

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

**13 JANUARY 2021**

**DAY 327**



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

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

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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**PROCEEDINGS RESUME ON 13 JANUARY 2021**

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

**ADV SELEKA SC:** Morning Chairperson.

**CHAIRPERSON:** Are you ready?

**ADV SELEKA SC:** Chairperson we are ready. Chairperson the hearings today is scheduled for Mr Anoj Singh the former CFO of Eskom. Mr Singh is represented legally by Counsel and an attorney and maybe they could place  
10 themselves on record.

**CHAIRPERSON:** Yes you may do that from where you are if you are able to. Yes.

**ADV VAN DEN HEEVER:** Good morning Chairperson.

**CHAIRPERSON:** Good morning.

**ADV VAN DEN HEEVER:** Members of the commission. It is correct my name is Anneline Van Den Heever I am an advocate of Johannesburg Bar and a member of the Legal Practice Council. I am here on instructions of Tshepho Mathopo of Mathopo Attorneys and we represent Mr Singh.

20 **CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** I will in due course Chairperson allude to when we actually took over as a team.

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** And the difficulties we encountered.

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** Now we are appreciative Chairperson of the fact that we did not comply with your directives. However...

**CHAIRPERSON:** Yes hang on. Let us just – you will get a chance to address me fully. I just wanted you to place yourselves on record then Mr Seleka can continue and then we take it from there.

**ADV VAN DEN HEEVER:** As it pleases.

10 **CHAIRPERSON:** Okay alright.

**ADV SELEKA SC:** Thank you Chair. I am sure my learned friend is at pains for me to draw to your attention that they have served – not served but handed us up an affidavit this morning which deals with the issue my learned friend was seeking to raise with you now.

But what I will do is to have Mr Singh take the oath.

**CHAIRPERSON:** I think what you should do is tell me what ...

**ADV SELEKA SC:** Okay.

20 **CHAIRPERSON:** The legal teams' plans are and then – in terms of plans for today as well as what evidence Mr Singh is supposed to – what matters Mr Singh is supposed to cover in his evidence and the questioning. And then after that you can tell me what Counsel for Mr Singh's attitude is and then at that stage we can allow her an opportunity to

address me.

**ADV SELEKA SC:** Thank you Chairperson. Chairperson from the side of the commission the hearing today was scheduled in order for Mr Singh to deal with matters that pertains firstly to his secondment from Transnet to Eskom and after arriving there to deal with matters that then unfold while he is at Eskom.

Those matters in a sequential order of events in a chronological order will include matters of contracts given  
10 to McKinsey and Trillian and I use contracts given in a loose sense. But he can give us insight into that and give the Chairperson evidence into that.

And then you have transaction relating to Tegeta that has been the focus of the teams' attention lately. And that is – is related to the acquisition of Optimum. The events leading up to Eskom making a decision in regard to a pre-payment of R1.68 billion.

A submission was prepared which from the evidence it is apparent that it was signed by both Mr Singh and Mr  
20 Koko and Mr Singh can testify on that and the purpose for that submission and the decision that was made.

From there Chairperson we have the submission also made in regard to the R659 million pre-payment. Mr Singh could also give the Chairperson what he knows about that and the purpose for the decision being made in

regard to that pre-payment.

He might address the Chairperson also...

**CHAIRPERSON:** I think you might wish to bring the microphone closer to you so that your voice will be louder.

**ADV SELEKA SC:** He might address the Chairperson also in regard to the issue of the R2.17 billion penalties that Eskom was seeking to enforce against Optimum and how that matter ultimately gets – got to be dealt with in regard to Tegeta.

10           The – there is an issue of the guarantee that pre-payment of R1.6 billion gets to be converted the next day into a guarantee. Mr Singh from the evidence played some role in that regard and we are expecting him also to – to testify on that before the commission.

          So from our side we are ready to lead his evidence on all those issues and we have a particular order and the main focus is the Tegeta but we know that since last year after Mr Singh was served with a 10.6 directive Chairperson an affidavit directing him to file an affidavit on  
20 matters set out in the directive with documentation provided to him relative to those matters.

          The affidavits that were due according to the directives on the 4 September 2020 have not been provided. I believe in the affidavit now submitted this morning my learned friend will address you on the reasons

for that.

There is a letter from us which is the last annexure I saw in that affidavit. I only wish to refer the Chairperson to that letter.

My learned friend can do so as well but I think as for me the nub of the issue.

So what we have in the file for Mr Singh absent his affidavit is his submission – written submission to the Parliamentary Portfolio Committee.

10 That submission Chairperson was – is dated 5 December 2017. So that is how far back that submission was prepared.

**CHAIRPERSON:** Did it cover all the matters that he has been told he needs to testify about?

**ADV SELEKA SC:** It has...

**CHAIRPERSON:** Or those that were in the 10.6 directive?

**ADV SELEKA SC:** It has covered the Tegeta transactions.

**CHAIRPERSON:** Hm

20 **ADV SELEKA SC:** The Tegeta matters both the 1.6 well I say the Tegeta because it will be explained how these decisions were made.

**CHAIRPERSON:** Ja yes.

**ADV SELEKA SC:** It has covered that pre-payment R1.6 billion. It has covered the pre-payment of R659 million. It has covered the McKinsey and Trillian relationship. I am

not sure whether Mr Singh covered his secondment but I am sure he would – he would deal with how he was sent to Eskom.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** So those matters are covered.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** The main issues. And then we also have the transcript of Mr Singh's testimony at the Parliamentary Portfolio Committee which is I think Mr  
10 Singh testified on the 23 January 2018. We have that.

We have shared that with our learned friends and indicated that that is what we will rely on at the present stage.

**CHAIRPERSON:** Yes. Okay. That is where you are okay.

**ADV SELEKA SC:** That is the position from our side.

**CHAIRPERSON:** The Counsel for Mr Singh. I think you can move to the podium because I think you may have quite some substantive issues to deal with. They will sanitise first and then you can move to the podium.

20 **ADV VAN DEN HEEVER:** Chairperson.

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** As already stated for the record I appear on behalf of Mr Singh. We prepared an affidavit a relatively comprehensive dealing with all the issues since the directive were issued.



I understand the original does form part of the file I would beg leave to hand up a copy or if you are in possession of the copy I wish to take you through the affidavit.

**CHAIRPERSON:** Ja, no I do not think I have – I do not think I have got a copy.

**ADV VAN DEN HEEVER:** I am handing – I think it is the original. Oh this is a copy. Chairperson let me hand you mine at this point because it is stapled together. I think it  
10 would be better for you to follow in that regard.

**CHAIRPERSON:** Okay. Tell me what the purpose of this affidavit is?

**ADV VAN DEN HEEVER:** Chairperson the purpose of the affidavit is set out in paragraph 5 page 2. May I take you to that?

**CHAIRPERSON:** Paragraph 5 you said?

**ADV VAN DEN HEEVER:** Yes it is on page 2. We state here:

20 “The purpose of this affidavit to set out and give reasons to the Chairperson the Honourable Judge President Zondo – supposed to be Deputy of the Judicial Commission of Inquiry to allegations of state capture, corruption and fraud in the public sector regarding my failure to comply

with the two directives issued to myself in terms of Regulation 10.6”

So this is ...

**CHAIRPERSON:** You might just wish to raise your voice or bring the microphone closer.

**ADV VAN DEN HEEVER:** I will do so.

**CHAIRPERSON:** Ja.

**ADV VAN DEN HEEVER:** The – we then go in paragraph 6  
Chairperson and we refer to the directives and the dates  
10 on which they were issued. And in paragraph 7 state:  
“It is common cause that we did not ...”

**CHAIRPERSON:** Well before you proceed why is this explanation brought at the last minute today when he is – he has had ample time to have done so?

**ADV VAN DEN HEEVER:** Chairperson if I go through the affidavit you will understand to a large extent why it is brought at this point in time. And in due course I will address you on various issues that arose during the course of an exchange of communication and finally this  
20 culminated as I said and this will come in due course in a virtual or a Zoom meeting that was held between ourselves and the legal team for the commission including the investigators and at that point we explained to them what our position is.

And all of that Chairperson is contained in our

affidavit. I think it is quite important that I...

**CHAIRPERSON:** Well let us start with that because it is inconvenient that I should be given this affidavit on the morning of the day when he is supposed to testify.

**ADV VAN DEN HEEVER:** Chair.

**CHAIRPERSON:** About his explanation. That could have been dealt with earlier so that by today we would have had certainty about what is happening.

**ADV VAN DEN HEEVER:** Indeed.

10 **CHAIRPERSON:** And if for argument sake I have come to the conclusion after seeing his affidavit maybe two weeks ago that I will allow him not to testify today. We could have made arrangements to have another witness to use today. But when the affidavit is brought on the morning of the day when he is supposed to testify it is important that I know whether there is a proper explanation why it is brought so late.

**ADV VAN DEN HEEVER:** Indeed I take note of what you say Chairperson. The situation is that the events that led  
20 us to filing such a late affidavit has its roots in the – the events that unfolded visa vie what our client needed to do.

I think there was an intention at some stage that we would try and be in a position today to present you with an affidavit and give evidence.

But as you will see from the comprehensive affidavit

it was impossible to do so. We tried Chairperson to – as I say to be here today – that was our wish but for the reasons set out in this affidavit it turned out that we were not in a position to get to this point

In fact we raised the issue as I have already stated on Friday with the legal team. There is various communications and I will refer you to that. We have dealt with it in the – in our affidavit.

But it deals with the predicament if I can call it  
10 which my client finds himself in. So this is in no ways Chairperson.

**CHAIRPERSON:** I think what we should do is – it is going to be faster if we adjourn. Let me go and read this affidavit and then when I come back then we can have a proper engagement. Rather than me reading it as you continue to address me.

**ADV VAN DEN HEEVER:** We are quite happy that we...

**CHAIRPERSON:** That is not satisfactory.

**ADV VAN DEN HEEVER:** We do that Chairperson. I must  
20 just – I might just add and this is again not as an excuse we did last night send – yesterday afternoon late a draft through and we undertook to give the signed one with the annexures this morning. As I said I think it is a good suggestion by yourself Chairperson to go through it and we can then engage in the content of the affidavit.

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** But just in short Chairperson so that you understand where we come from in this. Our client's is not in a position to give evidence today for the reasons set out herein. He was also not in a position to file his affidavit as per the directive because of the reasons set out herein.

So we have got the affidavit and we refer to the various annexures that is email exchanges, requests for  
10 further documents in the annexures.

**CHAIRPERSON:** Ja, no, no.

**ADV VAN DEN HEEVER:** Just so that you understand this.

**CHAIRPERSON:** That is fine let me go and read it. We are going to adjourn for fifteen minutes I think that should be enough for me to read but if I finish earlier then we will resume earlier that fifteen minutes. Okay we adjourn.

**REGISTRAR:** All rise.

#### **INQUIRY ADJOURNS**

#### **INQUIRY RESUMES**

20 **CHAIRPERSON:** I have read this affidavit. I have not looked at the – I have not read the annexures but the deponent deals with the gist of what was in the annexures to a large extent, in his affidavit.

Now that I have read it. So what do you say or what do you want to say about it?

**ADV VAN DEN HEEVER:** Chairperson, what we are requesting of yourself is that we be afforded an opportunity, having regard to the content of our affidavit with all the annexures, to file a comprehensive affidavit with the Commission.

We believe in doing so, we will curtail any evidence that needs to ...[intervenes]

**CHAIRPERSON:** Well, we will lose today. That is for sure.

**ADV VAN DEN HEEVER:** Yes, and ...[intervenes]

10 **CHAIRPERSON:** The Commission simply does not have time left. There is very little time left. There are many witnesses and implicated persons who must still give evidence. It is just very, very difficult to allow any day to be lost.

**ADV VAN DEN HEEVER:** Chairperson, we understand that but we verily believe, once the Commission has sight of our client's affidavit ...[intervenes]

**CHAIRPERSON:** That affidavit should have been brought a long time ago. And I have read what Mr Singh says here and  
20 I am not convinced that he gives an acceptable reason for not filing – complying with the directives.

**ADV VAN DEN HEEVER:** With the greatest of respect Chairperson, we believe that there is good reason why he did not do so and it relates to, first of all, the change of legal teams. You will then notice, once Mathopo Attorneys got

onboard, they immediately corresponded with the Commission.

And throughout, you will see Chairperson, there is communication. We did not sit back and just let it be. We ...[intervenes]

**CHAIRPERSON:** Well...

**ADV VAN DEN HEEVER:** We communicated, explained our position to the Commission and almost in ...[indistinct] [00:02:32] said to them this is the problems that we felt. And  
10 specifically – I think if you take note of what our clients says, Mr Singh says in the beginning. He wants to play ball with the Commission if I can look – if I can refer ...[intervenes]

**CHAIRPERSON:** Well, his – the history of his conduct does not show that.

**ADV VAN DEN HEEVER:** That is an inference to be drawn Chair.

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** But take it from us as the legal  
20 team and from our client, we place on record, we want to assist the Commission. And the client verily believes, as he set out here, that the best way to assist the Commission is to give the Commission a comprehensive version. And that comprehensive version ...[intervenes]

**CHAIRPERSON:** No, no, no. Well, you – he would be

seeking to be treated differently from how other people have been treated. We – the way the Commission has dealt with issues from the beginning is that people who may have a number of matters to testify about and be questioned about, they get called for a specific matter at a particular time or specific matters.

And they are told: For now, you are just coming to give evidence about A, B and C. We will ask you to come back later and deal with D, E and F. And almost, without  
10 exception, everyone has cooperated with that.

That is why there are many witnesses who have come to the Commission to give evidence about other matters. So all that is required and has been required of Mr Singh, is that today he comes to testify only about the matters that he has been told about.

And he has had ample time knowing what those matters are. He would have been given, even before the directives and even before the summons, he would have been given Rule 3.3. notices in regard to the matters.

20 Of course, also one cannot ignore the fact that there is no way that somebody like Mr Singh could have thought that this Commission would finish his job without calling him to come and give evidence.

So he has known from the inception of this Commission – it was established early in 2018 – so he has had three



years of knowing that in all probability, at some stage or another, he would be called.

And he knew what matters are likely to be raised with him. And he could easily have made sure that if and when he is called, he is ready.

**ADV VAN DEN HEEVER**: Chairperson, may I address you on a few of the issues that you have raised?

**CHAIRPERSON**: Yes, yes.

**ADV VAN DEN HEEVER**: Now first of all. The summons we  
10 received in December.

**CHAIRPERSON**: Ja

**ADV VAN DEN HEEVER**: And you would have noticed from the affidavit, Mr Mathopo immediately dealt with it.

**CHAIRPERSON**: Ja.

**ADV VAN DEN HEEVER**: And I do not want to go, again, into the details but the fact of the matter is. Only on Friday afternoon did we understand and we were given – and I do not want to go into an off the record discussion but it is common cause.  
20

We were at that point informed exactly what we were going to be called about. That it is the Tegeta issue. And we, at that stage, played open cards with the legal team and the investigators during this.

And we have explained to them, we have got issues in the following things. We have not had the benefit, one, of

being presented with a reference style. We have taken note of the way the Commission works and when witnesses give evidence, they refer to a Reference File and they refer to documents.

In order for us, and in fairness for us, to prepare we need that. So then the Commission, I think, late Friday or early evening forwarded to us, not the updated but the documents they had electronically. We also, at that stage, pointed out to them.

10 Insofar as you want to lead our client's evidence with reference to the Portfolio Committee. We want to place on record, and there is documents. It is documented. But our client has not received the transcript of his evidence that he gave to the Commission.

And we explained to him, and you will appreciate this, that at the time our client was no longer with Eskom. Written submissions were prepared *in vacuo*. In other words, relying on memory, not the benefit of certain documents, etcetera.

And on that basis, the client also gave evidence there.  
20 You will appreciate, for him now to from memory deal with issues that he gave evidence on, I think the date was in January of 2018. It is just not fair.

He needs an opportunity to go through his evidence and deal with the issues that arose there. To that extent, I think yesterday afternoon, quite late, we finally got an electronic

version of the evidence.

And you will appreciate Chairperson, and forgive me for repeating this, we dealt with it. We constantly asked, we need it. It is important for us to have it. We need it to comprehensively deal with the issues raised.

So you will understand that this is not a question of not having prepared all along. As we have stated. We worked on an affidavit. There was a draft which we constantly had to amend because of the new evidence that came up. And  
10 we ...[intervenes]

**CHAIRPERSON:** Ja. You were required as at a certain date to give your version based on what was available at the time. Obviously, if subsequently something else cropped up that needed, that you supplement. A supplementary affidavit could be put in. But all you would be required to is, to give your version to the best of your knowledge and belief and your recollection.

**ADV VAN DEN HEEVER:** Ja, but Chairperson, again, you need to understand the reason why the client was  
20 apprehensive to do that because he once before found himself in a position where he had to give evidence and it led to difficulties.

He deals with it in his affidavit, where he has not had the benefit of documents, other people's input, et cetera, to give a fair, reasonable and truthful explanation at the time.

And for that reason, he explains to the Commission: I was apprehensive to *in vacua* just deal with – because Tegeta, you will recall, is Annexures A to G. So just ...[intervenes]

**CHAIRPERSON:** Where is that? Can I have a copy of the summons that was served on him?

**ADV VAN DEN HEEVER:** The summons to appear today?

**CHAIRPERSON:** Ja.

**ADV VAN DEN HEEVER:** Ja, because these are the directives. Mr Mathopo... Chairperson, may I just approach  
10 my attorney whilst you read?

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** Thank you, Chair.

**CHAIRPERSON:** Well, this summons says:

“He is directed to appear before the Commission for the purpose of giving evidence before the Commission and being questioned on the affidavits that he had submitted to the Commission and issues arising from or relating thereto.”

What affidavit had he signed, had he filed at the  
20 Commission?

**ADV VAN DEN HEEVER:** [Microphone not switched on.]

**CHAIRPERSON:** Please switch on the mic.

**ADV VAN DEN HEEVER:** Sorry. At that point, he had not filed an affidavit and my instructing attorney went on record to say: We do not know what affidavit you are referring to.

Please enlighten us. And you will appreciate, and again, I do not want to put blame at the door of Mr Seleka and his team, but the first communication that we got back from them was on the 7<sup>th</sup> of January. That is after the letter of Mr Mathopo of 18 December. And just more point that was brought to my attention Chairperson.

**CHAIRPERSON:** H'm?

**ADV VAN DEN HEEVER:** The first time our client was informed or that he will be needed for purposes of giving –  
10 potentially giving evidence in the Commission was in August last year. So it is not an issue – and we have taken note of the fact that many people that has been involved in the issues that has been canvassed, were not – were never called.

So with that again as background, there potentially could have been a reasonable thought process by the client that he might not be called, that says that he might not be needed to come and give evidence.

And it was on that basis, as I said, that the client  
20 prepared the draft affidavit.

And constantly amended it as the evidence came up because the thought process was that if we present the Commission with a thoroughly thought through comprehensive affidavit dealing with these issues – and I can place on record that in the way we dealt with the draft –

and I have informed my learned friends about it – is to deal with the issues as we were informed you wish to deal with.

**CHAIRPERSON:** Assume that you persuade me, and I am far from being persuaded, but assuming that you persuade me that I should allow Mr Singh not to testify today. This affidavit that you are talking about, which I assume would deal with the issues contained – he was required to deal with in the directives and deal with the – certainly those. Maybe to deal with some of the matters that he was supposed to  
10 testify about today. When would you undertake to file it with the Commission?

**ADV VAN DEN HEEVER:** Chairperson, the only issue that we are basically left with at this point is, we last night received his oral evidence. It goes in quite a number of pages. We need to peruse that. We need to take instructions on that, and we need to prepare on it.

Our suggestion to our learned friends was, that we file our affidavit on Friday, next week. It will then be dealing with all the issues. I think the ...[intervenes]

20 **CHAIRPERSON:** No, that is too long. Ja. It is too long.

**ADV VAN DEN HEEVER:** Maybe if you can give us guidance Chairperson?

**CHAIRPERSON:** Ja.

**ADV VAN DEN HEEVER:** If we can be so bold, to give us guidance as to when you would find it reasonable for us. As

I said, I place on record, we are relatively far in our preparations. It is literally – we need to deal with our oral evidence and we need to deal with, I think some of the evidence that was presented yesterday.

And then we can – and we have to – sorry, there is one more issue. We have to deal with the Reference File. There are issues contained, documents in the Reference File that is utilised by my learned friends for the Commission, and there are certain documents in there that we have to deal  
10 with.

And that is having regard to the manner and the way evidence was led and the issues that was highlighted by both yourself Chairperson and my learned friend that you find important where you need a proper explanation on, and that is what our client wants to give you.

