

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

15 JULY 2021

DAY 422



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TRANSCRIBERS:

B KLINE; V FAASEN



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PROCEEDINGS RESUME ON 15 JULY 2021

CHAIRPERSON: Good morning everybody.

ADV SONI SC: Good morning Chairperson.

CHAIRPERSON: Good morning Mr Soni, good morning everybody.

ADV SONI SC: Morning Chairperson.

ADV MAKATINI: Good morning DCJ.

CHAIRPERSON: Good morning, good morning, good morning. Okay. Is everybody ready for us to start?

10 **ADV SONI SC:** Chairperson I do not know if Mr Buthelezi's – the – the representatives are on.

CHAIRPERSON: Was – was the plan that they would be attending?

ADV SONI SC: I know that they – they were keen to attend and notification was given.

CHAIRPERSON: Ja.

ADV SONI SC: I would – my colleague Ms Ngalwana sent me a message this morning so I am just trying to confirm in fact that they are present so that ...

20 **CHAIRPERSON:** Ja.

ADV SONI SC: So – come back on it.

CHAIRPERSON: Ms Ngalwana are you there by any chance?

ADV MAKATINI: Good morning Chair.

CHAIRPERSON: Good morning.

I am not Mr Ngalwana it is Ms Makatini here from RMT Attorneys. Ms Buthelezi's attorney.

CHAIRPERSON: Oh okay, okay.

ADV MAKATINI: I – Advocate Ngalwana had indicated when the date was furnished that he will not be able to attend as he is preparing for the commencement of his acting stint on Monday.

CHAIRPERSON: Oh okay.

ADV MAKATINI: Yes so I am not sure if Advocate Soni had
10 communicated directly with him but in any event our stance is that today as indicated in the previous proceedings it was for the evidence leaders to make further approach to the two witnesses and then we will then take it from there if there is a need to cross-examine. I think that was what Advocate Ngalwana expressed to the commission during its last sitting.

CHAIRPERSON: Yes the position is that he completed presenting his argument on – on the application for leave to cross-examine and then an arrangement was made that the
20 two witnesses would be recalled and Mr Soni would put further questions to them and then once that has been done then Mr Ngalwana or his client would then decide whether they still wanted me to grant them leave to cross-examine or not but yes that is where are. I think we will proceed then and then we will take it from there. Mr Soni.

ADV SONI SC: As you please Chairperson. Chairperson it – these are matters I was going to raise and perhaps I should put them on record in the fashion that ...

CHAIRPERSON: Yes.

ADV SONI SC: Was formerly agreed so that we could...

CHAIRPERSON: Yes.

ADV SONI SC: (Inaudible).

CHAIRPERSON: Ja.

ADV SONI SC: Chairperson today in respect of the
10 evidence relating to PRASA we are going to call – recall two witnesses Mr Ryan Sacks and Mr Popo Molefe both of whom you would recall gave quite extensive evidence.

CHAIRPERSON: Yes.

ADV SONI SC: What prompts the recall of these witnesses Chairperson is the following.

On the 20th of March 2021 Mr [?] Sfiso Buthelezi was the former chairperson of PRASA and to whom reference had been made in the report of Mr Sacks and the affidavit of Mr Molefe. Mr Buthelezi submitted an application to cross-
20 examine Mr Sacks and Mr Molefe.

In support of that application Mr Buthelezi submitted an affidavit. Now that affidavit Chairperson is part of the record and appears as SEC17 of 2021.

And in the affidavit Mr Buthelezi deals with a number of matters that he had been asked to address in a request

sent to him by the legal team but that is not in issue today
Chairperson.

His application to cross-examine Mr Sacks and Mr Molefe was considered by yourself Chairperson on the 15th of June. You indicated that the evidence leader and Mr Buthelezi's counsel Mr Ngalwana should attempt to agree on the way forward.

Now having regard to the basis on which the application to cross-examine was made the agreement
10 reached between myself and Mr Ngalwana was communicated in a letter as far as this part goes reads as follows Chairperson.

“Sacks and Mr Molefe will be recalled on a date determined by yourself. At such reappearance Mr Buthelezi's version in relation to each of the witnesses will be put to them by the evidence leader who will to the extent required by their respective responses further probe their evidence in
20 relation to Mr Buthelezi as informed by the specific paragraphs of his affidavit in support of the application to cross-examine.”

I am reading if it is a – I am just trying to make sure that the record reflects what was said.

CHAIRPERSON: Ja.

ADV SONI SC: Because the letter then goes on to say:

“In the event that Mr Buthelezi and his legal team should still be dissatisfied with the manner in which the evidence of Mr Sacks and Mr Molefe has been probed on the specific issues identified by Mr Buthelezi in his affidavit Mr Buthelezi reserves his right through counsel to address the commission on these specific issues that may require clarification and if needs be ask to re-examine the witnesses on those specific issues.”

CHAIRPERSON: I guess re-examine is not the right term there.

ADV SONI SC: To examine Chairperson.

CHAIRPERSON: I thought that was meant for Mr Ngalwana.

ADV SONI SC: Yes, yes sorry – sorry – so...

CHAIRPERSON: Ja because they are not....

ADV SONI SC: If they are not satisfied then he will apply to you to examine them.

CHAIRPERSON: Oh he will apply to me for...

ADV SONI SC: Yes.

CHAIRPERSON: Okay.

ADV SONI SC: For leave to examine them on any matters that he is not satisfied.

CHAIRPERSON: Yes. Yes well he – he has – he has already argued an application for leave to cross-examine. I guess that – that is what the rule provide for.

ADV SONI SC: Yes.

CHAIRPERSON: So I think what will happen there – is that once the – today’s session is done then his instructing attorney will obtain a transcript or a recording and make it available to him and his client and I think that at the end of the session I will indicate a deadline by when they must
10 indicate whether they withdraw the application in the light of today’s session or they persist in it or what they would like to do with it and then I can then make a decision thereafter.

ADV SONI SC: As you please Chairperson.

CHAIRPERSON: If it is not – if it is not withdrawn.

ADV SONI SC: Yes.

CHAIRPERSON: Okay. All right then let us – Mr Makatini must I take you as simply observing as opposed to appearing?

ADV MAKATINI: In light of what has been outlined Chair it
20 will be more observing and then we will wait for the Chairperson’s directive after today’s proceedings.

CHAIRPERSON: Okay all right. Okay thank you. Okay Mr Soni.

ADV SONI SC: As you please Chairperson.

CHAIRPERSON: Yes.

ADV SONI SC: Chairperson in – in the light of how Mr Buthelezi's affidavit is framed he deals first with matters dealt with by Mr Ryan – Mr Sacks. So I am going to call Mr Sacks first Chairperson.

CHAIRPERSON: Okay no that is fine. That is fine. Good morning Mr Sacks.

MR SACKS: Good morning Chairperson good to see you again.

CHAIRPERSON: Thank you very much. Thank you for
10 availing yourself once again.

MR SACKS: It is a pleasure.

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

REGISTRAR: Mr Sacks will you be taking the oath or the affirmation?

MR SACKS: Yes the oath.

REGISTRAR: Please state your full names for the record.

MR SACKS: My full name is Ryan Marc Sacks.

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

MR SACKS: No.

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

MR SACKS: I do.

REGISTRAR: Do you solemnly swear that the evidence you

will give will be the truth; the whole truth and nothing but the truth; if so please raise your right hand and say, so help me God.

MR SACKS: So help me God.

CHAIRPERSON: Thank you very much. Mr Soni.

ADV SONI SC: As you please Chairperson. Mr Sacks you gave evidence before the commission on the 24th and 25th of February 2021.

MR SACKS: That is correct.

10 **ADV SONI SC**: Your evidence was based on a report in which you dealt mainly with the flow of funds from Swifambo pursuant to its receiving payments from PRASA, is that correct.

MR SACKS: That is correct.

ADV SONI SC: Now in your report and in parts of your evidence you referred to Mr Sfiso Buthelezi the former Chair of PRASA's board of directors.

MR SACKS: That is correct.

20 **ADV SONI SC**: He has – Mr Buthelezi has since filed an affidavit dealing with some of the matters raised in your affidavit – I mean in your report and in evidence you gave subsequently. The purpose of calling you back is to put to you the challenges that Mr Buthelezi mounts against the correctness and in some cases the truthfulness of what is set out in your report.

