Judicial Commission of Inquiry into State Capture Report: Part 2

Vol. 1: Transnet

This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state, also known to the public and the media as the Zondo Commission

Chairperson: Justice RMM Zondo

Acting Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture: Part 2: Vol. 1

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Judicial Commission

Of

Inquiry into allegations

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State Capture, Corruption and Fraud in the Public Sector Including Organs of State

Report: Part II

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TRANSNET

LIST OF KEY ABBREVIATIONS AND TERMS	
BADC	Board Acquisitions and Disposals Committee
BAFO	Best and Final Offer
B-BBEE	Broad-Based Black Economic Empowerment
B-BBEE Act	Broad-Based Black Economic Empowerment Act 53 of 2003
BBi	Broadband Infraco
BDSA	Business Development Services Agreement
BEX	Business Expansion Structured Products (Pty) Ltd
BT	Bombardier Transportation South Africa (Pty) Ltd
CDB	China Development Bank
CFET	Cross Functional Evaluation Team
CGT	Century General Trading FZE
CNR	China North Rail Corporation Ltd
CNRRSSA	CNR Rolling Stock South Africa (Pty) Ltd
Commission	Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State
Constitution	Constitution of the Republic of South Africa Act 108 of 1996
CPO	Chief Procurement Officer
CRRC-E-Loco	CRRC E-Loco Supply (Pty) Ltd
CRRC-SA	CRRC SA Rolling Stock (Pty) Ltd
CSR	China South Rail Corporation Ltd
CSR-SA	CSR E-Loco Supply (Pty) Ltd
DEC	DEC Engineering
DOA	Delegation of Authority

DPE	Department of Public Enterprise
ETC	Estimated Total Cost
FRC	Further Recognition Criteria
GCEO	Group Chief Executive Officer
GCFO	Group Chief Financial Officer
GCOO	Group Chief Operating Officer
GCSCO	Group Chief Supply Chain Officer
GE	GE South Africa Technologies (Pty) Ltd
GFB	General Freight Business
GNS	General Nyanda Security Advisory Services (Pty) Ltd
HVT	High-Value Tender
JJT	JJ Trading
LC	Local Production and Content
LOI	Letter of Intent
LSA	Locomotive Supply Agreement
LSC	Locomotive Steering Committee
MDS	Market Demand Strategy
MEP	Manganese Expansion Project
MSA	Master Services Agreement
NPV	Net Present Value
OEM	Original Equipment Manufacturer
PFMA	Public Finance Management Act 1 of 1999
PMA	PM Africa
POCA	Prevention of Organised Crime Act 121 of 1998
PPM	Procurement Procedures Manual
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
PRECCA	Prevention and Combatting of Corrupt Activities Act 12 of 2004

PTN	Post Tender Negotiations
RFP	Request for Proposals
SD	Supplier Development
SDP	Supplier Development Partner
SOE	State Owned Entity
TE	Transnet Engineering
TFR	Transnet Freight Rail
TOR	Terms of Reference
TSDBF	Transnet Second Defined Benefit Fund

CHAPTER 1 – STATE CAPTURE AT TRANSNET

The terms of reference and legal framework

1. The Commission is required to investigate allegations of state capture, corruption and fraud in Transnet. In the period between 2010 and 2018 Transnet was involved in major procurements of locomotives, network services and infrastructure expansion. The evidence reveals extensive wrongdoing by some members of the board of directors and senior executives at Transnet during the relevant period.

2. The terms of reference ("TORs") of the Commission in relevant part require it to determine: i) whether attempts were made to influence members of the National Executive, office bearers or employees of Transnet through any form of inducement or any form of gain;[1] ii) whether the President or any members of the National Executive, public official or employee of Transnet breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state; iii) the nature and extent of corruption in the awarding of contracts, tenders to companies, business entities or organisations by Transnet; and iv) the nature and extent of corruption in the awarding of contracts and tenders to companies, business entities or organisations by government departments, agencies and entities - particularly, whether any member of the National Executive (including the President), public

[1] Including gratifications and property as defined in the Prevention and Combatting of Corrupt Activities Act 12 of 2004 ("PRECCA") and the Prevention of Organised Crime Act 121 of 1998 ("POCA")

official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.[2]

3. TOR 7 provides that the Commission shall, where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of certain persons. The standard of proof in making findings therefore must be guided by the objects of the Commission. A commission of inquiry is investigative by nature and does not apply (and is not bound by) the ordinary rules of evidence. It may rely on hearsay evidence, representations, or submissions without sworn evidence. While the Commission may make determinations of certain facts on the probabilities, a referral to prosecution or further investigation may be made on the basis of a *prima facie* case with reasonable prospects of corroboration by other evidence sufficient to meet the requisite standard of proof. There must be an objective reasonable basis for believing that a crime or misconduct may have been committed.[3]

4. The TORs arise from, and are to be construed, in the light of the report of the Public Protector. The report followed her preliminary investigation into allegations of improper conduct by the President, other state functionaries and the Gupta enterprise in the removal and appointment of ministers and directors of SOEs and the possibly corrupt award of state contracts. The Public Protector specifically identified for further investigation various contracts awarded by Transnet to three financial services companies with links to the Gupta enterprise: McKinsey Ltd, Regiments Capital (Pty) Ltd and Trillian Capital (Pty) Ltd.

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[2] TOR 1.1, TOR 1.4, TOR 1.5 and TOR 1.9

[3] See section 27 of the National Prosecuting Authority Act 32 of 1998

5. The conduct of the role players in the capture of Transnet must be evaluated in terms of the constitutional requirement of an accountable public sector[4] and the legal framework established to deal with corruption, fraud, money laundering and racketeering. Section 217(1) of the Constitution requires that, when an organ of state contracts for goods or services, it must do so in accordance with a tendering system that is fair, equitable, transparent, competitive and cost-effective. The Public Finance Management Act[5] ("PFMA") was enacted to give effect to these broad principles laid down in the Constitution.

6. Transnet is defined as a major public entity in Schedule 2 of the PFMA and is thus subject to its provisions. Section 51(1)(a)(iii) of the PFMA obliges the accounting authority (the board)[6] of a public entity to ensure that the public entity concerned has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. In terms of section 50 and section 51 of the PFMA the board of Transnet is enjoined to exercise the duty of utmost care to ensure reasonable protection of the assets of the public entity[7] and to act with fidelity, honesty, integrity and in Transnet's best interests in managing its financial affairs.[8] It is a criminal offence for the board or its members, and officials of Transnet to whom powers have been delegated by the board,[9] wilfully or in a grossly negligent way to fail to comply with the duties and

[4] Section 195 of the Constitution

[5] Act 1 of 1999

[6] Section 49 of the PFMA

[7] Section 50(1)(a) of the PFMA

[8] Section 50(1)(b) of the PFMA

[9] Section 57(d) of the PFMA.

responsibilities set out in section 50 and section 51 of the PFMA, punishable by a fine or imprisonment not exceeding five years.[10]

7. The obligations of the board of Transnet in terms of section 51(1)(a)(iii) of the PFMA to ensure that Transnet has and maintains an appropriate procurement and provisioning system, and to act with fidelity, honesty, integrity and in the best interests of the public entity in managing its financial affairs, are reflected in its Procurement Procedures Manual ("PPM"). Paragraph 5.1.2 of the PPM requires all Transnet employees to: i) act with integrity and professionalism at all times; ii) be honest; iii) protect Transnet's assets; iv) refrain from using a position of authority and/or facilities provided by Transnet to further their own interests or that of friends and relatives; v) desist from allowing personal interests to influence business decisions; and vi) maintain an attitude of zero tolerance toward any form of bribery, corruption and inducements.

8. Many instances of wrongdoing in procurements at Transnet between 2011 and 2018 possibly amounted to planned offences as part of a pattern of racketeering activity conducted by a racketeering enterprise (comprising a group of individuals and companies associated in fact) aligned with the Gupta family and its associated companies. In terms of the Prevention of Organised Crime Act[11] ("POCA"), a pattern of racketeering activity comprises two planned, ongoing, continuous or repeated offences contemplated in Schedule 1 of POCA including: i) offences under the Prevention and Combatting of Corrupt Activities Act[12] ("PRECCA") – corruption; ii) the common law offences of extortion, theft, fraud, forgery and uttering; iii) offences related to exchange control; iv) money laundering as enacted

[10] Section 86(2) of the PFMA.

[11] Act 121 of 1998.

[12] Act 12 of 2004.

in POCA; and v) any offence the punishment wherefore may be imprisonment exceeding one year without the option of a fine.

9. Racketeering consists not necessarily in the commission of a specific act of dishonest, corrupt or fraudulent conduct by an individual. The focus is on the relationship between the accused, the enterprise and the pattern of racketeering activities. Section 2(1) of POCA provides two categories of racketeering offences: participation offences and offences associated with receiving and using property derived from racketeering activities. The recurring elements in all of the offences under section 2(1) are the pattern of racketeering activity and the enterprise. A racketeering activity is an event. The relationship of the events to one another, or of an event to the enterprise, or of an event to a common objective of the enterprise, establishes a pattern.[13] The participation offences are the acquiring of any interest in or control of any enterprise, participation in the conduct of the enterprise's affairs and the management of the operation or activities of an enterprise, through a pattern of racketeering activity.[14] The receipt and use of property (very broadly defined) derived from racketeering activity on behalf of an enterprise or for the enterprise are also offences.[15]

10. In addition to the common law offence of fraud, two statutory offences listed in Schedule 1 of POCA are of particular relevance to the analysis of the scheme of capture at Transnet: corruption and offences relating to the proceeds of unlawful activities, including money laundering. Corruption is a statutory offence in terms of PRECCA. Anybody who accepts any gratification from anybody else, or gives any gratification to anybody else, in order to influence the receiver to conduct himself in

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[13] A Kruger: *Organised Crime and Proceeds of Crime in South Africa* 2013, 2nd Ed, LexisNexis, p 23.

[14] Section 2(1)(d)-(f) of POCA.

[15] Section 2(1)(a)-(c) of POCA.

a way which amounts to the unlawful exercise of any duties, commits corruption. Gratification is broadly defined in PRECCA, and includes essentially any valuable consideration. The gratification must be accepted or given as an inducement to act in a certain manner.

11. Section 1 of the Financial Intelligence Centre Act[16] ("FICA") defines money laundering as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds. POCA creates a number of specific money laundering offences. Section 4 of POCA outlaws the crime of money laundering. It prohibits any person from entering into any agreement, engaging in any arrangement or transaction,[17] or performing any other act,[18] with anyone, in connection with property that is or forms part of the proceeds of unlawful activities (being any property or any service, advantage, benefit or reward which was derived, received or retained in connection with or as a result of any unlawful activity). The offence is committed if that person knows or ought reasonably to have known that the property constitutes the proceeds of unlawful activities ("the requisite knowledge"). In addition, the agreement, arrangement or other act must have or be likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of or interests in relation to it.[19]

12. Money laundering thus usually involves an agreement or arrangement regarding the proceeds of unlawful activities aimed at hiding their nature, source, location, disposition or movement. The offence is also committed if the conduct has the

[16] Act 38 of 2001.

[17] Section 4(a) of POCA.

[18] Section 4(b) of POCA.

[19] Section 4(a)-(b)(i) of POCA.

effect of enabling or assisting any person who has committed or commits an offence to avoid prosecution;[20] or, importantly, to remove or diminish any property acquired as a result of the commission of an offence.[21]

13. Section 5 of POCA creates the offence of assisting another to benefit from the proceeds of unlawful activities. It prohibits firstly any person (with the requisite knowledge) from entering into any arrangement with another person facilitating the retention or the control of the proceeds of unlawful activities obtained by that person.[22] Additionally, it prohibits arrangements whereby the proceeds of unlawful activities are used to: i) make funds available to the other person; ii) acquire property; or iii) benefit him in any other way.[23] Section 6 of POCA prohibits any person (with the requisite knowledge) from acquiring , using or possessing property that is or forms part of the proceeds of unlawful activities of another person.

14. Although contraventions of the PFMA will not be constitutive elements of the crime of racketeering, not being listed under Schedule 1 of POCA, they will constitute unlawful activity and any advantage, benefit etc. in connection with that activity will be considered as the proceeds of an unlawful activity an element of money laundering and the assistance offences.

An overview of state capture at Transnet

15. Transnet is the proprietor of all rail, ports and pipelines in South Africa. It is made up of five operating divisions, namely, Transnet Freight Rail ("TFR"), Transnet Rail Engineering ("TE"), Transnet National Ports Authority ("TNPA"), Transnet Port

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[20] Section 4(a)-(b)(ii) (aa) of POCA.

[21] Section 4(a)-(b)(ii) (bb) of POCA.

[22] Section 5(a) of POCA.

[23] Section 5(b) of POCA.

Terminals ("TPT") and Transnet Pipelines ("TPL"). Its principal objective is the optimal development of the freight system.

16. In 2011 Transnet embarked on the so-called Market Demand Strategy ("MDS"). Mr Anoj Singh, the GCFO, and Mr Brian Molefe, the GCEO, played important roles in the development of the MDS.[24] The MDS is a counter-cyclical investment strategy involving investment of R300 billion in TFR, TNPA, TPT, TPL and TE ahead of demand on the premise that demand would peak within three years. The biggest portion of the proposed investment spend was allocated to an accelerated procurement of locomotives to enhance locomotive operational efficiency to enable delivery against the MDS, the growth of volumes from 208 million tonnes to 350 million tonnes and create business opportunities for TE.

17. State capture at Transnet involved a systematic scheme of securing illicit and corrupt influence or control over the decision-making. Corrupt actors sought to gain control over staff appointments and governance bodies to influence large procurements and capital expenditure by changing procurement mechanisms (such as the use of confinements rather than open tenders), the altering of bid criteria to favour corrupt suppliers, and the payment of inflated costs and advance payments. Corrupt procurement practices were sustained by bringing approval authority for high-value tenders ("HVTs") under centralised control and the weakening of the internal controls designed to prevent corruption. Collusion between individuals inside and outside of Transnet, as part of a co-ordinated effort to access and re-direct funds and benefits in substantial procurements, resulted in the strategic positioning of particular individuals in positions of responsibility. A small group of senior executives and directors were strategically positioned to

[24] Transcript 22 April 2021, p 156.

collude in the award of key contracts. The evidence further shows that key employees at an operational level in Transnet were disempowered or marginalised from participation in important procurement decisions which affected their work. Internal controls were deliberately relegated with the result that irregularities went unchecked. Procurement processes were manipulated to ensure preferential treatment to certain suppliers linked to the Gupta enterprise. There was an increased reliance on consulting and advisory services (McKinsey, Regiments and Trillian) that was accompanied by the weakening of internal controls and the payment of substantial fees for work that should have been done internally.[25] These fees were then shared with companies established and controlled by Mr Salim Essa, an associate of the Gupta family, and laundered to the Gupta enterprise.

18. The results of this process were that Transnet became the primary site of State Capture in financial terms. Mr Paul Holden, a director of Shadow World Investigations, who submitted a report to the Commission regarding the "Gupta Enterprise and the Capture of Transnet", testified that Transnet contracts to the value of approximately R41.204 billion were irregularly awarded for the benefit of entities linked to the Gupta family or Mr Essa. This amount represents 72.21% of the total State payments in respect of contracts tainted by State Capture.[26]

19. Three persons were identified as the primary architects and implementers of state capture at Transnet: Mr Brian Molefe, Mr Anoj Singh and Mr Siyabonga Gama. Mr Molefe was appointed as the GCEO of Transnet in February 2011. He was seconded as acting CEO of Eskom in April 2015 and became CEO of Eskom in October 2015. Mr Singh was GCFO of Transnet from 2011 until he too was seconded to Eskom as CFO in July 2015. Mr Gama was dismissed as CEO of

[25] Transcript 7 May 2019, p 39-40.

[26] FOF-20-006, para 2.

TFR on 29 June 2010 but was reinstated to the same position in February 2011 under the very strange circumstances discussed below.

20. The former Minister of Public Enterprises, Mr Malusi Gigaba, was involved in the appointment of Mr Molefe and Mr Singh as directors of Transnet, and in the reinstatement of Mr Gama as the CEO of TFR. They in turn gave free reign to Mr Iqbal Sharma who in 2012 became the Chair of the influential Board Acquisitions and Disposals Committee ("BADC") of the Transnet board. These appointments were followed by the award of significant contracts that benefitted the Gupta enterprise.

21. During the relevant period Transnet procured 1259 locomotives in three separate procurement exercises (the 95, 100 and 1064 locomotive contracts) with a total contract value of more than R60 billion. Evidence heard by the Commission revealed serious procurement irregularities in respect of each of these procurement transactions. The irregularities usually favoured bidders associated with the Gupta enterprise. Investigations revealed: i) improper engagements with the successful bidders; ii) irregular changes to the evaluation criteria benefiting the preferred bidder; iii) a failure to levy delay penalties;[27] iv) the improper use of the mechanism of confinement (a process that does not involve opening the tender to the market in cases justified by urgency, standardisation or highly specialised goods); v) the questionable escalation of acquisition costs; vi) the request for proposals ("RFPs") not complying with legal requirements; vii) improper deviations when evaluating technical compliance; viii) non-compliance with the local production and content threshold and the award of tenders to bidders that did not meet the threshold; ix)

[27] Transcript 7 May 2019, p 63-65; and Exh BB1(a), PSM-013, para 10.12.2

impermissible batch pricing causing Transnet to incur an additional cost of R2.7 billion; and x) a corrupt relationship between the bidders and the Guptas.[28]

22. The evidence establishes that Mr Essa (using two shell companies – Regiments Asia (Pty) Ltd and Tequesta (Pty) Ltd) concluded several so-called Business Development Services Agreements ("BDSAs").[29] These were essentially kickback agreements with various companies based in Hong Kong associated with two of the successful bidders in the locomotive procurements, China South Rail Corporation Ltd ("CSR") and China North Rail Corporation Ltd ("CNR") both Chinese companies. These two companies merged in 2015 to become CRRC Corporation Ltd.[30]

23. The evidence discloses that various subsidiaries of and companies associated with CSR and CNR, incorporated in South Africa and abroad, played some part in the various procurements of locomotives at Transnet. Thus, in relation to the procurement and delivery of electric locomotives, bids were made and transactions concluded variously by CSR, CSR Zhuzhou Electric Loco Co Ltd, CSR E-Loco Supply (Pty) Ltd ("CSR-SA") and CRRC E-Loco Supply (Pty) Ltd ("CRRC-E-Loco"). CNR acted similiarly in relation to the procurement of 232 diesel locomotives that formed part of the procurement of the 1064 locomotives. Its relevant South African subsidiary was CNR Rolling Stock South Africa (Pty) Ltd ("CNRRSSA"), which later became CRRC SA Rolling Stock (Pty) Ltd ("CRRC-SA"). Other associated companies that were parties to the kickback agreements included: CNR (Hong Kong) Co Ltd, CSR (Hong Kong) Co Ltd, CRRC (Hong Kong) Ltd and CNR Dalian Locomotive and Rolling Stock Co Ltd. Unfortunately, in many instances the

[28] Transcript 7 May 2019, p 67-76; and Exh BB1(a), PSM-014, para 10.12.5

[29] See for example Transnet-Ref-Bundle-05149.

[30] SEQ 12/2020 para 7

witnesses and documentary evidence before the Commission failed to identify the relevant corporate entity precisely and merely referred to CSR or CNR. In the final analysis, not much turns on this. Hence, the generic references to CSR and CNR in this report should be taken to refer to the relevant company within the CRRC group. Nonetheless, where it is possible and important to do so, the name of the specific company involved in a transaction or conduct will be used.

24. In terms of the BDSA or kickback agreements, Mr Essa secured commissions of 21% paid to the shell companies. Mr Essa's companies were to receive at least R7.342 billion from CSR and CNR for the provision of advisory services for Transnet's locomotive procurement when, as discussed later in this report, there is no evidence of any true valuable consideration in the form of services for these fees. Mr Essa's companies retained 15% of the payments with a significant portion of the remaining 85% being paid to the Gupta racketeering enterprise.[31] During that time, Mr Sharma, the chairperson of the BADC of Transnet, had a matrix of business relationships with Mr Essa.

25. During July 2015 Transnet approved the relocation costs of two of the original equipment manufacturers ("OEMs"), Bombardier Transportation South Africa (Pty) Ltd ("BT" or "Bombardier") and CNR, amounting to R618.4 million and R647.2 million, respectively, for conducting their operations in Durban and not in Gauteng as originally envisaged in the RFPs. The variation orders to the locomotive supply agreements ("LSAs") were inflated and inadequately evaluated by Transnet and a fee of R67 million was paid in terms of a dubious BDSA between CNR and a

[31] Without powers of compulsion in relation to offshore bank accounts, the Commission has been unable to trace all of these payments, but Mr Holden has traced aggregate payments of R3 400 558 015 by CRRC and its predecessor companies to JJT, CGT, Regiments Asia and Tequesta. There is no reason to believe that the as yet untraced kickbacks were not paid. Exh VV10A-Exec Sum-032 para 41 to -033 para 45 read with Exh VV-PEH-1189 para 244 to -1198 para 270 and -1217 para 306 – 1218 para 308

Gupta-linked company, BEX, with some of that being laundered to the Gupta enterprise.

26. The appointment of financial advisors in relation to the 1064 locomotive procurement was a significant part of the racketeering at Transnet between 2011 and 2016. This involved the siphoning of funds from Transnet through the use of contracts for advisory services which sometimes provided little or no value for hugely inflated fee payments. The evidence of Mr Ian Sinton, the former General Counsel of Standard Bank,[32] establishes that in October 2012 McKinsey agreed to appoint Regiments as its supplier development partner ("SDP") subject to Regiments agreeing to share with Mr Essa 30% (later increased to 50%) and Mr Kuben Moodley 5% of all income received from Transnet. Neither Mr Essa nor Mr Moodley rendered any service beyond introducing Regiments to McKinsey and Transnet. This was affordable because the consultancy rates that McKinsey agreed with Transnet were substantially more than Regiments would have accepted directly from Transnet.

27. More than R1 billion was laundered through various shell companies nominated by Mr Essa and Mr Moodley out of fees paid by Transnet to Regiments in accordance with this arrangement.[33] All of these shell companies operated as out and out money laundering vehicles without any legitimate business activities. Revenue received from Regiments by these shell companies was within days, laundered to lower level money laundering entities. None of the shell companies paid PAYE (employees' tax) to SARS.

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[32] Exh U10, IHSS-012 *et seq*

[33] Mr Holden calculates the total amount of State Capture related Transnet payments to Regiments at R1 023161 529.89. This figure excludes an additional R248 729 210.00 in additional State Capture related payments to Regiments by the Transnet Second Defined Benefit Fund. See FOF-20-012, para 5

28. The laundering arrangements with Mr Essa and Mr Moodley on joint McKinsey/Regiments' contracts with Transnet were fraudulently presented by Regiments in joint McKinsey/Regiments bid submissions as Regiments' supply development arrangements. In 2021, as a result of an initiative of the Commission to confront McKinsey with certain evidence, McKinsey agreed to repay R650 million to Transnet.[34]

29. Corruption also attended the hedging and risk mitigation of the funding arrangements for the locomotive procurement. In relation to a loan of USD1.5 billion advanced by the China Development Bank ("CDB"), Regiments was paid a success fee of R189 million of which R147 million was paid to Albatime, a company controlled by Mr Moodley. R122 million was then laundered to Sahara Computers (Pty) Ltd, a Gupta company. In relation to another funding arrangement, "the ZAR Club loan" for R12 billion, Trillian Capital Partners (Pty) Ltd (in which Mr Essa had an indirect 60% controlling interest, through Trillian Holdings (Pty) Ltd) was paid R93 million for arranging the loan, when no services had in fact been rendered. Four days later, R74 million of that amount was paid to Mr Moodley's company, Albatime. This amount would ultimately be laundered on to secure a R104.5 million loan from the Bank of Baroda that was used by Tegeta Exploration and Resources to pay part of the purchase price for the Optimum Coal Mine.[35]

30. Most of the corruption and money laundering associated with the locomotive procurements and their financing happened while Mr Singh was the GCFO, Mr Molefe and Mr Gama served as the GCEO (at different times), and Mr Sharma was the chairperson of the BADC.

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[34]Letter addressed by Norton Rose Fulbright to the Acting Secretary of the Commission dated 12 August 2021

[35] Transcript 25 June 2021,p 38-39

31. There was also corruption in relation to key contracts for IT network and data services outsourced by Transnet. During 2013 Transnet issued a substantial tender for network services. After Neotel (Pty) Ltd had been identified as the preferred bidder, Mr Molefe reversed the award and awarded it to T-Systems (a company with Gupta links), the bidder that was ranked third in the scoring. Mr Molefe later revoked his decision and the tender was awarded finally to Neotel. Various irregularities attended the award of this tender - most significantly, substantial improper payments were made by Neotel to Homix (Pty) Ltd, a company linked to the Gupta enterprise.[36] In February 2017 there was a further attempt to favour T-Systems. Transnet awarded an IT data services tender to T-Systems as the second highest scoring bidder, rather than to the highest scoring bidder Gijima on the spurious basis that there were objective criteria justifying such an award. The matter was litigated and the decision was ultimately reversed and the award made to Gijima.[37] By the time that T-Systems was finally removed from its appointment, it had paid over R3 million to Zestilor, a company nominally owned by Ms Zeenat Osmany, the wife of Mr Essa, and R323 413 332.51 to Sechaba Computer Systems, a subsidiary of Zestilor.[38]

32. There was also evidence of corruption in relation to Transnet's Manganese Expansion Project ("MEP"). Unqualified persons associated with the Gupta enterprise sought improperly to benefit from the project by seeking appointment as SDPs and inflation of the contract price to accommodate payments for services that added no value.

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[36] Neotel paid a total of R75 573 519 to Homix in relation to these Transnet contracts. Transcript 22 June 2021, p 65

[37] Transcript 7 May 2019, p 86-90; and Exh BB1(a), PSM-018-019, para 10.12.12-15

[38] See FOF-09-093-100, paras 103-114; and Holden Executive Summary Exhibit VV10A FOF-20-037 – 038.

33. Two other transactions in relation to the procurement of cranes for Transnet are of interest. The contracts were concluded in the period 2011-2014 between Transnet and two companies, ZPMC and Liebherr. The conclusion and execution of these contracts was not subject to full investigation by the Commission. However, the Holden Money Flow Reports, analysed fully in a separate report of the Commission, indicates that these transactions were tainted by corruption and contributed to the illegal flow of funds to the Gupta enterprise.

34. ZPMC was awarded the Transnet cranes contract (designated iCLM HQ 0762 by Transnet) and received an aggregate amount of R877.81 million in payments from Transnet in connection with the contract.[39] Evidence shows that the contract was probably procured by corrupt payments to the Gupta family via JJ Trading FZE, an entity controlled by individuals from the Worlds Window Network, a major money laundering operation. JJ Trading acted as a conduit through which moneys were paid to the Gupta enterprise by ZPMC and CSR in relation to Transnet contracts.[40]

35. ZPMC and JJ Trading FZE concluded an agreement dated 13 June 2011 in relation to the cranes contract which had recently been advertised through tender by Transnet, and for which ZPMC intended to submit a bid.[41] JJ Trading's obligations under the contract included: i) the provision of information about the project to ZPMC; ii) the acquisition of the tender documents; iii) the provision of copies of the local laws and safety codes related to the project and information pertaining to local customs; iv) assistance to the personnel of ZPMC for the duration of the contract, including issuing invitation letters, communications with Transnet, hotel reservations, airport pick up and send-off; and v) the protection of

[39] FOF-09-151, para 192 read with FOF-13-345 to 374, Annexure 43 at FOF-13-358

[40] FOF-06-220 to FOF-06-260

[41] FOF-06-298, Annexure A

ZPMC's interests. The ledgers of the Gupta Dubai companies found in the Gupta-leaks show that, between 22 December 2011 and 30 January 2014, Gupta family companies in Dubai were paid at least USD3,987,103 (equal to R34 million at the time) in respect of these services.[42]

36. The second cranes contract was between Liebherr and Transnet. On 17 February 2014, Liebherr announced that it had received the contract to supply 22 cranes to TPT.[43] Transnet ultimately paid Liebherr an aggregate amount of R841.1 million in connection with this contract.[44]

37. Liebherr made at least eight payments aggregating to USD3,232,430.88 to the Gupta enterprise company, Accurate Investments (based in Dubai), between 22 July 2013 and 26 May 2014.[45] These payments were then laundered further to various other companies in the Gupta enterprise. Liebherr has not provided any details of the services that Accurate Investments allegedly provided as "sales agent" to it in relation to the cranes contract.[46] The Gupta-leaks and the Dubai ledgers in particular show that Accurate Investments was beneficially owned and controlled by the Gupta enterprise,[47] and its function was to act primarily as a vehicle through which kickbacks could be laundered.

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[42] FOF-09-410 to 411, Table 237 read with FOF6-253 to 254, para 232. ZPMC did not seek to bring evidence to the Commission to contradict the evidence against it in this regard, despite the fact that it was served with a Rule 3.3 notice inviting it to do so.

[43] FOF-06-203, fn 3

[44] FOF-09-151, Table 71

[45] FOF-06-204, para 79 - FOF-06-215, para 124 - Note that in his overall money flows report, Mr Holden under calculates these payments in the aggregate amount of USD2,593,480.86 because he fails to take account of certain other payments.

[46] FOF-06-1099, Annexure W

[47] FOF-05-028 to 029, section 3.1; FOF-05-040, para 39; FOF-05-042 to 043, section 4.2; FOF-06-218, para 131

38. A review of the Dubai ledgers shows that in 2013-2014, the only incoming funds into Accurate Investments that were not sourced from other Gupta family companies were funds paid by Liebherr[48] and an unknown entity called VK Trading Hong Kong.[49] Accurate Investments incurred no notable expenses relating to rental or salaries at any time during the period in which it was receiving payments from Liebherr.[50] It is difficult to conceive of any legitimate payments that could have been made by Liebherr to a "sales agent" in respect of a cranes contract that ought to have been awarded by a fair, competitive and transparent process in accordance with the requirements of section 217 of the Constitution. If there was any legitimate reason for these payments to Accurate Investments as a "sales agent", Liebherr could have been expected to place evidence before the Commission but it declined to do so.

The restructuring of governance and the weakening of institutional controls

39. The capturing of Transnet involved the restructuring of governance and weakening of internal controls. In particular, the centralisation of approval authority at the level of the board and senior management in the hands of a few executives had the effect of shielding procurement processes from the scrutiny of a wider group of Transnet officials who could have detected and reported irregularities.

40. A rule of practice existed that key procurement documents, such as RFPs, confinements, condonations and variations to contracts had to be reviewed by Group Governance[51] at Transnet to assess compliance with the regulatory

[48] FOF-06-218, para 131

[49] FOF-06-218, para 131

[50] FOF-05-113 to 117, Annexure A

[51] Group Governance at Transnet performs four functions: i) policies and procedures; ii) transactional advice; iii) training and development; and iv) compliance and monitoring.

framework before sign off.[52] This practice came not to be observed and contracts of substantial value, tainted with corruption were concluded, usually through the process of confinement (confining enquiries for required goods/services to one or a limited number of bidders)[53] rather than open tender, without prior scrutiny and review by governance and procurement specialists within Transnet.[54]

41. Historically, the board of Transnet was not directly involved in procurement. Prior to 2011, the board did not have any delegation of authority for procurement-related activities.[55] These responsibilities were introduced during 2011 with the creation of the BADC as a sub-committee of the board. Under the 2011 DOA framework, the BADC was empowered to approve approaches to market and to conclude contracts for HVTs exceeding R500 million. The timing of the BADC's establishment in February 2011 and the changes to the delegation of authority framework that afforded individual executives greater authority coincided with Mr Molefe's appointment as GCEO on 16 February 2011.

42. The subsequent expansion of the BADC's authority and procurement powers over time closely tracked the injection of funds for capital expenditure and the consolidation of power in Transnet by Mr Molefe, Mr Singh and Mr Sharma. The MDS was announced in April 2012, Mr Singh was permanently appointed as GCFO in July 2012, and Mr Sharma was appointed Chair of the BADC in August 2012. In step with these developments, the BADC's approval authority was increased during 2012 to tenders up to R2 billion, with the board itself able to approve tenders above R2 billion. The 2013 delegation of authority framework

[52] Exh BB2.1(a), PSV-0005, para 16.2

[53] Para 15 of PPM (2013), Annexure PV 7, Exh BB2.1(b), PSV-0477

[54] This has changed since the appointment of the new board in 2018. Group Governance now ensures that procurement documentation meets the required standard before being submitted for sign off.

[55] Exh BB2.1(a), PSV-0010, para 25

added bid adjudication to the BADC's powers and extended the authority of the GCFO to R750 million and the GCEO to R1 billion. By 2016, the BADC's approval authority increased to R3 billion. This was accompanied by a concomitant disempowerment of Transnet's operating divisions in relation to procurement decisions and concentrated significant authority in the hands of a few individuals. The increase in authority worked to the benefit of the Gupta enterprise. The evidence shows that many of the irregularities that attended the HVT procurements between 2011 and 2017 took place within the BADC or at the instance of the GCEO and GCFO, on occasions when they acted without the prior scrutiny and review of Group Governance.[56]

43. There are three stages (comprising a cycle of nine steps) in the procurement process at Transnet. The first is a planning stage; the second is the actual procurement stage; and the third is the implementation stage where the contract is in place and must be implemented. The process usually starts with demand planning and management, where the business requirements are articulated, assessed, validated and checked against budget. A business case is prepared and approval to proceed is sought. This requires the establishment of a cross-functional sourcing team ("CFST") which prepares the specifications and devises a sourcing strategy and may involve consideration of proceeding by confinement rather than open tender.[57] Approval to approach the markets is then obtained in accordance

[56] See the evidence of Mr Singh on this topic at Transcript 22 April 2021, p 163-169 – Mr Singh gave evidence before the Commission over eight days and filed a number of affidavits. On 13 December 2021, he belatedly filed a re-examination affidavit which he had undertaken to file on or before 3 July 2021. He did so without seeking condonation or providing any explanation for the late filing. The re-examination affidavit (Transnet-05-2351) raises some issues for the first time and discusses matters that could have been dealt with during his testimony. Given that the re-examination affidavit was filed shortly before the Commission was due to deliver its report (possibly deliberately and strategically), the investigative team of the Commission has been denied the opportunity to deal with the new matters raised in it thus affecting its evidentiary value.

[57] Transcript 9 May 2019, p73

with the relevant delegation of authority. The CFST considers the procurement strategy and writes the RFP. The RFP is then advertised and issued. The receipt of the bids is followed by bid evaluation, the production of the evaluation report, shortlisting, negotiations with preferred bidders, the award of the contract and contract management.[58]

44. Evaluation of tenders at Transnet normally followed the classic two phase methodology of the public sector. The bid evaluation process (steps 5-7 of the nine step cycle) commences with a preliminary stage 1 in which bids are assessed for administrative and substantive responsiveness. Bids are regarded as administratively responsive if all mandatory documents are received. Bids are regarded as substantively responsive if all pre-qualification criteria are met (e.g. technical or B-BBEE criteria). In designated sectors[59] bids that meet the test for responsiveness (both administrative and substantive) progress to the threshold stage in stage 1 for determination of whether the bid meets the threshold for local production and content ("LC"). The second threshold in stage 1 involves the award of a combination of points for supplier development ("SD") and the B-BBEE score card.[60] A bidder will need to meet a percentage (threshold) based on a combination of SD and B-BBEE before qualifying for assessment on functionality or quality - the technical requirements of the tender. The functionality stage involves a process of scoring bids against various functionality criteria, such as technical compliance,

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[58] Transcript 9 May 2019, p 71 *et seq*; and see diagram at Annexure PV2, Exh BB 2.1(a), PSV-0111

[59] The Department of Trade and Industry has designated various sectors for local production and content e.g. buses, office furniture, rail rolling stock, electrical cables etc. In cases involving local content, bidders must meet the minimum prescribed percentage for local content in order to be considered further. This is expressed as a percentage of the bid price. For example, in respect of rail rolling stock, bidders must indicate that a minimum of 55% of the bid price for diesel locomotives will be spent on local production.

[60] As provided in the Code of Good Practice issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003 ("B-BBEE Act").

previous experience, quality etc. Bids that do not meet the thresholds are disqualified from further assessment.

45. In stage 2 bids are assessed for price and preference. The elements of price and preference are used to compare bidders against each other. SD and B-BBEE are scored again in stage 2. In stage 1 SD and B-BBEE are disqualifiers, meaning that the bidder needed to meet a minimum threshold. In stage 2, the idea is to differentiate between bidders who give a superior SD offering and those who just meet the basics. Bidders are allocated points out of 100 for price and preference and the bid must be awarded to the bidder who scores the highest points overall. Where the value of the tender is expected to be between R30 000 and R50 million, 80 points are allocated to price and 20 to B-BBEE (preference). For tenders above R50 million, 90 points are allocated to price and 10 for preference. The points for price are determined by using a pre-determined formula, in which the lowest priced bid scores the maximum number of points (80 or 90 points as the case may be). The points for preference are allocated based on the bidders' B-BBEE scorecard. Bidders with B-BBEE recognition level 1 are allocated the maximum number of points (20 or 10 as the case might be) with fewer points allocated to bidders with lower B-BBEE levels, based on a pre-determined scale. In addition to the B-BBEE scorecard, points are awarded for Further Recognition Criteria ("FRC") to mitigate the fact that the scorecard might not be current. The points for price are then added to the points for preference to determine the bidder with the highest number of points. In terms of section 2(1)(f) of the Preferential Procurement Policy Framework Act[61] ("PPPFA"), the tender must be awarded to the bidder with the highest number of points, unless "objective criteria" justify the award of the tender to a bidder other than the highest-scoring bidder.

[61] Act 5 of 2000

46. There were several problems in procurement practice at Transnet during the period investigated by this Commission.[62] In general these included: i) inadequate needs assessment; ii) poor or biased development and drafting of specifications; iii) under budgeting; iv) inappropriate deviations from the open bidding processes; v) short time for bidders to respond to tenders possibly intended to favour preferred bidders; vi) changing evaluation criteria during bid evaluation and adjudication; vii) inconsistent application of disqualification criteria; viii) improper overruling of the evaluation team; ix) manipulation of scores; x) the opportunistic use of risk factors as a reason to disqualify top-ranked bidders; xi) multiple repetitive awards to the same supplier; xii) awards not made by the official with the delegated authority; xiii) poor contract management; xiv) abuse of variation procedures; xv) failure to pursue contractual remedies for delay and breach; and xvi) inadequate validation of services rendered prior to payment.[63]

47. Group Governance at Transnet was concerned about the changed delegation of authority framework, as it effectively granted authority to individuals to act as an acquisition council despite the complexity of the adjudication requiring a multi-disciplinary approach taking account of finance, legal, governance, compliance, tax and business etc. It is virtually impossible for any single person to possess all this expertise. The restructuring was accompanied by informal, but significant, shifts in governance culture and procurement practices that added to the centralisation of power in a small group of top executives and board members. Recommendations were routinely presented directly to the board for approval, rather than benefitting from internal review and scrutiny. The result was that high-value procurement decisions by the board were often uninformed or made on the basis of advice received from external advisors and consultants. The concentration of power in a

[62] Exh BB2.1(a), PSV-0015-0024 and PSV-0031 *et seq*.

[63] Exh BB2.1(a), Annexure PV 2, PSV-0112; and Transcript 9 May 2019, p 86-99

small group of senior executives and board members appears to have fostered an authoritarian culture of decision-making rather than inclusive and transparent deliberation.[64]

48. The inappropriate use of confinements, emergency procurement and contract variations also aided corruption at Transnet.[65] Deviations from the open bid process helped to facilitate capture.[66] The procurement mechanism that applies by default within Transnet is the open-tender process. Confinements are a deviation from the general rule of open-tenders. Confinements are permissible only in instances of: (a) genuine urgency; (b) limited supplier source; (c) standardization; and (d) goods or services that are highly specialized and largely identical to those previously procured from the supplier. Misuse of the confinement process can undermine competition and lead to entrenching monopolies within Transnet.[67]

49. The practice of permitting the GCEO to award tenders by confidential confinement was also abused. Confinements were normally reviewed by the CEO and CPO of the operating division, and then would be considered by an acquisition council. Confidential confinements went straight from the CEO of the operating division to the GCEO without any prior review. Under the delegation of authority framework, when Mr Molefe and Mr Gama were GCEO, it was possible for a confidential confinement of a tender worth R1 billion to go straight to the GCEO without much internal review. This happened with the substantial tenders awarded to McKinsey and Regiments for financial advisory services where substantial "fees" were

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[64] See Exh BB1(a), PSM-010 *et seq*; Exh BB3(a), MSM-032; Exh BB7(a), GJJVDW-008 *et seq*; and Transcript 9 May 2019, p 115-116

[65] Transcript 9 May 2019, p 119-127; and Exh BB21 (a), PSV-0017, para 45.4

[66] Transcript 9 May 2019, p 82-83

[67] Para 15.1.1 of the PPM

laundered to the Gupta enterprise. The 2019 delegation of authority framework at Transnet no longer permits confidential confinements.[68]

50. The extent of permissible contract variation was also an issue. At Transnet a rule was introduced that allowed an acquisition council to approve a variation of up to 40% of the original contract value and variations above 40% to be approved by a higher level authority. This has been changed. Contract variations are now governed by National Treasury Instruction 3 of 2016/17 in terms of which Transnet can only approve a contract variation of 20% or R20 million for construction-related works or services and 15% or R15 million for non-construction works or services.

51. There were also instances where amendments were made to evaluation criteria subsequent to the receipt of bids. Paragraph 13 of the PPM provides that evaluation criteria must be unambiguous, rational and justifiable, quantifiable, predetermined and objective. The requirement that evaluation criteria are to be determined means that the evaluation criteria must be stated upfront in the RFP document and no evaluation criteria should be used in the evaluation process that were not stipulated in the RFP document.

52. Finally, the effectiveness of internal controls was also undermined by limiting access to information that would expose corruption. The upward flow of information was deliberately filtered so that limited information reached the board. The internal audit unit, which should ideally report directly to the audit committee of the board, had to "dilute" and "be selective" about what report reached the board and the audit committee. This practice of withholding the disclosure of audit information appears

[68] Transcript 9 May 2019, p 65-69

to have continued, as the investigators tasked by the new Transnet board were unable to obtain many reports from the internal audit unit.[69]

53. During the period under investigation, internal structures at Transnet were increasingly marginalised from procurement processes and their functions were outsourced to private firms. More particularly, the Transnet treasury was marginalised in key financial transactions and ultimately made redundant as its work was taken over and outsourced to Regiments.[70] The role of the treasury at Transnet is to ensure that the Transnet Group has enough cash to meet all its operational and capital requirements by ensuring that funding is sourced cost effectively within approved risk parameters and without breaching key financial ratios. In terms of the MDS, Transnet intended to fund over two thirds of its CAPEX plan through internally generated funds with the remainder funded externally.[71]

54. During the relevant period, the Transnet treasury team had a complement of about 40 staff members with multi-disciplinary skills, competencies and experience. The staff included mathematicians, accountants, investment bankers, commercial lawyers, traders, financiers and economists, who were all highly experienced with an average of 10-30 years of experience in their respective fields.[72] Despite this extensive functional expertise and experience within its treasury, Transnet engaged financial advisors (with links to the Gupta enterprise) at enormous cost to manage the financing of the approximately R70 billion procurement of locomotives undertaken by Transnet between 2012 and 2017. The use of external financial advisors was for the most part unwarranted since Transnet had the necessary specialist expertise and capacity. Transnet treasury had all the ability, skills,

[69] Transcript 7 May 2019, p 34-35

[70] Exh BB10(a), MEM-001 *et seq*

[71] Exh BB10(a), MEM-009, para 24; see also the testimony of Mr Molefe – Transcript 8 March 2021, p 189 *et seq*

[72] Exh BB10(a), MEM-004, para 7

qualifications and experience to raise debt and execute financial transactions in most markets. After the appointment of Mr Phetolo Ramosebudi as the Group Treasurer, the skills and capability within treasury were not utilised as they could have been.[73]

President Zuma's refusal to appoint a GCEO

55. Mr Popo Molefe, the current chairperson of the Transnet board, testified that the problems with governance and procurement at Transnet escalated with the appointment by Cabinet of Mr Brian Molefe as GCEO (on the recommendation of the then Minister of Public Enterprises, Mr Gigaba) in 2011. Mr Molefe, Mr Singh and Mr Gama in their testimony before the Commission denied their involvement in state capture, corruption and any association with or participation in the Gupta racketeering enterprise. The evidence, however, shows that all three had significant contact with the Gupta family, who benefitted considerably from the corruption at Transnet during the time they presided over the affairs of Transnet.[74]

56. Mr Molefe, Mr Singh and Mr Gama facilitated the conclusion of irregular contracts at inflated prices, variously through deviations, improper confinements and the changing of tender evaluation criteria, in order to facilitate entry for companies involved in the extensive money laundering scheme directed by Mr Essa on behalf of the Gupta enterprise. Mr Sharma, as a member of the board and later the Chair of the influential BADC also played a part. He was a business associate of Mr

[73] Transnet-Ref-Bundle-06841. As is pointed out in Part 1, Vol 1 of this Report (on Aviation), Mr Ramosebudi had a longstanding corrupt relationship with Regiments Capital from his days at ACSA and SAA. The marginalisation of the Transnet Treasury and the outsourcing of its functions to Regiments Capital appears to have been linked to this corrupt relationship.

[74] Transcript 7 May 2019,p 15 and p 41

Essa.[75] Mr Gigaba, Mr Molefe and Mr Singh were regular visitors to the Gupta compound in Saxonwold, Johannesburg from where the corrupt enterprise operated in South Africa.[76] Mr Gama too had interaction with Mr Essa and visited the Gupta compound. Other role players implicated in the scheme of wrongdoing include Mr Garry Pita, who held various positions including the GCSCO and GCFO; Mr Thamsanqa Jiyane who at relevant times was the Chief Procurement Officer ("CPO") at TFR; and Mr Ramosebudi, the Group Treasurer appointed in 2015.

57. State capture at Transnet began with the resignation of Ms Maria Ramos as GCEO of Transnet in 2009 and the election of Mr Jacob Zuma as President of the Republic. In May 2009, following the national elections, President Zuma appointed Ms Barbara Hogan as Minister of Public Enterprises. From Ms Hogan's earliest days in office President Zuma interfered and sought to thwart her appointment of a new GCEO of Transnet.[77]

58. Ms Hogan submitted a statement to the Commission which she stated was intended "to illustrate from my personal experience as Minister of Public Enterprises (from 11 May 2009 to October 2010) the extent to which the former President of South Africa, President Zuma improperly and recklessly interfered in matters relating to the appointment of Board of Directors and Chief Executive Officers (CEOs) of State Owned Enterprises (SOEs)'. She added that the actions

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[75] They were co-directors and shareholders in a number of companies - Exh BB 30.

[76] Transcript 7 May 2019, p 50

[77] Transcript 12 November 2018, and Exh L 1 - Ms Hogan joined the African National Congress as an underground political activist in 1977. In 1981 she was detained by the Apartheid Police and was charged with high treason against the Apartheid state. Her conviction for high treason was based on her political activities against Apartheid. She was sentenced to an effective ten years imprisonment. She was released from prison a week after the unbanning of the African National Congress and other political organisations in February 1990.

of President Zuma "damaged and embedded an ethos of political corruption, nepotism, lack of accountability and corruption in our body politics."

59. After the resignation of Ms Ramos, Mr Chris Wells was appointed the acting GCEO. In early 2009, the Transnet board, following a selection process, recommended Mr Pravin Gordhan as its only candidate for the GCEO position. A week later, Mr Gordhan withdrew his candidature and ultimately was appointed the Minister of Finance after the General Elections of May 2009.

60. Mr Gama was a candidate for the position at the same time. Mr Gama had served as the CEO of TFR since 2005. In early 2008 there was an investigation into Mr Gama's conduct following allegations of corruption in relation inter alia to the procurement of security services from General Nyanda Security Advisory Services (Pty) Ltd ("GNS"), a company controlled by General Siphiwe Nyanda, then a Minister and member of President Zuma's Cabinet. An investigation established that there was a prima facie case of misconduct against Mr Gama. Ms Hogan accordingly formed the opinion that the serious nature of the allegations against Mr Gama precluded him from appointment as GCEO. The board also considered Mr Gama unsuitable for appointment as GCEO as, in addition to the allegations of corruption, an assessment revealed worrying concerns about his judgement and "important gaps, relative to the requirements for this position" and that Mr Gama required "greater cognitive development to handle the complexity of the position".

61. After a second process, the board recommended the appointment of Mr Sipho Maseko who was a highly capable and experienced black candidate with the requisite experience and admirable managerial capabilities. Mr Maseko set out his qualifications, skills and experience at the time he was interviewed for the position in an affidavit filed with the Commission. He holds the degrees of BA, LLB and has

held various management positions, mostly in BP Southern Africa. At the time of his interview he was the Chief Executive Officer of BP Southern Africa (Pty) Ltd and was in charge of 4000 employees. He has served as a Non-Executive Director, BP Botswana (Risk Sub-Committee); Executive Member, BP Southern Africa (Transformation Sub-Committee); Chairperson, BP/Shell Zimbabwe (Risk Committee); and Non-Executive Director, Center for Development & Enterprise – CDE (Policy Sub Committee). The memorandum recommending his appointment stated:

> "Mr Sipho Maseko is recommended on the basis of the strength he displayed against the competency profile and in comparison with the other candidates who were interviewed. According to the assessment provided by the Board, Mr Sipho Maseko has also demonstrated the requisite track record to ensure the drive for efficiencies and growth in Transnet as well as the necessary linkages and support with the relevant role players and stakeholders."

62. Mr Gama was a candidate for the position during this process as well but was again found not to be suitable. False reports then appeared in the media that Mr Gama was being victimized by an anti-transformation white cabal that had instituted an inquiry (and later disciplinary proceedings) to prevent him from being appointed as the GCEO.[78]

63. According to Ms Hogan, at a meeting in June 2009, President Zuma indicated that he was not prepared to accept the appointment of the board's candidate, Mr Maseko, and insisted that Mr Gama be appointed. When Ms Hogan resisted this on the basis that he was not the board's preferred candidate and was facing

[78] Mr Maseko was Black, as were the majority of the members of Transnet board.

disciplinary proceedings, President Zuma adopted the position that no new appointments would be made at Transnet until the proceedings were completed.[79]

64. On 28 July 2009, Ms Hogan sent President Zuma a decision memorandum detailing the selection process, the strong motivation for the appointment of Mr Maseko, the investigation into Mr Gama, and the corporate governance aspects of GCEO appointments. The report recommended the approval of the submission of a Cabinet memorandum recommending the appointment of Mr Maseko as Transnet's GCEO without delay.[80]

65. The decision memorandum extensively set out the allegations which were being investigated against Mr Gama as well as what had been done or was being done to investigate the allegations. A reading of that memorandum leaves little doubt that the allegations against Mr Gama were of a very serious nature. Ms Hogan effectively told President Zuma in the memorandum that the charges against Mr Gama were not 'trumped up' or trivial but potentially significant and the board would be failing in its fiduciary duty if it did not complete the investigation in accordance with due process. She also pointed out that the board was confident that the substance and method of the recruitment and selection process were kept discrete from the investigations. Ms Hogan also told President Zuma that the board had not at any stage shortlisted Mr Gama as the second in-line preferred candidate to Mr Gordhan and that the board embarked on an extended search after the withdrawal of Mr Gordhan as it was not confident that the other candidates available, including Mr Gama, were suitable for the position.

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[79] Exh L 1, p 10, para 34

[80] Transcript 17 July 2019, p 75, line 11 – p 76, line 25

66. Paragraph 2.4 of the memorandum indicates that the memorandum was prepared after certain questions and concerns had been raised. That is because in that paragraph Ms Hogan said to President Zuma that due to the delay in the appointment of the GCEO and media speculation, it had become critical for the shareholder to resolve the appointment of the CEO and to re-establish leadership stability at Transnet. The memorandum, she said, "serves to address questions and concerns raised with a view to agreement on the way forward in appointing a CEO for Transnet as soon as possible."

67. In the context of Ms Hogan's evidence about her discussion with President Zuma earlier in June 2009, the questions and concerns referred to in this excerpt had to be questions and concerns that were raised in the earlier or previous discussion between Ms Hogan and President Zuma.

68. In that memorandum all the candidates who were considered during the first recruitment process that produced Mr Gordhan as the board's recommended candidate were disclosed. They included Mr Gama who was an internal candidate. With regard to the candidates other than the candidate that the board recommended at that stage, namely, Mr Gordhan, the memorandum said:

> "Regarding the assessment of the other candidates, the Board reported to the Minister that 'the other candidates were found to be less suitable for the position or not suitable at all. The preferred internal candidate, Mr Siyabonga Gama, was thoroughly considered but the Board is of the view that his assessment showed that there are important gaps, relative to the requirements for the position. According to the independent assessment and Board evaluation, he currently requires greater cognitive development to handle the complexity of this position."

69. The description of Mr Gama as "the preferred internal candidate" begs the question of whose preferred candidate he was? It seems probable that this description meant that Mr Gama was President Zuma's preferred candidate. That is the most

logical meaning of that phrase in the second sentence. It thus corroborates Ms Hogan's version that President Zuma wanted Mr Gama to be appointed as the GCEO of Transnet. It is inconsistent with Mr Zuma's version that he had no preferred candidate and that he did not tell Ms Hogan that he wanted Mr Gama for that position and nobody else.

70. Ms Hogan informed President Zuma in the memorandum that she intended approaching Cabinet with a view to getting it to approve her recommendation to appoint Mr Maseko as the GCEO as also recommended by the board. Ms Hogan had this to say in the memorandum, which is quite telling:

> "Regarding the position of Mr Siyabonga Gama, the Board has assured me that it will continue to ensure that due process is followed in the investigation involving him and that... he is not prejudiced. Should any litigation follow from the investigation, it is best processed discretely from the appointment of the CEO; I have been informed that whilst the Board may be willing to work with Mr Siyabonga Gama, should he be appointed, senior management executives may opt to leave the company."

71. The question that arises from this excerpt is: why would Ms Hogan say this if President Zuma had not said to her that he wanted Mr Gama appointed as GCEO of Transnet?

72. President Zuma denied Ms Hogan's version that his position was that his only choice for the position of GCEO of Transnet was Mr Gama and that, insofar as Mr Gama was still the subject of investigations and could be subjected to disciplinary process, there would be no appointment of the GCEO of Transnet until those processes had been completed. He said that his approach was to go along with the recommendation of the board and to see to it that processes had been followed.

73. Mr Zuma's version must be rejected as a complete fabrication. If he had no objection to appointing Mr Maseko who was recommended by both the board and his own Minister of Public Enterprises, why then was Mr Maseko not appointed? On Ms Hogan's version, the reason why Mr Maseko was not appointed is that Mr Zuma would not allow the matter to be taken to Cabinet because he said that his only choice was Mr Gama. Mr Zuma fled the Commission before he could be asked to explain this. Therefore, on his version there is no explanation for why Mr Maseko was not appointed.

74. In the last paragraph of the decision memorandum before her recommendation of the appointment of Mr Maseko, Ms Hogan stated:

> "In the event that Cabinet does not approve the appointment of any of the preferred candidates recommended by the Board, consideration should be given to commencing a new process of recruitment and selection conducted by the shareholder in order to immunize the process from any further controversy. However, in the interest of the company, this is not a preferred route to follow."

75. Mr Zuma acknowledged that he received the decision memorandum. Ms Hogan testified that she did not receive any response from President Zuma to her decision memorandum. So, again, if President Zuma's version that he had no objection to the appointment of Mr Maseko as GCEO is true, why did he not allow Ms Hogan to submit to Cabinet her Cabinet Memorandum recommending that Mr Maseko be appointed? Ms Hogan has an answer for this question too. It was because President Zuma was opposed to the appointment of Mr Maseko because he wanted Mr Gama for that position. On Mr Zuma's version, there is no explanation.

76. When President Zuma did not respond to this report and recommendation, Ms Hogan sent President Zuma an urgent letter on 25 August 2009 requesting

his assistance to expedite the placement of the memorandum on the agenda of the cabinet meeting of 26 August 2009, stating that she considered it imperative to brief Cabinet on the process and to request Cabinet's approval for the appointment of Mr Maseko in the interests of leadership stability and certainty at Transnet. She noted further that recent negative media reports surrounding the position of GCEO at Transnet, was affecting staff morale. The question has to be asked: if, as Mr Zuma would have the Commission believe, he had no objection to appointing Mr Maseko as GCEO, why did Ms Hogan need to send him a second request to place before the Cabinet a memorandum recommending Mr Maseko's appointment? She testified that she had to do all this because President Zuma was refusing to appoint Mr Maseko. It is difficult to think how Mr Zuma would have been able to stand by his version when questioned on the basis of all these documents if he had not fled the Commission to avoid answering questions.

77. Ms Hogan testified that President Zuma in response to her letter gave her instructions to withdraw the memorandum and requested her to provide him with the names of three potential chairpersons for Transnet.[81] She was told that the Cabinet Secretariat was instructed by President Zuma to withdraw the memorandum.[82]

78. President Zuma's refusal to appoint Mr Maseko as GCEO of Transnet and his insistence on appointing Mr Gama to that position – even as Mr Gama was facing investigations into allegations of serious acts of misconduct – including allegations of misconduct relating to tenders - reflects the first steps taken by President Zuma towards the capture of Transnet by the Guptas with President Zuma's assistance.

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[81] Transcript 12 November 2018, p 87, lines 20-21 and p 89, lines 13-14

[82] Transcript 12 November 2018, p 88, lines 4-5

79. It would seem that from around the end of August 2009 to the end of June 2010 when Mr Gama was dismissed, Ms Hogan did not take any further steps towards the appointment of the GCEO of Transnet. Her version is that that was because President Zuma had told her that the filling of that position would have to wait for the outcome of Mr Gama's disciplinary process.

80. The preference for Mr Gama received support from two Cabinet ministers, Mr Jeff Radebe, and General Nyanda (who was the owner of the company implicated in the procurement irregularities that led ultimately to Mr Gama's dismissal), the ANC Secretary-General, Mr Gwede Mantashe and certain factions within the ANC. Mr Mantashe testified that he supported Mr Gama because it was appropriate to promote "black excellence" and Mr Gama had demonstrated his abilities during his career at Transnet. He preferred Mr Gama above the white candidate favoured by the board and was concerned about racism. He also held to the fiction that the board had initially favoured Mr Gama as second in line when it recommended the appointment of Mr Gordhan, when it had in fact not made such a decision and twice had considered Mr Gama to be unsuitable. Mr Mantashe's account is accordingly implausible and inconsistent with the facts. Mr Gama never competed against a white candidate. Mr Wells had put in an application for the position but withdrew it after a few days of making it. The only candidates preferred by the board with whom Mr Gama competed were Mr Gordhan and Mr Maseko. Mr Mantashe during his testimony to the Commission claimed not to know that, which is not credible given his obvious contemporaneous interest and his role in deployments by the governing party.[83]

[83] Transcript 14 April 2021, p 198-211

81. Immediately before, and in the days following his suspension, Minister Radebe, Minister Nyanda, the ANC, the South African Communist Party, the South African Transport Workers Union ("SATAWU") and the ANC Youth League (under Mr Julius Malema at the time) all issued strong and harsh statements in support of Mr Gama, accusing Transnet of persecuting him. Mr Randall Howard, the General Secretary of SATAWU, and senior figure in COSATU, was a vocal supporter of Mr Gama.[84]

82. In their evidence before the Commission both President Zuma and Ms Hogan confirmed that the deployment committee of the governing party, the ANC, identifies appropriate candidates for appointment as CEOs of State Owned Enterprises ("SOEs").[85] It is therefore reasonable to infer from the public support shown for Mr Gama by key members of the ANC that he also enjoyed the support of the deployment committee and this led ultimately to his appointment as GCEO in 2016.

83. Ms Hogan considered the support given to Mr Gama to have been part of "concerted attempts" to improperly influence the appointment process of the Transnet GCEO and a material breach of corporate governance.[86]

84. When President Zuma gave evidence on 17 July 2019, he objected to the manner in which he was being questioned in relation to the report of 28 July 2009 put before him by Ms Hogan regarding Mr Gama. After a discussion in chambers, the proceedings were adjourned and President Zuma did not testify again before the Commission. The upshot of this is that while President Zuma did testify in relation to this issue he did not fully address the allegations by Ms Hogan that he was party

[84] E xh L 1, p 12, para 45

[85] Transcript 17 July 2019, p 10, line 10 *et seq*

[86] Exh L 1, p 10, para 35

to a breach of corporate governance at Transnet and thwarted Ms Hogan's efforts to appoint Mr Maseko because he favoured Mr Gama.