**CHAIRPERSON:** H'm. Can I see the directives that were issues as well?

**ADV VAN DEN HEEVER:** The directives?

**CHAIRPERSON:** The directives, ja. Or was it one or was it  
20 two?

**ADV VAN DEN HEEVER:** It was two directives Chairperson.

**CHAIRPERSON:** Ja.

**ADV VAN DEN HEEVER:** In the affidavit, we state that the one that relates to the Tegeta issue, if I can call it ...[intervenes]

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** ...simple is a directive with Annexures A to G.

**CHAIRPERSON:** Ja.

**ADV VAN DEN HEEVER:** These annexures are pure documents *in vacuo* if I can be so bold to state it like that.

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

**ADV VAN DEN HEEVER:** And if you – if we were to file, and that was our problem at the time, and you would notice that  
10 we asked for numerous documents in order to assist us to deal with the issues that – or to deal with Annexures A to G. If we were file *in vacuo*, we would have said: Yes, we agree that this is – the document is recorded correctly. Yes, we agree.

But that would not have assisted you Chairperson. What you want to have is to understand how document or Annexure A came about. What role did you play?

And in – to that extent, what transpired – and again, we dealt with it in the affidavit – what transpired is that  
20 witnesses came to give evidence and their diversion on it. And on occasion we agree and on other occasions we do not agree.

And then documents came up that we never had sight of and those documents, of course, refreshed our memory and we – by looking at the document, we can objectively say to



the Commission in our affidavit:

If you look at the document, this is our version. And we are not taking issue, for instance, with the Commission's approach on this.

Or, if you look at this document – and a lot of these documents, if I may interrupt myself, only came up during December with the evidence, and to that extent – I do not want to highlight it. Ms Daniels' evidence is quite important.

And documents were presented to her that we did not  
10 have. And that, of course, again prompted us to deal with that.

So I hope you understand Chairperson what our predicament is. We want to assist the Commission.

**CHAIRPERSON:** H'm.

**ADV VAN DEN HEEVER:** And we want to curtail, client sitting here and going through written submissions that we might say: Take it as a given. It is correct.

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

**ADV VAN DEN HEEVER:** Except – I want to amplify this  
20 point.

**CHAIRPERSON:** H'm?

**ADV VAN DEN HEEVER:** Instead to taking the client through that: But did you say this? Yes. Did you say this? Yes.

**CHAIRPERSON:** H'm.

**ADV VAN DEN HEEVER:** So with that as a background, we really literally beg you to give us an indulgence to assist the Commission and file this affidavit. And we – and take it from us, we believe it will curtail his evidence and we will not – and I am not going to say, today will be wasted if he is taking through that.

**CHAIRPERSON:** H'm.

**ADV VAN DEN HEEVER:** But it might not even be necessary to deal with it ...[intervenes]

10 **CHAIRPERSON:** If I grant you the indulgence. My inclination would be that it should be enough if you have – if you file on Monday.

**ADV VAN DEN HEEVER:** We understand and if that is your directive, we will file on Monday.

**CHAIRPERSON:** Yes, yes. Okay alright. Let me hear what Mr Seleka has to say.

**ADV VAN DEN HEEVER:** Thank you, Chairperson.

**CHAIRPERSON:** Ja.

20 **ADV SELEKA SC:** Thank you, Chairperson. Chairperson, I have listened carefully to my learned friend. I have two issues that needs to be addressed from what she is saying. One is the reason for the failure.

I think that is apparent from the affidavit that the position taken by Mr Anoj Singh is that: I waited to hear the evidence of other people in order to file an affidavit or

submit one, and that the evidence in regard to the Tegeta matters only came up only in December 2020.

**CHAIRPERSON**: I tell you what Mr Seleka. The only thing that might persuade me to grant effectively a postponement of the hearing of Mr Anoj Singh's evidence. I am not sure about all the arguments that have been advanced about the reasons and so on. But I have looked at this summons.

**ADV SELEKA SC**: Yes, Chair.

**CHAIRPERSON**: Have you looked at this summons that was  
10 issued to him?

**ADV SELEKA SC**: I have looked at it.

**CHAIRPERSON**: It says: He is directed to appear before the Commission... And it gives the address and the date, which is today.

And then it says:

“...for the purpose of giving evidence before the Commission and being questioned on the affidavit that you had submitted to the Commission and issues arising from or relating thereto.”

20 Now, what affidavit was the legal team talking about there?

**ADV SELEKA SC**: Yes, Chairperson that is an important question. Chair, I want to read from the letter that we addressed to him because ...[intervenes]

**CHAIRPERSON**: Well, let us talk about the summons first.

**ADV SELEKA SC:** Yes. Because ...[intervenes]

**CHAIRPERSON:** So I am asking the question. The summons called him to appear today.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** His evidence ...[intervenes]

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** ...and to be questioned on the affidavit, he alleged he had submitted to the Commission and the issues arising from or relating thereto.

10 **ADV SELEKA SC:** Yes.

**CHAIRPERSON:** What affidavit was the legal team talking about?

**ADV SELEKA SC:** Yes. At that stage Chairperson, as my learned friend said for Mr Anoj Singh, he had not served an affidavit but it was expected from him the day after the summons was served.

**CHAIRPERSON:** So the summons it was talking about, a non-existent affidavit?

20 **ADV SELEKA SC:** It was talking about an affidavit at the time that was not – had not been given.

**CHAIRPERSON:** It was ...[indistinct] ...[intervenes]

**ADV SELEKA SC:** Correct, Chairperson.

**CHAIRPERSON:** Does this make this summons – does not that make the summons defective?

**ADV SELEKA SC:** Well, Chair I think in discussion with the

legal team at the time they were assisting me with attorneys for Mr Anoj Singh, there was an undertaking from their part that there will be an affidavit on the 18<sup>th</sup> of December. I believe the summons was served on the 17<sup>th</sup> of December.

**CHAIRPERSON:** How does that help, whether or not the summons is defective? If, at the time, the summons was issued, it referred to a non-existent affidavit, that he must come and testify about a non-existent affidavit and issues arising from that affidavit ...[intervenes]

10 **ADV SELEKA SC:** Yes.

**CHAIRPERSON:** ...which did not exist.

**ADV SELEKA SC:** Yes. Well, what I am saying to the Chairperson is that. If there is any defect in that regard Chairperson, it is taking care of by the arrangement ...[intervenes]

**CHAIRPERSON:** But why was a summons issued which said he had submitted an affidavit when factually he has not submitted an affidavit?

20 **ADV SELEKA SC:** Yes, that point I have myself also raised Chair. But I was given – to understand that. Look, it was against the background of an undertaking given by ...[intervenes]

**CHAIRPERSON:** But you cannot issue summons that says, you filed – and now somebody has filed an affidavit, if factually that has not happened.

**ADV SELEKA SC:** Yes. Chair, the summons is issued against a particular person.

**CHAIRPERSON:** Yes.

**ADV SELEKA SC:** And that person has been engaging with the Commission in regard to the filing ...[intervenes]

**CHAIRPERSON:** But it does not matter. The summons must tell the person to whom it is issued what he is required to testify about on the day when he is required to appear.

**ADV SELEKA SC:** Yes.

10 **CHAIRPERSON:** And effectively, what this summons is requiring Mr Singh to come and testify about, is an affidavit that did not exist then and actually does not exist even now, as far as I am concerned because I do not think that the affidavit that has been handed up is that affidavit.

**ADV SELEKA SC:** No, it is not. No, it has not.

**CHAIRPERSON:** So how do I insist that he must give evidence today when the summons told him to come and testify about a non-existent affidavit.

20 **ADV SELEKA SC:** Ja. Chair, when the issue was raised, you will see from the letter that I then wrote Chairperson personally, which is the last annexure in this affidavit, I explained the position that: Okay, I understand that the communication between you and the Commission, which is my assistance in the Commission, was that you – and I think with the secretariat – was that, an affidavit was anticipated

from you on the ...[intervenes]

**CHAIRPERSON**: But the moment you say it was anticipated ...[intervenes]

**ADV SELEKA SC**: Yes.

**CHAIRPERSON**: It does not help. You as the leader should not have authorised your team to give the secretariat a summons to sign which said Mr Singh was required to appear and give evidence and be questioned on an affidavit that you had not seen.

10 **ADV SELEKA SC**: I accept that Chairperson.

**CHAIRPERSON**: You agree?

**ADV SELEKA SC**: That it could not have been written that way. Ordinarily, you would not write it that way Chairperson. That I accept. I accept that they would have then based their summons in that regard in the light of the anticipation. That is not giving you the answer Chairperson but I am saying that is ...[intervenes]

**CHAIRPERSON**: Just help me.

**ADV SELEKA SC**: Yes.

20 **CHAIRPERSON**: Because in the first place, the summons did not have to refer to any affidavit.

**ADV SELEKA SC**: Yes, Chair. Correct. I have raised that issue Chair.

**CHAIRPERSON**: You and your team ought to have known what the issues are or were that you wanted him to testify

about.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** And those could have been listed in annexures, as Annexure A. So the summons could have said: For the purpose of giving evidence before the Commission and being questioned on the matters listed in Annexure A.

Then you could list the issues or you refer to the affidavits of witnesses that have implicated that you would  
10 want to question about. That could have been done. You did not have to refer to any affidavit by him in circumstances where there was no affidavit by him.

**ADV SELEKA SC:** Chair, I have raised that issue myself. The explanation I have give you Chairperson is how I get it. I wrote a letter, explaining to the attorney for Mr Anoj Singh that the issues that he would be expected to testify about, are those that were listed in the directives.

**CHAIRPERSON:** But the summons should stand or fall on its own. It should be completely. It should tell the person to  
20 whom it is directed what the matters are that he is required to testify about.

**ADV SELEKA SC:** Yes.

**CHAIRPERSON:** And this summons, as it stands, does not tell him anything meaningful because everybody knows that whereas it says he would give evidence and the questions on



the affidavit he had submitted, everybody knows he had not submitted any affidavit.

**ADV SELEKA SC:** Yes, Chair that is – what I am saying to the Chairperson. I accept your position Chairperson. That is correct. What I am saying to the Chairperson is how the communication unfolded between the parties. So ...[intervenes]

**CHAIRPERSON:** Ja. No, no. My interest was whether or not I can insist on the basis of the summons that he testifies  
10 today and it seems to me that I cannot or I should not because I am not satisfied that this summons sufficiently tells him or tells him ...[intervenes]

**ADV SELEKA SC:** What is ...[intervenes]

**CHAIRPERSON:** ...what he is going – he is required to testify about. There may be have been correspondence between ...[intervenes]

**ADV SELEKA SC:** Between the parties.

**CHAIRPERSON:** ...the Commission's legal team and – but the summons which required and compelled him to appear  
20 before the Commission, does not tell him. The only thing you can ask him about today, strictly speaking, is this non-existing affidavit.

**ADV SELEKA SC:** Yes, for him to... Ja.

**CHAIRPERSON:** He would be entitled to say: I have been asked to – I have been told through this summons that I will

give evidence and be questioned on this affidavit and issues relating to it. And he can say: Where is that affidavit before you ask me questions? What would you say? He would be entitled to say: You cannot ask me questions on other matters.

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** The matters you have called me here to deal with, are the matters that are in the affidavit. And the affidavit is talking about a non-existing affidavit.

10 **ADV SELEKA SC:** H'm. Chair, if the – and I am not answering the Chairperson but I am answering him on the hypothetical question Chairperson. But it will not be fair for him to ask the question if there has been an engagement between... [technical cut in recording]

**CHAIRPERSON:** Ja, but the fact of the matter is. Why would he not be entitled to say: I am here under compulsion on the basis of this summons?

**ADV SELEKA SC:** H'm.

20 **CHAIRPERSON:** And this summons says, today my evidence must relate to this affidavit. You cannot outside the scope of the summons. So I must say that I was very inclined to refuse the indulgence, the request for indulgence that counsel for Mr Singh asked for. And wanted to insist that Mr Singh begins his evidence today and be questions.

But in the light of this summons, I do not think that I can

do that. But I also take note that counsel for Mr Singh has very passionately undertaken that they intend to file a comprehensive affidavit and – when I indicated that, if I grant the indulgence, I would not grant them up to Friday but up to Monday. She has said that they will comply with that deadline.

So if you have something to say, something else to say, you can say it but right now, I am inclined to reluctantly grant the indulgence but may be order that they must file  
10 their affidavit, comprehensive affidavit on Monday.

But if you ...[intervenes]

**ADV SELEKA SC:** Ja.

**CHAIRPERSON:** ...you would like to deal with some matters to argue that I should not grant the indulgence, you may do so. But that is my difficulty. I have indicated to you how I feel about this.

**ADV SELEKA SC:** Yes. No, Chair I understand because on the one hand you have discussions between the parties, exchange by letters, and you see how parties accommodate  
20 each other or the Commission and the parties.

On the other hand, you have the formalities of the rules. So if you go strictly by the formalities of the rules Chairperson which I appreciate, that is what the Chairperson is focussing on, that is the approach to be adopted.

But I think it is really opportunistic Chairperson, after

having engaged along the lines of the Commission and the party have done, and mind you Chairperson, reliance was not placed on that summons to seek a postponement. It is placed on other things.

**CHAIRPERSON:** Well, it might not have been placed on it but if I am going to insist that Mr Anoj Singh takes the witness stand and give evidence and be questions, I must be satisfied that he has been properly summoned because he could be entitled and that is not what his counsel has said, I  
10 mean.

But he could be entitled to say: Well, if I am being forced to give evidence, I am going to approach the court and have the summons set aside because it is fatally defective. And he might have a good point.

**ADV SELEKA SC:** H'm.

**CHAIRPERSON:** So it is more about whether in these circumstances and in the light of this summons, I can insist that he gives evidence. That is where my difficulty is and I am inclined to – that I cannot or should not.

20 **ADV SELEKA SC:** Yes, Chair ...[intervenes]

**CHAIRPERSON:** The... I get the impression that certainly his counsel is committed in assisting the Commission by way of this comprehensive affidavit. And so that will be helpful.

**ADV SELEKA SC:** Yes. Yes, Chair. Certainly, I have been – she has communicated that much to me.

**CHAIRPERSON:** H'm.

**ADV SELEKA SC:** But can I also – and I do not need to persuade the Chairperson because she has already told the Chairperson that we have informed them that he will be testifying on the Tegeta matters.

**CHAIRPERSON:** H'm.

**ADV SELEKA SC:** But that does not have to change.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** Because the emphasis is on the  
10 summons as it is. I myself have had to question the summons. The Chairperson will appreciate the workload and not everything passes under one's eye. So.

**CHAIRPERSON:** Well ...[intervenes]

**ADV SELEKA SC:** yes.

**CHAIRPERSON:** But a summons must – in a summons in your work stream should not go out without you having authorised it. That should not happen. And as you see, this is, as far as I am concerned, a fatal defect of the summons. The summons is fatally defective. Okay. I...

20 Unless you have some other points to make, I am inclined to grant the indulgence, make it an order that Mr Singh must file his comprehensive affidavit by close of business on Monday.

And then one will have to find another date when he must come back. And you will just have to make sure that

that time the summons is not defective.

**ADV SELEKA SC:** I will certainly attend to that one Chairperson. I do not think I have any further to say.

**CHAIRPERSON:** Yes. Ja.

**ADV SELEKA SC:** Except that my learned friend will bear in mind that there has been a long string of indulgences.

**CHAIRPERSON:** Ja.

**ADV SELEKA SC:** So.

**CHAIRPERSON:** Ja.

10 **ADV SELEKA SC:** Ja.

**CHAIRPERSON:** Okay alright. I am going to adjourn the hearing of Mr Anoj Singh's evidence to a date yet to be determined and then order that he delivers to the Commission by close of business on Monday a comprehensive affidavit as indicated by his counsel, dealing with all the issues referred to in the affidavit in the 10.6 Directives. But counsel, it goes beyond that what you want to put up. It is actually also other issues that he would testify about. Is that right?

20 **ADV VAN DEN HEEVER:** Indeed Chairperson.

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** Our intention is to deal with the evidence, the documents, et cetera.

**CHAIRPERSON:** Yes.

**ADV VAN DEN HEEVER:** Based on the issues that we know

you wish to hear.

**CHAIRPERSON**: Yes.

**ADV VAN DEN HEEVER**: Those evidence on. This will be Tegeta.

**CHAIRPERSON**: Yes. Okay. No, that is fine. Okay. So the order I make is the following.

1. The hearing of Mr Anoj Singh's evidence is adjourned to a date to be determined.

10 2. Mr Anoj Singh is ordered to deliver to the Commission by close of business on Monday, the 18<sup>th</sup> of January 2021, a comprehensive affidavit this counsel has referred to that will deal with, among other things, the issues referred to in the two directives as well as all the issues that he is required to testify about.

3. Another date for Mr Anoj Singh to appear before the commission will be determined in due course.

That is the order.

20 **ADV SELEKA SC**: Thank you, Chairperson.

**CHAIRPERSON**: Okay alright.

**ADV VAN DEN HEEVER**: Thank you, Chairperson.

**CHAIRPERSON**: Thank you. We are going to adjourn for the day but later on, the Commission will hear evidence. So there will be a sitting later on, I think at four. We will hear

evidence from Mr Chris Todd relating to Transnet. But then tomorrow, the Commission will continue with evidence relating to Eskom. Who are the witnesses for tomorrow?

**ADV SELEKA SC:** That is – in the morning is Ms Matsietsi Makholo. Then there are two further witnesses, Ms Mosilo Mothepu and Ms Bianca Goodson.

**CHAIRPERSON:** Ja, okay alright. Okay. We adjourn.

**ADV SELEKA SC:** Thank you, Chair.

**INQUIRY ADJOURNS**

10 **INQUIRY RESUMES**

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

**ADV MYBURGH SC:** Good afternoon, Chairperson.

**CHAIRPERSON:** Yes, are we ready?

**ADV MYBURGH SC:** Yes, thank you.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** Chairperson, this afternoon's evidence relates to the Transnet [indistinct] 00.00.43 Mr Todd is being recalled as a witness to deal with two things  
20 ...[intervenes].

**CHAIRPERSON:** Just one second, I think they will need to adjust the air con, it is quite noisy. But in the meantime you can try and raise your voice.

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

**CHAIRPERSON:** Ja, okay.



**ADV MYBURGH SC:** Mr Todd will deal with two things and I will go into more detail in a moment, GNS and the third payment of legal costs made to Mr Gama upon his reinstatement. Mr Gama is present this afternoon together with counsel. Perhaps I should afford his counsel opportunity to place himself on record.

**CHAIRPERSON:** Yes, let him place himself on record or herself. You can do – ja, okay, alright. Let them just sanitise first.

10 **ADV OLDWADGE SC:** Thank you, Mr Chairperson, Oldwadge. I will spell that, it is O-I-d-w-a-d-ge, K C. Is my name, I am a member of the Johannesburg Bar. I appear on behalf of Mr Gama.

**CHAIRPERSON:** Yes.

**ADV OLDWADGE SC:** I am instructed in this matter by Brian Kahn Incorporated. Ms Barker seated to my right from the aforesaid firm is in attendance with me.

**CHAIRPERSON:** Yes.

20 **ADV OLDWADGE SC:** I have appeared before you in these proceedings.

**CHAIRPERSON:** I think I remember.

**ADV OLDWADGE SC:** Indeed.

**CHAIRPERSON:** Yes, yes.

**ADV OLDWADGE SC:** Thank you, Mr Chair. We are merely here to observe today and there may very well be

an application that follows the testimony.

**CHAIRPERSON:** Yes, okay.

**ADV OLDWADGE SC:** I am indebted.

**CHAIRPERSON:** No, that is fine, thank you.

**ADV MYBURGH SC:** Mr Chairperson, if I could just take a few minutes to sketch the background then to Mr Todd's evidence.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** The name GNS, General Nyanda  
10 Security has featured in these proceedings when Mr Todd first gave evidence. You will recall that Mr Gama was dismissed as the Chief Executive Officer of Transnet Freight Rail on a number of charges of misconduct. He was found guilty *inter alia* of negligent conduct in relation to his signature of the confinement tender in favour of GNS. They were then appointed as a security provider at Transnet. So evidence has been given by Mr Todd in that context.

Today the focus shifts to evidence by Mr Todd  
20 relating really to the proprietary of the contract and ultimately the settlement of litigation that ensued between Transnet and GNS.

Between the time that Mr Gama was dismissed and reinstated, Transnet instituted legal proceedings against GNS where they effectively reclaimed the R95 million that

had been paid to GNS during the course of the contract after they had terminated it.