Now Mr Buthelezi's affidavit in which he challenges what you say has been made available to you, is that correct?

MR SACKS: Yes that is correct.

ADV SONI SC: So I am going to firstly deal with the allegations that are contained in your report dealing with the Swifambo contracts. I want to refer you to Bundle L page 872 and in particular paragraph 11.36.1 to 36.4.

I will just quickly read to you what you said so we
10 know what the ambit of the – the allegation – of the questioning for today is going to be.

MR SACKS: Okay that is correct – that is fine.

ADV SONI SC: So he – in your report you say:

“Mr Buthelezi/Sebenza in the flow of funds analysis shows that an entity Sebenza Forwarding and Shipping received R99 million from Swifambo.”

That you say at 11.36.1 and you say 36 – 11.36.2.

“Previous directors of Sebenza include Mr
20 Buthelezi the former Chair of the board of PRASA.”

And then at 11.36.3 you say:

“Mamabolo”

And you refer there to an affidavit that was filed in the Swifambo high court application:

“Alleged in his affidavit that Mr Buthelezi while chairman of the board failed to disclose his interest in Makana Investment Corporation which has a 15% shareholding in Cadres a company allegedly providing advisory services to PRASA on the rolling stock. It has now been confirmed that it has a 55% shareholding in Sebenza the preferred forwarding and clearing service provider to PRASA.”

10

And in 11.36.4 you say:

“In addition per investigations at PRASA into disclosure of interest Mr Buthelezi did not disclose his interest in the entity Sebenza.”

So that is one set of allegations. And then at 11.36 – oh sorry 38 on page 837 of the report.

CHAIRPERSON: 873 is it not?

ADV SONI SC: 873 Chairperson yes.

CHAIRPERSON: Yes.

20 **ADV SONI SC:** It is the very (inaudible) it says at 11.38 you say:

“Bridgette Gaza who was a member of the board.”

I am just adding that in.

“Raised certain concerns about Swifambo in

an email dated the 6th of November 2012 to both Mr Buthelezi and Mr Montana the former CEO.”

And in another email to Mr Mbatha on the 20th of November 2012.

“Despite these concerns Mr Montana allowed the negotiations to proceed and the contract between PRASA and Swifambo was concluded thereafter.”

10 Now it is those two sets of matters that Mr Buthelezi complains about and says that his version should be put to you.

I am going to put his version to you in relation to those. Now in relation to the emails his version is put at paragraphs 21 to 31 of his affidavit and in relation to the possible conflict of interest his allega – I mean his version is put at 32 – paragraphs 32 to 46. I am just going to look at those and ask you to respond to them.

MR SACKS: That is fine.

20 **ADV SONI SC**: You have seen them though Mr Sacks?

MR SACKS: Yes, yes I have Mr Buthelezi’s affidavit as provided to me.

ADV SONI SC: Right. So at paragraph 31 – sorry 21 Mr Buthelezi says in regard to the two emails – he says:

“The electronic email from Dr Gaza dated

the 6th of November was never received by me in 2012.”

Now just for context can I just say to you in that email Ms Gaza addresses it to Mr Buthelezi and Mr Montana and she says she has received information that is not good about Swifambo’s capacity to produce on – in respect of this contract. And she says that if the information is correct it would require an immediate intervention to the board.

That is what she says in the email. Now Mr
10 Buthelezi says that he did not receive this email and he says he did not receive the email because the email address in respect of himself was the incorrect email address.

Now in fairness to Mr Buthelezi I must point out that in regard to the 20th of November the email that is sent to him has a slightly different email address. His name in the first email is spelt wrongly. Are you in a position to dispute that he did not receive that email?

MR SACKS: Chairperson I am not in a position to dispute
20 that.

ADV SONI SC: And in fairness as I say if you look at the two emails the email address on the first email – the email of the 6th of November spells his name as Sifiso and the second email which just now would show to you he says he received spells his name as Fs – sorry as Sfiso. So it

would make sense that he would not have received it.

MR SACKS: I accept that Chairperson.

ADV SONI SC: Right. Then he says at paragraphs 22, 23 and 24 that he received the email he would have made certain enquiries from Ms Gaza but I mean that is just what he is saying. You do not need to respond to that. But he sets out what he would have enquired from her namely:

What was the nature of the information?

Where did she get it from?

- 10 How was it that her committee missed out that information?
How would that information compromise the Swifambo contract?

What is your reaction to that?

MR SACKS: I accept that.

ADV SONI SC: Then at paragraph 25 regarding the email of the 20 – of the 20th of November and if I could just point out that email was addressed to Mr Chris Mbatha and was – and he was cc'd on that email. When I say he Mr Buthelezi was cc'd and she says to Mr Mbatha:

- 20 “I have made these enquiries of you can you please confirm that everything is in order. It will not be appropriate to go on with this contract unless those enquires are done.”

I am just saying that that is what the email of the 20th of November says. You see that?

MR SACKS: Yes I see that.

ADV SONI SC: All right. Now he says in response to that that email was addressed to Mr Mbatha and that Ms Gaza had sought information from him and his procurement team. He was not part of the discussions, he was the chairman of the board and he was copied on this in his capacity as such. Are you in a position to dispute that?

MR SACKS: I am not in a position to dispute that Chairperson.

10 **ADV SONI SC:** Then in regard to what he could have done he says at paragraph 26:

“As Chairperson of the board I had no special powers to reverse the approval by the board of the recommendation made by the Bid Adjudication Committee and the FCIP Committee.”

He says:

“It would have been a decision for the board to make if it considered it appropriate.”

20 What is your reaction to that?

MR SACKS: Again I am – Chairperson I am not in a position to dispute this.

ADV SONI SC: He says:

“On receiving the email I suspect that I would have spoken to Dr Gaza because she

referred to capacity issues.”

He says:

“I equivocate because this happened nine years ago and I cannot remember every detail of the conversation.”

So he says this is what he probably did. Are you in a position to respond to this?

MR SACKS: I am not. I am not in any position to dispute that Chairperson.

10 **ADV SONI SC**: And he says at paragraph 28 towards the end that he believes that everything would have been resolved in that matter and if there had been lingering concerns about Swifambo’s capacity the board would not have approved the conclusion of the contract. Are you in a position to...

MR SACKS: I am not – I am not in a position to dispute his – his views on that Chairperson.

ADV SONI SC: Right. Now.

CHAIRPERSON: Well Mr Soni

20 **ADV SONI SC**: Yes.

CHAIRPERSON: Should you not identify those that the witness cannot really say anything about and – and focus on those where he can comment.

ADV SONI SC: Yes. Yes as you please Chairperson.

CHAIRPERSON: Ja.

ADV SONI SC: That is what –

CHAIRPERSON: Ja.

ADV SONI SC: Now you say in your evidence and in the report that despite the concerns Mr Montana allowed the negotiations to proceed in a contract between PRASA and Swifambo and that contract was concluded on – in March 2013. Mr Buthelezi responds as follows to that he say:

10 “The CEO did not have the authority to conclude a contract without the approval of the board and the board would not have permitted the conclusion of the contract if there were still lingering capacity issues or concerns. So my assessment is that Dr Gaza’s concerns might have been resolved between the 20th of November and the 25th of Novem – of March 2013 when the contract was concluded.”

Any comment on that?

20 **MR SACKS:** That – that extract from my report is about these concerns is – is from Ms – Dr Molefe’s affidavit in the High Court proceedings and just clearly stated in my report.

ADV SONI SC: Okay. Then at paragraph 32 he says:

“As regards the appointment of Swifambo as the preferred bidder he says he played no role in that appointment and that – he

played no role that was not ...”

CHAIRPERSON: No special role.

ADV SONI SC:

“That was not played by other board members.”

CHAIRPERSON: Not special role I think Mr Soni.

ADV SONI SC: Sorry

“No special role.”

Sorry. You accept that Mr?

10 **MR SACKS:** I accept – I am not in a position to dispute that Chairperson.

ADV SONI SC: Yes. Now in relation to the questions of his possible conflict of interest and benefits at paragraph 33 Mr Buthelezi says:

20 “I did not derive a benefit from the award of the contract to Swifambo. In this regard I need to dispel a few untruths in the evidence and innuendos of Mr Sacks in his efforts to draw links between the various entities including Makana, Sebenza, Kelders and Swifambo on the one hand and the award of the contract to Swifambo on the other.”