85. In relation to Mr Gama's candidacy, President Zuma said that following a process of discussion within Cabinet, there was a view that "this man [Mr Gama] we know him, he has been working here, he is capable, and then at the end I think there was kind of a stronger view that now let us take the decision that we should take him."[87]

86. Regarding the recommendation of Mr Maseko, President Zuma claimed to remember the name, but not the background and details.[88] He admitted that Ms Hogan had briefed him in June 2009 about the need for Transnet to appoint a GCEO and new chairperson of the board, the board's choice of Mr Maseko and the investigation into the misconduct of Mr Gama.[89] He, however, denied that he told Ms Hogan that Mr Gama was his only choice for GCEO because this would have constituted a deviation from the proper process (the decision had to be taken collectively by Cabinet). He did not recall if he was told that it would be "messy" to appoint Mr Gama considering the charges he was facing and denied he said that no appointments whatsoever were to be made at Transnet until Mr Gama's disciplinary process was over.[90]

87. President Zuma could neither admit nor deny that there was widespread vocal support for Mr Gama to be appointed as the next GCEO of Transnet. He maintained that from his perspective he had no preference for Mr Gama and was willing to abide the outcome of the final decision.[91] He recalled that there were

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[87] Transcript 17 July 2019, p 40, line 24 – p 41, line 3

[88] Transcript 17 July 2019, p 45, lines 1-7

[89] Transcript 17 July 2019, p 45, lines 20-24

[90] Transcript 17 July 2019, p 46, line 1 – p 50, line 19

[91] Transcript 17 July 2019, p 52, line 19 – p 54, line 19

allegations relating to Mr Gama and General Nyanda, but did not remember the detail.[92] There were murmurs about Mr Gama being victimised, but he could not recall the detail.[93] He could not remember the final conclusion of Mr Gama's disciplinary inquiry.[94]

88. President Zuma admitted that he had received and read the comprehensive report (dated 28 July 2009) sent to him by Ms Hogan.[95] He did not take issue with the report, which, *inter alia*, stressed the urgent need for the appointment of a GCEO.[96] He was not able to remember whether he responded to Ms Hogan or the recommendation in the report.[97] The process was that unless he raised an important issue with a Minister, a Cabinet memorandum would be placed before Cabinet for discussion.[98] It was the Cabinet Secretariat's responsibility to ensure that the memorandum went to Cabinet.[99]

89. Having denied that he insisted that Mr Gama be appointed and delayed the appointment of a GCEO, President Zuma intimated that he had no difficulty with the memorandum proposing the appointment of Mr Maseko being placed before Cabinet. Because he walked out of the Commission and refused to return, President Zuma did not directly answer the allegation that after receiving Ms Hogan's letter of 25 August 2009 he instructed her to withdraw the matter of Mr Maseko's appointment from the Cabinet agenda.

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[92] Transcript 17 July 2019, p 59, line 14 – p 60, line 6

[93] Transcript 17 July 2019, p 60, lines 7-19

[94] Transcript 17 July 2019, p 60, line 20 – p 61, line 3

[95] Transcript 17 July 2019, p 61, line 24 – p 62, line 3

[96] Transcript 17 July 2019, p 75, lines 13-18

[97] Transcript 17 July 2019, p 79, lines 24-25; p 89, lines 1-5

[98] Transcript 17 July 2019, p 82, lines 11-17

[99] Transcript 17 July 2019, p 84, lines 18-25

90. The evidence of President Zuma that he did not insist at his meeting with Ms Hogan in June 2009 that Mr Gama be appointed and that he did not seek to prevent the appointment of Mr Maseko, stands to be rejected. President Zuma's position was "Mr Gama or nothing". Despite having received Ms Hogan's report on or about 28 July 2009 and acknowledging the urgent need for the appointment of a GCEO, he allowed the position to go unfilled for almost two years until his removal of Ms Hogan as Minister with effect from 1 November 2010.

91. The failure of President Zuma to respond to the contemporaneous correspondence, the practices of the ANC deployment committee, the vocal public support for Mr Gama by senior members of the ANC, the attacks on the members of the board, the fact that President Zuma allowed the position of GCEO to go unfilled for a period of 15 months and the subsequent removal of Ms Hogan as Minister of Public Enterprises on 31 October 2010, all support Ms Hogan's version that President Zuma insisted on the appointment of Mr Gama.

92. Hence, President Zuma's version is improbable as most evident from the fact that Mr Maseko was not appointed despite the desires and best efforts of the board and Ms Hogan. There is no other plausible explanation for the non-appointment of Mr Maseko. The evidence of President Zuma that he did not insist on Mr Gama and did not seek to prevent the appointment of Mr Maseko accordingly stands to be rejected as untruthful and false.

The dismissal of Mr Gama

93. Various witnesses gave evidence regarding the dismissal, reinstatement and subsequent promotion of Mr Cama, which forms important background to the role

he played at Transnet and the political pressure and influence brought to bear in his favour during the period of state capture.[100]

94. Disciplinary proceedings were instituted against Mr Gama on three charges in late August 2009[101] and he was suspended on full pay from 1 September 2009.[102] On 10 September 2009, Mr Gama brought an urgent application in the High Court challenging the legality of his suspension and the decision to institute disciplinary proceedings against him.[103] Amongst Mr Gama's grounds for urgency was that Cabinet was about to consider the appointment of a new GCEO of Transnet and that the disciplinary action was timed to prejudice his prospects of filling the vacancy, for which he considered himself the front runner.[104] On 7 October 2009, the High Court dismissed Mr Gama's application with costs in favour of Transnet, Mr Wells (the acting GCEO), the Group Executive: Human Resources, Mr Pradeep Maharaj (who were represented by Bowman Gilfillan), and eight Transnet directors who opposed the application (who were represented by Eversheds).[105]

95. Mr Gama 's subsequent disciplinary inquiry took place over 14 days between 13 January and 25 February 2010. The inquiry was chaired by Adv Antrobus SC, who found Mr Gama guilty on three charges.[106]

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[100] Mr Todd, Mr Mkwanazi, Mr Mapoma, Mr Gigaba and Mr Mahlangu all gave evidence in this regard: Mr Todd (an attorney) represented Transnet during Mr Gama's dismissal dispute; Mr Mkwanazi was the chairperson of the board, acting GCEO and the lead negotiator of the settlement with Mr Gama; Mr Mapoma was the GM: Group Legal Services; Mr Gigaba was the Minister of Public Enterprises; and Mr Mahlangu was Mr Gigaba's special advisor.

[101] Transnet-02-155, paras 83-84

[102] Transnet-02-157, para 96

[103] Transnet-03-069, para 29

[104] Transnet-02-145, para 15; Transnet-02-156, para 87

[105] Transnet-02-142-163; and Transnet-02-162, para 121

[106] Transnet-03-074, para 51

96. The first charge was that Mr Gama authorised the irregular conclusion of a contract by confinement (after cancelling an open bid process) for the provision of security services (at an ultimate cost of more than R95 million) by GNS (the company owned by General Nyanda, later a member of President Zuma's cabinet) in excess of his delegated authority (R10 million).[107] The chairperson found Mr Gama guilty on this charge in that he negligently authorised the conclusion of the contract and signed it without reading it and negligently failed to take appropriate steps to investigate the irregularities associated with the halting of an open tender process.

97. The second charge against Mr Gama concerned his failure to properly execute a contractual condition imposed by the board in a contract with Electro Motive Division ("EMD") for the provision of 50 "like new" refurbished locomotives requiring the reservation of all the local work on engineering, assembly and maintenance for Transnet Engineering ("TE"). The chairperson found that Mr Gama was negligent in failing to secure a contractual term which provided for TE to perform all the local work.[108] Mr Gama admitted that he failed to read the contract or to acquaint himself with its content and implications in order to ensure compliance with the board resolution.

98. The third charge upheld by the chairperson was that during the investigation into his conduct and in the various proceedings, Mr Gama had made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified, unreasonable, calculated to cause harm and had led to an irretrievable breakdown in the trust relationship between Mr Gama as the CEO of TFR and Transnet.

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[107] Transnet-03-243

[108] Transnet-03-404, para 330

99. During the disciplinary hearing it was put to Transnet witnesses that Mr Gama only knew General Nyanda (the owner of GNS) as a well-known politician. However, Mr Gama's cell phone records showed regular contact between Mr Gama and General Nyanda in the period preceding the award of the contract, including a call on 1 December 2007, four days before Mr Gama signed the confinement in favour of GNS. Mr Gama then explained that he had given his counsel an incorrect instruction because he "wanted to put some distance between me and the General" and admitted that General Nyanda was an acquaintance with whom he had played golf, with whom he spoke on the phone when there were family bereavements, and who had called him to commiserate when he had been suspended.[109]

100. On 28 June 2010, the chairperson of the inquiry recommended Mr Gama's dismissal.[110] He did so on the basis that the appropriate sanction in respect of each of the charges viewed in isolation was dismissal, and that viewed cumulatively, dismissal was surely appropriate. Mr Gama was dismissed on 29 June 2010.[111]

The role of Mr Gigaba as Minister of Public Enterprises

101. Following Mr Gama's dismissal, and Mr Maseko having withdrawn his application, Ms Hogan sought to secure the appointment of a new board that would commence a fresh search for a new GCEO. She did so by attempting to place a memorandum dated 27 October 2010 before Cabinet.[112] She was then called to a meeting with President Zuma and the Secretary-General of the ANC, Mr Mantashe, on 31 October 2010, and advised of her removal as the Minister of Public Enterprises and

[109] Transnet-03-311, para 149 *et seq*

[110] Transnet-03-442-478

[111] Transnet-03-094, para 5(b)

[112] Exh L 1, p 14, paras 52-56

re-deployment as the ambassador to Finland. She declined the re-deployment and indicated her intention to resign as an MP.[113] Ms Hogan contends that she was removed because she resisted the repeated attempts to improperly influence executive and board appointments at Transnet and other SOEs.[114]

102. The following day, 1 November 2010, President Zuma appointed Mr Gigaba as Minister of Public Enterprises. Mr Gigaba remained the Minister of Public Enterprises until 25 May 2014, which period spanned the procurement and acquisition of the 100 and 1064 locomotives.

103. Mr Gigaba had a close relationship with the Gupta family (as did President Zuma and members of his family) which commenced in the early 2000s when he was the president of the ANC youth league. In affidavits filed with the Commission and in response to questions from the Fundudzi investigation, Mr Gigaba initially sought to downplay the relationship, but his testimony reveals that he had extensive, recurring contact with the Gupta family over a number of years.[115]

104. When asked in a written interrogatory sent to him by the Fundudzi investigation on 18 March 2019 if he had "any" relationship with the Guptas, and if so to describe its nature, Mr Gigaba answered "no".[116] During his testimony to the Commission, he implausibly sought to explain away the falsehood on the basis that the question was ambiguous (which it plainly was not)[117] and that he meant that he had no relationship beyond a social and cultural one. This interpretation is unsustainable in that the question posed by Fundudzi was general in nature (it asked if there was

[113] Exh L 1, p 14-15, para 57

[114] Exh L 1, p 24, para 108

[115] Transcript 21 June 2021, p 58-71

[116] Transcript 21 June 2021, p 59, line 5

[117] Transcript 21 June 2021, p 62-66

"any" relationship) and provided a follow up question asking for a description of the relationship, intended to elicit the nature of any relationship. In a further affidavit filed in August 2021, after he had completed his testimony before the Commission, Mr Gigaba re-visited the issue.[118] He averred that the answers to the Fundudzi interrogatories were given on his behalf (presumably on his instructions) by his attorney, Mr Tshabalala , in April 2019. As he now saw it, on reflection, the question posed by Fundudzi was in the present tense and thus he assumed that the question was inquiring whether he had a relationship with the Guptas in 2019. While admitting that he had a relationship (exclusively social and cultural in nature) with the Guptas that endured for a number of years, which was well known, he started to distance himself from them in 2014 when he came to see them as "peddlers of influence". The question posed by Fundudzi, Mr Gigaba said, was "vague", and despite his belated explanation for the answer in the negative being "technical" in nature, he contends that his answer in the negative was an accurate answer to the question because by 2019 he indeed had no relationship with the Guptas.

105. The questions posed were clearly intended to elicit an explanation of the nature and extent of any relationship with the Guptas. A categorical unqualified negative answer created the impression that there was no relationship at any time. A reasonable person with the background and experience of Mr Gigaba, with full knowledge of the scandals concerning the association of the Guptas with many politicians, including him, would have known and understood the import and intention of the questions posed by the organisation conducting a forensic investigation into wrongdoing at Transnet during the time he was the responsible Minister. His false answer and his subsequent belated "technical" answer do not

[118] Transnet-11-1084, para 139 *et seq*

assist him and, if anything, add convincingly to a finding that his testimony should not be believed.

106. Mr Gigaba in fact knew all the Gupta brothers and their mother,[119] was especially a friend of Mr Ajay Gupta (who he would visit at Sahara Computers)[120] and made regular visits to the Gupta Saxonwold compound while he was Minister of Public Enterprises.[121] His special advisor, Mr Siyabonga Mahlangu, was tasked with managing the Guptas and was a buffer between Mr Gigaba and Mr Ajay Gupta so as not to confuse the roles of friendship and business.[122] He permitted Mr Mahlangu to travel with President Zuma's son, Mr Duduzane Zuma, to a Gupta wedding in India. The trip was paid for by Sahara Computers and Mr Mahlangu was paid his salary during his absence. Mr Gigaba attended the notorious Gupta wedding at Sun City[123] and the Guptas were invited to his wedding.[124]

107. On 24 November 2010, an internal memorandum which proposed a list of candidates for appointment as non-executive directors to the Transnet board was approved by Mr Gigaba. This memorandum indicated that only three non-executive directors would be retained, in disregard of a decision taken at the Transnet AGM in July 2010 to reappoint all non-executive directors. This meant that a total of 12 new board positions were filled at this stage. In an addendum to the memorandum, it was proposed that Mr Vijay Raman be replaced by Mr Sharma (who in 2013/2014 was the business partner of Gupta associate, Mr Essa, and later assumed control of the BADC). The substitution of Mr Raman with Mr Sharma was

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[119] Transcript 21 May 2021, p 118-119; and Transcript 21 June 2021,p 61

[120] Transcript 18 June 2021, p 43; and Transcript 21 June 2021,p 59

[121] Transcript 21 June 2021, p 114-129; Transcript 27 May 2021, p 207-215; and Transcript 18 June 2021, p 137-153

[122] Transcript 18 June 2021, p 43

[123] Transcript 27 May 2021, p 276

[124] Transcript 31 May 2021, p 28

questionable in the light of the Minister's responsibility to ensure that the board had an appropriate mix of skills and experience. The change replaced the only railway specialist (Mr Raman) with another business and strategy specialist (Mr Sharma).

108. On 8 December 2010, Cabinet approved Mr Gigaba's recommendations for the board at Transnet (including the appointment of a new chairperson – Mr Mafika Mkwanazi). The new board included Mr Sharma. A few days after his appointment as chairperson of the board, Mr Mkwanazi was appointed as acting GCEO by Mr Gigaba to replace Mr Wells who resigned on the same day as President Zuma appointed Mr Gigaba as Minister.

109. Mr Gigaba was later party to an attempt to appoint Mr Sharma as chairperson of the board. Cabinet rejected that recommendation. A newspaper article of 9 June 2011 stated that the reason Cabinet "shot down" Mr Gigaba's recommendation for Mr Sharma's appointment was because he was inexperienced and therefore risked a negative reaction from the capital markets, and that there were "fears that he may be closely identified with the wealthy Gupta family". Mr Sharma, as mentioned, went on to be appointed as the Chair of the BADC, which played a central role in key procurement decisions that advanced the interests of the Gupta enterprise.

The appointment of Mr Brian Molefe as GCEO

110. Shortly after the appointment of Mr Gigaba as Minister, in December 2010, prior to the publication of the advertisement for applications to fill the GCEO vacancy, the Gupta owned newspaper, the New Age, predicted the appointment of Mr Molefe as GCEO of Transnet.[125] In January 2011 a special Nominations and Governance Committee was convened and a recruitment agency, Leaders Unlimited ("LU"),

[125] Transcript 8 March 2021, p 95-108

was appointed to lead the process. Mr Sharma nominated Mr Molefe for the position,[126] who was contacted by LU a few days later and he furnished it with his curriculum vitae.[127] In early February 2011, nine candidates were interviewed, including Mr Molefe and Mr Gama (who by then had been dismissed). Mr Sharma sat on the selection panel that interviewed Mr Molefe and scored him.[128]

111. On 11 February 2011, the board resolved to submit a list of three preferred candidates for GCEO to the Minister, which included Mr Molefe and Dr Mandla Gantsho, the highest scoring candidate. The Ministerial guidelines for appointment of a CEO for a SOE required the board to submit a minimum of three shortlisted candidates and to indicate its preferred candidate. The board in this instance failed to identify its preferred candidate and abdicated its responsibility to identify the person it preferred.[129] Mr Gigaba did not consider the board's omission as material and felt no need to refer the matter back to the board to indicate its preferred candidate.[130] In a memorandum dated 14 February 2011, Mr Gigaba requested Cabinet to "note" the appointment of Mr Molefe as "the most suitable candidate" for the position of GCEO,[131] and inappropriately failed to inform it that Dr Gantsho was the highest scoring candidate as he preferred Mr Molefe on the basis of his experience at the Public Investment Corporation.[132] On 16 February 2011, Cabinet approved the appointment of Mr Molefe as the GCEO. In effect, Mr Gigaba (a friend of the Guptas) was instrumental in the appointment of Mr Molefe (another

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[126] Transcript 8 March 2021, p 104

[127] Transcript 8 March 2021, p 105

[128] Transcript 27 May 2021, p 229. He belatedly recused himself and his scores were not taken into account – though his preference by then was clearly known.

[129] Supplementary affidavit of Mr Mkwanazi, Transnet-04-021.423, para 5.14

[130] Transcript 27 May 2021, p 231 *et seq*

[131] Transcript 27 May 2021, p 228

[132] Transcript 27 May 2021, p 232-245

friend of the Guptas), with his appointment having been predicted in the newspaper owned by the Guptas, and initiated by Mr Sharma (another Gupta associate).

112. The evidence confirms that Mr Molefe knew the Guptas well, particularly Mr Ajay Gupta who he spoke to on the phone often. His interaction with Mr Ajay Gupta started some years before his appointment as GCEO in 2011. He attended regular social functions and private meetings at the Gupta compound and would visit about once a month, on average. It is estimated that Mr Molefe may have gone to the Gupta compound as many as 50 times in the four years that he was GCEO at Transnet. The Guptas also visited his home.[133] During his tenure as GCEO, Mr Molefe supported substantial payments to the Gupta owned newspaper, the New Age, for advertising and marketing events, which others at Transnet regarded as being of questionable value.[134] Other evidence, discussed later, points to the fact that the Guptas influenced the decision to transfer Mr Molefe to Eskom, first on secondment as the acting CEO and later as CEO in 2015.

113. Mr Molefe went on to oversee the substantial procurements at Transnet from which the Gupta network illegally benefitted. Most of the transactions were approved by the BADC chaired by Mr Sharma, who was in a close business relationship with Mr Essa who had a 20-21% interest (via the dubious BDSAs) in the transactions. Ultimately, under Mr Molefe's watch, the Gupta enterprise received more than R3.5 billion in (proven) kickbacks in respect of the locomotives procured.

114. Despite the perpetrators of this massive racketeering, corruption and money laundering being his friends and associates operating in the Transnet space,

[133] Transcript 8 March 2021, p 143-184

[134] Transcript 10 March 2021, p 136-145

Mr Molefe maintains he was wholly unaware of any wrongdoing.[135] His denials are not credible when assessed against his role and involvement in the many transactional decisions during the procurement and contractual processes analysed later in this report. Mr Molefe was reluctant to acknowledge that he felt betrayed by the plundering of Transnet, during his time as GCEO, by his good friends, the Guptas. He stated that he preferred rather to reserve judgment until their crimes were established beyond all reasonable doubt.136

The reinstatement of Mr Gama

115. The process to reinstate Mr Gama appears to have begun (at around the same time as the process that led to the appointment of Mr Molefe) in a meeting between Mr Gigaba and Mr Mkwanazi either before 1 November 2010 or in early November 2010.[137] Prior to this, in July 2010, Mr Gama had referred an unfair dismissal dispute to the Transnet Bargaining Council [138] and later limited his claim to a contention that dismissal was an inappropriate sanction.[139] During the meeting with Mr Mkwanazi, Mr Gigaba requested that the incoming board should review the fairness of the dismissal of Mr Gama[140] because he thought the sanction of dismissal was unfair and too harsh for two reasons: firstly, because white employees had committed more serious acts of misconduct and had not been

[135] Transcript 8 March 2021, p 134-136

[136] Transcript 8 March 2021, p 179 *et seq*

[137] Transcript 21 May 2021, p 161, lines 14-17

[138] Transnet-03-091-097

[139] Transnet-03-103, para 3

[140] Transnet-04-021.415, para 6

dismissed;[141] and secondly, because Transnet had not followed the applicable condonation process for condoning procurement irregularities.[142]

116. A new board was appointed with Mr Mkwanazi as the new chairperson on 13 December 2010. On 22 December 2010, the Public Protector notified Transnet that she was conducting an investigation into certain allegations that the Transnet board had unfairly conspired to prevent Mr Gama from successfully applying for the vacant post of GCEO.[143] Mr Mkwanazi enlisted the assistance of Mr Siyabulela Mapoma, GM: Group Legal Services, to deal with the Public Protector investigation.[144]

117. According to Mr Mapoma, Mr Mkwanazi made it clear to him that he had been instructed to reinstate Mr Gama. Mr Mapoma assumed the instruction came from President Zuma. When Mr Mapoma later asked why Transnet was reinstating Mr Gama, Mr Mkwanazi "indicated initially that this was coming from the ministry...later on, he indicated that it was coming from higher up".[145] Mr Mkwanazi denied Mr Mapoma's version, stating that the shareholder instruction was to review the fairness of the dismissal, and that Mr Mapoma had made his own assumption about President Zuma's involvement.[146] Mr Gigaba testified that he had not given Mr Mkwanazi an instruction to reinstate Mr Gama,[147] did not discuss the issue with President Zuma and had received no instruction from him.[148]

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[141] Transcript 16 October 2020, p 83, line 14 – p 85, line 10

[142] Transcript 16 October 2020, p 76, lines 3-7

[143] Transnet-02-024

[144] Transnet-03-006-007, paras 12-13

[145] Transcript 14 October 2020, p 202, lines 3-11

[146] Transcript 16 October 2020, p 101, lines 9-25

[147] Transcript 21 May 2021, p 164, lines 15-18

[148] Transcript 21 May 2021, p 179, line 24 – p 180, line 1

118. Sometime before 13 January 2011, Transnet, on the advice of Mr Mahlangu, Mr Gigaba's special advisor, engaged Mr Sibusiso Gule of the law firm Deneys Reitz to assist it.[149] Mr Mahlangu testified that Mr Mkwanazi had informed him (at this early stage) that Transnet intended to reinstate Mr Gama.[150] Asked why he had not contacted Mr Christopher Todd, the attorney from Bowman Gilfillan that had represented Transnet in the matter, Mr Mkwanazi accepted that he did not really want to hear that Transnet was going to win the arbitration of the dismissal dispute.[151]

119. On 18 January 2011, after a discussion with Mr Mkwanazi, Mr Mahlangu sent Mr Gigaba an email informing him that Transnet was nearing a settlement with Mr Gama and suggesting that he "socialise the President and his key aides (formal & informal) on the proposed settlement".[152] Mr Mkwanazi could not explain how Mr Mahlangu could have reported to Mr Gigaba that settlement was imminent as early as 18 January 2011 (unless the decision was pre-determined).[153] Mr Gigaba testified that he did not respond to the email as he saw it as a "run of the mill heads up" and had thus not "socialised" President Zuma.[154]

120. On Friday, 21 January 2011, Mr Ndiphiwe Silinga (a Transnet legal advisor) advised Mr Todd that Mr Mkwanazi[155] had instructed that the steps taken to recover from Mr Gama the costs awarded to Transnet in the High Court application should be halted and the arbitration set down for hearing during the week commencing 24 January 2011 should be postponed indefinitely, so as to allow the

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[149] Transcript 23 October 2020, p 62, line 8 – p 63, line 21

[150] Transnet-01-170, paras 6-7; Transcript 23 October 2020, p 65, lines 11-14

[151] Transcript 16 October 2020, p 162, line 7 – p 163, line 7

[152] Transnet-01-178

[153] Transcript 16 October 2020, p 116, line 11 – p 117, line 2

[154] Transcript 21 May 2021, p 179, line 17 – p 181, line 3

[155] Mr Mkwanazi was both the chairperson of the board and the Acting GCEO at the time

parties to engage in settlement negotiations.[156] By this time, a warrant of execution had been issued by Bowman Gilfillan for the costs due by Mr Gama.

121. On 22 January 2011 settlement negotiations were held between Transnet (represented by Deneys Reitz) and Mr Gama (represented by Langa Attorneys). Deneys Reitz's consultation note reflects Mr Mkwanazi as having stated during a caucus held before the negotiations commenced that he wanted to assist Mr Gama and bring him back into his office to assist him on strategic issues. If provided with an opinion setting out some unfairness, he would persuade the other board members to make a decision to bring Mr Gama back into the organisation.[157] Mr Mkwanazi in effect wanted some "friendly" legal advice from Deneys Reitz.[158] During his testimony he explained that he believed Mr Gama had been treated inconsistently, in that similar procurement irregularities had been condoned.[159] He was however forced to concede that the third charge (the unwarranted criticism charge) was not a condonable irregularity and was serious enough to deserve the sanction of dismissal on its own.[160]

122. Mr Mapoma testified that, after a meeting between Mr Mkwanazi and Mr Gama at Inanda Estate, Mr Mkwanazi told him that they could not reach consensus on the terms of reinstatement, because Mr Gama wanted to be reinstated as the GCEO of Transnet – a position he had never held and for which the previous board

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[156] Transnet-03-105-106

[157] Transnet-02-003, para 4

[158] Transcript 16 October 2020, p 166, line 18 – p 167, line 1

[159] Transcript 16 October 2020, p 135, line 21 – p 136, line 1

[160] Transcript 16 October 2020, p 154, lines 7-12

considered him unsuitable.[161] Mr Mkwanazi conceded that Mr Gama may have asked for that.[162] Mr Gama denied that he made the demand.[163]

123. On 24 January 2011, Mr Todd wrote to Mr Silinga confirming that his instructions had been carried out and asked him to inform Mr Mkwanazi that the legal team representing Transnet was satisfied that it was likely that the fairness of the sanction of dismissal would be upheld at arbitration.[164]

124. The minutes of the board meeting on 25 January 2011 record that Mr Mkwanazi referred to more than 30 cases of transgressions similar to those of Mr Gama mentioned in internal audit reports in 2008 and "a culture of condonation of exceeding delegated authority".[165] Mr Mkwanazi accepted during his testimony before the Commission that the irregularities in the audit reports were not identical to those in Mr Gama's case[166] but only broadly comparable.[167] On 2 February 2011, Mr Todd prepared a report ("the Todd report") for Transnet on the disciplinary proceedings involving Mr Gama,[168] giving a full account of the matter, Mr Gama's weak prospects of success and senior counsel's opinion that the sanction of dismissal was likely to be upheld.[169] Mr Mkwanazi accepted that, on his reading of the Todd report, it left no room for concluding that Transnet was actually

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[161] Transnet-03-008, para 19

[162] Transcript 16 October 2020, p 145, lines 22-24.

[163] Transcript 11 March 2021 p 131, lines 7-9.

[164] Transnet-03-107-108

[165] Transnet-01-534

[166] Transcript 16 October 2020, p 181, lines 21-22

[167] Transcript 19 October 2020, p 54, line 22 – p 56, line 12

[168] Transnet-03-065-090

[169] Transnet-03-089, para 65

going to lose the arbitration. But this did not stop him from getting a second opinion.[170]

125. On 3 February 2011, a meeting of the Nominations and Governance Committee, comprising Mr Mkwanazi, Ms T Mnyaka, Ms Doris Tshepe and Mr Sharma, was convened.[171] The meeting first considered whether there should be a deviation from clause 4.8.4 of Transnet's recruitment and selection policy providing that the candidate for the still vacant GCEO position must not have been previously dismissed from Transnet for reasons related to incapacity or misconduct so as to permit Mr Gama to apply.[172] Clause 2 of the policy permitted deviation where necessary in respect of executive appointments.[173] The CGNC resolved in favour of Mr Gama by deciding to allow him to apply for the position,[174] despite advice by senior counsel that by not challenging the findings of misconduct Mr Gama had conceded that he was guilty and thus it would be irrational for Transnet to interview him.[175] The Nominations and Governance Committee also discussed the settlement negotiations. The transcription of the meeting indicates that Mr Mapoma advised that Transnet had good prospects of success in the arbitration. When Ms Tshepe asked why in that case was Transnet settling, Mr Mkwanazi replied: "We don't know" and later rated the prospects as 50/50.[176] Mr Mkwanazi's answer that he did not know why Transnet was not pursuing the arbitration suggests that he

[170] Transcript16 October 2020, p 187, lines 15-19

[171] Transnet-01-827-832

[172] Transnet-02-307

[173] Transnet-02-304

[174] Transnet-01-831

[175] Transnet-02-298, para 19

[176] Transnet-01-855, lines 695-708

was indeed acting under instruction from someone higher up. Mr Mapoma in effect said that the arbitration was postponed so as to avoid the possibility of a victory.[177]

126. Following a meeting with Mr Mkwanazi on 4 February 2011,[178] Mr Mahlangu sent Mr Gigaba an email advising him of Mr Gama's application for the vacant GCEO position and the settlement negotiations with him.[179] Mr Mkwanazi shared this information with Mr Mahlangu on account of the instruction that he had received from Mr Gigaba to review Mr Gama's dismissal.[180]

127. On 10 February 2011, Mr Gama signed a draft of the settlement agreement, which provided for his reinstatement.[181] This was before Deneys Reitz had provided any advice, and appears to indicate that friendly advice was sought subsequently which accorded with a decision that had already been taken.[182] On 14 February 2011, Mr Mapoma sent Mr Gule of Deneys Reitz an email asking for a two pager for Mr Mkwanazi for the board meeting of 16 February 2011 and attaching a draft to be settled by Mr Gule.[183] The attached two-page memorandum ("the Group Legal opinion") proposed a settlement of the dismissal dispute on generic grounds, without any suggestion that the dismissal was unfair or an assessment of prospects of success at arbitration.[184] Paragraph 7 of the memorandum included the following sentence at the request of Mr Mkwanazi:[185]

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[177] Transcript 16 October 2020,p 209, line 11 – p 212, line 6

[178] Transcript 23 October 2020, p 97, lines 16-19

[179] Transnet-01-181-182

[180] Transcript 19 October 2020, p 40, lines 10-16

[181] Transnet-02-006-011

[182] Transcript 19 October 2020, p 32, line 23 – p 34, line 6

[183] Transnet-02-012

[184] Transcript 14 October 2020, p 138, lines 16-20

[185] Transnet-02-013; and Transnet-03-030, para 7

"The Chairman of the Board, with the support of the Shareholder Minister has within his rights and obligations decided to revisit the matter of the disciplinary proceedings against Mr Gama."

128. On 15 February 2011, Deneys Reitz sent Mr Mapoma a revised version of the memorandum,[186] including two additional paragraphs (numbered 10 and 11) dealing generally with prospects of success, but without saying anything specific about Mr Gama's case.[187] These paragraphs stated that the issue of sanction is complex to which there is no clear and straightforward answer and expressed the view that there is a probability that the bargaining council or a court considering the appropriateness of the sanction of dismissal could reach the conclusion that dismissal was not appropriate and order compensation or reinstatement. During his testimony Mr Mkwanazi said this created some doubt about Transnet's prospects of success. He accepted though that the statement about the probabilities was unsubstantiated and the opinion was "a weak submission"[188] in comparison with the Todd report which he should have abided.[189]

129. The board met on 16 February 2011 and discussed the possible settlement.[190] The board members had before them the Todd report, the Group Legal opinion (with the input of Deneys Reitz) and a draft settlement agreement negotiated by Mr Mkwanazi, which provided for reinstatement.[191] The board then decided that the sanction of dismissal was too harsh on the grounds of inconsistency in that other similar irregularities had been condoned.[192] The board erred in this respect. Condonation is a procurement process entirely distinct from decision making about

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[186] Transnet-02-015

[187] Transnet-02-17

[188] Transcript 16 October 2020, p 228, line 1 – p 230, line 9

[189] Transcript 16 October 2020, p 231, line 6 – p 233, line 21

[190] Transnet-01-034-035

[191] Transcript 19 October 2020, p 49, line 18 – p 50, line 12

[192] Transcript 19 October 2020, p 63, line 22 – p 64, line 1

the consequences that should follow from employee misconduct. In terms of Transnet's PPM Directive 03/2010 condonation is a procurement procedure under which a person or body with authority to incur expenditure is permitted to condone the non-compliance with the laid down policies and directives.[193] It allows for minor deviations from required procurement policies to be "condoned" so that if expenditure was incurred in some circumstances it would not constitute unauthorised or irregular expenditure. Material non-compliance will usually not be condoned because these "have PFMA implications which could result in civil, criminal or disciplinary steps being taken". Even where matters have been submitted for condonation disciplinary action can still follow.[194]

130. Furthermore, none of the three instances of misconduct for which Mr Gama was dismissed was suitable for or capable of condonation in the sense contemplated in Transnet's procurement policy.[195] The misconduct in relation to the 50 "like new" locomotives arose from Mr Gama's failing to comply with an important condition prescribed by the board, which was that local work performed on refurbished locomotives should be done by TE and not by an external partner. Mr Gama's conduct was not a procurement irregularity that could be condoned and was not in fact condoned by the board.[196] Moreover, the procurement irregularities in relation to the appointment of GNS were so serious that no rational person could have condoned it.[197] And finally, the third charge of misconduct (the unwarranted criticism charge), for which the sanction of dismissal was also imposed on Mr Gama, had nothing to do with procurement at all, and the question of condonation

[193] Transnet-03-158, para 9

[194] Transnet-03-159, para 11; Transcript 19 October 2020, p 82, lines 10-15 ; and Transnet-03-169

[195] Transnet-03-160, para 13

[196] Transnet-03-160, para 13(a)

[197] Transnet-03-161, para 13(b)(i)

was entirely irrelevant.[198] Mr Mkwanazi conceded all of this during his evidence before the Commission.[199]

131. In recognition of the weakness of the legal advice before it, the board requested Deneys Reitz to provide an augmented opinion, which it did on 22 February 2011.[200] The augmented opinion supported settlement in generic terms without a proper analysis of the prospects of success, or any reference to the third charge, and ultimately concluded that the prospects were poor. This was contradicted in an earlier paragraph in the augmented opinion which pointed out that various legal opinions including its own "were of the view that Mr Gama's chances of successfully challenging his dismissal are not good."[201] When it was put to Mr Mkwanazi during his testimony that this demonstrated that the board had another agenda in reinstating Mr Gama (divorced from prospects of success at arbitration) he conceded that he could not fault the proposition.[202]

132. Sometime before the settlement agreement mandated by the board was entered into,[203] Mr Mahlangu phoned Mr Mapoma. According to Mr Mapoma, Mr Mahlangu put pressure on him to finalise the reinstatement of Mr Gama as "No. 1 wanted to get it done quickly."[204] Mr Mahlangu admitted phoning Mr Mapoma, but denied the

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[198] Transnet-03-162, para 13(c)

[199] Transcript 19 October 2020, p 84, line 10 – p 96, line 11

[200] Transnet-02-019-022

[201] Transnet-02-020

[202] Transcript 16 October 2020, p 242, lines 2-22. Subsequent to Mr Gama's reinstatement, on 6 April 2011, Deneys Reitz responded to the Public Protector's notification of an investigation (Transnet-02-041-047). Although the letter records that Mr Gama's reinstatement rendered the investigation academic (Transnet-02-044, para 12), it referred to legal opinions from two reputable firms of attorneys confirming that Mr Gama's dismissal was substantively and procedurally fair. Mr Mkwanazi conceded during his testimony that this too contradicted the opinion of Deneys Reitz that created doubt about Transnet's prospects of success at arbitration –Transcript 19 October 2020, p 193, lines 7-15.

[203] Transcript 14 October 2020, p 73, lines 8-11

[204] Transnet-03-012, para 27

content of the discussion for various reasons.[205] Mr Gigaba testified that he was not aware of the discussion between Mr Mapoma and Mr Mahlangu, and President Zuma never gave him any instruction to reinstate Mr Gama.[206] However, Mr Mapoma reported the matter to Mr Mkwanazi[207] who conceded that was possible.[208] The probabilities as evidenced by subsequent events support Mr Mapoma's version.

133. On 23 February 2011 Transnet and Mr Gama concluded an agreement of settlement[209] in terms of which Mr Gama would return to Transnet with effect from 23 February 2011 and resume duties as CEO of TFR on 1 April 2011. Any employment benefits that were due to him for the intervening period of 30 June 2010 to 23 February 2011 ("the intervening period") in terms of his employment contract were to be fully restored. Mr Gama was paid some R13 million under this clause. He was given a final written warning effective from 29 June 2010 to 29 December 2010 which he was deemed to have already served. Transnet agreed to "make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Mr Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council." Mr Gama's attorneys were paid in excess of R4 million in costs.

134. There was thus a complete capitulation on the part of Transnet during the settlement negotiations, despite Transnet having a very good case on the merits and the fact that, to the knowledge of the board, Mr Gama accepted by then that he

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[205] Transcript 23 October 2020, p 121, lines 3-6; p 122, lines 6-9; and Transnet-01-172-173, paras 12-20

[206] Transcript 21 May 2021, p 175, lines 12-19

[207] Transnet-03-012, para 28

[208] Transcript 16 October 2020, p 123, lines 9-10

[209] Transnet-01-036-041

had been correctly found guilty of three acts of misconduct and was at that stage only challenging the fairness of the sanction of dismissal.

135. On 1 April 2011 Mr Gama resumed his duties as the CEO of TFR. He was unsuccessful in his attempt to be appointed GCEO. Around about this time, Mr Gigaba held a meeting with Mr Gama with a view to ensuring that he would support Mr Molefe as the new GCEO.[210]

136. The evidence as a whole justifies a finding that the decision to reinstate Mr Gama was pre-determined and there was no sustainable legal advice in support of the decision to reinstate or any objective review of the fairness of Mr Gama's dismissal and the process followed did not set out to achieve this. While Mr Mkwanazi led his fellow board members astray about the list (and the applicability of condonation), the fact remains that the decision to reinstate on the basis of inconsistency and the procurement condonation process was wholly indefensible. That the board did not properly consider the matter is incontrovertible.[211]

137. Not only was Mr Gama reinstated, but his reinstatement operated with full retrospective effect without any loss of remuneration and benefits (totalling some R13 million); three costs payments were made to him (totalling in excess of R4 million); and the six-month final written warning that was issued to him expired before he returned to work, had no deterrent effect and served no real purpose. Mr Mkwanazi correctly conceded that it was a nonsensical final written warning.[212]

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[210] Transcript 11 March 2021 p 92, line 21 – p 93, line 6.

[211] Some of the board members in affidavits filed with the Commission justified their stance with reference to the KPMG/Nkonki reports that were filed long after the board took the decision to reinstate Mr Gama. The reports were not before them and thus could not have played a role in their decision, which was indefensible on the information before them.

[212] Transcript 19 October 2020, p 140, lines 9-12

The payment of Mr Gama's legal costs

138. The payments made to Mr Gama in respect of his legal costs were also indefensible. On 30 March 2011, Transnet paid Langa Attorneys R1 016 564.90.[213] This constituted 75% of the taxed costs incurred by Transnet (with Bowman Gilfillan and Eversheds) in the High Court litigation.[214] The amount was made up of R319 999.78 in respect of Bowman Gilfillan,[215] and R696 565.12 in respect of Eversheds.[216]

139. According to Mr Mapoma, Mr Mkwanazi had instructed him to pay 75% of Transnet's taxed costs to Mr Gama on the basis that he had incurred liability for such costs.[217] Mr Mkwanazi denied this, but explained that the idea was to refund Mr Gama for costs that he had already paid in terms of the court order.[218] Mr Gama gave a similar version.[219] Because he was unhappy about making the payment, Mr Mapoma escalated the matter to Mr Singh, the GCFO, who (according to Mr Mapoma) approved the payments.[220] In substantiation of this, Mr Mapoma referred to the handwritten annotations that he made on 28 March 2011 on each of the taxed bills submitted by Bowman Gilfillan and Eversheds recording "payment has

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[213] Although the payment advices are dated 28 March 2011 (Transnet-02-165), it appears from Transnet-01-109 that payment was effected on 30 March 2011.

[214] Transnet-03-031, para 12.1

[215] Transnet-01-088-096-75% of R426 666.37

[216] Transnet-01-112-120-75% of R928 753.49

[217] Transnet-03-031, para 12.2

[218] Transcript 19 October 2020, p 170, lines 19-24; p 178, lines 4-11

[219] Transcript 11 March 2021, p 209, lines 1-20

[220] Transnet-03-031, para 12.2

been approved as per attached memo. (Discussed with Anoj)".[221] The relevant memorandum was approved by Mr Molefe on 28 March 2011.[222]

140. According to Mr Mapoma, things became heated with Mr Langa in relation to the payment of Mr Gama's legal costs when Mr Mapoma refused to entertain the payment of a bill of more than R12 million, which he considered to be overreaching.[223] Langa Attorneys then submitted a bill totalling R4 254 171.76.[224] A Transnet appointed tax consultant taxed this down to R2 293 627.68,[225] with 75% thereof equating to R1 720 220.76, which was the amount eventually paid as a second payment.[226] This constituted 75% of the taxed costs incurred by Mr Gama in the High Court application, his disciplinary inquiry (14 days) and his referral to the Transnet Bargaining Council.[227] The tax consultant's memorandum concluded that the costs had been substantially inflated and would likely be reduced even more in taxation. [228]

141. On 16 August 2011 the Director-General of the Department of Public Enterprises ("the DPE") sent a letter to Mr Molefe (the GCEO) advising that Langa Attorneys were complaining that Transnet was reneging on its undertaking to pay, without taxation, its bill of costs. The following day, Mr Mapoma addressed a memorandum

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[221] Transnet-01-093; 01-96; 01-117; 01-120

[222] Transnet-01-104-106

[223] Transnet-03-010, paras 22-24

[224] Transnet-02-175-209

[225] Transnet-02-169-174

[226] Although the payment advice is dated 9 June 2011 (Transnet-02-166), it appears from Transnet-02-164 that payment was effected on 15 June 2011.

[227] Transnet-03-031, para 12.1

[228] Transnet-02-174

to Mr Molefe explaining the background facts.[229] A draft response to the DPE was prepared, but it is unclear whether it was sent.[230]

142. Almost three years later, on 25 June 2014, Langa Attorneys addressed a letter to Transnet's attorneys stating:[231]

> "We confirm that when this matter was settled it was agreed, in writing, with the then Minister of Public Enterprise [Mr Gigaba] that the costs incurred by Mr Gama ... would be borne by Transnet. It was further agreed that Transnet would contribute 75% towards the bill incurred by Mr Gama." [232]

143. Langa Attorneys contended that Mr Gama was entitled to 75% of their bill of R4.2 million equating to R3.1 million, but that only R1.7 million had been paid (the second payment), thus leaving a balance owing of R1.4 million.[233] Although it appears that Langa Attorneys subsequently submitted an invoice for R2.3 million, ultimately a new tax consultant arrived at a figure of R776 267.58 as being outstanding.[234] Langa Attorneys accepted this offer, but claimed interest from the date of settlement[235] (23 February 2011), which culminated in them submitting an invoice dated 8 April 2015 for R1 399 307.11.[236] This amount was approved by Mr Singh (on the recommendation of Mr Silinga) on 15 April 2015.[237] As the documentary record reflects, no regard was had to the fact that there had been a previous taxing of Langa Attorneys' bill, and that the amount paid of R1.7 million

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[229] Transnet-01-142-144

[230] Transnet-01-147-148

[231] Transnet-03-854, para 2

[232] Mr Gigaba denied that he was involved in any such agreement – Transcript 27 May 2021, p 180, lines 2-15.

[233] Transnet-03-854-856

[234] Transnet-03-857-861

[235] Transnet-03-862-864 - this letter is incorrectly dated 16 September 2016, instead of 2014

[236] Transnet-03-875-876

[237] Transnet-03-877-879

was as a result thereof.[238] On 16 April 2015, some four years after the second costs payment, Transnet paid Langa Attorneys another R1 399 307.11.[239] This payment was made around the time Mr Gama commenced acting as the GCEO. He was appointed permanently a year later in April 2016.

144. The costs payments were indefensible and significantly enriched Mr Gama.

145. The first payment (of R1 016 564.90) involved paying Mr Gama 75% of the costs incurred by Transnet (with Bowman Gilfillan and Eversheds) in the High Court application that had been awarded in its (and its directors') favour. The only conceivable explanation for this that surfaced in evidence (given by Mr Mkwanazi and Mr Gama) was that the payment was aimed at refunding Mr Gama for the costs that he had already paid to Transnet under the High Court order.[240] However, this makes no sense for a number of reasons: firstly, the payment was not due under paragraph 3.5 of the settlement agreement (which provided for the payment of Mr Gama's High Court costs, not those incurred by Transnet that he was ordered to pay); secondly, the High Court application was divorced from the merits of the disciplinary charges that led to Mr Gama's dismissal; and thirdly, by the time that the payment was made, Mr Gama had not paid Bowman Gilfillan's taxed bill of costs[241] (the execution process having been stopped) – yet he was reimbursed an amount of R319 999.78 in respect of those. (Although Mr Gama claimed to have paid Transnet about R1 million in December 2009 in respect of the costs taxed by Eversheds,[242] he was unable to obtain banking records going that far back,[243] and

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[238] Transnet-03-845, para 10

[239] Although the payment advice is dated 15 April 2015 (Transnet-02-166), it appears from Transnet-02-164 that payment was effected on 16 April 2015.

[240] Transcript 19 October 2020, p 178, lines 4-11; Transcript 11 March 2021, p 209, lines 1-20

[241] Transcript 11 March 2021, p 212, lines 11-24

[242] Amounting to R928 753.49

Transnet was unable to verify receipt of this payment.[244]) All in all, as Mr Mkwanazi conceded, the first payment made no sense,[245] and Transnet ought to have proceeded with the recovery of the costs from Mr Gama.[246]

146. During his evidence, Mr Mkwanazi conceded that Transnet should never have undertaken to pay any of Mr Gama's High Court costs (the second payment of R1 720 220.76) as his application had been dismissed by the High Court.[247] Furthermore, although they may have been of a different view at the time, both Mr Mapoma[248] and Mr Mkwanazi[249] accepted that Mr Gama's disciplinary inquiry costs fell outside of the scope of paragraph 3.5 of the settlement agreement, which provides for the payment of the costs of Mr Gama's referral of the dismissal dispute to the Transnet Bargaining Council (which arose after his dismissal).

147. In relation to the third payment (of R1 399 307.11), which was made after Mr Mapoma and Mr Mkwanazi had left Transnet, Mr Gama knew little about it and had not received the proceeds. As far as he was concerned, it was something that Langa Attorneys had to explain.[250] On the face of it, the payment was not due because it was a duplication of the second payment. Further investigation is required to determine if the offence of fraud may have been committed in this instance.

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[243] Transcript 11 March 2021, p 213, lines 8-17; and Transcript 30 April 2021, p 60, lines 13-18

[244] Transcript 11 March 2021, p 59, line 25 – p 60, line 11

[245] Transcript 19 October 2020, p 167, lines 17-24

[246] Transcript 19 October 2020, p 226, lines 2-7

[247] Transcript 19 October 2020, p 225, lines 13-18

[248] Transcript 14 October 2020, p 98, lines 8-14; p 106, line 25 – p 107, line 6

[249] Transcript 19 October 2020, p 189, line 22 – p 190, line 11

[250] Transcript 11 March 2021, p 214, line 9 – p 215, line 2

148. In the result, and given the concessions made by him, Mr Mkwanazi stated that he would not be opposed to the Commission recommending to the President that steps should be taken to recover the costs of the settlement (remuneration and legal costs) from members of the board who supported the settlement.[251]

Political interference and impropriety in the reinstatement of Mr Gama

149. The process followed in reaching the settlement agreement, the decision to reinstate, the terms of the settlement agreement and the payment of costs falling outside the terms of the settlement agreement were all indefensible. There are two possible explanations for this: i) Mr Mkwanazi and the board went legitimately wrong; or ii) there was an instruction to reinstate Mr Gama which accounts for the complete capitulation in negotiations.

150. Both Mr Mkwanazi and Mr Gigaba denied that an instruction had been given by government. However, a conspectus of the evidence overall, especially the indefensible terms of the settlement agreement (reinstatement, back-pay, expired warning and costs), and the fact that the board permitted Mr Gama to apply for the position of GCEO when he had recently been dismissed as CEO of TFR for serious acts of misconduct, strongly indicate that political interference was probably at play. Mr Mapoma's conclusion at the time was that the complete capitulation in the settlement negotiations arose from an instruction to reinstate Mr Gama, which he understood to have come from President Zuma, is the most plausible account. There is simply no other credible explanation for this level of indefensible decision-making.

[251] Transcript 19 October 2020, p 226, line 23 – p 227, line 15

151. Moreover, Mr Mkwanazi's approach from the outset is reflective of a pre-determined decision to reinstate Mr Gama. Mr Mkwanazi was evidently biased in favour of Mr Gama from the outset and President Zuma had made no bones about his preference for Mr Gama to Ms Hogan. Mr Gigaba's testimony that he was issued with no instructions by President Zuma whatsoever is improbable in the light of Ms Hogan's evidence and the time frame. Mr Gama was reinstated shortly after Ms Hogan was removed by President Zuma as Minister of Public Enterprises and replaced by Mr Gigaba.

152. In addition, there is the evidence of Mr Mapoma that Mr Mkwanazi told him that he had been instructed to reinstate Mr Gama. Although Mr Mkwanazi denied this, the process that he followed in negotiating the settlement agreement and in getting it approved (in principle) by the board, supports Mr Mapoma's version. There is also the evidence that Mr Mahlangu put pressure on Mr Mapoma to wrap up the settlement, telling him in the process that President Zuma wanted it to be concluded quickly. Although Mr Mahlangu denied this, Mr Mapoma's version is more probable. Mr Mapoma was an outspoken critic of settlement with Mr Gama (as evident at the Nominations and Governance Committee meeting), which could well have paved the way for the telephonic discussion in question. Mr Mahlangu's conduct accords with the probabilities that President Zuma's support for Mr Gama continued after the appointment of Mr Gigaba.

153. Additionally, the nature of the interaction between Mr Mahlangu and Mr Gigaba as evidenced by their email communications reflects Mr Mahlangu keeping Mr Gigaba apprised of an issue (i.e. settlement with Mr Gama) that was clearly of importance to him and President Zuma. Although the issue fell outside of the realm of Mr Gigaba's ministerial oversight, President Zuma clearly favoured Mr Gama and in all

probability would have conveyed this to Mr Gigaba after he removed Ms Hogan for not supporting his preference.

154. In the premises, Mr Gigaba probably did not simply request Mr Mkwanazi (and the board) to review the fairness of Mr Gama's dismissal, but instead probably required Mr Gama to be reinstated.

155. In terms of section 3 of PRECCA, the crime of corruption is committed, *inter alia*, by the making of an offer of employment (a gratification in terms of section 1 of PRECCA) for the benefit of that person in order to act in a manner: i) amounting to the improper exercise of any power or function arising out of any legal obligation; ii) designed to achieve an unjustified result; or iii) amounts to any other unauthorised or improper inducement to do or not do anything. The conduct of Mr Gigaba, and Mr Mkwanazi, when assessed against the role Mr Gama played in enriching the Gupta enterprise through various irregularities, gives rise to a reasonable suspicion that the crime of corruption may have been committed in the circumstances surrounding Mr Gama's reinstatement. Further evidence may be needed to establish that the offer and acceptance of employment was made in order for Mr Gama to act in a manner that amounted to an improper inducement to do anything (such as advantage the Gupta enterprise).

156. Considering the indefensible nature of the settlement agreement, and the concession of Mr Mkwanazi that steps should be taken to recover the monies paid in terms of the unjustifiable settlement agreement, there are reasonable grounds to believe that the members of the board who voted in favour of settlement, the GCFO and the GCEO (as the accounting authority) may have failed to exercise

their duty of utmost care to ensure reasonable protection of Transnet's assets.[252] Further investigation is required to determine whether the members of the board contravened section 50 and 51 of the PFMA wilfully or in a grossly negligent way so as to have committed an offence in terms of section 86(2) of the PFMA.

157. The evidence of the role played by Mr Gigaba, President Zuma and Mr Mkwanazi in the Gama saga, and the likely benefit of Mr Gama's reinstatement and subsequent promotion for the Gupta enterprise, may provide a reasonable basis to conclude that these individuals participated in the affairs of and were associated with the Gupta enterprise.

158. The findings regarding the improprieties associated with Mr Gama's reinstatement thus reveal possible attempts by Mr Gigaba and President Zuma to influence the directors of the board of Transnet through possible inducements and links to the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.1 and TOR 1.4, as well as corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The possible offences and identified wrongdoing should accordingly be referred in terms of TOR 7 for further investigation by law enforcement agencies.

The appointment of Mr Gama as GCEO

159. On 17 April 2015, Mr Molefe was seconded to Eskom as Acting CEO.

160. At a meeting of the Transnet board on 20 April 2015, Mr Gama was appointed as Acting GCEO purportedly "due to his vast knowledge of the Company". Mr Gama had worked at Transnet since 1994 and had been CEO of both TPA and TFR. He

[252] Section 50(1)(a) of the PFMA

was appointed as Acting GCEO initially from 20 April 2015 to 20 July 2015 on the assumption that Mr Molefe's secondment to Eskom was temporary. His acting appointment was later extended.

161. On 30 September 2015 Mr Molefe resigned from the Transnet board and was appointed Eskom CEO with effect from 1 October 2015. Mr Gama continued to act as GCEO of Transnet.

162. At a meeting of the Transnet board[253] on 18 February 2016, the chairperson of the board, who, by then, was Ms Linda Mabaso, informed the board that she had received a letter on 7 January 2016 from Ms Lynne Brown, the Minister of Public Enterprises, requesting that the GCEO appointment be finalised within 30 days. She then indicated that, in the circumstances, an internal appointee would be ideal and proposed Mr Gama as the most qualified individual. The board approved the appointment.

163. In a letter dated 24 February 2016, Ms Mabaso recommended to Ms Brown that Mr Gama be appointed on a permanent basis without any formal recruitment processes as the matter was urgent because Mr Gama's delegation of authority would expire on 31 March 2016. She said that the board did not feel it necessary to advertise the post internally or externally based on the urgency and Mr Gama's performance. Ms Mabaso's letter made no reference to the fact that Mr Gama had been dismissed for financial misconduct, non-compliance with the directions of the board, and unwarranted criticism of the board and senior executives; nor to the fact that Mr Gama had on two other occasions been found unsuitable for appointment

[253] The board at that time was comprised of: Ms L Mabaso, Mr Y Forbes, Mr G Mahlalela, Mr PEB Mathekga, Mr ZA Nagdee, Mr VM Nkonyane, Mr SD Shane, Mr BG Stagman and Mr PG Williams.

as GCEO . On 12 March 2016, Ms Brown appointed Mr Gama as GCEO for the period 1 May 2016 to 30 April 2021.

164. Mr Gama did not see out his full term of office. In September 2018, after the appointment of a new Transnet board, Mr Gama was dismissed as GCEO and removed from the board of Transnet because of serious violations of his financial procurement and fiduciary responsibilities and the board having lost trust and confidence in his ability to lead Transnet.

165. In an affidavit dated 28 October 2021 submitted to the Commission, Ms Mabaso said that the board was not aware of the disciplinary findings, the terms and conditions of the indefensible settlement agreement, the nature of the serious misconduct to which Mr Gama admitted, and his prior unsuccessful attempts to be appointed as GCEO. She stated that, because Mr Gama "was within the structures of Transnet", there was no need for the board to interrogate his history as "it would have been unfair to conduct a post-mortem on him on issues that were settled between the parties."[254]

166. This blithe unconcern reflects poorly on the judgement of Ms Mabaso and the Transnet board and appreciation of their responsibilities as directors of the board of an SOE. It was incumbent on Ms Mabaso and the board to review Mr Gama's history and to evaluate his conduct against other possible candidates. The justification for not advertising the position internally and externally so as to allow a fair, transparent and competitive process is unconvincing. The denial of Ms Mabaso that she and the board were subject to any political influence in deviating from the normal process of appointment in taking these extraordinary steps to appoint Mr Gama is accordingly open to doubt.

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[254] Transnet-07-250.575-576.

Mr Gama's links to the Gupta enterprise

167. Mr Gama's links to the Gupta enterprise are most evident from his association with Mr Essa. These are discussed more fully in the analyses of the specific transactions. It suffices now, by way of overview, to note that Mr Gama claimed he met Mr Essa only on four occasions: during a meeting at TFR's offices with McKinsey and Regiments in early 2015;[255] in Mr Singh's office at the Carlton Centre in July 2015;256 at the Gupta compound in November 2015;[257] and at the Oberoi Hotel in Dubai in January 2016.[258] In addition, he said that they met in passing at a restaurant.[259]

168. At the second meeting in July 2015 Mr Essa requested a meeting with Mr Gama who told him to get his contact details from Mr Singh.[260] Mr Essa followed up and phoned him in October / November 2015 and invited him to a meeting at what turned out to be the Gupta compound in Saxonwold where Mr Essa introduced him to Mr Rajesh (Tony) Gupta who indicated that there was scope for the development of a working relationship between Transnet and his businesses in the future. Mr Gama said that he considered the discussion meaningless and indicated to Mr Essa that he was disappointed about having been duped into a meeting at the Gupta compound.[261] Mr Gama said he did not visit the Gupta compound again, and had no further interactions with the Guptas. His driver testified otherwise.

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[255] Transnet-07-047, para 31.2; Transcript 11 March 2021, p 56, lines 23-25

[256] Transnet-07-048, para 31.3

[257] Transnet-07-048, para 31.4

[258] Transnet-07-052, para 32.6

[259] Transcript 11 March 2021, p 55, lines 6-9

[260] Transnet-07-048, para 31.3

[261] Transnet-07-048, para 31.4 - para 31.5.7

169. On 3 December 2015 Mr Gama authorised the payment of R93 million to Trillian Capital Partners (Pty) Ltd for supposedly arranging a R12 billion ZAR club loan facility in relation to the 1064 locomotive transaction.[262] There was no evidence of Trillian having worked on the ZAR club loan. R74 million of the amount paid to Trillian was laundered to Albatime, a company forming part of the Gupta racketeering enterprise.[263] Shortly after the payment to Trillian, and shortly before his promotion to GCEO, Mr Gama met Mr Essa again at the Oberoi Hotel in Dubai on 23 January 2016 on his return from the World Economic Forum. There is compelling (disputed) evidence, discussed later, pointing to the fact that Mr Gama's hotel bill was paid by Sahara Computers, a Gupta owned company. By this time, Mr Essa had already been involved in a series of corrupt activities in relation to Transnet. Most notably, he had been paid 50% of the fees charged by Regiments and had concluded the corrupt BDSAs with CSR and CNR, which provided for kickback payments of 20%- 21% of the contract value of the locomotives.

170. Mr Gama also had links with Mr Vikas Sagar of McKinsey who was implicated in the corrupt activities of Mr Essa, Regiments and Trillian at Transnet and Eskom.[264] There is evidence that Mr Sagar assisted Mr Gama with an MBA project in December 2015 - January 2016.[265] An investigation by McKinsey revealed that Mr Gama was enrolled in the Trium global executive MBA program. Mr Sagar allegedly coordinated research support for Mr Gama, supplemented course work using company resources and contractors to outline and help draft two chapters which Mr Gama submitted as his contribution to the Capstone project. The support commissioned by Mr Sagar caused McKinsey to incur costs of R100 000 for which

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[262] Transnet-07-250.72

[263] Transcript 30 April 2021, p 114-115

[264] Transnet-05-493, para 1

[265] Transnet-07-244, para 7.2.1; 07-245, para 7.2.4

Mr Gama did not pay.[266] Mr Gama denied the McKinsey findings, but admitted that Mr Sagar had put him in touch with an editor who assisted him in editing the MBA assignment for which Mr Gama did not pay.

171. As discussed, Mr Gama enjoyed political support from Mr Gigaba and President Zuma. Ms Nomachule Gigaba (nee Mngoma), Mr Gigaba's wife, testified that Mr Gigaba may have used his influence with Mr Gama to get his sister, Ms Gugulethu Gigaba, a job at Transnet.[267] Mr Gigaba and Mr Gama denied this. Ms Gugulethu Gigaba commenced employment with TFR in February 2017,[268] some months after Mr Gigaba emailed Mr Mlamuli Buthelezi (the then Group Chief Operating Officer of Transnet reporting to Mr Gama) her curriculum vitae on 25 June 2016 with the message, "herewith the matter I told you about".[269]

172. The evidence of Ms Hogan confirms that President Zuma knew Mr Gama and wanted him to be appointed as Transnet's GCEO in 2009 already. Mr Gama denied any knowledge of this,[270] and denied having had any personal interactions with the former president – stating that he had only ever met him at various official functions.[271] In 2015, shortly before being promoted to GCEO of Transnet, Mr Gama (while acting GCEO) decided on behalf of Transnet to donate R500 000 towards the Jacob G Zuma Foundation's Youth Day event held on 20 June 2015 in Durban.

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[266] Transnet-07-250, para 2(d)

[267] Transnet-07-250.128, para 31.3

[268] Transnet-07-250.112-114

[269] Transnet-07-250.104-105

[270] Transcript 11 March 2021, p 82, lines 10-17

[271] Transcript 11 March 2021, p 92, lines 3-11

Mr Singh's links to the Gupta enterprise

173. On 1 July 2012 Mr Singh was appointed as Transnet GCFO, having acted in the position since 2009. Mr Sharma was appointed as Chair of the BADC one month later. These appointments in 2012 coincided with the launch of the MDS, the R300 billion capital expenditure program, which was the centrepiece of procurement corruption at Transnet in subsequent years and over which Mr Singh exercised financial control.