Sometime after that, by which time Mr Gama was reinstated Transnet and GNS or Nyanda Security, its successor in title, entered into a settlement agreement in terms of which Transnet withdrew its application and agreed to pay costs on an attorney and own client scale and ultimately ...[intervenes]

**CHAIRPERSON:** Was it not an action?

10 **ADV MYBURGH SC:** It was an action, yes, an action for ...[intervenes]

**CHAIRPERSON:** An action, ja, it claimed for damages.

**ADV MYBURGH SC:** Correct.

**CHAIRPERSON:** That Transnet had instituted GNS.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** Ja, to recover effectively money that they had paid to GNS pursuant to the contract that Mr Gama had approved.

**ADV MYBURGH SC:** Yes, correct.

20 **CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** Allegedly an irregular contract.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** Ja, so that action, Mr Chairman, you are correct, it was an action. It was withdrawn and then there was an agreement to pay costs on an attorney client

scale. That litigation was still at quite a premature stage, there had been an exchange of pleadings and I think the filing of a discovery affidavit. Ultimately Transnet paid some R20 million in costs.

So Mr Todd's evidence will give you insight into alleged irregularities in relation to the conclusion of the contract, irregular performance under the contract, the decision to settle and the decision to pay the R20 million costs.

10           The other leg of Mr Todd's evidence relates to the third payment of legal costs made to Mr Gama further to his reinstatement. The background to that you will recall, Mr Chairperson, when Mr Gama was reinstated, it was agreed that Transnet would pay 75% of his costs in relation to the High Court application and referral of his dismissal dispute to the bargaining council. Now what we know ...[intervenes]

**CHAIRPERSON:** And it was taxed cost, hey?

**ADV MYBURGH SC:** Yes.

20 **CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** What we do know is that Mr Gama was paid that but then he was paid more, he was also paid 75% of the costs that were incurred by Transnet by two separate sets of attorneys and counsel in the High Court proceedings.

When Mr Todd and Mr Mapoma gave evidence before because Mr Mapoma dealt with the costs issue, we did bring to your attention that a year or two later there was in fact a third payment that was made in respect of Mr Gama's legal costs of some 1.5 million.

Mr Todd has undertaken an investigation in that regard. He has been provided with the documents and he puts up a short affidavit which he will also speak to but that part of his evidence will be very short. Unless you  
10 have any questions, Mr Chairman, might I call then Mr Todd as a witness?

**CHAIRPERSON:** Yes, thank you. Good afternoon, Mr Todd, thank you once again for coming back to assist the Commission in regard to this matter. We appreciate the fact that you have assisted the Commission to understand exactly what happened in regard to this matters. Thank you.

**MR TODD:** Thank you, Chair.

**CHAIRPERSON:** Thank you. Please administer the oath  
20 or affirmation.

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

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

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

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

**REGISTRAR:** Do you solemnly affirm that the evidence you will give will be the truth the whole truth and nothing else but the truth. If so, please raise your right hand and say I truly affirm.

**CHRISTOPHER FRANCIS NEALE TODD:** I truly affirm.

**CHAIRPERSON:** Thank you, you may be seated, Mr Todd. Mr Myburgh, the latest affidavit of Mr Todd that deals with the third payment...

**ADV MYBURGH SC:** Yes.

10 **CHAIRPERSON:** I read it yesterday, it was separate, I wonder whether it is now in this bundle because I do not see it separate.

**ADV MYBURGH SC:** Yes, it has been added to that bundle.

**CHAIRPERSON:** It has been added. Okay, alright.

**ADV MYBURGH SC:** Mr Chairperson, as you know, Mr Todd's affidavits are contained in EXHIBIT 17 which is – I think it is marked as bundle 3 and that contains EXHIBIT BB16 and EXHIBIT BB17.

20 **CHAIRPERSON:** I guess we should start by saying that we will be using Transnet bundle 03.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** Is that right? And then the various exhibits are in that bundle.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** So it is the various affidavits of Mr Todd appear in EXHIBIT 17. If I could, before I get to the detail of them, just sketch this.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** Mr Todd has now produced five affidavits. The first affidavit, which has already been admitted into evidence, deals with Mr Gama's reinstatement.

The second affidavit that has also been admitted  
10 deals with the issue of condonation, the basis upon which Mr Gama was reinstated. You will recall, Mr Chairperson, that right at the end of that affidavit Mr Todd also deals, gives a bird's eye view really of GNS.

Mr Todd then has produced a third affidavit that deals with GNS, he produced a fourth affidavit which deals with GNS but just the payment of costs, that is a very short affidavit.

And then the fifth affidavit deals with the third  
20 payment of legal costs made to Mr Gama after his reinstatement. So I am going to take Mr Todd now to his third, fourth and fifth affidavit and then I will ask you as we go along to admit them into evidence.

**CHAIRPERSON:** Okay, that is fine.

**ADV MYBURGH SC:** Mr Todd, do you have in front of you bundle 3, EXHIBIT 17?

**MR TODD:** Yes, I do.

**ADV MYBURGH SC:** Could I take you please to page – and, as you know, we refer in evidence to the black numbers – could I please take you to page 486? Are you there? And perhaps I could ask you to turn to page 508. Would you confirm that this is an affidavit of yours together with a series of annexures running from I all the way through to – I think it is NN at page 797.

**MR TODD:** Yes, that is correct.

10 **ADV MYBURGH SC:** Do you confirm then, if you go back to page 508, that it is an affidavit of yours deposed to on the 25 September 2020?

**MR TODD:** That is correct, yes.

**ADV MYBURGH SC:** And would you confirm again under oath the accuracy of this affidavit, the truth and accuracy?

**MR TODD:** Yes, I can confirm it.

**ADV MYBURGH SC:** Mr Chairperson, might I ask you then please to admit Mr Todd's affidavit of the 25 September 2020 as EXHIBIT 17.3?

20 **CHAIRPERSON:** And you said that one is the one that begins at 486?

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** And goes up to 508 and then it has annexures?

**ADV MYBURGH SC:** Yes and the annexures run all the



way to 797, Chairperson.

**CHAIRPERSON:** Yes, okay. What exhibit number would it be?

**ADV MYBURGH SC:** 17.3.

**CHAIRPERSON:** There is no letter before 17?

**ADV MYBURGH SC:** It would be BB17.3.

**CHAIRPERSON:** BB, okay. The affidavit of Mr Christopher Francis Neale Todd starting at 486 together with its annexures is admitted and will be marked as  
10 EXHIBIT BB17.3.

**CHRISTOPHER FRANCIS NEALE TODD'S AFFIDAVIT STARTING AT 486 TOGETHER WITH ANNEXURES HANDED IN AS EXHIBIT BB17.3**

**ADV MYBURGH SC:** Thank you.

**MR TODD:** Yes

**ADV MYBURGH SC:** Now you previous gave evidence about what Mr Gama said about his signature of the original confinement tender but perhaps we could just – I am not going to ask you to rehash that, but could we start  
20 at paragraph 4. Just to formerly place on record the signature of that document by Mr Gama.

**MR TODD:** Yes, Chairperson, that document was the original confinement document that was approved and that initiated the appointment or was necessary to initiate the appointment of GNS. The document itself appears at page

509 and the pages that follow and the signature page of that document is at page 515.

So that is the document which sets out the – if one looks at page 509, at the start of it, that is the document that sets out the title of the submission, is a confinement. The heading at the top was confidential, GNS confinement. The recommendation which sets out the reasons for issuing a confined tender is then explained and they talk about how – and I do not want to repeat the evidence, there was  
10 an unknown tender process, which was stopped and this document records ...[intervenes]

**CHAIRPERSON:** There might be – might not be a bad idea just go back a little bit just so that even the public that is listening they can follow.

**MR TODD:** Yes.

**CHAIRPERSON:** Without going too much back, just the context. So that the public can follow your evidence correctly.

**MR TODD:** Yes.

20 **CHAIRPERSON:** Ja.

**MR TODD:** Thank you, Chairperson. The – so what this document in fact summarises is that there had been a public procurement process, competitive bidding process and as I gave evidence last time, GNS was not one of the bidders, it was not involved in that process. That process

was then stopped.

**CHAIRPERSON:** This was a tender for the provision of security services.

**MR TODD:** Of security services.

**CHAIRPERSON:** At Transnet.

**MR TODD:** Yes.

**CHAIRPERSON:** Yes.

**MR TODD:** Yes and as I said last time it was a tender which everybody agreed, and Mr Gama was quite emphatic  
10 about this, that it was not suitable for confinement because there were so many available, public providers of the service and his evidence was had he known the true facts he would never have approved this confinement but, as I explained last time, he said he did not read the document, he just signed it but the document itself explains the background, it explains that it is a confinement, explains that there had been a public tender process that had been stopped and then says – and I am reading in the second  
20 paragraph next to the letter 2 on page 509, in that block, fourth paragraph from the bottom, it says:

“A research of potential companies was conducted and General Nyanda Security, GNS, was called in to do a presentation in a form of a proposal.”

And then it explains that:

“GNS’ proposal was in content with our required

solution.”

Etcetera, etcetera.

“They were highly recommended”

And so on. So this document really is the original motivation for the confinement and it was originally intended to be five months subject to a review and that is explained over the page at page 510 next to paragraph 4 which talks about the contract period and it specifies there from 1 November to 30 April 2008, five months on a  
10 performance review period and then it says the total contract period is one year, from 1 November to 31 October 2008.

And then it sets out the pricing, it sets out a commercial evaluation, who approved it, technical evaluation and the name of the company itself, the tenderer at page 511, is General Nyanda Security (Pty) Ltd. The directors are set out there as being Sylvester Sithole and General Siphwiwe Nyanda.

Over the page on 512 the BEE requirements are set  
20 out and it says percentage black ownership of the tenderer is confirmed as being 100% and so on.

And then the signatures eventually are appended at page 515 and there are really a series of approvals, the last of which is Mr Gama’s approval which was given on the 5 December in 2007.

**CHAIRPERSON:** Paragraph 4 initially talks about the period being 1 November 2007 to 30 April 2008, which is not a year, but it says in the next sentence total contract period one year, 1 November 2007 to 31 October 2008, is there an inconsistency there or not?

**MR TODD:** Well it is a strange provision because it says it is a one year contract, but it says, it also says it is five months performance review and if one – the only that was raised was this, one of the complaints, one of the issues  
10 was that this contract its annual value which on the initial pricing of it was estimated to be R18million as an annual value, and you find that if you look at paragraph 11, that exceeded Mr Gama's authority which was a R10million authority and Mr Gama said no I actually only approved five months, which fell within the R10million authority.

**CHAIRPERSON:** Mmm.

**MR TODD:** Now whether that was the intention of putting a five months in there if the officials were alive to the R10million issue they may well have inserted that five  
20 month review period in order to give an argument that it fell within Mr Gama's authority. As it happens this contract in fact doubled in value within – inside that give month period and was then extended further and as we know within, it continued for 25 months at a total cost of R95million, but that its origins and certainly at a time Mr

Gama said that having only approved the first five month review period it actually fell within his levels of authority, but that argument wasn't really available to him once he said in his disciplinary hearing that actually he never read these documents, and just appended his signature, so I don't know, you know he would be able to explain whether he relied on that or not.

**CHAIRPERSON:** It is quite strange, and of course the Chairperson of the disciplinary hearing made certain  
10 findings, but it is most concerning that the Chief Executive Officer could sign a document committing a company to such – to millions of rands without reading the document, to the extent that he says he was approving the contract that would run for five months when in the document there is reference to a year, so you signed something that you cannot explain yourself, saying is this contract for five months or is it for a year because in the same document you have got a reference to a year, then you have got a reference to five or six months, ja.

20 **MR TODD:** Yes that was the finding of the Chairman as to why he said it was serious negligence for a chief executive and justified ...[intervenes]

**CHAIRPERSON:** Yes, yes. Thanks. Mr Myburgh?

**ADV MYBURGH:** Mr Todd if I could take you back to page 487 of your affidavit, you have already touched on this,

you have mentioned the disciplinary proceedings that were instituted against Mr Gama, one of the charges that he faced, you deal with this at paragraph 5, related to his signature of this confinement.

You then go on to explain what Mr Gama said and some of this you have already touched on, about his signature of that confinement during his disciplinary hearing, you attached the transcripts of the hearing and you deal with this at paragraph 7.

10           This is also evidence that you have given before, but perhaps in line with the direction given by the Chairperson for the sake of the public could you just summarise or paraphrase for us what Mr Gama said about his signature of this consignment during his disciplinary hearing?

**MR TODD:** Yes, Chairperson if I may just make it clear, the full transcripts run to many more pages, the inquiry ran over – I don't recall the exact number of days, but possibly seven or eight, and not all of the transcripts are attached  
20 that – it seem to be very, well unnecessarily paper heavy, but these transcripts do show certain things, key things, primarily what Mr Gama actually said in the disciplinary hearing and it deals with in paragraph 7 of the affidavit I deal with one point which we have already canvassed, which is the relationship between Mr Gama and General

Nyanda which was a matter of concern, because it was alleged by Transnet in the disciplinary hearing of Mr Gama that there was a personal relationship and Mr Gama said – put it through his counsel through cross-examination that there was no such personal relationship and that he knew General Nyanda like any other member of the public would know him and what then happened was that Transnet produced Mr Gama's cell phone records which showed various telephone calls between Mr Gama and General  
10 Nyanda in the period immediately preceding the award of the contract and the – in fact as I point out there, the most recent phone call between them had been on 1 December 2007 which was four days before the contract was signed.

What Mr Gama was obviously called upon to explain this discrepancy, having said that he did not know General Nyanda, but then having to explain why it was that he had been in touch with him and he then said that, and this is explained, and this is the portion that is reflected in these transcripts, a portion of Mr Gama's own testimony where  
20 he said that he had in fact given his counsel in the inquiry incorrect instructions because he had wanted to put some distance between himself and the General, and he admitted that that had been wrong and he apologised to the Chairperson and he then stated that General Nyanda was not a close friend, but an acquaintance with whom he had



played golf in the past, with whom he had spoken on the phone when there were family bereavements and who had called him to commiserate when he had been suspended.

So he explained that as being the nature of that relationship between him and General Nyanda. The significance of that of course was that the company that had benefited from the confinement in fact above General Nyanda's name it was General Nyanda Security and obviously that was something which created quite a strong  
10 inference that Mr Gama was in fact aware and party consciously to granting an irregular confinement.

But Mr Gama's version as I have said in the inquiry was then that he knew General Nyanda but had no idea even that the contract was in favour of General Nyanda Security and he then said and this is summarised in the affidavit. He then said that actually an official had come and asked him to sign the document without letting him read the document and he had explained the document completely differently and not told him who it was in favour  
20 of and it said it was the product of a full open tender and that he was merely confirming the appointment of the successful tenderer after a public procurement process.

So that was the evidence he gave in the hearing including that he had not read any part of the document and then what really is important also from those extracts

is that in a disciplinary hearing when it was put to him but Mr Gama you now concede this confinement document which you signed is written all over it that there was a confinement and it is written all over that it is in favour of General Nyanda Security. The amount exceeds your authority and various other irregularities were brought to his attention and it was then that he said in the inquiry that in fact now having been shown all of this he realised he could smell something fishy and that he realised that this  
10 was in fact fraudulent it was a complete fraud and that he now realised what the scam was all about and by this scam he was referring, if one reads the evidence to the way in which this procurement occurred which he described as a scam and what he said though he was an innocent party in the scam. He had not realised he had been manipulated by officials who had as it were pulled the wool over his eyes.

So that was the evidence and when he was asked in those portions of the transcript if one can see he is asked  
20 well who should be accountable if you signed this document and it was a fraudulent scam and he then pointed to various officials. Two of them already had been dismissed in fact; one Mr Senemela and Mr Kanye and the other person he suggested should be held accountable is a Mr Beatty who had in fact presented him with the document

and who by then was living in Australia.

So that is what we deal with here and that really leads to I think the point that this contract with General Nyanda Security rather than being cancelled and the money recovered it was cancelled but when Transnet sued for the return of the money it had paid under this contract two things happened. One, Mr Gama was reinstated into his employment and then through a series of over a period of time the management of Transnet gradually effectively  
10 poured cold water on the litigation and ultimately persuaded the Board that it was appropriate to withdraw the litigation.

**CHAIRPERSON:** But the transcript of his evidence in the disciplinary inquiry that you have referred to would my understanding be correct that what he in effect was saying when he said that he has given his counsel incorrect information about the relationship between himself and General Nyanda because he wanted to create a distance between himself and General Nyanda, that in effect he was  
20 admitting to having given his counsel untruthful information.

**MR TODD:** Yes.

**CHAIRPERSON:** To use to challenge the evidence of witnesses.

**MR TODD:** Yes, Chairperson that is exactly what he did.

**CHAIRPERSON:** That is what it means.

**MR TODD:** Yes and that is what he – and he apologised for having done so. He accepted that that is what he was doing and then he said it was wrong.

**CHAIRPERSON:** But it was also he was caught out.

**MR TODD:** Yes.

**CHAIRPERSON:** Because the telephone records were produced and then he was in a corner he could not deny the telephone records.

10 **MR TODD:** That is what happened Chairperson, that is correct.

**CHAIRPERSON:** Yes and at the disciplinary hearing as I understand the position everybody agreed including him that there was no basis for General Nyanda's company to have been awarded this contract on the basis of a confinement in other words without an open tender, everybody accepted that.

**MR TODD:** Correct Mr Gama is very clear on that he said he would never have signed it, had he known of the  
20 irregularity.

**CHAIRPERSON:** And of course that just helps us to compound the whole subsequent withdrawal of the action which you will deal with in due course. Okay alright Mr Myburgh you may continue.

**ADV MYBURGH SC:** Thank you, Mr Todd you go on in

paragraph 9 to explain that the finding of this hearing as well as the finding of the Cassim enquiry which dealt with Mr Senemela and Kanye which we dealt with last time formed the backdrop to the civil claim. You also mentioned in paragraph 9 that what was also relevant to bringing the claim was the inability to obtain information from GNS as to what they had actually done under the contract and you say at paragraph 9 that this is something that you deal with in your first affidavit and you refer to paragraph 37, A to E.

10 Could I just take you there please 37, A to E in your first affidavit you will find it on page 61.

**MR TODD:** Yes, Chairperson really what I dealt with there is the irregularities in the appointment which ultimately were confirmed by Mr Gama that the appointment itself had been completely in breach of the procurement regulations and had arisen as was very clear particularly in the inquiry involving Mr Senemela and Mr Kanye had involved collusion between – it was not it was put rather coyly in the confinement document here was research done and that

20 GNS was identified, in fact there were emails exchanged between the Transnet officials and GNS in a way that is described in the finding of a Chairperson in that inquiry which showed that Transnet helped GNS to compile its proposal and that in fact GNS contrary to what it said it had zero track record and it had adopted, really plagiarised

from an American security companies in pitching for its long track record and its experience. There were a whole lot of indications that this was a completely irregular contract which as I said Mr Gama used words like fraud and scam when he was confronted with what had actually happened here and that was what had happened at its inception.

In fact, the contract was then doubled in size quite soon afterwards and I will come to that in a moment and  
10 what ultimately led to the total amount paid to GNS being R95.5million over, just over two years, twenty-five months. The total amount paid was R95.5million for those twenty-five months. But the piece that is the dealt with and this is what is really important to understand how this contract was, I have said and I have given evidence about the irregularity in its inception but what became equally of concern was the irregularity of its execution and by that I mean that Transnet attempted at that stage to ascertain what GNS had actually been doing and whether it had  
20 actually rendered services to Transnet and it became immediately apparent that there were serious questions over whether it had actually done what it was contracted to do and what it had been paid for and that is a piece that I can actually explained.

**ADV MYBURGH SC:** Perhaps we can start if we can have

a look at the paragraph 37 at page 61. At little [a] you then make reference to the contract which is attached as G.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Could I take you to Annexure G, that you find at page 110 and you go on to make the point that of particular significance is Annexure C to this contract which you find at page 141 and that sets out the resources that GNS were to deploy.

10 **MR TODD:** Yes.

**ADV MYBURGH SC:** Page 141.

**CHAIRPERSON:** I am sorry Mr Myburgh initially you said we should go to 110 and then 140?

**ADV MYBURGH SC:** Yes, 110 is the commencement of the contract it runs through and is signed at 136 and then there are series of annexures A, B and C. C you will find Chairperson at page 141.

**CHAIRPERSON:** Ja, okay.

20 **ADV MYBURGH SC:** You want to address that annexure and page Mr Todd.