He says:

“There is no such link.”

Now that is a general comment but he deals with each of them in the sub-paragraphs – I mean in the paragraphs that follow. I am just going to go through those with you and ask for your comment on them.

MR SACKS: Okay.

ADV SONI SC: In paragraphs 34 to 39 – 38 he deals with Sebenza and in regard to Sebenze he says:

10 “Sebenza is a clearing forwarding warehousing and logistics company and among its clients was Swifambo.”

You accept that?

MR SACKS: Yes I accept that.

ADV SONI SC: And among the things that it would have require – been required to do would have been to collect customs, VAT and duty on behalf of SARS.

20 **MR SACKS**: Chairperson I accept that is what it says in Mr Buthelezi’s affidavit I just need to reiterate that my mandate as I was appointed by the Hawks was to perform a cash flow analysis of the Swifambo bank accounts and to state how Swifambo utilised those – such funds received from PRASA and payments were made from Swifambo to Sebenza which I stated in my report and which were clearly stated was subject to further investigation. This is Mr Buthelezi’s view and I accept that this is his view but those investigations as clearly stated need to be ongoing. So that – at this point

that is all I can – I can say.

CHAIRPERSON: Yes.

MR SACKS: I accept that this is Mr Buthelezi's view.

ADV SONI SC: All right. Now in regard to his association with Sebenza Mr Buthelezi says:

“Sebenza”

At paragraph 35.

10 “Sebenza managed the imports of trains for Swifambo. The relationship between Sebenza and Swifambo started in April 2014 more than a year after PRASA had awarded the contract and signed the agreement with Swifambo.”

He said he resigned from Swifambo as a director of Sebenza in December 2013. So at that time he was not a director. You accept that?

MR SACKS: December 2012 – para – (inaudible) yes I – I accept – accept that. My reports did state that he was former director of Sebenza.

20 **ADV SONI SC:** I was just going to point that out.

MR SACKS: Ja.

ADV SONI SC: That is correct. Then at 36 he – at paragraph 36 he emphasises the point. He says:

“At the time PRASA concluded the contract with Swifambo he was no longer a director

of Sebenza and therefore there was no need to point out any relationship – he needed to point out any relationship between him and Sebenza because he was no longer a director.”

You accept that.

MR SACKS: I accept that Mr Buthelezi’s view.

ADV SONI SC: He says:

10 “In any case had there been a relationship he would have declared the conflict of interest not from his directorship of Sebenza but from Makana’s 55% shareholding in Sebenza.” He said he would have disclosed that.

MR SACKS: I accept that is what Mr Buthelezi says.

ADV SONI SC: Then in regard to the payments made to Sebenza he says:

“That a total of R100 524 597.00 was paid to Swifambo.”

20 You accept that.

MR SACKS: He says Mr Soni that Sebenza bills Swifambo an amount of R100 million.

ADV SONI SC: Oh sorry.

MR SACKS: The amount that was paid was – was different – that was reflected in Swifambo’s bank accounts. I think

there is a difference between amounts billed and amount paid.

ADV SONI SC: Oh I see. No, no I understand. Can you recall just offhand what was the amount paid to Swifambo?

MR SACKS: The amount paid by Swifambo was – I will get you the exact amount. R99 284 090.00 Chairperson. That is as it is reflected in the bank account of Swifambo.

ADV SONI SC: That – so that was the amount was paid but the amount that was billed is slightly higher.

10 **MR SACKS:** Yes – I – yes I will accept that – I have not been provided with the police any further information over and above Swifambo’s bank accounts. So I accept what Mr Buthelezi states – saying over here.

ADV SONI SC: Say – he – at paragraph 38 you will see he says:

“He obtained these details from Sebenza.”

MR SACKS: I would – ja I can – I am not in a position to dispute that.

ADV SONI SC: Yes okay. Now he says that based on what
20 Sebenza told him. This is the – this is how the billing – I mean this is how the amount that was billed was spent. He says first at 37.1:

“R94 344 752.33 was paid for customs, VAT and duty.”

You accept that.

MR SACKS: Well again Mr Soni I am not in a position – I accept that is what he said but this information was not available to me when I was performing my investigation.

ADV SONI SC: Sure.

MR SACKS: But I accept – I accept that that was said in Mr Buthelezi's affidavit.

ADV SONI SC: And that – okay I am just going to put this to you on the basis that you accept that this is what Swifambo says and you not in a position to dispute. But
10 just for the record that we will put these amounts on record.

MR SACKS: Yes I –

ADV SONI SC: Are you happy with that?

MR SACKS: Yes I accept that Chairperson.

ADV SONI SC: And he then says that an amount of R2 539 665.08 was paid to the shipping lines. That an amount of R165 377.15 was (inaudible) for finance and an amount of R3 474 802.44 was the agency and documentation fee charged by Swifambo. That is what Swifambo says and what Mr Buthelezi wants us to put on
20 record.

MR SACKS: I accept that.

ADV SONI SC: Then at para – from paragraph 39 he deals with the allegations you make about him in relation to Makana. He says in your quoting at 11.86 you say that Mamabolo claimed that Mr Buthelezi failed to disclose an

interest in Makana Investments when he was chairperson of the board. That Makana had a 15% shareholding in Cadars. That Cadars was at the time providing advisory services to PRASA on the rolling stock. He says each of these is patently false. He bases it on the following at paragraph 40. He says at 40.1.

10 “The Public Protector in August 2015 in her report dated – titled Derailed confirmed that Mr Buthelezi had disclosed his interest in Makana (inaudible) and shareholder and in Cadars as a shareholder.”

 Have you seen the Public Protector’s Report?

MR SACKS: Chairperson at the time I performed my investigation I was not aware that the Public Protector investigated that aspect. It was not part of the information provided to me. My report and my evidence I have itemised it is in my report clearly the documents which I received and which I relied upon and I accept that these are the Public Protector’s findings. I am not in a position to dispute the
20 Public Protector’s findings.

ADV SONI SC: Then at the time you filed your report and the time you gave evidence were you aware of what the Public Protector’s findings were?

MR SACKS: No I was not aware.

ADV SONI SC: All right. Now he then says at paragraph

40.2.

“Caders on the 23rd of November.”

This is after Ms Madonsela submitted her derailed report.

“That Caders had written a letter to Ms Madonsela saying that it had never tendered for and had never consulted to PRASA for advisory services on the rolling stock recapitalisation project.”

10 And he attaches a letter from Caders to the Public Protector. Have you seen those – have you seen that letter?

MR SACKS: No this was not...

ADV SONI SC: That appears at...

MR SACKS: No I – I besides Mr Buthelezi’s affidavit just extracts this was not evidence that was provided to me by the police. So I have not seen it.

ADV SONI SC: Okay but do you accept that that is...

MR SACKS: I accept that.

20 **ADV SONI SC**: That – that what Caders said.

MR SACKS: I accept that this is what they say.

ADV SONI SC: Then – and then on the 20 – oh sorry at paragraph 42 Mr Buthelezi says that the former Public Protector in her letter of the 25th of November to Caders said the following:

“I have taken note of your assertion that Makana is and never was a subsidiary of Cadars and vice versa and that at no time did any of the companies within the Cadars view provide advisory services to PRASA on the rolling stock recapitalisation project and appreciate your enlightenment on the shareholding and distinction between the companies Makana Financial Services, 10 Cadars Holdings, Cadars Corporate Solution and Cadars Projects – Special Projects Limited.”

So the Public Protector accepted the findings or the explanation given by Cadars. I am just placing that on record.

MR SACKS: I accept that the Public Protector’s findings.

ADV SONI SC: Then at paragraph 44 he says – oh Mr Buthelezi says:

20 “The Public Protector’s – the new Public Protector’s Report also closed this matter and absolved himself and Cadars of any wrongdoing in any improper involvement in the provision of services in the rolling stock recapitalisation project.”

You aware of that.

MR SACKS: Just to (inaudible).

ADV SONI SC: And when you did your report and gave your evidence were you aware of that?

MR SACKS: Again I was not – this was not information that was provided to me when I performed the work I did at the time.

ADV SONI SC: Yes. So at paragraph 45 Mr Buthelezi says:

10 “There is no truth to the allegation that I
 somehow benefitted from the award of the
 contract to Swifambo by my re – by reason
 of my association with Makanda, Cadars and
 Sebenza.”

I am just placing that that that is his assertion. You want to comment on that?