174. Mr Singh also knew the Guptas fairly well. He was at pains to minimise the extent of the relationship. His denials must be assessed in the light of his poor credibility as evidenced by his many falsehoods and dissembling exposed throughout his testimony before the Commission. He lied in his affidavit (which he was directed to produce) about the frequency and reasons for his visits to Saxonwold. By his own admission, Mr Singh visited the Saxonwold compound at least 12 times in four years "for religious or cultural functions only". He was invited to the notorious Gupta wedding at Sun City. Mr Singh also visited the offices of Sahara Computers. Mr Singh's then girlfriend, Ms Selina Naik, was originally employed at Transnet but later secured employment with the Guptas at Sahara Computers. She resigned from Transnet in December 2014, commenced employment at Sahara Computers in January 2015 and worked there until 2017. Her boss was Mr Ashu Chawla (the CEO) and she worked directly with the Gupta brothers.

175. Mr Singh denied the evidence of his driver that he took him to Saxonwold more than ten times or that he took him to Knox Vaults (a safety deposit box facility) from the Gupta compound six or seven times, but admitted that he took him to Sahara Computers on a number of occasions to fetch his girlfriend.

176. Mr Singh sought to underplay his relationship with Mr Essa. He testified that they only met twice informally at Mr Essa's request at Melrose Arch. This is contradicted by testimony of Mr Gama. He testified that in July 2015, he saw Mr Singh and Mr Essa together in a boardroom by Mr Singh's office at Transnet where Mr Essa asked him (Mr Gama) for his contact details. Moreover, Mr Singh's former secretary, Ms Nobahle Takane, stated in an affidavit that in late 2012 Mr Essa visited Transnet's head offices in Carlton Centre when Mr Singh was the acting GCFO to pick up a document which she described as a memorandum to the BADC that made mention of Hatch Goba, a company involved in the MEP.[272] Mr Singh also denied the testimony of Mr Henk Bester, the global director and managing director for the rail division of Hatch Goba (corroborated by Mr Craig Sumption of Hatch Goba) that he attended a meeting together with Mr Essa at Melrose Arch regarding the appointment of SDPs on the MEP.[273]

177. Mr Singh used the same travel agent as Mr Essa, stayed in the same hotel in Dubai as Mr Essa, and was, on occasion, present in Dubai (sometimes at the Oberoi Hotel) at the same time as Mr Essa. Certain of Mr Singh's hotel reservations and invoices were forwarded by Mr Chawla of Sahara Computers to Mr Essa. Ms Sameera Sooliman of Travel Excellence testified that Mr Essa and Sahara Computers used Travel Excellence and that Mr Singh's flights were

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[272] Transnet-05-2017-2022 – Mr Singh took issue with Ms Takane's affidavit in his re-examination affidavit – Transnet 05-2419, paras 224-225. He unconvincingly and pedantically sought to discredit the affidavit on the basis of minor and inconsequential inconsistencies (for example her statement that he was Acting GCFO rather than GCFO at the time; her inability to recall the exact date and time of Mr Essa's visit; and her misstating of Hatch Goba as Hedge Goba). His claim that Mr Essa could not have had free access to his office and his pointing to the absence of any record in the document collection register are not determinative. Mr Gama saw Mr Essa in the vicinity of Mr Singh's office on another occasion and there are possibly other reasons (perhaps of an irregular nature given the allegations of corruption) for not registering the document. Moreover, it seems unlikely that Mr Singh's own secretary would seek falsely to implicate him. Mr Singh did not himself advance any reason why his own secretary would have falsely implicated him.

[273] Transnet-04-045, paras 57-58

allocated to Mr Essa's account. She considered Mr Essa to be the guarantor of Mr Singh's tickets.

178. In the period between April 2014 and June 2015, Mr Singh took up to six trips to Dubai , all of which were arranged and probably paid for by the Gupta enterprise.[274] The documentary evidence shows that members of the Gupta family and Mr Essa were in Dubai at the same time as Mr Singh and they all stayed at the Oberoi Hotel. On one occasion Mr Singh flew to Dubai on the same flight as Mr Essa. Most of the hotel bookings were made and invoices were seemingly settled by either Sahara Computers or Mr Essa. On 30 April to 2 May 2014 Mr Singh travelled to Dubai and stayed at the Oberoi Hotel, together with Mr Essa and Mr Rajesh (Tony) Gupta. He unconvincingly denied knowledge of their presence.[275]On 6 June 2014 he again travelled to Dubai, with Mr Essa having forwarded Mr Singh's accommodation voucher to Mr Chawla (the CEO of Sahara Computers).[276] On 7 August 2014 Mr Singh once more travelled to Dubai and flew on the same flight as Mr Essa. He again denied knowledge of this.[277] On 25 February 2015 Mr Singh (joined by his fiancée, Ms Naik) travelled to Dubai, with Mr Essa and Mr Rajesh Gupta being present in Dubai at the same time. He again denied knowledge of their presence.[278] In the run up to this trip, on 23 February 2015, Ms Sooliman of Travel Excellence sent Ms Naik's air ticket to Mr Chawla, copying Mr Essa.[279] The hotel bill for this trip, in the name of Sahara Computers (in the amount of approximately R60 000), was settled by the credit card of a Gupta associate. Mr

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[274] Transcript 18 May 2021, p 8-158; Transnet-05-1949-54; Transnet-05-1955-62; Transnet-05-1781-84; Transnet-05-770-74; Transnet-05-775-82; Transnet-05-1785-87; and Transnet 05-1972-79

[275] Transnet-05-1949-54

[276] Transnet-05-1955-62

[277] Transnet-05-770-74

[278] Transnet-05-775-82

[279] Transnet-05-1963

Singh implausibly tried to convince the Commission that he had paid the bill in cash received from moonlighting in Dubai.

179. On 11 to 15 June 2015 Mr Singh once again travelled to Dubai and stayed at the Oberoi Hotel. Mr Ajay Gupta, Mr Rajesh Gupta and Mr Essa were present in Dubai at the same time. Mr Chawla forwarded Mr Singh's confirmation of reservation to Mr Essa.[280] On 11 June 2015 – at the same time as this particular Dubai trip – Mr Singh approved payment, which was made on the same day, of a wholly unjustifiable R189 million success fee to Regiments for its role in securing funding in relation to the procurement of 1064 locomotives.[281] R122 million of this amount was later laundered to Sahara Computers.[282]

180. Mr Singh's various trips to Dubai thus give the lie to his denials about his relationship with Mr Essa. Mr Singh disputed the authenticity of all the Gupta leaks documents and contended that someone must have fabricated the invoices and emails and that they are not genuine. Viewed from the perspective of the evidence overall, his contention is inherently improbable. He had no invoices or supporting documentation (such as credit card statements) of his own that confirmed that he paid for his own flights and hotel accommodation.

181. In just over three years, Mr Singh accumulated R19 million in a current bank account as a result of spending virtually none of his remuneration, indicating that he had other sources of money besides his salary. The fact that this account was not an interest bearing account obviated his declaring additional income from it in his tax returns. Mr Singh maintained that he funded his living expenses from savings held in other bank accounts.

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[280] Transnet-05-1785-87; 05-1972-79

[281] Transnet-07-250.399

[282] Transcript 30 April 2021,p 11

182. Mr Singh was struck from the roll of Chartered Accountants by the South African Institute of Chartered Accountants on the grounds of improprieties committed by him in relation to procurements at Transnet.[283]

Other key appointments

183. On 23 May 2011 Mr Gigaba was requested to approve a reshuffle of the Transnet board proposed in a DPE memorandum which had been prepared following consultation with his advisor, Mr Mahlangu. The memorandum proposed the replacement of Mr Mafika Mkwanazi with Mr Sharma as the chairperson of the board, on the ground that Mr Mkwanazi had become "intimately involved in the management of the company" and the Department of Public Enterprises was of the view that "there should be a clear division of responsibilities at the head of the company, ensuring a balance of power and authority". The memorandum also recommended the removal of Mr Don Mkhwanazi (who had seriously criticised the process that led to the recruitment, selection and appointment of Mr Molefe as GCEO) and Ms Mnyaka (whose name was subsequently struck out) as non-executive directors only six months after their appointment in December 2010.

184. On 7 July 2011 Ms Yasmin Forbes and Mr Nishi Choubey (a former employee of Sahara Computers) were appointed as non-executive directors. As discussed earlier, Mr Sharma was not appointed to the position of chairperson of the board possibly because of concerns about his close ties with the Guptas and Mr Essa.[284]

185. On 26 May 2014, after the general election of 2014, Ms Brown was appointed Minister of Public Enterprises. A board reshuffle took place in December 2014. A

[283] Transcript 17 June 2021, p 33-36

[284] Transcript 27 May 2021, p 217-227

number of non-executive directors resigned and were replaced with Mr Richard Seleke, Mr Stanley Shane and Mr Brett Stagman.

186. Mr Seleke had been proposed by Mr Tony Gupta to Mr Mxolise Dukwana in 2011 (or there about) as the head of his department to replace the incumbent who Mr Tony Gupta wanted Mr Dukwana to dismiss.

187. Mr Shane served as a board member of Transnet from December 2014 to June 2017 and as the chairperson of the Transnet Second Defined Benefit Fund ("TSDBF") over the same period. He succeeded Mr Sharma as chairperson of the Transnet BADC. Like Mr Sharma, Mr Shane had close links with Mr Essa. He was a director of Integrated Capital Management, which was involved in the creation of the Trillian Group under Mr Essa and Mr Eric Wood in late 2015 / early 2016.285 A CIPC company search undertaken in May 2021 reflects that Mr Shane and Mr Essa are both active directors of Antares Capital, with their dates of appointment being 28 October 2014 and 5 June 2016, respectively.[286]

188. Mr Shane presided over or was linked to three transactions (or sets of transactions) pointing to the possibility of his association or participation in the Gupta enterprise. First, he was a director of Transnet when CNRRSSA entered into a BDSA with BEX (a company linked to the Gupta enterprise) in relation to the relocation of CNR's assembly line to Durban, which resulted in BEX being paid a kick-back of R76 million on 25 September 2015.[287] Mr Holden's evidence establishes that R9 million of this was ultimately paid to Integrated Capital Management of which Mr Shane was a director, in November 2015.[288] Secondly, in his capacity as the

[285] Eskom-14-427-428, para 15; Eskom-14-430-431, para 17

[286] Transnet-07-1175.1 (this document was not referred to in evidence)

[287] FOF-09-159, para 204

[288] FOF-09-404-405, paras 717-720

chairperson of the BADC, Mr Shane played a leading role in the irregular award of the IT data services tender to T-Systems instead of to Gijima in February 2017, despite Gijima having been the highest scoring bidder – an award that was set aside on review on the grounds of irrationality and bias (on the part of Mr Shane).[289] T-Systems was linked to Mr Essa via Zestilor, a company owned by his wife, who received regular monthly payments from T-Systems and its partner Sechaba Computers running to R3 million during the period August 2012 to July 2015. In May 2015, T-Systems ceded to Zestilor the equipment sales and rental elements of its MSA with Transnet.[290] Thirdly, Mr Shane was the chairperson of the TSDBF when contentious interest rate swaps were carried out for which Regiments was allocated a questionable fee of R229 million.

189. The personnel changes and board appointments during Ms Brown's tenure as Minister saw the departure of individuals in senior management who resisted the alleged corruption and weakening of governance structures at Transnet. This included the resignation of Ms Mathane Makgatho as Head of Group Treasury in November 2014. Ms Makgatho had objected to a number of transactions that were not in the best interests of Transnet, especially the use of Regiments as advisors. She found herself increasingly side-lined from processes that were in her direct remit as Group Treasurer.

190. After prolonged conflict with senior management, particularly Mr Singh, Ms Makgatho began to feel unsafe, suspecting that she was under surveillance and that her car had been tampered with. The impact of this working environment on her health prompted her to resign. A number of Transnet Treasury members who

[289] Exhibit BB11, MMAM-214-234

[290] FOF-09-091-092, paras 98-102

worked under Ms Makgatho resigned at a similar time for allegedly the same reasons. Mr Ramosebudi replaced Ms Makgatho as the Group Treasurer.

The role of Mr Essa

191. The evidence before the Commission thus reveals that the individuals appointed to key positions at Transnet had a relationship or contact with the Gupta enterprise and Mr Essa in particular.

192. Mr Essa's role and influence appears from the evidence in relation to all the significant transactions analysed later in this report, which indicates that he was influential from October 2011 when Mr Gigaba appointed him as a director of Broadband Infraco ("BBI") (an SOE in the IT sector). This SOE had some part in the questionable decision of Mr Molefe on 20 November 2013 to reverse the award of the IT network services contract to Neotel and the appointment of T-Systems together with BBI in its place.[291]

193. Mr Essa worked closely with two consulting firms, Regiments and Trillian, both of which, with his help, were awarded strategic consulting contracts with Transnet. These contracts put them in a position to wield considerable influence over the financial, strategic and procurement decisions of Transnet. Mr Essa probably played some part in facilitating the illicit Regiments fee arrangements and in concluding the array of BDSAs in relation to the acquisition of locomotives. He interacted extensively with Mr Singh and was apparently instrumental in setting up a meeting for Mr Niven Pillay (of Regiments) with Mr Singh on 3 December 2012, just before Regiments emerged as McKinsey's new SDP.[292] Likewise, Mr Essa, on

[291] Exhibit B86(a), SC-88-94

[292] Transnet-05-2203 – Mr Singh denied that he had any contact with Mr Essa regarding this meeting and contended that Mr Essa played no role in facilitating the meeting; see further below.

behalf of Regiments Asia, concluded the BDSAs with the suppliers of the locomotives under substantial contracts awarded by Transnet, which provided for a 21% fee for services of little or no value. Following the migration from Regiments to Trillian, as the majority shareholder of Trillian, he came to the fore as the head of a key service provider to Transnet.

194. Throughout this time, Mr Essa maintained a close relationship with Mr Sharma who was appointed to the Transnet board on 9 December 2010 by Mr Gigaba and was chairperson of the BADC from August 2012 to November 2014. Mr Essa had significant mutual business interests with Mr Sharma during this period. Mr Essa was a director of VR Laser Services (Pty) Ltd and a director and a shareholder in Elgasolve (Pty) Ltd. On 28 February 2013 Mr Sharma declared a 50% shareholding in Elgasolve which owns 74.9% of the shares in VR Laser, an active Transnet vendor at the time when Mr Sharma was on the board. VR Laser had business dealings with Transnet to the value of approximately R200 000 per year since 2006. In 2014, Elgasolve held 80% shares in National Agricultural Development Project (Pty) Ltd ("NADP"). Both Mr Sharma and Mr Essa have been directors of NADP since November 2013 (and were still active directors as at 13 April 2021).[293]

195. As outlined earlier, Mr Essa had significant contact with Mr Singh and Mr Gama in the period under investigation. Mr Essa's relationship with Mr Molefe was more limited, but possibly more consequential. As discussed earlier, Mr Essa's close business associate, Mr Sharma nominated Mr Molefe for the position of GCEO . Mr Sharma sat on the selection panel that interviewed Mr Molefe but belatedly recused himself. It is unlikely that the person who became the GCEO of Transnet

[293] Exh BB30

(and later the GCEO of Eskom) was nominated by a Gupta associate by chance.[294] More likely, the role played by Mr Essa and Mr Sharma in advancing Mr Molefe was part of a bigger strategy by the Gupta enterprise to capture Transnet. At a meeting in Melrose Arch in 2014, at which Mr Essa attempted to persuade Mr Henk Bester of Hatch Goba to appoint his preferred company as an SDP and illegitimately increase the value of the contract awarded to Hatch Goba by R80 million for that purpose,[295] Mr Essa claimed that he and his associates had influence over executive appointments in SOEs and boasted that "they" had already decided that the new boss of Eskom would be Mr Molefe and that an announcement would be made in the newspapers soon.[296] Mr Bester later understood Mr Essa to be referring to the Guptas. Mr Molefe was seconded to Eskom in April 2015 and some months later appointed as CEO of Eskom without a transparent and competitive process. When this happened, Mr Bester realised that this meant that Mr Essa had known what he was talking about.

196. As mentioned, on 20 November 2013 Mr Molefe reversed a decision to award the IT network services contract to Neotel and appointed T-Systems in its place which favoured the SOE of which Mr Essa was a director. On 1 December 2014, Mr Molefe entered into a cession and delegation agreement in terms of which T-Systems ceded its rights (in relation to the management of Transnet's IT infrastructure) to Zestilor.[297] Zestilor was owned at the time by Mr Essa's wife, Ms Osmany.[298]

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[294] As stated above, Mr Molefe's appointment as the GCEO of Transnet was also predicted beforehand by the Gupta owned newspaper the *New Age*

[295] Transcript 20 October 2020, p 100, line 20

[296] Transcript 20 October 2020, p 103-105; and Exh BB19 , BB 19-HB-023, paras 62-66

[297] Exhibit BB3(b), MSM-531-543

[298] Transnet-05-405.89-90

197. Mr Essa also cultivated a relationship with Mr Pita who, as the acting GCFO of Transnet, authorised the corrupt payment of R93 million to Trillian on 2 December 2015;[299] the day on which Mr Pita also secured two additional large safety deposit boxes at the facility known as Knox Vaults, where other Gupta associates, including Mr Singh and Mr Moodley, also had boxes. Mr Pita was permanently appointed as GCFO on 1 February 2016. He met with Mr Essa at the Gupta compound around this time to discuss the cession of a substantial Regiments contract to Trillian.[300] In or about April 2016, Mr Pita made a presentation on investment projects at the Gupta compound, with Mr Essa and Mr Rajesh (Tony) Gupta being in attendance.[301] In or about October 2016[302] Mr Pita was summoned to a meeting by Mr Essa at the Gupta compound to discuss the failure to pay Trillian .[303] Mr Pita confirmed that he met Mr Essa on unspecified dates at the Gupta compound, at Mr Essa's offices in Melrose Arch and at the Parreirinha restaurant in Turffontein.[304]

The cash bribes

198. Three witnesses testified before the Commission essentially to the effect that Mr Molefe, Mr Gama, Mr Singh, Mr Pita and Mr Gigaba were the recipients of cash bribes from the Gupta enterprise.

199. All three witnesses were drivers and close protection officers who provided driving and protection services to these officials. In terms of orders made on grounds of

[299] Transnet-07-1068A

[300] Transnet-07-1043-46, paras 6.6-6.19

[301] Transnet-07-1046-47, paras 6-20-6.26

[302] Transcript 1 June 2021, p 248, lines 22-23

[303] Transnet-07-1047-48, paras 6.27-6.34

[304] Transcript 1 June 2021,p 167, lines 2-8; p 183, lines 16-17

safety and security, they testified before the Commission without their faces being shown and their identities have been protected.

200. Mr Molefe was incriminated by Witness 1 who has worked in close protection since 1989. Prior to giving testimony to the Commission, Witness 1 was subjected to sinister threats of death and extreme violence in messages sent to his phone. He was also followed by vehicles acting suspiciously.

201. Witness 1 performed close protection and driving services for Mr Molefe from February 2011 until August 2014. He testified that he transported Mr Molefe to various meetings with Mr Ajay Gupta and others at different places over a period of time. He provided entries from logbooks that confirmed 15 meetings between July 2011 and September 2012. He said that these meetings were not recorded in Mr Molefe's diary. Witness 1 also testified to seeing Mr Molefe with Mr Ajay Gupta at Bloemfontein airport during the ANC National Conference at Bloemfontein in 2012, and Mr Gigaba at the Gupta compound in Saxonwold on an occasion when he took Mr Molefe there.

202. According to Witness 1, Mr Molefe would take a light brown backpack with him to the meetings at the Gupta compound. Mr Molefe confirmed that he owned such a backpack and pointed it out to the Commission during his testimony. Witness 1 testified that he observed Mr Molefe on some occasions come out of meetings with the Guptas carrying a sports bag containing something and was instructed on one occasion to take the sports bag to Mr Ajay Gupta at Sahara Computers in Midrand.

203. Witness 1 also testified that one day while attending a meeting in the main boardroom of Transnet, Mr Molefe instructed him to fetch his cell phone from his brown backpack in his office. He said that when he did so, he discovered that the backpack was half full with bundles of R200 notes. He called Mr Molefe's personal

assistant, Ms Mbele, into the office and showed her the cash.[305] He said he then took the phone to Mr Molefe and informed him about the cash and advised him that having such amounts was a safety risk. Mr Molefe became annoyed and dismissed his concerns.

204. Mr Molefe denied that he ever received cash from the Guptas in his many visits to them (which he admitted)[306] or that he had the bundles of R200 notes in his backpack. He was unable to recall if he had met Mr Gigaba at Saxonwold or Mr Ajay Gupta at Bloemfontein airport. [307]

205. Witness 1 testified further that he frequently deposited cash amounts on behalf of Mr Molefe at ABSA, Standard Bank and Nedbank in and around the Carlton Centre in Johannesburg. Mr Molefe would fill out the deposit slips, but Witness 1 would count out the cash which usually was several thousand Rand at a time. Mr Molefe admitted that Witness 1 did indeed deposit large amounts of cash at ABSA bank on his behalf.[308] However, he maintained that this money was cash receipts payable to a burial society of which he was the treasurer. He did not furnish any accounting or supporting documents in relation to this cash, its source or purpose. Nor did he apply for leave to cross-examine Witness 1 before the Commission. He explained that he had not done so because Witness 1 had not implicated him, which is not correct.

206. This evidence, assessed together with the evidence regarding Mr Molefe's appointment, the role he played in the various transactions tainted by irregularity

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[305] Ms Mbele was not prepared to provide the Commission with an affidavit as she did not wish to become involved.

[306] Transcript 10 March 2021, p 200

[307] Transcript 10 March 2021, p 217-218

[308] Transcript 10 March 2021, p 226, line 20

and corruption that favoured the Gupta enterprise and his frequent association with the Guptas, left unanswered, would amount to a *prima facie* case of corruption and possibly racketeering. His denials must be assessed against his general credibility (which is reflected upon negatively throughout this report), his close association with the Gupta enterprise, his failure to cross-examine Witness 1, and his failure to produce any supporting documentation (within his peculiar knowledge) corroborating his version that the cash payments into his personal bank account were for the benefit of the burial society.

207. On this basis it is possible to conclude, with reference to TOR 1.5, that there are reasonable grounds to believe that Mr Molefe may have committed the crime of corruption by accepting a gratification to act in violation of his duties or in order to influence the price under various contracts or the procurement of tenders favouring the Gupta enterprise. There are also reasonable grounds to believe that Mr Molefe was associated with or participated in the affairs of the Gupta enterprise.

208. Witness 3 incriminated Mr Molefe, Mr Singh, Mr Pita and Mr Gigaba.

209. Witness 3 worked first for Mr Gigaba in 2005 and 2006 when Mr Gigaba was Deputy Minister of Home Affairs. He then worked in the private sector. Mr Gigaba's office then head hunted him in 2013 and he was employed by Transnet and seconded to Mr Gigaba for the period of July - December 2013 while Mr Gigaba was Minister of Public Enterprises. He was assigned to Mr Singh in July 2014 until Mr Singh was seconded to Eskom in 2015. Thereafter he worked for Mr Pita.

210. Witness 3 testified that he accompanied Mr Gigaba on six or seven visits to the Gupta compound in Saxonwold. These visits were not recorded in Mr Gigaba's diary or the vehicle logbook. The cross examination of Witness 3 by counsel for Mr Gigaba revealed a contradiction in Witness 3's version about whether the logbooks

recorded some or none of the visits to the Gupta compound. Witness 3 held firm that some of the visits were not recorded on the instruction of Mr Gigaba. The contradiction between his written statement and his testimony is inconsequential because Mr Gigaba admitted to having regularly visited the Gupta compound with Witness 3 and being a friend of Mr Ajay Gupta.[309]

211. During the visits to the Gupta compound, Witness 3 said that he saw Mr Molefe, Mr Matshela Koko (the CEO of Eskom), Dr Ben Ngubane (the chair of Eskom), Ms Mabaso (the chair of Transnet) and President Zuma. He stated that he did not know Mr Koko and Ms Mabaso when he saw them in 2013 but realised who they were later.[310]

212. Witness 3 also testified to the fact that Mr Gigaba was in the practice of carrying large amounts of cash, and paid for expensive clothing and restaurant bills in cash. He said that one day he opened the boot of the vehicle for Mr Gigaba and witnessed Mr Gigaba take money from a travel bag full of bundles of R200 notes. He suspected this money came from the Guptas. Mr Gigaba denied this.

213. As with Mr Molefe, this evidence (taken with the full range of evidence implicating Mr Gigaba addressed elsewhere in this report) provides reasonable grounds to believe that Mr Gigaba might have been involved in corruption and participated in and was associated with the Gupta enterprise and for a finding in that regard to be made in terms of TOR 1.4 and TOR 1.5, justifying a referral for further investigation in terms of TOR 7.

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[309] Transcript 8 March 2021, p23 *et seq*

[310] Transcript 22 April 2021, p 45 *et seq*

214. Witness 3 testified that after he was assigned to Mr Singh, he transported Mr Singh to the Gupta compound in Saxonwold more than ten times. He said that Mr Singh would appear from the residence carrying a full sports bag. He suspected the bag was full of cash because Mr Singh gave him cash from it.

215. Witness 3 testified that on six or seven different occasions, Witness 3 drove Mr Singh from meetings with the Guptas at Saxonwold to Knox Vaults, a facility in Killarney, Johannesburg providing safety deposit boxes, where Mr Singh would alight from the car with the full sports bag and return with it empty.

216. It is common cause that Mr Singh leased safety deposit boxes at Knox Vaults. Mr Moodley, the director of Albatime, the company that received 5% of the Regiments payments made to the Gupta racketeering enterprise, and Mr Pita, Singh's successor as GCFO at Transnet, both kept safety deposit boxes there too.[311]

217. Mr Singh denied that Witness 3 had ever driven him to Knox Vaults. He also initially maintained that he had only four boxes, one for himself and one each for his wife and two small children. His evidence was shown to be demonstrably false on a number of counts, which impacts on his overall credibility. His various falsehoods should be seen as admissions against interest tendered to the Commission while conscious of the incriminating nature of the truth.

218. Firstly, Mr Singh lied about the number and purpose of the boxes.[312] After his initial explanation in his evidence before the Commission that he had only four boxes for a few family valuables and some cash (which he said implausibly was earned through gambling and moonlighting), Mr Singh was confronted with the Knox Vault

[311] Transcript 1 June 2021, p 206-208

[312] Transcript 22 April 2021, p 14 -30

records which showed that over a period of time Mr Singh incrementally kept changing the boxes upgrading them from small to extra-large as his leased boxes became unable to accommodate the larger contents he needed to deposit in them. He eventually had eight boxes, and tried, belatedly, to explain these as having been necessary for his personal items while he was undergoing a divorce. This explanation was tendered for the first time after he had been confronted with the records from Knox Vault demonstrating that his initial version was false.

219. Secondly, in elaboration of his denial that Witness 3 ever took him to Knox Vaults, Mr Singh testified that he used to drive there himself during working hours in the week in his own car rather than his official car. This version is inconsistent with the undisputed evidence that Mr Singh left his own vehicle at Transnet during the week when he used his official car and driver and drove his own car home only on weekends. The lie is given to Mr Singh's denial that Witness 3 drove him to Knox Vaults most cogently by the fact that Witness 3 was the original source of the information about the safety boxes to the Commission. Mr Singh initially stated that Witness 3 probably became aware of Knox Vaults when told about it by investigators at the Commission. He essentially accused the investigators and Witness 3 of engaging in a fraudulent scheme to incriminate him by fabricating testimony to the effect that Witness 3 had driven Mr Singh to Knox Vaults when he had not done so. The relevant investigator filed an affidavit confirming that before interviewing Witness 3 the investigation team was unaware of Knox Vaults. Witness 3 was the source of the information about Mr Singh's safety deposit boxes.

220. Mr Singh conceded that he had a cordial relationship with Witness 3 and could offer no explanation for why Witness 3 would engage in perjury and a damning act of deception to incriminate him. In the premises, on the probabilities Mr Singh did

visit Knox Vaults with bags of cash after attending meetings with the Guptas at Saxonwold and was driven there by Witness 3.

221. Witness 3 testified also about an incident at the Three Rivers Lodge in Vereeniging in July 2014. He said that he drove Mr Singh there to attend a conference. He said that while sitting in the car park he observed two Chinese men walk into the lodge with two suitcases, one maroon the other black. At about 15h00, he received a message from Mr Singh asking him to come inside. There, he said, he encountered Mr Singh, Mr Molefe and the two Chinese men he had seen in the car park. He testified that Mr Singh asked him to take the maroon suitcase to the car. Witness 3 then went back to the vehicle and put the "very heavy" maroon suitcase in the boot. While sitting in the vehicle waiting for Mr Singh, Witness 3 saw Mr Molefe's driver emerge from the lodge with the black suitcase which he put into the boot of Mr Molefe's car.

222. A few days later, Witness 3 found the maroon suitcase (no longer so heavy) in the boot of the car parked in the basement at Transnet. He opened it and saw it contained rolls of R200 notes. He messaged Mr Singh who came to the basement to collect it.

223. Both Mr Singh and Mr Molefe denied that they were given money by the Chinese men at Three Rivers Lodge and accused Witness 3 of perjury and fabrication. They could venture no explanation for why Witness 3 would engage in such deception to falsely incriminate them.[313] Given Mr Singh's proven dishonesty, Witness 3's version is likely more credible and a finding may be made on the probabilities that Mr Singh and Mr Molefe were given cash by the two Chinese men seen by Witness 3.

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[313] Transcript 10 March 2021, p 233-239; and 12 March 2021, p 92 *et seq*

224. This evidence, viewed with the conspectus of evidence incriminating Mr Singh in relation to his conduct at Transnet and Eskom during the period of state capture, together with his marked tendency to mislead, be evasive and to give false testimony (commented upon throughout this report), provides clear and convincing grounds for a finding in terms of TOR 1.5 that Mr Singh committed the crime of corruption by accepting a gratification to act in violation of his duties or in order to influence the price under various contracts or the procurement of tenders favouring the Gupta enterprise and participated in the affairs of the enterprise. These findings justify a referral for further investigation as contemplated in TOR 7.

225. After Mr Singh's secondment to Eskom in 2015, Witness 3 was assigned to Mr Pita (previously the GCSCO) who became the acting GCFO when Mr Singh left and was later promoted to GCFO in February 2016. He testified that he drove Mr Pita to the Gupta compound twice; once in the week immediately preceding Mr Pita's appointment as GCFO (possibly in late January 2016). Mr Pita denied the intimation that the visit had anything to do with his subsequent appointment and maintained that it took place after his appointment on 1 February 2016.[314] This visit, according to Mr Pita, concerned the cession of a contract from Regiments to Trillian, a company controlled by Mr Essa. Mr Pita testified that he did not know at the time that the residence he visited was the Gupta compound.

226. According to Witness 3, Mr Pita was upset when he left the Gupta compound on the second time he drove him there. Witness 3 said that Mr Pita cursed and made a comment about a R600 million payment. Mr Pita confirmed that he was upset

[314] Transcript 1 June 2021,p 139

after the meeting at which he had been abused by Mr Tony Gupta and Mr Essa concerning payments that Mr Essa claimed were due to Trillian.[315]

227. Witness 3 did not see Mr Pita emerge from the Gupta residence with any bags on either visit. However, he testified that he did transport Mr Pita to Knox Vaults six times and witnessed him remove a sports bag from the boot and go into the building. He said he also drove Mr Pita 15 times to the Parreirinha restaurant in Turffontein for meetings with Mr Essa, usually on Friday afternoons where lunch was had and much alcohol consumed.

228. Mr Pita acknowledged that he visited the Gupta compound at the invitation of Mr Essa on three other occasions on which he drove there himself in his own vehicle (at least one of which was prior to the second time Witness 3 drove him there) and that he had met Mr Essa on various occasions at the Gupta compound and elsewhere. During this time (April-September 2016) Mr Essa's company, Trillian, was rendering services to Transnet under different contracts. There were disputes regarding the division of work and payments between Regiments and Trillian.[316] According to Mr Pita, at one meeting, Mr Tony Gupta became abusive, reminding Mr Pita of his political influence and threatened him with consequences if he did not facilitate certain payments to Trillian.[317] When allegations of corruption were made against the Guptas in the media during 2016-2017, Mr Pita attended other meetings with Mr Essa and Mr Tony Gupta at the compound, which he described as tense and difficult, and at which a recommendation to terminate Transnet's relationship with Trillian led to heated exchanges and attempts to intimidate Mr Pita.

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[315] Transcript 1 June 2021, p 170

[316] Transcript 1 June 2021,p 140 *et seq*

[317] Transcript 1 June 2021, p 154 *et seq*

229. During his testimony, Mr Pita was at pains to put distance between himself, Mr Essa and the Guptas. He sought to portray that he was a victim of abuse whenever he attempted to question their claims for payment. The evidence nonetheless confirms that Mr Pita had ongoing engagements with them at several meetings at the Gupta compound, at Mr Essa's offices and at restaurants in Johannesburg. Mr Pita admitted that he often visited the Parreirinha restaurant in Turffontein and that Witness 3 could have taken him there 15 times. He denied meeting Mr Essa there more than once, saying that Mr Essa as an observant Muslim would usually go to mosque on Friday afternoons. Thus, he contended that Witness 3's evidence that he sat in the restaurant and observed Mr Pita there with Mr Essa frequently was a fabrication.[318]

230. Mr Pita admitted that he and his mother had safety deposit boxes at Knox Vaults, a fact unearthed not by his admission but by the investigators of the Commission in June 2019 when they seized a box leased by him.[319] He acquired seven large boxes over six months between June 2015 and December 2015 (precisely at the time he took over Mr Singh's functions at Transnet as acting GCFO) incrementally increasing the quantity as he required more space. He paid approximately R30 000 per annum for the lease of the boxes and paid cash for four of them.[320] He cancelled the boxes in 2017 and kept only the one which was discovered by the investigators.

231. Mr Pita admitted that Witness 3 drove him to Knox Vaults, where he deposited items from a bag he carried into the premises. He testified that the boxes were for storing financial records of a restaurant in Killarney Mall (opposite Knox Vaults) co-

[318] Transcript 1 June 2021, p 183-186

[319] Transcript 1 June 2021,p 171

[320] Transcript 1 June 2021, p 196

owned by his mother and his cousin. This explanation is doubtful in view of the fact that his mother sold the restaurant in October 2014 and Mr Pita leased the first box in June 2015. Mr Pita explained that the ongoing negotiations around the sale of the restaurant necessitated the boxes.[321] That explanation is also implausible when weighed against the fact that he commenced leasing the boxes at Knox Vaults in very close proximity to assuming Mr Singh's position at Transnet after Mr Singh had followed Mr Molefe to Eskom. Allied to this, Mr Pita was forced to contend (implausibly) that it was a mere coincidence that back-to-back GCFOs at Transnet held multiple boxes at Knox Vaults. He said that he was unaware that Mr Singh made use of the same facility[322] (located in close proximity to the Gupta compound which they both visited on numerous occasions).

232. Mr Pita played a role in the illegitimate payment of R189 million as a "success fee" to Regiments in respect of a loan of USD1.5 billion from the China Development Bank ("the CDB"); the payment of R647 million to CNR in relation to the relocation to Durban, with BEX having received an illegitimate kickback of R67 million; and the payment of R93 million to Mr Essa's company, Trillian, in respect of services already paid for and rendered by Regiments in relation to a syndicated ZAR club loan of R12 billion. These transactions all took place around the time Mr Pita was incrementally acquiring safety deposit boxes at Knox Vaults. Mr Pita denied that he ever received cash payments from the Gupta enterprise and invited the Commission to conduct a lifestyle audit on him.[323]

233. Mr Pita's denials must be assessed in the light of his other conduct related to the Gupta enterprise during his tenure at Transnet in different roles, which is examined

[321] Transcript 1 June 2021, p 210-217

[322] Transcript 1 June 2021, p 207-222.

[323] Transcript 1 June 2021, p 176.

later in this report. His visits to Knox Vaults alone are not sufficient to establish reasonable grounds to believe that he was a corrupt recipient of cash. The timing and manner of Mr Pita's acquisition of the boxes at Knox Vaults, the similarities between him and Mr Singh, his extensive dealings with Mr Essa and the Guptas, and his role in various tainted transactions at the relevant time, give rise to a reasonable suspicion that he may have received cash payments as a *quid pro quo*. Further investigation is required to determine if there are reasonable grounds to conclude that Mr Pita should be prosecuted for corruption for the receipt of cash payments from the Gupta enterprise.

234. Mr Gama was incriminated by Witness 2 who worked as his driver and close protection officer from May 2012 to December 2017 while he was CEO of TFR and GCEO of Transnet. Witness 2 testified that he took Mr Gama to the Gupta compound four times. These visits were not recorded in Mr Gama's diary. No logbooks were kept because Mr Gama used his private vehicles. Mr Gama denied visiting the Gupta compound four times, claiming that he only did so once.[324]

235. Witness 2 testified that on one occasion when he had driven Mr Gama to the Gupta compound and while he was waiting there for Mr Gama he spoke to Mr Jiyane, the Chief Procurement Officer at TFR, who said to him that he (Witness 2) was being exposed to the "shady stuff" they did there.[325] Witness 2 said that on another visit he saw Mr Molefe there.

236. Witness 2 testified that in November 2016, during one of the visits to the Gupta compound, Mr Gama came out of the residence and told him that he should expect someone to bring him a suitcase and instructed him to place it in the boot. A short

[324] Transcript 26 April 2021, p 68

[325] Exh BB14(d), BB14(d)-witness[1-3]-093, para 13; and Transcript 26 April 2021, p 69-70

while later, a person Witness 2 assumed was a member of the Gupta family came out of the residence with a suitcase which was put in the boot. Later Witness 2 drove Mr Gama to the Maslow Hotel in Sandton where they met Mr Jiyane. Mr Gama instructed Witness 2 to transfer the suitcase from the car to Mr Jiyane's car. Mr Jiyane gave Witness 2 his car keys. Witness 2 said that when transferring the suitcase, he opened it and saw that the suitcase was stacked with cash. While conceding that he did at times go to the Maslow Hotel, Mr Gama denied that he visited the Gupta compound in November 2016, received cash and arranged for Witness 2 to transfer the suitcase of cash to Mr Jiyane's car.[326]

237. Witness 2 further testified that he transported Mr Gama three times to Melrose Arch where he collected cash from Mr Essa and provided specific details of two of the collections. He said that on 13 June 2017, he picked up a bag from Mr Essa at Melrose Apartments, then picked up Mr Gama at the African Pride Hotel and took him to the home of Mr Gama's girlfriend in Bryanston. He said that when they arrived, Mr Gama opened the suitcase and with the assistance of Witness 2 counted the cash inside. According to Witness 2, the cash amounted to approximately R1 million of which Mr Gama took about half into the home of his girlfriend and gave Witness 2 R50 000, which Witness 2 said he used for building at his home. Mr Gama took the suitcase with the balance of the cash into his home in Midrand when Witness 2 dropped him off later. Witness 2 provided the Commission with a printout of Google Maps travel history confirming his movements that evening.

238. Mr Gama denied these events and initially put up a case that Witness 2 had not transported him that day.[327] However, it became apparent that they had both been

[326] Transcript 26 April 2021, p72-75

[327] Transcript 26 April 2021, p 75-95

in Pretoria earlier in the day, but Mr Gama claimed that he left Pretoria earlier than the records showed Witness 2 had left. He denied that he was at Melrose Arch or in Bryanston. The difficulty with accepting that version is that the Google Maps information shows that Witness 2 was at Melrose Arch on 13 June 2017 from 20h27 to 21h36 and was parked at the home of Mr Gama's girlfriend between 22h37 and 01h57, confirming the version of Witness 2.[328] Mr Gama could offer no convincing account for Witness 2 being parked at the home of his girlfriend at such a late hour. Mr Gama sought to argue that the Google Maps information was unreliable because it seemed to reflect that Witness 2 took more than three hours to drive to Pretoria on the morning in question. However, Mr Gama did not apply for leave to cross-examine Witness 2 on this issue. In any event, whatever the explanation for that apparent anomaly, the Google Maps information unequivocally places Witness 2 at the correct address of Mr Gama's girlfriend that evening.

239. Mr Gama's version does not include an explanation for why Witness 2 would have visited Mr Gama's girlfriend's home that evening without Mr Gama. His version must be rejected as untrue and that of Witness 2 accepted as true. Mr Gama's demonstrably false version should be construed as an admission against interest tendered in the knowledge of the incriminating implications of the truth.

240. The second instance involving the collection of cash from Mr Essa by Witness 2 allegedly occurred a month later on 13 July 2017 when Mr Gama instructed him to drive him to the Melrose Apartments. On arrival, Mr Gama went inside to meet with Mr Essa. Later, Mr Gama, walking with Mr Essa, returned with a plastic bag which he put in the boot and instructed Witness 2 to drive to the residence of a person he knew in Sandhurst. Witness 2 testified that while waiting there he decided to check

[328] Annexure W2-06, Exh BB14(d), BB14(d)-witness [1-3]-113-115

what was inside the plastic bag. He said he opened it and found it filled with packets of R200 notes bound with elastic bands. He then dropped Mr Gama off at the home of his girlfriend in Bryanston. Witness 2 again annexed his Google Maps travel history of that day confirming his movements to and from Melrose Arch between 15h51 and 17h04, to Sandhurst between 17h26 and 19h05 and arriving in Bryanston at 19h31.[329]

241. Mr Gama denied that this could have happened as he was in meetings all day. He said that he left one meeting at TNPA in Parktown at 15h47 (this being the time that the meeting ended according to the minutes) and thereafter had a meeting with the chairperson of the board at Carlton Centre between 16h00 and 18h00, making it impossible for him to have been at Melrose Arch at 15h51.

242. Mr Gama's version is questionable for a few reasons. Firstly, the minutes of the TNPA meeting make no reference to Mr Gama after his initial presentation, which ended immediately before the lunch adjournment at 12:30.[330] The minutes of the meeting reflect that Mr Gama made no contribution to the discussion after that suggesting that he could have left the meeting earlier than he said.[331] Secondly, the spreadsheet relied on by Mr Gama to show that he had an appointment with the chairperson of the board, does not confirm that he attended it and he did not produce any evidence from the chairperson or any other person confirming that the meeting took place.[332] Thirdly, in any event, it is improbable that the meeting at the Carlton Centre could have started at 16:00 if Mr Gama ended his meeting in Parktown at 15:47, as he said. Fourthly, it stands to be accepted that Witness 2 was on duty on the day in question – this in the light of the fact that he dropped Mr

[329] Annexure W2-07, Exh BB14(d), BB14(d)-witness[1-3]-116-117

[330] Transnet-07-250.287; and Transcript 26 April 2021, p 109, line 11 – p 110, line 1

[331] Transcript 26 April 2021, p 105 *et seq*

[332] Transcript 26 April 2021, p 109, line 11 – p 113, lines 14-19

Gama off at the address of his girlfriend at 19:31- 19:36.[333] It follows from this that just as much as Mr Gama contended that he could not have been in two places at once, the same applied to Witness 2 – he could not simultaneously have been at Melrose Arch (between 15:51 and 17:04, as per the Google Maps information) and on route with Mr Gama between Parktown and the Carlton Centre (between 15:47 and 16:00).

243. In short, Witness 2's Google Maps information again serves to corroborate his version that Mr Gama again collected cash from Mr Essa at Melrose Arch. The lie is given to Mr Gama's denial by the improbability of Witness 2 driving to Melrose Arch (where Mr Essa lived) and Sandhurst,[334] and then to the home of Mr Gama's girlfriend without Mr Gama.

244. Witness 2 referred to two instances (one in September 2015 and the other in April 2017) where he said he discovered stacks of R200 notes in the boot of the vehicle, in both instances amounting to about R100 000. Mr Gama denied that he would leave that amount of money in the boot of his car.

245. Witness 2 also testified to Mr Gama picking up a box which he assumed contained cash from Mr Jiyane at Beaulieu College in Midrand in 2016 and witnessing Mr Gama hand over a packet of cash (R200 notes) to Mr Jiyane on the N17 Highway in 2017.[335] Mr Gama recalled meeting Mr Jiyane at Beaulieu College to give him a

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[333] Mr Gama could think of no reason why Witness 2 would have gone to this address, unless he was dropping him off there.

[334] Mr Gama claimed that he did not know if he had gone to the address with Witness 2 – Transcript 26 April 2021, p 110, line 5

[335] Exh BB14(d), BB14(d)-witness [1-3]-097-099, paras 39-48

letter but denied receiving a box from him.[336] He also recalled the events on the N17 Highway but denied giving Mr Jiyane a packet of cash.[337]

246. Witness 2's evidence against Mr Gama must be approached with some caution given the personal friction between them. Mr Gama alleged that Witness 2 had been set up to incriminate him and had been induced with an offer of reinstatement by Transnet, having been dismissed at Mr Gama's instigation for allegedly sprinkling *muti* at the home of Mr Gama's girlfriend.[338]

247. Witness 2's evidence is supported by the Google Map travel history and the implausibility of some of Mr Gama's denials. Moreover, Mr Gama did not apply for leave to cross examine Witness 2. He attempted to explain this on the basis that cross examination would have been hampered by the absence of his electronic diary. The Commission (via Transnet) had provided Mr Gama with electronic data making up his diary, but was unable to recreate the diary in a viewable form. Using the data provided, Mr Gama was able to present his version of his whereabouts on 13 June 2017 and 13 July 2017. He then called for the discovery of documentation supporting his case which was provided to him. He could have cross examined Witness 2 based on these documents. In any event, there was no need for him to have his diary to cross examine Witness 2 about whether he was bribed (through reinstatement) to fabricate his version, and whether he was motivated by a grudge to falsely implicate Mr Gama.

248. The allegations of Witness 2 should also be assessed in the light of Mr Gama's alleged participation in the Gupta racketeering enterprise. Mr Gama was centrally involved in the award of contracts to Regiments and Trillian and the making of

[336] Transcript 26 April 2021, p 133

[337] Transcript 26 April 2021, p 135 *et seq*

[338] Transcript 26 April 2021, p118-131 and p 140-147

unjustifiable payments to them. He dubiously sought to deny his association with Mr Essa, whose company, Trillian, benefited handsomely from corrupt and fraudulent payments during Mr Gama's term as GCEO. There are accordingly reasonable grounds to believe that Mr Gama received a *quid pro quo* in relation to these transactions. The evidence about his receipt of cash is also consistent with the accounts of the other drivers referred to above, signifying the existence of a pattern of conduct on the part of the Guptas and their Transnet associates. There are accordingly reasonable grounds to believe that Mr Gama may have committed the crime of corruption in relation to these payments.

249. For the reasons outlined, the evidence relating to the cash bribes gives rise to strong and convincing reasonable grounds that Mr Molefe, Mr Gigaba, Mr Singh, Mr Gama and Mr Jiyane[339] corruptly received property from and participated in the conduct of the affairs of the Gupta enterprise. There is also a reasonable suspicion that Mr Pita may have done so. Appropriate referrals for further investigation in terms of TOR 7 are justifiable.

[339] Although Mr Jiyane was not called to give evidence before the Commission, he did not respond to the Rule 3.3 notice issued to him in relation to Witness 2. He did not file a statement with the Commission, seek to give evidence or apply for leave to cross examine Witness 2.

CHAPTER 2 - THE GNS/ABALOZI CONTRACT

The confinement and terms of the contract

250. The discussion of Mr Gama's reinstatement and promotion is not complete without examination of the fate of the GNS contract and the litigation related to it. The contract had its origin in a confinement memorandum which served before the TFR Acquisition Council in late 2007.[340] The contract was for security services in relation to cable theft and the prevention of criminal activities against TFR. The tender for the services originally followed an open tender process, which was stopped and substituted with a confinement to GNS on the basis that there was an increase in cable theft as the festive season approached. GNS was recommended on the basis of its "expertise, proven track record and national footprint in providing specialised security solutions". The cross functional sourcing team noted that GNS had a highly technical skilled workforce able to secure the rail network.

251. The contract[341] signed in early June 2008 made provision for four kinds of services related to security: i) project management; ii) investigations; iii) monitoring and evaluation of personnel posted to safeguard the railway line, infrastructure and freight; and iv) information gathering and analysis.[342] GNS was obliged to provide personnel to be based at strategic locations in order to effectively monitor and provide surveillance on security related matters and occurrences. Annexure A to the contract consisted of an "Employee Project Name List" which was intended to include the identity details of all the employees engaged by GNS consisting of: i) a director and co-ordinator for project management; ii) a manager and eight investigators for investigations; iii) a manager and eight researchers for monitoring

[340] Transnet-03-509

[341] Transnet-03-111

[342] Transnet-03-137

and evaluation; and iv) a manager, eight handlers and 20 (confidential) sources for information gathering and analysis.[343] Annexure C to the contract set out the project cost (R18 933120 at the time of signing) which reflects that the entire cost was made up entirely of personnel costs of the identified posts.[344]

252. Soon after the appointment of GNS a significant extension to the contract was approved on 31 July 2008. The extension of services arose from the discovery of thefts out of containers at the Kaserne Yard. This extension was for depot protection and for the escort and protection of train drivers.[345] As a result of this extension of the scope of services, and from that month onwards, GNS rendered a second invoice each month in the amount of R1 781 683.20, and continued to do so each month until the contract was terminated in January 2010. This was followed by a second extension of services on 12 May 2009 which increased the number of personnel for "train crew personnel escort duties" at an additional cost of R976 752.[346] Following the second extension of the scope of services, Transnet was issued with three invoices by GNS each month, in the following amounts: i) R1 798 646.40 for the services initially procured; ii) R1 781 683.20 for the additional services procured under the first extension; and iii) R976 752 for the additional services procured under the second extension. The total amount that Transnet paid to GNS for security services over a period of some two years and two months was R95.5 million.

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[343] Transnet-03-137-138

[344] Transnet-03-141

[345] Transnet-03-624

[346] Transnet-03-630; and Transcript 13 June 2021, p 81-83

Misrepresentations and improprieties in the award of the contract

253. The award of the contract to GNS was attended by significant misrepresentations and irregularities. Most significantly, GNS in fact employed no staff at all, and so could not have deployed its own staff as the resources for which it invoiced Transnet monthly.

254. A disciplinary inquiry that led to the dismissal of Mr Senamela and Mr Khanye (two Transnet employees involved in the procurement) in March 2010 found *inter alia* that GNS had no employees, was not registered for PAYE and wrongfully used subcontractors to perform the work it had undertaken to perform. It concluded also that the open tender process was wrongfully cancelled, the confinement was improper, the price paid to GNS was excessive and the profile provided by GNS in its bid was fraudulent and plagiarised its purported expertise from the profile material of foreign service providers, as evident from its claim to have experience in investigating jury tampering in South Africa where juries are not used.[347]

255. Towards the end of 2009 or early 2010, Transnet decided to terminate the contract. In negotiations regarding the termination of the contract, GNS was afforded an opportunity to explain its operating model and to disclose the number and identity of the persons it had deployed to Transnet and for whom it had invoiced Transnet monthly for some two years. Representatives of GNS initially refused to provide the information but later explained that GNS did not employ the resources itself and had sub-contracted with third parties to procure staff. This was a breach of the agreement with Transnet.[348] GNS effectively outsourced the tender as it had no track record in the security service industry. Transnet requested more details of the

[347] Transnet-03-170 *et seq.*

[348] Transcript 13 January 2021 p 68; and clause 20 of the contract at Transnet-03-127.

sub-contracting arrangements in order to verify that the investigators, researchers, handlers, guards and similar resources for which it had been charged had been deployed to provide services to Transnet. GNS refused to provide the information requested and Transnet opted to terminate the contract. On 1 July 2010, Transnet blacklisted GNS for five years and placed it on the Transnet list of excluded tenderers on the grounds of the misrepresentations. The blacklisting included its directors in their personal capacity, as well as any associated companies owned or managed by those directors.[349]

The litigation

256. Transnet issued summons against GNS, then known as Abalozi Risk Advisory Services ("Abalozi"), for the recovery of R95.6 million on 27 October 2010, under case number 10/43494 in the South Gauteng High Court, alleging that the contract was invalid or void on the grounds of illegality and misrepresentation. Abalozi filed a special plea of misjoinder contending that Transnet had contracted with the "GNS Consortium" (made up of GNS, Revert Risk Management Solutions (Pty) Ltd and Nayle Outsourcing (Pty) Ltd). There was no factual basis for the contention as all the contractual documentation left no doubt that GNS was the contracting party. GNS/Abalozi also lodged four counterclaims for: i) damages of R93.7 million for contracts lost by publication of negative findings against GNS/Abalozi in disciplinary proceedings; ii) an enrichment claim for reimbursement of R88 million of incurred expenditure; iii) damages of R6 million in respect of defamation arising from the publication of the findings of the disciplinary inquiry; and iv) damages of R300 million for lost business following its blacklisting.[350] GNS/Abalozi never

[349] Transnet-05-405.98

[350] Transnet-03-830 *et seq*

provided the list of persons deployed or their time sheets, not for the purpose of avoiding the cancellation of the contract or in the pre-trial discovery process.[351]

257. After Mr Gama's reinstatement as CEO of TFR in early 2011, there appears to have been a concerted effort to withdraw the litigation.[352]

258. On 13 April 2012, management informed the Risk Committee that there was new information impacting on the case.[353] Some months later, on 27 September 2012, Mr Silinga, Transnet's General Manager, Legal Services received an updated schedule of security reports allegedly provided by GNS/Abalozi stating that "all the months billed are now supported by a report of some form".[354] Mr Silinga then instructed Bowman Gilfillan to seek counsel's opinion on the possible impact of this development on the prospects of success in the litigation.[355] On 5 December 2012 Adv F Barrie SC provided an opinion which noted that though it seemed that GNS/Abalozi (via its sub-contractors) had rendered some services (mostly unrelated to the original rationale for employing GNS/Abalozi – to deal with cable theft) the value of the services was probably miniscule in relation to the overall remuneration paid to GNS/Abalozi. He advised Transnet to proceed with a claim for *restitutio in integrum*[356] and for GNS/Abalozi to be put to the proof of any value provided in a counterclaim for enrichment.[357]

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[351] Transcript 13 January 2021,p 91-94

[352] Transcript 13 January 2021, p 88

[353] Transnet-03-496, para 35; and Transnet-03-662

[354] Transnet-03-496, para 36; and Transnet-03-665

[355] Transcript 13 January 2021, p 90

[356] *Restitutio in integrum* is a remedy available to a party to a contract where agreement has been improperly obtained (such as by fraud or error). It flows from the cancellation of the contract and involves restitution and the return of performances under the contract.

[357] Transnet-03-670; and Transcript 13 January 2021, p 90-91

259. In a memorandum dated 14 January 2013, Mr Caesar Mtetwa, the General Manager, Rail Network for TFR provided Mr Gama with feedback on the cost of services provided by GNS/Abalozi in comparison to the current service provider, Combined Private Investigation/Analytical Risk Management Joint Venture ("CPI/ARM").[358] He explained that the costs were mainly in relation to the deployment of personnel and set out an analysis comparing the length of copper cable lost to theft during the period June 2009 to January 2010 while GNS/Abalozi provided services (21.3 km per month) to when there was no specialised security service in February 2010 to April 2010 (31.3 km). The consortium was appointed in May 2010. The average monthly loss during May to December 2010 under CPI/ARM was 20.4 km which reduced in 2011 to 13.25 km. For the GNS contract, the monthly average costs for the full contract period amounted to R3.5 million, with the average cost in the last 12 months of the contract being R4.4 million. For the CPI/ARM contract, the monthly average cost amounted to R6.4 million, increasing in the last 12 months of the contract to R7.4 million. Mr Mtetwa thus concluded that GNS was not overpaid. The memorandum did not consider whether the resources for which GNS/Abalozi had charged had in fact been deployed, including those resources required to be deployed for different reasons, such as guarding train crew. Mr Mtetwa incorrectly regarded the analysis of the length of copper cable stolen as a complete refutation of these claims.[359]

260. On 5 February 2013 the Risk Committee held a further meeting at which management of TFR (over whom Mr Gama presided) informed it that there was a need to review the decision to litigate.[360] On 15 March 2013 Adv Barrie SC provided an opinion pointing out that the intangible nature of the contracted

[358] Transnet-03-678

[359] Transnet-03-498; and Transcript 13 January 2021, p 99

[360] Transnet-03-686

services was a complicating factor and concluded that unless Transnet had witnesses able to contradict Mr Mtetwa's assertions, pursuing the case could be wasteful.[361]

261. Mr Todd (the attorney handling the litigation on behalf of Transnet) doubted that full value had been given and, accepting the fraudulent and illegal genesis of the contract, favoured continuing the litigation.[362] TFR seemed more aligned with the interests of GNS/Abalozi than those of Transnet.

262. In a meeting on 18 March 2013, the GCEO, Mr Molefe, informed Mr Todd that the litigation was sensitive and that he had been receiving calls from a person he did not identify (whom Mr Todd assumed was General Nyanda) asking why Transnet was persisting with the litigation against GNS/Abalozi.[363] At this point Mr Todd, like Adv Barrie SC, realised that pursuing the litigation would be difficult in the absence of any witness willing to advance the interests of Transnet.[364]

The withdrawal of the litigation

263. At the time Mr Todd met Mr Molefe, Mr Singa had addressed a memorandum to Mr Molefe recommending the rescission of the blacklisting of GNS/Abalozi on the grounds that new information showed GNS/Abalozi had submitted reports that the work had been done and that TFR (under Mr Gama) had no complain t.[365] On 10 April 2013 Mr Molefe accepted the recommendation and rescinded the blacklisting on the grounds that the decision had been both procedurally and substantively unfair. In his evidence before the Commission, Mr Molefe maintained that the

[361] Transnet-03-689; and Transnet-03-696, para 20

[362] Transcript 13 January 2021, p 106, line 5.

[363] Transcript 13 January 2021, p 106

[364] Transcript 13 January 2021, p 107, lines 9-20

[365] Transnet-03-700

blacklisting had not followed due process[366] and GNS/Abalozi had been "wrongly accused by Transnet" as the required services had been rendered. He relied on Mr Mtetwa's memorandum of 14 January 2013 showing a decline in cable theft supposedly as a result of GNS/Abalozi's performance.[367] Mr Molefe's justification for rescinding the blacklisting is not sustainable. Mr Khanye and Mr Senamela were dismissed on the basis of evidence of collusion and the contract was (in the words of Mr Gama) a "scam and a fraud" that misrepresented the capacity of GNS/Abalozi. Mr Molefe's contention that GNS/Abalozi was wrongly accused is false. There are accordingly reasonable grounds to believe that Mr Molefe breached his obligation to exercise the duty of utmost care to ensure reasonable protection of the assets of the public entity[368] and to act with fidelity, honesty, integrity and in the best interests of Transnet in managing its financial affairs.[369]

264. Some months later in a presentation to the Risk Committee, Mr Mtetwa, in response specifically to the question whether the contract was adhered to in terms of the number of security personnel, stated:

> "Specialised 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 and type of resources required are not prescribed to the service provider as with guarding contracts."

265. These statements were false and inconsistent with (i) the terms of the contract concluded with GNS/Abalozi, and (ii) all invoices submitted by GNS/Abalozi, which specifically represented a cost per human resource allocated to the project. The

[366] Practice Note Number SCM 5 of 2006

[367] Transnet-05-405.98-100

[368] Section 50(1)(a) of the PFMA

[369] Section 50(1)(b) of the PFMA

services were not limited to performance outcomes in relation to a target reduction of cable theft, but extended to a range of other services including intelligence gathering, guarding the train crews and the protection of depots.[370] Mr Mtetwa furnished no information illustrating how, where and when personnel were deployed to different points in Transnet. He provided no staff lists, duty rosters, site information or shift schedules. Nor did he identify any deployed employee by name. In effect, he obfuscated the issue by focusing on outcomes. The presentation did not address the original concern that no "warm bodies" had been deployed. To repeat: the agreement was entirely about the deployment of specified human resources. Not a shred of evidence has been produced by GNS/Abalozi at any point in the last 13 years which establishes that any person was deployed by GNS/Abalozi to perform the tasks contemplated in the contract.[371] Mr Mtetwa's explanation to the Risk Committee about the deployment of personnel to sites was accordingly misleading.[372]

266. The minutes of the meeting of the Risk Committee of 7 November 2013 record that the management representatives informed it that GNS/Abalozi adhered to the contract and that Transnet "did not have a KPI that required the service provider to provide a list of security personnel." It is not clear whether the various legal opinions were presented to the board or the Risk Committee at its meetings during 2013. Ms Yasmin Forbes, a board member and member of the Risk Committee, has filed an affidavit stating that she was unaware of the various legal opinions and may have taken a different approach to the matter had she been.[373]

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[370] Transcript 13 January 2021, p 115-116.

[371] Transcript 13 January 2021, p 112-114.

[372] Transcript 13 January 2021, p 118.

[373] SEQ 11/2011.

