and the Executives incurred by Bowman Gilfillan and also of the Directors, those costs incurred *vis a vis*

10 Eversheds, you knew all of that?

MR MKWANAZI: Yes, I'm aware.

ADV MYBURGH SC: And those costs were to include the costs of two counsel? Those are very significant costs order in favour of Transnet, correct?

MR MKWANAZI: Yes, there was.

ADV MYBURGH SC: And in favour of its Directors?

MR MKWANAZI: Yes, there was.

ADV MYBURGH SC: And that's, importantly, just to get your confirmation on, the High Court found that Mr Gama had mis-joined or impermissibly sought to join the Directors in their personal capacity and that was something that featured prominently in them being awarded their costs, did you know that?

20

MR MKWANAZI: Yes, I am aware.

ADV MYBURGH SC: So, effectively the High Court said

you should not have brought this application against the Directors in their personal capacity.

MR MKWANAZI: Yes.

ADV MYBURGH SC: What we know from this settlement agreement is that it was in full and final settlement of all claims that Transnet had against Mr Gama and vice versa. So, the first thing that Transnet did, is it, effectively in the settlement agreement, agrees to abandon this costs order, do you agree with that?

10 **MR MKWANAZI:** Agree with that.

ADV MYBURGH SC: Why would you do that?

MR MKWANAZI: Chairman, as I'd indicated at the time that there was this potential litigation which we never knew when it goes to Transnet Bargaining Council which way it would go, yes, which is why then, that decision was taken.

ADV MYBURGH SC: Sorry Mr Mkwanazi, perhaps you misunderstand my question, of course this had nothing at all to do with the litigation in the Transnet Bargaining Council that was litigation about the fairness of Mr Gama's
20 dismissal. This was a High Court application that was dismissed the year before.

MR MKWANAZI: Yes.

ADV MYBURGH SC: What caused you to abandon the costs order made in favour of Transnet by way of an Order of Court, why?

MR MKWANAZI: Chairman, as I indicated there was this view that this matter were to go – because I don't recall the submission of Gama's team on these issues, whether they were claiming that Transnet – I really don't recall, should pay all costs of the Transnet High Court and also the disciplinary proceedings in the matter I would have to get the document in front of me to understand what that firm of attorneys – it could have been Langa or whoever, might have put on the table...[intervenes].

10 **CHAIRPERSON:** No, Mr Mkwanazi you'll have to really explain to me and the public, properly, what your decision was, really here because I can tell you this, I've been on the bench for close to 24 years, I've never seen anything like this, I've never seen anything like this. This, Mr Gama, had launched an urgent application against the Board, against Transnet and he cited individual members of the Board in order to stop or interdict the disciplinary proceedings that were being instituted against him, he lost because Transnet and the Board, at that time, which was
20 not your Board, the Board that preceded your Board, opposed that application because they must have seen that, this application that he brought had no foundation whatsoever. There was a need for a disciplinary process to be instituted and he should go through that process. If he was found not guilty that would be fine, if he was found

guilty then there would be a sanction for that, they opposed that application, successfully and a High Court Judge concluded that, Mr Gama should pay Transnet's costs as well as the costs of the individual Directors whom he had cited in that application. He applied for leave to appeal against that decision that was refused, that was the end of the road for him in regard to that and in that application, he had argued that there was an agenda that underlay the disciplinary proceedings, namely to stop him
10 from being appointed as Group CEO. The Judge rejected all of that and dismissed that application, that was done. Now, he went through a disciplinary process, he was found guilty and he was dismissed, then he goes to the Bargaining Council, refers his disciplinary to the Bargaining Council but now he says, by the time you are negotiating this settlement, he says, I accept that I was guilty, I'm guilty of the three acts of misconduct that the Chairperson of the disciplinary enquiry found me guilty of, I accept that. Now, you then say, in settlement of the
20 dismissal dispute, not the High Court dispute, because that's, been sorted out, you say, you know what, Mr Gama, the costs that the Judge said you must pay us, pay Transnet, you don't have to pay off that. That has got nothing to do with the dismissal dispute, the Bargaining Council, even if Mr Gama had won against Transnet the

Bargaining Council Arbitrator would never have interfered with that. He would not have changed Mr Gama's fortunes in regard to the High Court, Court Order. So, why did you interfere with a cost order made by a Judge in a separate litigation which Mr Gama had lost and say, you don't have to pay those costs because Transnet was not at risk in regard to those costs, that was finalised, why did you do that?

MR MKWANAZI: Chairman as I indicate there were other
10 documents or submissions from Gama's attorney which, in a nutshell were also trying to recover those costs and it is on that basis that then this type of settlement agreement could have arisen ja, I don't recall the full submission.

CHAIRPERSON: No but Mr Mkwanazi, that's not going to be good enough. Remember, before you deposed to your first affidavit that you had filed in the Commission, remember that?

MR MKWANAZI: Ja.

CHAIRPERSON: Remember that you filed your affidavit
20 pursuant to a letter from the Commission which said that the Chairperson would like you to explain the terms of that settlement, do you remember that?

MR MKWANAZI: Yes.

CHAIRPERSON: Do you remember that, that letter, specifically drew your attention to certain features of the

settlement agreement, including the issue of costs, do you remember?

MR MKWANAZI: I do recall.

CHAIRPERSON: It gave you a chance to explain, among other things, why you and your Board decided that that the costs which a High Court Judge had said Mr Gama should pay to Transnet, why you said he should not pay those. Actually when you – Mr Todd, testified that he and his firm had gone to the extent of having those costs taxed –
10 actually it was not all of the costs because he said there were two law firms, his firm represented Transnet, another firm, Eversheds represented, I think, individual Directors but I think the cost that related to Transnet and not individual Directors, he said they had taxed that bill and that bill in terms of the taxed costs, Mr Gama was owing Transnet about four hundred and twenty six thousand rand something and he said, you, through somebody at Transnet instructed him to stop all processes aimed at recovering that money from Mr Gama, R426 000 that Mr Gama owed
20 Transnet, you said they must stop trying to recover that, why did you do that?

MR MKWANAZI: Chairman, that is correct because at the time, in the – the interpretation that we were getting was that, now that this matter was going the Transnet Bargaining Council route, although that High Court

decision to a certain extent, maybe is not related to this, but yes, at the time the view was, even that cost needed to be part of that settlement discussion.

CHAIRPERSON: Why, why because that's a question you would have asked anybody who told you that, you would have said why?

MR MKWANAZI: Chairman I did not necessarily ask the question, why?

CHAIRPERSON: But that's an obvious question that a
10 Director of a company should ask in such a situation, to say, a High Court Judge has said Mr Gama must pay Transnet these costs, this matter is finalised. You are telling me that, now we must abandon those costs, why, that's a question that a Director would ask, why didn't you ask that question?

MR MKWANAZI: Chairman, that question at the time, was not dealt with the way you are putting it yes.

CHAIRPERSON: But do you not accept that it's an obvious question to ask?

20 **MR MKWANAZI:** Chairman, I agree with you because there are two separate issues as you rightfully point out. The one is that application of Mr Gama where he accuses the company of unfair – of trying to block him from applying a position, that's a separate matter and then the other matter then deals with the actual disciplinary process

itself. Now on that first matter, yes, at the time, the question was not posed as to why then link the two because the two, frankly are not linked.

CHAIRPERSON: I'm sorry, Mr Myburgh I know you might be having – you and I might have the same question but I'm going to ask this.

ADV MYBURGH SC: No please go ahead, Mr Chairman.

CHAIRPERSON: Not only that Mr Mkwanazi, not only do you then decide with your Board that Mr Gama should not
10 bother to pay R426 000 that he owed Transnet and actually it was going to be more because there was the cost relating to the Directors, probably it would be about a million maybe about R800 000. So, you say Mr Gama, you don't have to bother paying that, in effect, forget about what the Judge said, you don't have to bother about that, you don't have to pay that but not only that, you then say, you know what Mr Gama, we Transnet who won that case are going to undertake to pay 75% of your own legal costs that you incurred to unfairly take us to the High Court,
20 that's what you – in effect what you said, isn't it?

MR MKWANAZI: No, that is correct Chairman.

CHAIRPERSON: How do you explain that, how can that possibly be in the interest of Transnet, how possibly could it be said to be acting in the interest of Transnet when you act like that?

MR MKWANAZI: Chairman, yes at the time that is how this matter was looked because there was this other matter of the value that, that individual would take if brought back to the company yes.

CHAIRPERSON: What would he take?

MR MKWANAZI: No, no the value add of being CEO etcetera, etcetera that was perceived to – would have happened when that individual comes back to the company.

CHAIRPERSON: The value that a CEO who signs
10 documents without reading them would bring to the company, is that what you're telling me about? The value of a CEO who defied a Board instruction, is that what you're talking about?

MR MKWANAZI: Chairman, I'm talking about that, yes.

CHAIRPERSON: Or did you think he defied that other Board, but he would not defy your Board?

MR MKWANAZI: Not exactly, I'm not sure Chairman but – I'm not sure if he would have defied my Board, and yes Chairman, I'm not sure, maybe he did but I'm not sure
20 Chairman.

CHAIRPERSON: Were you sure that he was not going to sign documents without reading them?

MR MKWANAZI: Chairman, I was not sure.

CHAIRPERSON: So why you want him back because there is this risk. He signed – on his version, he signed

documents without reading them that had millions of rands of implications for Transnet. The next time he could have signed a document with, even a large amount in terms of implications. Weren't you concerned about that?

MR MKWANAZI: Chairman, in retrospect, yes the matter that he – the two matters that he you know quote, do indicate that this individual was not the best individual to be, sort of, brought back into the company but at the time we had other operational problems etcetera and we were of
10 the view that this individual would still add value into that company and yes, Chairman, you're spot on there was this new risk that this individual would defy this Board as well.

CHAIRPERSON: Mr Myburgh, I'll leave it for you to take further, that issue.

MR MKWANAZI: Thank you. Mr Mkwanazi are you able to tell us why, not only, did you let him off on what would have amounted to about a million rand that he owed you but then you agreed to pay 75% of his costs. You landed up paying him about a million rand, he should have owed
20 you a million, you let him off that and then on top of that you paid him a million. Now, apart from the fact that, that's what he wanted, why did you do that?

MR MKWANAZI: Advocate Myburgh, you know, when you mention these payments, somehow they don't make sense to me as well because I'm not sure how Group Treasury

and Group Legal interpreted these payments, I'm a little bit perplexed myself on all these additional payments which, somehow I don't understand.

ADV MYBURGH SC: Well can you think of any rational reason why, you would want to do that, apart from the fact that, that's what Mr Gama wanted?

MR MKWANAZI: I've tried to explain to the Chairman that there were certain payments that would have been made in terms of this settlement agreement but from what you are
10 saying there were other payments that I'm not privy to which were made under the assumption that they are part of this settlement agreement and I may disagree with those payments.

ADV MYBURGH SC: Alright, so if you go back to 3.5, 75% of Mr Gama's taxed costs incurred during the High Court application, we've dealt with that and in respect of his unfair dismissal dispute referred to the Bargaining Council, why should he get those costs?