MR SACKS: I am not in a position to dispute his assertion.

ADV SONI SC: And he says in regard to the sort of profit made by Sebenza it was more in the region of R3,5 million although the – it received some R99 million that he has explained where the – where the rest of the money went to
20 and that we have been through. That is what Sebenza’s documents show.

MR SACKS: Yes – I accept that is what – well I accept that position again at that time that information was not available to me to investigate provided to me by the police.

ADV SONI SC: Mr Chairperson having regard to the

purpose of this cross-examination I have no further questions for Mr Sacks. I have put to Mr Sacks as I undertook to do to my learned colleague Ngalwana all the assertions that...

CHAIRPERSON: Ja.

MR SACKS: Mr Buthelezi wanted to place on record.

CHAIRPERSON: Ja no that – that is fine. Thank you very much Mr Sacks I think the issues that relate to you have been covered. You are now excused.

10 **MR SACKS:** Thank you Chairperson. Thank you Mr Soni.

ADV SONI SC: Thank you Mr Sacks – thank you for making yourself available again.

MR SACKS: No problem.

CHAIRPERSON: Thank you. Mr Soni.

ADV SONI SC: As you please Chairperson. Chairperson I – next one to call Mr Molefe to deal with matters that Mr Buthelezi's affidavit raises about him.

CHAIRPERSON: Yes okay all right.

ADV SONI SC: As you please Chairperson.

20 **CHAIRPERSON:** Good morning Mr Molefe.

MR MOLEFE: Good morning Chairperson.

CHAIRPERSON: Thank you very much for coming back again and availing yourself.

MR MOLEFE: Okay it is my pleasure Chairperson.

CHAIRPERSON: Thank you. Registrar please administer

the oath or affirmation.

REGISTRAR: Mr Molefe will you be taking the oath or the affirmation?

MR MOLEFE: Yes I will.

REGISTRAR: Which one?

MR MOLEFE: Oh – oh the oath – oath.

CHAIRPERSON: You will take the oath or affirmation?

MR MOLEFE: Oath – I will take the oath. I will take the oath.

10 **CHAIRPERSON:** Okay. Well I have – I have seen some witnesses they do – they take the oath when they depose to an affidavit and when they come before the commission they say they will do an affirmation. So if you were hesitating – yes Registrar go ahead.

REGISTRAR: Please state your full names for the record.

MR MOLEFE: Popo Simon Molefe.

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

MR MOLEFE: I do not.

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

MR MOLEFE: I do.

REGISTRAR: Do you solemnly swear that the evidence you will give will be the truth; the whole truth and nothing but the truth, please raise your right hand and say, so help me

God.

MR MOLEFE: So help me God.

CHAIRPERSON: Thank you. Mr Soni.

ADV SONI SC: As you please Chairperson.

CHAIRPERSON: I know Mr Soni that Mr Molefe was recalled to deal with the issues raised by Mr Buthelezi but I want to take this chance to say if we have not dealt with any issues that have been raised by other witnesses such as Mr Montana that should be raised with Mr Molefe an
10 opportunity ought to be made so that those can be raised with him and he can deal with them. I am not saying today because he might not have been prepared for today but I am just saying that must not be forgotten so that issues that they may have raised about him or concerning him that need to be put before him so that he can deal with he would get a chance to deal with them.

ADV SONI SC: Yes as you please Chairperson. We – we will separate the two because as you rightly point out Chairperson with respect we did not anticipate but – but
20 fairness would demand that Mr Molefe is given an opportunity should he so choose to come back to deal with those matters.

CHAIRPERSON: Yes. Well – well he might choose in regard to others but the commission might want him to deal with some nevertheless. You know so I think that it is

important that arrangements be made so that he can deal with whatever needs to be dealt with.

ADV SONI SC: As you please Chairperson.

CHAIRPERSON: Okay all right.

ADV SONI SC: I will – I will in due course raise it with Mr Molefe and the rest of the team Chairperson.

CHAIRPERSON: Ja okay all right. I am sure he is aware of – of all the issues.

ADV SONI SC: Yes.

10 **CHAIRPERSON:** Mr Molefe you are aware of at least some of the issues.

MR MOLEFE: I – Chairperson I am aware of some of the issues.

CHAIRPERSON: Yes.

MR MOLEFE: In fact I have read a very long affidavit of Mr Montana and...

CHAIRPERSON: Ja no that is...

MR MOLEFE: Understand that I would be required to respond to any one of the issues I will do so.

20 **CHAIRPERSON:** Yes.

MR MOLEFE: Although – although.

CHAIRPERSON: Ja.

MR MOLEFE: I within what I had dealt with extensively with the issues in my own affidavit when I was giving evidence.

CHAIRPERSON: Ja it may well be that some of the issues

are issues that have been dealt with and if they have been dealt with adequately there may be no need to deal with them again. What obviously we do not want is a situation where some issues slipped through fingers or they are not dealt with. Those that have been dealt with adequately there is no need to – no need to deal with them again but those that might not have been dealt with that are important they – they might need to be dealt with. But that is fine. Thank you. Mr Soni do you want to proceed.

10 **ADV SONI SC:** As you please Chairperson. Yes. Mr Molefe in regard to your being recalled today I just want to paint the background against which that has been done. You submitted an affidavit dated the 17th of February 2020 and yet you dealt with various matters relating to PRASA and you subsequently gave evidence based on that affidavit. Is that correct?

MR MOLEFE: That is correct Chairperson.

ADV SONI SC: Now in your affidavit and in evidence you led thereafter you made certain allegations against the
20 former chairperson of the PRASA board Mr Sfiso Buthelezi. Is that correct?

MR MOLEFE: That is correct.

ADV SONI SC: Sorry you are muted Mr ...

CHAIRPERSON: I think he moved away from – ja so if you just repeat your answer Mr Molefe.

MR MOLEFE: I – I was saying this – what counsel said is correct.

CHAIRPERSON: Yes.

ADV SONI SC: Now Mr Buthelezi has since filed an affidavit. I have got to place on record that he did not have the affidavit at the time you or Mr Sacks had testified and therefore what he said in his affidavit was not put to you. I am though now constrained to place on record what he says in response to some of the allegations you make about him
10 and I am then going to put those allegations to you or his responses to you and get your response to that. Now firstly you are aware that Mr Buthelezi has submitted an affidavit and you have been favoured with a copy of that affidavit. Is that correct?

MR MOLEFE: That is correct Chairperson.

ADV SONI SC: Now I want to then refer you to certain paragraphs of the affidavit and these are the paragraphs that concern you. At paragraph 54 – 52 of the affidavit which Chairperson appears at Sequence 17 page 31.

20 **CHAIRPERSON:** Yes.

ADV SONI SC: Mr Buthelezi:

“I do not know how many statements or affidavits Mr Molefe submitted to the commission. He says the one I was given is dated the 17th of February 2020.”

Chairperson that affidavit appears in Bundle D and as Exhibit SS6.

CHAIRPERSON: Yes I have got it.

ADV SONI SC: And I – Chairperson I just point out that there are two relevant paragraphs – paragraphs 18 and 21 but I will deal with just so that you can..

CHAIRPERSON: Ja.

ADV SONI SC: Orientate yourself to the – to the questions.

CHAIRPERSON: Yes.

10 **ADV SONI SC:** Coming back though to what Mr Buthelezi says – he says that in your affidavit Mr Molefe you told the commission that you were assisting in preparing the affidavit presumably by Werksmans your and PRASA's attorneys in the commission. Now I would just like your response to that part of the allegation.

MR MOLEFE: I was not assisted. The affidavit to the commission.

ADV SONI SC: Yes.

20 **MR MOLEFE:** No I was not assisted by Werksmans nor PRASA's attorneys in that regard. So the statement is not correct.

ADV SONI SC: Yes. Were you assisted in regard to that affidavit (inaudible).

MR MOLEFE: I was assisted – I was assisted by the M&S Attorneys.

ADV SONI SC: I see. Now he says in that affidavit you assert that you became a victim of state capture. Now I take it this is the allegation being made in relation to your general notion of how state capture was operated and in particular your reference to Mr Roy Moodley.

MR MOLEFE: That is correct Chairperson.

ADV SONI SC: Now as I – is it correct to say that in your affidavit you allege you were a victim of state capture?