267. Despite the assurances of TFR management, the Risk Committee at its meeting of 7 November 2013 resolved that the matter should be referred to the Arbitration Foundation of Southern Africa for resolution, preceded by mediation. This was an unusual approach that was not pursued. Instead, on 18 December 2013, a memorandum of instruction was given to Mr Charles Nupen of the law firm Harris Nupen Ralebatsi ("HNR") to conduct an independent investigation to determine whether Transnet received value for money from the security services rendered by GNS/Abalozi to TFR in terms of the contract.

268. HNR delivered its report on 30 April 2014. It pursued three lines of investigation: i) the degree of contractual compliance by GNS/Abalozi; ii) a comparison of GNS/Abalozi costs with those of CPI/ARM; and iii) the impact of services rendered by GNS/Abalozi. Its brief did not extend to consideration of the lawfulness or validity of the GNS/Abalozi contract, the issues of misrepresentation, collusion, non-compliance with the procurement policies, or corruption.

269. HNR concluded that GNS/Abalozi had not rendered value for money when assessed against contractual compliance. However, this was not the fault solely of GNS/Abalozi as TFR security had to "bear some responsibility for its failure to manage the contract effectively." It was unable to proffer an opinion in relation to cost comparison due to the differences in the geographical scope of the services rendered, the levels of investment in the services provided for in the contracts and the differences in the management of the contracts.

270. In relation to impact and effectiveness, HNR concluded differently on the disaggregated services. The contract provided for three distinct services: i) intelligence and investigations undertaken to provide a comprehensive service but primarily directed at curbing national cable theft; ii) security guarding and

escorts for train drivers and crew; and iii) additional investigators to curb container theft at three depots in the central region. HNR concluded as follows: i) value for money was rendered in relation to cable theft; ii) it could not proffer an opinion on the investigation of theft of customer goods at depots due to an inability to assess value for money from incidents of theft; iii) there was no evidence to suggest that value for money was given in 2008 with regard to security of train crew (in respect of the deployment of 16 resources); and iv) value for money was given in the 2009 deployment of resources for the security of train crew. However, such value would have been enhanced if contractual compliance had been assured.[374] The shortcomings in contract management emanated from the broad and open-ended terms of the agreement and the lack of clear performance indicators for GNS/Abalozi.[375]

271. HNR's conclusion that some value for money had been received does not amount to a convincing finding of contractual compliance. It relied primarily on *ex post facto* reports that had been provided by GNS/Abalozi indicating that sites were visited. These and other reports were found by Mr Peritus, the expert employed by HNR, to be wholly unprofessional and of dubious value.[376] Most importantly, it is clear that HNR could establish no evidence that GNS/Abalozi or any of its sub-contractors had in fact deployed the human resources for which Transnet had been charged. Despite making appropriate requests to the legal representatives of GNS/Abalozi, HNR was unable to obtain: i) a list of all staff deployed to perform services for Transnet since December 2007 to date together with personal details, identity numbers and PSIRA registration numbers; ii) the nature of services rendered by these staff; iii) staff time and attendance records reflecting work performed for

[374] Transnet-03-753-754

[375] Transnet-03-760

[376] Transnet-03-762 *et seq*

Transnet; or iv) all supporting invoices from any other entity or platform that had provided staff or services to GNS/Abalozi for which Transnet had been invoiced. [377]

272. As Mr Todd correctly intimated, the conclusion of the HNR report suggesting that GNS/Abalozi had performed adequately is erroneous.[378] It is clear from the facts (including those represented in the HNR report) that Transnet was invoiced for deploying resources and not for results. Despite this, without any evidence that the resources charged for were in fact deployed, and despite the severe shortcomings of the written reports that had been provided by GNS/Abalozi, the HNR report concluded that Transnet had received "value for money" on the questionable analysis of the length of copper cable stolen before and during the relevant period.

273. On 28 May 2014, the Risk Committee of the Transnet Board held a meeting at which the HNR team presented the findings in their report and answered questions. The Risk Committee resolved that the litigation against GNS/Abalozi should not be pursued on the basis of the findings of the HNR report.[379] The board subsequently noted that decision.[380]

The settlement and improper payment of R20 million to GNS/Abalozi

274. Transnet then conducted negotiations with GNS/Abalozi leading to the conclusion of a settlement agreement in terms of which the parties "agreed to settle all disputes between them" and withdrew the action and counterclaim. Transnet undertook to pay the costs not only of GNS/Abalozi but also of its directors and

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[377] Transnet-03-761

[378] Transnet-03-505 para 55; and Transcript 13 January 2021, p 125-130

[379] Transnet-03-783

[380] Transcript 13 January 2021,p 131

"co-founders', on a punitive scale.[381] The agreement was concluded without the advice of Bowman Gilfillan, the attorneys representing Transnet in the litigation.[382] Mr Molefe, as GCEO, signed the deed of settlement on behalf of Transnet on 4 August 2014. Though not entirely clear, the person who signed on behalf of GNS/Abalozi seems to have been General Nyanda.

275. There were simply no grounds for Transnet to have agreed to pay legal costs of persons who were not parties to the litigation. Given the absence of merits in GNS/Abalozi's case, the misrepresentations it had made to Transnet and the fact that GNS/Abalozi had not proved that it had deployed people as required by the contract, there was no basis for Transnet to agree to pay any costs to GNS/Abalozi, not to speak of punitive costs on the attorney and own client scale. Mr Molefe justified paying the legal costs incurred by the directors and co-founders of GNS on an attorney and own client scale as being the legal costs of persons and entities who had been unfairly blacklisted by Transnet.[383] But they were not party to the litigation under case number 10/43494 and there was no litigation in regard to the blacklisting. In any event, that explanation does not justify punitive costs. It is simply nonsensical and in all probability Mr Molefe knew that.

276. The undertaking by Transnet to pay "all the legal costs incurred by Abalozi, its directors and the co-founders and directors of GNS on an attorney and own client scale" appears to have led GNS/Abalozi to believe that it was entitled to much more than the costs incurred in the litigation. This is evident from certain letters addressed to Transnet by GNS/Abalozi after the settlement agreement was concluded.

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[381] Transnet-03-789

[382] Transcript 13 January 2021, p 136

[383] Transnet-05-405.101, para 11

277. In correspondence to Mr Molefe during September and October 2014, GNS/Abalozi claimed an amount of R40 million in settlement of its legal costs "in the action instituted by Transnet and damages claimable in connection with...the pending review application; and ...the pending defamation claim".[384] It argued that Transnet's actions had caused irreversible harm to the reputation of Abalozi. The proposed amount also took into account loss of revenue on the TFR contract as the contract was on a month to month basis until the completion of a new tender process. GNS/Abalozi could have continued to render the services and the revenue generated over the four years would have been no less than R250 million. Abalozi was also contracted to render services to the State Security Agency and this contract (valued at R387 million) was terminated partly due to the negative publicity arising out of the dispute. G Fleet had also terminated a contract with losses estimated at R82 million. GNS/Abalozi also valued its defamation and pain and suffering claims at over R700 million. Hence, it reasoned that the R40 million proposal of settlement was fair compensation inclusive of the legal costs incurred in all matters with Transnet.[385]

278. What is clear from this correspondence is that GNS/Abalozi, or its representatives, sought to use Transnet's undertaking to pay legal costs on a punitive scale as a basis to recover substantial amounts of damages alleged to have been caused by Transnet. The references in the first letter to the pending review application and defamation action were to a proposed application to review the findings in the disciplinary hearings of Mr Khanye and Mr Senamela and a claim for defamation

[384] Transnet-03-791

[385] Transnet-03-807

arising from the publication of the findings. No such application and action were ever instituted.[386]

279. The deed of settlement concluded between Transnet and GNS/Abalozi dated 4 August 2014 contemplated the settlement of all disputes between the parties under case number 10/43494. Under paragraph 2 of the deed of settlement, GNS/Abalozi withdrew its counterclaim in that litigation. On any reasonable assumption, the deed of settlement compromised each of the elements of the counterclaim that were set out in the GNS/Abalozi plea and counterclaim. The only financial payment Transnet undertook to pay in terms of the settlement was legal costs on the terms set out in paragraph 4. On reasonable assumptions, the taxed costs of GNS/Abalozi in that litigation would not have exceeded R200 000 at that stage of the litigation as there had only been an exchange of pleadings. The discovery process was underway and there had been no preparation for trial.

280. Nonetheless, in a memorandum dated 30 January 2015, Mr Silinga requested the GCFO, Mr Singh, to authorise payment of an amount of R20 million to GNS/Abalozi "in full and final settlement of the legal disputes between Transnet and GNS/Abalozi".[387] The memorandum provided no explanation for Transnet's decision to conclude an agreement (by exchange of letters) to pay the amount of R20 million to GNS/Abalozi. Any amount paid in excess of a reasonably taxed bill of costs was not in the financial interests of Transnet. On 16 January 2016, Mr Molefe agreed, without admission of liability, to offer R20 million "in full and final settlement" of all legal claims and costs against Transnet as he was of the opinion that the settlement of R20 million was reasonable under the circumstances. The sum of R20 million paid by Transnet to GNS/Abalozi constituted either an

[386] Transcript 13 January 2021, p 142

[387] Transnet-03-801

excessively inflated assessment of legal costs due to GNS/Abalozi, or alternatively was paid to settle claims by GNS/Abalozi that had already been compromised or, to the extent that any of those claims had not been compromised (new claims not included in GNS/Abalozi's counterclaim that had been settled), any such claims would certainly, by January 2015, have prescribed.

281. Mr Molefe was of the view that the settlement agreement of 4 August 2014 excluded the following; i) loss of revenue from Transnet of R250 million; ii) loss of revenue from SSA of R387 million; iii) loss of revenue from G Fleet of R82 million; and iv) pain and suffering arising from defamation of R700 million. He obviously assumed that Transnet bore liability for these additional claims in the amount of R1.4 billion, despite the fact that some of the claims were spurious and had either been compromised by the settlement or had prescribed. The evidence indicates that part of the inflated claim of R1.4 billion included amounts claimed in the counterclaim under case 10/43494 that had been compromised exclusively by the agreed payment of costs in the deed of settlement.[388]

282. Moreover, Mr Molefe opted to settle the claims for additional amounts before summons had been issued in respect of them and without properly investigating whether the claims were valid or inflated as they appear to have been.[389] He was not suspicious of the fact that GNS/Abalozi within weeks of making the claims was prepared to settle an alleged entitlement to R1.4 billion (including a wholly unrealistic defamation claim of R700 million) for R20 million. He was adamant that the claims were not inflated and that he was entitled to rely on internal legal advice (which he could not substantiate) without applying his independent judgment to the merits of these dubious claims, some of which had been settled and others were

[388] Transcript 29 April 2021, p 228

[389] Transcript 29 April 2021, p 229

most likely inflated or had prescribed.[390] He in effect, conceded that he took a decision to compromise the additional claims without seeking external legal advice or without a full examination of the evidence supporting the additional claims.[391] He could point to no memorandum or other documentary evidence upon which he allegedly relied to take the decision to compromise the claims.[392] His conduct falls short of his responsibilities as the GCEO and a board member in terms of the PFMA.

283. As a member of the board of Transnet Mr Molefe was prohibited in terms of section 50(2)(a) of the PFMA from acting inconsistently with the responsibilities assigned to the board in terms of the PFMA. He and the other board members had statutory fiduciary duties towards Transnet and were enjoined to exercise the duty of utmost care to ensure reasonable protection of Transnet's assets,[393] to act in its best interests in managing its financial affairs,[394] prevent expenditure not complying with its operational policies,[395] and manage available working capital efficiently and economically.[396] The payment of R20 million to GNS/Abalozi for costs and dubious causes of action that had not been the subject of appropriate legal advice was a serious dereliction of duty. Mr Molefe seemed more intent on advancing the interests of GNS/Abalozi than Transnet.

284. Mr Singh authorised the payment (which was made on 30 January 2015)[397] on the basis of Mr Silinga's memorandum of that date.[398] He testified that his role was

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[390] Transcript 29 April 2021, p 230-237

[391] Transcript 29 April 2021, p 224 *et seq*

[392] Transnet-05-405.102

[393] Section 50(1)(a) of the PFMA

[394] Section 50(1)(b) of the PFMA

[395] Section 51(1)(b)(ii) of the PFMA

[396] Section 51(1)(b)(iii) of the PFMA

[397] Transnet-03-812

limited to authorising the out of budget expenditure (being the liability created by Mr Molefe's decision to make the settlement payment) which he accepted could be funded from cost savings.

[398] Transnet-03-801; and Transcript 17 June 2021, p 183-185

CHAPTER 3 – THE PROCUREMENT OF THE 95 LOCOMOTIVES

The procurement decision

285. The first locomotive transaction of significance was the procurement of 95 locomotives by Transnet from CSR Zhuzhou Electric Locomotive Company Ltd ("CSR ") which commenced in 2011. The irregularities which attended this procurement (other than the kickbacks paid) were less serious but provide insight into the evolving relationship between Transnet and CSR, indicating that CSR was improperly favoured as a supplier in various procurements as part of the corruption and pattern of racketeering activity involving the Gupta enterprise.

286. Shortly after the appointment of Mr Molefe as GCEO of Transnet and the reinstatement of Mr Gama as CEO of TFR, on 20 April 2011, the board of Transnet approved the Locomotive Fleet Modernization Plan, subject to the BADC confirming affordability. Mr Gama submitted a memorandum dealing with affordability to the meeting of the BADC held on 3 August 2011. Originally, the TFR locomotive acquisition plan was accommodated in the latter years of the five-year capital programme. However, at its meeting of 3 August 2011 the BADC accepted that due to "action plans to create the much-needed liquidity", TFR could fund the acquisition of 138 locomotives (43 diesel and 95 electric) sooner. An efficient and reliable locomotive fleet was imperative to deliver the volumes indicated in the corporate plan and the then existing fleet was unable to support current volumes. The proposed acquisition of the 138 locomotives over the following two financial years was thus "the first tranche" of the larger rollout of the locomotive fleet plan.[399] The BADC accordingly recommended the acquisition of the 138 locomotives.

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[399] Transnet-Ref-Bundle-08344 *et seq*

287. The business case[400] submitted to the Transnet Capital Investment Committee ("CAPIC") sought authority to proceed with the acquisition at an estimated total cost ("ETC") of R3.649 billion. The ETC for the 95 electric locomotives was R2.659 billion of the total ETC. At its meeting of 31 August 2011, the board approved the acquisition at a cost of approximately R3.6 billion, and authorised Transnet to proceed with the acquisition of the 43 diesel locomotives by confinement and 45 electric locomotives in 2012/13 and 50 in 2013/14 by an open bid process.[401]

288. On 5 October 2011 the then chairperson of the board, Mr Mkwanazi, notified the Minister of Finance of "the significant capital expenditure" involved in the acquisition of the 95 locomotives. On 24 October 2011, Mr Mkwanazi wrote to Mr Gigaba, the Minister of Public Enterprises, requesting approval for the procurement of the 95 locomotives in terms of section 54(2)(d) of the PFMA.[402] The letter explained that there was insufficient traction power to meet the volume demand as the ageing fleets limited Transnet's ability to support current volumes and thus an efficient and reliable locomotive fleet was imperative to deliver the volumes as indicated in the corporate plan. Mr Mkwanazi made two other important points. Firstly, Transnet had adopted a procurement strategy aimed at achieving localisation benefits and the weighting criteria focused on the promotion of black economic empowerment through applying weighting for the B-BBEE scorecard rating and allocating additional points for further recognition criteria focusing on black ownership, management control, employment equity, enterprise development and preferential procurement. Transnet aimed to transform "its supplier base by engaging in targeted supplier development initiatives to support localization and

[400] Transnet-Ref-Bundle-08344 *et seq*

[401] The confinement of the 43 diesel locomotives for acquisition from General Electric appears not to have given rise to any controversy or allegations of irregularity or impropriety. Therefore, the procurement of the 43 diesel locomotives is not analysed in any detail in this report.

[402] Transnet-Ref-Bundle-08365

industrialisation whilst providing meaningful opportunities to previously disadvantaged South Africans."

289. On 21 December 2011, Mr Gigaba approved the procurement of the 95 electric locomotives at an ETC of R2.7 billion, subject to the proviso that Transnet provide him with a comprehensive briefing on Transnet's engagement with the competitive supplier development plan, particularly the supplier development and localisation components for the procurement.[403]

Inappropriate communications with CSR during the bid

290. Transnet issued the RFP for the acquisition of the 95 electric locomotives on 6 December 2011 and advertised it in the *Business Day* newspaper.[404] The closing date for collection of the tender documents was 30 January 2012. The notice stated that the RFP documents could be obtained at the Reception Tender Advice Centre in Parktown, Johannesburg and that a R20 000 non-refundable tender charge was payable. The notice stated that preference would be given to B-BBEE companies in terms of Transnet's B-BBEE policy. Section 2 of the RFP required all respondents to attend a compulsory briefing session (scheduled for 31 January 2012) and that those without a valid RFP document in their possession would not be allowed to attend.[405] The closing date for the submission of the bids was originally 28 February 2012. On 26 January 2012, Mr Gama approved the extension of the closing date to 17 April 2012.[406]

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[403] Transnet-Ref-Bundle-08367

[404] Tender notice HOAC-HO-7801 – Transnet-Ref-Bundle-08370

[405] Section 2.2 of the RFP, Annexure MSM 12, Exh BB(3)(a), MSM-210

[406] Fundudzi was commissioned by National Treasury to undertake a forensic investigation into various allegations at Transnet and Eskom. Chapter 1 of its report is titled *Final Report: Forensic Investigation into Various Allegations at Transnet, November 2018*. It deals with the acquisifion of the 95, 100 and 1064

291. Section 5 of the RFP noted that Transnet, as a state-owned company, was obliged to transform its supplier base by engaging in targeted SD initiatives to support localisation and industrialisation, while providing meaningful opportunities for black South Africans. Section 5.5 of the RFP set out the socio-economic obligations for foreign bidders. Foreign bidders would assume obligations under the competitive supplier development programme developed by the DPE, to develop local downstream suppliers, leverage local maintenance and manufacturing initiatives, and develop skills and technology transfers.

292. Section 6 of the RFP addressed the B-BBEE requirements under the B-BBEE Act which aims to promote the inclusion of previously disadvantaged South Africans in the economy. The B-BBEE scorecard is derived from the B-BBEE codes that assess a firm's compliance with the B-BBEE Act. Any private company seeking to secure tenders with public entities is usually expected to comply with the targets. The maximum points that can be scored is 118 points with points allocated for: i) ownership (25 points); ii) management (15 points); iii) skills development (20 points); iv) enterprise and supplier development (40 points); and v) socio-economic development (5 points). The RFP recommended bidders to be accredited[407] by a verification agency accredited by the South African National Accreditation System ("SANAS") or a registered auditor approved by the Independent Regulatory Board of Auditors ("IRBA"), in accordance with the approval granted by the Department of Trade and Industry.

293. Any verification certificate had to reflect the weighted points attained by the entity for each element of the B-BBEE scorecard as well as the overall B-BBEE rating.

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locomotives, and appears at Transnet-06-002 *et seq* ("Fundudzi Loco Report"). At para 5.5.12 of the report, Fundudzi maintains that Mr Gama did not have the authority to extend the date as this vested with Mr Molefe in terms of the board resolution of 31 August 2011, and Mr Molefe had not sub-delegated the authority to Mr Gama.

[407] In compliance with GG No. 34612, Notice No. 754 of 23 September 2011

Large enterprises were required to be rated by verification agencies or auditors on a rating level based on all seven elements of the B-BBEE scorecard. Bidders were required to furnish a detailed scorecard. A failure to do so would result in a score of zero being allocated for B-BBEE.[408] While points would be allocated in terms of the 10/20% preference system for a bidder's B-BBEE rating, additional points would be allowed for further recognition criteria ("FRC") calculated on the extent to which the bidder met or exceeded certain identified transformation targets in relation to ownership, board participation, management employment equity, preferential procurement and enterprise development.[409]

294. Section 29 of the RFP set out the evaluation criteria in selecting a preferred supplier. The process of evaluation involved three stages. Stage 1 involved: i) the application of the B-BBEE rating, based on the accreditation scorecard; ii) the SD commitment; and iii) the FRC related to transformation. Stage 2 involved an evaluation based on technical capabilities and risk mitigation. Section 30 of the RFP specified the technical disqualifying or unresponsive criteria. It required an overall minimum threshold of 60% for Stage 1 evaluation criteria and an overall minimum threshold of 80% for Stage 2 in order to progress to Stage 3 which applied financial considerations and involved further evaluation and consideration of the B-BBEE rating, the FRC and SD commitment.

295. The tender notice informed potential bidders that enquiries regarding the tender had to be directed to Ms Lindiwe Mdletshe of Transnet. On 14 December 2011 Mr She Yongjun of CSR[410] addressed an email to Ms Mdletshe expressing interest in

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[408] Section 6.2 of the RFP, Annexure MSM 12, Exh BB(3)(a), MSM-218

[409] Section 6.5 of the RFP, Annexure MSM 12, Exh BB(3)(a), MSM-219-221

[410] CSR was founded in 1936 and developed the first main line electric locomotive for China in 1958. It had since become "one of the important solution providers for the World Railway Transportation System" and supplied electric locomotive products in many countries.

the tender and enquiring whether the RFP documents were available on the website or whether it would be possible to purchase them by transferring the funds and for Ms Mdletshe then to send the documents to CSR.[411] On 15 December 2011, Ms Mdletshe informed Mr She Yongjun that the RFP was not available on the website but, considering that CSR did not have a representative in South Africa, she agreed that if CSR provided proof of payment of the R20 000 charge, she would arrange for the documents to be emailed to CSR.[412]

296. The next day, on 16 December 2011, Mr Pita, the then GCSCO, wrote to Mr Wang Pan, the Deputy Director, Overseas Business Division of CSR as follows:

> "My CEO, Mr Brian Molefe, advised me that you met in early December. He also stated that CSR Zhuzhou Electric Locomotives showed interest in participating in our next tender for electric locomotives. I wish to advise you that this tender has been released and is available from Transnet Freight Rail. I am not sure whether CSR is aware of this and has already bought the tender documents." [413]

297. Mr Molefe confirmed that he had met with representatives of CSR at a meeting organised by the Chinese embassy a few days before the issue of the RFPs on 6 December 2011 and had informed them of the pending tender. He invited and encouraged them to submit a bid and instructed Mr Pita to inform them once the RFPs were issued.[414]

298. Mr Wang Pan replied to Mr Pita on 19 December 2011 confirming that CSR had met with Mr Molefe at the beginning of December, expressed its interest in the tender for 95 electric locomotives and mentioned that Ms Mdletshe was assisting

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[411] Transnet-Ref-Bundle-08433

[412] Transnet-Ref-Bundle-08435

[413] Exh BB(3)(a), MSM-203

[414] Transcript 9 March 2021, p 188

with the tender documentation and expressed gratitude for that assistance.[415] After receiving proof of payment,[416] Ms Mdletshe sent the RFP to CSR by email and signed the RFP collection list on behalf of CSR.

299. Ms Mdletshe's assistance to CSR is open to criticism. It is not desirable for a Transnet employee to collect tender documentation on behalf of a bidder. The tender notice did not provide for tender documents to be emailed to potential bidders. CSR may well have faced challenges collecting the RFP, as it did not have an office or a representative in South Africa.[417] But it could and should have used a courier service. This minor transgression was not consequential, but viewed in the context of other events, they point to the possible favouring of CSR.

300. On 19 January 2012, before the compulsory clarification meeting scheduled for 31 January 2012, Mr Wang Pan addressed a letter to Mr Molefe in which he thanked him for the opportunity to take part in the tender, outlined CSR's credentials and capabilities, and expressed an intention "to bid and cooperate with Transnet with our quality and competitive products". The letter went on to explain that CSR intended to participate in the briefing session of 31 January 2012 and that a CSR delegation intended to visit South Africa from 30 January to 3 February 2012. Mr Wang Pan then asked Mr Molefe to "give us chance and support us to arrange": i) a meeting with him to discuss cooperation; ii) a meeting with Transnet's technical group to discuss and optimize the technical specifications; iii) a site visit to a locomotive depot or engineering factory to study existing electric locomotives and investigate the operational conditions; and iv) a visit and discussion with some

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[415] Exh BB(3)(a), MSM-203

[416] Transnet-Ref-Bundle-08438

[417] CSR maintained that there was no dishonesty or impropriety in this "mundane" request – SEQ 43/2019, para 48

potential or preferred companies willing and able to cooperate with CSR for the localisation work.[418]

301. Mr Molefe replied the same day thanking Mr Wang Pan for the letter and his interest shown in the tender. He did not object to CSR 's attempt to gain preferential access prior to the closing of the bids, and informed Mr Wang Pan that he had forwarded his request to Mr Gama (at TFR) who would "process and respond to your request."[419]

302. The Fundudzi investigation attached significance to these events in its report. It discovered that Mr Wang Pan (for reasons unknown and not established by its investigation) simultaneously forwarded his email of 19 January 2012 to Mr Molefe to Mr Rupesh Bansal, a known Gupta associate in India, who forwarded it to Mr Suchi Bansal at Worlds Window in India and to Oakbay Investments, both companies associated with the Gupta enterprise, indicating possible involvement and influence by individuals linked to the Guptas at this early stage.[420]

303. There is no evidence that the meetings proposed by Mr Wang Pan ever in fact took place.[421] Mr Molefe said that he did nothing beyond referring the letter to Mr Gama and thus intimated that he did not attend any meeting with CSR prior to the closure of the bid.[422] There is a possibility that others at Transnet may have communicated with the officials of CSR and discussed the tender prior to the closure of the bid.

304. No executive of Transnet is allowed to engage with a bidder during a tender period, prior to the closing date. It was inappropriate for Mr Pita to alert CSR to the bid

[418] Transnet-Ref-Bundle-08530-08531; and Exh BB(3)(a), MSM-205

[419] Exh BB(3)(a), MSM-205

[420] Fundudzi Loco Report, paras 5.5.13.13 -16

[421] Transcript 28 May 2019, p 73, line 21

[422] Transcript 9 May 2021, p 192

after the issue of the RFPs and for Mr Molefe to entertain correspondence or the possibility of meeting bidders (by referring the letter to Mr Gama) before the process was complete. Besides the constitutional requirement that state procurement processes should be fair, equitable, transparent, competitive and cost effective, paragraph 1.5.2(a) of the Transnet PPM (2009) required "honesty and integrity beyond reproach" and stated that Transnet would not tolerate any form of improper influencing or any other unethical conduct on the part of the bidders.

305. Furthermore, paragraph 1.5.3.4 of the PPM (2009) provided that no employee was allowed to discuss bids with outsiders or disclose information which would have the effect, or be perceived to have the effect, of placing a tenderer in a better position than its competitors.[423] Section 7.2 of the RFP provided that specific queries relating to the RFP before the closing date required the submission of a bid clarification request form. The tender notice required bidders to communicate exclusively with Ms Mdletshe. Accordingly, Mr Molefe should have directed Mr Wang Pan to refer his queries to Ms Mdletshe, as the tender process was still underway and not closed. The communication between CSR and the officials of Transnet was thus inappropriate and affirms that CSR may have been favoured as a potential bidder, which was inconsistent with a fair and competitive tender process.[424]

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[423] On 25 August 2020, CRRC E-Loco Supply (Pty) Ltd ("CRRC-E-Loco"), the South African company incorporated by CSR, was granted leave not to adduce oral evidence. It however filed a statement SEQ 43/2019. In para 48 of the statement, CSR denied that it was favoured or that there was any fraud or corruption attending the prior contact, which it maintained, was largely innocent.

[424] See the MNS Report Vol 3A (dealing with the procurement of the 95 locomotives), Transnet-Ref- Bundle-08254 *et seq* ("MNS 95 Report"); and Transcript 28 May 2019, p 74, lines 10-20.

The changing of the evaluation criteria to favour CSR

306. Nine bidders, including CSR, submitted their tenders timeously on 17 April 2012 and complied with the submission requirements. The tender opening process was regular and in line with paragraph 3.3.3 of the PPM (2009).

307. Section 4 of the proposal form of the RFP required respondents "to forward a valid copy of their company's tax clearance certificate with their proposal".[425] A tax clearance certificate was thus one of the returnable documents, as was a B-BBEE accreditation certificate. The RFP provided that a failure to furnish all returnable documents could lead to disqualification. On the closing date, CSR was not registered as a company in South Africa and thus could not and did not submit: i) valid South African VAT and company registration certificates; ii) a B-BBEE accreditation certificate; and iii) a valid South African tax clearance certificate. Its bid was accordingly non-responsive and should have been disqualified.

308. On 22 May 2012 Mr Molefe delegated the power to Mr Gama to appoint the Cross Functional Evaluation Team ("CFET"). The CFET's B-BBEE evaluation report reflected that B-BBEE evaluations were conducted on nine bidders as part of the stage 1 evaluations. The RFP required a bidder to attain an overall minimum threshold of 60% in stage 1 to proceed to stage 2. The stage 1 criteria had three components: i) B-BBEE scorecard (10%); ii) FRC (10%); and iii) SD specifics (80%). Only three of the nine bidders scored above the required minimum threshold, namely: Bombardier (70%), Siemens (63%) and SSMM Consortium (62%). CSR was awarded zero for the B-BBEE scorecard resulting in it receiving an overall score of 56% (below the overall minimum threshold of 60%) meaning

[425] Transent-Ref-Bundle-08418

that it should have been disqualified at stage 1. CNR and Nelesco were also awarded zero for their B-BBEE scorecard.

309. Instead of proceeding with the evaluation of the three bidders that achieved the minimum threshold in stage 1, Transnet (seemingly with the intention of avoiding the disqualification of CSR) introduced what it referred to as "option 2" which simply removed the B-BBEE requirement as one of the scoring criteria in stage 1. In a memorandum addressed to Mr Molefe, dated 6 June 2012, Mr Gama requested him to approve the shortlisting of the tenderers that had met the SD threshold of 60% and approve the issuing of letters to unsuccessful tenderers that did not meet the SD threshold for stage 1 of the evaluation process. [426] The memorandum also sought a change to the evaluation criteria in stage 1. Mr Gama explained that during the stage 1 evaluation it had emerged that there was a local bidder (Nelesco) with an invalid B-BBEE certificate and a foreign bidder that did not have a local office (CSR). This, Mr Gama maintained, meant that the methodology (if it included the B-BBEE certificate and the FRC) "would have been unfair to both the local supplier (Nelesco) and foreign supplier (CSR)".[427] In the light of that he proposed two options for the stage 1 evaluation:

> "a) Option 1 – as part of stage 1 of the SD evaluation and as per the RFP and the BADC submission, the SD evaluation includes B-BBEE and FRC. The effect of this is that foreign tenderers that do not have local representation are prejudiced and will score zero on B-BBEE. This option does not support the B-BBEE code of good practice clause which allows for such foreign companies, if registered locally (as start-up enterprises) to be deemed to have a B-BBEE status of 'level 4 contributor' in the first year of operation only. Based on option 1, the following three tenderers met the minimum threshold of 60%: 1) Siemens; 2) Bombardier; 3) SSMM Consortium.

[426] Exh BB(3)(a), MSM-268

[427] Exh BB(3)(a), MSM-269, para 6

b) Option 2 – as part of stage 1 of the SD evaluation, evaluate only SD specifics (exclude B-BBEE and FRC) in stage 1 and evaluate B-BBEE and FRC in stage 3. Given the nature of the RFP which attracted foreign companies, such companies could not be fairly evaluated on their B-BBEE status and FRC in stage 1. As per the RFP, stage 3 caters for the evaluation of B-BBEE and FRC. Based on option 2, the following five tenderers met the minimum SD specific threshold of 60%: 1) Siemens; 2) Bombardier; 3) CSR Zhuzhou; 4) Nelesco 85; 5) SSMM Consortium."[428]

310. Mr Molefe accepted and approved the recommendation to change the criteria on 8 June 2012.[429] The consequent amendment of the RFP to exclude B-BBEE and FRC in stage 1 of the evaluation process and to include these criteria in stage 3 was ratified by the BADC on 21 August 2012 and noted by the Transnet board on 29 August 2012.[430] After the removal of the B-BBEE requirement, CSR's score changed from 56% to 69% above the minimum threshold of 60%; and thus it proceeded to stage 2 of the evaluation process. CSR was the only foreign company to benefit from this change.[431]

311. The change of the evaluation criteria in the middle of the process compromised the fairness of the procurement process in that there might have been other potential bidders that did not participate in the bidding process on the assumption that they were unable to attain the stage 1 threshold as publicly advertised.[432] The Procurement Procedures Manual ("PPM") provides that evaluation criteria must be unambiguous, rational and justifiable, quantifiable, pre-determined and objective.[433] The requirement that evaluation criteria are to be pre-determined means that they must be stated upfront in the RFP document and no criteria should be used in the

[428] Exh BB(3)(a), MSM-269, para 7

[429] Exh BB(3)(a), MSM-269

[430] Fundudzi Loco Report, para 5.5.16.31- Ms Tshepe objected to the change

[431] Transcript 28 May 2019, p 83, lines 15-20; p 89 *et seq*; and p 98-99

[432] MNS 95 Report, para 2.3.8; Transcript 15 May 2019, p 78, lines 13-25

[433] See para 13 of the PPM (2012)

evaluation process that were not stipulated in the RFP document. The bids in this procurement were required to be evaluated against B-BBEE preference criteria included in the bid document and they were not.

312. Paragraph 3.17.1 of the PPM (2009) provided that Transnet was entitled to amend any tender condition, validity period, specification or plan after the closing date of a tender. However, all parties who had submitted valid tenders had to be advised of the amendment in writing by registered post or fax and given the opportunity of tendering/quoting on the amended basis by an extended date and "in the event of a significant change" to the specification to which other tenderers could possibly respond, a fresh tender would be required. The provisions of paragraph 3.17.1 of the PPM (2009) were not followed in changing the evaluation criteria in this procurement. The change to the mandatory criteria should have gone back to the BADC to decide if the tender needed to be re-issued to the market with the altered criteria or other potential bidders should have been afforded an opportunity to submit bids.[434]

313. The stated reason for favouring or exempting CSR from the B-BBEE criteria at stage 1 was that it did not have a local office and thus would be disadvantaged. The B-BBEE criterion was relevant again in stage 3 of the evaluation. On 18 July 2012, CSR registered a local company CRRC E-Loco Supply (Pty) Ltd ("CRRC-E-Loco") which had four black South African directors.[435] Its B-BBEE profile changed accordingly at stage 3 of the evaluation.

314. The Code of Good Practice of the B-BBEE Act allows for foreign companies, if registered locally as a start-up enterprise, to be deemed to have a B-BBEE status

[434] Transcript 15 May 2019, p 79, line 10 - p 80, line 8

[435] Fundudzi Loco Report, para 5.5.18.9

of level 4 in the first year of operation. Mr Gama argued in the memorandum of 6 June 2012 that CSR was in a similar position to a local start-up foreign company. That contention is wrong. The Code of Good Practice defines a start-up enterprise as "a recently formed or incorporated entity that has been in operation for less than one year". For the purposes of B-BBEE scoring, start-up enterprises are measured on the same basis as exempted micro-enterprises ("EMEs") that automatically qualify for level 4 contributor status. CSR could not be regarded as equivalent to an EME. It had been in existence for more than a year and was not incorporated in South Africa. The suggestion in the memorandum that CSR should enjoy equivalence has no foundation.

315. In his evidence before the Commission, Mr Gama was dismissive of the concerns about his altering the B-BBEE criteria and argued that it made no difference whether the bidders were evaluated at stage 1 or stage 3. All the bidders, he said, were evaluated at stage 3 equally and it was fairer to allow CSR to be evaluated for B-BBEE compliance once it had established a local office.[436] His view is indisputably wrong, and it is hard to accept he believed that the RFP permitted a company that was not compliant at the closing date to delay its B-BBEE accreditation. More likely, he devised his so-called option 2 to accommodate and favour CSR. His reasoning reveals a lack of regard for (or insight into) the principles of fair and regular procurement. The fact remains that CSR was inappropriately favoured by this irregular change in the evaluation criteria (promoted and justified by Mr Gama, and accepted by Mr Molefe) when it should rightly have been disqualified at stage 1. CSR's non-disqualification served the state capture agenda and ensured that the planned 20% kickback to the Gupta enterprise negotiated by Mr Essa remained possible.

[436] Transcript 11 May 2021, p 295-297; CSR aligned with this view – SEQ43/2019, paras 49-59

The award of the contract to CSR

316. Only Siemens, Bombardier and CSR met the technical requirements in stage 2 and proceeded to stage 3. A memorandum dated 8 August 2012 records the results of the stage 3 evaluation process.[437] CSR scored the highest score and became the preferred bidder with a score of 76.4%. The weighted targets in stage 3 were: B-BBEE scorecard (20%); SD scorecard (20%); and price (60%). CSR scored 16% on B-BBEE scorecard, 13.8% on SD scorecard and 46.6% on price, giving the total of 76.4 %. Siemens scored 54.16% and Bombardier 59.7%. CSR's zero score for B-BBEE in May 2012 thus changed to 80% (16% of the weighted 20%) in July 2012. The competitive scores on B-BBEE and SD were marginally different, but CSR far outscored the other bidders on price, was awarded the tender and signed a Locomotive Supply Agreement ("LSA") with Transnet in late 2012.

317. The RFP required bidders to submit a price including hedging and a price excluding hedging. Only Bombardier did this. Siemens and CSR failed to submit their pricing schedule as required by the RFP. CSR's recommended price for the tender was R2.7 billion (excluding VAT) including hedging and escalation costs. Ms Helen Walsh, the Acting General Manager: Governance, Risk and Compliance at Transnet, and a qualified chartered accountant, testified that between December 2012 and May 2017, R2 686 790 000 was paid to CSR under the LSA for the 95 locomotives. An additional amount of R376 150 600 was paid for VAT, giving a total of R3 062 940 600. Additional payments of R369 928 965 (R328 582 544 plus R45 449 856 VAT) were paid between December 2013 and December 2018.[438] The total cost of R3 062 940 600 plus R369 928 965, being R3 432 869 565 was approximately R700 million more than the amount authorised by the Minister as the

[437] Fundudzi Loco Report, para 5.5.18.4

[438] Exh BB13(a), HJW-0006 and Annexure HJW2, HJW0016-19

ETC of the acquisition in his letter of 21 December 2011, being R2.7 billion.[439] There is no evidence confirming that this cost overrun was authorised by the board or the Minister.

318. In accordance with the delivery schedule of the LSA, delivery was to commence in April 2014 and continue over a period of 11 months with the last delivery due in February 2015. The first locomotive was delivered on 16 April 2014 and the last on 19 June 2015. Thus, the first locomotive was late and the last locomotive five months late. Clause 9.1.1 of the LSA provided that if the acceptance of a locomotive occurred after its scheduled acceptance date, CSR would pay a delay penalty at the applicable rate. Fundudzi determined that CSR delivered 85 of the 95 locomotives late.[440] The MNS Report maintained that Transnet was entitled to impose delay penalties amounting to approximately R1.7 billion (being 63% of the contract price).[441]

319. The evidence on this matter is incomplete. Further investigation is required to determine if there is justification for the non-recovery of the delay penalties and whether such amounted to a contravention of section 51(1)(b)(i) of the PFMA which requires the board to take effective and appropriate steps to collect all revenue due to Transnet.

Payments to the Gupta enterprise and transgressions related to the 95 locomotives

320. The evidence in relation to the procurement of the 95 locomotives discloses the beginning of a relationship between CSR and officials of Transnet that continued and led to CSR's irregular appointment and further wrongdoing in other bids and

[439] Transnet-Ref-Bundle, p 8367

[440] Fundudzi Loco Report, paras 5.5.18.1-5

[441] MNS 95 Report, para 2.5

contracts for the acquisition of more locomotives. It provides important background and may add to the evidentiary basis for any prosecution for participation in the conduct of the affairs of an enterprise engaged in a pattern of racketeering.[442] The relationship of the events in the acquisition of the 95 locomotives to the acquisition of other locomotives from CSR points to the existence of an enterprise engaged in a pattern of racketeering activities.

321. The report submitted to the Commission by Mr Holden of Shadow World Investigations[443] shows that CSR (Hong Kong) and Century General Trading FZE ("CGT") concluded an exclusive agency or consultancy agreement pertaining to "the 95 Project" on 14 April 2012. A 2015 accounting spreadsheet of payments due from CSR to various parties confirms that CGT was due to receive 20% of the total value of the 95 Project, equal to R523.32 million, as a kickback.[444] An email dated 22 August 2015, discovered in the Gupta-leaks, attached a payment schedule including a calculation of the moneys CSR had agreed to pay to CGT, amongst others.[445] The calculations show that CGT was to be paid 20% of the contract value of the 95 locomotive contract, which equalled R523.32 million.[446] On 10 February 2015, CSR and Regiments Asia (Pty) Ltd, a company controlled by Mr Essa, concluded a Business Development Services Agreement ("BDSA") in relation to "the 95 Locomotive Project" indicating that Regiments Asia effectively displaced CGT under the consultancy agreement of 2012.[447] Thus, Regiments Asia was due

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[442] Section 2(1)(e) of the POCA

[443] FOF-06-163

[444] FOF-06-180, paras 11-12

[445] FOF-06-193, paras 54-60

[446] JJ Trading and Century General Trading were due to receive R5 267 007 200 (R5.267 billion) in payments from CSR in relation to the 359, 100 and 95 locomotive contracts.

[447] FOF-06-427 - Preamble

to receive what CGT had originally been paid on Project 95, namely, 20% of the total value of the 95 contract.[448]

322. The schedule confirmed that CSR at that stage had paid USD16 699 902.89 to CGT in relation to the 95 locomotive contract. The document also confirmed that CGT was not due to retain the full amount paid to it by CSR. It would retain 15% of the total amount paid by CSR. While the document is silent on who was to receive the remaining 85%, banking records from the Gupta-leaks show that at least a portion of this 85% was paid to companies controlled by the Gupta enterprise.[449]

323. When Mr Singh was asked during his evidence how it was possible for the margins on the deal to accommodate an undisclosed 20% kickback, he initially answered that he was not able to comment as he was "not au fait or in any way an expert on locomotive pricing". He could not comment on the margins that the OEMs hoped to earn. He was satisfied that the escalations were justified and were a result of economic variables that had changed during the contract negotiation phase. He said that if the OEMs decided to make a lower margin, for whatever reason (including making provision for a bribe), that had nothing to do with Transnet.[450]

324. Later in his testimony Mr Singh referred to an article published in a magazine in January 2020 headed: "CRRC remains threat to rail and car suppliers".[451] CRRC is a new entity in China resulting from a merger between CNR and CSR. The article claimed that CRRC used subsidies from Beijing to help it win nearly USD3 billion in state contracts and to undercut competitors. Mr Singh speculated that CSR and CNR followed a similar strategy in South Africa with Transnet by making a price cut

[448] FOF-06-186, paras 29-31

[449] FOF-06-196, para 60

[450] Transcript 28 May 2021, p 151-154

[451] Transcript 31 May 2021, p 81-84; and Transnet-05-2205

to secure the bid and then got a subsidy from government to make up the shortfall. By gaining control of the South African market, CRRC would gain greater control of the African market. This, he imagined, accounted for the Transnet negotiation team not picking up the 20% price inflation to allow for the kickback paid to the Gupta enterprise.

325. Insofar as the award to CSR was invalid, it constituted conduct in contravention of a law and thus *prima facie* was "unlawful activity" as contemplated in section 1 of POCA. The award of the tender also constitutes "property" as defined in section 1 of POCA. To the extent that Mr Gama and Mr Molefe ought reasonably to have known that CSR had obtained the proceeds of unlawful activity through the illegal award of the tender and engaged in the transaction whereby control of the proceeds by CSR was facilitated, there may be reasonable grounds to believe that Mr Molefe and Mr Gama contravened section 5 of POCA. Likewise, there are reasonable grounds to believe that Mr Molefe and Mr Gama may have contravened section 50(1)(a) read with section 57 of the PFMA in failing to act with fidelity and integrity in the best interests of Transnet.

326. The conduct associated with the conclusion of the BDSA provides reasonable grounds to believe that the offences of corruption, money laundering and racketeering may have been committed by Mr Essa and his associates in the Gupta enterprise and the persons who concluded the BDSA on behalf of CSR.

327. These findings are to the effect that there are reasonable grounds to believe that these employees and board members of Transnet violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.4 and involved corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The likely offences and identified

wrongdoing should accordingly be referred in terms of TOR 7 for further investigation by the law enforcement agencies.

CHAPTER 4 – THE PROCUREMENT OF THE 100 LOCOMOTIVES

The decision to favour CSR above Mitsui

328. In April 2012 the board of Transnet approved the procurement of the acquisition of 1064 locomotives to give effect to the Market Demand Strategy ("the MDS"). Delays in the procurement impacted on the MDS targets and thus it was decided to urgently procure 100 additional locomotives for use on the coal export line (which runs from the Ermelo coalfields to Richards Bay). The acceleration of the acquisition would release older locomotives from the coal line for use for General Freight Business ("GFB").[452] There was also a need to standardise the electric locomotive fleet on the coal line with dual voltage locomotives. The DC (direct current) voltage network stops at Ermelo and the AC (alternating current) voltage network then goes from Ermelo to Richards Bay. This meant that locomotives had to be changed at Ermelo thus causing operational inefficiency.[453]

329. Therefore, on 15 October 2013, Mr Francis Callard, a senior engineer at TFR, submitted a business case memorandum for an accelerated procurement of 100 class 19E dual voltage electric locomotives for the coal export line by confinement (on grounds of urgency, standardisation and highly specialised and largely identical goods) to Mitsui African Rail Solutions ("Mitsui") at a cost of R3.871 billion (excluding borrowing costs).[454] Class 19E locomotives are 311 kilo-newton tractive

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[452] The memorandum analysed the impact of the delay on the 1064 procurement. A two-year delay in the delivery of the 1064 locomotives would cause a shortfall in revenue by an amount of R14.7 billion over the seven year procurement schedule. The procurement of the 100 class 19E would mitigate that shortfall in the amount of R4.16 billion, while the procurement of the 60 diesels would mitigate in the amount of R5 billion. The release of the 125 locomotives from the coal line for use in GFB would protect approximately 16.4 million tonnes (cumulative 2013-2017) of general freight and would allow growth that otherwise might have been lost - see Annexure PV 33, Exh BB2.1(d), PSV-1202, para 30 et *seq*

[453] Transcript 17 May 2019, p 25, line 1-20

[454] Annexure FC1, Exh BB4(a), FQC-069

effort, 26 ton per axle, locomotives for heavy haul use, more powerful than general freight locomotives which haul trains of up to 6500 tonnes, and thus more suitable for deployment on the coal export line to haul long trains of approximately 16000 tonnes.[455]

330. Mitsui had contracted with Transnet in 2009 and had already supplied 110 class 19E electric locomotives for use on the coal export line, which, according to Mr Callard, were operating optimally. The Mitsui designs were finalised so delivery lead times would be kept to a minimum and set up costs reduced. The restarting of the Mitsui production lines would be quick and there would be maintenance standardisation. Specialised tender specifications take time to prepare and a new supplier would necessitate a new design, design review and type testing which could take up to 15 months before production commenced. Moreover, Transnet crew (drivers and assistants) had already been trained to operate the Mitsui locomotives.[456] Furthermore, a confinement to a Japanese company would bring forex savings on the 40% foreign component as at the time the JPY/ZAR rate was favourable.[457]

331. The proposal for the confinement to Mitsui was scheduled for discussion at a meeting of the BADC on 21 October 2013. However, the matter was removed from the agenda on grounds of sensitivity arising from a media controversy about previous confinements to Mitsui .[458]

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[455] Annexure PV 33, BB2.1 (d), PSV-1207, para 58

[456] Annexure PV 33, BB2.1 (d), PSV-1211, paras 67-71

[457] Annexure PV 33, BB2.1 (d), PSV-1211, para 73

[458] MNS Report Vol 3B (dealing with the procurement of the 100 locomotives), Transnet-Ref-Bundle-08567 *et seq* ("MNS 100 Report") at 08574

332. Between October 2013 and January 2014, Mr Callard worked on the business case and submitted an updated final version (Annexure FC5A) dated 20 January 2014.[459] On 22 January 2014 Mr Callard received an email from Ms Mdletshe attaching a revised memorandum dated 21 January 2014 (Annexure FC7A) requesting him to make certain changes.[460] The revised memorandum included significant changes about which he had not been consulted,[461] which resulted in unsuitable locomotives being specified and procured.[462] These were: i) it was proposed to confine the award to CSR instead of Mitsui; ii) references to "class 19E locomotives or equivalent" had been removed; iii) the discussion of the fact that the class 20E locomotives procured from CSR (in the tender for the 95 locomotives) were not suited for heavy haul on the coal export line was deleted;[463] iv) it falsely stated that the locomotives would be "largely identical with those already supplied" when CSR had not supplied any locomotives;[464] and v) it deleted all reference to the fact that Mitsui had already produced 110 locomotives for the coal export line and the discussion of the advantages that entailed.

333. The analysis in the memorandum of the advantages of standardisation in a confinement to Mitsui was replaced with a discussion about CSR having been adjudicated a preferred bidder in the procurement of the 95 and 1064 locomotives which maximised supplier development and quality, and that another tender process would not be efficient given the urgency. Supplier development had not been a key focus area in the previous Mitsui contracts and Mitsui did not fare well in the most recent tenders and continuation with it by confinement "would pose

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[459] Annexure FC 5A, Exh BB4(a), FQC-129

[460] Annexure FC 7, Exh BB4(a), FQC-158

[461] Exh BB4(a), FQC-009, para 39; and Annexure FC 7A, Exh BB4(a), FQC-161

[462] Transcript 17 May 2019, p 68, line 20

[463] CSR did not manufacture class 19E locomotives - Transcript 17 May 2019, p 101-102

[464] Transcript 17 May 2019, p 77-80

unnecessary risk to the organisation."[465] None of this rationale addressed the key point of standardisation of the coal line fleet (dual voltage locomotives) and interoperability. The CSR locomotive in the 95 procurement was a class 20 locomotive, which is less powerful. The benefits of standardisation offered by a confinement to Mitsui were for all intents and purposes negated.[466] Furthermore, the estimated price of R34.34 million per locomotive in the original version[467] was qualified by the addition of "which will be used as a guide as is dependent on forex fluctuation",[468] adding an uncertainty and variable to the price, in that it allowed for a fluctuation in the price of the imported content of the locomotive.[469]

334. Mr Callard was of the view that the amendments to his memorandum were intended to mislead the board that the confinement to CSR was in order when in fact the requirements for confinement were not met and the locomotives to be procured from CSR were not suited for use on the coal export line.

335. Mr Gama, then the CEO of TFR and the end-user of the procurement, testified that, contrary to the requirements of the Procurement Procedures Manual ("the PPM"), he was not initially informed of the amendment of the memorandum or the replacement of Mitsui by CSR, nor asked to give input on the revised business case or to motivate the change on behalf of TFR.[470] He said that he learnt of the change for the first time shortly before the BADC meeting of 24 January 2014, "was not party to the unilateral amendment" and did not sign the altered memorandum

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[465] Annexure FC 8, Exh BB4(a), FQC-201

[466] Transcript 17 May 2019, p 67, line 15

[467] Annexure FC 5A, Exh BB4(a), FQC-148

[468] Annexure FC 14, Exh BB4(a), FQC-263

[469] Transcript 17 May 2019, p 97, line 20

[470] Para 15.1.5 of the PPM requires a submission for confinement to be motivated by the end-user; Transcript 11 May 2021, p 332, line 15; and Transcript 9 March 2021, p 252

(Annexure FC14) submitted to the board.[471] He assumed that the changes to the memorandum had been effected by Mr Singh on 21 January 2014. The altered memorandum was signed by Mr Singh that day and by Mr Molefe on the next day, 22 January 2014. Mr Singh denied that he effected the change to the memorandum but accepted that he probably acted on the direction of Mr Molefe to instruct a subordinate in procurement (probably Mr Pita) to do so.[472]

336. On 23 January 2014, prior to the board meeting of the next day, Mr Callard addressed an email to Mr Gama and Mr Jiyane complaining that the revised memorandum undermined the rationale of the procurement – speedy delivery of powerful, heavy haul class 19E locomotives with Toshiba T-Ethernet interoperability. The equivalency of power and interoperability was at the heart of the business case. The CSR class 20E locomotive was not a powerful heavy haul locomotive. Its acquisition would mean that locomotive calculations would no longer hold resulting in the MDS volume targets being at risk. The CSR class 20E locomotives could also not interoperate with the existing 19E locomotives.[473]

337. Mr Callard received no written response to his email but he spoke to Mr Jiyane on the phone and told him that the alteration of the business case would result in unsuitable locomotives being procured. On the afternoon of 23 January 2014, Mr Singh sent an email to Mr Gama seeking his signature on the submission to the board. Mr Gama replied later that day advising Mr Singh that the submission was "a mess" and needed to be withdrawn because the CSR class 20E locomotive was not a heavy haul locomotive, was less powerful than the 19E and was not

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[471] Transcript 11 May 2021, p 323-324; Transnet-07-250.152; Annexure FC 14, Exh BB4(a), FQC-267; and Transcript 28 May 2021, p 171-172

[472] Transcript 28 May 2021, p 171-174; Annexure FC 7A, Exh BB4(a), FQC-161 reflects the initials "GP" (Mr Garry Pita) on the revised edition.

[473] Annexure FC 9, Exh BB4(a), FQC-216

interoperable. He also noted that while CSR could make additional locomotives in China quickly to mitigate against MDS volume loss, this would be counter to Transnet's localisation strategy.[474] The import of Mr Gama's email is that he had grasped the implications of the concerns raised by Mr Callard and was conveying them to Mr Singh in anticipation of the upcoming BADC and board meetings scheduled for the next day. Mr Gama testified that he agreed with Mr Callard and did not support the confinement to CSR. That, he said, was why he ultimately did not sign the memorandum presented to the BADC and the board.[475] The next morning, 24 January 2014, at 07:02, Mr Singh replied to Mr Gama in an email[476] suggesting that they discuss it later that day. Prior to that, at 07:00, Mr Singh had forwarded Mr Gama's email to Mr Molefe in an email stating: "FYI".[477]

338. Later that morning, just before the BADC meeting, Mr Singh, Mr Gama and Mr Molefe met in Mr Molefe's office to discuss the matter. Mr Singh testified that Mr Gama was not opposed to the confinement to CSR and indicated at the meeting that his concerns were resolved to his satisfaction,[478] as confirmed by the fact that Mr Gama subsequently attended the BADC and board meetings and did not raise any issues.[479] Mr Gama justified his silence on the basis that as a partial attendee at the meeting he was inclined to give advice only if it was asked of him and implausibly intimated that despite being the CEO of TFR (the end-user) he spoke only when spoken to.[480] Although Mr Gama's signature is not on Annexure FC14,[481] the amended memorandum submitted to the BADC and board, Mr Singh

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[474] Annexure FC 10, Exh BB4(a), FQC-219

[475] Transcript 11 May 2021, p 324-327; and Transnet-07-250.153, para 51

[476] Annexure FC 11, Exh BB4(a), FQC-222

[477] Transcript 17 May 2019, p 125

[478] Transcript 28 May 2021, p 183, line 5

[479] Transcript 28 May 2021, p 177

[480] Transcript 11 May 2021, p 338

[481] Annexure FC 14, Exh BB 4(a), FQC-267

claimed that Mr Gama eventually signed another version of the altered memorandum.[482] No such document is on record. Nonetheless, Mr Gama's acquiescent stance at the BADC and board meetings indicates that he ultimately was prepared to live with the decision to confine the procurement to CSR rather than Mitsui. He certainly did nothing to manifest his opposition.

339. The BADC met at 11h50. The meeting was chaired by Mr Sharma and attended *inter alia* by Mr Molefe, Mr Singh and Mr Pita, with Mr Gama and Mr Jiyane in partial attendance. The minutes reflect that management informed the BADC that a 26 ton heavy haul locomotive by CSR would perform better than a class 19E locomotive by Mitsui and CSR would deliver faster than Mitsui. Mr Sharma stated that the previous submission was withdrawn prior to the commencement of the 27 October 2013 meeting due to concerns raised in the media that Mitsui had benefited from two confinements since 2006. It was said that Transnet had never confined to CSR and therefore there would be no adverse publicity. CSR had the capacity to produce five locomotives a day and thus could produce 100 locomotives within a short space of time. Assurance was given to the BADC that the confinement had been audited by Transnet Internal Audit ("TIA"). The BADC then resolved to recommend to the board the procurement by means of confinement to CSR of the 100 electric locomotives at an estimated cost of R3.8 billion (excluding borrowing costs).[483] The special board meeting later that day (attended by Mr Molefe, Mr Singh and Mr Gama) accepted the recommendation and rationale of the BADC.

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[482] Transcript 28 May 2021, p 178, line 15 *et seq*; and Transcript 28 May 2021, p 12, line 5

[483] The estimated cost of R3.8 billion (excluding borrowing costs) was the standard ETC which by virtue of the exclusion of only borrowing costs, would normally be understood to include inflation, escalation and forex - Transcript 17 May 2019, p 155, line 15.

The flawed rationale for the confinement

340. While the claim that CSR could produce and deliver locomotives faster than Mitsui might have had some truth, management failed to disclose that expedited production would have to take place wholly in China (not in keeping with localisation objectives) and at that stage CSR had delivered no locomotives to Transnet.[484] Moreover, not confining to Mitsui on grounds of adverse publicity was not a sound reason. If the PPM grounds for confinement were met, which was the case, Transnet should have gone ahead with the confinement. If the process of confinement was the problem causing reputational risk, and no good grounds for confinement existed, Transnet should have resorted to an open tender.[485] Thus management misled the BADC by creating the impression that: i) a 26 ton heavy haul CSR locomotive existed when in fact that was not the case; ii) using CSR would be faster, but in fact would have negated local content requirements; and iii) the confinement was in compliance with the PPM when in fact no previous CSR product had been delivered to Transnet. Lastly, there was in fact no internal audit report.[486]

341. In his evidence Mr Molefe maintained that a heavy haul CSR locomotive did in fact exist or that CSR had the capacity to produce one.[487] Mr Singh also argued that the CSR class 21E was interoperable.[488] These assertions are not sustainable in that, as discussed later, Transnet eventually agreed to pay an additional R347 million for

[484] Transcript 17 May 2019, p 146-154

[485] Transcript 28 May 2019, p 144-146

[486] On 23 January 2014, Mr Andre Botha of TIA addressed an email (Annexure 13A, Exh BB4(c), FQC-sup-09) to Mr Singh and Mr Pita indicating that "in view of the urgency of the matter" TIA was prepared to give an "in principle assurance" that TIA was satisfied with the process. This intimates that no substantial audit was done, beyond a "reading of the memorandum in its own right without reference to any of the background context of the changes and/or processes which it followed"- Transcript 17 May 2019, p 153

[487] Transcript 9 March 2021, p 201-202 and p 212

[488] Transcript 28 May 2021,p 202

the CSR locomotive specifications to be modified so that they were suitable for heavy haul.

342. Mr Gama testified that Mr Molefe later informed him that Mr Sharma, in particular, was strongly opposed to a confinement to Mitsui, and the BADC supported him.[489] The minutes[490] make no reference to any of the matters raised by Mr Callard. Mr Molefe confirmed in his evidence that despite the concerns being known to him, Mr Singh and Mr Jiyane, they were not raised or discussed.[491] As mentioned, Mr Gama raised no objection.

343. The rationale for the confinement to CSR remained one of urgency.[492] The original pretext for confinement (standardisation, compatibility and the prior supply of identical goods) was weakened by the fact that the benefits accruing to a confinement to Mitsui did not apply in a confinement to CSR. The need for new production lines, a design review and crew training reduced the prospect of meeting the requisite urgency. The justification of urgency was further undermined by the fact that CSR intended to supply class 20E locomotives, which required additional modifications to enable them to interoperate with the existing class 19E locomotives that had been supplied by Mitsui earlier.[493]

344. Subsequent to the approval of the confinement, Transnet's technical design team engaged with CSR to create new prototypes, revised the specifications for the RFP and made design changes necessary to make the class 20E electric locomotives fit

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[489] Transcript 11 May 2021, p 339-341; and Transnet-07-145

[490] Annexure FC 13, Exh BB4(a), FQC-232, para 5.2

[491] Transcript 9 March 2021, p 211, line 17

[492] Annexure FC14, Exh BB4(a), FQC-245, para 6; and FQC-256, para 68 *et seq*

[493] MNS 100 Report, Transnet-Ref-Bundle-08574

for purpose for the heavy haul coal line operations.[494] The modifications included: i) a continuous tractive effort of 311 kN at 34km/h, with a wheel tread with adhesion of 30% maximum; ii) locomotive Bo-Bo axle mass limited to a maximum of 26 tons per axle; and iii) locomotives to be fitted ECPB/WDT interoperable with class 19E locomotives.[495] The price of the CSR locomotives was later increased by R347 million to provide for the modifications to produce a "class 21E" locomotive.[496]

345. The rationale justifying the decision not to confine the procurement to Mitsui but to favour CSR therefore does not stand up to scrutiny. Management misled the BADC and the board on 24 January 2014 with spurious motivations and false or misleading statements. The conduct was a breach of fiduciary duties on the part of Mr Molefe, Mr Singh, Mr Gama and Mr Jiyane and a contravention of sections 50 and 51 of the PFMA. Their conduct was part of an evident pattern to favour CSR by means of an unjustifiable confinement of the procurement of the 100 locomotives to it.