MR MKWANAZI: Again, Advocate Myburgh, the
20 assumption was that, maybe at Transnet Bargaining Council he would have had a case but now based on the discussions that we are having truly on the last offence he didn't have a case but then based on not waiting for litigation through the Transnet Bargaining Council processes then, yes, those payments were then looked at

as something that the company could also pay.

ADV MYBURGH SC: But Mr Mkwanazi, why because firstly, Mr Gama would have to win in the Bargaining Council and you said, maybe that might have happened.

MR MKWANAZI: Yes.

ADV MYBURGH SC: But Mr Gama, it seems, we know, accepted that he was guilty of misconduct so the prospects of him winning hands down in the Bargaining Council were remote and also Bargaining Council and the CCMA, as you
10 heard from Mr Todd, they grant costs very, very sparingly because they don't want to discourage litigants from coming to those fora. Now when you consider that, why on earth, in the give and take and cut and thrust of negotiation would you just give away these costs, apart from the fact that, again, that's no doubt what Mr Gama wanted, why did you give in?

MR MKWANAZI: Chairman, there was that weak legal opinion which created doubt and yes, based on that weak legal opinion we felt that there was this litigation risk if we
20 continued with this matter at Transnet Bargaining Council.

ADV MYBURGH SC: Yes, you've said that many times – sorry carry on.

CHAIRPERSON: But that legal opinion never advised you to offer costs to...[intervenes].

MR MKWANAZI: No, it did not, one fully agrees that legal

opinion – I fully agree Chairperson...[intervenes].

CHAIRPERSON: So, you can't invoke that legal opinion to justify why you undertook to pay 75% of the cost because the lawyers, at least in that legal opinion, never said you were at risk of being ordered to pay costs.

MR MKWANAZI: Chairman that legal opinion did not quantify the costs and the 75% it just created doubt that if further litigation was to happen in the Transnet Bargaining Council, the costs could be higher or lower, that is correct
10 Chairman.

CHAIRPERSON: Mr Myburgh?

ADV MYBURGH SC: Now, what did you understand these costs to involve. It says 75% tax legal costs in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council, now you negotiated this clause, what does it mean? So, he gets dismissed and he refers a dispute to the Transnet Bargaining Council, and he does that by filling out a referral, so what costs are you dealing with here?

20 **MR MKWANAZI:** Chairman I'm not sure at the time if I knew the exact costs but the assumption is that, yes there would have been costs and based on that then 75% of those costs, if he had incurred them, would be refunded by the company yes.

ADV MYBURGH SC: That would be costs in relation to

the Bargaining Council referral, correct?

MR MKWANAZI: That is correct Chairman.

ADV MYBURGH SC: It wouldn't include his costs of the disciplinary hearing?

MR MKWANAZI: Advocate Myburgh, yes, your questioning is correct, that is why then I – I do not recall the full submission that was dealing with the referral of the matter to the Transnet Bargaining Council. I would have to go back I think there was a document submitted in October 2010 I
10 would have to go back to that. Your analysis is spot on. I do not recall that submission spoke to the high court matter at all. I do not recall.

ADV MYBURGH SC: Mr Mkwanazi I am not sure that I understand your evidence. Do you agree that it would not include the costs of his disciplinary hearing?

MR MKWANAZI: Hold it Advocate maybe you will recall that he had this matter where he – he took the matter to the high court.

ADV MYBURGH SC: Yes.

20 **MR MKWANAZI:** That is a separate matter.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Then the other matter is the disciplinary process to himself – itself. I am addressing the disciplinary process costs itself and the fact that then when this matter is taken to the Transnet Bargaining Council there could be that

probability that he could win; he could lose and therefore his costs to that Transnet Bargaining Council process and the disciplinary process were to be lumped into one and dealt with as something that the company would pay so in fact I sent off. But the other costs relating to the high court matter I am indicting that I do not recall what his submission in October 2010 was indicating. I would have to go back to that submission.

ADV MYBURGH SC: Mr Mkwanazi a Bargaining Council
10 arbitrator has got no power to award an employee costs of a disciplinary hearing. I mean surely you must have known that?

MR MKWANAZI: Chairman at the time I do not think I was aware of that but an impression was created that when now this matter goes through litigation costs could be far higher than what they might have been had we gone this route.

CHAIRPERSON: Did you ask any of the lawyers that were available to you whether Chris – Mr Todd or – of Bowman Gilfillan or Deneys Reitz or Webber Wentzel to say just guide
20 me on the issue of costs? What could happen and what could not happen at the Bargaining Council? Did you ask for guidance?

MR MKWANAZI: Chairman I do not think I did ask Deneys Reitz but Chairman I am aware that Mr Todd or the other law firm maybe he would have touched on that in the submission

of the 2nd February to the board.

CHAIRPERSON: Well Mr Todd's report or opinion made it clear that Transnet had reasonable prospects of success therefore I do not think that they would have mentioned anything to you about any risk that the Bargaining Council could award costs against Transnet even if Mr Gama were to be – to win.

MR MKWANAZI: Chairman I do recall Mr Todd's submission basically it was indicating a hundred percent confidence
10 level of winning this matter.

CHAIRPERSON: Yes.

MR MKWANAZI: Should it go the Transnet Bargaining Council.

CHAIRPERSON: Yes. Yes. Mr Myburgh.

ADV MYBURGH SC: So Mr Mkwanzazi costs of a disciplinary hearing and costs associated with a referral of an unfair dismissal dispute to a Bargaining Council are two separate things. Did you know that?

MR MKWANAZI: No I did not know at the time but yes I do
20 know now.

ADV MYBURGH SC: Well I am surprised because what I want you to do please is to turn – leave page 38 open in Bundle 1.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Please can you turn now to Bundle 2.

MR MKWANAZI: For Bundle 2

ADV MYBURGH SC: To page 8 and if you can hold the two pages open together.

MR MKWANAZI: Page 8 Bundle 2. Bundle 2?

ADV MYBURGH SC: Yes.

MR MKWANAZI: Okay let me put it this side. Yes I am now on Bundle 2 page?

ADV MYBURGH SC: Page 8. So this is the...

MR MKWANAZI: I am on page 8 yes.

10 **ADV MYBURGH SC:** This is the draft settlement agreement that Mr Gama actually signed on the 10 February. Have a look at clause 3.5.

MR MKWANAZI: Bundle 2 page 8.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Clause 3.5 yes I can see that.

ADV MYBURGH SC: So this was the preceding formulation of the clause.

20 “Transnet will make a contribution equivalent to 75% of Mr Gama’s tax legal costs incurred during his disciplinary hearing and in respect of his unfair dismissal.”

So there they were separate. Disciplinary hearing and in respect of his unfair dismissal referred to the Transnet Bargaining Council. Did you see that?

MR MKWANAZI: I see that Chairman.

ADV MYBURGH SC: And then the final clause drops costs in respect of the disciplinary hearing. Correct?

MR MKWANAZI: Which one if the final clause Chairman – 3.6?

ADV MYBURGH SC: The final clause is at Bundle 1 page 38 Clause 3.5. The one that you signed.

MR MKWANAZI: Interesting. I – I see – I see that Chairman.

ADV MYBURGH SC: So what was ...

10 **MR MKWANAZI:** I see that distinction.

ADV MYBURGH SC: On the face of it there was a deliberate decision made by yourself not to pay 75% of the costs of his disciplinary hearing. Correct?

MR MKWANAZI: Chair can you repeat I am now looking at the two documents. One is paragraph 3.5 of Bundle 2 page 8. And the other one is Bundle 1 page 38. Can I take you through...

ADV MYBURGH SC: Mr Mkwanazi I am quite sure you understand the proposition.

20 **MR MKWANAZI:** Please can you repeat?

ADV MYBURGH SC: Initially – well...

CHAIRPERSON: Okay let me try that. You see Mr Mkwanazi in Bundle 2 page 8.

MR MKWANAZI: Yes.

CHAIRPERSON: You have a draft settlement agreement that

had been signed – that was signed by Mr Gama on the 10 February which you did not sign. Okay?

MR MKWANAZI: Yes.

CHAIRPERSON: In Clause 3.5 of that draft settlement agreement it was written:

10 “Transnet will make a contribution equivalent to 75% of Mr Gama’s taxed legal costs incurred during Gama’s disciplinary hearing and in respect of his unfair dismissal referred to the Transnet Bargaining Council.”

So there...

MR MKWANAZI: Yes.

CHAIRPERSON: That draft settlement agreement was saying that you will pay 75% of his legal costs relating to the unfair dismissal dispute. That is the referral to the Bargaining Council.

MR MKWANAZI: Yes.

CHAIRPERSON: And you will pay 75% of his legal cost incurred in connection with his disciplinary hearing.

20 **MR MKWANAZI:** Yes.

CHAIRPERSON: That is what that clause says. Now you did not sign that – that draft settlement that has got that clause.

MR MKWANAZI: That is correct.

CHAIRPERSON: You signed the one that we have got at

Bundle 1 at page 38. Now paragraph – clause 3.5 of that – of the agreement – the settlement agreement that you signed says Transnet will make a contribution equivalent to 75% of Mr Gama’s taxed legal costs incurred during Gama’s high court application. So in other words where the draft that you did not sign said incurred during Gama’s disciplinary hearing it was replaced with incurred during Gama’s high court application. And Counsel’s question to you – question to you is this must have meant that you rejected the idea of paying
10 75% - a 75% contribution towards the legal costs he incurred during the disciplinary process. You rejected that idea. That is what Counsel is saying. Would you not agree? Because that is why it does not – it is not reflected in the final settlement. But you replaced that part with the part that says incurred during Gama’s high court application. So Counsel was saying to you, you specifically applied your mind to the question whether you should undertake to pay 75% of Mr Gama’s legal costs in relation to the disciplinary process. You rejected that. So he is saying you could not
20 have subsequently thought that this final settlement agreement includes Mr Gama’s legal costs in relation to the disciplinary hearing. What do you say to that?

MR MKWANAZI: No that is what this last agreement indicates. Yes.

CHAIRPERSON: Yes. So you had rejected the idea of

paying a contribution towards his legal costs in the disciplinary hearing?

MR MKWANAZI: That is – that is what this agreement says. I agree yes.

CHAIRPERSON: Yes. Yes okay. Mr Myburgh.

ADV MYBURGH SC: Thank you. Mr Mkwanzazi perhaps to fast forward on the issue of costs. Can I please take you to Bundle 3.

MR MKWANAZI: Bundle 3.

10 **ADV MYBURGH SC:** Page 31.

MR MKWANAZI: Page 31. I am there.

ADV MYBURGH SC: So this is Mr Mapoma's affidavit at paragraph 12.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Please at page 31. He says:

20 “And all the supporting documents we have I think this is probably because that you would agree with. Two payments were made to Langa Attorneys whilst I was at Transnet. Firstly they were paid R1 016 000.00 odd on 28 March 2011 being 75% of the taxed costs incurred by Transnet with Bowman Gilfillan and Eversheds in the high court litigation.”

So there is that – let us call it a million.

MR MKWANAZI: Yes.