**MR TODD:** Yes, this document is important because the contract effectively says the services to be rendered are set out in Annexures A, B and C and Annexure C is the costing, the basis on which the cost was calculated the cost of the contract. And so Annexure C sets out it refers

to a budget based on cost estimated using current resources available. The cost includes disbursements and any other project related costs and they exclude VAT and then it sets out the resources that are going to be allocated to each of three elements of the contract or the services and those are explained in the contract. There is an investigations element, a monitoring and evaluation element and an intelligence element.

Overall those are overseen by a project director and  
10 that is at the top, project director with a cost per month of R40 000 and then a project coordinator at a cost of R25 000 per month and then under each of those three headings that I have mentioned the resources that would be made available. In relation to investigations a manager at R25 000,00 a month and then ten investigators would be deployed at an hourly rate of R320,00 giving rise to a monthly cost of R537 600 and one can do the maths effectively there at R530 000 is the monthly cost of ten investigators at a rate of R320,00 an hour. And then that  
20 gives a total for the investigation team of R562 000 and then the same breakdown is given for the monitoring and valuations team. There they have a manager at R25 000 but they do not have investigators they have researchers and there are eight researches also at R320 an hour and they then result in a cost of R430 080.



And then under the intelligence stream of this contract again a third manager, again at a cost of R25 000 a month, eight handlers at R320 an hour now they are handling informers. So they are eight handlers at R320 an hour again leading to a monthly cost of R430 000. Twenty informers at R2 000 a month each, R40 000 a month giving a total of R495 000 under that stream and that leads to a sub-total of R1 577 760 per month excluding VAT.

So I have referred to it in some detail Chairperson  
10 because as it happened this was attached to the contract and each invoice issued for this work reflected that breakdown of those charges for the contract.

**CHAIRPERSON:** Which – or the information contained herein Annexure C including the total and it said total per annum would all indicate that the intention was for the contract to run for a year.

**MR TODD:** Yes.

**CHAIRPERSON:** Because otherwise why calculate on the basis of a year if it is four, five months.

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

**CHAIRPERSON:** Okay alright.

**MR TODD:** This is the number that was written into the confinement agreement as the annual cost.

**CHAIRPERSON:** Yes, yes.

**MR TODD:** And then it had that sort of proviso which said

well we will review it after five months.

**CHAIRPERSON:** Yes, it is just difficult to understand how anybody would not have seen all of these things, yes okay alright.

**ADV MYBURGH SC:** So if you go back to page 61 you then say at [b] that there were extensions, I am going to leave that for a moment Mr Todd we will come to the detail of that when we return to your third affidavit. But then importantly at [c] page 62 you talk about the fact that  
10 consideration as given to terminating the contract and that you then attended a meeting, perhaps you could address what transpired at that meeting and thereafter leading up to the issuing of the summons that is [e].

**MR TODD:** So the backdrop to this is that while preparing and formulating the complaint against Mr Gama and Mr Senemela and Mr Kanye who had effectively entered into this highly irregular fraudulent corrupt scam whatever words are most appropriate to attach to it. The fact of the matter was that every month Transnet was paying this  
20 company at that stage roundabout R4.5million after two extensions to this contract and Transnet wanted to terminate that arrangement and so they engaged with GNS, with the company and they set up a meeting which I was asked to attend because I had now become familiar with all of the background facts and they wanted to know – one of

the particular concerns that Transnet had was of course it was not entirely sure whether this was just an irregular procurement but the services were being rendered as required or whether it was worse and one of the things which would worse meaning in fact the services weren't even being provided or at least not as they should be and one of the biggest alarm bells that rang for Transnet was that on a very quick analysis of GNS by the forensic investigations team it immediately transpired that GNS in fact had no employees still. It had no employees at all, it was not even registered as a PAYE payer and it wasn't registered with PSIRA, which is the private security industry regulatory authority, and that was a very – so that was the backdrop actually of the meeting that I went to which Transnet said look you don't have any employees, are you – we are paying you every month for all of these resources, what is going on, and at that meeting GNS representatives were there and they said well you don't understand our business model, and so we said well – please we are here, explain the business model.

And they said actually we are a platform and we operate as a platform and we procure employees from other security companies, who then render services to Transnet. So we said to them well that is interesting to hear because your contract, and I can point to the

provisions, says you cannot sub-contract unless you have our consent as Transnet, we have contracted with you on the basis that you are General Nyanda Security, with two directors, wholly black-owned and you will deliver the work because of your track record in delivering services, so if you want to sub-contract you are supposed to have our permission, but let us put that aside for the moment. If you have been procuring, and in fact delivering these resources through other service providers then you will be

10 able to provide us with details of those other service providers are, your contractual arrangements with them, so that we can get comfort that there are ultimately, to use colloquial language warm bodies, there are actually people, there are managers and investigators, researchers and handlers who are actually doing the work, because at the moment there is just no evidence that any such people exist and they – at that stage in the meeting they asked for a caucus, which meant that we were asked to excuse ourselves while they considered whether they would give

20 us this information.

I may mention it was quite theatrical, they had arrived at the meeting with suitcases on wheelie – wheelie suitcases saying we have got all of the information that you are asking for in all of these suitcases and we said to them when – before they had their caucus we said to them

all we suggest – we don't all need to be in a meeting, we will just nominate one or two of our people and they can sit with whoever on your side and can go through the information you have and then just reconcile it and show who the people are who have been doing the work over the period of the contract that we have been paying for, and which companies have been contracted to do so.

They then had a caucus which lasted a few minute and when we came back into the meeting we were told they  
10 had decided, their attorney who was present in the meeting, that they discussed the matter with their attorney and they would not be disclosing anything to Transnet concerning any of the matters that we had asked, they weren't going to disclose anything about their contractual arrangements with these other entities that had supposedly provided these services nor where they going to disclose the details of the warm bodies or the personnel who had actually delivered the service and they then withdrew with their suitcases of information, and as a consequence of  
20 that Transnet gave a letter following that, saying well we have tried to engage with you but we are terminating your contract and that ended the contract at the end of 25 months.

Had they not, had Transnet not ended it then the contract – their position was that it should just keep going,

they thought they were doing a good job, but that is what led to the cancellation of the contract, but it also led to concerns on Transnet's side which said not only was this contract entered into irregularly but we are now very worried that actually what we paying every month for might not even be being provided to us because we are being given no information by our service provider about who the people are on the job.

**ADV MYBURGH SC:** Mr Todd you mentioned a clause in  
10 the contract prohibiting sub-contracting, could I ask you please to turn to page 127 and can I direct your attention to Clause 20.

**MR TODD:** Yes that is the contract, and in fact it is not just approval it is more than approval that is needed, and I think that is a sensible, I mean it is a standard and a sensible position if you contract with General Nyanda Security you don't want to find out without your express agreement that actually somebody else is providing the job, is doing the work, otherwise you are being misled.

20 So it requires written approval for any kind of assignment or sub-contracting.

**ADV MYBURGH SC:** And that you see at 20.1 read with 20.1.2?

**MR TODD:** Correct.

**ADV MYBURGH SC:** Go back to page 63 of your affidavit,

you have now told us of the meeting, you have told us of the letter ...[intervenes]

**CHAIRPERSON:** Just one second Mr Myburgh I just want to make sure that my understanding of this is correct. So in the meeting GNS representatives told you that their business model is in effect, was in effect such that they did not have – they did not keep employees that would go and do the job in terms of the contract, they would sub-contract and get other service providers to effectively do the job  
10 that they were supposed to do.

**MR TODD:** Yes.

**CHAIRPERSON:** But now the contract prohibited sub-contracting on their part without written approval of Transnet.

**MR TODD:** Correct.

**CHAIRPERSON:** Which that will mean that they couldn't be said to have performed in terms of the contract.

**MR TODD:** No, but Chairperson there is no doubt about that.

20 **CHAIRPERSON:** Yes.

**MR TODD:** On their own business statement about their business model they were from the get-go in breach of the contract.

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

**MR TODD:** Right from the beginning, but the Transnet

attitude in that meeting had been however let's not at this stage exercise our rights on the technicality and say you are in breach of the contract on that ground. First let's see who these people actually are and then we can possibly decide *ex poste facto* we could have decided *ex poste facto* to give written consent and say now that we've understood it, but it gave rise to other very serious concerns, one of which is raised in the – by the Chairperson of the disciplinary hearing of Senemela and

10 Kanye which is, is this not simply fronting, you hold yourself out as being an experienced company capable of delivering services, actually you have no track record, no staff, and you don't even tell us, you are just getting other people to come in and do the work. What are the commercial terms on which those other people are coming in to do the work, and they never had to contract with Transnet, they never even pitched with Transnet, so that is a gross – you know that was a very serious problem that Transnet had about this supposed business model but at

20 this stage it went even further, because Transnet was saying irregular business model aside who is actually doing the work, have these people actually been – you know obviously we would like to know ...[intervenes]

**CHAIRPERSON:** That they have been through the field and dug ...[intervenes]



**MR TODD:** It is one thing to tell us well you have sub-contracted but how do we know that the work is even being done, and that these people are being deployed in the field, and who are these people, and they said well we have got the information but we are not going to share it with you.

**CHAIRPERSON:** So actually what GNS wants to represent to Transnet that they had the expertise and the experience and the track record necessary for them to provide these  
10 services but once they tell us about their business model then it becomes clear that then they had made a misrepresentation in the first place.

**MR TODD:** Yes. Chairperson GNS did say and they said it later, that Transnet knew so when we come to the litigation and when Transnet sued for repayment of the R95.5million it had paid to GNS, GNS rather bizarrely denied that it had ever had a contract as GNS with Transnet and I say that is bizarre because they have confined the documents in their favour and mentions no  
20 other entity, and the contract is in their favour and mentions no other entity with an express provision of sub-contracting but despite that in their High Court pleading defending their claim they said there was never a contract with GNS, our company, they said there was only a contract with something which they called the GNS

consortium and they said that consortium included, represented our business model. I think – I mean I can explain why that is just totally inconsistent with any of the documents, but I think they felt forced to do that because at that point they had admitted to Transnet, and they had to, that they had none of their own staff and they had no ability themselves to deliver it, it was other companies that they needed to deliver the services.

**CHAIRPERSON:** But also I am sure the contract didn't  
10 refer to GNS Consortium it referred to GNS.

**MR TODD:** Correct Chairperson, that is correct.

**CHAIRPERSON:** Ja. Okay, Mr Myburgh?

**ADV MYBURGH SC:** Thank you. At page 63 paragraph [e] you then mention what you have already touched on and that is that following the termination of the contract with GNS Transnet then issued summons and that summons and the particulars of claim are at or attached as Annexure H, perhaps I could just take you there Mr Todd, you find that at page 142, one four two.

20 **MR TODD:** Yes, that was High Court summons for payment – repayment of R95.5million.

**ADV MYBURGH SC:** And the particulars of claim commence at page 144, and then the amounts you see at page 154, the R95million, I just wanted to ask you to address the fact that here the defendant was cited as

Abalozi Risk Advisory Services.

**MR TODD:** Yes.

**ADV MYBURGH SC:** Why was that so?

**MR TODD:** Yes, between the period when the contract was terminated and Transnet issued summons the legal entity, General Nyanda Security, with which Transnet had contracted, had changed its name, the company name, so it is the same company but with a now changed name and now it was called Abalozi Risk Advisory Services, it had  
10 been called General Nyanda Risk Advisory Services as one contract that was concluded with.

**ADV MYBURGH:** If I could then ask you please to go back to your third affidavit to turn up page 489.

**MR TODD:** Yes.

**ADV MYBURGH:** So we have dealt with the signature of the confinement and you have dealt with the run-up and the issue of the summons and then what you go on to do in your third affidavit at page 490 is you analyse the charges as reflected in the invoices and you deal with the initial services  
20 and then you deal with the first extension and the second extension.

You have already touched on this but do you want to just summarise your evidence in that regard?

**MR TODD:** Yes so if I can refer – I did take the Chairperson and show Chairperson Annexure sheet C to the contract but

what is – the point that I thought it was appropriate to make then is that when invoices were issued and I have just attached examples that were available to me when I deposed to this affidavit. But I am very confident because I have seen all of the invoices they take the same or similar form.

But at page 623 – 623 is an example of a tax invoice for the first initial services that were contracted for with GNS. And that tax invoice shows that – it shows the breakdown as in Annexure C to the contract. In other words  
10 it shows a project director. It shows the project coordinator at R25 000.00 and then it has investigation stream R562 600.00. The monitoring and evaluation stream at R455 080.00 and the intelligence stream at R495 080.00 giving a total of R1 577 780.00 to which VAT is then added for once to give a total of R1 798 645.00 for a month.

But I make – made that point because later it was suggested that actually this contract was not for the particular resources specified in Annexure C. That it was just a globular number and that GNS could do whatever it  
20 thought appropriate for that number to try and manage security.

But it seems to me that that argument is – cannot be reconciled with the way in which GNS invoiced and it is very clear that the invoice ties back to Annexure C to the contract which sets out that there is going to be a project director, a

project coordinator and in each of these three streams a manager, ten investigators, a manger, eight analysts or – and a manager and eight intelligence handlers.

And so those are the resources which make up these numbers and then this amount is invoiced to Transnet every month of the 25 months of the contract for that – for those initial services.

**ADV MYBURGH:** And then you deal with the first extension at page 491.

10 **MR TODD:** Yes. So what happened once this contract had got – had kicked off in December 2007 is that within a few months and it is described in the document which is at page 624. It is in fact the document over the page from that invoice.

**CHAIRPERSON:** What is the page?

**MR TODD:** 624 Chairperson.

**CHAIRPERSON:** Ja okay.

**MR TODD:** That is a document which is referred to as an extension of scope and this was a document – a procurement  
20 document which effectively described the background and reasons for extending the scope of GNS' contract in – in effect it was in March I believe – with effect from March 2008.

And the background to that is explained in paragraph 2 at page 624 where it says:

“Recommendation reasons for extending the scope of work.”

And it says:

“Due to theft irregularities at the Kaserny Yard.”

And that is a yard in south of Joburg where a lot of containers and other things are stored.

10 “An appropriate decision was taken by TFR Security Management to suspend the TFR security personnel at the yard and the contractor on site Sinqobile question Security Services.”

So what happened was and then it is explained:

20 “On the 14 February 2008 a container was found outside Kaserny Yard without the relevant authority and as a result they dismissed the – they suspended the TRF Security personnel. It was irregular that a container was outside the yard without authority and they suspected insiders so they suspended the – Transnet’s own security and they dismissed Sinqobile which was the outsourced service contractor at that yard and they pulled in extra GNS resources and they said the extra GNS resources will be

used for the following conclusion of the investigation for suspended TFR security employees after internal disciplinary process.

2. Executing security operational functions that were previously done by those TFR security employees and

3. Escort and protect train drivers.”

I am not sure where – why that follows from the Kaserny Yard but they – they explain those three reasons for  
10 extending the scope of this contract.

But what is then important if I may say Chair over the page – oh on the next page 625 again this procurement document describes exactly what resources are now being procured through this extension of the contract from GNS.

So it says there at page 625.

“16 resources at R150.00 per hour.”

Giving a total of R884 000.00 or R864 000.00 per month for 16 resources at R150.00 an hour. So these were now people who were going to secure the yard and escort and protect  
20 train drivers working twelve hours for thirty days a month.

And in item 2:

“7 investigators.”

So that is 7 additional investigators. We have seen that the first leg of the contract had 8 investigators in the investigations on this was an additional 7 investigators at

R320.00 an hour R376 000.00 a month and they would be deployed nationally to investigate cable theft incidents linked to syndicates.

Again it is not clear why that follows from the Kaserny Yard incident it is just another seven additional resources for the first scope of the contract and then the third item.

“6 investigators”

That is another 6 at R320.00 an hour for R322 000.00 a  
10 month permanently dedicated to Kaserny and Klascorn Yards due to vastness of the area working eight hours for 21 days a month. That is explaining how the investigators you multiply their hourly rate by eight hours and 21 days a month you multiply it by the number of investigators and you get R322 560.00.

And then one resource at R150.00 an hour to be deployed at electrical control room to monitor the call and reporting incidents for 24 hours for 30 days with a change of shift and a reliever.

20 So this extension again specifies per person what the cost is either on an hourly basis so that you get to the additional monthly cost of and it explains that there R1 670 880.00. So R1.6 million per month additional cost.

And what you then find after that is every month from this point of view a second invoice is issued by GNS to



Transnet for that amount plus VAT and that is why I said in the affidavit that effectively doubled the value of the contract when you looked at the cost. In fact it is slightly more than double the value of the contract.

**ADV MYBURGH:** If you go to paragraph 19 at page 491 that is where you set out the figure.

**MR TODD:** Yes.

**ADV MYBURGH:** The second invoice each month in the amount of R1 781 000.00.

10 **CHAIRPERSON:** Page 4?

**ADV MYBURGH:** 491 Chairperson.

**CHAIRPERSON:** 491.

**ADV MYBURGH:** Paragraph 19.

**CHAIRPERSON:** Okay. Yes you can continue.

**ADV MYBURGH:** Then Mr Todd you go on to deal with the second extension.

20 **MR TODD:** The second extension the services occurred a year – about a year later in March 2009 and the background to that is again set out in a similar procurement document. It is attached – actually there is a – this time it is in a letter which is at page 630 of the documents.

And what it explains there is and what – what I can go into the detail but this was actually expos facto what had happened after the event.

What had happened was that an additional resources

had been procured from GNS but there – it had – there have not been regularised through a procurement process and this letter asked for – this letter is dated in May it is the 12 May 2009 and it is actually explaining why additional resources have been procured from GNS and asking for those to be approved.

And the background to this is that on the 28 February 2009 a Mr Herbert Msagala who one can see I think later on he approves it as the General Manager for Resource  
10 Management at that stage in TFR – Herbert Msagala General  
Manager Resource Management.

He received a message that a train crew driver had gone missing with a company official vehicle without a trace. And this was described as a security risk; as a hijacking of a Transnet employee and that this person never turned up again. And some of the documents I am not able to say what the details is but there was a reference in the documents to this person being presumed dead which was regarded as a very serious risk to train crew and train drivers.

20 And so what they did was they acquired additional resources from GNS. And the additional resources from GNS are then explained. They wanted armed vehicle, escort officials and security to give train crew management protection and that led to an additional amount of R856 800.00 due to GNS excluding VAT per month.

So that extended the contract by a further amount.  
An example of the invoice is over the page at 62.

**ADV MYBURGH:** Sorry can I just – so the – the additional resources that were required they set out in the second paragraph of page 631. The required resources as you said are armed vehicle, escort officials and security to give train crew management. Is the – were those the additional resources?

**MR TODD:** Yes that is what this letter says but the invoice  
10 that is – has been – was rendered for March they refer to the March 2009 and that amount of R856 800.00 excluding VAT being due. That very invoice one can see over the page at 633 which then sets out what the – how those resources are in fact made up.

So at page 633 that is an invoice dated 25 March 2009 and there you see the resources there what has been invoiced for are two supervisors at a total monthly cost of R108 000.00 and 16 train crew monitors and rapid response at a total cost of R748 800.00.

20 **ADV MYBURGH:** Again warm bodies.

**MR TODD:** Those are – exactly warm bodies. 16 people and this is in addition to the earlier extension which I referred to which – which had involved also involved 16 resources to secure the yard and escort and protect train drivers.

So this was an additional 16 over and above the 16

that had been procured a year earlier and were being provided every month.

So an additional 16 train crew monitors and rapid response at that cost of R748 000.00 giving another monthly cost of R856 000.00 with VAT amounting to R975 752.00 and that again became a third invoice from that point onwards a third invoice was rendered every month to Transnet and that it was those three invoices together by this stage that cumulatively was approximately R4.5 million a month.

10 **ADV MYBURGH:** So that you deal with at paragraph 25 of your affidavit at page 492. There payments of services initially procured that is the R1.7 million then the first extension another R1.7 and then the second extension the R976.

**MR TODD:** Correct.

**ADV MYBURGH:** And you go on to say that that is in effect how you computed the claim of R95 million.

**MR TODD:** Yes that is correct and what Transnet I have included it is was provided to me by Transnet's I have got no  
20 reason to doubt it is correct. It is from their payment ledger. From their SAP system which shows that throughout the whole period of this contract three invoices were rendered – well not for the whole period. From the beginning the first invoice is rendered and once this – the extension was granted from that month a second invoice was rendered

every month and then when the third – second extension a third invoice was rendered every month from that point onwards.

But the amounts remain the same in each of those invoices.

**ADV MYBURGH:** Mr Todd at page 493 you then deal with Abalozi's plea and counter claims do you want to summarise that for us please?