MR MOLEFE: My – I did say so Chairperson and I have
10 articulated the context clearly in my affidavit and in my –
the evidence I gave to this commission. I have nothing
more to add.

ADV SONI SC: I understood you – I understood you though in the affidavit to say it was PRASA that was a victim of state capture or did I misunderstand the affidavit in that regard?

MR MOLEFE: Well we – I did say that PRASA was a victim of state capture but I did also say what attempts were made to – to – as part of consolidating the capture of PRASA to
20 capture me as well.

ADV SONI SC: Yes.

MR MOLEFE: And I did refer Chairperson to two or three instances. One related to the July Handicap. The second one was the golf event organised by Mr Moodley, both of them. The third one related to the intended trip to the

Masters, which I was doing regularly, and this particular year Mr Moodley having heard that I was attending the Masters wanted to come along with me. And then details thereof are set out in my affidavit or my oral evidence.

CHAIRPERSON: Ja.

ADV SONI SC: But as I understand it, you resisted all Mr Moodley's attempts.

MR MOLEFE: I did, Chairperson.

ADV SONI SC: Now Mr Buthelezi then says that you
10 defend your appointment of Werksmans at PRASA despite the auditor general having found that appointment irregular. What is your reaction to that?

MR MOLEFE: We have dealt, Chairperson, with the processes leading to the appointment of Werksmans. Mr Buthelezi might not be happy with how we have dealt with it but I have nothing more to add.

ADV SONI SC: And by whom was PRASA appointed, by you or by the board?

MR MOLEFE: Werksmans were appointed by the board but
20 it did so through the management, the acting Group CEO at the time.

ADV SONI SC: And then he says you accuse him of misleading the board and weakening governance at PRASA. Now I am going to deal with the affidavit – those allegations in a moment but let me deal with the allegation

at paragraph 53. He says that you present yourself as a state capture buster but he says you are no such things, he says:

“For the reasons hereunder, I appeal to the Commission to allow me to cross-examine Mr Molefe.”

And he gives two examples. I am going to ask your reaction to that. First he says at 53.1 you irregularly appointed personal bodyguards for R6 million of PRASA
10 funds and the SIU is or was investigating the irregular appointment of Black Hawks Business Solutions to provide that service. What is your reaction to that?

MR MOLEFE: The first point I am constrained to raise is that I do not need validation that I am a state capture buster, I mean that is a matter for public record, so I do not need validation.

With regard to the appointment of the Black Hawks, it is true that they were appointed but they were appointed not by me, by the company. The circumstances under
20 which they were appointed was that my life was under threat and we could not rely on the security that PRASA had employed at the time.

ADV SONI SC: So you say they were not appointed by you.

MR MOLEFE: That is correct.

ADV SONI SC: I did not hear who was appointed by?

MR MOLEFE: By the company, by PRASA.

ADV SONI SC: By PRASA?

CHAIRPERSON: That is correct, that would be the management.

MR MOLEFE: And I personally had no role in determining who gets appointed.

CHAIRPERSON: When you said PRASA are you referring to the management of PRASA as a [inaudible – speaking
10 simultaneously]

MR MOLEFE: Yes, I am referring to the management of PRASA but of course the Chairperson of the SHAQ committee of the board, which was Safety, Health and Quality Assurance committee would have been involved in the process.

CHAIRPERSON: Yes.

MR MOLEFE: In engagement with the PRASA management.

CHAIRPERSON: Yes. Mr Soni?

20 **ADV SONI SC:** As you please, Chairperson. Was a decision to that effect taken by the board itself?

MR MOLEFE: No, no, the decision was – well, that decision was taken by management having consulted with the Chairperson of the SHAQ committee, it was not a board *per se*. So the board would have approved.

ADV SONI SC: And when the board approved were you part of that meeting.

MR MOLEFE: I was not part of that meeting.

ADV SONI SC: Then he says, the second point in relation to your not being a sanctions buster – I mean, a state capture buster is he says you and your board only paid yourselves and you were ordered to pay an amount of R680 000 back to PRASA.

MR MOLEFE: Well, firstly, it is true that there are certain
10 remuneration that was paid to the directors. I was not involved in determining that, I was out of the country. When I came back I found that there was money in my account. I raised that matter with the company secretary and knowing that remuneration of directors has to be determined by a shareholder, the executive authority, the minister, when I found that the minister had not approved, I took a decision myself voluntarily, without anybody having asked for anything from me to say that I am paying back this money until such a time that the process of approval
20 has been effected by the minister. That is how I paid back the money and I encouraged other directors to also pay back the money.

ADV SONI SC: Do you know if the others did?

MR MOLEFE: I do not know how many of them might have paid but I know that there were others who did not pay it.

ADV SONI SC: But you paid back the full amount.

MR MOLEFE: I paid back the full amount minus – well, the amount was actually more than a million but the million included the money that was taken by SARS. So when I paid back, I paid back about 680 because the other money was with SARS anyway and it did not come from me, it did come from the company itself. So I could not claim it and there was no need for me to pay it on the advice of PRASA Treasury.

10 **ADV SONI SC:** Now at paragraph 54 Mr Buthelezi that you appeared at the Commission on the 7 May 2019 in your capacity as the Chairperson of the Transnet board of directors and he says on that occasion you alleged that the PRASA locomotives – I take it those are the locomotives that are subject or were part of the Swifambo contract were not fit for process.

CHAIRPERSON: For purpose.

ADV SONI SC: For purpose, sorry. Now firstly, is that what your evidence was before the Commission?

20 Remember it happened under the Transnet stream.

MR MOLEFE: That is correct, Chairperson, that would have happened as an example during the course of oral evidence and raised as an example on irregular procurement and ...[intervenes]

ADV SONI SC: Alright. In relation to that – sorry, Mr –

are you finished?

MR MOLEFE: I am done, yes.

ADV SONI SC: So in relation to the allegation that those locomotives were not fit for process, Mr Buthelezi said ...[intervenes]

CHAIRPERSON: For purpose, Mr Soni. It is not your day today.

ADV SONI SC: I apologise.

CHAIRPERSON: Not fit for purpose.

10 **ADV SONI SC**: Yes. He says this allegation is factually incorrect and in support of that allegation, that it is the – your allegation is factually incorrect, he says the trains were delivered in Cape Town, they are stationed in Johannesburg, they were not transported by air, they were driven through tunnels from Cape Town to Johannesburg and clocked over 70 000 kilometres.

MR MOLEFE: Well, I cannot argue that they were driven from Cape Town. The factual position is that they were not fit for purpose and this clearly articulated in the advice
20 that Transnet Freight Rail, TFR, had given to PRASA to say that these locomotives are not compliant with our rail and infrastructure network as well as safety. So to that extent Transnet had given an advice.

CHAIRPERSON: Well, let me – I am sorry, Mr Soni.

ADV SONI SC: As you please, Chair.

CHAIRPERSON: When I read this part of Mr Buthelezi's affidavit, Mr Molefe, particularly the part where he said these locomotives were not transported by air to – from Cape Town to Johannesburg, they were driven through tunnels from Cape Town to Johannesburg, I understood him to be raising maybe indirectly the allegation that has been made from time to time that I think they were too tall for the – I do not know what you call these things, but they were too tall because that criticism gave the impression
10 that they could not be used. Now I cannot remember whether in your evidence you said anything directly on that when you talked about not fit for purpose but maybe it would be good just to deal with this issue once and for all because one does hear people who said no, they were too tall but then I think Mr Montana, for example, also disputed that and said, you know, these locomotives were fine. So I do not know if you want to say anything about this issue, Mr Molefe?

MR MOLEFE: Chairperson, I confirm that the locomotives
20 were too tall.

CHAIRPERSON: Yes.

MR MOLEFE: I cannot give the exact figures.

CHAIRPERSON: Yes.

MR MOLEFE: But the requirement of Transnet was that the locomotives should not be – had to be below – four

metres high.

CHAIRPERSON: Ja.

MR MOLEFE: Which means they had to be around 3.9 metres, that is the height.

CHAIRPERSON: Yes, yes.

MR MOLEFE: These locomotives came at the height that was above 4.1 metres.

CHAIRPERSON: Yes.

MR MOLEFE: And PRASA together with Vossloh which is a
10 company that manufactured them, attempted to adjust them. They reached a point where they could only adjust them up to four metres plus some centimetres and Vossloh said we are unable to do anything more than that, you know, so you have got to take them as they are. So there is no question that they were taller than was required.