ADV MYBURGH SC:

“75% of the taxed costs incurred with Bowmans and Eversheds in the high court litigation. Secondly they were paid R1.7 million on 9 June being 75% of the taxed costs incurred by Mr Gama in the high court, his disciplinary inquiry and his referral to the Transnet Bargaining Council.”

10 You have got those two amounts. We know there was an amount of...

MR MKWANAZI: I have got that.

ADV MYBURGH SC: 2015 let me not tax you about that because that was after your time. What Mr Mapoma then does is he deals with the first payment. Regarding the first payment it came about.

MR MKWANAZI: Yes.

ADV MYBURGH SC: As follows:

20 “Following my dealings with Langa Attorneys who presented a ridiculously inflated bill I was opposed to pay Mr Gama’s fees. This was an unpopular decision and I came under pressure within the organisation to finalise the issue. In this context I held a discussion with Mr Mkwanazi who I dealt with closely on the issue which culminated in him instructing

me to pay 75% of Transnet's taxed costs to Mr Gama on the basis that he had incurred liability for such costs. Given that I was unhappy with this I escalated the matter to Mr Singh who approved of the payment. I refer in this regard to my handwritten annotations dated 29 March 2011 on various tax bills attached to Mr – Ms Mahlabe's affidavit on costs. The decision is also recorded in the memoranda to Mr Singh and Mr Molefe referred to in certain paragraphs in his second affidavit."

So what he is saying is – is essentially this. Sorry in terms of the settlement agreement you somehow agreed to pay 75% of Mr Gama's taxed costs in the high court but ultimately what Mr Gama was paid was 75% of Transnet's costs in the high court. And he says and you shake your head; it does not make any sense. And he says.

MR MKWANAZI: No it does not.

20 **ADV MYBURGH SC:** And he says you were the person who instructed him to do that.

MR MKWANAZI: It does not make sense. I am not sure at times that people who employ how they interpret these issues but this does not make sense.

ADV MYBURGH SC: You see what – what does not make

sense is one he is let off paying your costs. Then you agree to pay 75% of his costs. Then you land up paying him 75% of Transnet's costs and then over and above that we will come to in a moment he actually gets his high court costs as well. But what is going on here Mr Mkwanazi?

MR MKWANAZI: There is something wrong with that.

ADV MYBURGH SC: Why are we dealing with this man so generously?

MR MKWANAZI: Chairman...

10 **ADV MYBURGH SC:** Why?

MR MKWANAZI: I am also seriously confused. I would need to sit with an accountant to explain why some of these payments are interpreted the way they are done – or with a legal person. They do not sound right

CHAIRPERSON: No I do not think you need an accountant Mr Mkwanazi. You just need common sense.

MR MKWANAZI: I agree Chair. There is something wrong with these numbers Chairman.

20 **CHAIRPERSON:** But it is not just the numbers it is the principle. Why in the first place in a labour matter when you are settling the matter that is pending before the Bargaining Council for arbitration you agree to pay the opponent's legal costs of 75% at all. Somebody who accepts that he is guilty of three acts of misconduct. That I think both you and I agree were serious acts of misconduct. Why is it that none

of the board members says hang on, hang on, hang on a minute. Why must we do all of this when the man himself admits that he is guilty of three acts of misconduct? Why must we treat him as if he is innocent? Why must we deal with the matter as if he is wrong anywhere? As if Transnet just unjustifiably brought these charges against him Why is it that there is not a single member of that board who says hang on, hang on, we are – there is something I do not understand here. Why must we do that? It is just difficult to
10 understand why not a single person in that board was able to say really even with reinstate – well I should not say single person because there was a minority – there was a minority.

MR MKWANAZI: There was a minority.

CHAIRPERSON: Ja there was a minority who said no, you know. But it looks like it was maybe only two people. And the rest – so it is not true to say there was not a single member of the board who – who could see that there was something wrong here. There was a minority which did but
...

20 **MR MKWANAZI:** There was a minority Chairperson.

CHAIRPERSON: Ja the majority did not seem to think there was anything wrong in doing – handling this matter in this way. Mr Myburgh.

ADV MYBURGH SC: Yes thank you. So Mr Mkwanzazi did you or did you not instruct Mr Mapoma to pay Mr Gama 75%

of Transnet's costs in the high court? Did you or did you not instruct him to do that?

MR MKWANAZI: Do not forget the interpretation is as follows: The assumption is that Gama has incurred some costs – there are two issues. One it is in the high court and one it is – under the disciplinary process itself. Yes at the time there was an instruction that based on the agreement that Gama must re – the company must refund Gama 75% of his costs incurred during the high court application. That is
10 the one matter. Then the other matter it is respect of his unfair dismissal dispute referred to the Transnet Bargaining Council. And on that matter as well the – the directive was to pay 75% - to refund Gama 75% of his incurred costs on the matter that is now being dealt with in the Transnet Bargaining Council arbitrating process yes.

ADV MYBURGH SC: Yes you just recite the agreement. Mr Mkwanazi please answer my question?

MR MKWANAZI: Yes.

ADV MYBURGH SC: Did you or did you not instruct Mr
20 Mapoma to pay Mr Gama 75% not of the costs that he incurred but of the costs that Transnet incurred ...

MR MKWANAZI: No, no. no I did not. It was of the costs that Transnet had incurred. Well I think Mr Mapoma misinterpreted what I was saying.

ADV MYBURGH SC: Well.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You think he misinterpreted what you said?

MR MKWANAZI: Yes.

ADV MYBURGH SC: So Mr Mapoma says he was not really happy with the instruction.

MR MKWANAZI: Ja he was correct.

ADV MYBURGH SC: And if we go to page 104 of Bundle 1.

MR MKWANAZI: 104 of Bundle 1.

10 **ADV MYBURGH SC:** You will see there that he addresses a memorandum to Mr Singh.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And if you look at 105 under Financial Implications.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Here at 75% of the attached invoices have to be paid to Mr Gama's attorneys and those are 75% if you go over the page of the invoices received from Evershed Attorneys. Those were the attorneys for the
20 directors in the high court and then under that 75% of the taxed costs awarded to Bowman Gilfillan. They were Transnet's attorneys. So you see here this memorandum recommends that Mr Gama is paid 75% not of the costs incurred by him but 75% of the costs incurred by Transnet and the executives and 75% of the costs incurred by the

individual directors. It is quite incredible is it not?

MR MKWANAZI: Oh no it is so wrong.

ADV MYBURGH SC: Yes.

MR MKWANAZI: Yes I am not sure between so many people who – why they could not understand the interpretation.

ADV MYBURGH SC: Well Mr Mapoma says that you told him to do that.

MR MKWANAZI: No.

10 **ADV MYBURGH SC:** And that is why he sought the approval of Mr Singh and he addresses this memorandum to Mr Singh.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And do you see then how it lands up being signed by Mr Molefe?

MR MKWANAZI: Yes I see that.

ADV MYBURGH SC: Yes.

20 **MR MKWANAZI:** I mean this is strange. Because even Mr Mapoma and Mr Singh should have gone back to – to that settlement agreement and interpreted it properly. Now they then elevate this matter in a completely inaccurate manner.

CHAIRPERSON: But Mr Mkwanzazi this was not the first thing that could not be explained about this agreement. There were a number of things that had happened which

could not be explained. We have dealt with some of them in the settlement agreement.

MR MKWANAZI: Chairman I cannot explain this wrong interpretation by Anoj Singh and by Mr Mapoma.

CHAIRPERSON: Hm.

ADV MYBURGH SC: So just to continue with this if you go to page 93 of Bundle 1.

MR MKWANAZI: 93?

ADV MYBURGH SC: Yes. You see Mr Mapoma was
10 concerned about this so he was very anxious to record what had happened. And on a series of taxed bills in relation to Bowman Gilfillan and Eversheds he then made this annotation. Look at the foot of 93.

“Transnet to pay 75% of the taxed costs above.”

Right now these were in this document the taxed costs of Bowman Gilfillan. And he sets out the figures and then he says:

20 “Payment has been approved as per the attached memorandum.”

That is the memorandum that I have taken you to and then he says:

“Discussed with Anoj.”

That is Mr Singh.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And what he says Mr Mapoma is that you gave him the instruction – sorry Mr Mkwanazi you gave him the instruction. He was concerned and he escalated it to Mr Singh and he says:

“This bears out his evidence.”

What do you say about that?

MR MKWANAZI: Chairman he was correct to be concerned and to elevate it but then what I find strange is that even Anoj at the time did not bother to go back to the settlement
10 agreement. That is not a proper interpretation even if though maybe Mr Mapoma could have said I said. I could not instruct Mr Mapoma to do something that – to me it is illogical what he then interpreted is what the agreement said.

ADV MYBURGH SC: No, no sorry that was not his interpretation. You instructed him to do that.

MR MKWANAZI: No.

ADV MYBURGH SC: That is his evidence.

MR MKWANAZI: No Chairman.

20 **ADV MYBURGH SC:** Well when you say it is illogical you say it was illogical for Anoj to do that you see that Brian Molefe signed this memorandum. And by the way clause 3.5 of the settlement agreement is actually reproduced at the beginning of the memorandum.

MR MKWANAZI: I am not sure how these people –

Chairman I am not sure how these people were interpreting that clause 3.5. I wish somebody had come back to me – ja – but that was now operational.

ADV MYBURGH SC: Mr Mkwanazi before I leave this subject someone did come to you.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Mr Mapoma came to you and explained that as far as he was concerned Mr Gama was not able to actually prove the incurrence of any costs. And
10 what you then instructed him to do was to pay Mr Gama 75% of Transnet's costs.

MR MKWANAZI: I deny that instruction to Mr Mapoma. I would have said go back to the agreement and implement what is in the agreement.

CHAIRPERSON: You see –

MR MKWANAZI: Because what implemented is over and above what was in that agreement.

CHAIRPERSON: You see Mr Mkwanazi Mr Mapoma says if you go to the settlement agreement.

20 **MR MKWANAZI:** Yes.

CHAIRPERSON: The 75% costs that it talks about are taxed legal costs. Okay.

MR MKWANAZI: Yes.

CHAIRPERSON: You understand the concept of taxed legal costs?

MR MKWANAZI: Yes I do.

CHAIRPERSON: Yes okay. So he says in accordance with the settlement agreement they were insisting. He said Mr Langa that is Mr Gama's attorney sent an invoice or a bill I am not sure for a certain amount I do not know whether it was R12 million or what and it was not taxed. So he says he was insisting that 75% - the 75% of legal costs that Transnet would pay would only be of taxed legal costs that incurred by Mr Gama and he was insisting on that with
10 regard to Mr Langa. But he says Mr Langa did not want to submit a taxed bill – a taxed cost and there was a delay because there was this issue. Mr Mapoma was insisting that it should be taxed costs and Mr Langa was not submitting that. Maybe he was not prepared to submit that and in the meantime there was a delay. So he says with the delay – now I do not know whether Mr Mkwanzazi can...

MR MKWANAZI: There is something wrong here I need a help.

CHAIRPERSON: Oh there is something wrong.