**MR TODD:** Yes I have attached the documents themselves.

10 There were various technical points raised I have mentioned of them already which is they put in a plea of misjoinder or non-joinder and there they said you have sued the wrong person. GNS or now Abalozi Pty Limited was never the counterparty. The GNS consortium was the counterparty. And that as I have already dealt with it is an odd thing to say both because a consortium is not a legal entity and secondly there was no contract with the consortium. The contract all along was with GNS now known as Abalozi.

20 But that became central to the defence. Throughout the plea they say it is the GNS consortium and they mention two other companies which they say were part of the GNS consortium which they name.

And ja in essence what they do is say the consortium has been doing what it was asked to do. The invoices – I mean again the invoices have all along been rendered by

GNS the company and a suggestion that any other entity was involved. But perhaps the most significant to say then is about their counterclaim because what Abalozi did is said you suing me for R95.5 million well I am counterclaiming for something close to R500 million for damages which have been caused to me by your conduct. Because you have cancelled my contract and this has created reputational harm to me I have lost various contracts in the public sector and we have lost various other hopeful contracts and in total we  
10 suffer damages of – when you add it all up it is very poorly pleaded and it is difficult to make out exactly what they claiming. But it amounts to in the R400 millions as a counter – as counter claims which they say they bringing against Transnet.

**ADV MYBURGH:** But you say you attach that document that is Annexure R.

**MR TODD:** Yes that is correct.

**ADV MYBURGH:** Or in file it is at page 636, is that correct?

**MR TODD:** Correct.

20 **ADV MYBURGH:** Running through to page 661..

**MR TODD:** Yes.

**ADV MYBURGH:** Alright. Then if we can turn to the next main topic and that is Transnet's decision not to pursue the claim.

**MR TODD:** Yes.

**ADV MYBURGH:** That you deal with at page 495 commencing at paragraph 32. Please take us through that.

**MR TODD:** Yes – just the – the context for that Chairperson if I may say when I dealing with the reinstatement of Mr Gama one of the points I made is that a reinstatement of somebody in these circumstances has consequences and one of the consequences if you follow through is what happens in a case like this.

And – so what we then deal with is that you have now  
10 reinstated a chief executive who was charged with a conclusion of this contract in an inappropriate – ultimately found guilty of negligently and he admitted acting with serious negligence when entering into this contract. He is being reinstated.

**CHAIRPERSON:** I think he was ...

**MR TODD:** Into the business.

**CHAIRPERSON:** I think he was lucky that the arbitrator – the chairperson did not find that he had intentionally.

**MR TODD:** Yes. But in the course of doing so as I have  
20 shown from the transcript he say that effectively this was a fraud, a scam the contract should never have been concluded.

So one might have expected the very first thing on his desk when he was reinstated to say let us get that money back. It was all a fraud, a scam, inappropriate, the wrong

thing was done here.

But in fact what happens over a period of time as we see is that the management within TFR which Mr Gama is again leading now starts to say actually there is no reason to sue these people. And I am paraphrasing.

But they said and I am really then set out what through the minutes that were given to me. We represented Transnet in the litigation and there were long periods of silence when we had no instructions and nothing was really  
10 happening.

But then we got requests to say we had had monthly reports from them about the services they have rendered does that not show that they actually did the work? And then we had another thing which – and I – really that is what this section of the affidavit takes you through. So the Transnet – the management team over which Mr Gama now presided started to say and I say it is the management team it is one manager in particular under Mr Gama started to say, well we actually – the work was done there is no problem here. So  
20 why are we suing them? That is really – I am paraphrasing.

**ADV MYBURGH:** Alright and then you – you mention along the way at paragraph 37 page 496 that there was a time where you were asked to obtain counsel's opinion.

**MR TODD:** Yes.

**ADV MYBURGH:** Just address that please.



**MR TODD:** Well if you – the backdrop to that is you can see that in April 2012 and the minute is there – there is a Risk Committee meeting which shows that the management team now – so now you have members of the board interacting with members of the management team. The board sub-committee is the Risk Committee which has got a long agenda. One of the items on its agenda is that Transnet is suing Abalozi for the repayment of R95.5 million. And Abalozi has counterclaims.

10           And the management team say well we have actually now – what is reflected in the minute and I of course was not at the meeting. I can only read the minute. And the minute says:

          "Management members of the management team informed members of the Risk Committee that they have uncovered information that had not been available in the past and that we may not actually have a case against Abalozi."

20           And what then happens is in September of that year Mr Ndpiwe Salinga he is the legal advisor within Transnet who is responsible for managing this litigation. He is the general manager for legal services and Mr Salinga gets a memorandum and he has attached an email which we were provided with by Transnet.

Now I have been provided with it by Transnet. I have not – again it is part of Transnet providing me in its capacity as a legal advisor with information internally. But that email says well we have now got a monthly report for every month each of the 25 months that Abalozi rendered services. GNS rendered services. We have got a written report setting out what they did.

Does that not prove that they did the work and we should not be suing for the R95.5 million. And so what  
10 Bowman Gilfillan was then instructed to do was to get counsel's opinion on whether the existence of these monthly reports you know had a material impact on the – on the case.

And effectively counsel gave opinion. I have included it in – as an annexure to the affidavit and said well this does not change it at all. It does not really show what services were actually provided.

And it is possible if - if GNS Abalozi comes along in the litigation and says we can prove that we deployed resources on Transnet business. We have deployed 16 train  
20 crew rapid response. Here are their – here is the evidence that they were deployed. Here are the – here is the evidence of the people who actually worked. There could be some reduction in the amount claimed. There is still an argument that the procurement was irregular from the start and so it must be repaid.

But there is a possibility that if GNS could prove that they actually rendered services that that might reduce the amount of the – that we would claim.

But up until this point and really it continued until this date GNS had never produced any evidence of those warm bodies those 16 train crew and the other – the next 16 train crew. They never produced the names and the entities and the contracts under which those people were provided. And they never had them.

10 **CHAIRPERSON:** And they had had all the opportunity to produce those names.

**MR TODD:** They had had all of that opportunity before the contract was cancelled. Once the litigation started. In the discovering process they never produced that information.

So it remained a big question mark and really what then became the question was well they have got these monthly reports saying we have done all this work.

Now that monthly report either is a true reflection. What they should have said is not just this is our report but  
20 here is the list of people who we deployed and here are their hour time sheets.

That would have been good – a good start. But they never did that. They produced monthly reports but those reports could also simply have been a desktop analysis produced by one person.

**CHAIRPERSON:** But they – they had been asked before the contract was terminated.

**MR TODD:** Ja.

**CHAIRPERSON:** To produce such information and they did not produce it.

**MR TODD:** No.

**CHAIRPERSON:** And took the risk that the contract would be terminated because they did not produce the information. So one ask the question. If they had provided – if they had  
10 that information and they had actually got some companies to provide the services why would they not have given you the information in order to avoid the cancellation of the contract?

**MR TODD:** Yes Chairperson it would have been the obvious thing to do.

**CHAIRPERSON:** Yes.

**MR TODD:** And it would have been the obvious thing to do when they were sued as well for repayment.

**CHAIRPERSON:** Yes.

20 **MR TODD:** They never did it.

**CHAIRPERSON:** But now the reports that were said to exist now that was being said was that being said by some people within TFR after Mr Gama had been reinstated?

**MR TODD:** Yes.

**CHAIRPERSON:** That had not been said in the meantime

and the contract was terminated early in 2010 is it?

**MR TODD:** Yes in January.

**CHAIRPERSON:** In January 2010. So – and Mr Gama was – came back to the company in April 2011. So for more than a year after the contract had been terminated they never placed before Transnet that information to say here is the information. And then after Mr Gama had come back suddenly managers under him began to say we – Transnet might not have a case against GNS.

10 **MR TODD:** Yes. Chairperson GNS had produced irregularly reports. They were required to provide a monthly account of what they had done.

**CHAIRPERSON:** Yes.

**MR TODD:** But those reports and there are versions of them and they come – become relevant because they were subjected to close analysis later.

**CHAIRPERSON:** Yes.

**MR TODD:** Before Transnet ultimately settled this case. They are monthly reports of the kind which describe what  
20 activities generally have been conducted. What investigations are on-going and what police's cases have been opened for criminal conduct and so on.

So as I have said they could be a good summary of the – of what is going on with the actual deployment of 10 investigators, 8 researchers, 8 handlers, 16 train crew and

so on.

But you would still expect to be – see some evidence that those people were actually deployed in the field. Because if they were not deployed in the field those reports could equally have been produced by somebody sitting at a desk plagiarising other reports and simply writing up a fantasy about what has been going on.

So in other words the reports themselves looked like a narrative of services that were being provided but they did not – they were not evidence that in fact those services have been provided and particularly where Transnet was paying for all of these warm bodies those resources in the field and there was no evidence that those people existed and GNS had never provided that evidence.

So it was a worry that those reports.

**CHAIRPERSON:** Yes.

**MR TODD:** Simply reflected.

**CHAIRPERSON:** Yes.

**MR TODD:** You know anybody can write oh I have been working really hard this month and this is what we have been doing. But which prove that that actually – that that work had actually been done.

**CHAIRPERSON:** Yes. Mr Myburgh.

**ADV MYBURGH:** Thank you. At paragraph 39 on page 497 you then deal with what becomes quite a significant event

and that is the memorandum produced by Mr Mtetwa that was copied to Mr Gama.

**MR TODD:** Ja.

**ADV MYBURGH:** On the 14 January. Please deal with that.

**MR TODD:** Yes just to round off. After counsel's opinion said these reports are not sufficient you can see that Mr Salinga then sends a memorandum to his superior Ms Mabandla who is the Group Executive for Legal Services at that time and says and this is at page 497. I have actually  
10 quoted from the memorandum which is Annexure V which is at page

**ADV MYBURGH SC:** 677.

**MR TODD:** 6 – is it 677. Thank you. So the memorandum itself is at page or is at page 8 I think. Yes. Oh, sorry. It is at page 677.

**ADV MYBURGH SC:** Thank you.

**MR TODD:** There is a memorandum from Mr Selinga. It is in December 2012, saying:

20 “Having received various monthly reports which were intended to demonstrate that Abalozi did in fact rendered security services to TFR.”

So having received various monthly reports which were intended to demonstrate that Abalozi did in fact render security services. That was – that explains what was the intention of these reports.

These reports were trying to show, yes there was – they do – they did do the work. Group Legal was requested to obtain a brief opinion from counsel and whether or not the reports would be sufficient to demonstrate that Abalozi had indeed performed in terms of the agreement and if so, whether Transnet would be justified in withdrawing the action it instituted against Abalozi. The language is ...[indistinct] [00:00:55], it's would it be justified in withdrawing the action it instituted? Not whether it would be wise or whether it would be – whether it was likely to lose the case. It says whether this would constitute a good enough reason to withdraw the case.

Anyway, the counsel's opinion was... You know, there is an opinion given and the opinion is, there is no reason to withdraw. But very soon after that, from that time, that is December 2012.

The very following month, in January 2013, a memorandum appears from Mr Twetwa who, at that stage, was the General Manager, Rail Network.

20 And he sent a memorandum to Ms Mbandla and copied it to Mr Gama. And that is the memorandum which is at page ...[intervenues]

**ADV MYBURGH SC:** 678.

**MR TODD:** 678. Now. So that is January 2013. Mr Mtetwa writes a memorandum and he says the purpose of this



memorandum is to provide feedback on the performance of GNS Risk Advisory Services and the cost of services they provided in comparison to the current service provider.

And in a nutshell what Mr Mtetwa does in that memorandum is he says if you analyse cable-theft loss per month in a period before GNS was appointed when we had a couple of months where we had no security provider and then when GNS provided their services.

And you analyse monthly cable-theft. And then you  
10 analyse it now with a new security provider where we actually paying a lot more.

Overall, he says, actually we got a very good deal with GNS. And I am paraphrasing. It is what Mr Mtetwa says. It is basically an analysis of the length of the copper cables stolen per month in kilometres and he sets that out in his memorandum.

Now – and he says in his conclusion which is at page 682, he says it is evident from the performance statistics that the use of specialised security services produced  
20 positive results in combat copper cable theft, the period which TFR did not have the service being provided, resulted in copper theft deteriorating significantly.

The cost comparison reveals that – and that was the period between February and April 2010 – the cost comparison reveals that CPIR must be made almost twice

what GNS was paid monthly. The aforementioned facts refute the two claims made that GNS was over paid and paid for work they did not perform.

And then he said: I would have asserted these facts if anybody had asked me. Unfortunately, I was never made part of the investigation or told of the claims.

So what Mr Mtetwa says. He says: I am not looking at whether any warm bodies were deployed in the field. I am not looking at train crew. I am not looking at the  
10 ...[indistinct] [00:04:13] yard and the protection of other assets. I am just looking at cable-theft.

And if I look at cable-theft, I think that GNS did a good job. That is what he says. If I look at the cable theft statistics.

And so having been sent the monthly reports to say is this a justification to withdraw the claim. In January, the attorneys – us as attorneys are sent this report and said but Mr Mtetwa says that actually we got good value for money from GNS. Is that a reason to withdraw the claim?

20 And I am again paraphrasing what he said but that is really the next instruction that comes is that he get asked to see counsel's opinion on whether or not the memorandum from Mr Mtetwa will change the game in terms of the litigation.

**ADV MYBURGH SC:** Thank you. And you then obtained a

further opinion from counsel.

**MR TODD:** Yes, let us have a look.

**ADV MYBURGH SC:** It is Annexure Y at page 689, is it?

**MR TODD:** Ja. I mean, I jumped a step because actually what happened was, after Mr Mtetwa's memorandum in January 2013, without – before going to the attorneys. There is a meeting of the Risk Committee again. Where management again say there is a need to review the decision, to litigate in Transnet versus Abalozi Risk Advisory  
10 Services.

So management are again saying we have got – you know this is new and there is a new issue which shows that perhaps we should review our decision to be suing other Abalozi and ...[intervenes]

**ADV MYBURGH SC:** And you deal with it at paragraph 40.

**MR TODD:** Yes, correct.

**ADV MYBURGH SC:** Right.

**MR TODD:** And then we were then asked to brief counsel and did so. And as you say, the counsel provided a further  
20 memorandum and that is at page ...[intervenes]

**ADV MYBURGH SC:** 689.

**MR TODD:** 689.

**ADV MYBURGH SC:** And what was the upshot of counsel's advice?

**MR TODD:** Ja. What counsel's advice is – I mean, it is not

equivocal. But effectively what counsel say is – says in that memorandum, if I – and I have not read it right now. That is: Look, this may indicate that some services were rendered. May indicate that Transnet derived some value from GNS.

If GNS did in fact help to curb cable-theft, that is – it may become an indication of value that mitigates or militates against the amount, the quantum that is being claimed.

But he really points to a different problem, counsel does, he says; I am a bit worried here because I advised – we  
10 were advising Transnet and our own people are telling us that they – you know – who are the witnesses for Transnet in TFR who are going to say it is going to be our witnesses?

They are going to say that GNS did not provide the services that they were contracted to provide and that... Who is going to give the version of events here that was the basis on which we sued GNS for return of the money? And he raises that problem and this is at page 698. He says...

**ADV MYBURGH SC:** He deals with that in the last sentence of paragraph 25.

20 **MR TODD:** Ja, the upshot is. Unless Transnet has witnesses available who are willing and able to contradict Mr Mtetwa's assertions that Transnet received fair value for the money expended and who can do so on firm grounds, pursuing the case further, would be wasteful.

So counsel is now saying, effectively, if we cannot get

somebody to stand by the arguments that the reasons, the cause of actions that he put up in the summons and if the client itself – if the client itself is saying well, the work was, based on Mr Mtetwa's memorandum, we are going to have a problem in the litigation.

And that then led to a meeting with the Group Chief Executive, Mr Molefe that I also ...[intervenes]

**CHAIRPERSON:** Now just to make sure I understand this part. Mr Mtetwa's memorandum does not say here is  
10 evidence that shows that GNS provided the services. It does not say that. But it simple says, we have looked at the statistics of cable-theft and we have seen that there was some significant reduction during the period of the contract, of the GNS contract. And we, therefore – I, therefore, think that might be an indication that GNS did perform the services.

Is that what it says in effect or does it say more than that?

**MR TODD:** Ja. Chairperson, I mean, you are correct with  
20 respect that the memorandum does nothing to say the various warm bodies, the resources that were being contracted from GNS were in fact provided.

It actually operates on the assumption that they were and says I can show that they were effective. That is only what the memorandum does.

It does not say I can confirm that ten investigators were deployed from the outset but another seven of them – another six were then added. That is 16 people.

And also, it does not deal with the train crew point at all that resources were or were not provided to the train crew. That is not dealt with in that memorandum at all.

It simple deals with copper theft and it presupposes, actually, that GNS were in fact delivering the resources that they had been contracted to deliver and were invoicing.

10 **CHAIRPERSON**: But you said the only reports that GSM did provide at some stage, were reports that did not show, in terms of the information they put forward, did not show that the services were actually provided. And the people who were supposed to – the stations where they were supposed to be stationed, were stationed.

The reports, as I understood what you are saying, could well have been prepared by somebody sitting at his desk and not having seen people actually working.

**MR TODD**: Yes.

20 **CHAIRPERSON**: So Mr Mtetwa's memorandum must be understood in the context of the fact that he does not put up evidence that says the services were actually provided, were rendered as a matter of fact.

And in circumstances where GNS itself had not provided any evidence showing that the services were as a matter of

fact provided.

Only provided was something that, you know, really did not go that far. Is that a fair summary of that part of your evidence?

**MR TODD**: Yes, Chair.

**CHAIRPERSON**: Ja, ja. Okay. I get the impression and you must tell me whether – maybe getting that impression and not justified – I get the impression that at this time, which is after Mr Gama had come back, had been reinstated,  
10 I get the impression that managers within his department, TFR, seemed to be going quite an extra mile to try and not have Transnet pursue its claim against the GNS.

**MR TODD**: Yes, all the information available to me suggest that Chair.

**CHAIRPERSON**: Yes.

**MR TODD**: And in fact, that is then exactly what we then said ...[intervenes]

**CHAIRPERSON**: Yes.

**MR TODD**: ...to the then Group Chief Executive, Mr Molefe,  
20 when we had a meeting with them in March of 2013.

**CHAIRPERSON**: Yes.

**MR TODD**: We said that – we said exactly what you have just said. We are getting the impression – we did not mention the fact that it was post Mr Gama's reinstatement but we said we are not getting...

**CHAIRPERSON**: Yes.

**MR TODD**: The management, the executive or management team within TFR appear to be more aligned with GNS's position in this litigation than Transnet's.

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

**MR TODD**: And if that is the case, it can be very difficult to run this case.

**CHAIRPERSON**: H'm. Ja, it seems that they were more concerned really about protecting Transnet – I mean, GNS's  
10 position than protecting Transnet's interest. Yes,  
Mr Myburgh.

**ADV MYBURGH SC**: Thank you. You deal with your meeting with Mr Molefe in paragraphs 42 and 43 at page 499.

**MR TODD**: Yes.

**ADV MYBURGH SC**: Perhaps you could just describe to the Chairperson what Mr Molefe informed you of – at that meeting?

**MR TODD**: Yes. I mean, in essence it was – it is not usual  
20 that, you know, in a litigation that – ninety five million is – that is a relatively large case but we would not normally deal directly with the Group Chief Executive. But we were asked as attorneys to – together with counsel – to attend the meeting with the Group Chief Executive.

And he said to us: I need to go on with this case



because I am – and I am gain paraphrasing – feeling heat. I am getting called. I am getting called – calls from this fellow.

And he did not say who he was getting calls from but he was getting calls from somebody who was putting a lot of pressure on him to – about this litigation and to withdraw the litigation.

**CHAIRPERSON**: Who was speaking, saying that?

**MR TODD**: Mr Molefe, the then Group Chief Executive.

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

**MR TODD**: And so we said to him – and in effect I have attached a note. I kept a file note at the time which I have attached to page 699.

In fact, I have prepared that note in advance of the meeting because it was really a note of what I wanted to communicate to Mr Molefe in the meeting because we have been called there to and discuss.

We were – we – and we were getting the feeling that you have just described Chairperson. We are getting one thing  
20 after another, showing that internal managers thought that we should not be pursuing the litigation.

And we kept getting asked: Well, does this change it? Is this a reason to withdraw? And so, effectively what we communicated and I am confident that I communicated.

These were my talking points for that meeting on the

18<sup>th</sup> of March 2013. I had prepared them at the time. And the point he made were: Look, this contract was invalid from its foundation.

It was fundamentally invalid from a procurement point of view and it was the product of – I use the words of Mr Gama – a scam.