And the second point is that although the locomotive might have travelled along a certain rail route from Cape Town to Gauteng, but we also heard evidence where some of them bent trying to go through certain
20 bridges and I think that evidence was there, was in the media as well. To the extent that it becomes necessary maybe for me to respond to some of the things that Mr Montana had said, I could then try to some of those reports, contemporaneous points of the time.

CHAIRPERSON: Yes, yes.

MR MOLEFE: And then, of course, the reason Transnet did not want locomotives that were too high, there were also issues of safety. If the pantograph was too close to the electric line, there was always a chance that the locomotives could burn like it happened when it went through that particular bridge that I am referring to. The fact that they managed to get to Gauteng does not mean that they were fit for purpose.

CHAIRPERSON: Yes, well it is important to – I guess it
10 might not be enough to say they were driven from Cape Town to Johannesburg unless one finds out what was done to make sure that they reached Johannesburg safely.

On a lighter note I am thinking of, you know, sometimes you get people who drink alcohol and after they have drunk alcohol they like getting behind the wheel and they will not allow anybody to drive their cars, they say they drive best when they have had something and they will tell you the long distances they have driven after drinking liquor and then some people will say they do not
20 tell how other drivers on the road suffered trying to avoid them. So it might not be a full story, you know, that driver might reach home but you do not know what happened on the way.

So it may well be that it is important to find out to what extent their height was a problem when they were

driven from Cape Town to Johannesburg but, apart from that, also, those who might be suggesting that tall as those locomotives may have been, they could nevertheless be used, those might have to deal with issues of safety that you say – you raise, Mr Molefe, to say well, it might not mean that physically they could not be driven but there would be safety issues that could arise and that is why there would have been a requirement that they should not be higher than a certain height, they should not be taller
10 than a certain height.

MR MOLEFE: That is correct, Chairperson, there are regulations.

CHAIRPERSON: Yes.

MR MOLEFE: Of the Rail Safety Regulator.

CHAIRPERSON: Yes.

MR MOLEFE: There are also safety positions taken by the owner of the rail network infrastructure like Transnet. Whoever uses that is required to comply with the requirement. But what I will do, Chairperson, is that –
20 because we dealt with these details in the application before the High Court of South Gauteng when we sought a review of the contract on this locomotives. The specific calculations were given in that regard, so I will find that information.

CHAIRPERSON: Ja.

MR MOLEFE: And submit it.

CHAIRPERSON: Ja.

MR MOLEFE: So that the numbers could be read it and then comparison could be raise Afro 4000 locomotives.

CHAIRPERSON: Ja. Okay, thank you. Mr Soni?

ADV SONI SC: As you please, Chairperson. Now in paragraph 55 Mr Buthelezi says he wants to deal with certain allegations you made and he deals with them in subparagraphs 55.1 to 55.4. Just going to deal with each
10 of them very briefly. He says that – and I can just refer you perhaps to the relevant part of paragraph 18 of your affidavit where in the first sentence you say:

“To add to the board’s challenges, at the board’s first substantive meeting which was held on the 27 November 2014, its former Chairperson Mr Sifiso Buthelezi advised us that he would be resigning immediately after the meeting.”

So that is the allegation that you made. Now in paragraph 55.1 Mr Buthelezi says it is not true that he said he would
20 be resigning immediately after the meeting, he says he gave notice at the meeting of his resignation which was to take effect on the 31 December 2014 and he had given a letter to that effect to the Minister of Transport. There was no urgency to his resignation, he was not running away from anything.

Well, let us forget the other things. The suggestion is he did not say – or his version is he did not say at that meeting that he was going to resign immediately.

MR MOLEFE: It may well be that he did not say immediately but what he said was that that was his last board meeting, so he was not going to be in any other board meeting after that. So he was – the fact of the matter is that he was resigning. What the letter to the minister said, I am not privy to.

10 **CHAIRPERSON**: I guess what you – your two versions, your version and his version maybe are irreconcilable, what you are saying is that the meeting at which he said he was resigning was his last meeting at a particular level but you were not aware of whatever letter he may have written to the minister and you do not dispute that, whatever letter he may have written to the minister was to the - or may have been to the effect that he was going to resign at the end of the December or he would – his membership of the board would come to an end at the end of December.

20 **MR MOLEFE**: I do not dispute that, Chairperson.

CHAIRPERSON: Ja, ja. Yes.

MR MOLEFE: All that I knew, that was the last meeting of the year of the board.

CHAIRPERSON: Ja. Mr Soni?

ADV SONI SC: As you please. Did he give any reason for

resigning now [inaudible – speaking simultaneously]

MR MOLEFE: He did not give ...[intervenes]

ADV SONI SC: Okay, so in subparagraphs a, b and c at pages 33 and 34 of sequence 17 he sets out his reasons and I am just going to put them to you. He said the reason he was resigning is that it would be good for the company that a new Chairperson operates without the yoke of former Chairperson.

Secondly, it would not be fair to you that he, as a
10 former Chairperson, remained on the board because you had your own – he had his own way of chairing meetings.

And thirdly, he says he considered it would not be fair because the new Chairperson may want to criticise the previous board and his being present might be an impediment to such criticism. What – are you in a position to comment on that?

MR MOLEFE: On reflection, whether he gave reasons, let me say that in my conversation with him he only said that he had served the board for a long time, it is more than
20 two terms that he had been on the board, that is all.

The reasons that are read by counsel to me were never discussed with me, neither were they given to the board and I cannot dispute that that is what motivated his resignation, I cannot dispute that.

ADV SONI SC: Alright. Then at 55.2 – sorry, before I read

that, can I read to you another sentence from paragraph 18 of your affidavit. The last sentence reads:

“Quite strangely Mr Buthelezi then made his submission for the approval of the appointment of service providers for the Braamfontein depot modernisation project and for the purchase of rails turnouts alleging that the tenders were urgent.”

Now Mr Buthelezi takes issue with your describing his request as strange.

10 **MR MOLEFE**: Chairperson ...[intervenes]

ADV SONI SC: Why did you consider – yes, go ahead.

MR MOLEFE: Okay, let proceed with the question?

ADV SONI SC: I was just going to ask why did you say that it was strange that he would make that request?

MR MOLEFE: My affidavit is written after the fact but there is a context to that statement, Chairperson. The context is that Chairperson would recall that at that meeting just before the board approved and after deliberation, there was a requirement, a request by the
20 board that a probity report be given to the board as an assurance given that the tender that the board was being asked to approved was a tender that was running into billions and the board needed to be assured that – reassured that the proper process was followed and the risk mitigation would have been taken into account.

So, therefore, the strangeness then comes about because in the meeting that considers this matter, it turns out that the committee that Mr Buthelezi was chairing had never considered the issue of probity. So I think that is really the context in which it arose.

CHAIRPERSON: Yes. Mr Soni?

ADV SONI SC: As you please, Chairperson. Mr Buthelezi then says at the bottom of paragraph 55.2:

10 “It is odd that Mr Molefe should not assert that it was strange because the approval of the projects would have been on the agenda otherwise it would have not been served there.”

That must be correct, is that correct? It was on the agenda.

MR MOLEFE: No, it is correct, it was on the agenda, it would have been part of the FICP report, his committee’s report.

20 **ADV SONI SC:** And he said that for that to have happened it would have had to have gone through the whole process from the Bid Evaluation Committee, the Bid Adjudication Committee, the FCIP committee and it was after that that is project would be – the matter would be referred to the board, he says there was nothing strange about that.

MR MOLEFE: The strange thing, Chairperson, I repeat, is that the probity that that committee and the board needed

to be satisfied of was not done.

ADV SONI SC: Yes.

MR MOLEFE: It is not – the dispute is not whether it went through various supply chain committees. So I cannot dispute what he says about the various supply chain committees that the matter went through.

ADV SONI SC: Now Mr Buthelezi then goes on in subparagraph b to say that:

10 “The projects were in fact urgent because there was
 a need for a new depot to accommodate the new
 fleet of trains, the old depot was not appropriate.”

Then he says you owned – in your evidence owned that there was an urgency but the evidence leader, being myself, then attributed the question of urgency to you. You may want to respond to that.

MR MOLEFE: No, the project indeed we said was part of the modernisation of rolling stock and rail so it was in urgent in view of the fact that there were trains that were under manufacturing in Brazil but it does not derogate from
20 the fact that the board needed probity and it was strange that the board was required to approve without these checks and balances. So I agree with Mr Buthelezi that it was urgent.