20 **MR MKWANAZI:** With the video.

CHAIRPERSON: With the video. Okay I wonder whether we should adjourn for somebody to deal with that or are they going to be able to deal with it while we are talking? Do you know? I do not know whether it is to be fixed from this side. Looks like we have – where are our technicians?

I just need – at – you can still hear me?

MR MKWANAZI: I can hear you clearly Chairman.

CHAIRPERSON: Oh it is just the video. Okay let us talk while ...

MR MKWANAZI: It is...

CHAIRPERSON: Let us talk while they fix the video and if we need to adjourn to – okay I am told that it should be fine now.

MR MKWANAZI: It looks like it is back. Yes.

10 **CHAIRPERSON:** Yes okay. Okay. So I am – I was saying to you Mr Mapoma says there is a context to the position that ultimately paid 75% of its own legal costs to Mr Gama's attorneys. And he says the context is that Mr Gama's attorneys did not want to send a tax bill or was delaying or was reluctant to send a tax bill.

And in the meantime, he was getting pressure from within Transnet to pay Mr Gama's attorneys. And he was the told: Okay pay 75% of Transnet's legal costs. And he says you instructed him to do that.

20 **MR MKWANAZI:** No, Chairman I did not.

CHAIRPERSON: H'm. Myburgh.

MR MKWANAZI: I did not.

ADV MYBURGH SC: So in other words, what he was saying is that you said: Use the Transnet bills as a proxy for Mr Gama's costs.

MR MKWANAZI: Hold it. Not really. I think you are on the right track, Advocate Myburgh. Please, continue.

ADV MYBURGH SC: Is that what you told him to do?

MR MKWANAZI: Not really. But let me still try and explain what this was supposed to be even though Mr Mapoma interpreted it in a strange way. The assumption would have been that Mr Gama would have paid certain costs at that high court process.

Then the idea was that if he had to pay those, then Mr
10 Gama needed to be refunded 75% of those costs only but still paid the 25%. Yes.

ADV MYBURGH SC: Well, I think we all understand but that is what was supposed to have happened but it did not.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And Mr Mapoma said it did not happen because you instructed him.

MR MKWANAZI: I did not.

ADV MYBURGH SC: Well, who did instruct ...[intervenes]

MR MKWANAZI: I am not sure who did. I did not. Ja.

20 **ADV MYBURGH SC:** You do not know who instructed him?

MR MKWANAZI: No.

ADV MYBURGH SC: Alright.

MR MKWANAZI: I do not.

ADV MYBURGH SC: Let us go then please to Bundle 1 to page 142.

MR MKWANAZI: Bundle 1. One, four, two? Okay let me go back to 142. Yes?

ADV MYBURGH SC: So what happened is, sometime later ...[intervenes]

MR MKWANAZI: Yes.

ADV MYBURGH SC: ...mister... there was an inquiry by the Director General of the Department of Public Enterprises about ...[intervenes]

MR MKWANAZI: Yes.

10 **ADV MYBURGH SC:** ...Mr Gama's legal fees.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Why he wanted to become involved in this one, does not know. But what happened is that Mr Mapoma then addressed a memorandum to Mr Molefe about Mr Gama's legal fees. This is the memorandum. Do you see it?

MR MKWANAZI: I see it, yes.

ADV MYBURGH SC: And you see that it was CC'd to you?

MR MKWANAZI: Yes, I see that.

20 **ADV MYBURGH SC:** Did you receive this memorandum?

MR MKWANAZI: I would have received it at the time, yes.

ADV MYBURGH SC: Alright. Well, that is helpful. So let us go then to paragraph 6 at page 143.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes.

“Mr Gama incurred legal costs in two matters. The first is his application to the high court in which Transnet used two sets of attorneys, Bowman Gilfillan Attorneys and Deneys Reitz.”

I think everyone agrees that should read Eversheds(?).

MR MKWANAZI: Yes.

ADV MYBURGH SC: Yes.

10 “The second matter in which he incurred costs is the labour matter in which he was charged in a disciplinary process. The costs in the high court were granted in Transnet’s favour by the court.”

That you accept, right?

MR MKWANAZI: I accept that, yes.

ADV MYBURGH SC: Yes.

“These costs were supposed to have been paid by Mr Gama on which ...[intervenes]

MR MKWANAZI: I accept that.

20 **ADV MYBURGH SC:** “...a settlement with Mr Gama, Transnet sought and obtained the tax bills from these two firms of attorneys and paid 75% of the total amount.”

So here it is written in black and what actually happened is that Mr Gama was paid 75% of Transnet’s costs.

“The tax amounts included the fees of counsel which are indicated as disbursements in the attorney’s bill.

The amount of R 69 603,19 were paid to Langa Attorneys on 28 March 2011 being 75% of the tax costs incurred by Transnet's to its attorneys, Deneys Reitz and Bowman Gilfillan, respectively. The total amount paid to Langa Attorneys on 28 March was therefore R 1 016 000,00."

Do you see that?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And you shake your head. Correct?

10 **MR MKWANAZI:** [No audible reply]

ADV MYBURGH SC: You shake your head. It is unbelievable.

MR MKWANAZI: No, I see the figure.

ADV MYBURGH SC: Yes.

MR MKWANAZI: But the question is. Did Gama paid Transnet in the first place?

ADV MYBURGH SC: No.

MR MKWANAZI: Because that is my problem as well. That is why I shake my head. Because the idea was that... the
20 assumption was. Gama has paid the legal fees of Transnet's lawyers, et cetera.

ADV MYBURGH SC: Come now, Mr Mkwanazi. Come now.

CHAIRPERSON: [laughing]

ADV MYBURGH SC: You had issued an instruction to Mr Todd that he must stop the execution process.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Yes.

CHAIRPERSON: So how could you have expected that Mr Gama would have paid Transnet's legal costs when you had instructed that all steps to recover Transnet's legal costs for Mr Gama should be stopped?

MR MKWANAZI: My interpretation... I understand, Chairman. My interpretation was that, as those processes were going, Gama was servicing his obligation to Transnet's
10 lawyers.

CHAIRPERSON: What obligation now you are talking about now?

MR MKWANAZI: Whatever legal fees had been incurred by Transnet's lawyers.

CHAIRPERSON: In regard to what?

MR MKWANAZI: In regard to the high court matter.

CHAIRPERSON: But you never went back to Mr Todd and say: Go ahead. You remember I stopped you from the process of recovering Transnet's costs from Mr Gama. Now I
20 am saying go ahead. You never went back to say that, did you?

MR MKWANAZI: If I recall, I did not do that because I was communicating some of these decisions particularly to stop with the Transnet's Group Legal. But the question you are posing is a relevant question in that it sounds like no

Transnet's legal fees had been paid even by Gama at that time.

CHAIRPERSON: Yes. He had... Mr Todd gave evidence here and said ...[intervenes]

MR MKWANAZI: Yes.

CHAIRPERSON: ...after the high court had ordered that he should pay costs, they were in communication with his lawyers and he was not paying the costs.

So they had to get the costs taxed in the high court.
10 There was a tax bill. They informed him that this is how the costs have been taxed. Still did not pay.

So they then embarked upon the execution process. That is the process which you instructed him to stop pursuing in January. And you never went back to him to say: Now you can continue.

Actually, the settlement agreement Mr Mkwanazi seems to be inconsistent with the notion that you would have expected Mr Gama to be paying any legal costs of Transnet.

Because whereas he had been ordered by the high court
20 to pay Transnet's costs in regard to the high court ...[intervenes]

MR MKWANAZI: Yes.

CHAIRPERSON: ...you said to him: We are going to pay 75% of the costs you incurred in taking us to court, Mr Gama. That is inconsistent with somebody who would...

to think after that settlement agreement which has got that, to think that Mr Gama would be paying something towards Transnet, is inconsistent with that position with the terms of the settlement agreement.

Because there will be no point. What point would there have been for you to say: Mr Gama, we will pay 75% of the costs you have incurred in the high court application against us. If you were expecting him to pay you, Transnet's legal costs. There would have been no point, is it not?

10 **MR MKWANAZI:** Chairman, I would not like to agree to fully that interpretation because at the time when this issue was being discussed, my assumption was Gama owes various lawyers a certain amount of money.

And my assumption was he should have paid by then although yes in terms of the Advocate Todd. He might not have paid but the assumption was he was going to pay.

Therefore, whatever he would have been refunded would have been based on him having incurred certain costs which would have been then 75% of those costs.

20 Not the other way around where he has not even incurred... he has not even paid and he gets paid. That is a total misinterpretation of that agreement.

CHAIRPERSON: But Mr Mkwanazi, remember the timeframe. It is around mid-January 2011 that you instruct ...[intervenes]

MR MKWANAZI: That is correct.

CHAIRPERSON: that you instruct Mr Todd to stop the process ...[intervenes]

MR MKWANAZI: Yes.

CHAIRPERSON: ...of getting from Mr Gama the money that he owed Transnet in terms of the high court order.

MR MKWANAZI: Yes.

CHAIRPERSON: You stop him.

MR MKWANAZI: Yes.

10 **CHAIRPERSON:** And the reason given is that you are stopping him so that... so as to give the settlement negotiations a chance. That is the reason that was advanced.

MR MKWANAZI: That is correct.

CHAIRPERSON: Okay. So obviously, pending the outcome of the settlement, that process of recovering from Mr Gama was at a standstill. You accept that?

MR MKWANAZI: [No audible reply]

CHAIRPERSON: It could not be ...[intervenes]

20 **MR MKWANAZI:** Not so if he could not...[intervenes]

CHAIRPERSON: It could have been ...[intervenes]

MR MKWANAZI: But I will accept that, yes.

CHAIRPERSON: Let me repeat that. That process of recovering the legal costs from Mr Gama for Transnet, could not have been ongoing while the negotiations were ongoing,

is it not?

MR MKWANAZI: Yes.

CHAIRPERSON: It was at a standstill that process.

MR MKWANAZI: Yes.

CHAIRPERSON: So when you were settling, negotiating the terms of the settlement, you knew that the process to recover Transnet's legal costs from Mr Gama was at a standstill. You could not have thought that he had been paying anything in the meantime. You could not have
10 thought that.

MR MKWANAZI: [No audible reply]

CHAIRPERSON: It was only about a month before that you said: Mr Todd stop until we have finalised negotiations.

MR MKWANAZI: Yes.

CHAIRPERSON: So I am putting to you that when you were negotiating and settling the matter and talking about 75% about Transnet undertaking to pay 75% of Mr Gama's costs, it could not have been because you thought Mr Gama had been paying some money towards Transnet in terms of legal
20 costs. It could not have been that.

MR MKWANAZI: Chairman, I am not sure what should have been paid by that time but what I can indicate here, there is a serious misinterpretation by a few people of what that settlement agreement meant. Those people include Mr Mapoma and they include even Mr Anoj Singh. There is a

serious misinterpretation.

CHAIRPERSON: Mr Myburgh.

ADV MYBURGH SC: Yes, thank you. Mr Mkwanazi, one of the first questions that I asked you in relation to costs was, whether you accept that Mr Gama's obligation to pay Transnet's costs was actually compromised in the settlement agreement. It was written-off. And you said you agreed ...[intervenes]

MR MKWANAZI: Yes, it was compromised.