As to whether GNS actually did anything. It is possible if they proved so. We have asked them to show us evidence and so far we have been given a monthly report,  
10 summarising what they say they did.

But they have not given us any underlining evidence of the warm bodies deployed that we have paid for. And so, it is possible.

If they prove that they did do valuable work for Transnet, equity, to the extent that it would come into play. To the extent that a court could say: Well, to some equitable remedy to reduce the amount of damages you are claiming.

There are various other, you know, possible grounds on which a court could reduce a claim. But an equity might  
20 justify reducing the total amount that Transept has repaid if actually GNS are able to show but these are the resources we deployed. This is what it cost us to work for Transnet. And yes it was invalid but we spent these amounts.

It might be that that would result in a reduction of the amount we claimed by Transnet. But then, on the prospects

of success – and I made this point in my – and I made this point very specifically to Mr Molefe.

We have to get cooperation from the Transnet's Executive Team and a commitment to pursuing Transnet's interest in the litigation.

If we, as the lawyers, are faced with the instructions all the time which say we do not really think we got a case. We think GNS did a good job.

You know, unless we have somebody who is going to  
10 pursue Transnet's interests that it is entitled to pursue under the contract as a result of this whole exercise then we can really battle and to run the litigation successfully.

We will be hamstrung by the kind of instructions we get and we said we would actually like and we wanted him to give direction that we get given – somebody would be given clear instructions to work with us to do a proper analyses of whether we got the witnesses we need to win the case and whether we are right.

And we said, in the interim we should put GNS to the  
20 proof of their claim that they did actually rendered the services because they have not satisfied us to date that they did anything.

So that was effectively what we communicated to Transnet at that point in time.

**ADV MYBURGH SC:** You say that Mr Molefe said he was

taking heat and he was being persistently called by someone who was asking why Transnet was persisting with the litigation. Who did you think he was referring to?

**MR TODD:** Ja, it is my – I surmised that he was referring to General Nyanda but because what the context showed it was aw powerful person that was unhappy with the litigation continuing. I can put it that way.

He felt very uncomfortable about it and he did not mention a name but I cannot say whether it was in fact  
10 General Nyanda.

It seemed logical in the context that he was referring having been called by General Nyanda.

**ADV MYBURGH SC:** Then Mr Todd. Perhaps I can just paraphrase what you deal with next so that we can come to the next important part of this. In paragraphs 45 and 46, you deal with the fact that Mr Selinga addressed a memorandum to Mr Molefe where he proposed or recommended the rescission of the decision really to blacklist GNS.

**MR TODD:** That is right.

20 **ADV MYBURGH SC:** And that ultimately, Mr Molefe approved of that. And by blacklisting, I mean, that they had, on the face of the document, being traced on a list of so-called excluded tenderers.

**MR TODD:** Yes.

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

**MR TODD:** Yes. We were not aware of that. There is the documents at page 700, at that stage. Even before we met Mr Molefe internally without recourse to us. Transnet, Mr Selinga had recommended to Mr Molefe who had approved actually removing the bar on doing further business with – now it is called Abalozi – on grounds that really of Mr Mtetwa’s memorandum.

To say we are satisfied internally on the strength of Mr Mtetwa’s memorandum that actually we should remove – we  
10 should uplift the bar to doing further business with Abalozi.

And in fact, it even includes that it was suspected that Abalozi may have colluded with some Transnet employees in order to be awarded the contract.

However, there is no direct evidence to corroborate those suspicions. Is what it says. Now there was a disciplinary process in which Mr Senamela and Mr Kanye were dismissed which found precisely that there was that corroboration.

And that is precisely why Mr Senamela and Mr Kanye  
20 were dismissed. And Mr Gama had described this procurement process as a scam and a fraud.

So on what basis - it is now being suggested – but Mr Gama was the Chief Executive of TFR at this point. But Mr Selenga sends a memorandum to Mr Molefe supported by the Group Legal Services, saying there is no reason to

believe that there was anything improper in the conclusion with the contract of Abalozi.

And TFR are actually happy dealing with their joint venture partners, mail and revert to security providers that were working in their consortium and so actually we should clear them for further business with Transnet.

But that was done without resource and we did not know when we went to see Mr Molefe that that was the attitude that was being pursued by the management team at the time.

10 **ADV MYBURGH SC:** Then at paragraph 47 of your affidavit, page 501, you deal with a memorandum dated the 8<sup>th</sup> of October from Mr Gama to Mr Molefe. Please deal with that.

**MR TODD:** There is typographic error in page – paragraph 47. It is the memorandum dated the 8<sup>th</sup> of October 2013, signed by Mr Gama on the 22<sup>nd</sup> of October 2013. It says 2010. It is – obviously, that memorandum of October 2013.

20 And really this is the culmination of these regular meetings at Risk Committee of the board and that the board where management are saying, there is no real – we – there is new information. We should not be pursuing with this litigation against GNS.

And so this culminates in the Risk Committee saying: Well, somebody must come and tell us why. And so Mr Gama attends this memorandum or approves this

memorandum.

He writes it to Mr Molefe, asking for him to get a slot on – at the Board Risk Committee meeting. That is at page 705.

Now the purpose of the submission to request approval from the Group Chief Executive for TFR to present its responses to the Transnet Group Risk Committee to questions raised by the committee in respect of other laws Risk Advisory Services.

10 And so what appears from that is that it says in January 2013 – that memorandum says – Mr Gama. This memorandum is prepared by Mr Mtetwa and it is effectively signed by Mr Gama, addressed to Mr Molefe.

And it says in January 2013, TFR was requested to respond to the performance of GNS Risk Advisory Services and the costs in comparison to the current service provider.

This was done in January 2013. One assumes that is the Mtetwa memorandum being referred to. And then in October 2013, TFR was informed that the Transnet board  
20 Risk Committee was not fully satisfied with the responses and raised the following three specific questions.

Ascertain whether the contractual agreement was adhered to in terms of the number of security personnel required and the sites that were to be covered by the contract.

So the Board Risk Committee are saying, can you actually tell us, did we actually get the security personnel that we were paying for. Report on the KPI's and for deliverables and reports on investigations conducted during the contract period should be submitted to the committee.

So – and so then the – under discussion at page 706, the memorandum writes – reads: In an attempt to bring this matter to finality it is our request that that the TFR General Manager Rail Network within whose portfolio security  
10 services resides and the TFR General Council address the committee in order to explain the background to the problem which the service aimed to solve, the context and the nature.

And it is anticipated that such discussion will have to resolve in moving the matter to closure. And let TFR address the Board Risk Committee.

So this is Mr Gama sponsoring or either Mr Mtetwa – Mr Gama asking Mr ...[indistinct] [00:26:14] can we bring Mr Mtetwa and deal – explain to the Risk Committee why we say there is no reason to continue with the litigation against  
20 GNS.

**CHAIRPERSON:** Is it not strange that if GNS had actually provided security personnel at the places where they were supposed to have been provided, that there would have been nobody within Transnet who had seen that they had been there?



I mean, if the City of Johannesburg contracts GNS to say, provide security services and there must be 50 personnel during the day at the following points, surely there must be City of Johannesburg officials who would see that those people are there.

**MR TODD**: Absolutely Chairperson. So we had asked GNS to provide information of who have they had posted, where and when.

**CHAIRPERSON**: Yes.

10 **MR TODD**: They have not provided it.

**CHAIRPERSON**: Yes.

**MR TODD**: Then one thing that is nowhere to be found in any of these TFR interaction with the board, is any statement exactly like you have made. I confirm that 16 trained drivers worked a full shit and we hired another 16. And I can confirm that those people did their shifts.

20 There is no indication – in fact, what Mr Mtetwa then does is, as you will see, he goes to the Risk Committee and he says, this is very specialised and actually we do not pay for the resources. We pay for the outcomes. That is actually what Mr Mtetwa does to deal precisely with that problem.

**CHAIRPERSON**: Ja. I mean, the contract is clear. Provide X number of personnel.

**MR TODD**: Yes.

**CHAIRPERSON:** And you cannot – you could not have provided personnel over a certain period and nobody from Transnet would have seen them.

And it should not be a problem to say, here are the points at which we provide the people and the people were working from eight in the morning to eight in the evening or whatever the period, over this period.

Here are even the names. And then Transnet would simple go there and say: Well, who are the people who are  
10 in charge of that point? Were there people here during that time? And then they will say yes they were there or they were not there.

**MR TODD:** So what Transnet – what TFR Management did at this point is retreated into the idea that this is very specialised and it was entirely up to GNS to decide who to deploy, when and where and we did not – we merely monitor the outcomes to see if we have noted a reduction in theft or something like that over that period.

**CHAIRPERSON:** But then that point or position seems to be  
20 inconsistent with the expressed terms of the agreement which say deploy so many people.

**MR TODD:** I would agree with you Chairperson.

**CHAIRPERSON:** Ja, Ja. Okay. Mr Myburgh.

**ADV MYBURGH SC:** Thank you. Mr Todd, you go on then at paragraphs 48 and 49, page 502 and 503 to deal with a

presentation that was prepared for the Risk Committee.

**MR TODD:** Yes.

**ADV MYBURGH SC:** And then the meeting of the Risk Committee on the 7<sup>th</sup> of November. You deal with those two things, please.

**MR TODD:** Ja, the presentation ...[intervenes]

**CHAIRPERSON:** Which page are we now?

**MR TODD:** Sorry Chairperson?

**CHAIRPERSON:** 502?

10 **ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** Okay. I have got it.

**MR TODD:** And the – so for that October 2013, so Mr Gama says to Mr Molefe can we get Mr Mthethwa an audience for the risk committee and he will explain things. So then a presentation is prepared for the risk committee and I have referred to that. The presentation itself is at page 707 where it is prepared by Mr Mthethwa and it contains – includes in it the extract that I have referred to there which is at page 710. And that is where in response  
20 to the question specifically raised by the board risk committee:

“Ascertain if the contractual agreement was adhered in terms of a number of security personnel required and the sites that were to be covered by the contract.”

That is the question that Mr Mthethwa is asked to address the board subcommittee and his response is to say:

“Specialise security contract different to traditional guarding contract. Performance/outcomes focused is based on a targeted reduction in theft incidents, length of cable stolen, arrests and convictions. Number of type of resources required are not prescribed to the service provider, as with guarding contracts.”

10 Now that statement, the board subcommittee have not read the contracts, but it is false, it is completely untrue.

**CHAIRPERSON:** Yes because the contract says exactly the opposite, says specify.

**MR TODD:** Yes and every time – when further resources are procured, which more than doubled the contract, the two extensions, they specifically mentioned the exact number and it is not just for cable theft, it is for trained crew guards and it is for somebody to sit at the –  
20 set of trained crew guards.

So to say that the GNS contract, the number and type of resources required are not prescribed is just – it is completely misleading the board, quite frankly, that is what this did.

But it is something which was necessary, if I can

put it that way, if you wanted to defend – if you were determined to defend this contract, it is hard to know why any Transnet would be determined to not – to undermine Transnet’s claim for recovery of money paid to GNS but it is a logical thing to say when in fact there are no time sheets and no list of staff deployed. Then you say oh, well, actually they did not have to and in fact what he then says is the security – he in fact then goes further, he says:

10            “It is a monthly project budget, reviewed and evaluated. Service provider deploys resources such as investigators, researchers and handlers at its discretion within the limit of the monthly budget and according to changing crime patterns.”

So what he is actually saying is, they put all these numbers together but they do not really have to deploy people like that, they can do something totally different and the invoices say this is how much I am charging for and this is who I am charging for, the invoices say two supervisors and 16 train crew but whether they provide  
20 them or not depends on their assessment of the risk at the time, of whether it is a good idea to deploy train crew or not but they still invoice us for it. I mean, that is really Mr Mthethwa was telling the board sub-committee, it seems to me, but it is just completely inconsistent with the contractual arrangements that had been concluded from

the outset.

**CHAIRPERSON:** You might not be able to say anything about this but I wonder whether somebody who could – who had read the contract could put up this version without intentionally seeking to make a misrepresentation. One does not know whether Mr Mthethwa had read the contract.

**MR TODD:** Yes and Chairperson, read the contract and the extensions to it and understood what was going on there.

10 **CHAIRPERSON:** Yes, yes. And, in any event, the question that was sought to be addressed actually required the person who gives response and answer to have checked the contract because the question is certainly if the contractual agreement was adhered in terms of the number of security personnel required and the sites that were to be covered by the contract, to answer that question you must go to the contract.

**MR TODD:** Yes.

**CHAIRPERSON:** Okay.

20 **MR TODD:** Seems to me, Chairperson.

**CHAIRPERSON:** Mr Myburgh?

**ADV MYBURGH SC:** Thank you. Then could you deal with what happened before the risk committee?

**MR TODD:** Yes.

**ADV MYBURGH SC:** At paragraph 49 you say that the

presentation which you have just spoken of was duly made to the risk committee at a meeting on the 7 November 2013.

**MR TODD:** Yes, I was not at the meeting but I have read a minute of it, it is an approved minute of that meeting provided by Transnet and that says that the intention – there management, again, you have got the minute recording what did management tell the committee and management told the committee that the intention of the  
10 exercise was to establish if there was value derived by the company from the contract or not. So they change it, they say oh no, this is not – were the personnel there or not, they say well, did we get value from the contract? The quantum of the value derived was set out in the monthly reports and matched by invoices. So whatever that means, management are saying if you read a monthly report saying we have done a whole lot of work for you and here is our invoice, that is proof that the invoice ...[intervenes]

**CHAIRPERSON:** The work was done.

20 **MR TODD:** Services – that the work was done. That is what management are saying. They say that the supplier was appointed to perform a data gathering function. I do not know what that means. But Abalozi adhered to the contract and that the company did not have a KPI that required the service provider to provide a list of security

personnel. So management says, you know, you are asking the question but they were not obligated to tell us or to even have any specified number of people on the job. They just had to give us reports and give us an invoice and that is all they needed to do.

**CHAIRPERSON:** It is a very strange situation that an entity can spend and pay 98 million – R95 or R98 million to a service provider without being able to say we know that the service that they were supposed to provide was  
10 rendered.

**MR TODD:** Well, it obviously is ripe for abuse, that situation, Chairperson.

**CHAIRPERSON:** Please just repeat that, Mr Todd?

**MR TODD:** I just it makes – it is ripe for abuse, a situation where a management team is either unable or does not – is not required to actually verify that services were provided, that is ...[intervenes]

**CHAIRPERSON:** And then maybe they were not interested in knowing.

20 **MR TODD:** It is a classic case where clearly a service provider can with the right support internally abuse that position by ...[intervenes]

**CHAIRPERSON:** But the question then arises, the person who had the final authority to approve that these millions be paid, should he not have sought proof that the services



had been rendered first so that that question would arise. I would imagine that if you authorise payment of millions of taxpayers' money, the least you should do is to say let me be satisfied that this payment is due.

**MR TODD:** Yes, Chairperson.

**ADV MYBURGH SC:** Thank you.

**CHAIRPERSON:** Mr Myburgh, I think we should take a short adjournment, just ten minutes, and then we can continue. What is your assessment of how we are doing in terms of time?

**ADV MYBURGH SC:** I think that we should still be able to finish in the three hours that I indicated.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** If we take a ten minute adjournment now, I hope to finish by quarter past six.

**CHAIRPERSON:** Ja, okay. No, that is fine. Let us just take a ten minutes adjournment. We adjourn.

#### **INQUIRY ADJOURNS**

#### **INQUIRY RESUMES**

20 **CHAIRPERSON:** Okay, let us continue. I think I just wanted to say before we proceed, I think just from one's own experience, I mean, when it comes to the deployment of security in companies and government departments there would even be a record that is kept when security guard reports for duties they would sign somewhere and

when they leave and somebody else starts. They would do that.

So it ought to have been very easy for GNS to produce such documents if they did, they had actually provided the services and actually they would have had – they would have asked the companies who might have done the work for them also to say just provide the names of those employees and they could even provide, that is GNS, proof of the money that they paid to those  
10 companies. All of that should have been easy if indeed they had actually subcontracted and work had been done. I would have imagined that all of that should be easy, should have been easy for them to produce, to say here are amounts that we were paying monthly to company A, company B, company C. Each of whom – each of which provided x number of security personnel during that period. Okay, Mr Myburgh?

**ADV MYBURGH SC:** Thank you, Chairperson.

**CHAIRPERSON:** Ja.

20 **ADV MYBURGH SC:** Mr Todd, just to finish off on the risk committee which you deal with at paragraph 49 at page 503 and it goes over to 504 at paragraph C. You mentioned there that what the committee resolved is that the matter should be referred to the Arbitration Foundation of Southern Africa for Resolution preceded by mediation, is

that correct?

**MR TODD:** Yes, that is what the minute shows the committee decided.

**ADV MYBURGH SC:** And what happened after that?

**MR TODD:** Ja, so this I – I had glean this from the documents but it is apparent that that did not happen, it was a strange suggestion that it would somehow that the Arbitration Foundation would produce a resolution unless they – but, in any event, what happened was that in  
10 December 2013 instead what Transnet did was they went to fresh attorneys, an independent law firm to ask the question whether Transnet received value for money for the services that it had paid for.

**CHAIRPERSON:** This was – was this similar to what happened to your law firm in regard to Mr Gama's dismissal matter, Mr Todd, because as I recall, in regard to his dismissal matter your law firm had been representing Transnet and had given certain advices to Transnet but at a certain stage Transnet then decided to terminate its  
20 mandate, your mandate and then they went to another law firm or other law firms in terms of seeking to have the matter settled and this seems to be something similar.

**MR TODD:** Yes, perhaps, Chairperson. It is an indication that Transnet wanted to ask another law firm whether or not the question that they put in their brief was did

Transnet receive value for money and was the payment at 95.6 million justified, is the question they ask and – I mean, the question is differently formulated, if I may just say, what had been sued for, for Transnet, and the claim that had been brought by our firm on behalf of Transnet was the contract was invalid from a procurement prospective and then it suffered all the various further defects that it suffered and services were not rendered.

We had said look, there may be some grounds for  
10 producing the claim against proof of services actually rendered but this seems to be the board saying well, let us ask somebody else if you can say that the payment was justified. That was the mandate given to another law firm, anyway.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** You then go on to mention that you attended a meeting with these attorneys, HNR, and perhaps I could then take you to paragraph 53.

**MR TODD:** Yes.

20 **ADV MYBURGH SC:** They, HNR, briefed a security consultant. Who was he?

**MR TODD:** Ja, they explain it in the report. So the – I do not know this person but his credentials are set out by HNR Attorneys as somebody properly qualified to analyse the reports that had been provided to Transnet by GNS and

to comment on certain key questions that they asked of this specialist security consultant. So they effectively engaged an expert in security services to look at what had been done here and answer various questions that they set out.

And if I – I mean, they then deal with that in their report and I think there is a report in – I have attached to my affidavit the report – the full report of that security consultant but the key provisions of it and the questions  
10 that were specifically asked are also summarised in the report from HNR attorneys and that is probably the easiest way to look at what this security consultant actually said. I do not know, I can refer to any page but that is at page 762. At page 762, this is in the report of HNM Attorneys, I do not know why I said HNR, it should be HNM, I think, Attorneys.

And that reflects – there were six questions, they say we posed six questions to Peritus, is the name of the specialist firm that John Pearson worked for.

20 1. Do the reports reflect that services were provided?

That is the first question, do the reports reflect that services were provided? He says:

“Yes, partly.”

Is his answer and he then explains what was provided in

indicates that work was actually done and what is not shown and then the second question at page 763 says:

“Would the services as set out in the reports represent, in your opinion, what one might expect to have been provided given the mandates?”

“No”

Is his conclusion there.

10 “Reports were nonspecific, vague, no evidence of internal involvement of Transnet employees, contents were more often than not conjectured with baseless opinions, never indication that any of the intelligence-based information was properly profiled.”

Dah-de-dah-de-dah. So the answer to that question is no. There were six questions. So the first one was yes, partly. The second question, no. The third question:

20 “Would the level of reporting in terms of detail of information provided represent, in your opinion, what one might expected to have been provided in reports of this nature? If not, please elaborate.”

“No, they did not contain security objectives”

And then there is a long explanation of what they did not do.

“Do the report reflect an account of services?”

This is the fourth question.

“...which, if rendered, would represent in your opinion contractual compliance?”

“No.”

They pursued the agreement and they say no, there was no contractual compliance. Question five:

“On the basis of the content of the reports can you identify any apparent material gaps in services that the service provider was mandated to provide? Can you identify material gaps?”

10 “Yes police CAS were falsely reported and did not exist. There was no feedback in criminal cases.”