346. However, Mr Molefe may have had legitimate concerns about the performance of the Mitsui locomotives. Mr Frikkie Harris, Program Manager (Capital Programs) wrote to Mitsui on 19 February 2013 (some months before the procurement of the 100 locomotives) notifying it of certain defects in some of the components of the Mitsui locomotives.[497] Mr Molefe testified that the "failings" had been brought to his attention prior to his decision to change the confinement to CSR.[498] No evidence was presented on the precise nature of the defects and whether they provided good cause not to procure further from Mitsui. Additional correspondence

[494] Transnet-07-250.169, para 77.1; and Annexure FC 15, Exh BB4(a), FQC-269

[495] Transnet-Ref-Bundle-08663

[496] See Table A in the MNS 100 Report, Transnet-Ref-Bundle-08581

[497] Transnet-05-114.9

[498] Transcript 10 March 2021, p 8, line 10-20

submitted by Mr Molefe reveals that during 2014-2015 the traction motor nose bracket bolts of the Mitsui Class 19E locomotives failed during in-service operations and rendered the locomotives unsafe and at risk of derailment.[499] Other correspondence in late 2015 indicates that various failures had led to "sub-optimal performance" of the locomotive fleet on the coal line with the result that the plan to cascade some of the locomotives from the coal line to general freight business ("GFB") could not be fully implemented.[500] These defects arose after the tender of the 100 locomotives had been awarded to CSR and Mr Molefe would not have been aware of them at the time of the award.

347. It thus seems that the decision not to procure further locomotives from Mitsui, although motivated by suspect intentions, may have been a good idea.[501] However, that does not avoid the other criticisms of confining the procurement to CSR. If Mitsui was an unsuitable OEM, then the standardisation rationale and benefits of confinement did not apply. If no good grounds for confinement existed, Transnet should have resorted to an open tender. Instead, key individuals resorted to a confinement with the aim of inappropriately favouring CSR, most likely with the intention to favour the Gupta enterprise.

348. In a letter dated 25 February 2014 addressed by Mr Molefe to Mr Wang Pan of CSR, Mr Molefe reiterated the need for expeditious delivery as a priority commencing latest September 2014 with completion by March 2015. He also noted

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[499] Transnet-05-114.6

[500] Transnet-05-114.4

[501] Mr Singh testified to other difficulties in the relationship with Mitsui. There were delays in commissioning and contractual disputes about late delivery which impacted on volumes – Transcript 28 May 2021, p 205-211

that supplier development was a non-negotiable suspensive condition and had to meet or exceed 70% as measured in the SD value summary.[502]

349. The Locomotive Supply Agreement ("the LSA") for the 100 locomotives was concluded with CSR on 17 March 2014, the same day as the contracts for the 1064 locomotives. The price per locomotive was R43.8 million. The payment terms stipulated that 30% of the total contract price was payable at the effective date (signature) of the contract, an additional 30% at the date of the design review finalisation and 37% on the date of issue of an acceptance certificate - leaving 3% as retentions for the post delivery period. That meant 60% of the price would be paid before the delivery of any locomotive.

350. The CSR proposal and the contract did not comply with the urgent delivery schedule required by the RFP, which stated that expeditious delivery for acceptance testing was a priority commencing latest September 2014 with completion by March 2015. The initial confinement rationale of October 2013 justified confinement on the basis that the 100 locomotives needed to be delivered within 12 months, i.e. during 2014. CSR initially undertook to deliver 40 locomotives manufactured in China between February 2015 and June 2015 and to deliver the balance of 60 manufactured in South Africa between June and September 2015. In terms of the LSA, the parties agreed to deliver the locomotives between June 2015 and November 2015.[503] This delivery schedule did not give effect to the urgent needs of the coal line and the entire rationale of the urgent confinement two years earlier in 2013.[504]

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[502] Transnet-Ref-Bundle-08663

[503] Fundudzi Loco Report, paras 5.8.20-5.8.28

[504] Exh BB4(a), FQC-016, paras 68-73

351. In June 2014, it became apparent that the procurement of the 95 locomotives from CSR had been delayed and this had a knock-on negative effect on the delivery of the 100 class 21E's by CSR. The rationale of the confinement of the 100 locomotives to CSR to protect the MDS volumes by the accelerated acquisition of the 100 locomotives was thus thwarted. Mr Gama accordingly addressed a memorandum[505] to Mr Molefe recommending that approval be granted to negotiate delivery with CSR on the premise of 100% imported content for the 100 class 21E locomotives, in other words that the locomotives be fully assembled in China. This proposal does not appear to have been approved.

352. It is not clear when exactly the class 21E locomotives were in fact delivered, but it can be accepted that the delays negated the entire raison d'etre of the project. The confinement to CSR was flawed in concept and execution. The motivation to use CSR based on its supposed production capacity in China at a time when it had yet to deliver a working locomotive to Transnet did not meet the rationale for and the requirements of procurement by confinement. CSR offered various excuses for the delay.[506] The essential point, though, is that the delays undermined the rationale for the confinement.

353. CSR also did not comply with the 70% (mandatory and non-negotiable) SD requirement.[507] Regulation 9(1) of the PPPFA Regulations of 2011 makes it mandatory for organs of state, including Transnet, when issuing RFPs for designated sectors to make it a condition for bidders to comply with minimum local production and content requirements for designated sectors. National Treasury Instruction Note of 16 July 2012 prescribed the minimum local production content

[505] Annexure FC 20, Exh BB4(a), FQC-300

[506] SEQ 43/2019, para 109 *et seq*

[507] MNS 100 Report, Transnet-Ref-Bundle-08576, para 1.4.4.

for the procurement of electric locomotives as 60%. Contrary to these provisions, the RFP for the 100 electric locomotives did not state that CSR was required to comply with the 60% local production and content threshold.

354. The local content information sheet submitted by CSR[508] indicates that the local content percentage was 15%. The total imported content of the 100 locomotives was valued at R3.723 billion, while the localised content was valued at R657 million, giving a total value of R4.370 billion of which only R657 million represented localised value. Although 60 of the locomotives were manufactured in South Africa, it appears from the local content information sheet that most of the components of the locomotives (car body, bogie, coupling equipment, suspension, AC traction motors, electric systems, facilities and the design) were imported and assembled here. The failure to meet the localisation production and content was an irregularity, confirming again that CSR was inappropriately favoured and accommodated.[509]

The excessive and unsecured advance payments

355. The upfront payment of 60% of the purchase price in respect of the 100 locomotives was unusual and not in line with past practice. This resulted in R1.32 billion being paid to CSR by Transnet before a single locomotive was delivered, suggesting again that CSR was unduly favoured and that Mr Molefe and the other officials involved in concluding this contract acted in breach of their fiduciary duties and in contravention of section 50 and 51 of the PFMA.[510] The norm in paying deposits was in the region of 10% with the balance being paid on delivery

[508] Transnet-Ref-Bundle-08666

[509] CSR without much in the way of substantiation maintained that it complied with the SD requirement – SEQ 43/2019, para 117

[510] Transcript 17 May 2019, p 185 *et seq*; and Exh BB4(a), FQC-014, paras 60-63

of the locomotives. By comparison, the upfront payment to Mitsui for the earlier procurement of 110 19E locomotives was 7.8% and the advance payment to CSR for the 95 locomotives was 10%.[511]

356. Moreover, CSR did not furnish requisite security in respect of the advance payments. Clause 1.2.2 (b) of schedule 1 to the LSA concluded between Transnet and CSR on 17 March 2014 provided that no milestone payment would be due without an advance payment guarantee ("APG") as a form of security against the default of CSR of its obligations under the contract. Correspondence in October 2014[512] confirms that Mr Jiyane authorised advance payments to CSR without an APG. Transnet paid two advance payments of 30% of the contract price in two instalments of R1 505 billion in March 2014 and September - October 2014.[513] These payments (or at least one of them) were made without APGs being in place. Further investigation is required to determine if any official of Transnet acted in contravention of sections 50(1)(a) and 50(1)(b) of the PFMA and committed an offence in terms of section 86(2) of the PFMA by wilfully or in a grossly negligent way failing to comply with these provisions.

The increase in the price of the 100 locomotives

357. On 24 January 2014 the board approved the procurement of the 100 locomotives from CSR at an ETC of R3.871 billion. On 17 March 2014 Transnet signed the LSA with CSR for the supply of the 100 locomotives at a price of R4.840 billion (R48.4 million per locomotive) - an increase of R969 million. When asked during his testimony whether it would not have been more appropriate to have sought the approval of the board for the approximately R1 billion (R969 million) increase

[511] Exh BB4(a), FQC-014, para 61; and Transcript 17 May 2019, p 188, line 15 *et seq*

[512] Transnet-Ref-Bundle-08686

[513] Exh BB13(a), HJW-0006, paras 22-23; and Annexures HJW 4, HJW 4(a) and HJW 4(b)

before signing the LSA, Mr Singh argued that the board on 24 January 2014 had delegated the power to Mr Molefe as GCEO to negotiate and conclude the procurement.[514] The prudence of such an approach in a transaction of this magnitude is questionable. It minimised the board's oversight function in relation to major expenditure (later shown to be tainted by substantial corruption). The board was presented with a fait accompli in respect of which it had little option but to ratify.[515]

358. The negotiations around price were conducted during February-March 2014 at the offices of the law firm Webber Wentzel. The negotiations were co-chaired by Mr Singh and Mr Jiyane who reported to the Locomotive Supply Committee. Mr Yusuf Laher was part of the financial support team.[516] The memorandum that served before the board on 24 January 2014, priced the 100 locomotives in JPY rather than USD.[517] This was anomalous in that CSR was a Chinese company and usually priced in USD. The final cash flow was priced in USD.[518] The JPY pricing was probably the result of the original proposal involving Mitsui, a Japanese company.

359. During the price negotiations Mr Singh requested Mr Laher to prepare a "reasonability calculation" of what the expected price would be for the 20E locomotives. The calculation[519] commences with a base price of R28 860 000 per locomotive. This price represented a 50/50 local and foreign content = ZAR14 430 000 plus USD 1 950 000 x 7.4 (ZAR/USD exchange rate). The

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[514] Transcript 28 May 2021, p 231-232

[515] Transcript 28 May 2021, p 232-233

[516] Exh BB4(f).2, YL-Resp-004-009, paras 19-42; and Transcript 21 October 2020, p 65 *et seq*

[517] The base price per locomotive was stated to be R34.34 million (2013-14) being JPY385 million at ZAR/JPY 0.09823

[518] Annexure FC17, Exh BB4(a), FQC-276-277

[519] Annexure YL 24, Exh BB4(f).2, YL-Resp-045

applicable exchange rate (7.4) was that applied by CSR.[520] Mr Laher added an additional R4 416 750 to the base price as a backward looking forex adjustment. It is not clear what exchange rate he used for that purpose. He then added various amounts for escalations, hedging costs, set up costs, variations (to change the 20E locomotive to a 21E locomotive) and options. He arrived at a price of R41 million per locomotive including options (but not contingencies). CSR pushed for a price of R48 million per locomotive. Mr Laher thought that CSR incorrectly used a high exchange rate[521] - ZAR/USD rate of 10.9 (and not 7.4) - which increased the USD portion of the base price from R14 430 000 to R21 255 000. Mr Laher's calculation (at 7.4) increased the USD portion of the base price from R14 430 000 to R18 846 750 (R14 430 000 plus R4 416 750). The rate used by CSR added R2.4 million per locomotive (R241 million to the total base price). According to Mr Laher, Mr Singh was not concerned about this and told him it was the overall price and the final result of the negotiation that was important.

360. Mr Singh then involved Mr Laher in the preparation of a memorandum for Mr Molefe to present to the board in May 2014 explaining the increase in the price. He was told to prepare a (walk forward) calculation from the business case price (R3.87 billion) to the final contracted pricing (R4.840 billion). Mr Singh instructed Mr Laher to take the price per locomotive in the business case of R34 million per locomotive and to add and subtract any elements that impacted that price in order to end up at the final contract price of R48.4 million per locomotive.

361. The assumptions used in the business case involved a ZAR/JPY rate of 0.09823 and the base price in the business case was based upon the price obtained from

[520] It is not clear why that rate was used. It seems to be the prevailing rate at the date of the bid for the 95 class 20E electric locomotives.

[521] Annexure YL 24, Exh BB4(f).2, YL-Resp-045

Mitsui in May 2013. The price was then escalated for the JPY movement from the date of the submission of the business case to the board (24 January 2014) to the date of contracting (17 March 2014) in order to show the impact of the change in the ZAR/JPY rate in the business case price. Mr Laher performed the calculation accordingly. As for escalations, Mr Singh directed Mr Laher to escalate the price (for inflation) not from the date of the business case submission to the board (24 January 2014) but from May 2013 because the base price was supposedly based on information at that date. He thus provided for backward looking escalations for the period May 2013 to March 2014 – 10 months instead of two months (January 2014 - March 2014).

362. Mr Singh then provided the guidance for the additional adjustments to price which are reflected in the memorandum submitted by Mr Molefe to the board dated 23 May 2014 explaining the price increase.[522] The memorandum (including the price of R48.4 million per locomotive) was recommended and signed by Mr Molefe, Mr Singh and Mr Gama. On the evidence heard by the Commission, these three officials all had connections with the Gupta enterprise and received substantial cash from it.

363. The purpose of Mr Molefe's memorandum of 23 May 2014 was to request the board to approve the increase from R3.871 billion to R4.840 billion. He justified the increase of R969 million as attributable to: i) an update of the business case for economic impacts (backward looking forex adjustments and escalations) of R495 million; ii) scope change, being additional costs for the variations for higher locomotive specifications to modify the class 20E locomotives to class 21E, in the amount of R347 million; iii) risk mitigation (forward looking forex, escalations and

[522] Annexure YL 25, Exh BB4(f).2, YL-Resp-047

contingencies) in the amount of R373 million; less iv) a negotiated discount of R247 million. He maintained that the final price was comparable to the Mitsui proposal except for the additional R347 million needed to convert the class 20E locomotives to class 21E. This cost would not have been incurred had Transnet procured the class 19E locomotives from Mitsui. However, Transnet had negotiated a discount of R247 million,[523] which mitigated the cost of the modifications. There was still an additional net cost of R100 million incurred for the adaptation.[524]

364. Paragraph 22 of Mr Molefe's memorandum of 23 May 2014 included Table 1 setting out the figures explaining the increase in cost per locomotive.[525] It is best represented as follows:

Base price per locomotive (excl hedging and escalations)	**R34.34 million**
Item A: impact of exchange rate to contract date (backward looking)	R3.69 million
Item B: impact of inflation to contract date (backward looking)	R1.26 million
Item C: additional cost for modification of the locomotives	R3.47 million
Item D: cost for fix escalations (forward looking)	R2.63 million
Item E: foreign exchange hedging (forward looking)	R1.08 million

[523] Annexure YL 25, Exh BB4(f).2, YL-Resp-049, para 22(g)

[524] Annexure YL 25, Exh BB4(f).2, YL-Resp-055, para 48

[525] See Table A in the MNS 100 Report, Transnet-Ref-Bundle-8581

Item F: discount negotiated	-R2.47 million
Final contracted price per locomotive	**R44 million**
Item G: 10% contingencies (capital spares, variations and options)	R4.4 million
Proposed ETC per locomotive	**R48,4 million**
Proposed ETC for 100 locomotives	**R4,840 billion**
Business case	R3,870 billion
Increase:	**R969.28 million**

365. Mr Molefe explained that the submission prepared in January 2014 for the board was based on economic forecasts obtained in May 2013.[526] There is no explanation for why the original figures had not been updated to January 2014 when the board approved the total price of R3.871 billion. If there were good reasons for relying on historical figures from May 2013 they ought to have been disclosed. There was some degree of disclosure in the memorandum of 21 January 2014 where it was cryptically stated: "The 100 electric locomotives are summarised below and are based on previous experience with the class 19E contract".[527] The figures used there were those proposed by Mitsui in May 2013.

366. In the memorandum of 23 May 2014 Mr Molefe addressed each item of price increase in Table 1 and provided elucidation of the reasons for the adjustment. Mr Alistair Chabi, the actuary employed by MNS, analysed those reasons, interrogated

[526] Annexure YL 25, Exh BB4(f).2, YL-Resp-050, para 23

[527] Annexure YL 23, Exh BB4(f).2, YL-Resp-039

the figures and concluded that an increase in the amount of R969.28 million was unjustifiable as some of the cost items were either incorrect or inflated.[528]

367. During his evidence, Mr Molefe, without much in the way of substantiation, dismissed Mr Chabi's conclusions as "rubbish". He essentially maintained that risk specialists would differ in making valuations as estimation was an art not a science.[529] Whatever the merit of that observation, Mr Chabi's analysis certainly reveals that some of the assumptions deployed by Mr Molefe unnecessarily inflated the price. Moreover, it is important to emphasise that despite being directed on 12 November 2020 in terms of Regulation 10(6) of the Regulations of the Commission to deal with Mr Chabi's opinion that the increase in ETC was unjustified, Mr Molefe did not deal with the issue in his affidavit filed with the Commission or in his testimony.[530]

368. Mr Chabi firstly maintained that the base price of R34.34 million per locomotive in Table 1 of Mr Molefe's memorandum was incorrect. In its proposal addressed to Mr Molefe on 28 February 2014, CSR reflected its base price as R28.86 million per locomotive.[531] The proposal letter included a table setting out the walk forward from R28.86 million to R49 158 426 taking account of the forex, escalation and modification adjustments to the base price. Thus, the base price per locomotive used by CSR (and Mr Laher) was R28.86 million. Mr Chabi accordingly accepted R28.86 million as the correct starting point and adjusted it (the April 2012 base price) for inflation and foreign currency movements from April 2012 to May 2013,

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[528] Transcript 4 December 2019, p 83-102; and MNS 100 Report, Transnet-Ref-Bundle-8580 *et seq*

[529] Transcript 9 March 2021, p 225-227

[530] Transcript 9 March 2021, p 229-230 - Mr Molefe deals with the procurement of the 100 locomotives in paras 40-50 of his affidavit at Transnet-05-035 without addressing Mr Chabi's adverse findings against him.

[531] Transnet-Ref-Bundle-8706

and arrived at a revised base price of R30.95 million.[532] This calculation reduced the price per locomotive by R3.39 million and the price for the entire 100 procurement by R339 million.[533]

369. Mr Singh contended in his testimony[534] that Mr Chabi's calculation was fundamentally flawed mainly because he used the "incorrect base price" of R28.86 million per locomotive, which was the CSR 95 locomotive price. This, he said, was untenable for commercial, technical and logical reasons because the 100 locomotives procured were 26 tons per axle and thus distinct from the 95 Class 20E already procured which are 22 tons per axle. The correct base price per locomotive, he argued, was that provided for in Table 1 of Mr Molefe's memorandum of 23 May 2014, namely R34.34 million per locomotive which was the amount quoted by Mitsui in its proposal of 13 May 2013.[535] Mr Singh's contention is not sustainable for a few reasons.[536] First, and perhaps most importantly, and as just mentioned, CSR in its proposal submitted to Mr Molefe in February 2014 based its walk forward price on a base price of R28.86 million per locomotive.[537] Table 1 made an allowance for a modification cost of R3.47 million per locomotive or R347 million for the entire 100 locomotives. To start off with the price quoted by Mitsui for locomotives that required no modification and then to make allowance for an additional R3.47 million per locomotive for modification is double dipping. Mr Singh, as a chartered accountant, would know this.

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[532] MNS 100 Report, Transnet-Ref-Bundle-8583, para 2.3.3.1

[533] The figure of R30.95 million per locomotive is made up of R28.86 million – the April 2012 base price, plus FX adjustment of R1.2 million plus inflation (April 2012 – May 2013) of R0.89 million.

[534] Transcript 31 May 2021, p 136; and Transnet-05-1467, paras 161-169

[535] Transcript 31 May 2021, p 136; and Transnet-05-1468, para 165

[536] See Transnet-05-1790, paras 12-19

[537] Transnet-Ref-Bundle-08706

370. The inflation of the base price, as said, added R339 million to the overall price, which again possibly advanced the money laundering agenda in that it might have provided excess funds to finance the kickbacks to the Gupta enterprise.

371. Mr Molefe justified Item A in Table 1, the backward looking forex adjustment of R369 million per locomotive, on the ground that the ZAR had depreciated by 10.74% against the Japanese Yen ("the JPY"). While he accepted that allowance had to be made for foreign exchange movements between May 2013 and March 2014, Mr Chabi maintained that Mr Molefe's figure was incorrect. Exchange rates obtained from the SARB website show a 3.51% (and not 10.74%) depreciation of the ZAR against the JPY from 0.1015 to 0.1051 per JPY. Secondly, the requirement of the NT Instruction Note that there be 60% local content / 40% foreign content (CSR's bid irregularly provided a 15/85 split), taken with the correct ZAR/JPY rate, meant that R0.43 million per locomotive was the correct adjustment. Mr Molefe's Item A figure of R369 million thus overstated the cost by R3.26 million per locomotive and the ETC by R326 million. The figure, of course, would be different if the local/foreign content of 15/85, as was in fact the case, was taken into account. However, the figure of 15/85 local/foreign content contractually concluded was irregular in terms of the NT Instruction Note.

372. Mr Singh challenged Mr Chabi's methods and use of the JPY in his forex calculations in relation to Item A. He contended that the exchange rate used by Mr Chabi to adjust the base price was flawed in that he used the JPY to adjust the CSR price that was based in USD when there was no logical or commercial reason to do so.[538] Mr Singh's complaint about the use of the JPY was disingenuous considering that in the memorandum of 23 May 2014 he attributed the change in

[538] Transnet-05-1468, paras 166-169

the expected price of the locomotives to the depreciation of the ZAR against the JPY. Mr Chabi did not choose the JPY as the basis of his calculations. Mr Singh did. Mr Singh also failed to offer clarity about which was the appropriate currency to use. In relation to Item A of Table 1, Mr Singh and Mr Molefe stated:

> "Foreign exchange rates: The rand has depreciated by 10.74% against the Japanese Yen. This has impacted the expected price of the locomotive as per the business case and ultimately the Estimated Total Cost (ETC) as approved by the Board by approximately 10.74%. Consequently, the additional 10.7% per A in Table 1 above is reasonable." [539]

373. Mr Chabi was concerned about the reference to the ZAR/JPY impact in the memorandum because CSR had referred to the ZAR/USD impact. For that reason he looked at two scenarios: ZAR/JPY and ZAR/USD. Using the ZAR/USD rate the total price would have been R4.478 billion, still R362 million less than the final price submitted to the board.[540]

374. Mr Chabi was of the opinion that the backward looking impact of inflation (Item B of Table 1) was understated by Mr Molefe. The base line price (as adjusted) of R30.95 million per locomotive made no provision for inflation between May 2013 and March 2014. Mr Molefe recorded that local producer price index in South Africa increased on average by 6.4% for the period thus affecting the locally sourced scope of the project. Foreign equivalent indices increased on average by about 1.3% to 2.5%. Having regard to increases to the cost of labour and steel, Mr Molefe provided for a net 3.7% increase of the backward looking ten-month period. Mr Chabi relied on the producer price index provided by Statistics South Africa of 7.42% and the OECD rate for Japan of 1.01% and applied a local/foreign ratio of

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[539] Paragraph 24(a) of the memorandum of 23 May 2015

[540] Exh BB8(b).2, AOC-100-020, para 5.34; and Transnet-05-1791, para 25; see also Transnet 05-2418, para 220

60/40 to reach a weighted average of 4.86% ((60% of 7.42%) = 4.5% + (40% of 1,01%) = 0.4%). A weighted average of 4.86% backward looking inflation computed at a cost of R1.5 million per locomotive rather than R1.26 million as provided by Mr Molefe under Item B, thus increased the adjusted base price by an additional R240 000 per locomotive.

375. Mr Chabi did not take issue with the computation of the modification cost for upgrading the locomotives from class 20E to class 21E (Item C) and accepted the figure of R3.47 million per locomotive (adding R347 million to the total ETC) in Table 1.

376. Mr Chabi believed that Item D (forward looking escalation/inflation impact) in Table 1 was overstated by R0.71 million per locomotive. In the memorandum Mr Molefe justified the increase of R2.63 million per locomotive as follows. Cash flow certainty is of paramount importance to Transnet for the purposes of long term planning and the managing of its key financial metrics such as gearing and the cash interest cover. Credit agencies and bondholders support Transnet fixing its escalation exposure and conservative risk appetites. After considering various inflationary trends, Mr Molefe accepted that a CPI of 6% (which excluded a premium for risk) escalated for 18 months resulted in a 9% increase which justified a 7.7% adjustment for item D. He believed that the high level of local content (60%) made local indices more applicable for the cost escalations going forward. In reaching this conclusion, Mr Molefe relied on the methodology and techniques proposed by Regiments.[541]

377. There are three factors that impact on Mr Molefe's calculation of item D that contribute to it being an overstatement. Firstly, an escalation rate of 6% should not

[541] Annexure YL 25, Exh BB4(f).2, YL-Resp-050, paras 51-65

be applied to the foreign component which was subject to Japanese economic conditions since it was quoted in JPY. Secondly, the local content was not 60% but was in fact irregularly quoted at 15%. Thirdly, the cost should not have been escalated over 18 months, but should have taken account of the staggered delivery schedule. The memorandum of 23 May 2014 noted that the first locomotives would be delivered in January 2015 and the last in September 2015.[542] Mr Chabi assumed it was more reasonable to project a uniform distribution in the delivery of the locomotives of 13 locomotives per month for six months and nine locomotives in September 2015. Thus, the March 2014 price (before forward escalations and forex) per locomotive needed to be escalated only to the date of delivery. Mr Chabi then applied a weighted average rate for PPI (6% to local content of 60% and 2% to 40% foreign content) being 4.4% and arrived at a total forward escalation cost of R1.92 million per locomotive which is R0.71 million less than R2.63 million provided in Item D of Table 1 (R71 million less in the ETC). Given that the local/foreign content may have been 15/85, the lesser amount calculated by Mr Chabi may also have been an overstatement.

378. Mr Molefe's treatment of the forward forex risk (Item E) was inconsistent in that it was based on the ZAR/USD rather than the ZAR/JPY rate. As the ZAR/JPY had appreciated in the relevant period, it is questionable whether the adjustment is justified. However, Mr Chabi (given the lack of clarity on the exchange rate definition and the levels assumed) was prepared to accept that the cost of R1.08 million per locomotive (R108 million added to the ETC) was justifiable on a ZAR/USD basis.

[542] Annexure YL 25, Exh BB4(f).2, YL-Resp-050, para 17

379. If one allows for the adjustments proposed by Mr Chabi to the base price, the backward looking forex and escalations and the forward looking escalations, and assume that the discount of R2.47 million per locomotive (Item F) represented 5% of the total cost of a locomotive, it is justifiable to allow for a proportionately lower amount of R2.09 million as a discount; being R380 000 less per locomotive (R38 million in ETC). Likewise, the 10% provision for contingencies would reduce from R4.4 million per locomotive to R3.73 million, being R670 000 less.

380. Mr Chabi accordingly concluded that the ETC per locomotive (including contingencies) was in fact R41 million per locomotive (base price R30.95 million; backward looking forex R430 000; backward escalations R1.5 million; modifications R3.47 million; forward escalations R1.92 million; less a discount of R2.09 million, plus contingencies of R3.73 million). Consequently, the figures put before the board unjustifiably increased the price by R7.4 million per locomotive or by approximately R740 million. Further investigation is required to determine if any board member and/or official of Transnet contravened section 50 and 51 of the PFMA and acted wilfully or grossly negligently in this regard so as to have committed an offence in terms of section 86(2) of the PFMA.

Payments to the Gupta enterprise Cand transgressions related to the procurement of the 100 locomotives

381. CSR paid a kickback of R925 million on this contract. The payment schedule attached to the email dated 22 August 2015 (discovered in the Gupta-leaks) shows that JJT was to be paid 21% of the total contract value for the 100 locomotives, being R925 million. In August 2016 CRRC signed an addendum varying the terms of the BDSA of 2 January 2015 between CSR and Regiments Asia (who had replaced JJT) in relation to the 100 electric locomotives. The payment schedule

confirmed that as at August 2015 USD107 203 912 had been paid to JJT, part of which related to the 100 locomotives kickback.[543] JJT was not to retain the full amount of the R925 million but only 15%, while at least part of the remaining 85% was to be paid to companies controlled by the Gupta enterprise.[544]

382. The conduct of Mr Singh, Mr Molefe and Mr Jiyane in favouring CSR above Mitsui and undermining the rationale of the original confinement gives rise to reasonable grounds to believe that they may not have acted in the best interests of Transnet, acted prejudicially in relation to its financial interests and thus contravened sections 76(1) and (3) of the Companies Act and sections 50 and 51 of the PFMA. Mr Gama's supine acquiescence in the ultimate decision is equally questionable. The failure to alert the board about Mr Callard's concerns amounted to non-disclosure of material information and a failure to act with integrity in the financial affairs of Transnet. Submitting a misleading memorandum on the escalation of the price was also a breach of these provisions. The submission of the memorandum to the board recommending confinement also breached the PPM.

383. The obvious favouring of CSR and the evidence regarding the kickbacks point towards corrupt activity relating to procuring a tender in violation of section 12 of PRECCA. The conduct associated with the conclusion of the BDSA provides reasonable grounds to believe that the offences of corruption as contemplated in Chapter 2 of PRECCA, and racketeering and offences related to the proceeds of unlawful activities may have been committed by Mr Essa, his associates in the Gupta enterprise and the persons who concluded the BDSA on behalf of CSR.

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[543] FOF-06-193, paras 54-60

[544] FOF-06-196, para 60

384. These findings are to the effect that there are reasonable grounds to believe that board members (Mr Molefe, Mr Singh and others), employees (particularly Mr Gama and Mr Jiyane) of Transnet and others violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.4 and involved corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

385. In the light, in particular, of his relationship with Mr Essa, the conduct of Mr Sharma (the Chair of the BADC) in relation to the acquisition of the 100 locomotives warrants further investigation.

CHAPTER 5 – THE PROCUREMENT OF THE 1064 LOCOMOTIVES

Background to the acquisition

386. The business case for the procurement of the 1064 locomotives was developed at TFR during 2011-2012 by a team coordinated by Mr Callard. The acquisition was part of the Market Demand Strategy ("the MDS") plan to grow volumes from 208 million tonnes to 350 million tonnes per annum and GFB in particular from 82.6 million tonnes to 170 million tonnes by 2019. Extending the life of the aging locomotives in the existing fleet was no longer economically cost effective or technologically practical. The business case recommended a programmatic procurement of new locomotives which would create benefits for TE through localisation, technology transfers, development of manufacturing skills and the creation of jobs. The acquisition cost of the 1064 locomotives was stated in the business case to be R38.6 billion. Two thirds of the cost would be financed using cash generated by operations and about R13 billion needed to be raised externally. Delivery of the locomotives was scheduled to take place over seven years.

387. RFPs were issued on 23 July 2012. Transnet then appointed McKinsey in March 2013 (and later other transaction advisors, Regiments and Trillian) to evaluate the business case and assist in the acquisition. The board only approved the business case on 25 April 2013; about nine months after the RFPs had been issued.[545] The Minister of Public Enterprises granted approval for the acquisition on 3 August 2013.[546]

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[545] Transcript 26 April 2021, p 169-183; and Annexure YL 1, Exh BB4 (f)1 , YIL-023

[546] Annexure FC 82, Exh BB4(b), FQC-638

388. Between May 2012 and April 2013 the business case was dealt with by Mr Singh (GCFO) and Mr Mohammed Mahomedy (GM: Capital Assurance and Integration). Mr Callard and Mr Pillay together with others from TFR assisted McKinsey with technical input. Mr Singh performed the key oversight role and Mr Gama as CEO of TFR provided human resources from TFR.

389. The procurement process was initiated by the issuing of RFPs and was followed by the receipt of bids, the tender evaluation stage, the best and final offer ("the BAFO") stage, the post tender negotiations ("the PTN") and ultimately the conclusion of the Locomotive Supply Agreements ("the LSAs"). The evaluation process and BAFO stage endured from May 2013 to January 2014. On 24 January 2014, the BADC and the board split the procurement into four contracts and appointed four OEMs as preferred bidders. The post tender negotiations took place in February 2014 and the LSAs were concluded on 17 March 2014.

390. Mr Jiyane of TFR was the overseer of the procurement process. Six or seven different committees worked on the procurement; each of them had a chairperson. The committees included the commercial stream, the financial stream, the technical stream and the supplier development stream. There were also different cross-functional evaluation teams for finance, commercial and technical. The chairpersons of those committees constituted the tender evaluation team. Each of those then reported to Mr Jiyane. Alongside that was the HVT evaluation team, an independent team of experts with audit and compliance skills, which considered deviations and recommendations. Mr Gama co-chaired the PTN team with Mr Singh, who took the lead role in the negotiations. There was also the Locomotive Steering Committee ("LSC") which was chaired by the GCEO, Mr Molefe. Mr Gama, Mr Singh and Mr Jiyane were also members. There was a sub-committee of the LSC consisting of Mr Molefe, Mr Singh and Mr Gama.

391. During 2012 Transnet issued two RFPs for the locomotives: one for 599 electric locomotives[547] and one for 465 diesel locomotives.[548] The closing dates changed over time and were ultimately extended to 30 April 2013. Both RFPs were issued in two separate parts to enable Transnet to seek an exemption from certain requirements of National Treasury. On 16 July 2012 National Treasury issued an Instruction Note which provided that only bids that achieved the minimum stipulated threshold for local production and content were to be evaluated further. Paragraph 3 of the Instruction Note set the minimum threshold percentage for local content and production for diesel locomotives at 55% and electrical locomotives at 60%. Further evaluation had to be done in accordance with the 90/10 price/B-BBEE preference point system. Transnet wanted to use a different preferential point system in the 1064 locomotive procurement and accordingly decided to split the RFPs into separate documents (Part 1 and Part 2) to afford it an opportunity to obtain an exemption from the Minister of Finance.

392. Part 1 of the RFPs was issued on 23 July 2012. Part 1 dealt with general, technical and administrative information. Part 2 was issued in December 2012 without an exemption having been obtained from the Minister of Finance. Part 2 dealt with the evaluation criteria, evaluation methodology, weightings, etc. It provided for a six-stage evaluation process and a points preference system (in stage 6) with criteria of price/supplier development/B-BBEE on a 60/20/20 basis. Transnet's preferred criteria in stage 6 of the evaluation process would have advanced affirmative action (perhaps at the expense of cost efficiency/price). However, whatever the motivation, neither the Minister nor the board members and officials of Transnet had the legal authority to deviate from the provisions of the Instruction Note and Regulations 5 and 6 of the PPPFA Regulations. Their conduct gave rise to a

[547] Transnet-Ref-Bundle-04535

[548] Transnet-Ref-Bundle-04594

possible ground of review by an unsuccessful bidder and possibly amounted to a breach of fiduciary duty and contravention of section 51 of the PFMA requiring an appropriate and fair procurement and provisioning system and compliance with systems of internal control and preventing any irregular expenditure.[549] Further, investigation is required to determine whether any official or board member contravened section 86(2) of the PFMA by wilfully or in a grossly negligent way failing to comply with these requirements.

The misrepresentation of the ETC to the Transnet board

393. The business case for the procurement was approved by the board on 25 April 2013, some months after the original closing dates for the receipt of the tenders. The board approved the procurement at an ETC of R38 6 billion "excluding the potential effects from forex hedging, forex escalation and other price escalations". The exclusion of the potential effects of forex hedging and escalations from the ETC gave rise to a controversy about whether there was a misrepresentation to the board with the aim of inflating the cost of the acquisition at a later stage after the board had approved an ETC of R38.6 billion. The ultimate cost of the procurement was R54.5 billion.

394. The original version of the business case (dated 7 March 2012) approved by the TFRIC on 9 March 2012 and CAPIC on 21 May 2012 proposed an ETC of R38.146 billion.[550] Not much else happened in relation to the development of the business case until March 2013 when McKinsey was appointed the transaction advisor. A version of the business case dated 25 April 2013[551] was submitted to the board (as

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[549] Transcript 28 May 2019, p 180; and MNS Report Vol 1 (dealing with the procurement of the 1064 locomotives), Transnet-06-275 *et seq* ("MNS 1064 Report") at paras 2.1.16-2.1.18

[550] See Annexure FC 36, Exh BB4(a), FQC-349; and Annexure FC 38, Exh BB4(a), FQC-354

[551] Annexure FC 54, Exh BB4(b), FQC-401 *et seq*

an annexure to a memorandum authored by Mr Singh and Mr Molefe dated 18 April 2013).[552] It stated the ETC to be R38.6 billion (excluding the potential effects from forex hedging, forex escalation and other price escalations)".[553] The board at its meeting of 25 April 2013[554] thus approved the business case similarly at an ETC of R38.6 billion "excluding the potential effects from forex hedging, forex escalation and other price escalations".

395. Mr Callard and others testified that the ETC figure of R38.6 billion presented to the board meeting of 25 April 2013 had in fact included provision for escalations, forex and hedging. He maintained that the ETC as originally calculated was intended only to exclude "borrowing costs" (interest on borrowed capital) and this was possibly changed at a meeting of the LSC on 18 April 2013 before the business case served before the board or even afterwards.

396. Correspondence and other documentation prepared while McKinsey was finalising its input on the financial model for the business case, confirm that the ETC originally made provision for and included escalations and forex.[555] The locomotive prices were based on projected US inflation and converted back to ZAR based on the forward rate obtained from the Transnet treasury.[556] In addition, a copy of the business case dated 29 April 2013 (after the board had passed its resolution) differed from the version dated 25 April 2013 and only excluded borrowing costs from the ETC of R38.6 billion. The meta-data for the file containing the final version[557] revealed that it was modified on the computer of Mr Yusuf Mahomed on

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[552] Transnet-07-250.236

[553] Annexure FC 54, Exh BB4(b), FQC-405

[554] Annexure YL 1, Exh BB4(f).1, YIL-023

[555] Annexure FC 42, Exh BB4(a) FQC-363

[556] See Exh BB4(a), FQC-024, para 103.1

[557] Annexures FC52 and FC53, Exh BB4(a), FQC-396-400

30 April 2013 at 10h31.[558] Mr Mahomed admitted that he amended the business case on 30 April 2013 by deleting the words "borrowing costs" and inserting the words "the potential effects from forex hedging, forex escalation and other price escalations". He explained that the change was on the instruction of Mr Singh to bring the document into line with the resolutions passed by the board and the other committees during April 2013.[559] This raises the suspicion that the board resolution may also have been changed.

397. A table in the Fundudzi Loco Report[560] (based on calculations done by Mr Callard and others in 2018) reflects that the ETC comprised a basic price of R31.887 billion with provisions for forex (R1.706 billion), escalations for inflation (R2.775 billion) and contingencies (R2.232 billion) making a total of R38.6 billion, of which R4.481 was for forex and escalations.[561]

398. In order to comprehend the dispute about the ETC it is necessary to understand certain key concepts of the financial model used in arriving at the ETC.[562] The most lucid evidence about the projected viability of the project and the composition of the ETC is found in the statement of Mr Chabi, an expert actuary appointed as part of the MNS investigation.[563] The ETC is an important measure used in the appraisal of the viability of any large capital project. It is the sum of the direct/immediate costs

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[558] Annexure FC53, Exh BB4(a), FQC-400

[559] Exh BB4(g), YM-08, para 5.1. In the re-examination affidavit, Mr Singh maintained that as a result of a miscommunication the exclusion was incorrectly formulated – he said it should have read: "excluding the potential effect from forex hedging, forex escalation, other price escalations, post approval" - Transnet 05-2398, para 155. This would have left the ETC open-ended; but more importantly would not have altered the misrepresentation to the board that the ETC did not include provision for hedging etc. when (as appears in the ensuing analysis) it in fact did so to the tune of R5 billion.

[560] Fundudzi Loco Report, para 5.9.12.22

[561] Fundudzi Loco Report, para 5.9.1222 ; see also Transcript 17 June 2021,p 29

[562] Exh BB8(b).1, AOC-1064-001 *et seq*

[563] Exh BB8(b).1, AOC-1064-001 *et seq*

associated with the purchase of the locomotives over the delivery period (in this case seven years). The components of the ETC normally include: i) the base price of the locomotives; ii) a localisation premium; iii) currency hedging costs; iv) escalations; and v) a provision for contingencies. These costs therefore would normally include provision for inflation (escalations) and forex costs. The ETC speaks purely to costs and does not consider revenue and profits. It is the key constitutive element of the total cost of ownership ("TCO").[564]

399. The ETC is not the appropriate measure to use in deciding whether to invest in a project. The projected profitability of a project is better measured by the Net Present Value ("the NPV") - the present value of the expected revenue net of the present value of the expected costs. The NPV represents the profit one expects to realise from the project in current money terms allowing for the risks associated with the project. These risks are allowed for in the hurdle rate – a discounting factor. The application of the hurdle rate arrives at the minimum return that shareholders would want from a project in order to consider investing in the project. Whereas the ETC on the 1064 locomotive project was determined over seven years (the predicted delivery schedule), the NPV was computed over a 36-year period (the foreseeable life of the project).

400. The contentious issue concerning the ETC and whether it included forex and escalations relates to the initial capital outlay or acquisition costs (which is the first element of the TCO in order of magnitude). The base price of the locomotives included in the ETC is what an operational locomotive would have cost Transnet in April 2013. The localisation premium used an assumption for local content of 50%.

[564] The TCO comprises six distinct elements: i) the ETC being the initial capital outlay/acquisition costs – the costs associated with the purchase of the locomotives; ii) personnel costs; iii) fuel costs; iv) maintenance costs; v) emission costs; and vi) insurance costs. In the 1064 procurement, the ETC made up 47% of the TCO and 20% of all costs (the TCO plus wagon costs etc.).

The ZAR price for the local component in 2014 was computed by taking the USD price of the locomotives at a percentage of 50% at the forward ZAR/USD rate in 2014 and adding a localisation premium of 2% to that figure. The figure was adjusted for 2015 onward by the predicted South African inflation rate for three years. The foreign component was done similarly except for the years going forward the USA inflation rate was assumed to be 2.2% for 2015 and 2.3% for each year thereafter. The business case relied on an assumed South African PPI averaging 5.7%. The PPI over the preceding five-year period was 3.6%. The assumption for inflation in the business case was thus higher than the historical rate. The business case used a rate of 2.3% for foreign components purchased abroad which was conservative and reasonable.

401. The business case applied hedging by applying forward rates, locking in the exchange rate for the purchase and sale of currency at a future date, thus removing the need to take a view on what forex rates would be going forward. Thus the business case provided protection against having to pay more than budgeted for the goods sourced from abroad because of depreciation in the ZAR.

402. A hurdle rate of 18.56% was applied. It was based on research of over 160 companies for Greenfields projects (completely new projects incorporating higher than normal business risks). This was conservative and acceptable, with the result that the NPV was R2.7 billion. The project was thus profitable, but thinly so, in that it was 2.5% of a total revenue of R109 billion. The risk of the project turning unprofitable was material in the event of certain assumptions not materialising, if revenue was delayed or reduced (for example, if locomotives were not delivered timeously, or the predicted MDS volumes did not materialise) or costs increased by more than expected.

403. Mr Chabi calculated that the base price of the 465 diesel locomotives was R11.147 billion and that of the electric locomotives was R19.329 billion, meaning that of the R38.6 billion of the ETC, the total base price was R30.476 billion. He arrived at these figures by using the cost per diesel locomotive of USD2.6 million and USD3.5 million per electric locomotive provided in the business case, which he multiplied by the then applicable spot rate of 9.1285, and added a localisation premium of 2% to the 50% local component.

404. Applying the applicable local PPI rate and the USA CPI rate of 23 %, Mr Chabi arrived at a figure of R1.821 billion for inflation on the local components and R713 million on the foreign components. The computation of the escalation costs was based on a straightforward application of the assumed local and foreign rates over the seven-year delivery period.

405. To calculate hedging costs, Mr Chabi applied hedging to the foreign component of the locomotive price and arrived at a figure of R3.358 billion by applying the Transnet treasury curve hedged rates to the foreign component of the total locomotive price as adjusted by the USA CPI.

406. The base price plus the escalation and hedging costs gave a total price of R36.368 billion. Contingencies of R2.232 billion brought the ETC to R38.6 billion.

407. Mr Chabi's calculations thus leave no doubt that the ETC of R38.6 billion included escalations and forex hedging in the total amount of R5.892 billion (R1.821 billion+ R713 million + R3.358 billion). He concluded that the variables and assumptions used to model the business case were reasonable; and the ETC of R38.6 billion in the business case was an acceptable estimate for the total costs of acquiring the locomotives, including escalations and foreign currency exchange rate hedging costs.

408. Mr Chabi's figures differ from those in the Fundudzi Loco Report which, as mentioned, reflects that the ETC comprised a basic price of R31.887 billion with provisions for forex (R1.706 billion), escalations for inflation (R2.775 billion) and contingencies (R2.232 billion) making a total of R38.6 billion, of which R4.481 billion was for forex and escalations. Both figures confirm though that provision was made in the ETC for forex and escalations in a total amount of between R4.481 billion and R5.892 billion.

409. The statement in the business case approved by the board thus quite evidently misrepresented the assumptions about the purchase price and the financial model that was agreed as part of the business case development. The supposed exclusion of forex and escalations from the ETC possibly allowed for the manipulation of the price later and left the actual price undetermined. The board, faced with an ETC not correctly reflecting the total cost, should have returned the business case to its authors with a request that it be revised to give an accurate ETC so that it could budget correctly for the cash flow of Transnet over the years of the project and not leave it open-ended.[565]

410. If it is accepted that the original business case ETC of R38.6 billion included some escalations, forex and hedging costs – in the amount of R4.481 billion or R5.892 billion – the presentation to the board that the ETC excluding such costs entirely was a misrepresentation and caused the board to take a decision without the benefit of a proper estimate before it. When Mr Molefe, Mr Singh and Mr Gama testified, they did not contest that the ETC made some provision for forex and escalations and thus it may be assumed that they accepted such provision was in the amount of R4.481 billion or R5.892 billion. However, their presentation to the

[565] Transcript 20 May 2019, p 90, lines 4-10

board communicated unequivocally that the ETC excluded all forex and inflation escalations. Had that been true, the ETC should have been stated to be R32.708 billion (R38.6 billion less R5.892 billion) and not R38.6 billion.

411. In their evidence before the Commission, Mr Molefe, Mr Gama and Mr Singh admitted that the business case did not provide a calculation of the escalation, forex and hedging costs and accepted there was an assumption that they were included in the ETC.[566] Mr Molefe asserted that the entire issue about whether escalations, forex and hedging were included in the ETC figure of R38.6 billion was much ado about nothing as the figure was an estimate or minimum to be escalated later.[567] This missed the point; firstly, of whether in truth the ETC in the business case included some forex, hedging and escalation costs, and, secondly, if there was a misrepresentation of the ETC to the board. When it was put to Mr Molefe that he had misrepresented the ETC to the board by saying it excluded hedging and escalation when it in fact included them, he conceded that he had.[568] He did not take issue with either the evidence of Mr Laher (regarding an exercise undertaken in 2018 which concluded that escalations, forex and hedging had been included in the ETC)[569] or with the evidence of Mr David Fine from McKinsey's that the intention had been to include the escalations, forex and hedging costs in the original ETC.[570]

412. Mr Gama argued that the stated contract value actually included escalations albeit at estimated and assumed values which ultimately proved to be inaccurate and understated. He maintained that the statement that the ETC excluded the potential

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[566] Transcript 10 March 2021, p 29, line 10; and Transcript 12 May 2021, p 179-201.

[567] Transcript 10 March 2021, p 17-24.

[568] Transcript 10 March 2021, p 38, lines 10-20.

[569] Transcript 10 March 2021, p 40, line 15.

[570] Transcript 10 March 2021, p 41, line 15.

effects from forex hedging, forex escalation and other escalations was not incorrect. Provision had been made for these costs in the ETC of R386 billion but that provision potentially could be insufficient going forward.[571] Mr Singh reasoned likewise. He admitted that the business case made provision for forex and escalations and confirmed that he had instructed Mr Yusuf Mahomed to make the change but Mr Mahomed had incorrectly formulated the sentence.[572] He said that the proper formulation should have been that the business case included these costs but excluded the effects of these variables post approval of the business case – meaning that the board needed to approve the R38.6 billion ETC on the basis that in the nature of things it was likely to change as the procurement process unfolded in the evaluation, adjudication and post tender negotiation phases.[573]

413. Mr Singh and Mr Gama did not identify precisely what forex and escalation costs were not included in the ETC. Mr Chabi's calculations related to the entire seven-year delivery period.574 Accepting that there was a provision of R5892 billion for forex and escalations in the ETC of R38.6 billion, it is not clear what that provision did not cover. In the memorandum[575] submitted to the board on 28 May 2014, Mr Molefe justified the increase from R38.5 billion to R54.5 billion on the grounds that the ETC of R38.6 billion excluded inter alia the cost of changes in economic conditions (forex and inflation) between approval of the business case (April 2013) and the award of the contract (17 March 2014), the cost of hedging for foreign exchange movements, and the cost for future inflationary escalations. That would seem to cover the whole range of backward and forward forex and inflation

[571] Transcript 12 May 2021, p 183

[572] Transcript 31 May 2021, p 161, line 9, p 163, line 9, and p 177

[573] Transcript 31 May 2021, p 166, line 10

[574] Exh BB8(b).1, AOC-1064-036, para 9.48.2 and 9.48.3

[575] Annexure FC 85, Exh BB4(a), FQC-713

escalations from the date the ETC was approved. Mr Chabi's calculations accounted entirely for backward and forward looking forex and escalation costs.[576]

414. At its meeting on 28 May 2014, the board accepted the recommendation to increase the ETC from R38.6 billion to R54.5 billion and took note that the main reasons for the increase in ETC was "due to the exclusion" of the identified costs from it.[577] That statement is false. The resolution did not mention or take account of the fact that the ETC had made provision for forex and escalations in the amount of R5.892 billion. Nor did it state that the provision for these costs in the ETC had proved insufficient and was understated.

415. On 31 March 2014, two weeks after the signature of the LSAs, Ms N Huma from the Department of Public Enterprises addressed an email to Mr Singh noting that the department had approved an ETC of R 38.6 billion as per the section 54 PFMA application, querying why there was such a huge difference between the approved ETC and the actual transaction value and asking if Transnet would make a submission to explain the difference to the Minister. Mr Singh responded to the email on the same day explaining that the approval was for R38.6 billion but excluded the impacts of foreign exchange and escalations, stating falsely that these were normally not included in the ETC as they are subject to the economic conditions at the time of contracting and are not available and they are a mere function of the economic inputs at the time of contracting. He undertook to provide a full report on the transaction once the board had approved it.[578] This email again misrepresented the true situation by omitting to mention that the ETC of R38.6 billion had in fact included R5.892 billion for forex and escalations and

[576] Exh BB8(b).1, AOC-1064-032, para 9.34; and Exh BB8(b).1, AOC-1064-035, paras 9.46 and 9.47

[577] Annexure AC 5, Exh BB8(b).1, AOC-1064-182

[578] Transnet-05-2337; and Transcript 17 June 2021, p 30-32

possibly constituted fraud. Mr Singh did not submit a report seeking the approval from the Minister for the increase in price.

416. The evidence as a whole therefore establishes that there was a misrepresentation to the board and the Minister of Public Enterprises concerning the elements making up the ETC. Consequently, the board was not apprised of the true ETC before going to market. The false assumption that the ETC excluded all escalation, forex and hedging costs, when it in fact made provision to the tune of R5.892 billion, probably influenced the negotiation of the final price. This must be so because instead of working from a base line ETC of R38.6 billion including some of these costs (or more accurately an ETC of R32.708 excluding them), Transnet (including the board and negotiation team) proceeded on the assumption that all such costs (established later to be R14.9 billion) could legitimately be added to the final price.[579] The approval by the board on 28 May 2014 for an increase of the price (including the provision of R14.9 billion for forex and escalations) was granted on the mistaken premise that no provision for those costs had been included in the ETC when in fact there was provision for R5.892 billion.

417. This false accounting may have facilitated the ability of CSR and CNR to pay the 21% kickbacks to the Gupta enterprise on the 1064 locomotive contracts. This conduct if shown to have been intentional gives rise to reasonable grounds to believe that there was a fraud on Transnet in that it amounted to a misrepresentation that was prejudicial (or potentially prejudicial) to Transnet and

[579] In their memorandum to the BADC, dated 23 May 2014, recommending approval of the increase of the ETC from R38.6 billion to R54.5 billion (Annexure PC 85, Exh BB4(b), FQC-715, para 14) Mr Molefe, Mr Singh and Mr Gama justified the R14.8 billion increase for escalations, forex and hedging costs on the basis that the costs had been expressly excluded from the ETC of R38.6 billion approved by the board in April 2013. In para 108 of the memorandum of 23 May 2014, the BADC was asked to "take note" that the main reason for the increase of the ETC to R54.5 billion was that those costs had been excluded, despite the fact that Mr Molefe knew that to be false.

that there may have been a contravention of the duty in section 50(1)(b) of the PFMA to act with fidelity, honesty and integrity and in the best interest of Transnet in managing its financial affairs.

The improper favouring of CSR and CNR in the evaluation of the bids

418. At the closing of the bids, on 30 April 2013, seven bidders submitted bids for the procurement of the 599 electric locomotives and four bidders submitted bids for the 465 diesel locomotives. The evaluation process endured until 15 January 2014. Two bidders for the electric locomotives went through to the BAFO stage of the procurement process - Bombardier Transportation SA (Pty) Ltd ("BT" or "Bombardier") and CSR E-Loco Rail Consortium Supply. All four bidders for the diesel locomotives went through to the BAFO stage, namely: CNR Consortium; CSR Loliwe Consortium ("CSR Loliwe"); EMD Africa (Pty) Ltd ("EMD") and GE South Africa Technologies (Pty) Ltd ("GE"). After the BAFO stage, the CNR consortium and GE were recommended to proceed to the PTN in respect of the diesel locomotives, and both Bombardier and the CSR consortium went through in respect of the electric locomotives. (Ultimately, the CNR contracting party was CNR Rolling Stock South Africa (Pty) Ltd ("CNRRSSA")[580] and the CSR contracting party, CSR E-Loco Supply (Pty) Ltd ("CSR-SA").[581]

419. Much evidence before the Commission suggests that CSR and CNR were unduly favoured at various stages of the procurement process. In March-May 2013, prior to the submission and evaluation of the bids, Transnet engaged in direct negotiations with CSR and the China Development Bank ("the CDB") with a view to concluding a tripartite cooperation agreement. The original draft of the agreement

[580] CNRRSSA later became CRRC SA Rolling Stock (Pty) Ltd ("CRRC-SA").

[581] CSR-SA later became CRRC E-Loco Supply (Pty) Ltd ("CRRC-E-Loco").

explicitly provided for cooperation on the procurement and refurbishment of electrical and diesel locomotives.[582] The cooperation agreement ultimately signed[583] was between the CDB and Transnet. Perhaps more conscious of the difficulty posed by a prior agreement favouring a bidder, the agreement provided merely for Transnet and the CDB to identify opportunities for CDB to participate in funding the development and upgrade of infrastructure in line with Transnet's MDS.[584]

420. After the evaluation process, the BADC, chaired by Mr Sharma, on 24 January 2014, recommended to the board that Bombardier, CSR, CNR and General Electric Ltd ("GE") be appointed as the OEMs to manufacture the 1064 locomotives and that the award of the locomotives be split as follows: Bombardier 240 electric locomotives; CSR 359 electric locomotives; CNR 232 diesel locomotives; and GE 233 diesels locomotives. The board accepted the recommendation of the BADC at its meeting of 24 January 2014 at an ETC of R33.4 billion (excluding hedging, escalations and the costs associated with using Transnet Engineering as a subcontractor – "TE scope").[585] The matter of TE scope is discussed below.

421. Mr Laher was responsible for the preparation of the financial evaluation criteria which consisted of a points scoring matrix for the evaluation of: i) price; ii) TCO; iii) delivery schedule; iv) payment terms; v) RFP and contractual compliance; and vi) financial stability. Mr Laher identified four risks that ultimately impacted on the price evaluation: i) batch pricing; ii) the decision to normalise the price by excluding the cost of using TE as the main subcontractor; iii) the delivery schedules; and iv) inconsistencies in the application of the TCO model.

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[582] Annexure MM 13, Exh BB10(a), MEM-112

[583] Annexure MM 17, Exh BB10(a), MEM-135

[584] Exh BB10(a), MEM-023-MEM-026, paras 91-101; and Transcript 6 June 2019, p 146-173

[585] Annexures YL 12 and YL 13, Exh BB4(f).1, YIL-113 *et seq*

422. In early January 2014, Transnet addressed letters to Bombardier and CSR for the electric locomotives and all four bidders (CNR, CSR Loliwe, EMD and GE) for the diesel locomotives requesting them to provide a best and final offer ("BAFO').[586] All the bidders submitted BAFO's on 10 January 2014.

423. Accounting for TE as a subcontractor led to a flawed evaluation process on the issue of price.[587] The business case expressed the aspiration for the procurement to create business opportunities for TE. Part 2 of the RFPs issued in December 2012 provided that the participation of TE in the locomotive procurement process "will be prescribed" and that further details would follow after the issuance of Part 2 of the RFP. No details however appear to have followed the issuance of Part 2 of the RFP.

424. On 10 December 2013, the Cross Functional Evaluation Team – Finance ("the CFET-Finance") issued two reports detailing its findings from the stage 6 evaluation for the 599 electric locomotive and the 465 diesel locomotive tenders respectively.[588] Both reports dealt with the use of TE and proceeded on the assumption that the RFP dictated that the participation of TE in the procurement process would be prescribed. As the CFET-Finance was not given access to the supplier development ("SD") files, it initially assumed that all the bidders had provided pricing based on the utilisation of TE as the main sub-contractor. However, the SD files indicated that bidders 3 and 7 on the electric locomotives procurement did not specify the use of TE as the main sub-contractor and bidder 1 did not specify the use of TE in the procurement of the diesel locomotives. Supply chain services ("SCS") explained that bidders were likely to make different

[586] Annexure FC 95, Exh BB4(b), FQC-775

[587] Exh BB4(a), FQC-040-FQC-050, paras 161-194; and Transcript 20 May 2019, p 130 - Transcript 23 May 2019, p 25

[588] Annexure FC 83 and Annexure FC 84, Exh BB4(b), FQC-641 *et seq* and FQC 681 *et seq*

assumptions on the use of TE as a main sub-contractor including the percentage that would be sub-contracted. These assumptions were not specified in the RFPs and could differ significantly between bidders. Accordingly, SCS (in conjunction with the CEO of TFR, the GCEO and GCFO) decided that clarity should be obtained to establish what proportion of the bidder's price related to the use of TE.

425. On 2 December 2013, Mr Jiyane addressed letters to bidders 1, 2 and 5 for the electric locomotives and bidders 2 and 4 for the diesel locomotives (bidder 3 for the diesel locomotive tender had already provided pricing with and without the use of TE) requesting clarity.[589] The letter in relevant part stated:

> "Transnet has realised that the statement about TE contained in the RFP has led to different interpretations by tenderers regarding the scope of work for TE.
>
> In an effort to fully consider every possible factor, Transnet requires the following clarification:
>
> 1. What would be the Rand impact on your price per locomotive if you did not use TE as a local subcontractor, but used an alternative local private sector subcontractor?
>
> 2. What would your price per locomotive be if you did not use TE as a local subcontractor but used an alternative local private sector subcontractor?"

426. The aim of the CFET-Finance and SCS in seeking this information was to apply a pricing methodology by evaluating all the bidders excluding the use of TE as a main sub-contractor "in order to normalise the base on which to evaluate price."

427. After receiving responses, the CFET-Finance determined in relation to the electric locomotives that: i) Bombardier's price per locomotive would decrease by approximately R1.9 million; ii) CSR's price per locomotive would decrease by

[589] Exh BB4(e), FQC-sup2-03

R3.48 million; and iii) bidder 5 indicated that there would be no impact on its bid price per locomotive. The ultimate implication of this adjustment was the reduction of Bombardier's total price per locomotive from R34.73 million to R32.83 million and the reduction of CSR's price from R38.2 million to R34.7 million.[590] This resulted in Bombardier moving from second best price per locomotive to best price. CSR moved from fourth best price to third within a close margin to the first and second, whereas before the adjustment, its price was much less competitive than the other three bidders. When it initially made allowance for the TE adjustment, CSR maintained that there would be a reduction of R3.48 million per locomotive but a subsequent submission indicated it to be R5.49 million, the difference of R2.01 million per locomotive was later explained to be a discount. The CFET-Finance proceeded on the basis of excluding this potential discount and reduced the price by R3.48 million per locomotive. As will be explained later, this discount was inappropriately factored back in at the BAFO stage. The contract for the electric locomotives was ultimately awarded to Bombardier and CSR. The ranking of the bids for the diesel locomotives in respect of price did not change as a result of the TE adjustment.[591]

428. Evaluating the bidders on the basis of not using TE as a sub-contractor was not on its own unfair.[592]Doing the evaluation on that basis meant that all bidders (including those who had not provided for TE as a subcontractor) would be treated equally. If the intention had been that all bidders had to quote on the assumption that TE would be used as the main sub-contractor, and that had been misunderstood by some bidders, one could fairly rectify the misunderstanding by evaluating the bids

[590] Annexure FC 83, Exh BB4(b), FQC-679 read with Exh BB4(c), FQC-sup-23

[591] Annexure FC 84, Exh BB4(b), FQC-712

[592] Transcript 20 May 2019, p 168 *et seq*

on the basis that TE would not be used as the main sub-contractor.[593] Moreover, it allowed the CFET-Finance to assess the impact of pricing for TE as a premium Transnet was prepared to pay for ensuring TE was used as the main sub-contractor with the attendant localisation benefits.