10 **ADV MYBURGH SC:** Yes. And you remember agreeing with that?

MR MKWANAZI: Yes, I do remember.

ADV MYBURGH SC: Ja. Then paragraph 8:

“Mr Gama's own attorneys in the high court application, the labour matter was Langa Attorneys. When Transnet received their bill being presented for payment, it became apparent that the bill had not been taxed as agreed.

20 Prior to this, Transnet had been asking for a tax bill and offered to pay for a private taxing master in order to facilitate the fast-track the taxation, to no avail. When the bill arrived, it was pointed out that the bill was not taxed but merely drawn up properly. After a number of meetings during which it became clear that the parties would not reach agreement,

Transnet instructed its legal advisors to instruct a private taxing master to tax the bill. This was done. The total amount came to R 2 293 000,00. According to the taxing master, Langa Attorneys Consultant who drew their bill was instructed not to cooperate with the taxation process.”

I will leave out the bracketed part.

10 “Transnet net paid the sum of R 1 700 000,00 on 9 June to Langa Attorneys being 75% of the tax costs.”

So that part you understand?

MR MKWANAZI: I do understand. Yes.

ADV MYBURGH SC: It is paragraph 7 that you do not understand how ...[intervenes]

MR MKWANAZI: Ja, also by the way, if I can add on advocate?

ADV MYBURGH SC: Yes.

20 **MR MKWANAZI:** Even that one point seven which say, I say I understand. It would have been on the basis that Gama would have paid a certain amount, not just on the basis of him being given a freebie. No.

ADV MYBURGH SC: So what the one point seven compromised of and let me take you... well, I can take you to the documents if you want. We have got the bill from Langa Attorneys, we have go the taxing master’s memo.

And she taxes it down to two point nine three and he is paid, 75% being one point seven. What he submitted a bill and what he was paid for Mr Mkwanazi was the high court, his disciplinary hearing and the Bargaining Council referral.

MR MKWANAZI: Yes, thank you.

ADV MYBURGH SC: So at paragraph 7, he had been paid our costs in respect of the high court. And then in paragraph 9, do you see how he was then paid also his costs in the high court? Astonishing, is it not?

10 **MR MKWANAZI:** Yes, I agree with you.

ADV MYBURGH SC: But Mr Mkwanazi, you received this memorandum. That is your evidence.

MR MKWANAZI: I did but at the time, my interpretation... of course, I am copied here. There are these two people interacting now. The Group CEO and Mr Mapoma. And at the time, I was under the impression that, particularly Mr Mapoma, understood what the intention of that settlement agreement is.

20 But this memo here was wrongly crafted. Yes, I should have highlighted that even say to Molefe that this was not what was in the agreement.

ADV MYBURGH SC: Do you accept that Mr Gama was not entitled to 75% of the costs he incurred during the disciplinary hearing given the changes in the wording of the two agreements, settlement agreements? Do you accept

that?.

MR MKWANAZI: Let me think of it carefully. In the agreement, entitled to which costs. Can you please repeat?

ADV MYBURGH SC: Do you accept that he was not entitled to the costs incurred during the disciplinary hearing?

MR MKWANAZI: My understanding of the agreement. It did not cover that for one or the other reason. Yes.

ADV MYBURGH SC: Yes. Well, I think there we agree with one another.

10 **MR MKWANAZI:** Yes. Yes. That agreement did not cover that.

ADV MYBURGH SC: Alright. Well, let us then move on to something else. And I just got a few pieces of correspondence and the like that I want to refer you to. And then I want to take you briefly to your supplementary affidavit. Can I ask you please to turn to Bundle 2? Continuing with the chronology.

MR MKWANAZI: Bundle 2. Okay let us check this... Aside, ja. We have Bundle 2.

20 **ADV MYBURGH SC:** Will you please go to page 41, four one?

MR MKWANAZI: Page 41. Oaky I am on page 41. Wait. Forty-one or 21?

ADV MYBURGH SC: Forty-one. Four one.

MR MKWANAZI: Forty-one. Okay. I have go that.

ADV MYBURGH SC: Alright. So the settlement agreement signed on 22 and 23 February. Page 41 is dated the 6th of April, a month or two later.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And on the face of it, Deneys Reitz' response on behalf of Transnet to the Public Protector.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Did you come across this document? Was it shown to you?

10 **MR MKWANAZI:** Yes, I have seen this document. Yes.

ADV MYBURGH SC: Alright. So let us go then to paragraph 10 at page 44. Mr Gule writes to the Public Protector and says:

“In addition to the findings made by Antrobus SC at the disciplinary inquiry and the grounds on which Mr Gama has referred the matter for arbitration, there are legal opinions that had been furnished by two reputable firms of attorneys relating to the procedural and substantive fairness of Mr Gama's dismissal.

20

These firms are Webber Wentzel and Denys Reitz Incorporated.

All these opinions confirmed that Mr Gama's dismissal was substantively and procedurally fair.”

This is been written on the 6th of April after you have

reinstated the man and paid him - what is it - the better part of R 16 million.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Deneys Reitz say that:

“All these opinions confirm that Mr Gama’s dismissal was substantively and procedurally fair.”

Correct?

MR MKWANAZI: Yes, that is correct.

ADV MYBURGH SC: And then they go on to say at
10 paragraph 12:

“In any event, the dismissal dispute referred to the Transnet Bargaining Council by Mr Gama has been settled amicable. The terms of the settlement are confidential.

However, we confirm that Mr Gama has been reinstated as CEO. Accordingly, we submit that all the issues raised with regard to the alleged unfairness of Mr Gama’s dismissal are now academic.”

20 So here ...[intervenes]

MR MKWANAZI: I see this.

ADV MYBURGH SC: ...Mr Gule tells the Public Protector that there are a number of opinions including by Denys Reitz that confirm that Mr Gama’s dismissal was substantively and procedurally fair.

MR MKWANAZI: Yes.

ADV MYBURGH SC: This is the man you reinstated a few months earlier and paid R 13 million in LTI's, STI's and back pay and then the better part of R 3 million in costs.

MR MKWANAZI: Yes.

ADV MYBURGH SC: How do you explain this?

MR MKWANAZI: I find it strange that even though this thing is an opinion of the same entity, Deneys Reitz, that much earlier on, sometime in February, it created doubt on the possibilities of success if this matter was taken through the Transnet Bargaining Council process and through to the fact that this doubt was created, then this settlement agreement was reached. And of course now, there is this shame which then says Mr Gama's dismissal is now academic. I see that, ja.

ADV MYBURGH SC: But you see Mr Mkwanazi, you never took the trouble to iron out the contradiction in Deneys Reitz' report to you.

MR MKWANAZI: There is a point ...[intervenes]

20 **ADV MYBURGH SC:** ...on the 22nd of January, did you?

MR MKWANAZI: [No audible reply]

ADV MYBURGH SC: So when you say ...[intervenes]

MR MKWANAZI: No ...[intervenes]

ADV MYBURGH SC: ...without a doubt, that was because you were reading and you were seeing that you wanted to.

MR MKWANAZI: Chairman, I concede at the time that yes there was this doubt but... because even as early as that as well, Deneys Reitz in that earlier letter, did indicate that Transnet did have a strong case, yes.

ADV MYBURGH SC: Well, let me then deal with the next document. You yourself some time later submitted a response to the Public Protector.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: If you go to page 48, you will find it
10 there. I see that you have signed it at page 55 on the
30th of June.

MR MKWANAZI: Where is it? Is it page 48?

ADV MYBURGH SC: Yes, Bundle 2, page 48.

MR MKWANAZI: Bundle 2, page 48. Yes okay. Yes, I have
got it.

ADV MYBURGH SC: Now you were in a... by this time, we
know that KPMG/Nkonki had issued their interim report,
correct?

MR MKWANAZI: That is correct.

20 **ADV MYBURGH SC:** And that report was dated either 26 or
28 April. Correct?

MR MKWANAZI: That is correct, yes.

ADV MYBURGH SC: Now, Mr Mkwanazi this is quite a long
time after Mr Gama's reinstatement, some four months or so,
after his reinstatement, right?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Let us see what you write to the Public Protector. Under the heading: Substantive and Procedural Fairness. There is a 2 in brackets. You say ...[intervenes]

MR MKWANAZI: Oh, yes I see it.

ADV MYBURGH SC: You say:

10 “However, there are matters which the auditors discovered where certain employees of the company may have been guilty of offences similar to the offences with which Mr Gama was charged with.”

We have been through all of that.

MR MKWANAZI: H’m.

ADV MYBURGH SC: “...and yet no disciplinary action was taken against him.”

MR MKWANAZI: H’m.

ADV MYBURGH SC: “In such circumstances, there is an argument that Transnet may have acted inconsistently.”

20 So that is the best you could do in June to say: We may have acted inconsistently.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Not that you did act inconsistently. Not that you knew that you were going to lose at the Bargaining Council. Only that you may have acted

inconsistently. Is that right?

MR MKWANAZI: That is correct.

ADV MYBURGH SC: And then look at, to drive home the point – look at 4 in brackets at the foot of the page.

“It would therefore appear that to the extent that no disciplinary action was taken in these matters, Mr Gama may have been able to sustain the argument on inconsistent treatment.

10 Such inconsistency may have had a bearing, not only the on the decision to charge Mr Gama but also on the sanction dismissal.”

Now why on earth do you reinstate the man and pay him R 13 million in back pay and benefits and R 3 million in costs when at absolute best for him he may have had a case on what you are telling the Public Protector? How is that possible?

MR MKWANAZI: Chairman, as you can see. Even in my submission to the Public Protector, there is always this may have, may have. And interestingly enough, as we have
20 discussed... even the few examples that maybe I made of the *V and E(?)* and al. these ...[indistinct] contracts. They are not identical to the offences that Mr Gama committed. That I concede but... ja.

ADV MYBURGH SC: Mr Mkwanazi, why do you settle with a man when he may have had a case?

MR MKWANAZI: [No audible reply]

ADV MYBURGH SC: I do not understand that.

MR MKWANAZI: Chairman, yes I understand fully. Please continue.

ADV MYBURGH SC: No, but it is not about you understanding fully. And why do you then capitulate in the settlement negotiations? At the best for him, here you telling the Public Protector, this is a carefully thought out, no doubt, response. At best for him, he may have had a case. What is
10 going on here Mr Mkwanazi?

MR MKWANAZI: Chairman, I had indicated that there was this doubt created that we may or may not win this thing when it went through the Transnet Bargaining Council.

MR MKHWANAZI (COUNSEL): Chair, if I may?

CHAIRPERSON: Yes?

MR MKHWANAZI (COUNSEL): If I may answer that and say? Chair, I am asking you to perhaps assist the process? Because I believe that what Advocate Myburgh is asking now, are issues that have been substantially dealt with up to
20 this point especially on Friday, giving our session with you Chair.

I feel that we have exhausted most of the issues as it can be. Advocate Myburgh is asking the same question: Why did you settle? Why did you capitulate? And so on. So can you please assist us here?