And they go on to define that. Now, I mean, that is a pretty material conclusion. They say yes, these reports say we opened cases with the police and here are all the case numbers and when you read the report in any detail they list a significant number of police case numbers which just do not exist and are false. And then:

20 “Would you render an opinion representing an overall assessment of the services rendered based on the contents of the reports?”

“Report writing is poor.”

Etcetera, etcetera. So effectively they hired an expert to look at whether, you know, what the reports show about the level of security services provided and overwhelmingly the expert says something was done, people travelled to

certain sites, there were photographs attached to certain reports so there is some evidence that something was done but nothing like the contract contemplated.

**ADV MYBURGH SC:** Then what was the conclusion then of this report?

**MR TODD:** Well, what these attorneys then conclude, rather extraordinarily, in my opinion, but they conclude, they say the following, if I am – and I am just summarising, paraphrasing what they say. They say, first question:

10            “We tried to find out if, from GNS, if they actually could provide any evidence of personnel deployed.”

So we had seen the request from Transnet, we had been told they had given no information, we wrote to, at that stage, Werksmans Attorneys who were representing GNS and they ignored us. They ignored our calls, they gave us nothing and in light of the long history of this matter we have got no reason to believe – we do not think we are going to get anything from them.

20            So that is the first rather, in my view, rather a crucial part of the report which says well, no evidence in that sense of warm bodies.

The second question is, they say well, we have looked at this comparative analysis of cable theft during GNS, during the new contractor, we have looked at Mr Mthethwa’s report, we have extended it beyond, we cannot



reach any conclusion based on a comparative analysis that actually these services were provided.

Then they look at the third thing and say well, based on our interviews with staff members and their interviews that they specifically mention, the interviewed Mr Gama who emphasised to them how the consequences, the financial consequences and the losses suffered when cable theft occurs is huge and it is very difficult to quantify because of all the knock-on effects. So Mr Gama's  
10 evidence say they recall from their interview with him was to say that cable theft has huge consequences for Transnet.

Mr Mthethwa said that actually the cable theft statistics were not bad or quite good or moderately good during GNS' contract and that Mr Msigala said that after the hijacked train crew member had disappeared with a vehicle, they did not have another incident like that and it had been a good thing for Transnet to have additional train crew support.

20 So they describe that and they say essentially on the basis of that we conclude that Transnet on balance did get value on cable theft, we cannot say that it got any value on protecting Karsene yard or anything like that, the middle portion, let us call it, of the contract, the first extension. And as regard train crew, on the basis of what

Mr Msigala said, what value can you place on a human life? We conclude that value was given to Transnet for the money paid. That is the conclusion that the attorneys reached. And they said on balance then, Transnet got value.

**ADV MYBURGH SC:** That you summarise in paragraph 55 at page 505. At page 506 you then go on to mention that the risk committee then held a meeting, it was presented with these findings and it resolved at the risk committee,  
10 that the litigation against Abalozi should not be pursued.

**MR TODD:** Ja, that is correct.

**ADV MYBURGH SC:** And ...[intervenes]

**CHAIRPERSON:** Part of what is changed is – and maybe it is something that I mentioned earlier, is internally Transnet is really going quite far to do – to itself do what one would have thought they would call upon GNS to do, day provide us with proof. But they are doing all of that themselves and it is like they want to find a basis to withdraw the claim.

20 I know that when we were dealing with the question of the settlement of Mr Gama's dismissal dispute, also one got the impression that there was quite a serious effort to make sure that he was reinstated, not matter what. Yes, okay, Mr Myburgh?

**ADV MYBURGH SC:** Thank you. And then at paragraph 57

you say that the Transnet met on the same day and you attach a copy of the minute. Could I take you there, please? That annexure is LL at page 787.

**MR TODD:** Yes.

**ADV MYBURGH SC:** You will see that what you attached to your affidavit was really an extract, paragraph 7.4 under the heading Board Risk Committee, but if you drop down to 7.4.3 you will see that it is cut off:

10           “One of the members indicated that the committee had approved the finalisation of the Abalozi matter based on the findings from an independent mediator. Moreover, management had also informed...”

And then there is nothing after that. Mr Todd, you have managed to procure the full minutes of that meeting and it is apparent from the full minutes and I will hand up them in a moment that the minutes went on to state that:

20           “Management had also informed the committee that the criminal matter on Abalozi was withdrawn by the NPA due to a lack of information to prosecute. The committee requested management to compile a lessons learnt document from the Abalozi challenges and then the board noted the update.”

So the real decision, the actual decision was taken by the committee and simply noted by the board.

Mr Chairperson, if I could just hand up this document which we will formally add into the exhibit to be marked and to be placed after page 787 marked A and B, it includes the missing sentence that I have just read.

**CHAIRPERSON:** Okay.

**MR TODD:** Would you give it to Mr Todd as well? Alright, then ...[intervenes]

**CHAIRPERSON:** I am sorry, this will be page 787A and 787B?

10 **ADV MYBURGH SC:** Yes, Mr Chairperson.

**CHAIRPERSON:** You know, your handwritten looks to me like 75A.

**ADV MYBURGH SC:** I beg your pardon. 787, yes.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** Alright. Now, Mr Todd, let us ...[intervenes]

**CHAIRPERSON:** I am sorry, I am sorry.

**ADV MYBURGH SC:** Yes.

20 **CHAIRPERSON:** So you say do they replace the current 787?

**ADV MYBURGH SC:** Well, 787, as it stands ...[intervenes]

**CHAIRPERSON:** And the name.

**ADV MYBURGH SC:** Is cut off, yes.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** Well, it is ...[intervenes]

**CHAIRPERSON:** Or should we replace it or ...[intervenes]

**ADV MYBURGH SC:** I suppose the only important page is actually 787B, Chairperson, because that contains the missing sentence.

**CHAIRPERSON:** Yes. So what do you say finally do we take out 787A or do you say we just replace ...[intervenes]

**ADV MYBURGH SC:** I suppose that perhaps could be the easiest way to do it just to add one page.

**CHAIRPERSON:** Ja.

10 **ADV MYBURGH SC:** It is not 787A that I have referred to.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** But the 787B, we could turn that into 787A.

**CHAIRPERSON:** Okay.

**ADV MYBURGH SC:** And it then includes the missing sentence and only one page needs to be added.

**CHAIRPERSON:** Yes, okay. So the one you had marked as 787B becomes 787A.

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

20 **CHAIRPERSON:** And the we slot it after page 788.

**ADV MYBURGH SC:** Comes after the existing 787.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** It will be marked A.

**CHAIRPERSON:** Yes. Ja, it goes up to – the minutes start on 787 and then go up to 788, hey? Ja. 788.

**ADV MYBURGH SC:** Yes, I beg your pardon.

**CHAIRPERSON:** So we slot it after that.

**ADV MYBURGH SC:** Yes.

**CHAIRPERSON:** And then it will be – or should it be 788A?

**ADV MYBURGH SC:** I think it is probably better to be – upon reflection, and I am terribly sorry, 788A.

**CHAIRPERSON:** A, ja.

**ADV MYBURGH SC:** Yes.

10 **CHAIRPERSON:** Okay. Then maybe for the record you can just place on record what the effect is of doing this so that whoever reads the transcript can follow.

**ADV MYBURGH SC:** So, Mr Todd, just to retrace our steps. If I could ask you go to 787.

**MR TODD:** Yes.

**ADV MYBURGH SC:** You see there is a report of the risk committee and it ends off with a sentence saying that:

20 “One of the members indicated that the committee had approved the finalisation of the Abalozi matter based on the findings from an independent mediator. Moreover, management had also informed...”

And if you could then go to what is now marked page 788A, it continues:

“...informed the committee that the criminal matter

on Abalozi was withdrawn by the NPA due to a lack of information to prosecute. The committee requested management to compile a lessons learnt document from the Abalozi challenges and that the board noted the update.”

**MR TODD:** Yes, I can confirm that that is from the full version of the approved minutes provided to us by Transnet and that ...[intervenes]

**ADV MYBURGH SC:** Mr Chairperson, why I asked for this  
10 and have gone to the trouble of adding it, is I think it might be an important fact for the purposes of the material facts of this case, that it is really the risk committee that took the decision.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** And then that that is noted by the board.

**CHAIRPERSON:** Yes.

**ADV MYBURGH SC:** I thought it was important to add this page.

20 **CHAIRPERSON:** Yes. No, no, I think it is ...[intervenes]

**ADV MYBURGH SC:** So that becomes clear to you.

**CHAIRPERSON:** I think it is important, ja.

**ADV MYBURGH SC:** Alright. Now, Mr Todd, the decision is taken to withdraw from the litigation and then at paragraph 58 at page 507 of your affidavit you go on to

explain that a settlement agreement was then concluded, is that correct?

**MR TODD:** Yes and it parallels with the previous matter on which I gave evidence but it was indeed the case that this settlement agreement too did not involve the attorney or Transnet did not involve the litigation attorneys who were representing it in this High Court litigation when they negotiated and concluded this settlement agreement. It was concluded without our advice.

10 **ADV MYBURGH SC:** That settlement agreement you find as annexure MM at page 789 and the terms of it are set out at 790 where it records that:

“Transnet hereby withdraws its action against Abalozi. Abalozi hereby withdraws its counterclaim against Transnet. Transnet will upon signature hereof issue a media statement in the form as agreed and attached hereto marked A.”

And then of some significance, 4:

20 “Transnet will pay all the legal costs incurred by Abalozi, its directors and the cofounders and directors of GNS on an attorney and own client scale. Terms of the settlement agreement are confidential and should not be disclosed to any one of the parties, to any third party.”

Could I just ask you to comment on 7 Could I just ask you



to comment on paragraph 4 of the provision dealing with costs?

**MR TODD:** Ja, it is unusual in two respects. I mean, the first is that it purports to refer to costs of not only the company that was party to the litigation but also its directors and the cofounders and directors of GNS suggesting other individuals' legal costs would be covered, not just Abalozi's but I do not know to what extent that was intended or played a role. As I say, we were not asked to  
10 advise on it. So it is unusual.

And then obviously, an attorney and own client scale is what is generally referred to as a punitive scale as if Transnet it was – somehow should be punished for having conceived of a case like this in the first place.

**CHAIRPERSON:** Ja, as if Transnet has done something reprehensible.

**MR TODD:** But there is one other point that I just make here, is that Abalozi did withdraw its counterclaims and that is important. It will appear in a moment important for  
20 what Transnet subsequently did to settle the legal costs.

And just, as far as the legal costs are concerned, when you settle High Court litigation like this, this is a matter which had only been pleaded. So any taxed bill of costs is going to be the cost even on an attorney and own client scale consequent on pleading the case, taking

instructions and drafting the pleadings and so on and so forth. There were no preparation for trial or trial in this matter. In fact discovery had occurred but on a very limited basis and that is it.

**CHAIRPERSON:** And actually there might not have been many witness statements that had been taken already.

**MR TODD:** It – ja, I will comment in a moment when we deal with the legal costs themselves that were subsequently paid.

10 **CHAIRPERSON:** Ja. Do you by any chance know whose signature that is that signed on behalf of Transnet? You might or might not know, Mr Todd?

**MR TODD:** It is consistent with other documents signed by Mr Molefe. It appears to be signed by Mr Molefe.

**CHAIRPERSON:** Yes.

**MR TODD:** I am not a handwritten expert.

**CHAIRPERSON:** Okay.

**MR TODD:** But it appears to be signed by Mr Molefe himself.

20 **CHAIRPERSON:** Okay.

**MR TODD:** And the other signature is legible, appears to be Siphwe Ayanda. But that, again, I am not a handwritten expert.

**CHAIRPERSON:** Ja, yes.

**MR TODD:** It appears to say legibly that that is the person

who signed that document.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** Then, Mr Todd, you go on in your affidavit at paragraph 60 to refer to two letters from Abalozi, the one dated the 8 September and the other the 16 October. Could you just deal with those letters? You find them at page 791 and then 793.

So these are letters that were sent to Transnet after the settlement agreement.

10 **MR TODD:** Yes.

**ADV MYBURGH SC:** The settlement agreement was ...[intervenes]

**MR TODD:** The settlement agreement was signed apparently on the 4 August 2014 and the following, within a month, Abalozi – or at least somebody on behalf of Abalozi writes a letter to Transnet, to Mr Molefe. And this is at page 791 saying:

20 “The following should be taken into account in finalising the lump sum payable to Abalozi in full and final settlement Abalozi’s legal costs.”

**CHAIRPERSON:** I am sorry, you said 791?

**MR TODD:** 791.

**CHAIRPERSON:** Oh you are reading from paragraph 2?

**MR TODD:** Paragraph 2, yes. Yes, Chairperson.

**CHAIRPERSON:** Okay. The letter is addressed to Mr

Brian Molefe.

**MR TODD:** Yes.

**CHAIRPERSON:** And it comes from – the letterheads are those of Abalozi.

**MR TODD:** Abalozi Risk Services.

**CHAIRPERSON:** Yes, okay, alright.

**MR TODD:** And it appears to be picking up on the obligation in paragraph 4 of the settlement agreement for Transnet to pay all legal costs incurred by Abalozi and  
10 various parties. So it says:

“The following should be taken into account in finalising the lump sum payable to Abalozi in full and final settlement of Abalozi’s legal costs in the action instituted by Transnet and damages claimable in connection with...”

And then they refer to other matters which – neither of which I think was ever pursued. But they then say in paragraph 3:

20 “The essence of this is, in our view, an amount of R40 million will be reasonable compensation to Abalozi.”

**CHAIRPERSON:** I am sorry, Mr Todd, I think the contents of that letter are important in their entirety. Could you just read it into the record, the letter at 791?

**MR TODD:** Yes. So it say – it is written without prejudice

and it says:

“Dear Brian...”

Which I take to be referring to Mr Molefe.

1. We refer to our letter of 20 August 2014.

The following should be taken into account in finalising the lump sum payable to Abalozi in full and final settlement of Abalozi’s legal costs in the action instituted by Transnet and damages claimable in connection with:

10

2.1 The pending review application, and

2.2 The pending defamation claim.

3. Our view is that amount of R40 million will be reasonable compensation to Abalozi in this regard.

4. As this matter has been dragging on for too long we need your response within seven days from today’s date failing which we will have no choice but to ask our lawyers to issue the bill of costs and proceed with the pending claims. Should our proposed settlement amount be acceptable, it should be deposited into our attorneys’ trust account as follows.”

20

And it gives the details of Werksmans Attorneys bank account.

“We await to hear from you.”

**CHAIRPERSON:** Thank you.

**ADV MYBURGH SC:** Now, Mr Todd, perhaps I could just ask you to comment on what you know of this so-called pending review application and pending defamation claim. What did they involve?

**MR TODD:** Well, I do not know – I will tell you what I am able to say but as regards the review application, I believe the findings in the disciplinary hearing which resulted in  
10 the dismissal of Mr Senemela and Mr Kanya. An article was published in a newspaper referring to those findings, and Abalozi believed, ...[Indistinct] said it was going to do two things, one was it was going to review the findings of the disciplinary chairperson, Abalozi as an external party was going to bring an application to review and set aside the disciplinary chairperson’s findings, and secondly, they were going to sue Transnet because they held Transnet responsible for the publication of the disciplinary matter. I don’t recall whether a review application was ever brought  
20 or if it was, it certainly wasn’t pursued, and I don’t believe that deformation proceedings were ever instituted. I made the – certainly, I don’t believe, to the best of my knowledge, our firm certainly wasn’t briefed in any deformation proceedings, there’s no reference to any proceedings that have been instituted. So, my – as far as I

can tell this is reference to a threatened claim rather than one that is currently pending before the Courts, but I'm not able to say more than that.

**ADV MYBURGH SC:** Alright and then you're also going to deal with the letter of the 16<sup>th</sup> of October, that you find at 793.

**MR TODD:** Yes, so there is missing correspondence because that refers to a response from Mr Molefe dated the 29<sup>th</sup> of September and I did not have a – don't have a full  
10 picture of all of those – or a full record of that – the missing correspondence but this is the stance of Abalozi after Transnet responded and it says – if I should read this one too, Chairperson?

**CHAIRPERSON:** Yes.

**MR TODD:** Again,

“Dear Brian, your letter dated 29 September 2014 refers. 1) In reference to our letter dated 8 September 2014, we have indicated that we would request our attorney to issue the bill of cost and  
20 proceed with the review application, deformation claims and the Directors/Employees pain and suffering claims, should our proposed settlement not be acceptable”.

So, it does appear that they are threatening additional proceedings that haven't yet been brought or

certainly, not proceeded with.

“As this matter has been dragging for so long, our consideration was that a lump sum would eliminate any further legal processes and thus, swiftly conclude this matter. 3) In light of Transnet’s own admissions, after appointing an external law firm which conducted a vigorous and exhaustive investigation and concluded that we were unjustly persecuted”.

10 Now, that’s a rather strange thing to – sorry, I’m reading,

“4) Restitution and compensation would be a due remedy for the deformation Abalozi, its employees and Directors. 5) It should also be noted that prejudice was also carried over to companies which had the Directors of Abalozi as members or Directors in their companies as all those companies were placed on Transnet’s list of excluded tenderers. This could pose further litigation against  
20 Transnet, and 6) The consequence of Transnet’s actions, including the criminal charges have caused irreversible affects, which Abalozi and its Directors have suffered in the business arena. Reputations of its Directors and officials were severely tainted rendering them unemployable and not trustworthy in



the sphere of security services. The nature of the company's core service is it requires integrity and honesty, and then, 7) The following were taken into account when considering the proposed amount and exclude the counterclaims that were subject to settlement agreement on the 4<sup>th</sup> of August".

And then there's various further provisions which suggest very large counter claims would still be brought after – including a R700million deformation claims and they  
10 then say, the R40million at paragraph 8,

"The R40million proposal of settlement was believed to be a fair restitution and compensation inclusive of the legal costs incurred in all matters with Transnet".

Given the extra information required by Transnet in response, a letter dated 29 September 2014,

"And the detail of lost revenue provided in this communication, we think that a settlement of R60million would be justifiable. It would be prudent  
20 to have this matter concluded expeditiously so as to avoid any further legal and consequential costs, we wait to hear from you".

**ADV MYBURGH SC:** Now, Mr Todd, if you go back to page 507 of your affidavit, after having dealt with those two letters at page 61 at 508, you go on to say that you, at

that time, were not aware of what actual costs were paid, correct?

**MR TODD:** Yes.

**ADV MYBURGH SC:** That, then takes us to your fourth affidavit, could I ask you, please, to turn to page 798, you say at paragraph 5,

10 “That, since I deposed to that affidavit, that’s the one we’ve just dealt with, by being provided with certain documents by Transnet, whose authenticity I have no reason to doubt, which indicate that Transnet ultimately agreed to pay an amount of R20million to Abalozi”.

Would you just pick up from paragraph 6 please?

**MR TODD:** Yes, thank you, Chairperson, these documents were provided to me by Transnet from its records, but they appear to reflect they come from Transnet’s files, particularly reflecting payments that were actually made and they – so they appear to come from the financial records and other credible records of Transnet, I’ve got no  
20 reason to think they don’t – aren’t correct. They show that – and really what the rationale for this R20million payment is set out in a memorandum at page 801 dated the 30<sup>th</sup> of January 2015 addressed by Mr Ndiphiwe Silinga to the then, Group Chief Financial Officer, Mr Anoj Singh and it says,

“The purpose of this submission is to request the Group Chief Financial Officer to authorise the payment of an amount of R20million in full and final settlement of the legal disputes between Transnet and Abalozi”,

Then they reflect that in 2011, Abalozi sued Transnet, this was its counterclaims, for damages in the sum of R487million arising out of various claims, including loss of business, loss of profit, deformation of character  
10 and others. So those were the counterclaims in the High Court litigation.

“During 2014 the parties engaged in settlement negotiations which resulted in Abalozi offering to accept an amount of R60million in full and final settlement, all its claims and legal costs against Transnet per letter dated 16 October 2014. Paragraph 4, Transnet made a counteroffer of R20million per letter dated 16  
January...[intervenes].

20 **CHAIRPERSON:** I’m sorry, I think I’ve lost you, I’m at 798 and 799, what page are you on?

**MR TODD:** My apologies, Chairperson, I was reading from – so it’s 798 paragraph 6 (a) refers to a memorandum dated 30 January 2015.