429. Mr Callard, however, emphasised that the RFP did not allow for the methodology and suggested that the reductions in price were arbitrary and not verifiable.[594] More importantly, the TE adjustment changed the rankings of the bidders in the procurement of the electric locomotives. In the case of the diesel locomotives, the application of the two methodologies inclusive of TE and exclusive of TE was inconsequential as it had the same outcome in respect of the ranking of the bidders on the basis of price. Bombardier moved from second to first, and CSR from fourth to third. Given that the award was split between Bombardier and CSR, it probably made no difference to the appointment of Bombardier. The change of CSR's price significantly altered its competitive position. Without the TE adjustment, it would have been difficult to justify CSR proceeding to the BAFO stage. As will be seen presently, in the BAFO stage CSR increased its price to add back the TE deduction.

430. As mentioned, on 4 January 2014, Transnet requested the bidders to submit their BAFO with a closing date of 10 January 2014. On 15 January 2014, the CFET-Finance prepared a memorandum setting out the results of the BAFO from Bombardier and CSR for the 599 electric locomotives.[595] In paragraph 5 of the memorandum there is a table outlining the BAFO prices per locomotive. It includes the previous evaluated prices of Bombardier and CSR as specified in the CFET-

[593] Transcript 20 May 2019, p 174-175

[594] Transcript 20 May 2019, p 172, line 8 – p 173, line 2

[595] Annexure FC 65, Exh BB4(b), FQC-578

Finance report of 10 December 2013. These prices are reflected as the prices after deducting the impact of not using TE as the main sub-contractor. Thus, Bombardier's price before the TE adjustment was R34.73 million. This price was not used in the BAFO memorandum. Rather the adjusted price was used – namely R32.83 million. Likewise, CSR's price of R38.19 million was not used – rather R34.71 million was used as the evaluated price.[596]

431. Although Bombardier and CSR were evaluated on the price per locomotive without using TE as the sub-contractor, Transnet in the end paid the amount using TE. The quoted price per locomotive for Bombardier including TE was R34.73 million. The difference between its quoted price and BAFO price per locomotive was R1.91 million (R34.73 million minus R32.83 million). Bombardier was awarded 240 locomotives. Hence, according to Mr Callard, its total price was understated by R458 million. Likewise, the difference between CSR's quoted price and the TE adjusted price was R3.48 million per locomotive (R38.19 million minus R34.71 million). It was awarded 359 locomotives. Its total price was thus understated by R1.25 billion. In the result, the total BAFO price for the electric locomotives to be supplied by Bombardier and CSR was understated by approximately R1.71 billion. This amount later was added back to the final price and is included in the calculation that led to the increase of the ETC from R38.6 billion to R54.5 billion.[597] The true prices were accordingly significantly understated for these bidders.

432. The BAFO prices for Bombardier and CSR were further adjusted downwards. The BAFO memorandum records the BAFO evaluated price per locomotive of Bombardier to be R32.38 million, being R455 661 less than the TE adjusted

[596] See Exh BB4(d), FQC-sup2; and Annexure FC 65, Exh BB4(b), FQC-582

[597] See Table 2 of Mr Molefe's memorandum of 23 May 2014 to the board - Annexure FC 85, Exh BB4(b), FQC-718; and the MSM 1064 Report, para 4.1.3

evaluation price of R32.83 million. The BAFO reconciliation recorded that the difference was made up of a forex change due to import content and rate changes.[598] The BAFO evaluated price of CSR in the memorandum was R32.46 million, being R2.25 million less than the TE adjusted evaluation price of R34.71 million. The BAFO reconciliation records that the difference was made up of a forex change (R243 893) and the discount on the price of R2.01 million, which the CFET-Finance had refused to take into account when doing the TE adjustment.[599]

433. The BAFO price of the successful bidders for the electric locomotives was thus fundamentally misstated because at a later stage the TE impact was added back to the BAFO price.[600] The stated BAFO price in the reconciliations[601] was not the price actually paid per locomotive. The essential point being that with the TE adjustment excluded from the BAFO price, the BAFO price could not be used to determine the true cost. The price that should have been used was the pre-adjusted for TE price. Both Bombardier and CSR were going to use TE as the main sub-contractor. The price per locomotive before TE adjustment was Bombardier R34.73 million and CSR R38.19 million. The BAFO should have been done using these prices. As a consequence, the BAFO prices did not include the premium that would be paid for using TE. Adding back the TE component significantly increased the base price of the locomotive. Besides the unfair favouring of CSR, the amount added back to the CSR and Bombardier price for using TE was part of the R15.9 billion escalation of the price of the procurement. The price excluding TE was a price that was not going to be finally contracted upon. The adjustment resulted in the contract being

[598] Annexure FC 65A, Exh BB4(b), FQC-582

[599] Annexure FC 65A, Exh BB4(b), FQC-581; and Transcript 20 May 2019, p 216 -219

[600] Transcript 20 May 2019, p 207, lines 5-7

[601] Annexures FC 65 and FC 65A, Exh BB4(b), FQC-581-582

awarded to the wrong bidder who did not meet the criteria –CSR.[602] The decision to do that probably constituted a contravention of section 50 and 51 of the PFMA and possibly fraud, and further advanced the interests of the Gupta enterprise.

434. The BAFO price used in the evaluation of CNR's bid in the diesel locomotive procurement was also problematic.[603] As mentioned, on 4 January 2014, Transnet wrote to CNR[604] seeking its BAFO using specific guidelines. CNR responded to the request for information on 10 January 2014 and claimed amongst other things to have reduced their base price in the Total Cost of Ownership ("TCO") model from R39.735 million per locomotive to R27.36 million. It noted that this price related "to the cost of manufacture and does not include training costs, logistics, royalties, technical support, service charges, finance costs, and contingencies etc.".[605] The use of "etc." left the price open-ended.

435. The exclusions from the base price in CNR's letter of 10 January 2014 (excluding training costs etc.) did not constitute "a comparative BAFO price".[606] The deductions in respect of some of the specifications were costed in the original bid and ought not to have been excluded in the BAFO,[607] and were "open-ended".[608] The adjustment of the base price involved a reduction of R12.38 million per locomotive amounting in total to a reduction of approximately R5.8 billion (465 x R12.38 million).[609] CNR's BAFO price was accordingly misleading as evident from the fact that the deductions exceeded its total Annexure E costs of R5.5 billion.

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[602] Transcript 21 October 2020, p 21

[603] Exh BB4(a), FQC-048-049, paras 181-190

[604] Annexure FC 95, Exh BB4(b), FQC-775

[605] Annexure FC 98, Exh BB4(b), FQC-785

[606] Exh BB4(a), FQC-049, para 187.2; and Transcript 20 May 2019, p 238, lines 13-15

[607] Transcript 20 May 2019, p 245, lines 1-10

[608] Transcript 20 May 2019,p 239, line 20

[609] Transcript 23 May 2019,p 6, line 15 *et seq*

Annexure E costs include manpower costs, factory overheads and administration overheads (many of which CNR purported to exclude from its BAFO).[610]

436. CNR's BAFO price was thus inaccurate, unrealistic and misleading. The memorandum,[611] dated 15 January 2014, sent by the CFET-Finance to the LSC regarding the results of the BAFO responses for the 465 diesel locomotives indicated that the original base price used for evaluation of the CNR bid before BAFO was R44.23 million per locomotive and the BAFO price used for evaluation was R30.45 million. The difference of R13.78 million was stated in the memorandum to be made up of a discount of R12.38 million and R1.4 million being a forex charge due to import content and rate changes.[612] This evidence confirms that the BAFO price carried forward for the purpose of evaluating CNR's bid included the inappropriate qualifications and exclusions from the BAFO price presented by CNR in its letter of 10 January 2014.[613]

437. Thus, taking account of the TE adjustment favouring CSR and the inappropriate reduction of CNR's BAFO, the prices of CSR (for the electric locomotives) and CNR (for the diesel locomotives) at the end of the BAFO process were not the real cost of the locomotives. CSR clearly benefited from the TE adjustment changing its ranking on price in relation to the procurement of the electric locomotives, and CNR was favoured not by the TE adjustment, but rather by the inappropriate reduction of its BAFO price by R12.38 million per locomotive. CNR's unrealistic BAFO price in all likelihood led to its bid being inappropriately favoured. The evidence before the Commission in relation to the identity of the officials and employees of Transnet

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[610] This is revealed in correspondence between Transnet and CNR – see Annexure FC 101, Exh BB4(b), FQC-791, and Annexure FC 102, Exh BB4(b), FQC-795

[611] Annexure FC 66, Exh BB4(b), FQC-584

[612] See Annexure FC 66, Exh BB4(b), FQC-587, read with Annexure FC 66A, FQC-589

[613] Transcript 23 May 2019, p 8, line 9 – p 10, line 7

who were responsible for these irregularities is not clear and thus requires further investigation.

The 1064 post tender negotiations: batch pricing, excessive advance payments and local content

438. On 17 January 2014 the GCEO, Mr Molefe, addressed two memoranda to the board of Transnet setting out results of the evaluation of the two tenders and proposing the splitting of the two procurements between the two OEMs in each tender.[614] In relation to the 599 electric locomotives, Bombardier received a total score of 65.96 and CSR 61.33. The memoranda explained that besides these two bidders scoring the highest points, their proposals offered local content and SD commitments of a higher order and a delivery schedule close to Transnet requirements. They also scored highest on technical evaluations. It was noted that CSR offered a discount of R2.25 million per locomotive, including a revised foreign content, thus offering the best price. The memorandum then proposed the split of the award (60% of the procurement to CSR and 40% to Bombardier) to reduce delivery risk and enhance ability to meet MDS volume targets.

439. CSR was favoured on the basis of its track record in relation to the 95 locomotives; while Bombardier had not done work for Transnet in the recent past. The memorandum concerning the 465 diesel locomotives made a like recommendation that there be a split of the award between CNR and GE on a 50-50 basis. On 24 January 2014 the board approved the recommendation and split the awards along the lines suggested,[615] "subject (to) a further endorsement by the BADC post the

[614] Annexures YL 10 and YL 11, Exh BB4(f).1, YIL-87-112

[615] Annexures YL 12 and YL 13, Exh BB4(f).1, YIL-113-116

negotiation process" and delegated authority to the GCEO to sign, approve and conclude all necessary documents to give effect to the resolutions.[616]

440. Paragraph 19.1.1 of the PPM (2012) provided that post tender negotiations ("PTN") should be used as an effective tool to drive down costs or extract further value for Transnet after the evaluation has been completed and the preferred bidder has been identified and approved. After the board's approval on 24 January 2014, Transnet and the successful bidders commenced the PTN process for the conclusion of the contracts.

441. The post tender negotiations took place during February-March 2014 and endured for about six weeks and were led by Mr Singh and Mr Wood of Regiments. Both Mr Singh and Regiments were associates of the Gupta enterprise and thus unlikely to act in the best interests of Transnet. Regiments essentially assumed the role that normally was reserved to Transnet's treasury. The Group Treasurer of Transnet, Ms Makgatho, was side lined and excluded from the process,[617] probably because she was too rigorous in her oversight.[618]

442. Supply chain management produced a negotiation mandate which required the PTN process to address 12 identified negotiation points.[619] The document ("the negotiations mandate") set out terms of reference for each of the negotiation points as well as the most desirable outcome, the target agreement and the least acceptable agreement on each negotiation point.[620] The negotiation points

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[616] Annexures YL12 and YL13, Exh BB4(f).1, YIL-114-116

[617] Transcript 6 June 2019, p 52-53

[618] Transcript 6 June 2019, p 39-67 and p 79-83; Mr Molefe authorised Mr Gama and Mr Singh to lead the process – Transnet-05-2388

[619] Transnet-Ref-Bundle-05144 *et seq*

[620] For example, under base price – foreign exchange impacts, the most desirable option was stated to be a "rand-based contract with fixed price including hedging costs (supplier manager's hedging costs)."

included: i) base price – foreign exchange impacts; ii) base price impact of TE; iii) payment schedules; and iv) break-pricing and batch-pricing.

443. The price of the procurement rose significantly during the post tender negotiations (supposedly intended to reduce costs) in the period from the short-listing of the bidders to the conclusion of the LSAs on 17 March 2014. The initial assessments of the total price by Regiments to TFR of the 1064 project were R39.94 billion. Over the course of Regiments interactions with TFR during January 2014 to 17 March 2014, the ETC increased by R15.9 billion. A significant factor contributing to this increase was the change in escalation formulas used and the source of the indices used in the escalation formula.

444. The issue of batch-pricing arose during the post tender negotiations as a consequence of the board's decision to split the awards between two bidders in both tenders.[621] Paragraph 12 of the RFP (under the heading "Disclaimers") granted Transnet the right to split the award between bidders.[622] It reads:

> "Respondents are hereby advised that Transnet is not committed to any course of action as a result of its issuance of this RFP and/its receipt of a proposal in response to it. In particular, please note that Transnet reserves the right to split the award of the contract between more than one supplier..."

445. The provision made for batch-pricing by the Transnet negotiation team during the PTN led to an increase of R2.7 billion in the ultimate price. Committing Transnet to batch-pricing was contrary to the provisions of the RFP, compromised the fairness of the procurement process and constituted an irregularity. Mr Singh, Mr Gama and Mr Laher justified the additional cost of R2.7 billion on the grounds that the

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[621] See generally - Transcript 28 May 2019, p 205 *et seq*; Transcript 29 May 2019, p 49 *et seq*; and MNS 1064 Report, para 2.4

[622] Transnet-Ref-Bundle-04547-04548

reduction in the quantities of the locomotives awarded to each bidder necessitated the bidders to increase their prices.

446. Paragraph 3.1 of Part 2 of the RFP (under the heading: "Scope of Requirements")[623] provided for a seven-year delivery schedule and stated:

> "Transnet requires flexibility in exercising options for the acquisition of the locomotives. These options may include suspending or postponing the delivery of the locomotives until a later day or changing quantities. Transnet however does not expect to pay a price premium should it exercise any of these options".[624]

447. Although this paragraph does not speak of "batch-pricing", it aimed at ensuring that if the batch of locomotives was reduced there would be no increase in the price of the locomotive. The next paragraph of the RFP spoke of "break-pricing" which must be distinguished from what was referred to as batch-pricing. It read:

> "Transnet reserves the right to terminate the locomotive acquisition programme or any part thereof at any stage during the seven-year period should circumstances so dictate. Therefore, Transnet is not obliged to acquire the full amount of 599 locomotives. Bidders are therefore required to provide "break-pricing" for each of the stages indicated below, should Transnet decide to terminate the acquisition process at any of these stages."

448. These provisions make it plain that Transnet would not pay a premium for splitting an award or changing quantities but only for break-pricing. The RFP permitted break-pricing adjustments but not batch-pricing adjustments. Price adjustments were permissible if Transnet terminated the acquisition programme at some point during the delivery schedule, but could not adjust prices if a different quantity of locomotives was awarded to a bidder prior to the contract being concluded.[625] The

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[623] Transnet-Ref-Bundle-04552

[624] Emphasis added.

[625] Transcript 28 May 2019, p 208, lines 20-25

assertion by Mr Singh during his testimony that Transnet never contemplated paying a zero cost for batch-pricing is simply wrong and inconsistent with these provisions.[626] The board's approval of the splitting of the award did not amount to authorisation to commit Transnet to batch-pricing, especially when it was specifically brought to its attention that the RFP in effect prohibited Transnet from paying a price premium for changing the locomotive quantities procured from any one bidder.

449. The CFET-Finance reports of 10 December 2013 conflated break-pricing and batch-pricing noting that break point pricing had been provided by all bidders and the price per locomotive would vary depending on the batch size of the order placed.[627] The reports then set out a table accounting for break-pricing. The table provided for the delivery of an escalating number of locomotives over five identified periods. There is no analysis of the implications for the price of each locomotive if there was a splitting of the batches.[628] By contrast, the negotiations mandate understood the difference. It set "the most desirable outcome" and "the target agreement" for batch-pricing as: "remove batch pricing".[629] Thus, the strategy of the negotiation team ought to have been to enforce the unequivocal right of Transnet to incur no additional liability or price increase for batch-pricing on account of the decision of the board to split the awards among the four bidders. Despite that, on the basis of the financial calculations and inputs from Regiments, as well as

[626] Transcript 17 June 2021 p 68-72; Transnet-05-1453, para 100; and Transnet-05-1827, paras 63-68

[627] Annexure FC 84, Exh BB4(b), FQC-661

[628] Annexure FC 85, Exh BB4(b), FQC-701. The CFET report dealing with the 465 diesel locomotives includes a similar paragraph and admonition.

[629] Transnet-Ref-Bundle-05148

"pushback" from the suppliers, the negotiations team ultimately agreed to batch-pricing.[630]

450. In an email dated 14 August 2018, Mr Laher justified agreeing to batch-pricing as being consistent with the board decision of 24 January 2014 and claimed the Locomotive Steering Committee ("the LSC") agreed that it would not make sense for there not to be a price increase when the batch size is reduced, especially where the reduction is substantial. He argued that "basic financial principles allow for recovery of fixed costs over the size of the batch, thus mathematically by reducing the batch size there are fewer units with which to recover fixed costs".[631] Mr Laher notably misstated what the board had decided. The board did not decide to provide for batch-pricing. It merely split the awards between different suppliers. Mr Laher clearly appreciated the risks of batch-pricing and the fact that it was unacceptable for Transnet. He nonetheless believed it was correct to have agreed to unnecessary batch pricing of R27 billion. His point that the reduction justified an increase in price is questionable when one considers the size and value of this particular procurement.

451. Mr Laher changed his tune about his understanding of batch-pricing in his evidence to the Commission. He testified that he told Mr Singh and Mr Jiyane that the original bid price per unit needed to be retained by bidders even though batch sizes were reduced because an adjustment could lead to their prices being higher than other unsuccessful bidders who could have given lower prices for a smaller batch.[632] The point so made is a compelling argument for why batch-pricing was inappropriate. During the post tender negotiations, Mr Singh and Mr Jiyane

[630] Transcript 29 May 2019, p 36, line 21

[631] Transnet-Ref-Bundle-04318

[632] Exh BB4(f).1, YIL-014, para 51

disagreed with this proposition on the basis that "all bidders were requested to provide break-point pricing, and were not evaluated on smaller batch-pricing". This conflated batch-pricing with break-pricing.

452. A PTN feedback meeting on 7 February 2014 discussed the issue of batch pricing. The transcript of the meeting reveals that the issue came up in the context of a discussion the negotiation team had conducted with the bidders about escalations and break-pricing and that Mr Laher was fully aware that firstly batch-pricing had not been provided for in the RFPs and secondly the mandate of the negotiating team was to avoid any undue liability for batch-pricing.[633] However, both Mr Singh and Mr Jiyane clearly considered introducing batch-pricing at this late stage (to favour CSR, the bidder pressing the matter) as justifiable. Mr Laher then intimated that the correct thing to do was to go back to all the bidders and to seek a proposal for batch-pricing. Mr Singh said it was too late. In his testimony, Mr Singh denied that Mr Laher had raised these concerns at the meeting. When confronted with the transcript showing that the matter was raised and that he had replied that it was too late to go back to the bidders, Mr Singh dissembled and repeated his untenable position that Transnet had to pay something.[634]

453. The meeting of 7 February 2014 then agreed that batch-pricing could justifiably be allowed to increase the price of the procurement by R2.7 billion (regardless of Transnet's contractual rights and the impact on the evaluation of price in stage 6 of the evaluation), through the simple expedient of including it under "escalations". Because Mr Singh was GCFO and Mr Jiyane was the CPO, Mr Laher said that he felt he was obliged to go along with their preferred approach.635 Mr Molefe,

[633] Annexure FC-S4-03, Exh BB4(h), FQC-018

[634] Transcript 17 June 2021,p 73-82

[635] Transcript 21 October 2020, p 36, line 10; and Transcript 21 October 2020, p 42, lines 9-15

although not a member of the negotiation team, was a member of the Locomotive Steering Committee ("the LSC") to which the negotiation team and Mr Singh reported. He conceded during his evidence that batch-pricing ought not to have been included in the price and that he bore some responsibility but denied he acted deliberately to the prejudice of Transnet.[636]

454. An accelerated delivery schedule was used to justify the cost of R2.7 billion for batch-pricing. In his memorandum of 23 May 2014 to the board, Mr Molefe argued that the R2.7 billion was offset by a shorter delivery period resulting in lower escalation and forex costs.[637] The business case and the RFP provided for the delivery of the locomotives over a period of seven years. In February 2014, Mr Singh requested TFR to respond to a proposal to reduce the delivery schedule from seven years to three / four years in the hope that accelerating the locomotives would save forex costs in the future.[638]

455. The key risk in accelerating the rate of delivery over a shorter period was that it required additional cash flow to effect payment for the locomotives at a time when there were constraints on the budget. Moving money to procuring the locomotives would take capital away from the capital projects which were required to support the acquisition of the locomotives. There was also considerable doubt about the preparedness of TE to handle the accelerated delivery. Moreover, the MDS volumes might not materialise as anticipated.[639] Accelerated delivery posed an overall risk as it required very tight simultaneous coordination of markets, customer capacity, material supply, and developing infrastructure capacity and wagons.

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[636] Transcript 10 March 2021, p 73-83

[637] Annexure FC 86, Exh BB4(b), FQC-726, para 70

[638] Transcript 20 May 2019, p 104, lines 8-15

[639] Annexure FC 54, Exh BB4(b), FQC-450, para 7.3

456. The LSAs concluded on 17 March 2014 included the accelerated delivery schedule.

457. The worst-case volume shortfall identified in the business case did in fact materialise. This occurred without the benefit of a flexible procurement and contracting strategy caused by the decision to accelerate the delivery schedule. As it turned out, the delivery of the locomotives was delayed. By December 2018, only 497 of the 1064 locomotives had been delivered.

458. The imprudence of accelerated delivery became apparent later. In about November 2015, Mr Pita (then GCFO) requested the Group Capital Integration and Assurance team to assist with potentially extending the 1064 locomotive delivery schedule by another two years, because of Transnet's precarious liquidity position. Transnet had paid excessive upfront payments and had not received much in the way of locomotives and this was impacting on liquidity. The proposal meant going back to the six-year delivery schedule that was originally envisioned in the business case. Regiments reviewed the cost implications of the proposed extension and considered a variety of options. These included the creation of a special purpose vehicle which would consider the sale of "excess" locomotives and a possible leaseback. Regiments submitted estimate calculations on 26 January 2016 of R13 billion (on top of the total cost of R545 billion) as the possible deferral cost for a period of two years.

459. The Group Capital Integration and Assurance team opposed the Regiments proposal as Transnet did not need to incur further costs because at that stage all the OEMs were experiencing production challenges or had not commenced production at the time, meaning they could not meet the accelerated delivery

schedule in any event.[640] There was no need to incur this additional cost given that some of the OEM's had not even commenced production in South Africa. Moreover, the deferral of locomotives delivery would have triggered deferral penalties. The proposal, which would have advanced the interests of Regiments and the Gupta enterprise, was not implemented.

460. Mr Mahomedy testified that it came to his attention during the post tender negotiations that the negotiation team was negotiating a higher than normal advance payment to the bidders. Transnet had a historical practice of paying a deposit of 10%.[641] Advance payments are made to cover costs that the OEM will incur before the first locomotive is delivered. The norm is to pay 10%-15%. An amount in excess of this would invariably impact the cash interest cover - the financial ratio that is of particular interest to financial institutions and credit rating agencies. Payment of too large an advance payment could affect Transnet's credit rating and its ability to borrow at favourable rates. The advance payments paid in relation to the 599 electric locomotives (especially to CSR) were beyond the norm.

461. Despite Mr Mahomedy's concern, the PTN team agreed to pay CSR a deposit of 10% on the date of signing and a further 20% within six months – on design review in September 2014. This meant that Transnet was obliged to pay CSR R5.4 billion upfront before any locomotive was manufactured or delivered. Bombardier similarly received 9% upfront, 9% on design review, and a further 9% after six months. Advance payments of less than 2% were also not unusual. CSR had in fact initially proposed that amount in its bid.[642] Thus, CSR's advance payment increased dramatically during the post tender negotiations. Bombardier had originally put

[640] Exh BB3(a), MSM-023, para 5.7

[641] Transcript 15 May 2019, p 81 *et seq*; and Exh BB3(a), MSM-011, paras 5.3.5-5.3.8

[642] Transcript 29 May 2019, p122; and Exh BB4(a), FQC-035, para 145

forward an advance payment of 25%. Its advance payment increased by 2% to 27%, being three payments of 9%. Likewise, CNR in the procurement of the 465 diesel locomotives increased its deposit from 1.08% to 15% (10% upfront and 5% on design review). No adequate explanation was ever tendered for these excessive payments.[643]

462. The consequence of the negotiations team (led by the Gupta associates Mr Singh and Mr Wood) agreeing to excessive advance payments on all the locomotive procurements was that on contract initiation on 17 March 2014, Transnet had to pay upfront advance payments of R7.37 billion before 1 April 2014 and had to increase its borrowings in the order of R6 billion in 2014-2015.[644] The agreement to pay these excessive amounts raises questions about whether the final negotiations were conducted in Transnet's interests and whether those responsible acted corruptly.[645]

463. In addition, the RFPs stipulated that "local content" was a prequalification for the acquisition with a threshold of 60% for the electric locomotives and 55% for the diesel locomotives. It is questionable whether Bombardier and CSR should have been awarded the electric locomotive tender, and CNR the diesel locomotive tender, on account of their non-compliance with local production and content requirements. Mr Molefe in his memorandum to the board justifying the price increase failed properly to take account of the reduced local content and lower foreign inflation assumptions leading to the forward escalation costs being overstated and adding R3.2 billion to the cost of the transaction.

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[643] Transcript 15 May 2019, p 83

[644] Transcript 20 May 2019, p 127 *et seq*; and Annexure FC 64, Exh BB4(b), FQC-537

[645] See also the evidence of Ms Makgatho, the Group Treasurer, Exh BB10(a), MEM-015, paras 52-54; Transcript 6 June 2019, p 84-97

464. The computation of local content is regulated by paragraph 4.3 of the NT Instruction Note in accordance with the following formula: LC=[1-X/Y] x 100 where X is the value of imported content in ZAR and Y is the bid price in ZAR excluding VAT.[646] Paragraph 4.2(1) of the NT Instruction Note provides that prices used in the determination of X must be converted to ZAR at the exchange rate published by the SA Reserve Bank at 12h00 on the date of the advertisement of the bid. Using this formula MNS established that the local content of the Bombardier bid (53.8%) and CSR bid (54.5%) in the procurement of the electric locomotives fell below the prescribed 60% threshold. Similarly, the bid of CNR (45.2%) in the procurement of the diesel locomotives fell below the 55% threshold.[647]

465. During the post tender negotiations, the negotiation team used a favourable exchange rate that reflected changes resulting from the deterioration in the ZAR during the period between the advertisement of the bid and the conclusion of the post tender negotiations. This revision did not alter the overall result. The local content of the three bidders in fact decreased further as follows: Bombardier (45.6%); CSR (49.6%); and CNR (37.6%).[648]

466. Hence, at the close of the post tender negotiations, the bidders ought to have been disqualified or at least advised that they no longer met the prescribed minimum threshold and requested to adjust their figures.[649] Notwithstanding this non-

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[646] MNS 1064 Report, para 2.3.3

[647] MNS 1064 Report, para 2.3.3

[648] MNS relied on certain spreadsheets used by the negotiations team - see Annexures FC 78 – FC 80, Exh BB4(b), FQC-624-632. The total imported value - relative to the locomotive price BAFO were: Bombardier – R15 804 152/R29 049 486 = 45.6%; CSR – R14 566 499/R28 890 000 = 49.6%; and CNR R17 557 873 /R28124 169 = 37.6%. See slide 52, Exh BB8(a), MNS-TS-53; and Transcript 28 May 2019, p 204 *et seq*

[649] Transcript 28 May 2019, p 205, lines 5-10

compliance, CNR, Bombardier and CSR were awarded the contracts.[650] This too was most likely in breach of the PFMA and advanced the corrupt scheme of the Gupta enterprise.

The increase in the price of the 1064 locomotives

467. The LSAs were concluded on 17 March 2014; CSR was commissioned to supply 359 class 22E electric locomotives at R18.1 billion; Bombardier to supply 240 23E electric locomotives at R13 billion; GE 233 44D diesel locomotives at R8.4 billion; and CNR 232 diesel locomotives at R9.9 billion. The total cost was R49.5 billion with a contingency of R4.9 billion making a total price of approximately R54.4 billion.

468. More than two months later, Mr Molefe submitted a memorandum to the BADC meeting of 26 May 2014,[651] and later to the board meeting of 28 May 2014 explaining the increase and seeking approval for it. The increase of R15.9 billion was attributed to four contributing adjustments: i) updated economic factors amounting to R5.4 billion; ii) risk mitigation – forex and escalation of R9.5 billion; iii) TE scope of R2.6 billion; and iv) contingencies of R4.9 billion. These four factors added R22.4 billion to the ETC. However, the PTN had yielded savings in respect of lower capital acquisition costs (less the batch-pricing adjustment) amounting to R6.5 billion, resulting in a total upward adjustment of R15.9 billion.[652] The board accepted the recommendation and took note that the main reason for the increase

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[650] See also the supplementary affidavit of Mr Sedumedi at Transnet-05-1977, paras 4.13-4.18 dealing with Mr Singh's untenable contention that it was sufficient for the LSAs to include contractual remedies for non-compliance with local content.

[651] Annexure FC 85, Exh BB4(b), FQC-715

[652] Para 14 of Annexure FC 85, Exh BB4(b), FQC-715

in ETC was the exclusion of the specified costs from the 24 January 2014 submission.[653]

469. Before approving the increase of R15.9 billion, neither the board nor the GCEO sought approval from the Minister of Public Enterprises for the increase. Paragraph 17 of the memorandum of 23 May 2014 noted that the acquisition had been approved by the Minister of Public Enterprises on 3 August 2013 and added that "although the approval from the Minister was not subject to a final cost of R38.6 billion, for good governance and for information purposes a letter will be sent to the Department of Public Enterprises advising of the final ETC".[654]

470. Section 54(2)(d) of the PFMA provides in relevant part that before a public entity (Transnet) concludes a transaction for the acquisition of a significant asset, the board must promptly and in writing inform the National Treasury of the transaction and submit relevant particulars of the transaction to the Minister of Public Enterprises (the relevant executive authority) for "approval of the transaction". Section 54(2) of the PFMA is aimed inter alia at ensuring Ministerial approval for transactions for the acquisition of significant assets.

471. The PFMA does not define what is meant by a significant asset. However, Treasury Regulation 28.3 provides that the Minister and the accounting authority must agree on the methodology for determining what is significant. The Shareholder Compact contained the Significance and Materiality Framework ("SMF") which provided that the Transnet board was exempt from the provisions of

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[653] Annexure AC 5, Exh BB8(b).1, AOC-1064-182 – Mr Singh argued in the re-examination affidavit (Transnet-05-2394, paras 138-140) that it was open to the BADC and the board to give an instruction not to make the award. This seems unlikely considering that Mr Molefe had signed the LSAs two months earlier on 17 March 2014.

[654] Para 17 of Annexure FC 85, Exh BB4(b), FQC715-16

section 54(2)(d) of the PFMA if the acquisition did not exceed 2% of the 30 September 2013 audited asset base (which equated to R4.4 billion). The SMF also provided that the board was required to provide the Department of Public Enterprises with a detailed notification of all acquisitions of assets valued above R2 billion.[655] Transnet agreed in clause 8 of the Shareholder Compact that an asset in excess of R3.9 billion would be significant.[656] Paragraph 5.1.3 of Transnet's delegation of authority framework provided that increases in the ETC of projects already approved by the Shareholder Minister had to be reported to the Shareholder Minister if the increase was in excess of 15%.

472. It is common cause that the Minister approved the acquisition at an ETC of R38.6 billion on 3 August 2013 but was never requested to approve the increase of R15.9 million, nor was the increase reported to the Minister as proposed in paragraph 17 of the memorandum of 23 May 2014. Mr Molefe, in the memorandum, in effect advised the board that there was no need for ministerial approval.[657] Mr Molefe admitted during his testimony that he had not reported the increase to the Minister,[658] even though he understood that he was obliged to report the increase and had undertaken to the board that he would do so.[659] He declined initially to comment on whether his conduct amounted to a contravention

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[655] Transnet-05-1913, para 3

[656] Clause 8 of the Shareholder Compact refers to the framework for significance and materiality in Annexure E. In the table in Annexure E under the heading: "Exemption from section 54 of the PFMA" it is provided that an acquisition which does not exceed 2% of the 31 December 2012 audited asset-based value (which equates to R3.9 billion) is exempted.

[657] Annexure FC 85, Exh BB4(b), FQC-715, paras 16 and 17

[658] Transcript 10 March 2021, p 74-76

[659] Transcript 10 March 2021, p 89, line 11

of the PFMA,660 but later said it was a matter for the legal and compliance department.[661]

473. Mr Singh, the author of paragraph 17 of the memorandum of 23 May 2014, dealt with this question in an affidavit filed with the Commission on 10 March 2021.[662]He said that he stood by the contents of paragraph 17 of the memorandum as it was based on the delegation of authority framework and the significance and materiality framework applicable at the time. Paragraph 5.1.3 of the delegation of authority framework merely provided that increases in the ETC of projects already approved by the Shareholder Minister had to be reported to the Shareholder Minister if the increase is in excess of 15%. Since the procurement of the 1064 locomotives was approved by the then Minister of Public Enterprises, Mr Gigaba, on 3 August 2013, Mr Singh argued, Transnet only needed to report the increase in the ETC to the Minister and did not need approval for contracting at an agreed higher price.[663]

474. Mr Singh's argument is disingenuous, and if accepted would defeat the purpose of the materiality framework.[664] The object of paragraph 5.1.3 of the delegation of authority framework was to allow some leeway up to 15% of the approved price, but, for good reason, implicitly required approval where there had been a material change. The purpose was to provide the Minister of Public Enterprises with oversight authority in relation to projects that materially exceeded the original approved price estimates. The requirement of reporting to the Minister was aimed at obtaining approval for a substantial increase in the price of an existing project, in recognition of the fact that the supposition upon which the original approval had

660 Transcript 10 March 2021, p 76

661 Transcript 10 March 2021, p 77 and 80-83

662 Transnet-05-1431

663 Transcript 17 June 2021, p 146-151; Transnet -05-1436, para 21

664 See the supplementary affidavit of Mr Sedumedi, Transnet-05-1913, paras 3-4

been granted no longer held true: the price of the procurement in this case increased by an additional 41%.

475. If Mr Singh's argument were accepted it would lead to the absurdity or anomaly that Transnet, for example, could obtain approval for a R10 million transaction, then unilaterally enter into a contract for R20 billion for which it had no Ministerial approval and could regularise the ultimate transaction by the simple expedient of reporting it to the Minister who would be without power to veto the transaction and prevent its conclusion. That could never have been the intention.

476. The fact of the matter in this case is that despite Mr Singh undertaking on 31 March 2014 to provide a full report to the Minister[665] the increase of R15.9 billion was neither reported to nor approved by the Minister with the result that the legality of the LSAs is open to question on this ground. The Commission is aware that there is litigation between Transnet and the OEMs in relation to this procurement.

477. As will be discussed more fully later in this report, Regiments took over the role of financial adviser on the 1064 procurement in February 2014, shortly before the LSAs were signed at the increased price of R54.5 billion. The memorandum of 23 May 2014 indicated that escalations had been verified by Transnet using publicly available data and by Regiments "using their intellectual property methodology techniques."[666] The altered business case and price increase was considered only by the BADC and the board without the benefit of the specialist expertise of other internal structures and only subsequent to the award of contracts.[667] Given the extensive increase, the business case ought to have been re-visited using the

[665] Transnet-05-2337; and Transcript 17 June 2021, p 30-32

[666] Annexure FC 85, Exh B84(b), FQC-725, para 59

[667] Transcript 15 May 2019, p 54

changed assumptions and tested for viability and profitability before the LSAs were concluded.[668]

478. Table 2 of the memorandum of 23 May 2014[669] sets out the line items making up the ultimate price of R54.5 billion. It commences with an aggregate amount of the BAFO price in respect of the entire 1064 acquisition and adds amounts for backward looking escalations and forex adjustments, batch-pricing adjustments, accounting for TE, forward looking escalations, hedging costs, and contingencies. Mr Chabi concluded that the increase from R38.6 billion to R54.5 billion reflected in Table 2 was not entirely justifiable.

479. Mr Mahomedy took issue particularly with the forex and escalation amounts reflected in Table 2, amounting to R14.9 billion (R2.3 billion escalation up to signature date; R3 billion forex adjustment to spot rate; R6.7 billion escalations to end of contract; and R2.7 billion hedging costs). He believed these were markedly high because: i) the entire contract was not subject to foreign exchange hedging and fluctuation (considering that 55% of the diesel locomotives and 60% of the electric locomotives was localised); ii) large upfront deposits were paid at the outset; iii) the business case had made provision for costs and price escalations; and iv) given that fixed price contracts had been signed in March 2014, an amount of R4.95 billion for contingencies was excessive – the business case provided for R2.232 billion. Taking account of localisation and the advance payments, Mr Mahomedy calculated that at most, only R12 billion of the R54.5 billion would have been subject to foreign exchange movements. Yet R5.7 billion of the R15.9 billion price increase provided for foreign exchange. It seems implausible that R5.7 billion was required to provide for foreign exchange fluctuations on an amount of R12

[668] Transcript 15 May 2019, p62 *et seq*

[669] Annexure FC 85, Exh BB4(b), FQC-718 - The table is more legible in MNS 1064 Report, para 4.1.3

billion. Furthermore, the escalations appear not to have taken account of the shortened delivery schedule. All of these considerations, Mr Mahomedy submitted, required the business case to have been re-visited and re-designed using the updated changed assumptions and then tested for viability and profitability before the LSAs were concluded.[670]

480. The business case provided for a positive Net Present Value ("NPV") of R2.7 billion based on the original ETC using a hurdle rate of 18.56%. Moving from R38.6 billion to R54.5 billion produced an NPV negative. The procurement project in the business case was profitable, but thinly so, in that it was only 2.5% of a revenue of R109 billion. A delay in the delivery of the locomotives, the MDS volumes not materialising, or increases in costs (all possibly impacting cash flow and thus the financing of the deal) meant there was a material risk that the project would become unprofitable.[671] Mr Molefe in the memorandum of 23 May 2014 however informed the board that the NPV of the business case remained positive at R11.68 billion (a significant increase on the R2.7 billion projected in the business case) using a changed hurdle rate of 152 % but would have become a negative R1.67 billion at the original hurdle rate of 18.56%.[672]

481. Mr Singh changed the hurdle rate at Transnet from 18.56% to 16.24% (effective from 31 March 2014) on 20 May 2014, days before the memorandum justifying the increase was submitted to the board.[673]Yet the memorandum applied a hurdle rate of 15.2%. He could not convincingly account for where he had obtained the hurdle rate of 15.2% used by him to achieve the positive NPV of R11.68 billion, beyond saying it had been under discussion before the rate of 16.24% was settled on. He

[670] Transcript 15 May 2019, p 62 et seq

[671] Exh BB8(b).1, AOC-1064-022, para 8

[672] Annexure FC 85, Exh BB4(b), FQC-715, para 7

[673] Transcript 31 May 2021,p 210

could not say whether the use of the rate of 16.24% would have resulted in a negative or positive NPV and accepted that the exercise to determine that would take some weeks.[674] The use of the hurdle rate of 15.2% and the statement that the NPV result was positive at R11.86 billion was a significant misrepresentation and (in view of the proximity in time of the change to the hurdle rate effected by Mr Singh to his compiling the memorandum) was most likely deliberately designed to mislead the board. Mr Singh used a hurdle rate of 15.2% a few days after he had signed the policy document changing the rate from 18.56% to 16.24% most likely to ensure a positive NPV when the ETC hurdle rate of 18.56% produced a negative NPV.

482. The memorandum of 23 May 2014 depicted the reasons for the increase in ETC in Table 2 as follows:[675]

ITEM	**RANDS**
BAFO per board submission excluding hedging and escalation:	**R29** 355 532 **740**
A. Escalation up to signature date (close of tender to	R2 362 018104

[674] Transcript 31 May 2021, p 190-217. Mr Singh later maintained that the NPV would have been positive regardless of the hurdle rate used because of unproven potential operational efficiencies that could be achieved from optimisation of flows based on new technology, for example, running dual-electric locomotives across routes that previously required multiple change overs from AC to DC, and if there was a 5% increase in operational efficiency -Transcript 17 June 2021, p43-52; Annexure FC 54, Exh BB4(a), FQC-423 and FQC-452. In the re-examination affidavit, Mr Singh described the use of the incorrect hurdle rate as "a mere oversight" – Transnet 05-2405, para 175; he also sought to attribute the blame for it to Mr Laher - Transnet 05-2402, para 168 *et seq*. Given the late filing of the re-examination affidavit, neither Mr Laher nor the investigative team have had an opportunity to deal with this allegation. Mr Laher's name does not appear on the memorandum of 23 May 2014 submitted to the board, which was recommended by Mr Singh on 22 May 2014 (and drafted on his instruction and under his supervision and guidance).

[675] Annexure FC 85, Exh BB4(b), FQC-718

March 2014):	
B. Add back original TE scope for BAFO purposes:	R1 706 643 360
C. Forex adjustment to spot rate:	R3 030 660 144
D. Batch price adjustment for batch size:	R2 754 402 335
BAFO updated for economic and other factors	**R39 209 256 683**
B. Additional TE scope:	R883 172 732
New price including TE's scope	R40 092 429 615
E. Cost to fix escalation to end of contract:	R6 725 784 499
F. Cost to hedging:	R2 729 046 496
ETC including hedging and escalations	R49 547 224 410
G. Contingencies:	R4 954 775 590
ETC including hedging, escalation, options etc.	**R54 502 000 900**

483. The BAFO cost of R29.356 billion represents the total cost of the 599 electric locomotives and the 465 diesels. The base price in the ETC was R30.476 billion.[676] The difference may be attributable to the BAFO and PTN stages. The aggregate figure used in the price evaluation as reflected in the memoranda of 15 January 2014 submitted to the LSC by the CFET-Finance differs from that in the memorandum of 23 May 2014. The BAFO prices per locomotive used in the memoranda of 15 January 2014 led Mr Chabi to a total BAFO price of R29 532 819 948 which is about R177 million more than the price stipulated in Table 2 of Mr

[676] Exh BB8(b).1, MNS-AC-23

Molefe's memorandum of 23 May 2014 (R29 355 532 740). If Mr Chabi's calculations are correct, the BAFO was understated by Mr Molefe in the amount of R177 million. Mr Chabi received no documents substantiating the BAFO price of R29.356 billion used by Mr Molefe, but worked on the assumption that such figure was the correct value.[677]

484. Mr Chabi reached the overall conclusion that the increase to the BAFO figure made up of the additional items A-Gin Table 2 was unjustifiably high.

485. Items A and C in Table 2 provide for an adjustment of price to take account of escalations and a forex adjustment for the period between the close of the tender and the signature of the LSAs (April 2013 to March 2014). In total they amount to R5 392,678 248 (R2 362 018104 plus R3 030 660 144). These are "the backward-looking economic factors" that impacted the price. Mr Molefe argued that the estimates and assumptions on which the business case was based had changed substantially since the board approved the ETC in April 2013.

486. With regard to Item A, Mr Molefe explained that labour cost increases (Transnet had concluded a two-year wage settlement at 8.5%), a 12.9% increase in the price of steel, a local producer price index of over 7.5%, higher foreign inflation and anticipated inflation of 6.1% would result in a locomotive price increase of 8% which was reflected in the amount of R2 362 018 104 in Item A in Table 2.

487. Mr Chabi took issue with the computation of the backward-looking escalation figure of R2.362 billion.[678] He agreed that there was deterioration in economic factors beyond the levels allowed for in the business case. The cost arising from this

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[677] Transcript 29 May 2019, p 226 *et seq*; and Exh BB8(b).1, AOC-1064-041, para 10.2

[678] Exh BB8(b).1, AOC-1064-036, para 9.54.3

deterioration as per Items A and C of the memorandum was R5.4 billion. He computed this cost to be R4.4 billion. Mr Chabi accepted that the foreign currency cost of approximately R3.1 billion (Item C) was reasonable, but considered the escalation in Item A to be overstated. The key inputs in determining backward escalation costs were the local content declarations by the OEM's and the relevant price inflation indices. Because this was backward-looking, the inputs were observable and required no assumptions. The memorandum estimated R2.362 billion on the back of assumed local content of 60%. Contrary to the submissions in the memorandum, all the OEM's, except GE, failed to meet the local content requirements.[679] He estimated the escalations by using the following parameters: i) actual declared foreign-local content; ii) the Treasury curve hedge rates; iii) local inflation in line with South African PPI rates (backward-looking at 7.74% per annum); iv) foreign inflation in line with US CPI i.e. 2% per annum; and v) expected accelerated delivery schedules. Based on these, the estimated inflation should have been R1.42 billion instead of R2.362 billion. The memorandum does not show the calculation for the R2.362 billion, but it does appear to consider additional inflation for cost components. The additional inflationary costs of components are accounted for in the PPI and foreign inflation. Adding them back amounted to double counting.[680] Mr Chabi simplified the point by intimating that the 8% escalation posited by Mr Molefe in his memorandum did not properly account for the different rates of inflation for the local and foreign components.[681] Foreign inflation was 2% or less, while South African inflation was 7.8%. A weighted average of 8% was not justifiable.[682]

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[679] Exh BB8(b).1, AOC-1064-043, paras 10.6-10.7

[680] MNS 1064 Report, paras 4.1.4 -4.1.8

[681] Transcript 4 December 2019, p 48-52

[682] See MNS 1064 Report, para 4.1.3

488. Item C was a provision for the depreciation of the ZAR, which had impacted the expected price of the locomotives as per the business case and ultimately the ETC. Mr Chabi 's computation was R3.17 billion which was more than the R3.031 billion provided in Table 2. He thus accepted that Item C was a reasonable adjustment.

489. Item B of Table 2 comprises two amounts in respect of TE. R1.707 billion and R883 million. Together they amount to a premium of R2.59 billion for the use of TE as a sub-contractor. The amount of R1.707 billion is the amount which was deducted from the BAFO price of the electric locomotives during stage 6 of the evaluation. Mr Molefe's adding it back at this stage confirms that CSR and Bombardier were not in fact evaluated on the actual price of their locomotives. This unfairly favoured CSR. However, from an accounting perspective, the adding back of this amount to the price was appropriate because it reflected the actual price – including the additional cost of using TE as a sub-contractor. The memorandum did not provide a clear explanation for the additional amount of R883 million under Item B for TE scope beyond suggesting it was a risk premium into their pricing for the risks associated with TE carrying out the additional new scope of work for the first time. Mr Chabi was unable to get more information and was unable to refute it. He therefore assumed that the R2.5 billion TE adjustment was reasonable.[683]

490. Item D of Table 2 provided for an adjustment of approximately R2.7 billion for the reduction of the batch size. Mr Molefe justified the additional cost on the basis of an overall saving on future escalations and hedging costs as a result of a shorter

[683] Transcript 4 December 2019, p 53

delivery period in the amount of R4.08 billion (which given the delays was probably not realised).[684]

491. The batch price adjustment cost (batch-pricing) in Item D was probably a break-point pricing cost (break-pricing). Break-pricing only applies when there is a premature termination of the procurement order and thus applies only once a contract was in place. The idea behind break-pricing is that with a premature break the bidders need to be compensated for having committed financial resources in anticipation of fulfilling the entire order. However, when the board split the bids into batches, no contract had been signed with the OEM's and therefore no fixed costs for setting up the production lines needed to be recouped by them. The pricing schedules provided by the bidders in respect of break-pricing were probably used to obtain the figure of R2.7 billion. Using the break-point pricing schedules provided by the bidders, a figure of R2.7 billion was obtained assuming OEMs were contracted and orders were terminated at the point where the batches were supplied by the OEMs. The figure is wholly unjustifiable. Paragraph 3.1 of Part 2 of the RFP specifically provided that Transnet would not be expected to pay a price premium should it exercise the option to change the quantities of locomotives procured from any bidder. Mr Chabi accordingly concluded correctly that the amount of R2.7 billion was unjustified and no basis existed for the adjustment.

492. Item E of Table 2 provided for an adjustment to a forward escalation of input costs in the amount of R6 725,748,499. This cost is the expected escalation from 17

[684] Annexure FC 85, Exh BB4(b), FQC-726, paras 66-71- Mr Singh re-visited the question of batch pricing in his belatedly filed re-examination affidavit – Transnet 05-2411, paras 205-208. His analysis indicates that he misunderstands the principal contention that he played a significant part during the PTN in incurring an additional liability of R2.7 billion that Transnet was not contractually obliged to incur. He accused Mr Chabi of being "obsessive in the way that he interprets the concept of break pricing as this is the only way to justify a zero value for the batch pricing adjustment". The inclusion in the price of a R2.7 billion adjustment that was not due entirely supports Mr Chabi's finding that the price was unjustifiably inflated by this amount.

March 2014 (the contract signing date) over the contract term (originally seven years but reduced to three to four years by the accelerated delivery schedule). The cost should be an estimation of the difference between the BAFO price as at 17 March 2014 (the contract date) and the expected prices at the times of delivery for each locomotive, allowing for declared local/foreign contents, and future South African PPI at 6% per annum and USA CPI at 2% per annum.[685] However, the cost estimation in the memorandum of 23 May 2014 used different assumptions resulting in an unjustifiable increase in this cost.

493. In the memorandum, Mr Molefe justified the R6.7 billion increase on the ground that financial prudence warranted fixing the escalation exposure on conservative grounds.[686] He argued that given the size, magnitude and risk tolerance of Transnet due to the execution of the Market Demand Strategy, cash flow certainty was of paramount importance when planning for the long term. This would ensure that Transnet was able to manage its gearing, cash interest cover and the like. Fixing escalation for input costs, especially the volatile cost of labour and steel, would gain certainty of cash flows and satisfy the conservative risk appetite of bond holders and credit rating agencies. The contractors had also built a risk premium into their pricing for forward looking inflation to cater for the unpredictable nature of the labour environment within South Africa and the risk associated with TE carrying out the additional new scope of work.

494. Although the South African Reserve Bank ("SARB") forecast CPI at 6.2%, 5.9% and 5.5% for the years 2014, 2015 and 2016 respectively, there was concern about upward inflationary pressure. The "high level" of local content, which Mr Molefe set at 60%, justified in his view the use of local indices in assessing the cost of

[685] MNS 1064 Report, para 4.1.12(b)

[686] Annexure FC 85, Exh BB4(b), FQC-724, paras 45-59

escalations going forward. It should be immediately noted that Mr Molefe misstated the local content figure. The local content of three bidders (Bombardier, CSR and CNR) was in fact below 50%. Nonetheless Mr Molefe believed a net escalation of 16.8% provided in Item E was justified (CPI of 6% escalated for 35 months on a compound basis, excluding a provision for risk results in a 18.54% increase). These escalations were verified by Regiments "using their intellectual property methodology and techniques". The escalation of R6.7 billion amounted to the application of a weighted average of 7.35% to the entire transaction.

495. Mr Chabi was of the opinion that the calculation in Item E was unjustifiable for two essential reasons: first, the incorrect local content figures; and, second, the use of local indices in relation to foreign inflation assumptions.[687] He performed his analysis by constructing an inflation index for each OEM to reflect each OEM's local and foreign content (Bombardier 45/55; CSR 50/50; and CNR 38/62). In modelling cash flows he allowed for a 90% upfront payment on delivery and 10% after a retention period of four months (presumably accounting for the advance payments made within the six months of signature). He assumed local and foreign inflation at 6% and 2% respectively over the accelerated delivery period.[688] He started with an "escalated" price of a locomotive as at March 2014 (the date of the LSA), being the updated BAFO price at that date, taking account of inflation between April 2013 and March 2014, the forex adjustment, the add back of the TE adjustment, and the batch price adjustment. The escalation cost was then the difference between the escalated March 2014 price per locomotive and the escalated price of the locomotives at various points over the accelerated delivery period.

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[687] Transcript 4 December 2019, p 59-67; and Exh BB8(b).1, AOC-1064-046, paras 10.20-10.23

[688] These figures were conservative because South African and US inflation were probably lower

496. The first key difference in assumptions in relation to Item E was Mr Chabi's use of an inflation rate which took account of the local/foreign content ratio. Mr Molefe erred in applying the local indices to the entire transaction –7.35% per year.[689] The second mistaken assumption in Mr Molefe's calculation was his escalation for 60 months, resulting in an 18.54% increase. This incorrectly assumed that all the locomotives were purchased in the 35th month, whereas the delivery was scheduled to take place intermittently over the three-year period. Thirdly, the calculation that the 16.8% adjustment (R6.7 billion) to the price was justified by a forward-looking inflation assumption of 6% per year (18.54% over 35 months) was incorrect. To achieve an escalation cost of R67 billion, the assumed inflation rate would be 7.35%.[690]

497. The crux of Mr Chabi's testimony is that the application of proper assumptions regarding local/foreign content, a lower weighted inflation rate (taking account of the different local and foreign rates), the intermittent delivery of locomotives and the accelerated delivery schedule, results in an Item E adjustment of R3.472 billion and not R6.726 billion. Item E in Table 2 of the memorandum accordingly overestimated this adjustment by approximately R3.3 billion.

498. Mr Singh challenged the conclusion by Mr Chabi that the provision for forward escalations was overstated by R3.2 billion on various grounds[691] and provided an expert opinion by Mr Erich Krohnert in support of his arguments.[692] Mr Chabi

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[689] Transcript 4 December 2019, p 61-64

[690] Transcript 4 December 2019, p 66, line 10 *et seq*

[691] Transnet-05-1492, paras 268-274; and Transcript 17 June 2021, p 82-105

[692] Transnet-05-1982 – Mr Krohnert does not appear to have qualified himself as an expert, despite Mr Singh's counsel undertaking to do so – Transcript 17 June 2021, p 112 – See also Mr Singh's re-examination affidavit (Transnet 05-2415, paras 209-215) where he belatedly elaborates on some of his contentions regarding escalations and the inclusion of a risk premium which he failed to raise during his testimony to which Mr Chabi and the investigative team of the Commission have been denied an opportunity to respond.

rebutted the submissions of Mr Singh and Mr Krohnert in two supplementary affidavits.[693]

499. Mr Singh argued firstly that Mr Chabi erred in using the payment profile of 90% on delivery and 10% after a four-month retention period used in the business case in March 2013 as opposed to the contractually committed provisions available in March 2014 which better reflected reality. Mr Singh did not set out the relevant contractual provisions. Mr Chabi countered that the profile suggested by Mr Singh was not sufficient because it did not account for the timing of each milestone over the payment profile. The assumption used by Mr Chabi is widely accepted and in fact was used by Mr Krohnert, who explained that like Mr Chabi he estimated the cost of escalation to the end of the contract by modelling the future cash flows using the delivery schedule provided in the memorandum to the board justifying the increase and provided for 90% of the purchase price to be paid on delivery and the remainder to be paid four months later. He noted that he had not been provided with the actual contracts to determine the correct delivery or payment schedules. Accordingly, Mr Chabi's assumption on the payment profile seems appropriate.

500. Mr Singh further maintained that Mr Chabi made an error in using actual local content percentages as opposed to the contractually committed local content percentages. The contention is not sustainable as it would not accord with the actual reality since the contractual requirements were not in fact met.

501. Mr Singh accused Mr Chabi of being simplistic for relying on the local (6%) and foreign (2%) CPI numbers. In the opinion of Mr Krohnert, Mr Chabi should have utilized industry specific inflation indicators for each different country to assess the appropriate impact of this factor on costs - industry specific variables would include

[693] Transnet-05-1828, paras 69-77; Transnet-05-2004, paras 6.8-6.9

items such as steel, labour, copper etc. The OEMs were more likely to have priced using industry specific inflation for their own manufacturing costs.

502. Using data from the Bureau of Labour Statistics of the US Department of Labour, Mr Krohnert believed that an industry specific inflationary indicator of 4.2% for the USA was more appropriate than using a general inflation assumption which might not give sufficient weight to industry specific factors. An industry-specific index constructed for the local component could be estimated at 7.7% on the assumption that the labour component was equal to Transnet's 8.5% p.a. wage agreement and that the steel and fuel components would equal that of the foreign components. He felt this was optimistic given that South African electricity increases had averaged significantly higher than this prior to February 2014. Using these values would result in a composite future inflationary expectation of 6.2% p.a. as opposed to the 4.4% assumed using the general inflation assumptions. Mr Krohnert pointed out that there was nothing untoward in a provider seeking to immunise its own inflationary exposure when negotiating this transaction.

503. Mr Chabi responded to this by arguing that the information detailing the relevant factors along with the respective weightings for each OEM was not available to him or Mr Krohnert, as appears from the assumptions Mr Krohnert used. Mr Krohnert's approach seems problematic firstly because the memorandum justifying the price increases did not provide for a full basket of factors (or components) to consider when determining a composite inflation rate. It provided a few examples, with the implication that a financial modeller would need to assume the remaining factors and weighting for them. The model proposed by Mr Krohnert is complex (and not brief as per the actuarial principle of parsimony) and makes assumptions that are subjective and would not have generalised well across the four OEM's. Assumptions with regard to over 40 parameters would have been required resulting

in the model becoming volatile and unreliable. It was in Transnet's best interest rather for it to have relied on broad escalation indices (which it in fact did) when agreeing to price.

504. Mr Singh alleged that Mr Chabi also ignored the fact that a premium would be charged by the OEMs to assume the risk of future price escalations. According to Mr Krohnert a risk premium for taking on the risk of the unknown is legitimate. The need for a premium was mentioned in the memorandum but the quantum was not quantified. There are no market observable factors to determine the premium to be paid to assume future price escalations risk. A price premium of 1.35% for assuming such risk, according to Mr Singh, could reasonably be added by the OEMs to a rate of 6% (weighted average for both local and foreign components), thus arriving at the rate of 7.35% used in the memorandum. Mr Chabi disagreed.

505. Over the five-year period prior to March 2014, the rolling one-year local PPI averaged at 4.1%, well below the inflation rate of 6% assumed by Mr Chabi. An all-inclusive escalation rate (escalation rate + risk premium) of more than 6% was not warranted and should not have been agreed to by the Transnet team in the negotiations. The approach adopted by Mr Krohnert would not have been in the interest of Transnet because it would have ignored the upside risk of local inflation falling below 6% and allowed for an additional 1.35% as a risk premium without substantiating the amount. Mr Chabi's assumption of 6%, being the upper band of the SARB target, in effect allowed for a risk premium of about 2%.

506. In short, the application of a rate of 7.35% on both local and foreign content unjustifiably increased the price and provided a significant margin that would have assisted CSR and CNR to pay the agreed kickbacks to the Gupta enterprise.

507. Item F of Table 2 provided an additional hedging cost of R2 729 046 496. Mr Chabi agreed that this cost was justifiable and reasonable.[694]

508. Item G of Table 2 added R4 954 775 590 for contingencies. Mr Chabi estimated that Item G was unduly inflated by R2.1 billion.[695] Mr Molefe justified the R4.955 billion on the basis that the ETC of R495 billion did not include the cost of: i) capital spares beyond the warranty period; ii) variation orders and options (such as electronically controlled pneumatic braking and wire distributed power etc.); and iii) provision for manufacturing operations to be carried out by TE in Durban. These, he maintained, justified an additional 10% contingency adjustment.

509. According to Mr Chabi , it is standard practice in projects of this kind to set aside a contingency reserve to provide for unforeseen risks and costs in the amount of 5% to 10% of the capital cost.[696] Contingency costs of R2.232 billion made up 7.4% of the capital cost in the business case. Mr Chabi accepted that contingencies for variations and options were standard.[697] He took issue with the provision for capital spares because contingencies are not ordinarily meant to cover long term capital spares. Such components are usually under warranty and hence their costs would not be included.[698] Mr Chabi took the view that a contingency of between 7-8% was more typical of past practice within Transnet and a contingency of R2.809 billion was more appropriate. He broke the figure down into four items: i) capital

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[694] Exh BB8(b).1, AOC-1064-049

[695] Mr Singh's attempt to discredit Mr Chabi's findings on the provision for contingencies is not convincing – Transcript 17 June 2021, p 105-117

[696] Exh BB8(b).1, AOC-1064-039, para 9.54.9

[697] Transcript 4 December 2019, p 72, line 12 *et seq*

[698] MNS 1064 Report, para 4.1.14; Mr Singh contended belatedly in the re-examination affidavit (Transnet 05-2409, paras 196-200) that Mr Chabi was not qualified as a locomotive expert and thus did not possess the skill to challenge this variable and had failed to appreciate that the price for spare parts and tools was not finalised. The late filing of the re-examination affidavit resulted in Mr Chabi and the investigative team of the Commission being denied an opportunity to deal with this allegation.

spares – R545 344 406; ii) options – R1.07 billion; iii) relocation to Durban – R9.5 million; and iv) unallocated R1.18 billion.[699]

510. During his testimony, Mr Chabi did not deal with the additional amount included in the 10% contingency provision for the establishment of a production line in Durban. In the memorandum Mr Molefe explained that Transnet had decided that it would be more strategic to have two OEMs manufacture locomotives in Durban because TE could not accommodate four OEMs in Gauteng. Bidders had based their contracted price on manufacturing operations being carried out in Gauteng and thus there would be additional costs that had not been quantified. This cost was included in the additional 10% for contingencies.[700] Mr Chabi put this cost at R9.5 million[701] on the basis of a quotation supplied by CNR on 11 March 2014 (a week before the LSAs were signed). As discussed later, the cost increased dramatically to R1.2 billion subsequent to the contracts being concluded and was a significant component of the Gupta scheme.