CHAIRPERSON: Yes.

MR MKHWANAZI (COUNSEL): So that we can have some finality, so to speak. So we can enable him to continue to other matters. I am asking you to guide us here. Thank you.

CHAIRPERSON: Yes. No, no. That is fine. I am sure that in part it is the answers that come from Mr Mkwanazi that continue to leave questions. But it is okay. I understand. Mr Myburgh, do you want to say anything?

ADV MYBURGH SC: Yes, certainly. Well, this line of
10 questioning comes directly from Mr Mkwanazi's own letter to the Public Protector. I know that not in this context I guess that that is something I need not pursue any further certainly this letter.

CHAIRPERSON: Yes.

ADV MYBURGH SC: But I just wanted to confirm, by the time you wrote this letter to the Public Protector you no doubt had considered the matter very carefully and it is a carefully thought out response to the Public Protector, is that right?

20 **MR MKWANAZI:** Let us indicate that when you say carefully considered response, a letter like this would not have been authored by myself, as such, but it would have been authored in organisation in support of what I could have been telling them, yes.

ADV MYBURGH SC: But it is something no doubt that you

agreed with.

MR MKWANAZI: At the time, yes, I agree with but based on these discussions that we are now having, there are some interesting holes on similarities which frankly are not there in terms of whether the Gama matter was a procurement matter or was a misconduct matter.

ADV MYBURGH SC: Yes, no, I think you might have ...[intervenes]

10 **MR MKWANAZI:** That difference is beginning to emerge, ja.

ADV MYBURGH SC: I think you have conceded that fairly.

MR MKWANAZI: Ja.

ADV MYBURGH SC: Let me move to another document please. If I could ask you please to go to file 3.

MR MKWANAZI: File 3.

ADV MYBURGH SC: And to page ...[intervenes]

CHAIRPERSON: That is bundle 3.

ADV MYBURGH SC: I beg your pardon, bundle 3.

MR MKWANAZI: Bundle 3.

20 **ADV MYBURGH SC:** To page 479.

MR MKWANAZI: Page 479?

ADV MYBURGH SC: Yes.

MR MKWANAZI: Okay.

ADV MYBURGH SC: Are you there?

MR MKWANAZI: I have got that page 479, yes.

ADV MYBURGH SC: So this is a meeting of the Corporate Governance and Nomination Committee held on the 11 April and you see that you were present together with four of your fellow board members.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: This is 11 April but two and a half months – sorry, a month and a half after Mr Gama’s reinstatement.

MR MKWANAZI: Yes.

10 **ADV MYBURGH SC:** Can I ask you please to go to page 482?

CHAIRPERSON: It is that period of the settlement agreement, Mr Myburgh, and it is within two weeks after he has assumed duty. I just make that observation.

ADV MYBURGH SC: Thank you, Chairperson.

CHAIRPERSON: For another reason that will be – I will deal with later.

20 **ADV MYBURGH SC:** So this is shortly after Mr Gama resumes his duties and shortly after the settlement. At page 482, if I can ask you to go to the middle of page.

MR MKWANAZI: Yes.

ADV MYBURGH SC: Paragraph 5.2.3.4, there the committee – this is the committee that you were chairing, Corporate Governance and Nomination.

“Requested management to make a presentation

covering, amongst others, the following:

What is a condonation process? Where does it originate from? Where does it get approved and regularised?”

It seems that on the face of it you and your fellow board directors knew precious little about condonation at this time, is that not right?

MR MKWANAZI: Chairman, maybe not. Let me try and explain at times how these things were evolving. You still
10 need to recall that yes, that board, when it was dealing with certain issues, was a new board and it almost needed a re-induction because even when an induction could have been done it might not have been done to that detail to that board. Yes, that is how I interpret 5.2.3.4.

ADV MYBURGH SC: But, Mr Mkwanazi, I think you are perhaps missing the point. These are people who had voted to reinstate Mr Gama in the name of condonation, including you.

MR MKWANAZI: That is correct, yes, [inaudible –
20 speaking simultaneously]

ADV MYBURGH SC: Who now needed an induction into condonation. Is that what you are saying?

MR MKWANAZI: That is what I am saying, yes.

ADV MYBURGH SC: Well, that is precisely the problem pointed to by Mr Todd in his evidence.

MR MKWANAZI: Yes, he did.

CHAIRPERSON: I mean, Mr Mkwanazi, it is the same people – the same people who invoked condonation, the condonation process at Transnet to justify reinstating Mr Gama. It is the same people who on the 11 April say they are requesting management to make a presentation to deal with very basic questions. The first question they want management to deal with is, what is a condonation process? But they are supposed to have known that by
10 then because how could they have invoked the condonation process to reinstate Mr Gama if they do not what a condonation process is at Transnet? You understand our difficulty?

MR MKWANAZI: I understand, Chairman. Maybe let me try and get a little bit of – it is not background but at that time in almost the first two months of 2011, maybe first three months – again, I do not have proof, but we could have dealt maybe with close to 20 condonation applications and therefore that is why then this board was
20 saying hold it, there is too much of these condonations, can somebody come and explain in detail what are these condonation all about? Yes.

CHAIRPERSON: But, Mr Mkwanazi, that is what is – that is what makes it even worse. I mean, a question like this, what is a condonation process, is a question you should

ask before doing you first condonation case, it is not a question you should ask after doing 20 condonation cases. You understand what I mean?

MR MKWANAZI: I understand where you coming from.

CHAIRPERSON: By that time you are supposed to be very familiar with this, you cannot be asking that basic question. If you ask it after doing 20 condonation cases, you know, people will be tempted to say it mean this person did not know what he or she was doing through
10 these 20 condonation cases if he or she does not know what a condonation process is at Transnet? You understand what I mean?

MR MKWANAZI: I understand, Chairman, yes.

CHAIRPERSON: Mr Myburgh?

ADV MYBURGH SC: Yes, thank you.

MR MKHWANAZI: Chair, if I may, if you may indulge me, Chair?

CHAIRPERSON: Yes, yes.

MR MKHWANAZI: Chair, I think it is a bit unfair on Mr
20 Mkwanzazi to assume that having an induction condonation who drive a lack of understanding or knowledge of what condonation is. Many institutions, Chair, including, you know, lawyers and everyone from time to time have inductions around topics. They already - for example, Chair, most of companies have inductions every day on

King IV on the Companies Act, etcetera, etcetera, it does not presuppose that this person does not understand what it is. So I am just trying to assist, Chair, to make sure that we help the process rather than trying to, you know, create, you know, false impressions.

And then my submission that I am trying to make now, Chair, is that an induction does not presuppose lack of understanding of what is going on and I would like to leave it at that, Chair. Thank you.

10 **CHAIRPERSON:** Yes. No, but you think that my reaction is based on Mr Mkwanazi's statement that there was a need for induction or anything to do with induction but my question does not stem from that. It stems from the mere fact that the minutes reflect that this committee said they wanted to be addressed on what a condonation process is so that that is where it comes from, so that is what I am saying.

MR MKHWANAZI: Yes, Chair, and I agree, Chair. When we do, for example, board inductions, we start there as
20 well, we start by asking what is King IV. It does not presuppose that it means someone does not know what it is and most of the time, Chair, you do these inductions with very senior experienced board people who exactly, sit on various boards, but the inductions are used for different purposes including and showing that people have a

common understanding ...[intervenes]

CHAIRPERSON: No, no, no, ...[intervenes]

MR MKHWANAZI: Of the issues that they have because you may come from different institutions where the interpretation that the Transnet may have different but you are now making sure that that the organisation have a common understanding and I actually do not see anything wrong with that Chair, and I just wanted to clarify that. But thank you for you [indistinct] 10.05 as well, Chair. Thank
10 you.

CHAIRPERSON: Yes. No, just to clarify and we will proceed just now. So the idea is that somebody or the committee would not ask the question what is a condonation process if they know what a condonation process is. That is the point of departure. But okay, let us continue. Mr Myburgh.

ADV MYBURGH SC: Thank you, just to end off, Mr Mkwanazi, do you have your supplementary affidavit? It should have been added to bundle 4, just before the tab
20 BB19.

MR MKWANAZI: Bundle 4. Yes, please hold.

ADV MYBURGH SC: Just before the tab BB19.

MR MKWANAZI: Before tab 19. Okay. Chairman, I have got it in front of me.

ADV MYBURGH SC: And the page number is a difficult

one, it is bundle 4, page 21.414, are you there?

MR MKWANAZI: I have got that in front of me.

ADV MYBURGH SC: Alright, thank you. Now, Mr Mkwanzazi, given the lateness in the day, I am not going to take you through all of this and a lot of what you say here are things that I think have been clarified but paragraphs 1, 2 and 3 need no introduction or mention. You say at paragraph 4 that in your initial affidavit you did not deal with certain things and you now address them in this
10 supplementary affidavit. Correct?

MR MKWANAZI: That is correct, Chair.

ADV MYBURGH SC: Then at paragraph 5 you say that you met with Minister Gigaba in October 2010. That we have already dealt with.

MR MKWANAZI: That is correct, Chair.

ADV MYBURGH SC: At 6 you say:

“At this Minister Gigaba also requested that the incoming board must also review the fairness of the dismissal of Mr Gama.”

20 We have traversed that.

MR MKWANAZI: We have dealt with it, yes.

ADV MYBURGH SC: Then you say at paragraph 7 that on 22 December you received a letter from the Public Protector, the board then appointed a joint venture team of KPMG and Nkonki. We have dealt with that.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You say:

“The joint venture provided the board with the first/draft report which was used by the board in its deliberations on the matter of the dismissal.”

I have dealt with this report extensively in the initial affidavit. I think you accept though that there was no first report before the board made its decision on the 16 February, correct?

10 **MR MKWANAZI:** Chairman, yes, there was some report but it was not extensive.

ADV MYBURGH SC: No.

MR MKWANAZI: There was a report around the 24 January by KPMG. I say it was not extensive as in terms of dealing with the real issues on the Gama matter. It was more a planning report by KPMG.

ADV MYBURGH SC: When you say it was extensive, it was progress report, it did not deal with the facts.

MR MKWANAZI: It was progress report, that is correct.

20 **ADV MYBURGH SC:** Yes. And I do not want to re-traverse that ground. Paragraph 9:

“In addition to the KPMG/Nkonki report the board sought legal advice from Deneys Reitz Attorneys. Deneys Reitz advised the board that it will be in the best interests of Transnet to settle the matter than

get involved in protracted litigation with consequent financial disadvantages. The board received this advice in good order, took into consideration other reports at the time of irregular expenditure in making a decision to reinstate Mr Gama.”

I have already questioned you extensively about the Deneys Reitz advice, I am not going to re-traverse that. Then you now say for the first time that:

10 “The board further regarded the expertise that Mr Gama possessed as critical to Transnet Freight Rail and that his departure will have a marked impact on the organisation. This board considered was invaluable.”

Is that right?

MR MKWANAZI: That is correct, yes.