ADV SONI SC: Alright, so the strangeness then is not on account of it is not being urgent. So what was it on an

account of?

CHAIRPERSON: He said it was because of the probity.

MR MOLEFE: It is on account of assurance not being given to the board and not having been given to the committee itself that was bringing a submission to the board that there was adequate probity conducted.

ADV SONI SC: Okay, then at paragraph 55.3 he says that in your evidence on the 29 June you said that he was pushing the approval of the two projects and you
10 concluded by saying whether there was a motive or not, I do not know, I do not want to impute any motive. He says this innuendo is unacceptable, I had nothing to gain by submitting to the board their approval of the projects and it was a submission of the committee, the committee which yes, he shared, there was no motive. What is your reaction?

MR MOLEFE: Chairperson, my statement does say that I am not ascribing any motive.

CHAIRPERSON: Yes.

20 **MR MOLEFE:** I do not know what more one can say.

CHAIRPERSON: Ja.

MR MOLEFE: But I respect that Mr Buthelezi, reading that sentence, felt that there were certain innuendos that sat uncomfortably with him.

CHAIRPERSON: Ja.

MR MOLEFE: I cannot dispute that that is how he felt.

CHAIRPERSON: Yes.

ADV SONI SC: Then at paragraph 55.4 he says that:

“The board required a probity report as assurance that there had been proper compliance.”

And you repeated that, evidenced on the 12 March 2020, that raises a number of matters relating to that comment, says:

10 1. I was not aware the approval of the projects had become contentious until March 2020.”

When you gave evidence. What is your reaction to that?

MR MOLEFE: Chairperson, the factual position is that that same board meeting which Mr Buthelezi attended said that it could not give a final approval to that tender unless the probity report which Mr Montana had assured the board that it was available was given to the Chairperson of the board and to the Chairperson of the audit committee. The board gave approval subject to that report.

20 So the absence of that report is what would then have made the project contentious and it is a matter of record that in the end management, through the then acting Group CEO, Ms Martha Ngoye, had confirmed that in fact there had not been any probity report, that the probity officer - officers who were the Gobodo and Xabiso or Sekela and Xabiso, the auditors of the time, their contract

had expired before that process of that tender was finalised and there was not way in which they would have given a probity report and on the basis of that, which is an issue that was raised in the presence of Mr Buthelezi in that board meeting, the contract was held in abeyance because it was made clear that the preferred bidders would not be advised that they are preferred bidders until such a time that a probity report was submitted to the Chairman of the board and to the Chairman of the Audit and Risk
10 Committee of PRASA.

CHAIRPERSON: You refer, Mr Molefe, to auditors in regard to the availability of that report. I understood previously and I think it may have been from the evidence of Mr Ngoye that there would have been somebody who would have been an employee of PRASA whose function would have included preparing such a report but that that person or employee or officer or official had resigned or had left PRASA or had not been there for quite some time. Does that accord with your own memory whether that was
20 the case or whether it would have been prepared by the auditors?

MR MOLEFE: I did not follow closely the evidence of Ms Martha Ngoye.

CHAIRPERSON: Yes.

MR MOLEFE: But PRASA would have had a compliance

person in the company who would have had to ensure that there is a probity report but to subject these things to assessment which then produces a probity report would have been a function of the internal audit of PRASA and the internal audit of PRASA was capacitated by the audit ...[intervenes]

CHAIRPERSON: External auditors.

MR MOLEFE: External auditors, but they are not called – they are external auditors but who are providing internal
10 audit support. They are not the normal auditors who audit Transnet.

CHAIRPERSON: Ja, ja.

MR MOLEFE: They were inside and checked regularly these high value contracts.

CHAIRPERSON: They basically wear a different hat.

MR MOLEFE: They wear a different hat.

CHAIRPERSON: Ja.

MR MOLEFE: On probity, on probity.

CHAIRPERSON: Yes, in regard to probity Ja. Mr Soni,
20 do you have any recollection of what I am talking about?

ADV SONI SC: I am going to – was just going to refer you to it, Chairperson.

CHAIRPERSON: Yes, okay.

ADV SONI SC: If you look at paragraph 19 of Mr Molefe's affidavit, the last sentence.

CHAIRPERSON: Oh yes.

ADV SONI SC: He says:

“On the contrary, the board was later told that there could not have been a probity report as the contract of the probity officer had expired at least twelve months earlier.”

CHAIRPERSON: Yes.

ADV SONI SC: I think that is the evidence you recall, Chair.

10 **CHAIRPERSON:** Yes, I think that is the evidence, yes, yes, yes. Yes. You saw that, Mr Molefe?

MR MOLEFE: I saw it and I confirmed that that is what I said.

CHAIRPERSON: Yes. Okay, alright. Mr Soni?

ADV SONI SC: As you please, Chairperson. I am not going to be much longer.

CHAIRPERSON: Yes.

ADV SONI SC: We are right near the end. Now, Mr Molefe, there is just one thing I want to say to you and I
20 would like your comment on it. In the last sentence of paragraph 55.6(a) Mr Buthelezi said that the board sometimes approved of contracts. He says:

“Such conditions would include a successful conclusion of a contract, favourable outcome of probity exercise to ensure that there had been

compliance with the PRASA prescripts by everybody in the procurement and reward chain including the board.”

I think what he is trying to say there is that in those circumstances it is not unusual to have a condition such as where it will – the approval will depend on a successful probity report or a clean probity report.

MR MOLEFE: I cannot dispute what Mr Buthelezi is saying, Chairperson, but if indeed that is what he intended, 10 that is a point he should have made in the meeting to say well, I recognise that the board is uncomfortable with the fact that there is no probity, but I recommend that the board approves that – that no contract would approved before – would be signed before this probity element is brought in.

So, in any event, you cannot even sign a contract and say this contract is signed but is subject to a probity report, the probity report must come before you sign the contract. Because then you are satisfying yourself that 20 you are observing proper governance issues and we are acting in the best interests of the company, protecting the company.

Once the board let it go, it goes into the hands of other people, it is not the board that then deals with the contract. So the board had to make sure as what is the

mandate that it gives.

CHAIRPERSON: So are you saying that if the idea on his part and maybe on the part of his board had been what he now says here in the affidavit, namely they would be prepared to approve the conclusion of the contract on condition that – or they would approve maybe in principle the contract but say subject to an acceptable probity report you are saying you would have expected to have made that point at the meeting when this issue of the probity report
10 was raised?

MR MOLEFE: That is correct, Chairperson, two points to make. I cannot dispute that the board of which Mr Buthelezi was the Chairperson followed that *modus operandi*. I cannot dispute it because I was not there.

CHAIRPERSON: Yes.

MR MOLEFE: What I am saying, having the benefit of that experience and the *modus operandi*, one would have expected that he would have taken the board, that I was Chair of, into confidence and advised that you can actually
20 proceed with this tender even though probity report is not available. We have not have had to reconvene on the 23 December to appoint probity – and audit firm to do a probity for us.

CHAIRPERSON: Okay. Mr Soni.

ADV SONI SC: As you please, Chairperson. Now in

paragraph 55.4(b) Mr Buthelezi takes issue with a statement you make at paragraph 21 of your affidavit. You say – and it is not everything that he complains about but I am just going to read that for context because this is what happens to the contract. Says:

“As a result on the 26 March the board cancelled the tenders and asked ...[intervenes]

CHAIRPERSON: 26th of ...[intervenes]

ADV SONI SC: Of February 2015, sorry.

10 **CHAIRPERSON:** Ja, February 2015.

ADV SONI SC: Yes.

“The board cancelled the tenders and asked management to reissue the RFPs.”

Now that was what you said and that is correct, am I right?

MR MOLEFE: That is correct, Chairperson and remember, Chairperson, the board arrives at that position because the auditors appointed to assess the fairness in the process and its correctness advised that the board that we could not – the board should not proceed with the tender as it
20 stood at the time but it needed to be issued.

CHAIRPERSON: Yes.

ADV SONI SC: Now before I go into the next part, the part that Mr Buthelezi challenges, I would like to take you to paragraph 19 where you make the following statement in the second sentence.

“In regard to the probity report Mr Montana said the report...”

That is the probity report.