511. In the final analysis, Mr Chabi concluded that the deterioration and economic conditions (inflation and foreign currency) warranted an increase in the ETC in the business case from R38.6 billion to R45.379 billion made up of: i) BAFO price = R29.356 billion; ii) TE scope = R2.590 billion; iii) backward escalations = R1.392 billion; iv) backward forex = R3.031 billion; v) forward escalations = R3.472 billion; vi) forward forex = R2.7 billion; and vii) contingencies = R2.809 billion. This represented an increase of 18% (R6.8 billion) on the original ETC rather than the 41% increase proposed by Mr Molefe in the amount of R15.9 billion.

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[699] Transnet-05-2008, para 8

[700] Annexure FC 85, Exh BB4(b), FQC-726, paras 73-75

[701] Transnet-05-2008, para 8.

512. In short, according to Mr Chabi, the adjustment approved by the board in May 2014 in the amount of R15.9 billion included amounts totalling R9.124 billion in unjustifiable expenditure. This overstated expenditure was due to changes in escalation formulas and the source of the indices used by Regiments. This increase, at Transnet's expense, benefitted CSR and CNR, which in turn had kickback agreements with entities controlled by Mr Essa.

The **Tequesta agreements in relation to the 1064 locomotives**

513. The Shadow World Investigation report[702] reveals that CSR agreed to pay kickbacks of 21% of the value of the 359 electric locomotives (awarded to it as part of the 1064 locomotive procurement) to two Gupta linked companies, JJT and Tequesta Group Ltd, ("Tequesta"), equalling approximately R3.806 billion.[703] As with the kickbacks on the other contracts with CSR, approximately 85% of that was probably paid to the Gupta enterprise.[704]

514. On 18 May 2015 Mr Essa, acting on behalf of one of his companies, Tequesta, incorporated under the laws of Hong Kong, concluded a contract in Shenzhen, China, with CSR (Hong Kong) Co Ltd.[705] The contract is described on its cover page as a "Business Development Services Agreement" ("the BDSA"). The preamble of the BDSA records that Tequesta had acquired a familiarity with regulatory framework in South Africa and could identify opportunities to participate in various government projects. CSR (Hong Kong) was described as a global company specialising in the manufacture of electric locomotives with focus on emerging markets and had approached Tequesta to provide advisory services in

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[702] FOF-06-163

[703] JJT was to receive R706 770 480 and Tequesta R3 098 916 720

[704] FOF-06-194, paras 58-60

[705] FOF-06-358; and Transnet-Ref-Bundle-05149

respect of "the Project" for and assistance to achieve their BEE obligations. The Project referred to "Project 359" which was defined in clause 1.1 of the BDSA to refer to "any portion of the tender for the supply of 359 Electric Locomotives [22E]" to Transnet. At the time the BDSA was concluded (May 2015) the LSA for the 359 electric locomotives had already been concluded between CSR and Transnet (17 March 2014).

515. Clause 3.3 is a noteworthy provision. It reads:

> "The company has advised Tequesta that a previous agreement had been signed between CSR, Zhuzhou Electric Locomotive Co Ltd and JJ Trading FZE (hereinafter referred to as the "JJT"). However, the company advises Tequesta that in the event that JJT disputes or contests the cancellation or non-payment in a court of law and if the court decrees that the agreement with JJT is valid...then the financial compensation to JJT (which will not exceed the retention amount, that is 15% of the ...amount payable to Tequesta under this agreement) will be deducted from the amount retained from Tequesta as per clause 6.1.6 and the balance (if there is) will then be paid to Tequesta within 30 days".

516. Clause 6.1.1 of the BDSA set out the remuneration and payment terms:

> "For the project related advisory services provided by Tequesta, as detailed in Annexure A, Tequesta shall be entitled to an advisory fee of 21%... of the contract value of Project 359 awarded to the company, based on 2%... of the contract value as the success fee and 19%...of pro-rata to the milestone-based payments received by the company from the client. The company has already paid 3.9% of the contract value (R706 770 480) to JJT up to the agreement date (18 May 2015). The total payable amount to Tequesta under this agreement is 17.1% of the contract value (R3 098 916 720)".

517. The total payable under the BDSA was R3.806 billion consisting of the prior payment to JJT of R706.77 million and the remaining payment of R3.099 billion to

Tequesta.[706] In short, the BDSA undertook to pay Tequesta and JJT R3.86 billion for "advisory services" in Annexure A to the agreement to advise the company on the regulatory framework in South Africa and assist with various opportunities to participate in government projects.

518. Annexure A included a revealing clause in relation to the agreed services to be provided by Tequesta. It reads:

> "It is hereby noted and agreed between the parties that the above services are provided as pre-project service and will conclude on the company's signing the contract for the project with the client. The company will not require any proof of delivery of the above services since it is understood that the project would not have materialised without the active efforts of Tequesta to provide the services listed above."

519. The import of this clause is twofold. First, it confirms that the services for which Tequesta was to be paid were allegedly rendered by it to CSR (Hong Kong) prior to the signing of the LSA on 17 March 2014, some 14 months before the BDSA was signed. Second, Tequesta was not required to provide proof of any of the services allegedly rendered by it because in fact the remuneration was primarily for the role Tequesta had played in materialising the project. The provisions of the BDSA are thus ambiguous in a key respect. On the one hand the BDSA is cast in language identifying services to be performed in the future, but on the other it clearly intimates that the services had already been rendered and there was no need to establish that the services had in fact been delivered.

520. There are three other important observations that can be made about the BDSA: i) it confirms the exact number of locomotives that were awarded to CSR 14 months prior to its signature; ii) the services rendered pre-date the award of the tender; and

[706] The remuneration figure in the MNS 1064 Report is incorrect - MNS 1064 Report, para 3.1.19

iii) Tequesta was responsible for CSR being awarded the contract. CSR actually bid for the full 599 electric locomotives; yet the Project was defined as the 359 locomotives which were awarded to it. If there were genuine pre-award services, these would have related to the bid for 599.

521. There is no evidence of any services provided by either Tequesta or JJT. Mr Tshiamo Sedumedi of MNS reviewed videos of the PTN to see if Tequesta had assisted "the company in negotiating with the client on pricing levels in relation to the project". He observed that it was CSR personnel and not representatives of Tequesta who concluded these negotiations. There was no evidence that Mr Essa was involved in the negotiations either.[707] It is also not apparent what, if anything, Tequesta had done to assist CSR to secure the bid. From these facts it is quite clear that this transaction was corrupt.

522. Mr Sedumedi was not able to cast any light upon the identity and location of JJT and why it received R706 million before being substituted by Tequesta. He ventured that prior to Tequesta being appointed (long after the event) as the service provider under the BDSA, and the arrangement for the deduction of the R706 million from the overall fee, JJT was the service provider of these supposed services and there was a prior relationship between CSR (Hong Kong) and JJT. This was confirmed by Mr Holden during his testimony before the Commission.

523. In August 2016 CRRC signed an addendum to existing agreements with Tequesta varying the terms of the BDSA of 18 May 2015. The primary aim of the addendum was to modify the terms under which Tequesta was to be paid, and, in particular, waived CRRC's right to withhold portions of the payments due to Tequesta. It appears that CRRC had retained 15% of all payments due to Tequesta as surety.

[707] Transcript 29 May 2019, p 79, line 1

The addendum stipulated that this would no longer be the case and that the withheld amounts to date (equal to USD15,144,610 million) would be paid to Tequesta. This was contingent on Transnet awarding CRRC contracts to provide maintenance services. If this was not met, CRRC would be entitled to recoup the 15% outlay against future payments that were due to be made to Tequesta. The withheld amounts would be released within 90 days of the final payment being made by Transnet to CRRC. The effect of the addendum was to expedite a large payment to the Gupta enterprise through Tequesta.[708]

524. CNR also paid kickbacks to the Gupta enterprise for the award of the 232 diesel locomotive contract. On 20 May 2014 CNR and Tequesta entered into an exclusive agency agreement.[709] This agreement replaced and superseded an earlier agreement of 8 July 2013 between CNR and CGT related to the same matters. The later agreement is a simple cut-and-paste operation in which CGT was replaced by Tequesta. Paragraph 1.1 of the agreement defines the project upon which the agreement was based as "the supply of 232 Diesel Locomotives for the General Freight Business issued by Transnet Freight Rail in South Africa", while the product was defined as the "Diesel Locomotives as awarded by Transnet Freight Rail for General Freight Business after being successful in tender." In return for a series of services, including using its "best endeavours to promote and increase the sale of the Company's Product in the territory", CGT/Tequesta would be entitled to a success fee payment equal to 2% of the total value of the contract entered into between Transnet and CNR. The success fee was to be paid immediately upon CNR and Transnet formalising the agreement. CGT/Tequesta was also entitled to a further 19% sales commission, which was to be paid upon receipt by CNR of

[708] FOF-06-195

[709] FOF-06-304

certain milestone payments from Transnet. The total kickback paid in this instance was R2.088 billion.[710]

The maintenance services agreement with CSR

525. The LSA concluded between CSR and Transnet envisaged the parties concluding a maintenance agreement for the locomotives supplied. On 28 July 2016 the board approved the conclusion of a 12-year maintenance services agreement with CSR for an amount of R6.18 billion. The memorandum supporting the award was not presented to the relevant governance structures for review prior to it serving before the board. It was presented directly to the board and subsequently sent to the Minister of Public Enterprises for approval.[711] The minutes of the board meeting record the attendance inter alia of Ms Mabaso, Mr Gama, Mr Nagdee and Mr Shane.[712]

526. Management informed the board at the meeting of 28 July 2016 that the agreement was needed as part of Transnet's drive to improve operational performance and support of the 1064 locomotive project. It was aimed at: i) improved maintenance output and operating performance; ii) reduced and optimised cost; iii) an enhanced role for TE; and iv) enhanced local content. The negotiation team had been engaged in seven months of negotiations with CSR and managed to secure "substantial reductions in the cost of fully OEM managed maintenance through extensive negotiations with CSR".[713] The board recommended that the Minister should approve the business case and award the maintenance services (the 12-year contract) to CSR in terms of the LSA for the 1064 locomotives. The board

[710] Transcript 7 December 2020, p 177 *et seq*

[711] Transcript 15 May 2019, p12

[712] Annexure MSM 1, Exh BB3(a), MSM-040

[713] Annexure MSM 1, Exh BB3(a), MSM-043, para 3.2.4

further approved the delegation of authority to the GCEO (Mr Gama) to conclude the contract.[714]

527. On 12 August 2016 Transnet issued CSR with a Letter of Award for the maintenance services of the locomotives.[715] Clause 2.4 of the Letter of Award provided that Transnet would pay CSR "Start Up Costs" totalling R618 160 764 (excluding VAT) within 14 days of receipt of a valid and effective "On Demand Guarantee" issued by a financial institution.[716] Pursuant to this clause Transnet paid CSR an advance payment of R704 703 250 (including VAT) in October 2016.

528. Transnet terminated the Letter of Award in October 2017 (amidst allegations of corruption)[717] on the ground of non-performance. Despite the fact that Transnet had not received any goods or services in terms of this contract, no steps were taken to claim back the advance payment until September 2018 when Transnet notified the Bank of China of its claim under the bond on the grounds that CSR had failed to execute its obligations.[718] Mr Gama maintained that the Letter of Award was only terminated in September 2018 and intimated that Mr Mahomedy was responsible for the delay in terminating the agreement.[719]

529. In December 2018, more than two years after payment had been made, CSR refunded Transnet R618 160 746. CSR failed to repay the VAT amounting to R86 542 504 as well as the interest due to Transnet in the amount of R136 473 803. On 11 February 2019, Transnet demanded payment of the VAT

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[714] Annexure MSM 1, Exh BB3(a), MSM-044

[715] Annexure MSM 15, Exh BB3(a), MSM-281

[716] Annexure MSM15, Exh BB3(a), MSM-286, para 2.4

[717] Transcript 15 May 2018, p 97; and Exh BB3(a), MSM-340

[718] Annexures MSM16 and MSM17, Exh BB3(b), MSM-345 *et seq*

[719] Transnet-07-250.143, para 33

and interest in the total amount of R223 016 308.[720] The amount remained outstanding in May 2019 and it is not clear whether this amount has subsequently been paid to Transnet.[721]

530. There was also a BDSA in relation to the maintenance agreement which may account for CSR's reticence in making full repayment. About ten months prior to the board approving the maintenance agreement, on 10 June 2015, CSR entered into a BDSA with Regiments Asia Ltd.[722] The BDSA was signed by Mr Essa on behalf of Regiments Asia and by Mr Zhou Qinhe for CSR. Clause 1 of the BDSA defined the "project" as "the long term (expected 12 years) financial budget for the Railways Spares & Maintenance by Transnet SOC Limited, South Africa." In terms of clause 3 of the BDSA, Regiments Asia was to provide advisory and consulting services in respect of the project and to aid business development and assist CSR in achieving its B-BBEE objectives in South Africa. There is nothing in the BDSA which specifically addressed the outputs of maintenance or operational performance of the locomotives. The BDSA, like the other kickback agreements, was essentially a proforma contract.

531. In terms of clause 6 of the BDSA, Regiments Asia was to be paid 21% of the contract price as awarded to CSR by Transnet.[723] Had the contract run its course, the kickback would have been in the region of R1.3 billion. The fee was payable incrementally but would become payable after the signing of the contract between CSR and Transnet and the receipt of the advance payment by the CSR. In terms of this BDSA, CSR became liable to pay Regiments Asia R129 813 760 in October

[720] Annexure MSM 18, Exh BB3(b), MSM-351

[721] Transcript 15 May 2018, p 102

[722] FOF-06-388

[723] FOF-06-398

2016. On 29 October 2016, CRRC paid R9 406 181 into the Habib Bank UAE account of Tequesta, apparently in respect of this kickback payment obligation.[724]

The transgressions in relation to the 1064 locomotives

532. The procurement of the 1064 locomotives was attended by a wide range of wrongdoing that reflected a pattern aimed at favouring CSR and CNR with the objective of facilitating the kickbacks to the Gupta racketeering enterprise.

533. The wrongdoing comprised, *inter alia*: i) the misrepresentation to the board of the components of the ETC; ii) the non-compliance with the preferential points system; iii) the unfair favouring of CSR through the TE adjustment; iv) the factoring of the R2.01 million TE discount back into the price of CSR's locomotives; v) the understating of CNR's BAFO price; vi) the marginalising of Transnet's treasury; vii) the inflation of the price through the inappropriate use of batch-pricing; viii) the manipulation of the delivery schedule; ix) the payment of excessive advance payments; x) non-compliance with the local content requirements; xi) the failure to obtain the approval of the Minister for the increase; xii) the misrepresentation to the board of the NPV by using the wrong hurdle rate; xiii) the inflation of the provision for escalations, forex, batch-pricing and contingencies in the price; xiv) the dubious maintenance services agreement and the failure to recoup the excessive advance payment timeously and the VAT on it; and xv) the BDSA kickbacks.

534. As specifically discussed in the preceding paragraphs, all of this wrongdoing gives rise to reasonable grounds to believe that there may have been contraventions of various provisions of sections 50 and 51 of the PFMA on the part of the role players (Mr Molefe, Mr Singh, Mr Gama and other members of the board) in

[724] FOF-06-980 and Annexure II, FOF-06-885.6

relation to the transactions in which they were involved. At various times they failed to exercise the duty of utmost care to ensure reasonable protection of the assets of Transnet. Individually they did not act with fidelity, honesty, integrity and in the best interests of Transnet in managing its financial affairs and did not comply with its operational policies and applicable legislation.

535. Taken with the evidence against Mr Molefe, Mr Singh and Mr Gama concerning their receipt of cash gratifications from the Gupta enterprise and the payment of kickbacks to Mr Essa's companies and the Gupta enterprise by CSR and CNR, there are reasonable grounds to believe that Mr Molefe, Mr Singh , Mr Gama and Mr Essa, as well as others, received corrupt gratifications. There are also reasonable grounds to believe that they have participated in the conduct of the affairs of the Gupta enterprise and may have committed various offences under section 2 of POCA and those relating to money laundering and the proceeds of unlawful activities in terms of sections 4-6 of POCA. The conduct associated with the conclusion of the BDSA in particular provides reasonable grounds to believe that the offences of corruption, racketeering and those relating to the proceeds of unlawful activities as contemplated in Chapter 2 of PRECCA and Chapters 2 and 3 of POCA may have been committed by Mr Essa and his associates in the Gupta enterprise and the persons who concluded the BDSA on behalf of CSR.

536. These findings are to the effect that there are reasonable grounds to believe that the relevant employees and board members of Transnet violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.4 and involved corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

537. In the light of his relationship with Mr Essa, the conduct of Mr Sharma (the Chair of the BADC) in relation to the acquisition of the locomotives warrants further investigation.

CHAPTER 6 – THE RELOCATION OF CNR AND BT TO DURBAN

The PWC recommendation

538. While negotiations were being conducted for the supply of the 1064 locomotives, in February 2014, Transnet instructed Price Waterhouse Coopers ("PWC") to conduct a review of TE's operational readiness to deliver in respect of the assembly of the locomotives. In terms of the LSAs, TE and the OEMs were jointly responsible for setting up the assembly lines for the locomotives.

539. PWC assessed different TE sites to identify which ones could be used for the assembly of the 1064 locomotive order and submitted a report on 21 February 2014.[725] The original intention had been to use the Koedoespoort site in Gauteng, but the PWC assessment indicated that the site in Bayhead, Durban could also be used. The Koedoespoort facility had been used in the past to assemble the earlier procurements of Class 43E diesel locomotives for GE and the Class 20E electric locomotives for CSR. It, thus, had the advantage of the existing production lines and supply chain there and conveniently located engineering support. However, PWC felt that four large assembly lines located at the same location might divide focus and create supply bottlenecks. Accordingly, it recommended that two of the four assembly lines be set up at TE's Bayhead, Durban facility. Given that GE and CSR already had production lines at Koedoespoort, it made sense that they remain there to keep the benefit of shorter start-up periods. PWC accordingly recommended that the locomotives awarded to CNR and BT should be assembled in Durban.

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[725] Transnet-Ref-Bundle-08927

540. Discussions took place with CNR and BT about the location of the contractor facility in Durban during the PTN leading to the definition of "contractor facility" in the relevant LSAs being re-stated to mean "the facility at Koedoespoort, Gauteng or Bay-Head, Durban as notified in writing by the Contractor to the Company". Any costs associated with this decision were provided for in the 10% provision for contingencies in the ETC.

541. Mr Roberto Gonsalves and Mr Thobani Mnyandu gave insightful evidence into wrongdoing associated with the agreements and arrangements concluded by Transnet with CNR and BT in relation to the relocation.[726] Mr Gonsalves is a Chartered Accountant and the Managing Director of Mergence Corporate Solutions (Pty) Ltd (previously known as Cadiz Corporate Solutions (Pty) Ltd - "Cadiz"). Mr Mnyandu is an attorney and one of the directors at MNS Attorneys.

542. When Transnet issued tenders for the acquisition of the 1064 locomotives, Cadiz formed part of a consortium led by CNR, more precisely its South African counterpart, CRRC SA Rolling Stock (Pty) Ltd ("CRRC-SA"), formerly known as CNR Rolling Stock South Africa (Pty) Ltd ("CNRRSSA"). Mr Gonsalves is a non-executive director of this company. For the sake of convenience, the company will be referred to throughout as CNRRSSA.

543. The directors of CNRRSSA are: Mr Gang Wang (Mr Jeff Wang) (executive); Mr Tao Yu (Mr Tony Yu) (executive); Mr Feng Yu (non-executive); Mr Gang Zhao (non-executive); Mr Lulamile Lincoln Xate (minority non-executive director); Ms Rowlen Ethelbert Von Gericke (minority non-executive director); and Mr Roberto Gonsalves (minority non-executive director). The shareholding in CRRC-SA is

[726] Mr Gonsalves: Transcript 23 May 2019, p 127-206; and Transcript 24 May 2019, p 1-41. Mr Mnyandu: Transcript 30 and 31 May 2019

structured as follows: China North Rail Corporation (CNR) - 66%, represented by the Chinese directors; Endinamix (Pty) Ltd- 30%, represented by Mr Xate; Global Railway Africa (Pty) Ltd - 2%, represented by Mr Von Gericke; and Cadiz - 2%, represented by Mr Gonsalves. Global Railway Africa (Pty) Ltd and Cadiz each held 10% in Endinamix.

544. The day-to-day operations and business of CNRRSSA were run by Mr Gang Wang (CEO) and Mr Tao Yu (CFO). The directors representing the minority shareholders, being those other than CNR, were all non-executive directors of CNRRSSA, and as such not involved in the operations and day to day business, except for attending board meetings.

545. CNRRSSA submitted its tender to Transnet for the 465 diesel locomotives (part of the 1064) in April 2013. After Transnet had decided to split the award of the 465 diesel locomotives on a 50/50 basis and to award the supply of 233 locomotives to BT and 232 locomotives to the CNRRSSA consortium, on 17 March 2014 CNRRSSA entered into a LSA with Transnet for the manufacturing of 232 diesel locomotives at the Durban facility. At the time of signing the LSA, CNRRSSA was aware that it would work in Durban,[727] but had based its costing in the bid on the assembly of the locomotives at Koedoespoort.

546. During March 2014, Transnet requested CNRRSSA to provide a proposed costing of the impact of manufacturing/assembling the locomotives at the Bayhead facility in Durban instead of at Koedoespoort.[728] On 11 March 2014 CNRRSSA addressed a letter[729] to Mr Pita and Ms Mdletshe of Transnet indicating that the total additional cost would be R9 755 600. This was made up of approximately R4 million for extra

[727] Transcript 23 May 2019, p 139, line 10

[728] Transcript 23 May 2019, p 141, line 10

[729] Exh BB5, RG-181

costs on locomotives; R2.8 million for transport costs; R2.3 million for flights and accommodation; and R600 000 for new office set up.730 The letter stated that the costs related only "to the measurable financial implications" and added that there would be "a considerable amount of immeasurable financial losses that will be incurred due to relocating to Durban".731

547. There is no response to the letter from CNRRSSA dated 11 March 2014 on record. There is however an unsigned proposal under a CNRRSSA letter dated 1 February 2015 which estimated the increased cost to be more than R100 million.732 Annexed to this document is a schedule that includes figures against certain items and a total estimate of R318.7 million. Some of the cost items provided for are difficult to fathom, but they included the following: i) R65.4 million for increased logistics costs; ii) R29.4 million for set up facilities in Durban and travelling; iii) R48.6 million for increased cost of technical support on brand new process layout (compared with Koedoespoort); iv) R31.8 million for the difficulty and costs in training new employees; v) R47.4 million for increased cost for site service on site by supplier ; and vi) R96 million for the increased financial cost to postpone the delivery due to the relocation. It is uncertain whether any discussion of this document took place within Transnet.

CNR's appointment of BEX as advisor in the relocation negotiations

548. A few months later, on 25 April 2015, CNRRSSA appointed Business Expansion Structured Products (Pty) Limited ("BEX") to act as an intermediary for the purpose

730 Transcript 30 May 2019, p 24 *et seq*. See also Exh BB8(c), TTM-009-010

731 Mr Wang, the CEO of CRRC-SA, in his statement filed with the Commission in October 2019, SEQ 12/2020, explained that the initial estimate of the relocation costs was done by Mr Von Gericke. He described it as "an arbitrary computation of random figures with no substantive basis whatsoever" – SEQ 12/2020, para 53

732 Transnet-Ref-Bundle-09014 – Mr Wang maintained that this was also an unsubstantiated estimate, as CNRRSSA was not in a position to provide an accurate calculation – SEQ 12/2020, para 110

of negotiating a contract with Transnet for the claim of the costs of relocating CNRRSSA's locomotive manufacturing/assembly to the Durban facility. BEX had not been involved in CNRRSSA's initial costing exercise that arrived at a total figure of R9.7 million for relocation costs.[733] BEX was appointed despite the reservations of the minority non-executive directors. They were concerned about inadequate consultation, the payment of an excessive fee to BEX, the failure of TFR to follow a tender process and there being no clear rationale for CNRRSSA being entitled to a relocation claim.[734]

549. The appointment of BEX commenced in March 2015 when a draft unsigned BDSA dated 8 March 2015 was distributed by email.[735] This BDSA referred to BEX Structured Products Limited (a different company to BEX) which was a company with some background in the rail sector. However, BEX, with whom the agreement was ultimately signed, turned out to be a shell or dormant company with one director, Mr Mark Shaw appointed on 15 April 2015, which had not traded and had no experience in the railway engineering business.

550. The BDSA dated 8 March 2015 bears significant resemblance to the BDSAs signed by CSR with Tequesta and Regiments Asia in Hong Kong (used to set up kickbacks from the CSR deals for the 95, 100 and 359 electric locomotive procurements) and was probably drafted by the same person. It uses the same cover page, fonts, layout and format throughout the document. Like the Tequesta agreement, and in almost identical language, the preamble to the BDSA stated that

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[733] Transcript 23 May 2019,p 149, line 1

[734] Transcript 23 May 2019, p 150, line10

[735] Exh BB5, RG-189 – In his statement Mr Wang stated that he had not solicited the services of BEX and described how Mr Shaw of BEX had simply presented himself at the offices of CNRRSSA in Sandton in March 2015 to offer his services generally and agreed to Mr Wang's proposal to assist with an estimation of the costs of relocation – SEQ 12/2020, para 112 *et seq*. As set out later, Mr Shaw was connected to the Gupta enterprise.

BEX was a "professional services advisory business" with long subsisting relationships in South Africa with "a familiarity with regulatory, social, cultural and political framework whereby it is capable to closely co-ordinate with the designated authorities". The "Project" is defined in clause 1 of the BDSA as "the change in scope whereby Transnet Engineering (TE) requires the Company to change the location of the local manufacture programme from TE Spartan Pretoria facility to their Durban facility".

551. Clause 2 of the BDSA recorded that CNRRSSA had approached BEX to assess and formulate the strategy and planning to quantify and benchmark the costs associated with the relocation and BEX had agreed to undertake the work at its sole risk and at no cost to CNRRSSA if the agreed benchmark costs were not realised from TFR. Clauses 2.4 and 2.5 provided that after extensive research and negotiations with CNRRSSA and TFR, BEX and CNRRSSA had agreed that the benchmark costs for the Project would be fixed at R280 million excluding VAT and that BEX would be entitled to an agency commission equivalent to the difference between the price excluding VAT awarded to CNRRSSA by TFR and the price benchmark of R280 million excluding VAT as detailed in clause 7 which included an example that if the price awarded was R650 million, then BEX will be entitled to an agency commission of R370 million. In the BDSA eventually concluded on 25 April 2015, the benchmark price was increased from R280 million to R580 million.[736]

552. At a board meeting of 10 April 2015, the minority non-executive directors objected strongly to the agreement with BEX and requested that their dissent be expressly

[736] FOF-06-189

noted and minuted. Notwithstanding the objections of the minority non-executive directors, CNRRSSA proceeded to sign the agreement with BEX.

553. It is not clear from the BDSA how BEX benchmarked the cost of CNRRSSA locating its business activities in Durban at R280 million. On 21 April 2015, Mr Gonsalves received a document,[737] partly written in Chinese, reflecting the estimated cost increase amounting to approximately R287 million, made up of: i) R45.1 million for increased logistics costs; ii) R27.3 million for set up facilities in Durban and travelling; iii) R60.75 million for increased cost of technical support on brand new process layout (compared with Koedoespoort); iv) R31.8 million for difficulty and increased costs of training new employees; v) R47,4 million for increased cost for site service on site by supplier; vi) R48 million for increased financial cost to postpone the delivery due to the relocation; and vii) R26.3 million for inflation.

554. The BEX proposal and costs were subsequently presented by CNRRSSA to Transnet which culminated in CNRRSSA concluding an agreement with Transnet in terms of which Transnet agreed to bear the cost of relocation in an amount of R719 090 548, less a 10% discount, amounting to R647 181 494.

The variation order for the costs of relocation of CNR and BT

555. On 19 May 2015, Ms Mdletshe (Senior Manager: Strategic Sourcing Locomotives at TFR) compiled a memorandum[738] to Mr Gama motivating for a variation order to finalise the relocation of the programme for the construction by CNR of 233 Class 45D locomotives to a maximum value of R669 784 286. This amount approximated

[737] Annexure RG 11, Exh BB5, RG-233

[738] Transnet-Ref-Bundle-09111; and Transnet-07-250.401

the figure proposed by CNRRSSA and later included in the BEX agreement.[739] The proposal was recommended by Mr Ravir Nair (the acting CEO of TFR), Mr Singh (GCFO) and Mr Silinga (Group Executive: Legal and Compliance). The memorandum indicated that a negotiation team made up of Mr Singh (GCFO), Mr Jiyane (then CEO: TE), Mr Pita (then Group Head SCM), Mr Silinga (Group Executive: Legal and Compliance) and Ms Mdletshe would negotiate an agreement dealing with the costs of relocation. The memorandum recorded that on 24 January 2014 the board had resolved that the GCEO be given authority to sign, approve and conclude all necessary documents to give effect to the resolution approving the acquisition of the 1064 locomotives and thus the GCEO had the authority to approve variation orders in relation to the costs of the move to Durban.

556. In an earlier draft of the memorandum, Mr Gama approved the proposal but added in manuscript that he needed clarity on three matters: i) did the proposal apply to both BT and CNR; ii) whether the amount of R635 million was still under negotiation; and iii) how the proposal related to the delegation by the board. Mr Gama added his signature to the document on the basis that the limit of his delegated authority was not exceeded and he was informed of the final negotiation outcomes. He did not date his signature on this document.[740] The signatures of Ms Mdletshe, Mr Silinga and Mr Singh were added on 19 May 2015. Mr Gama signed the final version of the memorandum[741] on 9 June 2015, so it may be assumed that he made his handwritten annotations sometime after 19 May 2015 but before 9 June 2015.

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[739] See Transnet-Ref-Bundle-09111 and the comments of Mr Mnyandu, Transcript 30 May 2019, p 48, suggesting that this coincidence is suspicious.

[740] Transcript 12 May 2021, p 227-231; Transnet-Ref-Bundle-09115; and Transnet-07-250.405

[741] Transnet-Ref-Bunde-09114; and Transnet-07-250.404

557. The memorandum sought approval for a variation order to a maximum value of R669 784 286. It explained that as a result of the relocation, there would be a number of cost drivers, namely: labour costs; material costs; operational and logistical costs; technical support; physical transportation of materials and resources; incremental warehousing costs; and financing and risk costs due to time constraints and delays. When Mr Gama ultimately approved it the capped figure for the variation order was changed to R635 851 786, which was possibly derived from another proposal by CNRRSSA.[742]

The negotiations in relation to the relocation of CNR and BT

558. The relocation negotiations began on 19 June 2015. The negotiation team held two separate meetings with CNRRSSA and BT at OR Tambo International Airport in Johannesburg. The attendance register of the meeting with CNRRSSA reflects that it was attended also by Mr Shaw of BEX.[743] Mr Singh, despite leading the negotiation team at the OR Tambo meeting with Mr Shaw in attendance, presumably representing BEX, stated during his testimony that he had no sense of BEX ever having played any role in the negotiations and the finalisation of the relocation deal. He said he did not know who BEX was and did not know anybody from BEX.[744] His testimony is not credible in the light of Mr Shaw's attendance of the negotiations.

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[742] The final memo authorising the negotiations may not be part of the record – see Transcript 30 May 2019, p 49-58 and Transnet-Ref-Bundle -09115

[743] Exh BB8(c), TTM-98

[744] Transcript 17 June 2021, p 162 – In the re-examination affidavit, Mr Singh maintained that his role was "limited to supporting a memorandum to the acting GCE for approval of the relocation amounts in respect of CNR" – Transnet 05-2406, para 181. This is not correct given his role in the negotiations.

559. There are no minutes of the meeting of 19 June 2015, but it appears from the transcripts[745] that the OEMs were requested to clarify assumptions and contingencies built into the proposals. They were further requested to make a price reduction and a revised offer in the range of 10% to 20% and to deal with the specifics such as milestone payments, scheduling delays and the like. Transnet indicated that it would seek approval on 30 June 2015.[746] There was some superficial interrogation of the figures, but the Transnet negotiation team was comfortable with a ballpark figure of R600 million and was apparently to some extent just going through the motions.

560. A document prepared by CNRRSSA titled "Analysis of Cost Increases for Locomotive Delivery and Locomotive Factory Relocation" ("the Analysis") gives insight into CNRRSSA's final position.[747] The Analysis was signed by Mr Wang as CEO of CNRRSSA and provided a space for Mr Singh's signature but which was not signed by him.[748] Mr Singh claimed he did not have the delegated authority to sign it.[749]The Analysis provides a breakdown of the cost increases as follows: labour costs R54.3 million; material costs R223.9 million; logistical costs R6.4 million; technical support R70 million; transportation R94.2 million; delta to warehouse costs R75.6 million; and other costs R194.5 million. The total cost is stated to be R719 090 548 less a 10% discount giving an amount of R647181 494. The document goes on to offer some justification for each line item.

561. The Analysis justified the increase of labour costs by R54.3 million on the basis that each build team of 25 had to be increased with 23 additional staff members

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[745] Exh BB8(c), TTM-97 *et seq*

[746] See Exh BB8(c), TTM-022; and Transcript 30 May 2019, p 77 *et seq*

[747] Annexure RG 12, Exh BB5, RG-238; and Transcript 23 May 2019, p 164, line 18

[748] Annexure RG 12, Exh BB5, RG-249

[749] Transcript 17 June 2021, p 154

from CNRRSSA being: six mentors, six quality assurance and inspection specialists, eight customer service team agents and three senior managers because of the lack of skills and experience in Durban. The additional material cost was justified as R203 million for inflationary costs caused by the five-month delay and R21 million for added warehousing of imported raw materials. The logistics costs of R6.4 million were said to be administrative costs necessary to re-work the logistics as the roll-out needed to be altered, for additional travel costs and higher inventory requirements. The R70 million for technical support was for specialised technical and engineering teams in addition to that budgeted for Pretoria due to the lack of expertise in maintenance and post-production available in Durban and an increased cost of on-site service by suppliers. The R94.2 million for transportation was for the physical transportation of assembly parts of locomotives, short-term insurance on the value of transported goods and transport protection. The R75.7 million warehousing cost arose as a result of the substantially higher cost of "prime industrial factories" in Durban, fencing, security, office furniture, office construction, shelving and storage, additional forklifts, stacking trucks, delivery vehicles and additional staff. The other costs of R194 million were essentially financing costs.

562. On 20 June 2015 the day after the meeting at OR Tambo International Airport, Mr Pita (who attended the meeting) wrote an email to the other members of the negotiating team and Mr Laher[750] in which he set out detailed comments and questions for CNR. It is clear that Mr Pita (then the Group Chief Supply Chain Officer – "GCSCO") had serious reservations about the cost increase.[751] His comments reveal that the costs were very significantly inflated and in some respects were irrational and wholly unjustifiable. Mr Laher agreed with that

[750] Transnet-Ref-Bundle-09117; and Transnet-07-250.406

[751] Transcript 12 May 2021, p 231-232

assessment.[752] In an email[753] addressed to the negotiating team the next day, 21 June 2015, Mr Laher confirmed that much of the pricing made no sense. There is no evidence that any member of the negotiation team was ever informed of or queried the rise in cost from the R9.8 million (initially quoted by CNRRSSA in its letter of 11 March 2014 addressed to Ms Mdletshe and Mr Pita)[754] to the R670 million proposal just over one year later.

563. On 23 June 2015 Ms Mdletshe circulated a revised proposal from CNRRSSA to the members of the negotiating team and Mr Laher.[755] She noted that the meetings scheduled for that day were postponed and that BT's proposal was still outstanding and that it would revert later that day with a revised proposal. The costs in the revised CNRRSSA proposal remained essentially the same with some adjustment to the material and financing costs. The total claimed was R669 784 286. CNRRSSA however proposed a discount of 10% and thus the total revised cost was stated to be R602 805 858. CNRRSSA proposed an upfront payment of 50% amounting to R301 402 929 and 24 monthly payments of approximately R12.6 million per month.[756]

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[752] Transnet-Ref-Bundle-09120; and Transcript 21 October 2020, p 46 *et seq*.

[753] Transcript 12 May 2021, p 233; Transnet-Ref-Bundle-09120; and Transnet-07-250.408

[754] Annexure RG 3, Exh BB5, RG-182 – see the discussion of this issue at Transcript 31 May 2019, p 20-24

[755] Annexure YL 21, Exh BB4(f)1, YIL-255

[756] Mr Wang in his statement justified the cost of more than R603 million in general terms on the grounds that the Durban facility was inadequate, the poor condition of the flooring and constant problems with the equipment necessary for installation. The facility was empty and without shelving. He set out in some detail the difficulties CNRRSSA had in working effectively with TE, but failed entirely to provide an estimate or calculation of any actual additional costs incurred as a result of the relocation, and for which Transnet was contractually liable, despite such probably being possible to calculate some four years after the relocation. He, however, without any meaningful substantiation, maintained that the actual cost would exceed the amount of R603 million and undertook to provide a report of an expert engaged by CNRRSSA who had made an initial estimate that the amount was in fact insufficient. It seems that no such expert report has been filed with the Commission to date – SEQ 12/2020, paras 80-101, 106 and 152-153.

564. Mr Laher responded to Ms Mdletshe's email later on 25 June 2015 in an email[757] addressed to all the members of the negotiating team informing them that the proposal had not changed and his concerns still applied. He added that the payment terms offer needed to be considered in the light of Transnet's cash flow situation and suggested that advice be sought from Transnet treasury. There is no evidence of any communication among the negotiation team members or any correspondence with other officials or entities within Transnet in which the relevant figures were discussed, analysed or interrogated.[758] When Ms Mdletshe was asked by the MNS investigation team why Mr Laher's concerns had not been addressed she allegedly replied that he was not a member of the negotiation team.[759]

565. When Mr Singh was asked whether he as a member of the negotiation team was satisfied that Mr Laher's concerns had been resolved, he answered that he was comfortable that Ms Mdletshe would have attended to them prior to sending him the memorandum. He said he was also reasonably comfortable with the R1.2 billion ultimately agreed as the cost of relocation as he believed the amounts "were relatively in the ballpark and therefore...the values – the memorandum could be supported".[760]

566. There is little evidence on record dealing with BT's proposal regarding relocation costs.761 BT confirmed its willingness to relocate in a letter dated 6 June 2014

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[757] Transnet-07-250.410

[758] Transcript 30 May 2019, p 99-103

[759] Transcript 30 May 2019, p 102, lines 17-20

[760] Transcript 17 June 2021,p 151-163; and Transcript 17 June 2021, p 160, line 20

[761] On 25 February 2021, BT was granted leave to withdraw their rule 3.3.6 / 3.4 application (which had been granted) to lead oral evidence and cross-examine witnesses. In its affidavits BT originally sought to present evidence on: the tender process and conclusion of the LSA; the contractual advance payments; local content; the move to Durban; the MNS report; and the 95 locomotives tender. The affidavits deal with the relocation costs in detail. However, on 18 June 2021, the attorneys of BT sent a letter to the Commission submitting that if the affidavits of BT do form part of the record, they should simply be ignored.

addressed to TFR but indicated that it would need to review the infrastructure of the Durban facility and to determine the consequences for its supply and logistics chain as well as their project team. It proposed a process of analysis, assessment and negotiation in respect of cost, the extension of delivery times and changes to supplier development ("SD").[762] On 10 April 2015, BT sent Transnet a variation notice which seems to be the final version of a notice first submitted on 26 September 2014.[763] The document stipulated a fixed price for moving to TE's Durban facility at R634 315 000. Strangely, unlike CNRRSSA, BT provided no detailed pricing of the additional cost. It merely set out in general terms the pricing assumptions of the proposal without any accompanying figures. It stated that the change of location of the assembly facility had significant impact on most suppliers that would need to deliver to the Durban facility instead of Koedoespoort, including additional costs for the transportation of supplies as well as expert support at the facility. Moreover, the extension of production time of the project had a cost implication for all parties that have to maintain resources in place for additional months, including BT's suppliers and contractors.

567. On 22 June 2015 Mr Laher addressed an email to the negotiation team concerning BT's proposal, suggesting that clarity and a detailed costing of each element making up the additional cost should be obtained from BT. At a minimum, he said , information was required in relation to additional costs of hedging, escalation, bonding costs, transport (number of trips, size of containers per trip and distances),

[762] Transnet-Ref-Bundle-08835

[763] Annexure YL 18, Exhibit BB4(f)1, YIL-213. This was an updated version of a document prepared by BT on 26 September 2014 – see Transnet-Ref-Bundle-08837; and Transcript 30 May 2019, p71-72

warehousing (per square metre), insurance and new production layout. It was also necessary to ascertain any savings on transport costs for materials imported.[764]

568. On 10 July 2015 Mr Pita addressed an email[765] to Ms Mdletshe and copied the other members of the negotiation team, in which he mentioned that he had received feedback from BT that it would send a letter on the following Monday providing clarity on their offer. He requested Ms Mdletshe to update all the documentation and to compile a memorandum to be addressed to the acting GCEO (Mr Gama) for approval of the CNRRSSA and BT proposals.

569. There is no evidence that BT ever supplied this information or of any detailed analysis of BT's costing performed by the negotiation team or any official at Transnet. Mr Pita concluded that if the team was happy with the proposals the sign off could be done quickly. He also asked Ms Mdletshe to ensure that sign off by TIA (internal audit) was included in the memo. Mr Laher was not copied in this email. Nor did Mr Pita explain whether his and Mr Laher's concerns had been adequately addressed.

570. On 14 July 2015 Mr Pita wrote an email to Mr Silinga asking him to "review the legal clauses and caveats raised in both proposals, especially the BT offer" as these might have a "significant impact". Mr Silinga responded to this email on 17 July 2015 stating that the agreed price of R618 457 125 and various other clauses were acceptable but noting that timelines needed to be agreed.[766]

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[764] Transnet-07-250.408

[765] Transnet-Ref-Bundle-09126; and Transnet-07-250.412

[766] Transnet-Ref-Bundle-09442

The payments made in respect of the relocation of CNR and BT

571. Two memoranda[767] were prepared by Ms Mdletshe requesting the acting GCEO to note the final outcome of the negotiation for relocation to Durban and to approve the variation orders for the agreed total amounts. The memoranda were recommended by Mr Nair (Acting CEO: TFR), Mr Singh (GCFO), Mr Pita (GCPO), Mr Silinga (GEL&C), and Mr Jiyane (CEO: TE) on 22 July 2015, and approved and signed by Mr Gama (acting GCEO) on 23 July 2015.[768] Transnet agreed to pay BT R618 457 125 and CNR R647 181 494 for the relocation costs; being a total of R1.261 billion. The variation orders resulted in the total contract price of the 232 diesel locomotives awarded to CNR increasing from R9 947 116 464 to R10 594 297 958; and the price of the 240 electric locomotives awarded to BT increasing from R13 049 206 320 to R13 667 663 320.[769]

572. It would seem that Mr Gama approved the memoranda on 23 July 2015 despite the queries he had raised with Ms Mdletshe in May 2015 not having been answered.[770] Mr Nair confirmed in an interview with the MNS investigation team[771] that the memoranda had been recommended and signed on 22 July 2015 by himself, Mr Singh, Mr Silinga, Mr Jiyane and Mr Pita in the presence of each other at a breakaway meeting held at Kloofzicht in Muldersdrift. The transcription of the interview reflects that he recommended the variation order without properly satisfying himself about the justifiability of the R1.2 billion cost increase.

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[767] Transnet-Ref-Bundle-09130 *et seq*; Transnet-07-250.415; and Transnet-07-250.419

[768] Transnet-07-250.418; and Transnet-07-250.421

[769] Transnet-Ref-Bundle-09454-09455

[770] Transnet-Ref-Bundle-09181-09182

[771] Transnet-Ref-Bundle-09203-09206

573. Unusually, in a letter dated 23 July 2015 addressed to CNRRSSA, Mr Gama agreed that 50% of the variation order amount (R323.59 million) would be paid to CNRRSSA in advance and thereafter in 24 monthly instalments of R13.48 million without requiring it to submit invoices for specific expenditures incurred.

574. The full budgeted amount of R1.2 billion for relocation costs was not paid to the OEMs. CNRRSSA was paid only one payment in the amount of R368.89 million (being the initial 50% payment of R323.59 million plus VAT) on 19 August 2015.[772] The bank records of BEX reflect that R76 585 630.43 (R67.2 million plus VAT) was paid by CNRRSSA to BEX on 25 September 2015 shortly after CNRRSSA received the payment of R368.89 million.[773] BT, on the other hand, received 13 different payments in respect of relocation costs between 12 August 2015 and 13 July 2018. These payments totalled R248.71 million (inclusive of VAT).[774] As there is no variation order in relation to BT on record, it is not clear whether the payments were in accordance with the terms of the applicable variation order. Thus, a combined total of R617.60 million (inclusive of VAT) was paid in relocation costs to CNR and BT and not R1.2 billion as initially agreed. There is no explanation on record for why CNRRSSA did not receive the 24 monthly instalments or why BT was paid less than half of the agreed costs of relocation.

575. In October 2018 MNS attorneys appointed Loliwe Rail Solutions ("Loliwe") to conduct an assessment of the approved relocation costs to determine whether there was a rational basis for the increased costs. In its report,[775] Loliwe noted that the relocation negotiation team was not provided with any back up information pertaining to the alleged costs and thus could not have undertaken a proper due-

[772] Transcript 10 July 2019, p 59 *et seq*

[773] FOF-06-189, para 41

[774] Annexure HJW 15, Exh BB13, HJW-0081

[775] Transnet-Ref-Bundle-09447 *et seq*

diligence. Normally, a claim for variation would provide details and specific information pertaining to the breakdown of the items claimed and how each was affected by the unforeseen event. In the case of the variation orders of CNR and BT, only line items were provided and amounts provided. No detail as to how the OEMs incurred additional costs through their suppliers and sub-contractors was provided. Without sufficient and accurate backup information to support the claims, Loliwe could not accept any of the payments as valid. It concluded that the variation orders were inflated intentionally and inadequately evaluated by Transnet. It was also of the view that Transnet was not liable for any additional costs for "relocation" because the LSAs provided for the assembly of the locomotives to take place either in Pretoria or elsewhere in South Africa.

576. The lack of due diligence preceding these variations resulting in an increase of R1.2 billion to the price payable to BT and CNR is confirmed by the limited role played by Transnet Internal Audit ("TIA"). In his email of 10 July 2015, Mr Pita instructed Ms Mdletshe to obtain TIA approval. She failed to do so in contravention of the Procurement Procedures Manual ("the PPM"). In a report dated 7 June 2017,[776] the auditors reported that TIA had attended the meeting with the negotiation team, CNR and BT on 19 June 2015 at OR Tambo International Airport. A follow up meeting was scheduled, but, despite being copied in various emails, TIA was not invited to any subsequent meetings where negotiations on relocation costs took place with the bidders in attendance, as required by the HVT methodology in the PPM. TIA was not provided with the memoranda of 23 July 2015 or informed of the outcome of the negotiations. Based on its limited involvement in the process, TIA was therefore not in a position to produce a formal report to indicate the adequacy and effectiveness of the processes undertaken in

[776] Transnet-Ref-Bundle-09148

the relocation negotiations. Contrary to the requirements of the PPM, no internal audit report was ever produced.[777]

The challenge of the minority directors of CNRRSSA to the BEX payment

577. Mr Gonsalves testified that the minority non-executive directors had misgivings about why CNRRSSA, having negotiated a complex LSA, and despite having access to considerable rail rolling stock experience within its shareholder base, felt it necessary to appoint an intermediary such as BEX, which was a newly formed company with no trading history and little or no background in the assembly, manufacture, maintenance or operation of locomotives, or any other experience in the rail industry, to negotiate a variation order with Transnet and furthermore to do so on such significantly generous terms to BEX.[778] The appointment of BEX was concluded by CNRRSSA without the requisite authority as in terms of clause 4.1.3.27 of the Memorandum of Incorporation it required the support of 70% of the shareholders which was not attained. [779]

578. On 16 August 2016, Ms Von Gericke (Global), Mr Whiting (Global), Mr Xate (Endinamix) and Mr Gonsalves (Cadiz) met with Mr Gama , Mr Pita and Mr Silinga to discuss the issues. At that stage they had not had sight of the variation order signed by Mr Gama on 23 July 2015. Mr Gama testified that he was surprised at the meeting to hear of the excessive fee paid to BEX and denied being aware of the concerns of Mr Pita and Mr Laher about the deliberate inflation of the price of the relocation.[780] On 13 September 2016 Mr Xate and Mr Gonsalves met with Mr Silinga to hand over copies of the relevant documents. On 8 December 2016 Mr

[777] Transcript 31 May 2019,p 47-53

[778] Transcript 23 May 2019, p157-174

[779] Annexure RG 15, Exh BB5, RG-263

[780] Transcript 12 May 2021, p 237-238

Silinga informed the minority non-executive CNRRSSA directors that Transnet had appointed Werksmans to investigate the BEX matter. On 14 December 2016 the minority non-executive directors met with Werksmans and shared all the relevant information.

579. On 2 March 2017 Mr Silinga wrote to the minority non-executive directors intimating that he believed the differences between the shareholders of CNRRSSA may have been resolved and asked whether they were "still pursuing or withdrawing the complaint."[781] The minority non-executive directors requested Transnet to continue with the Werksmans investigation as their concerns about BEX had not been resolved.[782]

580. On 12 June 2017 Mr Fred von Eckardstein, an auditor at KPMG, reported a reportable irregularity to the Independent Regulatory Board of Auditors ("IRBA") to the effect that the relocation proposal of CNRRSSA significantly misrepresented the cost of relocation and the BDSA with BEX appeared to lack sound commercial substance and purpose.[783] On 28 September 2017 Mr Gonsalves spoke with Mr Charles Yu of Hogan Lovells who informed him that Hogan Lovells no longer wished to act for CNRRSSA on the reportable irregularity as one of the BEX directors apparently had a relationship with the Gupta enterprise.[784] On 27 October 2017 KPMG resigned as CNRRSSA's auditor. Following a meeting with Werksmans, the minority non-executive directors decided to report the BEX issue

[781] Annexure RG 18, Exh BB5, RG-277

[782] Annexure RG 19, Exh BB5, RG-279

[783] Annexure RG 20, Exh BB5, RG 289-290

[784] Transcript 24 May 2019, p 9-11

to the Hawks – the Directorate for Priority Crimes Investigation. Nothing has come of that report.[785]

581. On 27 September 2018, Mr Stephen Nthite, a director of Endinamix, wrote to the board of CNRRSSA on behalf of the Endinamix board informing it that Endinamix regarded the payment of R67.18 million to BEX as a bribe to induce the award of this tender and demanded that CNRRSSA report this matter in terms of the PRECCA.[786]

582. On 8 October 2018, after meeting with the minority directors, the new auditors, J Theron & Pietersen Inc, retracted the 2015, 2016 and 2018 annual financial statements of CNRRSSA. The draft audited annual financial statements distributed in March 2019 in respect of the year ended 31 December 2018 drew attention to the reportable irregularity of 12 June 2017 and record that the matter remained unresolved.[787]

Payments to the Gupta enterprise and transgressions related to the relocation

583. The contract between BEX and CNRRSSA was signed by Mr Shaw. Investigative journalists at AmaBhungane have confirmed that BEX forwarded an email confirming the new total of R647 million for the relocation to Mr Essa, merely stating "FYI". The bank records of BEX reflect that approximately R76.59 million (R67.2 million plus VAT) was paid by CNRRSSA to BEX on 25 September 2015.[788] This was shortly after CNRRSSA received the initial payment of R368.89 million from Transnet on 19 August 2015. Mr Shaw was the signatory of the Standard

[785] Transcript 24 May 2019, p 15

[786] Annexure RG 26, Exh BB5, RG-332

[787] Annexure RG 29, Exh BB5, RG-339

[788] Transnet FOF-06-189, para 41

Bank account into which the fee was paid by CNRRSSA. After receiving the payment Mr Shaw laundered the money immediately in four instalments to other shell companies.[789] As pointed out above, R9 million of the R76.59 million was ultimately paid to Integrated Capital Management of which Transnet director, Mr Shane, was a director, in November 2015.[790] Another R33.73 million was laundered through to the Gupta family company, Confident Concepts.[791]

584. The Enablers Report submitted to the Commission in February 2020 by Open Secrets and Shadow World Investigations affirms that Mr Taufique Hasware, a general trader with no relevant experience, was a director of BEX and of three other companies – Homix, Forsure Consultants and Hastauf – all of which were front companies for Mr Essa and the Gupta enterprise.[792] These companies were primarily purposed with facilitating kickbacks from Transnet contracts.[793]

585. The evidence indicates that the variation orders may have permitted the incurring of unnecessary expenditure prejudicial to Transnet, with the issue requiring further investigation. The evidence suggests *prima facie* that Mr Gama may have authorised the expenditure of R1.2 billion without satisfying himself that a cost/benefit analysis had been conducted when it evidently had not been.[794] There are accordingly reasonable grounds to believe that his conduct may have been in violation of sections 50 and 51 of the PFMA. Further investigation is required to decide if Mr Nair and the members of the negotiation team breached their fiduciary

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[789] "The Enablers" by Open Secrets (February 2020) p 61

[790] Exh VV10-SCFOFA-403-404, paras 717-720

[791] Exh VV10-SCFOFA-399-403, paras 707-712 and Table 234

[792] "The Enablers" by Open Secrets (February 2020) p 57-58

[793] The report relies on a media report on the Internet: "Gupta link in R647m Train Deal" – AmaBhungane 2018 https://amabhungane.org/stories/gupta-link-in-r647m-train-deal

[794] Transcript 12 May 2021, p 225-246

duties, the provisions of the PFMA and/or the PPM when negotiating and approving the variation orders.[795]

586. Moreover, the members of the negotiation team were all remiss in not resolving the issues raised by Mr Pita and Mr Laher in late June 2015. Paragraph 15.3 of the PPM requires high-value tenders ("HVT") to be conducted in a manner that enables supply chain management and the negotiation team to detect any shortcomings at key gateways in the process, make appropriate corrections, determine if governance processes have been followed and raise concerns which then must be addressed. In terms of paragraph 5.1.2 of the PPM all Transnet employees are required to protect Transnet's assets, act with integrity and professionalism, and to maintain an attitude of zero tolerance toward any form of bribery, corruption and inducements. Paragraph 12.6 of the PPM (2015) provides that where a contract amendment increases the value or period of a contract, supplier development must be re-negotiated based on the cumulative value and/or period of the contract.

587. The impropriety of the variations arising from the relocation, and their part in the Gupta money laundering and racketeering enterprise, is disclosed in the evidence relating to the payment made to BEX. The PFMA contraventions result in the payment to BEX being the proceeds of unlawful activities and thus there are reasonable grounds to believe that the directors of BEX, CNRRSSA and the relevant officials of Transnet contravened sections 5 and 6 of POCA and sections 3 and 13 of PRECCA. The benefit to the Gupta enterprise means also that there are reasonable grounds to believe that Mr Singh, Mr Gama and Mr Shaw participated in the conduct of the affairs of the Gupta enterprise.

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[795] Transnet-06-431-436

588. These findings are to the effect that there are reasonable grounds to believe that these employees, board members of Transnet and some of the directors of CNRRSSA violated the Constitution and other legislation and were involved in corruption of the kind contemplated in TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

CHAPTER 7 – THE FINANCIAL ADVISORS

The creation of a monopoly and the scheme for money laundering to Homix and Albatime

589. In the period between 2012 and 2016 Transnet contracted with four companies to provide various financial and advisory services, namely: McKinsey, Regiments Capital, Trillian Capital and JP Morgan. The lead provider for the various financial services was initially McKinsey which over time ceded many of its rights and delegated obligations to the other companies, most notably Regiments, and later Trillian. These companies were small firms with limited capacity, had virtually no track records and were involved in the Gupta enterprise. Regiments and Trillian used a large network of shelf companies and investment vehicles through which money was then laundered for the benefit of the Gupta enterprise and Mr Essa.

590. It is reasonable to conclude that McKinsey chose to partner with Regiments and Trillian because it would be awarded high-value contracts for doing so. Eight significant contracts were awarded by confinement to McKinsey/Regiments in the period 2012 – 2015 which advanced the interests of the Gupta enterprise.[796] McKinsey has conducted its own investigation and admits that its SDP, Regiments, engaged in a pattern of misconduct. It has opted to return the fees it received from Transnet for projects on which it worked alongside Regiments.[797]

591. The most important contract, and perhaps most controversial, was the contract for advisory services related to the acquisition of the 1064 locomotives. The confinement memorandum for these services[798] explained that further work was

[796] Exh BB2.1(a), PSV-0054 *et seq*; and Transcript 10 May 2019, p 39 *et seq*

[797] Letter from Norton Rose Fulbright to the Acting Secretary of the Commission dated 12 August 2021

[798] Annexure PV 36, Exh BB2.1(d), PSV-1260

required to strengthen the business case. Further verification and validation was needed to: i) validate the market demand for targeted commodities; ii) mitigate the foreign exchange risks inherent in the acquisition from foreign suppliers; iii) review funding options; iv) enhance the programmatic procurement and contracting strategy; v) obtain an independent review of financial , operational and technical assumptions; vi) conduct comprehensive risk assessments and mitigating plans; and vii) assist with the final contract drafting.

592. The confinement to McKinsey was sought to be justified on the grounds of urgency and the fact that the services were highly specialised and largely identical to work previously done for Transnet by McKinsey. Although the confinement was agreed to in May 2012, McKinsey only signed the final contract on 21 February 2014 and Transnet signed it on 11 August 2014. The work under it was performed in terms of a letters of intent, the first of which was only signed in December 2012, thus bringing into question the justification of the confinement on grounds of urgency. This contract was ceded from McKinsey to Regiments on 4 February 2014 after Phase 1, the completion of the business case for the procurement. The cession to Regiments was in respect of the balance of the work. The original contract value was R35.2 million. Subsequent amendments resulted in a fee increase firstly to R784 million and a second amendment to include an "at risk" success fee of R166 million.

593. The other contracts were: i) the SWAT1 contract (valued at R174.6 million), a contract of services related to the MDS for expanding the rail, port and pipeline infrastructure; ii) the SWAT2 contract for capital optimisation and implementation support valued at R225 million; iii) a contract for professional services to increase the coal line with a breakthrough of 2 million tonnes per week ("the coal line contract") with an original value of R216.7 million (a fixed fee of R73.5 million plus

a contingent fee of R143.2 million); iv) a contract (valued at R248 million) for the renegotiation of the contractual arrangements with Kumba for the transport of iron ore; v) a contract for the manganese project execution support ("the manganese contract") valued at R179.9 million; vi) a contract related to the New Multi Product Pipeline ("the NMPP"), a pipeline project aimed at increasing volumes from 4.4 billion litres to 8.7 billion litres through the construction of a 555 kilometre, 24 inch diameter trunk line ("the NMPP contract") valued at R446.2 million; and vii) a contract for professional services to support Transnet in increasing general freight business ("the GFB contract") for a fee of R463.3 million.[799] The total value of the eight contracts awarded by Transnet to McKinsey during 2014-2015 amounted to R2.2 billion. Half of the revenue earned by Regiments on six of the eight contracts (the coal line contract; the Kumba Iron Ore contract; the manganese contract; the NMPP contract; the SWAT 2 contract; and the GFB contract) was diverted to a Gupta associated company, Homix (Pty) Ltd ("Homix") as part of the money laundering scheme described earlier in this report.[800]

594. All eight contracts were awarded by way of confinement and approved mainly by Mr Molefe, as the GCEO, on the basis of memoranda submitted to him by Mr Singh and Mr Pita.[801] The evidence establishes that McKinsey and Regiments were in possession of Mr Singh's confinement memoranda to Mr Molefe prior to their making these bids.[802] This, Mr Singh and Mr Pita agreed during their evidence before the Commission, was highly irregular, and points to a concerted effort to favour McKinsey and Regiments in furtherance of the money laundering and racketeering scheme. The use of confinements rather than open tenders created a

[799] Transcript 1 June 2021, p 137, line 15

[800] Transcript 9 March 2021,p 184-185

[801] Annexures PV 35-PV 43, Exh BB2.1(d), PSV-1255-1322

[802] Transcript 17 June 2021,p 37-41

monopolistic situation which facilitated the scheme and was at odds with the policy of open competition and the introduction of new entrants into the market from previously disadvantaged communities.

595. The confinement memoranda sought to justify the use of confinements (rather than open tenders) on the grounds of urgency and the services being highly specialised and largely identical to work previously performed.[803] In terms of paragraph 15.1.2(a) of the PPM (2013) any urgency should not be attributable to a lack of proper planning and must be genuinely unexpected. Transnet's revenue risks (which formed part of the rationale for confinement in most of the McKinsey contracts) were not unforeseeable.[804] While the services were highly specialised and identical to work previously performed, it is doubtful whether proper consideration was given to the public interest in open and fair competition and the avoidance of a monopolistic situation. Mr Molefe testified that he had accepted the grounds of confinement presented by Mr Singh and did not bother to apply his independent judgement.[805] That was negligent and a failure by Mr Molefe to do his job properly.