**CHAIRPERSON:** Oh, okay.

**MR TODD:** That memorandum is just two pages further on, or three at 801.

**CHAIRPERSON:** Okay, that's alright, continue.

**MR TODD:** And then so that memorandum records that Transnet made a counteroffer, in paragraph 4, Transnet made a counteroffer of R20million in a letter of 16 January 2015 and that counteroffer was accepted and it goes on to say that it is due for payment,

10                   “Effective which will be to settle all legal disputes pending between - the parties that were pending before the South Gauteng High Court, including costs”,

And that was then approved and paid. The letters offering the settlement amounts and recording the acceptance of the R20million are then attached to those documents.

**ADV MYBURGH SC:** And you refer there, at page 803 to a letter from Mr Molefe to Abalozi where he made the offer of R20million, which was then accepted by Abalozi, correct?

20   **MR TODD:** Yes, correct.

**ADV MYBURGH SC:** Now Mr Todd, just to finish off on this, could I take you back, please, to page 799 and you undertake some analysis and commentary at paragraph 7, 8 and 9, could you just – and 10, could you go through those please?

**MR TODD:** So, in essence what occurred here is that – I mentioned earlier Abalozi had formulated some very broad ranging counterclaims against Transnet in response to Transnet’s claim of R95.5million. So, in its plea and counterclaims referred to earlier, it formulated broad ranging counterclaims against Transnet, totalling in the R400millions. When that – the deed of settlement recorded that their counterclaims were withdrawn, thus terminating litigation in relation to those counterclaims and what I have  
10 suggested – said in paragraph 7 (a) at page 799 is that having withdrawn its counterclaims on any reasonable assumption the deed of settlement, that’s this – that settlement agreement compromised each of the elements of the counterclaim that were set out in paragraphs 26 to 31 of the Abalozi plea and counterclaim. So, this is – back in 2011, Abalozi formulates wide ranging counterclaims against Transnet and then it compromises them and withdraws them, and Transnet pays legal costs. What, immediately happens – so Transnet’s legal costs – and I  
20 then deal with what legal costs actually would be, I’ve said on any reasonable – on reasonable assumptions the tax costs would not have exceeded R1million, that would be extraordinarily generous for a case that wasn’t...[intervenes].

**CHAIRPERSON:** Ja, I was thinking that would be quite

serious, I think.

**MR TODD:** It's more likely to be in the low hundreds of thousands at most, since it's on an attorney and client scale but whatever it is, you're not going above a million rand and so, on what conceivable basis could Abalozi claim R40million or R60million and would Transnet offer R20million. What appears to be the case, effectively, is that Abalozi re-threatened proceedings that had – in 2015, re-threatened proceedings that had been compromised  
10 already. Already introduced to litigation back in 2011 and – well, I say in paragraph 9, either somebody is suggesting that R20million if a fair assessment of legal costs, that's absurd, it can't be. So, therefore, the overwhelming portion of that must be a fresh – a payment to compromise a fresh what has already been withdrawn. Alternatively, if they say, to the extent that Abalozi says, well we could have brought new claims that weren't within our counterclaims, then the point I make is that, this is four years later – five years after the – these events. Any  
20 claims of that nature that weren't included in the counterclaims have long since prescribed under our ordinary legal principles. So, Transnet's apparently acting without legal advice, at this point in time...[intervenes].

**CHAIRPERSON:** That, on its own, is quite strange.

**MR TODD:** This is not on the advice – there's no

evidence on any of these documents that there was any other law firm involved, advising Transnet. These are R20million offered just by lettering one line by the Group Chief Executive in the letter at page 803 and – so it's just – it's inexplicable.

**CHAIRPERSON:** It's like – it's just like some people at Transnet decided to give GNS or Abalozi some millions of rands for nothing.

**MR TODD:** There was no legal counselling.

10 **ADV MYBURGH SC:** Just to – they just decided they should get some millions of rands and it's strange that they – I mean we know that, in regard to Mr Gama's dismissal matter, they acted – they had attorneys – different attorneys representing them at different times but it's quite strange that, here, they seem to have decided, we will deal with this without any external attorneys and they then purport to settle, either, things that had been withdrawn already or things that may have been threatened, it's quite strange. It's like there's somebody that just decided they  
20 need to be paid. GNS or Abalozi needed to be paid some millions of rands from Transnet.

**MR TODD:** Yes, Chairperson, it's – to me, I can see no legal – I used the word, counsel, no legal course for having made – paid anything remotely resembling this and the sensible thing, if anybody is given – asks for legal advice

would have been for them to get a bill of costs drawn, which they had undertaken in terms of paragraph 4, of the settlement agreement, say, draw a bill of costs and we'll pay that.

**CHAIRPERSON:** I mean you have the claim, Transnet's claim which is with – against Abalozi or GNS connected with the GNS contract that is being withdrawn in circumstances where it's quite clear that the contract was irregular. Of course, as you said, Mr Todd, maybe there  
10 could be an argument that if they did render the service, maybe in terms of equity, the amount that Transnet was claiming could be reduced by they had had ample opportunity to provide proof to Transnet that there were services that were actually rendered, they're paid to do that and then the matter is settled and it's settled on a basis that includes that Transnet must not only pay them costs but they must pay them costs on attorney and client scale, that's – I'm not going to say that's unheard of because I think I've heard of similar settlements in this  
20 Commission involving one or other SOE, you know. So, it's settled on a basis that's very, very favourable to Abalozi and very detrimental to Transnet. Usually if a matter is settled, very often each party pays its own costs, but Transnet must pay, not only the costs but on attorney and client scale and then Transnet must pay about R40million,



Mr Myburgh?

**ADV MYBURGH SC:** Thank you. Mr Todd let's then turn to the other leg of your evidence. This relates to the third payment of legal costs made to Mr Gamma or his attorneys after his reinstatement. You deal with this issue in your fifth affidavit which commences at page 841. Perhaps I could ask you to turn to paragraph 6. What you do in paragraph 6, is you summarise the position in relation to the first two payments, of course the Chairperson has  
10 heard this evidence before but just to place what you're going to deal with afterwards in context and for the sake of the public, could you just summarise what the state of claim was before the third payment was made?

**MR TODD:** So, before the third payment was made, two previous payments had been made. Payments one and two, payment one was 75% of Transnet's costs for two different legal teams, which was not regulated by the settlement agreement, shouldn't have been paid, completely irrational, no lawyer could sensibly have  
20 suggested that that amount was payable or should be paid, it should never have been paid but it was in the amount of a million rand sixteen in legal costs. Second payment was R1.7million and that was 75% of a privately taxed bill presented by Mr Gama's attorneys, Langa Attorneys. Langa Attorneys had, in fact presented a bill of some

R4.2million and Transnet had appointed a private taxing person, an attorney whose experience and cost to tax that bill and assess it and she had concluded that it should be reduced to R2.293million. That was the second payment or 75% of that taxed amount. Now, what is significant about that is, Transnet, even in dealing with that bill, effectively accepted that it would pay – that bill covered High Court litigation costs and the disciplinary hearing costs and the Bargaining Council costs. The settlement agreement only  
10 required Transnet to pay the High Court litigation costs and the Bargaining Council costs. The disciplinary hearing was, in fact, the greatest portion of the costs in the bill presented by Langa Attorneys but Transnet, if I'd heard the evidence of Mr ...[indistinct] saying, oh well, we thought the disciplinary hearing costs were included in Bargaining Council costs. So, Transnet paid 75% of the full amount of the costs incurred by Mr Gama throughout, from start to finish, for the High Court litigation, the disciplinary matter, and the Bargaining Council. No, I just...[intervenes]

20 **ADV MYBURGH SC:** Sorry, just before you get there and to the third payment, can you just confirm, you deal with this at paragraph (g) at page 844, that the first payment was made in March 2011 and then the second payment in June of 2011?

**MR TODD:** Yes, that's correct, that's what Transnet's

records show. I just want to say one thing further on the cost consultant, if I may, Chairperson, she did provide a detailed memorandum when she was dealing with the Langa bill presented of R4.25million and she taxed it – she, sort of gave an – assessed it and allow – and said the amount that should be allowed is R2.2million, this is *apropos* the second payment. Quite apart from the point that it covers the whole disciplinary matter which she was not apprised or told that it should be excluded but she  
10 included a commentary at the end of her assessment of that bill and it is included as an attachment to the papers, it is in a letter that she wrote dated – which is at page 848 where she returned the marked bill of costs and at page 853, after concluded that, what should be allowed is R2.2million she says,

“When the above figures are considered, kindly bear in mind that as per my instructions, I marked the bill as liberally as I thought possible. As per my instructions I marked the bill as liberally as I  
20 thought possible taking into consideration the difficulty of the matter, the importance to the client and the fact that the agreement stated that the respondent agrees to payment of fees and disbursements as between attorney and own client. However, taking into consideration all of the above

factors, it is still my respectful view that the bill, especially as far as fees are concerned has been substantially inflated. Should this matter proceed to assessment or taxation, in my experience, the figures set out herein before will undoubtedly be reduced even more”,

That is what Transnet is told by the tax consultant who it hires to assess the R4.2million bill presented by Mr Langa and she says R2.2million can be allowed on this  
10 very generous basis and Transnet, duly pays, under the settlement agreement, 75% of R2.2million and that is the second payment in the amount of R1.7million. So, it has now paid R1million that it should never have paid and R1.7million which is a very generous interpretation on any basis of what it should have paid.

**ADV MYBURGH SC:** Alright and then can you...[intervenes].

**CHAIRPERSON:** I'm sorry, who had instructed this tax consultant, was it Mr Gama's attorneys or  
20 Transnet...[intervenes]?

**MR TODD:** He appears to be writing to Mr Gule, I say that because he writes to Sebu...[intervenes].

**CHAIRPERSON:** Oh, so it must be...[intervenes].

**MR TODD:** At the beginning, but I don't know, I know that Deneys Reitz were at that stage advising...[intervenes].

**CHAIRPERSON:** Well, I'm trying to understand who it is that must have given her the instructions to mark the bill as liberally as possible, so if the instructions came from Mr Gule then that means probably that's where that came from.

**MR TODD:** That appears to be the case, but it is a clear indication that Transnet was, to use a colloquialism, bending over backwards to try and be as generous as possible.

10 **CHAIRPERSON:** So, I guess maybe Mr Gule had been instructed by somebody at Transnet that will tell the consultant to mark the bill as liberally as possible.

**MR TODD:** It appears to be the case.

**CHAIRPERSON:** Ja, yes Mr Myburgh?

**ADV MYBURGH SC:** Okay so, Mr Todd, can you then pick up from paragraph 7, where you deal with the third payment...[intervenes].

20 **CHAIRPERSON:** But – I'm sorry, but I think another point that you wanted to make, you did make, Mr Todd, is that it's important to note the tax consultant's last point, namely that she had thought that if this was taken to taxation, the amount would likely be reduced further?

**MR TODD:** Yes.

**CHAIRPERSON:** Ja.

**MR TODD:** Yes, I think she said significantly.

**CHAIRPERSON:** Significantly?

**MR TODD:** No, she just said, undoubtedly – will undoubtedly be reduced even more.

**CHAIRPERSON:** Yes, and Transnet appears to decide to pay 75% of that without seeking any further reduction that they might have sought through proper taxation?

**MR TODD:** Yes, they paid 75% of that amount three days later.

**CHAIRPERSON:** Yes, Mr Myburgh?

10 **ADV MYBURGH SC:** Yes, thank you. So, Mr Todd that takes us to paragraph 7 and the third payment.

**MR TODD:** Yes, for a reason that is – I have no idea what the reason is, I can only point to the facts based on documents provided by Transnet, three years later – so the first payment is made in March 2011, it shouldn't have been made but it was, the second payment is made in June 2011 on the basis you've just discussed. For some reason, nearly four years later the records show that Transnet made the – sorry I know the circumstances in which it was  
20 made but for some reason it was raised four years later and resulting in Transnet making a third payment and that third payment is another – just under R1.4million, R1.399million to Langa Attorneys and what – when I disposed to this affidavit, Transnet had dug out the documents which showed how that happened and it arose

because in June 2014, Langa Attorneys wrote to new attorneys representing Transnet in circumstances which I don't know saying, there's an outstanding cost issue we're still owed money by Transnet. So, it's been paid on any reasonable assessment a million too much and probably a lot more than a million too much but it's writing three years later to Transnet or its attorneys saying, we're still owed money for costs arising out of the Gama settlement and the basis of that is explained in a letter from Langa Attorneys  
10 which is at page 854 and essentially, what they're saying – they're going back to their original bill of R4.2million and they're saying – and this is at paragraph 7 on page 855, Langa Attorneys writes and say, our bill was actually R4.244million, 75% of that is R3.183million, we were paid R1.7million therefore we're still owed R1.4million.

Now nobody has told Ningiza Horner, which are the firm of attorneys then representing Transnet about the previous taxation and work that was done.

**CHAIRPERSON:** Where the amount was reduced?

20 **MR TODD:** By Transnet's Tax Consultant it appears, because they then appoint a new Tax Consultant to look at this and there are some, quite frankly when one reads the correspondence that follows it is almost impossible to work out how this happens but the new tax consultant says an amount of R776 000 is still due, and ...[Indistinct]

Attorneys say okay we will accept that provided you add interest at 15.5% compounded over the last three or four years and Transnet says fine, and it takes the R770 000 that the new tax consultant says should still be paid to them and it address interest in about – about R3million worth of interest – oh sorry, not R3million, my apologies, it takes the amount up to R1.3million and that is the amount that is then paid as a third payment.

So effectively the amount is taken up from  
10 R770 000 which the new taxing consultant says is still due and that is rolled up with interest at 15.5% compounded over roundabout four years and that takes it up to R1 399million, just under R1.4million.

**CHAIRPERSON:** I note that in their letter of 25 June 2014 which appears at page 854, you referred us to the letter, in paragraph 2 Langa Attorneys say:

“We confirm that when this matter was settled ...”

That is the Gama matter?

**MR TODD:** Yes.

20 **CHAIRPERSON:**

“It was agreed in writing with the then Minister of Public Enterprises that the cost incurred by Mr Gama would be borne by Transnet.”

Now that is interesting for certain reasons. So there must be some letter that they are talking about maybe to the



then Minister of Public Enterprises who would have been Mr Gigaba at the time, of the settlement of the Gama matter 2011, so ...[intervenes]

**MR TODD:** Yes it is not clear why he does not just refer to the settlement agreement, because the settlement agreement provides for Transnet to pay 75% of the costs incurred, I am not sure why in writing to Ningiza Horner Mr – or Langa Attorneys is now calling the authority of the Minister as somehow being the authority under which these  
10 legal costs are now claimed.

**CHAIRPERSON:** Well I think Mr Myburgh and I will appreciate the significance of this paragraph in regard to the entire Gama matter. Yes he is not referring to the settlement agreement I think since you referred to something that was according to him between them and the Minister of Public Enterprises. Mr Myburgh?

**ADV MYBURGH SC:** Yes thank you. Mr Todd you have given us a sort of a high level overview then of this. The correspondence and the like is addressed in the balance of  
20 your affidavit and attached. Perhaps I could just take you to what was the final authorisation and that you find at page 877 Annexure M.

**MR TODD:** Yes.

**ADV MYBURGH SC:** It being a memorandum from Mr Silinga to Mr Singh in which it was recommended that this

R1.399million be paid, and that you see at paragraph 10 at page 878 and then over the page you see that Mr Singh ultimately approved that and we know that that amount was paid.

**MR TODD:** Yes. What is a obviously surprising is that Mr Pepi Silinga by my recollection was in fact dealing with the matter in 2011 as well, but I may be mistaken, it would be – it is just surprising that he wouldn't refer to the previous taxation that had happened, but I cannot recall whether or  
10 not he was apprised of the 2011 taxation, I would have thought he was.

**CHAIRPERSON:** I think his name does get mentioned much earlier than 2015 and it may be that he was mentioned in 2011 as well. Well I see in Clause 10 at page 878 that clause says or that paragraph says Transnet is liable to pay R1.3million being the 75% amount taxed, and allow passengers. That must be factually incorrect isn't it, because there were no costs that were attached because taxed must mean taxed by a Taxing Master or Taxing  
20 Mistress isn't it?

**MR TODD:** Yes, Chair and also just the factual statement that Transnet is liable to pay it, I mean again this is obviously the basis of his opinion, it doesn't appear to be – it is his opinion presumably interpreting the original settlement agreement.

**CHAIRPERSON:** Ja.

**ADV MYBURGH SC:** But just as I understand it Mr Todd there wasn't – there was an attempt at this time to re-tax that bill?

**MR TODD:** Well Transnet appointed new lawyers who hadn't been involved previously.

**ADV MYBURGH SC:** Yes.

**MR TODD:** And they sought to re-tax the bill without reference to the work that had been done previously by a  
10 Transnet taxing consultant.

**ADV MYBURGH SC:** Yes. And as I understand it, if I could take you please to page 860, that then is the memorandum of the new taxing consultant for want of a better term.

**MR TODD:** Yes, that is correct.

**ADV MYBURGH SC:** And that gets one to the 776 and it was interest that was added to that, that gets one to the 1.3.

**MR TODD:** That's correct, that is correct Chairperson.

20 **ADV MYBURGH SC:** Mr Chairperson unless you have any questions that completes our examination.

**CHAIRPERSON:** Yes thank you. Mr Todd are you able to express any view about whether there were proper grounds to – for Transnet to settle the – its claim against GNS or Abalozi in relation to the GNS contract on the terms on

which it did or is that something you would prefer not to express any view on?

**MR TODD:** Chairperson my view expressed throughout on the basis of our assessment of the merits of that case, together with counsel, was that Transnet had strong grounds to recover all or at least a substantial portion of the R95.5million. There are reasons to compromise litigation, there is litigation risk, we had flagged a problem of having an executive which was chipping away or  
10 undermining the case rather than supporting it, which presents litigation risk, but a properly motivated case based on the contractual entitlements of Transnet if run properly in our view it should have been successful.

If you choose to compromise a case because there are some weaknesses, or there is some risk associated with it or if Abalozi GNS had come to the party and demonstrated that although the origins of the contract were unlawful it had put in a lot of resources and this is what had been paid and these were the people who had done  
20 the work then an appropriate discount or settlement or compromise could have been reached that took that into account, but I can say in my view there were no grounds for Transnet, no good grounds on which Transnet should have abandoned its claim for R95.5million altogether, and certainly not to settle it on effectively punitive terms and

most extraordinarily to them on top of that pay Abalozi R20million ostensibly for claims that had already compromised, so really this is a most unusual set of circumstances which indicates a state of mind of a party to litigation that is more interested – well it is not financially motivated, it is not motivated by the financial interests of Transnet, I think that must be clear.

**CHAIRPERSON:** The R20million did it go beyond just the legal costs, did it involve other claims that were kind of  
10 questionable as well? Or was there a separate amount for those?

**MR TODD:** Well Abalozi had laid its store against Transnet, its complaints and claims against Transnet fully in its counterclaims. They included reference to defamation, reputational harm, lost contracts, lost economic value, the whole gannet, and that was in 2011.

When the claim was settled, is it 2014 or 2015?

**CHAIRPERSON:** 2014/2015.

**MR TODD:** Mr Todd?

20 **CHAIRPERSON:** Mmm.

**MR TODD:** There are no live claims ...[intervenes]

**CHAIRPERSON:** They withdrew their ...[intervenes]

**MR TODD:** They withdrew their counterclaims and there were no other live claims but what Abalozi did immediately he said on the costs unless you pay us R20 – R40 000 we

are going to bring a whole lot of new claims against you.

**CHAIRPERSON:** And they couldn't have, Abalozi couldn't have – couldn't revive the claims that they had withdrawn?

**MR TODD:** The claims they were threatening vaguely were either had been compromised already.

**CHAIRPERSON:** Yes.

**MR TODD:** Or would have expired, prescription, but there was no legal advice being given to Transnet, Transnet just looked at this and said let us pay the R20million and that  
10 is what happened.

**CHAIRPERSON:** Mmm, so all in all it would have been that R95million of the GNS contract, R95 or R98, I can't remember.

**MR TODD:** It is R95million.

**CHAIRPERSON:** And now R20million on top of that, R115million altogether. Okay, no nothing arising Mr Myburgh?

**ADV MYBURGH SC:** No Mr Chairperson thank you.

**CHAIRPERSON:** Thank you very much Mr Todd for  
20 coming to assist the Commission with regard to this matter, we appreciate it very much. I will now release you, you are now excused. If a need arises to ask you to come back, we will ask you to come back, but hopefully there will be no need.

Thank you very much, you are now excused.

**MR TODD:** Thank you Chair.

**CHAIRPERSON:** Mr Myburgh we – and Counsel for Mr Gama, he indicated that they were just here to observe so I guess there's nothing – we will adjourn now. Tomorrow I will continue with evidence relating to Eskom. We will adjourn now.

We adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS TO 14 JANUARY 2021**

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