ADV MYBURGH SC: I think as you have candidly answered in response to questions by the Chairperson that these were not the expertise that you needed at Transnet, a Chief Executive who blindly signed a document allowed a
20 fraud to be perpetrated on the company, correct?

MR MKWANAZI: Chairman has already touched on that.

ADV MYBURGH SC: Yes, exactly.

MR MKWANAZI: In some of his remarks, yes.

ADV MYBURGH SC: And then paragraph 11:

“Circumstances prevalent at the time and

foreseeable tumultuous effect that Mr Gama's dismissal would have had on the operation of Transnet Freight Rail required the board put more focus on the stability of the group."

This is also a new issue it would seem to me to be dealt with that the board – but what are we saying here, that despite the fact that he was guilty of very serious misconduct you decided to take him back in the name of stability of the group.

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

ADV MYBURGH SC: But the main reason that you took Mr Gama back, you have said repeatedly, is because there was a slight doubt that you might not win at the bargaining council, correct?

MR MKWANAZI: That is also correct, Chair, yes.

ADV MYBURGH SC: Yes. And then you say:

"The board, having considered these factors, resolved that the reinstatement was in the best interest of the organisation."

20 You deal with retrospectivity of reinstatement and a final written warning.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You say at paragraph 13:

"As stated in paragraph 7 above the board was duly advised by Deneys Reitz Attorneys that litigation is

always uncertain and there is a risk on either side. Further, the board was advised that it might make sense to settle the matter rather than being involved in a drawn out and costly legal battle.”

Then you say at 14:

“Having converted the sanction of dismissal to a final written warning the board could not have dated the conversion to any other date other than the original date of the sanction being the date of
10 dismissal.”

I think we have traversed the fact that the final written warning had already run its course upon Mr Gama’s reinstatement.

MR MKWANAZI: Yes.

ADV MYBURGH SC: You say:

“I cannot speculate on what the arbitrator would have likely or unlikely awarded considering the uncertain nature of litigation as referred to above as advised by Deneys Reitz.”

20 Again your point, that there was [indistinct] 17.08 out but nothing else.

MR MKWANAZI: That is correct.

ADV MYBURGH SC: Then under the heading:

“Role played by any member of cabinet.”

You say:

“I confirm that neither the settlement nor the terms on which the settlement was made were influenced by any member of cabinet at the time. Minister Gigaba merely requested the board to review the fairness of the dismissal of Mr Gama.”

We have traversed that already repeatedly.

MR MKWANAZI: That is correct, yes.

ADV MYBURGH SC: Then in relation to costs you say:

10 “The board was at all material times supported by the Group General Manager Legal Services in the finalisation of the settlement agreement.”

That is Mr Mapoma, correct?

MR MKWANAZI: That is correct, yes.

ADV MYBURGH SC: And at 19:

“The board would have expected the General Manager Legal Services having been instrumental in the drafting of the agreement to have flagged any legal challenges associated with the payment of costs, if any.”

20 And I have already questioned you about that.

MR MKWANAZI: Yes.

ADV MYBURGH SC: And in fact put to you that Mr Mapoma said that he raised the very issue with you and I have put to you what he says was your instruction. Is there anything else you would like to add then, Mr

Mkwanazi?

MR MKWANAZI: No. Advocate, no, nothing except that I did indicate that I did not instruct Mr Mapoma, in my interpretation to do something that is almost illegal in terms of what he claims, to pay Gama's lawyers, the way they interpreted that agreement. To me, that I did not instruct Mr Mapoma to do that.

ADV MYBURGH SC: Thank you, Mr Chairperson, we have no further questions for this witness.

10 **CHAIRPERSON:** Thank you. Now, Mr Mkwanazi, were you, as a board, concerned that if you did not settle the matter of Mr Gama's unfair dismissal claim on the terms on which you settled it, something would happen that would not be in the interests of Transnet? Is there something you were concerned would happen that would not be in the interest of Transnet?

MR MKWANAZI: Chairman, I am not aware of something that could have happened. No, I am not aware, Chairman.

20 **CHAIRPERSON:** Now if you refused to include a contribution of costs in the settlement agreement in relation to the High Court matter.

MR MKWANAZI: Yes.

CHAIRPERSON: What did you think was the worst thing that could happen to Transnet if you stood your ground and told Mr Gama and his lawyers we are not going to make

any contribution to your costs in regard to the High Court application?

MR MKWANAZI: Chairman, I do not think anything would have happened to Transnet.

CHAIRPERSON: Do you think Mr Gama would still have signed the settlement agreement or do you think he would have proceeded to go to the arbitration?

MR MKWANAZI: Chairman, I do not know if he would have signed at the time but – and would have proceeded to
10 arbitration but based on the post events that we are observing, had he – had Transnet refused to deal with certain things and then say had he gone through the Transnet bargaining council process, different outcomes could have been on the table, ja.

CHAIRPERSON: But like what outcome do you think could have happened? In other words, you know when litigants settle a matter that is standing in court or in arbitration, each party weighs up its risks and its prospects. If I am the employer and I do not want the employee to be
20 reinstated, I look at the prospects that I could lose and the employee could be reinstated. Okay?

MR MKWANAZI: Yes.

CHAIRPERSON: And I say well, we will give you an *ex gratia* payment or compensation or 12 months, equivalent to 12 months salary. If you take that we call it quits.

Then, from the employer's side, I know that what I am getting is that the employee is not coming back because I think it is a bad thing for my company for the employee to be brought back, okay?

Now if you are an employee, you want your job back, you push for that but if the employer resists you might end up saying okay, I can take money because you say you think if I insist and the employer refuses and we end up in the arbitration, I might get nothing. Okay?

10 **MR MKWANAZI:** Yes.

CHAIRPERSON: So what is it, if there was anything, that the board of Eskom – you and the board of Transnet were fearing could possibly happen if you did not agree to contribute to Mr Gama's High Court legal costs?

MR MKWANAZI: Chairman, maybe let me put the issues a little bit differently. While Mr Gama was on suspension, etcetera, Mr Tau Morwe was Acting CEO and while Mr Tau Morwe was acting CEO, that business frankly was not doing very well either in terms of operations, etcetera. If I
20 recall at the time we almost had derailments every week at the time.

So then we somehow knew that we still want this executive back to come and fix some of the things that were not going well in that particular business unit.

CHAIRPERSON: So you feared that if you did not reach

agreement with him you will not have him back and therefore would not have somebody to fix those problems at TFR?

MR MKWANAZI: Chairman, there would have been somebody else, yes.

CHAIRPERSON: So that is how badly you wanted him back?

MR MKWANAZI: Chairman, the situation was not looking good in terms of operations.

10 **CHAIRPERSON:** And so is that why then you were prepared to contribute 75% of his legal costs in regard to the High Court? Is that the reason? Because it is an extraordinary thing to do that, what you and your board did.

MR MKWANAZI: Chairman, yes, it is extraordinary but the interpretation I am seeing now is not what was intended. So there is something not right with that implementation, yes.

20 **CHAIRPERSON:** Well, what were these – what was this special expertise or something that you and your board thought Mr Gama had which you thought that would add value to Transnet despite what we have been talking about in terms of what he had done and the type of CEO he seems to have been in terms of what he was found guilty of?

What is it that seemed so special that you did not think you could get if you advertised his position, if you did not take him back, you advertise his position and asked the public, people who qualify, to apply for his position?

MR MKWANAZI: Chairman, we could have gone that route of getting somebody new but here was this experienced individual particularly ...[intervenes]

CHAIRPERSON: You could not somebody more experienced?

10 **MR MKWANAZI:** ...many years in Transnet and he should have got in running to try and fix the problems that we were observing as that new board.

CHAIRPERSON: But you could get somebody with even better skills, somebody who would make sure that they read documents before they signed them and did not put Transnet at great risk by signing documents without reading them.

MR MKWANAZI: Chairman, I agree with you there.

20 **CHAIRPERSON:** Now after you had reinstated Mr Gama, I understood you or the documents to suggest that the board instructed Mr Brian Molefe, who was CEO then, Group CEO, to discipline various members, management members and staff who may have done something similar to what – well, let me not something similar and say who had deviated from procurement processes, is that correct?

MR MKWANAZI: That is correct, Chairman.

CHAIRPERSON: And there were many of these, is that correct? [inaudible – speaking simultaneously]

MR MKWANAZI: There were many, Chairman, but do not forget as a board we could only focus on what you would call the Exco then.

CHAIRPERSON: yes.

MR MKWANAZI: Not all the people involved.

CHAIRPERSON: Yes but in terms of Exco there were
10 some Exco members.

MR MKWANAZI: There were two, if I recall, Chairman, yes.

CHAIRPERSON: One of them was it Mr Maharaj or not really?

MR MKWANAZI: Yes and the other one was Ms Moira Moses.

CHAIRPERSON: Mr Moses, Ms Moses?

MR MKWANAZI: Ms Moira Moses.

CHAIRPERSON: Yes, yes. That Mr Maharaj, is that the
20 same one who had been asked by Mr Wells to make a decision whether to charge Mr Gama or not?

MR MKWANAZI: Chairman, yes, it is the same gentleman, yes.

CHAIRPERSON: Yes. Now their – the irregularities or deviations for which they were to be charged, did they

occur prior to the board's decision to reinstate Mr Gama, condone his transgression, bring him back or did they happens after the board had reinstated Mr Gama?

MR MKWANAZI: Chairman, their transgressions happened between 2005 and 2010. That was before the board reinstated Mr Gama. They are old transgressions, Chairman, very, very old transgressions.

CHAIRPERSON: And so in regard to other staff members who were not in Exco, the same was going to apply, those
10 who had transgressions that had happened a number of years before would also be judged.

MR MKWANAZI: Chairman that is correct but my recollection is that one particular individual the CEO did deal with, I don't know in what form, but his name is Mr Gary Peter and there were others that then the Board had expected Mr Brian Molefe to continue dealing with in terms of disciplinary processes. I do not have feedback on the rest Chairman, I would have to go back to some other notes to find out who the rest were and also I would have
20 to go back and ask the organisation as to what did Molefe do about this.

CHAIRPERSON: Oh, did he not report back at some stage while your board was there, while you were there, because you only left at the end of 2014, so this was 2011, so he must have reported back to you.

MR MKWANAZI: Chairman he did report to the Board on what I can call the two Exco members, then the Board then left it to him to deal with the rest, and now I don't think as a Board we got a summary of what he had done with the rest, whatever the number might have been.

CHAIRPERSON: I understand from what I have read that with regard to Mr Maharaj he resigned when this happened, is that correct?

MR MKWANAZI: That is correct but then I don't know the
10 detail because Mr Maharaj was interacting with Mr Brian Molefe. I don't know the dynamics.

CHAIRPERSON: And Ms Moses do you know what she did, I think she also resigned, or did she not?

MR MKWANAZI: She also resigned but again I don't have the detail of the dynamics between Mr Moira Moses and Mr Molefe at the time.