“...was available and he could not understand why it had not been included in the presentation. He undertook to provide it to the board as soon as possible.”

Now that is the background to what you then say at paragraph 21 after you make the point that the tenders
10 were cancelled. You then say:

“The board was very concerned that it had been misled by the CEO and senior management and demanded action be taken.”

And then you say to mean:

“The extent to which Mr Montana and the immediate past Chairperson, Mr Buthelezi, had misled the board where indications of major governance challenges at PRASA and it appears as if those responsible – or those responsibly, it was to
20 enforce governance were in fact weakening.”

So it is this comment that Mr Buthelezi takes offence to at paragraph 55.4(b) where he says:

“Mr Molefe claims that I misled the board.”

And he says in this – and I would just like to read this and then we can deal with your reaction to it.

“He seems – he bases this on the fact that I did not contradict the CEO when he told the board at the meeting of the 27 November 2014 that a probity report did exist at that stage even before the board had made a decision on the projects.”

He says:

10 “I am sitting at a disadvantaged position as I am expected to recall each and every detail of what transpired or what was said during a specific meeting more than six years ago without the benefit of minutes. I do not remember what the Group CEO said at the meeting regarding the probity report, it is odd to me that the assurance of one person are attributed to me. That person being Mr Montana. Mr Montana, on my Mr Molefe’s own version, gave the assurances to the board about the existence of the probity report. In any event, if that is what Mr Montana said, I would have no reason to contradict him in the absence of information to the contrary.

20 My silence on an issue on which I had information to the contrary cannot and should not be interpreted as misleading board.”

I would just like your reaction to that because that is what seems to be of serious concern to Mr Buthelezi.

MR MOLEFE: Chairperson, we can at length debate the

issues but I just want to deal with it narrowly to say firstly, that meeting that Mr Buthelezi – did not speak in that meeting and therefore the statement on him misleading the board is premises on the fact that as a Chair of the FICP Finance Capital Investment and Procurement Committee of the board, he should have been aware that the probity report was not there and him being aware that it was not there he should have at least said to the board that we are sorry that when we brought this report he did not think that

10 we needed to look into probity and again that raises this question where he says they were used to putting it as a condition for the signing of the contract.

But, in all fairness, I must say that he misled the board is based on the assumption that he was aware and that he did not speak.

CHAIRPERSON: And if he was not aware it falls away.

MR MOLEFE: If he was not aware it falls away, Chairperson.

CHAIRPERSON: Yes. Mr Soni?

20 **ADV SONI SC:** And of course that allegation that is made at paragraph 21 is made with the full knowledge thereafter that there was no probity officer who had left twelve months ago and there could not be a probity report. Now it may be that Mr Buthelezi was not aware of that fact that there could not be a probity report and, I mean, I am just

endorsing what the Chairperson has said, that that allegation of Mr Buthelezi misleading the board would then fall away as well.

MR MOLEFE: Ja. No, I agree, Chairperson.

CHAIRPERSON: Yes. In the absence of the compliance officer – I think you would have called him or her for 12 months or so, that would not mean that no probity report could be made – or let me put it this way, would that mean that no probity report could be made or could that mean
10 that a probity report could be made but in that event PRASA would have needed external auditors to put on the hat of internal auditors and therefore do the report. Would you know which one it would mean?

MR MOLEFE: The latter, it would mean the latter.

CHAIRPERSON: The latter?

MR MOLEFE: And in fact that is what happened.

CHAIRPERSON: Yes.

MR MOLEFE: The board convened a special meeting, recognising the urgency of the matter.

20 **CHAIRPERSON**: Ja.

MR MOLEFE: To appoint auditors who were giving internal audit capacity to PRASA to do an urgent assessment of that report and they did. Having done so, they produced a report that says this process was fatally floored and we recommend to the board that the board does not proceed

with this tender but the board rather reissues it. So that is what the position was, Chairperson.

CHAIRPERSON: Yes, yes. Now this might be something that relates to Mr Montana rather than to Mr Buthelezi. Mr Soni, do you remember whether we reached a point with Mr Montana where he would deal with this issue namely Mr Molefe's evidence that at that meeting of the board he, that is Mr Montana, advised the board that there was a probity report. Do you remember whether he has dealt with that,
10 either on affidavit on oral evidence and, if so, what he has said?

ADV SONI SC: Chairperson, I must confess I cannot recall. What I do recall, is you might remember that attached to Mr Molefe's affidavit there is the report, the assessment report at PM3 which is at the bottom of paragraph 20 and we went through that report with Mr Montana and he accepted that based on what had happened it was necessary to issue the tenders. What I cannot recall, and I will go through the transcript again, is
20 the question – or his response to the allegation that there could not be a probity report because there was no probity officer because I remember putting that to him, I just simply cannot remember his answer.

CHAIRPERSON: But do you recall whether he admitted or denied that at that board meeting he said there was a

probity report available? You cannot remember?

ADV SONI SC: Chairperson, I will have to look what we have got.

CHAIRPERSON: You will have to check. Okay, no, that is fine. Okay, are you done with Mr Molefe?

ADV SONI SC: I am done with Mr Molefe, Chairperson.

CHAIRPERSON: Yes. Mr Molefe, I think Mr Soni with regard to any other issues that may still need to be dealt with that Mr Molefe might need to deal with, attempts
10 should be made to try and have those issues dealt with without any undue delay.

ADV SONI SC: As you please.

CHAIRPERSON: Maybe I may as well say this while Mr Molefe is listening. If possible, if we are going to have a session where he deals with such issues particularly those emanating from Mr Montana and maybe any other witness, actually, it would be good if we could try and find a space sometime next week. I would imagine we should not need more than an hour to deal with them. But obviously Mr
20 Molefe will only be able to react to a particular date that you will suggest to him.

ADV SONI SC: Yes, as you please, Chairperson.

CHAIRPERSON: Yes. Thank you very much, Mr Molefe, for availing yourself once again, you are now excused.

MR MOLEFE: Thank you, Chairperson.

CHAIRPERSON: Thank you.

MR MOLEFE: Chairperson should not be too nice to some witnesses.

CHAIRPERSON: I thought I try to be okay to every witness but I know that I get accused of being nice to some, you know, but when you chair a Commission such as this you have got to expect to have all kinds of things said about you and how you treat witnesses. There is not much one can do about it, one must just continue to try and do
10 the job as best one can. But thank you very much, Mr Molefe.

MR MOLEFE: Thank you, Chairperson.

CHAIRPERSON: Thank you. Mr Soni, we are done then for the day.

ADV SONI SC: Chairperson, before we conclude this. I do not want to raise things unnecessarily.

CHAIRPERSON: Ja.

ADV SONI SC: But it would be unfortunate for, I submit, the Commission as a whole, to certain allegations made in
20 Mr Buthelezi's affidavit about the investigating team and the legal team, particularly the evidence leader, that certain things were not done or unanswered.

I am not going to use this opportunity, this is not the – it is neither the occasion nor the time to do it, just to say, Chairperson, that when it is said that the evidence

leader should have been affair of this, this and this, it is impossible to, for an evidence leader, especially where an allegation is made about what happened at a particular meeting without it being said that there were consequences flowing from that meeting.

Now I just want to place on record, Mr Chairperson, that at an appropriate time the manner in which we operate will be set out so that it is not deemed as if our silence constitutes acceptance of the criticisms made.

10 **CHAIRPERSON**: Ja, ja. Okay, no, no, that is ...[intervenes]

ADV SONI SC: And of yourself as well, Chairperson.

CHAIRPERSON: Of course.

ADV SONI SC: That is why I said it in that context.

CHAIRPERSON: Yes. No, no, no, I have been accused...

ADV SONI SC: On too many occasions.

CHAIRPERSON: On all kinds of things, but I guess that, you know, when you take a job such as chairing this kind of Commission you must know that...

20 **ADV SONI SC**: It comes with the territory, yes.

CHAIRPERSON: Ja, you know, you will face all kinds of accusations and not everybody will be happy with you and not everybody will think you are fair to everybody and that is just what it is.

ADV SONI SC: Yes.

CHAIRPERSON: But, thank you. So we will adjourn the proceedings for today. We adjourn.

ADV SONI SC: And I will let you know about Mr Molefe's recall, after the recall, Chairperson.

CHAIRPERSON: Yes. Ja, no, that is fine. Okay, thank you.

INQUIRY ADJOURNS

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