CHAIRPERSON: Yes. Now this is quite strange to me what you and your Board did, as I understand it insofar as you and your Board were concerned, or may have been
20 concerned that for a number of years there may have been a lot of transgressions in terms of deviations by Exco members and other senior managers, and that you wanted to – and no action had been taken. I would have expected that if you were feeling sympathy for Mr Gama you would then effectively grant condonation, or maybe I shouldn't

use the word condonation, so to speak or give everybody who had done that or that period and say we don't know, it looks like there has been confusion, we don't know what has been going on, but from now on, from a certain date here is a directive, from now on nobody can tell us they don't know what the position.

From now on if you deviate this will be the consequences and then you from then on anyone who commits these deviations can be dealt with, but it appears
10 like with regard to Mr Gama you said there were deviations nothing had been done, so he must come back, and then you gave him an ineffective warning and then you said others who had done deviations also during the same period you said Mr Molefe charged them.

That seems a – it is like this was a dispensation for Mr Gama only, the rest they must face the wrath of the Board.

MR MKWANAZI: Chairman I wouldn't say the rest must face the wrath of the Board because we did issue a
20 memorandum for the organisation at the time I could have signed it, talking about these condonations and irregular modifications of contracts and I did issue a memorandum putting a stop to that, and also I suspect in that memorandum I did indicate that any future condonations had to be approved by one individual, who is Brian Molefe,

because there was confusion of too many people thinking that they had authority to condone. Naturally I think the PPM, the Procurement Procedures Manual, might have allowed that and as well then Chairman that Board did deal with sort of condonations of big ticket items which would have been approved by that Board before in terms of the authority that approved the initial contract. I did mention earlier the VAE Contract, I did mention a few others, other appointments and yes I did mention a few, which then
10 came back to the Board and the Board did condone those.

CHAIRPERSON: You see when you and your Board talk about how you reinstated Mr Gama you create the impression that you sought to uphold the principle of consistency in discipline, you say there were so many people how had done the same thing and had not been disciplined and Mr Gama was disciplined, it looks like he was singled out. You then condone his transgressions but then instead of condoning the transgressions of others you say to Mr Brian Molefe go for them and one of those is Mr
20 Maharaj who had brought charges against Mr Gama, that seems very, very, very, strange, and he resigns. Where is the consistency, you just said Mr Gama must get an ineffective final warning, why don't you say to the others, to Mr Brian Molefe okay give a final written warning to everybody who in the past did the same thing. Why don't

you say that, in that way then you treat them like Mr Gama?

MR MKWANAZI: Chairman in a different way we are actually saying that to Mr Molefe, we were saying let all these condonements come to your office and you then decide on what steps to take post them being submitted to you and there was a lot that came in and I am not sure now of those, I think one of those would have been a repeater for instance where I know that he might have got a letter
10 of warning please don't do this again.

Now it was up to Mr Molefe then to decide on the rest including Mr Maharaj, including Ms Moira Moses but yes we did elevate others to then say there must be consequences for people, they must not do it again etcetera, etcetera, but I do not recall actually instructing that people then should be fired. I would always indicate let them submit all the condonations and take a view whether you want to condone, want to give a written warning, final written warning and that was the discretion
20 that was Mr Molefe was given.

CHAIRPERSON: Yes but if he fired anybody in that process that would not have been inconsistent with what you asked him to do, he could give a warning, he could fire, because you didn't say to him discipline them but don't fire them because we haven't – we have reversed Mr

Gama's dismissal. You left it to him what sanction he would give.

MR MKWANAZI: Ja.

CHAIRPERSON: But in regard to Mr Gama you have chosen that dismissal was not the right sanction.

MR MKWANAZI: Chairman your observation is correct because the guidance that he got from the Board was not that specific but there was a board resolution which was done on how he should deal with the rest of these irregular
10 procurements that were emerging.

CHAIRPERSON: And you would consider I would assume that the perception among the management and staff of what they were hearing, the perception they got arising from the decision of the Board must have been terrible because particularly for Mr Maharaj who was charging Mr Gama. Mr Gama the Board is saying Mr Gama you must come back, get full back pay, get all your benefits, this sanction recommended by the independent chairperson of the inquiry is no good, you deserve a final written warning
20 but that final written warning mustn't even start – mustn't be there when you return to work, it must have lapsed so he as all of this and then the next he hears that the same board has said to the Group CEO charge the others.

It must have felt like look we must go, obviously Mr Gama is very influential with this Board, Mr Gama is the

one who was criticising us publically for putting in charges against him, although he has conceded now that he was guilty and we were justified in bringing charges but we must be charged now, so he resigns and Ms Moses resigns.

You would understand that perception if it happened?

MR MKWANAZI: I fully understand Chairman but there is this example of Mr Gary Peter who – I don't recall now the detail but he also was party to some irregular contract but
10 he was not dismissed, between I am not sure how they handled it, but between Anoj Singh and Mr Brian Molefe they dealt with this through Gary Peter, but I am aware that he was not dismissed.

CHAIRPERSON: Okay now the Board, you and your Board should not have reinstated Mr Gama, isn't it? No you have had the benefit of looking at the whole thing properly, do you not come to that conclusion.

MR MKWANAZI: Chairman in hindsight I come to that conclusion because the three key matters that the process
20 of Advocate Antrobus looked into and came to decisions on. The last one which was charge 4 it is serious misconduct, if that matter had been elevated properly to that Board I would have also indicated that a sanction of a dismissal must stay and again in hindsight even on the other two matters which at the time looked like

procurement related they were not, they were actually misconduct and if that part of it had been discussed thoroughly by the Board I think that Board would have arrived at different decisions.

CHAIRPERSON: Yes. Even if for some reason he was reinstated what would you say to the proposition that he should not have got, he should not have been given full back pay, he should be – if he was to be reinstated at all, he should not have been given full back pay as if he was
10 not guilty of anything, as if he was innocent, would you not say that?

MR MKWANAZI: I concede Chairman yes.

CHAIRPERSON: Yes, would you also not concede that you and your Board should never have undertaken to pay any of his high court legal costs, because litigation was done and he had lost, he should not have brought that application against the ...[intervenes]

MR MKWANAZI: I concede that too Chairman yes.

CHAIRPERSON: Yes, well would you also not concede
20 that even with regard to his labour matter, the unfair dismissal matter, you should not have offered or undertaken to pay any of his costs because he himself accepted he was to blame also, he shared a certain amount of blame, he accepted that he was guilty of three acts of misconduct, would you not consider that?

MR MKWANAZI: I would consider that Chair.

CHAIRPERSON: Yes. Now would you not concede also that at some stage you should have gone back to Mr Todd and said proceed with the steps to recover Transnet Legal costs from Mr Gama?

MR MKWANAZI: ...[Indistinct – record distorted] yes we should have.

CHAIRPERSON: You should have gone back to him.

MR MKWANAZI: Ja, because he had made a convincing
10 submission.

CHAIRPERSON: Yes, now of course what this means is a lot of taxpayers' money went to Mr Gama and his attorneys, firstly in terms of the back pay for nine months, secondly in terms of the legal costs for the high court and the legal costs for the unfair dismissal matter, which at least now you are able to say should not have been offered. Now would there be anything unfair I know that there are other members of the Board who might still come and testify and make representations but you are – you
20 have given your evidence and you have dealt with issues and where you have dealt with it you have a certain realisation in regard to certain issues that you might not have heard before, wouldn't you – would you say there would be anything unfair if at the end the Commission were to recommend to the President that steps should be taken

to recover from members of the Board who supported the settlement this money that where you and I agree should not have been offered to Mr Gama by the Board.

MR MKWANAZI: Chairman I would not be opposed to that and because there are certain levels of recover and also of certain ...[indistinct – distorted] direct involvement on some of these issues because it goes even further Chairman to the point of saying what about all these monies which was paid to Langa's Attorneys in some funny way but ja.

10

CHAIRPERSON: Yes, yes, because – and of course there is the question of I mean Mr Myburgh said that in terms of back pay for Mr Gama and legal costs I think he said we are looking at about R17million Mr Myburgh?

ADV MYBURGH SC: That is correct yes.

CHAIRPERSON: Ja, does that include Eversheds part of the legal costs?

ADV MYBURGH SC: Yes.

20

CHAIRPERSON: So back pay and legal costs we talk about R17million but of course there is the R426 000 which was not included there which Mr Todd was trying to recover from Mr Gama so you know all of those amounts you know taxpayers say you know that money could be help in somewhere, it should not have gone to Mr Gama in the light of all of this evidence, but I think you have made your

point that you understand the situation. Is that right?

MR MKWANAZI: Yes Chairman.

CHAIRPERSON: Okay anything arising Mr Myburgh?

ADV MYBURGH SC: No Mr Chairperson, thank you.

CHAIRPERSON: Okay alright. Thank you very much Mr Mkwanzazi for making yourself ...[intervenes] yes?

MR MKHWANAZI: Is it possible that you could perhaps indulge me just to capture the main points, I think Mr Mkwanzazi was presenting to the Commission for the past
10 two days.

CHAIRPERSON: You would like an opportunity to say something?

MR MKHWANAZI: Yes Chair I would really like that, if I may Chair.

CHAIRPERSON: Okay alright, okay do that yes.

MR MKHWANAZI: Alright Chair it is really true today I have learnt that it is very true that there is a lot of clarity in hindsight as we have seen based on the evidence that Mkwanzazi has given and sometimes you run the risk of
20 having that hindsight to you know make you know determinations that will give an impression that you know things were normal at the time of ...[indistinct – recording distorted] but I would just like to touch on a few things Chair that the role of the Board in terms of King 4 is to provide a direction to the organisation and what happened

here is that in 2010 the ...[intervenes]

CHAIRPERSON: Sorry Mr Mkhwanazi to the extent that what you may be wishing to say might fall under argument, we would make arrangements for arguments at the right stage, so if that is what you had in mind we can leave it for when you present argument.

MR MKHWANAZI: Okay Chair, that's fine, I can deal with that, thank you very much.

CHAIRPERSON: Okay, alright fine. Thank you very much
10 to you and Mr Mkwanazi the witness and to you Mr Mkhwanazi the lawyer and for all the cooperation and thank you Mr Mkwanazi for availing yourself to come and testify before the Commission and provide explanations to the best of your ability on some of the decisions taken by your Board, we appreciate it and if a need arises, I think there probably will be another occasion when you need to come back on other aspects but thank you very much we appreciate the fact that you have made yourself available. Thank you very much.

20 **MR MKWANAZI:** Thank you Chair.

CHAIRPERSON: We are going to adjourn, it is nearly twenty five past four, we will adjourn and then tomorrow we will continue with evidence relating to Transnet, who is our witness tomorrow Mr Myburgh?

MR MYBURGH: Well Mr Chairperson on the assumption

that we cannot reach an agreement on the 33's in relation to Mr Mhlanka then we will start our evidence in respect of the Manganese Expansion Project with the first witness being Mr Henk Bester.

CHAIRPERSON: Okay. That's fine but if you reach agreement then it would be Mr Mhlanka.

ADV MYBURGH SC: Yes we will fit him in, we will juggle around but it will be one or the other.

CHAIRPERSON: Okay no that's fine. We will then
10 adjourn now and tomorrow we start at ten as usual.

We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 20 OCTOBER 2020