596. Four of the confinements (the coal contract, the Kumba Iron Ore contract, the manganese contract and the NMPP contract) were approved by Mr Molefe over a period of four days - between 31 March 2014 and 3 April 2014. [806] The four contracts appointed Homix and Albatime (Gupta-linked laundering vehicles) as supplier development partners ("SDPs").[807] They had a combined value (at that

[803] Transcript 10 May 2019, p 42 *et seq*; and Annexures PV 36 - PV 43, Exh BB2.1(d), PSV-1259-1322 – see para 15.1.2 of the PPM (2013)

[804] Exh BB2.1(a), PSV-0059, para 128

[805] Transcript 9 March 2021, p 159-160

[806] Transcript 9 March 2021, p 146-147

[807] Transcript 28 May 2021, p 94-98; Transnet-05-716; and Transnet-05-732

time) of R619 million. Although each of the transactions, viewed separately, fell within the delegation of authority for confinement given to the GCEO (at that time up to R250 million), the combined value of the transactions fell within the delegation of authority of the BADC (up to but not exceeding R1 billion). Given the fact that the transactions related to the same or similar services, and were awarded to one company within a few days of each other, confinement approval arguably should have been obtained from the BADC. The splitting of the transactions possibly amounted to a breach of the rules against parcelling.[808]

597. What is more, the four confinements were done unusually on a confidential basis.[809] As discussed earlier, confinement on a confidential basis is an effective way of by-passing some of the ordinary procurement safeguards. Paragraph 15.1.4(c) of the PPM (2013) permits the GCEO to approve a confinement without review, on grounds of confidentiality. However, confidentiality does not form a justification ground for not having an open tender process. While confidentiality may be a reason for bypassing the review processes, confidentiality is not of itself a ground for confinement.[810] Thus, the four confinements in the four-day period between 31 March 2014 and 3 April 2014 did not follow the normal review and sign off process, supposedly, for reasons of confidentiality. These four contracts in

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[808] Transcript 10 May 2019, p 57 *et seq*; Exh BB2. 1(a), PSV-0062-0063, paras 138-142; and see the discussion about confidential confinement at Transcript 10 May 2019, p 61 *et seq*. Mr Singh in his belatedly filed re-examination affidavit argued that there was no parcelling because the full scope of the work was not known at the time when the procurement events were initiated –Transnet-05-2360, para 34 *et seq*.

[809] Homix and Albatime were eventually paid more than R100 million of the value Regiments received under these contracts. Transcript 9 March 2021, p 147-150; Transnet-05-130, para 49; Transnet-05-331; Transnet-05-345; and Transnet-05-352

[810] Transcript 10 May 2019 , p 61 *et seq*; and Exh BB2.1(a), PSV-0063, para 149 *et seq*. The Transnet board has recently decided to remove confidential confinement from the PPM because it is a huge risk. The whole process of confidentiality is an oddity because an RFP still has to be submitted after the approval of the confinement and once the contract is awarded, and is thus no longer confidential. Because confidential confinement avoids the robust review of lower management, it amounts to a deviation within deviation.

particular contributed substantial revenue to the money laundering scheme involving Regiments, Homix and Albatime. Mr Molefe accepted that the advantage of a confidential confinement was that it ensured it was done in secret without scrutiny.[811]

598. There is little by way of justification for the supposed confidentiality of these four confinements in the relevant memoranda. Paragraph 25 of the confinement memorandum for the manganese contract, for example, merely stated: "due to the confidential nature of the information, the engagement cannot be subject to an open tender process." It added that in terms of paragraph 15.1.4(c) of the revised PPM "the GCE may approve such confinement without it being routed via any other signatory."[812] The same statement was included in the memoranda for the other three contracts.[813] The memoranda thus made out no case for why the confinements in those instances were confidential. The rationale for the confinements was largely that there were declining volumes and revenue risks, but these grounds provide no basis for not following the normal review process.

599. When asked during his testimony before the Commission[814] what was confidential about the four confinements, Mr Molefe referred to the grounds for confinement in the coal line confinement memorandum prepared by Mr Singh.[815] However, these

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[811] Transcript 9 March 2021, p 178

[812] Annexure PV 41, Exh BB2.1(d), PSV-1303, para 25 – Mr Singh attempted in his testimony to justify these transactions in a lengthy discourse aimed at showing that there were processes that examined the advantages of confinement of the four contracts to McKinsey prior to the award of the contracts. His discourse (Transcript 31 May 2021, p 84-105) is inconsequential and does not detract from the fact that there was no proper justification for the urgent and confidential confinement of four contracts that contributed substantially to the money laundering and racketeering scheme.

[813] Annexure PV 39, Exh BB2.1(d), PSV-1287, para 29; Annexure PV 40, Exh BB2.1(d), PSV-1295, para 22; and Annexure PV 42, Exh BB2.1(d), PSV-1311, para 27

[814] Transcript 9 March 2021,p 164

[815] Annexure PV 39, Exh BB2.1(d), PSV-1287, paras 27-28

did not deal with the question of confidentiality.[816] When this was pointed out to him, he admitted that he was not concerned with confidentiality at the time.[817] Later he maintained that confidentiality arose in relation to McKinsey's "proprietary models".[818] While this rationale was advanced as a reason for confinement,[819] the confinement memorandum did not specifically rely on such as a basis for confidentiality. Mr Singh too sought to rely on McKinsey's interest in protecting its intellectual property as a justification for confidentiality. He had no cogent answer to the proposition that confinement on a confidential basis is intended to protect or advance the interest of Transnet not bidders for work.[820]

600. Some of the confinements to McKinsey were not in compliance with the mandatory requirement that consultants should only be appointed after a gap analysis has been done to confirm that Transnet did not have the requisite skills or resources in its full time employ to perform the work. Paragraph 4.1 of National Treasury Instruction 1 of 2013 issued on 19 December 2013 pursuant to section 38(1)(b) of the PFMA ("the NT Instruction") requires that a consultant may only be appointed to an SOE after a business case and a gap analysis have been done to confirm that Transnet does not have the requisite skills or resources. The NT Instruction[821] was applicable to some of the McKinsey contracts concluded after 1 January 2014.

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[816] Transcript 9 March 2021, p 166, lines 13-14

[817] Transcript 9 March 2021, p 168, line 1

[818] Transcript 9 March 2021, p 177

[819] See for example Annexure PV 39, ExhBB2.1(d), PSV-1286, para 28 (d)

[820] Transcript 31 May 2021, p 107-127; and in particular Transcript 31 May 2021, p 124-125 - In his belatedly filed re-examination affidavit Mr Singh attempted to make the case that the confinement approvals were not in fact confidential because the subsequent award of the contracts (after the approval of the confinements confidentially) were subject to some scrutiny and evaluation by a cross functional team – Transnet-05-2362, para 41 *et seq*. Be that as it may, the fact remains that the confinement approvals were done with no apparent justification for confidentiality. The awards were made without a competitive, open and public tender process and advanced a monopolistic agenda and ultimately the interest of the Gupta enterprise.

[821] Effective 1 January 2014

There is no evidence that the relevant officials of Transnet conducted the necessary gap analysis before the appointment of McKinsey. This brings into question the validity of the appointment.[822] As discussed later, many of the tasks outsourced to the financial advisors at significant cost could have been performed by Transnet employees with the necessary skills.

601. The favouring of McKinsey and Regiments was further evidenced by the fact that supply chain management was instructed to make fee payments to McKinsey, even though the tender process had not been concluded and no contracts had been finalised.[823] On 9 April 2014, well before the RFPs were issued or contracts had been concluded with McKinsey, Mr Singh, as GCFO, wrote to both McKinsey and Regiments, requesting them to "mobilise a McKinsey led consortium to have initial discussions with our teams". McKinsey was advised that in the unlikely event that the contracts were not concluded, it would be reimbursed for all costs incurred.[824] In July 2014, while the bid evaluation process was still underway, Mr Edward Thomas, the Executive Manager, Group ISCM, instructed Ms Cindy Felix, Procurement Manager, ISCM, to create purchase orders for payments to be made to McKinsey where no contracts existed. In an email she recommended that the payments (approved by Mr Singh) should not be made until such time that the contracts (in relation to the coal line, Kumba iron ore, the MEP, the NMPP and the capital optimisation project) were concluded as the scale of the risk was significant and as per audit requirements the payments needed to be logged in the deviation register."[825] Mr Thomas replied and argued that a contractual obligation had been created once the confinement process was approved and a letter was issued to

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[822] Transcript 10 May 2019, p 76; Exh BB2.1(a), PSV-0065, paras 153-154

[823] See Annexure PV 45, Exh BB2.1(d), PSV-1341-1345

[824] Annexure PV 45(a), Exh BB2.1(d), PSV-1348-1349

[825] Annexure PV 45, Exh.BB2.1(d), PSV-1344-1345

McKinsey requesting it to commence work while the RFP was issued. [826] Ms Felix then authorised the payments to be made in accordance with Mr Thomas' instruction. [827]

602. Mr Thomas was mistaken. An approval to confine does not create a contract at all. [828] Paragraph 21.1 of the PPM (2013) specifically provides that no employee shall anticipate the approval of acceptance of bids and that no employee may enter into a contract verbally or in writing or place orders before the prescribed adjudication process has been performed and authority has been duly granted by a manager with the appropriate delegation of authority. Paragraph 15.1.3 of the PPM (2013) provides that once approval to confine is obtained, bids "will close at the relevant AC". This means that after an approval to confine has been obtained, the following further steps have to be taken: (i) an RFP has to be issued to the bidder; (ii) the bidder's response has to be received by the acquisition council secretariat; (iii) bids have to be properly evaluated; and (iv) the contracts have to be subsequently awarded by the person with the relevant delegation of authority.

603. Moreover, in May 2014 a directive had been issued specifically instructing end users not to engage suppliers to provide services before the confined tender process had run its course and a contract had been concluded. [829] It was accordingly irregular for Mr Thomas to have approved the payments. The confinements to McKinsey were *ex post facto* exercises to justify the award of business that had already occurred.

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[826] Annexure PV 45, Exh.BB2.1(d), PSV-1344

[827] Annexure PV 45, Exh BB2.1(d), PSV-1345

[828] Transcript 10 May 2019, p 51, lines 8-10

[829] Annexure PV 46, Exh BB2.1(d), PSV-1353 *et seq*; and Transcript 10 May 2019, p 56

604. As mentioned, the contracts concluded with McKinsey and Regiments (particularly the four concluded confidentially) contributed substantially to the money laundering scheme involving Regiments, Homix and Albatime. In the context of preparing joint proposals for these four contracts, on 13 June 2014 Regiments emailed McKinsey a spreadsheet containing a detailed breakdown of fees that were to be paid by Regiments to Homix and Albatime in their guise as SDPs of Regiments on the four contracts.[830] The spreadsheet attached to Regiments' email of 13 June 2014 provided for aggregate amounts in excess of R100 million to be paid to Homix and Albatime on the four contracts. McKinsey has confirmed through a statement made by Mr Fine to Parliament that neither Homix nor Albatime were involved in providing services on any project in which McKinsey were involved.[831]

605. Mr Molefe denied all knowledge of the money laundering scheme involving Regiments and Homix and maintained that the evidence before the Commission was insufficient to prove his involvement.[832] The manner in which he failed to apply his mind to the grounds of confinement, the inappropriate use of confidentiality, the irregular parcelling of the transactions, the creating of a monopolistic situation, the premature payments to McKinsey, and the failure to do a gap analysis all took place on his watch and provide reasonable grounds to believe that he was involved in the Gupta enterprise and participated in the conduct of its affairs.

606. Mr Singh had more information about the money laundering scheme which is clearly evidenced in a reconciliation Excel spreadsheet sent to him and later to Mr Pita (after Mr Singh had moved to Eskom). Regiments maintained a running reconciliation of the payments it had received from Transnet and the corresponding

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[830] See Annexures 3 and 4, Transnet-05-743 *et seq*

[831] Transnet-05-694

[832] Transcript 9 March 2021, p 185

payments it had made to Mr Essa's laundry entities and Albatime. The spreadsheet containing this reconciliation was named "Advisory Invoice Tracking".[833] Regiments forwarded copies of the Advisory Invoice Tracking spreadsheet to Mr Singh[834] when he was GCFO of Transnet on 18 May 2015 and to Mr Pita on 5 August 2015.[835]

607. Entries in the spreadsheet confirm the money laundering arrangement. For example, an entry for March 2014 in respect of "the 1064-Transaction Advisory" reflects a total payment of R6.128 million with amounts of R3.064 million (50%) and R285 000 (5%) payable to Chivita/Homix and Albatime respectively.[836] Likewise, an entry in respect of the NMPP contract invoiced on 30 March 2015 reflects the total amount due as R3.948 million. The amount recorded as payable to Chivita/Homix is R1.974 million (being 50% of the total) and the amount payable to Albatime is R197 391 (being 5% of the total).[837] This was in keeping with the money laundering arrangement that Regiments kept only 45% of the payments under the McKinsey contracts and forwarded 55% to Homix (Mr Essa) and Albatime (Mr Moodley). Several other entries in the Advisory Invoice Tracking prepared by Regiments reflect similar payments in respect of the various McKinsey and other contracts. The numerous recorded entries in the spreadsheet reflect a consistent pattern in keeping with the scheme of 45/50/5% involving Regiments, Homix and Albatime. Regiments paid total payments to these "business development partners" of

[833] Transnet-05-1924 *et seq*

[834] Transnet-05-706

[835] Transnet-05-709

[836] Transnet-05-1928

[837] Transnet-05-1925

R274.155 million in the 2015/2016 financial year alone, including payments aggregating over R100 million on the McKinsey contracts.[838]

608. This evidence establishes a strong *prima facie* case that Mr Singh and Mr Pita were aware of the payments being made by Regiments in terms of the confinements to the laundry entities controlled by Mr Essa and Mr Moodley. Such evidence will be relevant in any prosecution of Mr Singh on charges of corruption in terms of Chapter 2 of PRECCA and/or racketeering or offences relating to the proceeds of unlawful activity in terms of Chapters 2 and 3 of POCA. Mr Singh could not recall whether he opened the email of 18 May 2015 to him attaching these documents, but conceded that as it was addressed to his email address he probably did. He assumed the spreadsheet had been sent to him because the invoices were long overdue but implausibly maintained that he was not aware of all the information in the spreadsheet (especially that regarding the payments to Homix and Albatime) because he had not performed the single act of clicking the "unhide" function.[839] Given that Mr Singh is a chartered accountant working with Excel spreadsheets on a daily basis, it is highly unlikely that he would not have known of the "unhide" function applied to expand the first view of an Excel spreadsheet. Mr Pita claimed not to have any recollection of his receipt of the email.[840]

[838] Transnet-05-694, para 12

[839] Transcript 28 May 2021, p 130-140

[840] Transcript 1 June 2021, p 233-242

The non-responsiveness of the McKinsey bid for the provision of advisory services related to the 1064 locomotives acquisition

609. On 30 May 2012, a confinement RFP was issued to nine entities for the appointment of the transaction advisor.[841] Section 2.8 of the RFP set out the evaluation methodology and criteria. Four responses from three different consortia were received on the tender closing date, 7 June 2012. These were: KPMG Consortium; PWC Consortium; McKinsey Consortium; and Webber Wentzel attorneys (in respect of legal services only). On 26 July 2012, it was resolved to award the contract to the McKinsey Consortium,[842] which comprised: i) McKinsey Incorporated (main bidder); ii) Letsema Consulting (co-bidder); iii) Advanced Rail Technologies; iv) Nedbank Capital; v) Edward Nathan Sonnenbergs (ENS); vi) Koikanyang Incorporated; and vii) Utho Capital. The fee payable was R35 million as R15 million of the budgeted amount of R50 million was spun out for legal services, awarded to Webber Wentzel.[843]

610. The tender ought not to have been awarded to the McKinsey Consortium because it failed to meet the test for administrative responsiveness. The test for administrative responsiveness in the RFP included whether all returnable documents were completed and returned by the closing date. The RFP explicitly stated that the test for administrative responsiveness (step 1) "must be passed for a respondent's proposal to progress to step 2 for further evaluation". The returnable documents included audited financial statements for the previous three years.[844] McKinsey failed to submit its financial statements and submitted a letter indicating that if successful its accounts could be viewed through an on-site

[841] Transnet-Ref-Bundle-05622

[842] Transnet-Ref-Bundle-05512

[843] Transcript 27 May 2021, p 74

[844] See section 4 of the RFP at Transnet-Ref-Bundle-05647-05648

inspection. The letter did not comply with the tender requirements. The RFP specifically stated that the failure to provide the audited financial statements for the previous three years would result in a bidder's disqualification.[845] Section 1(i) of the PPPFA defines an "acceptable tender" as any tender which in all respects complies with the specifications and conditions of tender as set out in the tender document. Failure to comply with a peremptory requirement of the PPPFA offends the principle of legality.[846] Where the materiality of compliance with legal requirements requires to be assessed, it is necessary to link the question of compliance to the purpose of the provision.[847] Transnet could not achieve the purpose of the RFP due to the fact that McKinsey had failed to submit the audited financial statements or any other document reflecting verifiable financial stability as required in terms of the RFP and as such did not submit an "acceptable tender". Accordingly, the decision to appoint the McKinsey Consortium was irregular due to its failure to submit the mandatory returnable documents. McKinsey should therefore have been excluded and disqualified at step 1.

Appointment of Regiments Capital (Pty) Ltd

611. On 20 August 2012 Mr Singh addressed a memorandum to Mr Molefe[848] requesting approval for the appointment of the McKinsey Consortium for the advisory services and Webber Wentzel for the legal advisory work as transaction advisors on the 1064 locomotive tender. He also asked it to be noted that McKinsey would be advised to partner with another firm, with equal or better credentials than Letsema, for the procurement elements, due to a potential conflict with Barloworld and Letsema. Surprisingly, the memorandum did not explain or

[845] Transnet-Ref-Bundle-05648

[846] *Dr JS Moroka Municipality v Betram (Pty) Ltd* 2014 (1) SA 545 (SCA)

[847] *Allpay Consolidated Investments Holdings v CEO of SASSA* 2014 (1) SA 604 (CC)

[848] Transnet-Ref-Bundle-5528

discuss the nature of the alleged conflict of interest that had arisen. Nevertheless, it was recommended that McKinsey be advised to partner with another firm; which McKinsey eventually did, with Regiments, a key player in the Gupta enterprise.

612. Mr Molefe approved the recommendation on 22 August 2012. In his testimony before the Commission, he testified that Letsema had a conflict because Barloworld, which was either being advised by Letsema or was advising it, built engines that were used by EMD, a bidder on the 1064 locomotive tender. So, according to Mr Molefe, Letsema had a conflict. He did not know who brought the conflict to his attention or why it was not picked up earlier during the tender process.[849] Mr Singh too was vague about the precise nature of the conflict, why it had not been picked up earlier in the process or explained in his memorandum. He denied requesting McKinsey to sub-contract Regiments and could not recall interacting with Regiments at the time they were brought in to replace Letsema.[850] He believed Regiments would have been proposed by McKinsey and some sort of review of Regiments' credentials would have been done by the procurement team between August and December 2012. There is no evidence indicating that.[851]

613. Mr Singh's attempts to distance himself from Regiments are not credible. Correspondence between Mr Essa and Regiments (Mr Pillay and Mr Wood) on 28 November 2012 reflects that Mr Essa set up a meeting between Mr Singh and Mr Pillay of Regiments at Mr Singh's office on 3 December 2012.[852] Around this time,

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[849] Transcript 9 March 2021, p 49-53; and Transcript 8 March 2021, p 206-208

[850] Transcript 27 May 2021, p 65-73

[851] Transcript 27 May 2021, p 86-87

[852] Transnet-05-2203-2204. As mentioned above, Mr Singh denied that he had any contact with Mr Essa regarding this meeting and contended that Mr Essa played no role in facilitating the meeting. In his re-examination affidavit (Transnet-05-2426-2427), Mr Singh belatedly points to inconsistencies (times of sending, etc) between two sets of emails dealing with the meeting appearing at Transnet-05-1980 and Transnet-05-2203-2204. Due to the lateness of the affidavit, the issue was not investigated.

on 30 November 2012, Mr Singh addressed a letter of intent ("LOI") for the provision of the advisory services to McKinsey informing it that its offer had been accepted and that its consortium had been awarded the contract.[853] It recorded that the parties to the agreement were: Transnet, McKinsey Incorporated and the other members of the consortium, including Regiments Capital. Clause 1.1.5 of the LOI stated that McKinsey "agrees to partner with Regiments Capital, for the procurement and supplier development elements of this project". The LOI was signed by Mr Singh on 4 December 2012, the day after his meeting with Mr Pillay of Regiments, and by Mr Michael Kloss, a director of McKinsey, on 6 December 2012.

614. Regiments was included as a member of the McKinsey consortium in place of Letsema despite it not having tendered as part of the consortium. The tender was awarded to the consortium based on its composition at the time of the submission of its bid. The capabilities of the consortium members to perform the various aspects of the 1064 transaction advisory tender and the consortium's eligibility for the award was assessed based on the verification and evaluation of the claims made by its constituent members, of which Regiments was not one. The capabilities and other credentials of Regiments were not subject to the rigour of the verification, evaluation and adjudication process followed in relation to the tender.[854] The appointment of Regiments was therefore inconsistent with the constitutional requirements of transparency, fairness and competitiveness.

615. Regiments (and ultimately the Gupta enterprise) benefited substantially from the replacement of Letsema. Paragraph 17.2 of the memorandum of 22 August 2012

[853] Transnet-Ref-Bundle-06570

[854] MNS Report Vol 2A (dealing with transaction advisors) appears at Transnet-06-359 *et seq* ("MNS Transaction Advisors Report"); see para 2.4. (Vol 2B of the report appears at Transnet-Ref-Bundle-6826 *et seq*.)

from Mr Singh to Mr Molefe recorded that the percentage split of work to Letsema as McKinsey's procurement partner amounted to 20% of the total.[855] An analysis of the evaluation criteria in the bid[856] indicated that Letsema would have been involved in almost all the aspects of the bid with the exception of the technical optimisation of capital equipment, the capital project optimisation experience, the business case development and evaluation for mega-projects, and the deal structuring and financing for large capital investment projects.[857] Mr Molefe testified that he did not consider the change from Letsema to Regiments (a transfer of 20-30% of the business under the tender) as a "big change".[858]

616. The appointment of Regiments in place of Letsema advanced the corrupt scheme in which Regiments agreed to pay 30% (later 50%) of all of its income from Transnet to companies appointed by Mr Essa and an additional 5% to Albatime – it being the company of Mr Moodley who introduced Regiments to Mr Essa, who played a key role in orchestrating the incorporation of Regiments as McKinsey's SDP.[859] The Money Flow Team of the Commission ("the MFT") in its report[860] dealing with Regiments' relationship with the Gupta enterprise summarised the scheme usefully as follows:

> "In some cases Regiments' laundering arrangements with Mr Essa and Albatime on joint McKinsey/Regiments' contracts with Transnet were fraudulently presented ... as Regiments supply development arrangements...Through these laundering arrangements hundreds of

[855] Transnet-Ref-Bundle-05530, para 17

[856] Exh BB8(a), MNS-TS-72-74.

[857] Transcript 29 May 2019, p 109

[858] Transcript 8 March 2021, p 243-244

[859] Transnet-05-324

[860] Exh VV9, FOF-08-399; and Transnet-05-324

millions of rands were laundered through shell companies nominated by Mr Essa out of fees paid by Transnet to Regiments...The business development fees paid to Mr Essa were simply money laundering payments. The shell companies designated by Mr Essa to receive these business development fees changed over time. They included: a. Chevita Trading (Pty) Ltd; b. Homix (Pty) Ltd; c. Forsure Consultants (Pty) Ltd; d. Fortune Consulting (Pty) Ltd; Medjoul (Pty) Ltd; e. Medjoul (Pty) Ltd; f. Haustaff (Pty) Ltd; g. Maher Strategy Consulting (Pty) Ltd...All of these shell companies operated as out and out money laundering vehicles without any legitimate business activities. Revenue received from Regiments by these shell companies was within days, laundered to lower level money laundering entities. Apart from inflows from Regiments and other corrupt associates of Mr Essa and the Guptas, the shell companies had no income. Apart from outflows to lower lever laundry entities, the shell companies had no expenses of consequence. None of the shell companies paid PAYE (employees' tax) to SARS."

617. Although he approved the decision to substitute Letsema with Regiments, Mr Molefe "categorically" denied any knowledge of the money laundering scheme and his participation in it. His responses to questions arising from the MFT Report were generally non-responsive, evasive, pedantic and dismissive.[861] He mostly declined to engage with the allegations, saying that he would reserve his comment until after the Commission had made a finding in that regard. He eventually conceded that the MFT Report pointed to the possibility of a money laundering scheme of some magnitude.[862] However, he refused to comment on the

[861] Transcript 8 March 2021, p 213 *et seq*

[862] Transcript 8 March 2021, p 233-234

significance of McKinsey agreeing to repay Transnet R650 million in respect of fees paid to it in terms of various contracts with Transnet tainted by corruption.[863]

618. Mr Molefe's testimony about his lack of knowledge of the scheme involving Regiments and the Gupta associated companies must be assessed in the light of the evidence analysed earlier that he enjoyed a long standing relationship with the Gupta family and had been a frequent visitor to their Saxonwold compound between 2009 and 2016, the evidence that he received cash payments from the Gupta enterprise, and the evidence that the Guptas or their associates played a role in his appointment to the posts of GCEO of Transnet and GCEO of Eskom. The Gupta enterprise benefited substantially from Mr Molefe's approval of the appointment of Regiments.

The contractual arrangements for the provision of advisory services: The LOI and its addenda

619. The letter of intent ("**LOI**") of 6 December 2012 was intended to regulate the relationship between Transnet and the McKinsey consortium pending the conclusion of a Master Services Agreement ("MSA"). It provided that it would remain in effect until the MSA was signed or until 90 days elapsed from the date of issue of the LOI, whichever event should occur first.[864] The parties agreed to work towards concluding the MSA over a period of nine months, commencing 15 January 2013 and expiring 15 October 2013 (or sooner if completed). Clause 1.1.1 noted that the contract timeline could be for a longer period "at no extra cost to Transnet if the deliverables are not executed for whatever reason as this engagement is output-based, as opposed to time-based". The parties agreed to

[863] Transcript 8 March 2021, p 238; and see Transnet-05-403

[864] Transnet-Ref-Bundle-06571

use the LOI "as a proxy for the binding legal agreement and under its authority Transnet intends to request that the supplier commences the provision of such services as required, during which period the detailed agreement will be negotiated and finalised between the parties" (clause 1.1.2). Consequently, the LOI was valid for 90 days or until the earlier finalisation of the MSA and any deliverables not completed by 15 October 2013 would continue at no cost to Transnet.

620. Clause 3 of the LOI of 6 December 2012 provided that the fees for the services would be R35.2 million and any overrun in terms of time "will not be for the account of Transnet as the engagement is output-based and not time-based". Annexure A of the LOI reflected that different fees were allocated to different members of the consortium for different work. Nedbank/Utho Capital would be paid a fixed fee of R1.4 million and Regiments R6.1 million for contracting strategy. McKinsey would receive R6.6 million for business case validation, R13.5 million for technical evaluation and execution and R7.6 million for project management office, integration and shareholder management.[865]

621. The key deliverables under the LOI were the provision of advisory services related to the acquisition of the 1064 locomotives. This included: i) the developing and augmenting of the business case; ii) the procurement, legal, supplier development and localisation strategy; iii) technical/operations; iv) project management; and v) financial. The financial services have assumed some significance. They included "developing finance and financial options and develop deal structure (financing, hedging and de-risking options)".

622. As the LOI of 6 December 2012 was only valid for 90 days (from 6 December 2012 to 6 March 2013) or until the MSA was finalised, whichever of the two events

[865] Exh BB8(a), MNS-TS-78

occurred first, and because as at 4 March 2013, the MSA had not been finalised, the LOI would have expired on 6 March 2013. To avoid the expiry of LOI, Transnet and McKinsey concluded a "first addendum" to the LOI.[866] Clause 3 of the first addendum extended the validity date from 7 March 2013 to 15 October 2013 "to further conclude the MSA". A day before the expiry of the first addendum to the LOI, on 14 October 2013, Transnet and McKinsey concluded a second addendum to the LOI which extended the LOI's validity period from 15 October 2013 to 30 November 2013, to allow the parties to conclude the MSA. Both addenda recorded that the fixed contract price of R35.2 million was not affected by the extension of the original LOI.[867]

623. While the second addendum to the LOI was in operation, on 19 November 2013, Mr Singh addressed a letter to McKinsey confirming Transnet's agreement to a request by McKinsey for Regiments Capital to provide services in place of Nedbank (contracted to provide financing, funding options and deal structures) on the grounds of a potential conflict of interest.[868] The agreement increased the scope of Regiments' work to a stake of 30% in the McKinsey consortium - 20% from Letsema and 10% from Nedbank.[869] This substitution also advanced the money laundering scheme.[870] The memorandum motivating the substitution of Nedbank (prepared by Mr Singh) was approved by Mr Molefe some five months later on 17 April 2014.[871] It requested ratification of the substitution and the delegation of authority to Mr Singh to give effect to that approval. The approval of the substitution came one day after McKinsey informed Transnet in a letter dated

[866] Transnet-Ref-Bundle-06581

[867] Transnet-Ref-Bundle-06584

[868] Transnet-Ref-Bundle-05342

[869] Transcript 27 May 2021, p 80

[870] Transcript 8 March 2021, p 256 *et seq*

[871] Transnet-05-888

16 April 2014 that it had ceded all of its rights under the contract for financial services to Regiments, a matter which is discussed more fully later.[872] Mr Molefe testified that he vaguely recalled the decision but not the details.[873]

624. As at 30 November 2013 Transnet and McKinsey had neither concluded the MSA nor an addendum to extend the validity period of the LOI. As a result the LOI lapsed due to the effluxion of time. As a consequence, there was no valid agreement governing the relationship between Transnet and McKinsey as at 1 December 2013. By this date, the total amount paid to the McKinsey consortium under the extended LOI was about R11 million.[874]

Regiments' capital raising and risk management proposal

625. In early January 2014, Regiments presented a proposal ("the Regiments capital raising and risk management proposal") to Ms Makgatho (the Transnet Group Treasurer) in respect of their role as advisors on the 1064 locomotives.[875] The proposal *inter alia* offered the delivery of "the optimal funding structure and financial risk solution for the 1064 locomotives acquisition"; the optimal risk management solution, funding structures and/or in separate risk overlays to deliver the right balance between funding cost and risk; a comprehensive evaluation of all potential funding sources and mechanisms to enable the selection of the most appropriate avenues to pursue and execute; and a fee structure based on "a modest fixed monthly retainer" and a performance fee for "best alignment of interests".

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[872] Transnet-Ref-Bundle-05367

[873] Transcript 8 March 2021, p 260-262

[874] Transcript 29 May 2019,p 117

[875] Annexure MM10, Exh BB10(a), MEM-084

626. Ms Makgatho had reservations about dealing with Regiments.[876] In late 2013, Mr Singh gave her a funding proposal ("the R5 billion proposal") from Regiments and informed her that it was a very important matter that Mr Molefe needed executed speedily. The proposal was that Regiments would facilitate a five-year, R5 billion loan facility to be funded by Nedbank through an "in-between structure" (similar to a Special Vehicle Structure) that would serve as a conduit between the lender Nedbank and Transnet who would pay interest to the "in-between structure" which would in turn remit the funds to Nedbank. This was unusual as Transnet normally deals directly with lenders and pays interest and capital directly into the lender's designated account. The proposed facility was also priced much higher than normal facilities, similar loan facilities or domestic bonds. As Transnet had a direct relationship with Nedbank, there was no need to use a conduit like Regiments to engage with Nedbank. Ms Makgatho calculated that Transnet would have to pay an additional R150 million per annum in interest payments over and above what Transnet normally paid for similar facilities. This translated into potential losses of R750 million over a five-year period.

627. Ms Makgatho confronted Mr Molefe telling him that the proposal was tantamount to theft and the structure was never implemented. Mr Molefe denied that he had directed Mr Singh to instruct Ms Makgatho to execute this proposal and shifted responsibility for it to him.[877] Mr Singh could not recall these events, saying that it was unlikely that he would have instructed Ms Makgatho as she described.[878] Mr Molefe's concession provides sufficient basis to conclude that such a proposal was made which was not in the interest of Transnet and from which only Regiments (and the Gupta enterprise) would have benefited had it been implemented.

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[876] Exh BB10(a), MEM-019-20, paras 68-77; Transcript 6 June 2019, p 118-128

[877] Transcript 9 May 2021, p 132-145

[878] Transcript 28 May 2021, p 67-71

628. Having had this experience,[879] Ms Makgatho was sceptical of the benefit or value of the Regiments capital raising and risk management proposal when she received it a few months later. Transnet simply did not require the services offered by Regiments because all the work mentioned in it could have been done by Transnet's treasury or were matters that fell within the scope of the business case or OEM requirements in the tender.[880] Thus, the funding requirements could have been done by the Structured Finance unit; the risk management and financial risk solution by the Risk Manager; and the development of strategy and execution by the Front Office. The "detailed evaluation of the economic social and sustainability impact" offered as part of the proposal was part of the business case, which had been completed. Likewise, the tendered "collateral assessment of the components" was a matter for the OEMs which had been dealt with by them in their tender documents. The services offered for project management could be provided by the business units at Transnet dealing with capital projects.

629. Ms Makgatho met with Mr Pillay of Regiments to discuss the capital raising and risk management proposal. The proposed fee was a R1 million monthly retainer and a performance fee equal to 20% of the savings over the interest rate of Transnet's most recent funding secured prior to 1 January 2014. Ms Makgatho reported back to Mr Singh and informed him that she had requested Regiments to revise the proposal and link the deliverables to proposed timelines and a proposed budget.

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[879] Ms Makgatho also testified about other suspicious proposals of little or no value. In 2013 Mr Wood came up with a cross-currency proposal for Transnet to suggest that the SARB act as cross-currency counterparty. This proposal posed volatility risks to the ZAR of such an order that it raised serious doubt about Regiments' judgment in financial matters and Mr Singh and Mr Molefe's intentions – Exh BB10(a), MEM-021-022, paras 78-85 and Transcript 6 June 2019, p 129-136. Similarly, in 2013 McKinsey attempted to persuade Ms Makgatho to agree to a proposal for a credit rating model at a cost of R15 million. Much to the chagrin of Mr Singh, she refused to agree to it. The treasury team then undertook the exercise at minimal cost and time – Exh BB10(a), MEM-022-023, paras 86-90 and Transcript 6 June 2019, p 136-145.

[880] See the organogram of treasury at Annexure MM 1, Exh BB10(a), MEM-037

Mr Singh responded with annoyance and informed her that she should not concern herself about timelines and budgets and that Regiments were not meant to be her advisors but his.[881] She was surprised as in her opinion, the proposal was very vague and she saw very little in the way of "value-add".[882] Ms Makgatho was not involved thereafter in the appointment of Regiments. It was paid about R320 million between May 2013 and July 2014, and its invoices were paid within a day of submission, rather than after the usual 30 days.[883]

The agreement of 23 January 2014 and the increased fees payable to Regiments

630. Despite Ms Makgatho's concerns and the fact that the agreement with the McKinsey consortium had lapsed, Mr Singh signed a contract ("the agreement of 23 January 2014") with Regiments on 23 January 2014.[884]

631. The agreement of 23 January 2014 recorded that subsequent to the issuance of the original LOI a conflict of interest required the reallocation of the tasks originally intended to be handled by Nedbank to other members of the consortium and thus Transnet wished to contract with Regiments for that purpose. The specified deliverables were those in the proposal: i) determining the impact of the acquisition; ii) a collateral assessment to the component level to determine the potential for concessionary funding; iii) developing and implementing a best practice risk management framework; iv) evaluating all potential funding sources and mechanisms; and v) providing support in respect to funding.[885] The proposed fee structure for the services would involve a retainer applicable every month and a

[881] Transcript 6 June 2019, p 108-111

[882] Transcript 6 June 2019, p 101-109

[883] Transcript 6 June 2019, p 111-118; and Exh BB10(a), MEM-017 *et seq*, paras 60-67

[884] Annexure MSM 7, Exh BB3(a), MSM-177 *et seq*; and Transnet-Ref-Bundle-06587

[885] See Transnet-Ref-Bundle-06588-06589

performance fee on the funding raised at interest rates below the benchmark. Deliverables (except the actual fundraising) were to be executed for a fee of R15 million over a period of twelve months and provision was made for a performance fee equal to 20% of the savings achieved against the benchmark interest rate, being the interest rate at which Transnet was able to raise its most recent funding prior to 1 January 2014.

632. Some of these terms were varied in manuscript at the end of the agreement. The handwritten words "subject to items listed below" appear immediately below Mr Singh 's signature. Various handwritten terms appear at the end of the agreement (probably added by an employee in the procurement department).[886] The handwritten terms provided: "in terms of section 2 there will not be a performance fee for fundraising thus 2.1.2 will be removed as well". Clause 2.1.2 provided for the performance fee of 20%. It was further recorded that payments in terms of the agreement would be made to McKinsey and that the costs and payments against the scope could not be above R9 million, without specific approval from Transnet.[887] Mr Singh was unable to say whether the handwritten terms were a counter-offer by Transnet to which Regiments agreed.[888] He thought the performance fee would have been removed because funding was not on the agenda at that stage and that a performance fee would be negotiated later under a separate mandate.[889]

633. Mr Singh had no authority to appoint transaction advisors on behalf of Transnet without following a proper procurement process as such did not fall within his delegation of authority. Moreover, the agreement of 23 January 2014 was irregular

[886] Transcript 27 May 2021, p 97-98

[887] Annexure MSM 7, Exh BB3(a), MSM-180; and Transnet-Ref-Bundle-06590

[888] Transcript 27 May 2021, p 100-101

[889] Transcript 27 May 2021, p 101, lines 15-25

in that no procurement event preceded it. There is no evidence indicating that McKinsey was aware of this agreement. Thus, there was no valid amendment or variation of the LOI.[890]

The third addendum to the LOI for the provision of advisory services

634. On 4 February 2014 three months after the LOI had lapsed on 30 November 2013, Transnet and Regiments concluded the third addendum to the LOI, purporting to extend the scope of the lapsed LOI between Transnet and McKinsey.[891] It is recorded as being between McKinsey and Transnet. However, it was signed by Mr Wood of Regiments and Mr Singh. A typed reference to McKinsey as a party to the agreement on the last page of the third addendum is scratched out and replaced in handwriting by "Regiments Capital" and initialled by both Mr Singh and Mr Wood. According to Mr Singh, and as discussed presently, there was talk at the time of McKinsey ceding its rights to Regiments; and McKinsey had begun to demobilise its team. There is no reference to the purported cession in the preamble or in any clause of the third addendum to the LOI. Mr Singh signed the third addendum to the LOI with Regiments without having sight of any written cession. He sought to pass the buck for the irregular manner in dealing with the cession to the procurement department.[892]

635. Clause 3 of the third addendum to the LOI provided that the objective of the project was "to conduct all the necessary studies and preparatory work to enhance Transnet's ability to raise the required funding at a competitive interest rate and to achieve an optimal funding structure with minimal pressure on Transnet's future liquidity". The deliverables were virtually identical to those in the Regiments capital

[890] Transcript 29 May 2019, p 118-129

[891] Transnet-07-250.380; and Transnet-Ref-Bundle-06605

[892] Transcript 27 May 2021, p 104-111

raising and risk management proposal and the agreement of 23 January 2014. Clause 4 varied the contract price. It stated that as a result of the additional scope of work required on the financial phase of the contract, the initial price of R35.2 million would increase by R6 million, bringing the total contract value to the fixed amount of R41.2 million. The increase of R6 million was stated to be intended to provide a fee of R15 million for the funding and finance scope of the work by utilising the increase of R6 million plus funds of R9 million allocated to other deliverables no longer required.[893]

The cession of the advisory services contract

636. On 16 April 2014, Mr Sagar of McKinsey addressed a letter Mr Singh informing him that McKinsey had ceded its rights and delegated its obligations under the advisory services contract to Regiments on 5 February 2014 (the day after the third addendum to the LOI was concluded between Transnet and Regiments) and noting that all the work related to the mandate was in fact performed by Regiments.[894] There is no written cession agreement on record. The cession was invalid on the grounds that at the time when McKinsey purported to cede the contract to Regiments, McKinsey's rights in respect of the advisory services had lapsed as a consequence of the LOI having expired on 30 November 2013. In the light of that, McKinsey had no rights and obligations to cede to Regiments and consequently the cession was null and void. Practically (though perhaps not legally), Regiments became the principal contractor on a very substantial tender without having been

[893] Transnet-Ref-Bundle-06606; and Transcript 29 May 2019, p 130 *et seq*

[894] Transnet-Ref-Bundle-05367

awarded a tender or being subject to any verification, evaluation or proper assessment that is normally required for the award of a tender of this magnitude.[895]

637. A memorandum dated 19 May 2015 (a year after the purported cession) records that it was agreed by Transnet that McKinsey would cede the principal lead role in the contract to Regiments since phase 2 consisted of finance and deal structuring deliverables and the LOI was "amended by value to reflect additional scope of work to ensure better implementation and management of the risks". Regiments then indicated to Transnet that its preferred operating model for such engagements was a risk sharing model or success fee. The agreement was then amended by value, to reflect a change in the remuneration model as proposed by Regiments.[896]

638. From the letter, the memorandum and the third addendum of the LOI it is possible to infer that McKinsey and Regiments purported to enter into an out and out cession involving a transfer of the rights from McKinsey as the cedent to Regiments as the cessionary, which was effected by mere agreement without the prior knowledge or consent of Transnet, the debtor.[897] At the risk of repetition, it is important to emphasise that both the third addendum to the LOI as well as the purported cession were in all probability null and void. The third addendum to the LOI was concluded after the expiry of the LOI. Even if the LOI had not expired, the third addendum to the LOI was null and void as Regiments had no legal authority to amend the LOI unless a proper cession between McKinsey and itself had taken place, which was not the case at the time the third addendum to the LOI was concluded. The consequence of the invalid cession is that all contractual agreements concluded on the strength of the cession were also invalid.

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[895] Transcript 8 March 2021, p 263-264

[896] Transnet-Ref-Bundle-05594

[897] Generally, no formalities are required for an act of cession of this kind and thus could have been concluded either expressly or tacitly, or may be inferred from the conduct of the parties.

The Master Services Agreement and the substantial fee increase

639. In terms of the original LOI, it was envisaged that on the expiration of the LOI, or before its expiration within a certain period, the parties would conclude a Master Services Agreement ("MSA"). On 11 August 2014, Transnet concluded a MSA with McKinsey (not Regiments). [898] If the purported cession between McKinsey and Regiments had been valid then McKinsey did not have any legal authority to conclude the MSA with Transnet as it had ceded its rights and obligations in terms of the cession to Regiments. The terms of the MSA simply reiterated the terms of the LOI, including the original contract value of R35.2 million. The MSA was silent on the agreement of 23 January 2014 between Transnet and Regiments, the purported third addendum to the LOI dated 4 February 2014, and the purported cession of 5 February 2014. Moreover, the MSA recorded that the commencement date would be 15 January 2013 and the expiry date would be 31 March 2014. Thus, the MSA was signed by Transnet five months after the MSA on its own terms had expired.[899]

640. On 24 April 2014 just over a week after McKinsey had informed Transnet that it had ceded and delegated its rights and obligations to Regiments on 5 February 2014, and four months *prior* to Transnet signing the MSA with McKinsey in August 2014, Transnet and Regiments concluded *a first addendum to the MSA* with a view to varying the MSA by adding additional scope and amending the price.[900]

641. Both the LOI and the MSA allocated R13.5 million for technical evaluation and execution services. These services included amongst other things the calculation of the escalation and hedging costs pursuant to the finalisation of the LSAs with the

[898] Transnet-Ref-Bundle-06609; and Transcript 27 May 2021, p 117

[899] Transnet-Ref-Bundle-06609; and Transcript 29 May 2019, p 133-134

[900] Transnet-Ref-Bundle-06644

OEMs. This was the price for the technical evaluation and execution services that was agreed to through a competitive bidding process by the McKinsey consortium and Transnet. [901]

642. On 16 April 2014 (the same day that McKinsey informed Transnet of the cession), Mr Tewodros Gebreselasie, a senior economic advisor at Regiments, sent an email to Mr Laher of Transnet enclosing a draft closeout letter and requesting that Mr Laher provide his input and comments thereon before the closeout letter was made final.[902] The closeout letter confirmed that the assignment (the transaction advisory services for the acquisition of the 1064 locomotives) had been successfully completed by Regiments within the specified timeframe. It also set out the nature of the mandate related to cost escalation, the cost of foreign exchange hedging and the cost of performance guarantees. The letter claimed that Regiments had made significant savings in hedging costs as its proposed structure assumed the foreign exchange hedging to be contained on balance sheets of the bidders thereby avoiding balance sheet impairment, cash flow and accounting implications for Transnet. It added that performance guarantee benchmarking and the ensuing negotiations with the bidders resulted in recommendations that also resulted in savings for Transnet. [903] Mr Laher responded to the email disputing the claim that "significant savings were achieved."

643. On the same day, Mr Singh addressed a memorandum to Mr Molefe[904] requesting him to: i) note the deliverables executed by the transaction advisor[905] compared to

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[901] See MNS Transaction Advisors Report, paras 2.5.4-2.5.15; and Transcript 29 May 2019, p 139 *et seq*

[902] Transnet-Ref-Bundle-05369

[903] Transnet-Ref-Bundle-05371-05372

[904] Transnet-Ref-Bundle-05537

[905] It is not clear whether the transaction adviser referred to in para 1.1 of the memorandum of 16 April 2014 was McKinsey or Regiments – see Transcript 9 March 2021,p 60-65

the original scope per the LOI; ii) ratify the amendment in the allocation of scope of work from McKinsey to Regiments; iii) ratify the amendment in the makeup in the transaction advisor consortium from Nedbank to Regiments; iv) approve a change in the remuneration model of the transaction advisor compared to the original remuneration model; and v) delegate power to Mr Singh to give effect to the noted approvals. Most importantly, Mr Singh sought payment to Regiments of an additional fee of R78.4 million (excluding VAT) which was an increase of approximately 200% of the original fee agreed with McKinsey. The recommendations were made by Mr Singh and approved by Mr Molefe without any supporting recommendation from the procurement department, governance or other interested persons or bodies.

644. The memorandum asserted further that value had been created by Regiments through the accelerated delivery schedule saving future inflation related escalation costs and foreign exchange hedging costs of approximately R20 billion (before "break costs" – batch pricing). According to Mr Singh, the overall cost of the 1064 locomotive transaction reduced from R68 billion to R50 billion. In addition, he maintained that Regiments achieved a saving of approximately R2.8 billion for the performance based foreign exchange and guarantee bonds.[906] He added without explanation that Regiments also achieved direct benefit to Transnet of R219 million and indirect savings of over R500 million. If the savings had not been achieved, Mr Singh said, the 1064 locomotive acquisition transaction would have been unaffordable at an amount in excess of R50 billion. All of this, in Mr Singh's view, justified a substantial increase in the fee payable to Regiments. The Regiments' operating model for such engagements is usually based on a risk sharing model or success fee (25% of value created/saved). However, in this instance an additional

[906] Transcript 27 May 2021, p 128-150

fee of R78.4 million excluding VAT (representing 0,042% of the total savings) was recommended. Mr Molefe approved the request in the memorandum of 16 April 2014 on 17 April 2014. He believed the increase of the fee was justifiable because Regiments supposedly had saved Transnet R2.8 billion.[907]

645. On 23 April 2014 Mr Danie Smit of Group Treasury wrote to Mr Wood questioning the alleged savings made by Regiments. He pointed out that the idea of transferring the forex risk to the balance sheet of the bidders came from Transnet and was included in the conditions of the RFP. Moreover, the cost of calculating the relevant forex forwards is a simple technique, easily accessible from Bloomberg, Reuters and Transnet's dealers as well. He concluded by expressing doubt that Regiments brought any savings on forex or the performance guarantees as only one small amount was involved. He was apprehensive that the auditors would challenge any payments for alleged savings he clearly thought were dubious.[908]

646. From a broader perspective, it is hard to see any savings brought about by Regiments. The original ETC for the 1064 locomotives was R38.6 billion while Transnet ended up paying an amount of R545 billion. According to Mr Chabi, the reasonable cost of the locomotives was R45.7 billion. It is thus at least doubtful whether any savings were secured for Transnet. Moreover, JP Morgan had hedged the financial risks that Regiments claimed derived a significant saving; the idea of transferring the forex risk to the balance sheet of the suppliers came from Transnet; and the performance guarantees did not result in savings due to the

[907] Transcript 9 March 2021, p 75-76

[908] Transnet-Ref-Bundle-05382

small amount used and the fact that the majority of the bonds were market related.[909]

647. During his evidence before the Commission, Mr Molefe confirmed that Mr Singh had taken him through the memorandum point by point and admitted that he did not know whether there had been any savings as he had relied exclusively on what his subordinate (Mr Singh) had told him.[910] He did not apply his mind to the question in an independent manner and took no steps to satisfy himself that the savings of R2.8 billion had in fact been made. He sought no additional information substantiating the nature and value of the alleged savings of R2.8 billion.[911] He said there was nothing that made him suspicious.[912]

648. On 23 April 2014, Mr Thomas sent a memorandum to Mr Pita (the GSCO) objecting to the payment of the increased fee to Regiments in these terms.[913] The benefit that Transnet obtained from the contract was in terms of a fixed fee agreement. The fact that Regiments' usual operating model was based on a risk share model or success fee was irrelevant. Regiments willingly accepted the rights and obligations of the existing contract, which provided for a fixed fee for the deliverables. Paragraph 22 of the memorandum of 16 April 2014 recorded that "Regiments was transferred a mandate and remuneration model already accepted by McKinsey".[914] Mr Molefe denied ever receiving this memorandum but conceded that had he seen it he might have reconsidered authorising the fee increase[915] and that McKinsey had not expected remuneration in accordance with the Regiments

[909] MNS Transaction Advisors Report, paras 2.5.20-2.5.21.

[910] Transcript 9 March 2021, p 101

[911] Transcript 9 March 2021, p 99

[912] Transcript 9 March 2021, p 96-98

[913] MNS Transaction Advisors Report, para 2.5.14; and Transcript 9 March 2021, p 89-90

[914] Transnet-Ref-Bundle-05544

[915] Transcript 9 March 2021, p 91-92

model.[916] Mr Molefe thus agreed that there was accordingly no obligation on Transnet to agree an additional payment of R78.4 million for any of the services rendered by Regiments.[917]

649. An unsigned memorandum to Mr Singh in the name of Mr Pita (compiled by Mr Thomas) also challenged the decision to award Regiments an additional fee of R784 million on the same grounds.[918] Mr Pita did not sign the memorandum of 16 April 2014 because he did not agree with it.[919] Mr Singh admitted that he was aware of Mr Pita's objection but did not inform Mr Molefe of it.[920] When asked why he had failed to disclose an important difference of opinion among Transnet's senior executives about this wholly unjustifiable payment, Mr Singh maintained unconvincingly that there was adequate disclosure in the memorandum about the rationale for the additional fee of R78.4 million.[921]

650. The next day, 24 April 2014, despite the reservations by Transnet's treasury and supply chain management, Transnet, as mentioned earlier, concluded the first addendum to the MSA with Regiments at "a fixed fee" of R78.4 million. It was signed by Mr Singh on behalf of Transnet and by Mr Wood on behalf of Regiments.[922] Clause 4 stated that "as a result of a number of risks to which Transnet was exposed, Regiments utilised its extensive intellectual property and complex techniques and methodologies to mitigate the risks". It also stated that the scope of work in the MSA would be amended for Regiments to mitigate the risks by assisting Transnet with negotiations to accelerate the delivery schedule resulting in

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[916] Transcript 9 March 2021, p 76, line 9

[917] Transcript 9 March 2021, p 76, line 24

[918] Transnet-Ref-Bundle-05556

[919] Transcript 27 May 2021, p 141

[920] Transcript 27 May 2021, p 141-142

[921] Transcript 27 May 2021, p 143-144 and p 145-146

[922] Transnet-Ref-Bundle-06644

savings in costs for future inflation, foreign exchange hedging, and guarantee bonds. A mere six days later, on 30 April 2014, Transnet paid Regiments an amount of R79.23 million for "risk share – 1064 locomotives foreign exchange and warranty bonds".[923] A percentage of the additional fee paid to Regiments, facilitated and approved exclusively by Mr Singh and Mr Molefe was passed on to the Gupta enterprise in accordance with the established money laundering scheme.

651. An amount of R36.765 million was paid to Regiments between 18 February 2014 and 7 April 2014. These payments were made in terms of the purported third amendment to the LOI between Transnet and Regiments of 4 February 2014 and in terms of the MSA between Transnet and McKinsey (not Regiments) on 21 February 2014. The amount of R79.23 million paid to Regiments on 30 April 2014 flowed from the first addendum to the MSA between Transnet and Regiments (not McKinsey) dated 24 April 2014. The invoice was issued in respect of this last payment on 27 March 2014, before the first addendum to the MSA was concluded. Regiments was thus unjustifiably enriched with the additional payment of R79.23 million, as there was evidently no legal basis for the payment of this amount,[924]because the alleged cost saving was part of the LOI/MSA deliverable that had been budgeted for at a cost of R13.5 million.[925]

652. As there was no legal basis for Transnet to pay Regiments an additional fee on a risk sharing basis, both Mr Molefe and Mr Singh were in breach of their fiduciary duties and their conduct led to prejudicial expenditure not in the interest of Transnet in contravention of sections 50, 51 and 57 of the PFMA.[926] The contraventions of the PFMA constituted unlawful activity as defined in section 1 of

[923] MNS Transaction Advisors Report, para 2.5.18

[924] MNS Transaction Advisors Report, paras 2.5.19-2.5.23

[925] Transcript 29 May 2019, p 145-146

[926] MNS Transaction Advisor Report, paras 3.1.17 – 3.1.20

POCA and hence the payments to Regiments were the proceeds of unlawful activities. The acquisition and possession of these proceeds by Mr Essa's shell companies and the arrangement in terms of which they were transferred constitute the offences relating to the proceeds of unlawful activities contemplated in section 5 and section 6 of POCA. These planned and continuous money laundering offences, being offences in Schedule 1 of POCA, point to a pattern of racketeering activity by the Gupta enterprise. There are accordingly reasonable grounds to believe that Regiments, Mr Molefe, Mr Singh, Mr Essa, Mr Wood, Mr Moodley and others participated in the conduct of the affairs of the Gupta enterprise and may have committed one or more of the racketeering offences contemplated in section 2 of POCA. The matter should accordingly be referred to the law enforcement authorities for further investigation.

The **Nkonki** contracts

653. Nkonki was a service provider to Transnet for certain internal audit functions in terms of a contract valued at R500 million for a five-year period commencing on 1 August 2013. Trillian (in which Mr Essa had a 60% shareholding) acquired Nkonki in 2016.[927] In January 2017 Transnet received unsolicited bids from Nkonki for services related to supply chain efficiencies, the coal and iron ore line volume and tariff optimisation.[928] The proposal was aimed at reforming supply chain management practices at Transnet which were said to be bureaucratic and needed to be "reshaped and enhanced" to become more responsive, agile, and automated to reduce the cost of doing business with Transnet. Nkonki recommended an initial analysis to establish potential cost-savings, enhancement of the management information reporting system and the delivery of identified action plans.

[927] Transcript 12 May 2021, p 294

[928] See Annexure MSM 37, Exh BB3(b), MSM-542

654. Mr Gama then requested the board to utilise the existing internal audit contracts to appoint Nkonki for these services as permitted non-audit services and to delegate authority to him to sign all documentation including the contract documentation.[929] He maintained that the initiatives were needed particularly to enhance the revenues earned from the iron ore and coal businesses and that Transnet Group Commercial did not have the necessary capability and resources internally to complete the initiatives, but Nkonki (an accounting and auditing firm controlled by Mr Essa) apparently did. The precise nature of those skills and capabilities were not clearly set out in the approval memorandum. The proposal envisaged "a gain share methodology" based on 12% to 14% of OPEX savings and 8% to 10% of CAPEX savings delivered.[930] The estimation optimistically predicted savings at between R1.1 billion and R2.6 billion resulting in a fee of approximately R260 million. In his testimony, Mr Gama said that he had anticipated a saving of R5 billion and thus he expected to pay Nkonki a fee of R500 million.[931]

655. On 17 February 2017 the BADC (chaired by Mr Shane)[932] approved the use of Nkonki as consultants and delegated to Mr Gama the authority to sign a LOI for consultancy services "up to a maximum cost of R500 million".[933] The suggested extension was an increase in value of 100% on the existing Nkonki contract and a further 20-month extension to 2 March 2020. The procurement was open to question because the award of the contract did not go out to open tender (it was an inappropriate "piggybacking" on an existing contract) and seemed a duplication of

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[929] Annexure MSM 38, Exh BB3(b) MSM-571

[930] Annexure MSM 38, Exh BB3(b), MSM-574, para 31.1.2

[931] Transcript 12 May 2021, p 290-293

[932] Transcript 16 May 2019, p 145; and Exh BB3(b), MSM-576

[933] Annexure MSM 39, Exh BB3(b), MSM-579

some of the services that were supposed to be rendered by McKinsey/Regiments.[934]

656. National Treasury Practice Note 11 of 2008/2009 governs unsolicited proposals.[935] It provides *inter alia* that institutions are not obliged to consider unsolicited proposals but may do so if a comprehensive and relevant project feasibility study has established a clear business case, the product or service involves an innovative design to project development and management, or presents a new and cost effective method of service delivery. The Practice Note provides further that the accounting officer must reject the unsolicited proposal if it relates to known institutional requirements that can, within reasonable and practical limits, be acquired by conventional competitive bidding methods or relates to products or services which are generally available.[936] Mr Mahomedy was of the opinion that the unsolicited Nkonki proposal did not contain any innovative solution, nor did it meet these requirements for acceptance.[937]

657. In March 2018 the Auditor-General requested state organs to consider termination of contracts with Nkonki because of its association with the Guptas. Transnet heeded the call of the Auditor-General and terminated the internal audit contract sometime before 31 July 2018.[938] By 2019 Transnet had paid R26.1 million for these related services, with a further R16 million outstanding which has been disputed by Transnet.

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[934] Transcript 16 May 2019, p 147-153; and Exh BB3(a), MSM-029, para 5.11

[935] Transnet-07-250.82

[936] Strictly speaking, National Treasury Practice Note 11 does not apply to Transnet. It applies to PFMA Schedule 3A, 3B, 3B and 3D entities. Transnet is a public entity listed in Schedule 2 of the PFMA. The policy in the practice note is nonetheless a salutary one.

[937] Transcript 16 May 2019, p 148

[938] Transcript 16 May 2019, p 140

658. Challenged during his testimony to the Commission with the criticism of Mr Mahomedy that he had facilitated the award of a contract with a potential value of R500 million to a Gupta linked entity, Mr Gama was dismissive. He accused Mr Mahomedy of being "very desperate to ingratiate himself with the Chairman of the Board of Transnet" because he was acting GCEO and wanted to be appointed as the GCEO and claimed that Nkonki "used to be a very good brand". He added that when he learnt that Nkonki had gone rogue he terminated the contractual relationship,[939] no doubt after being brought under pressure by the Auditor-General to do so. He was unable to recall whether Transnet had a policy dealing with unsolicited proposals.[940]

659. The 100% increase in the value of Nkonki's contract (the "piggybacking") was a contravention of paragraph 9 of National Treasury Practice Note 3 of 2016/17 (which applies to all scheduled entities) that limited the variation of Nkonki's contract to a maximum of 15% or R15 million.[941] Any deviation in excess of the prescribed thresholds is allowed only in exceptional cases subject to prior written approval from the relevant treasury. There is no evidence that written approval was obtained in this instance. When confronted with this contravention during his evidence before the Commission, Mr Gama gave a response that was incoherent. He conveyed the impression that his non-compliance was acceptable because he believed the requirement was unnecessarily restrictive.[942] This irregular transaction was thus in contravention of section 51(1)(h) of the PFMA by not complying with applicable legislation and has evidentiary value in relation to the racketeering activities of the Gupta enterprise and Mr Gama's association with it. The placement

[939] Transcript 12 May 2021, p 284-285

[940] Transcript 12 May 2021, p 286-287

[941] Transnet-07-250.97

[942] Transcript 12 May 2021, p 288-289

of Nkonki as auditor at Transnet, where the Gupta enterprise was engaged in irregular activities, was of strategic value to the enterprise and its associates.

CHAPTER 8 – THE FINANCING OF THE 1064 LOCOMOTIVES PROCUREMENT

The negotiations for the CDB loan

660. Due to rating agency requirements of matching commitment capital to committed funding sources to reduce liquidity risk, Transnet needed to identify appropriate and cost-effective funding sources to fund the 1064 locomotive procurement. To this end, Transnet concluded funding facilities with USEXIM and EDC to fund the GE and BT portions of the 1064 locomotive contracts. These facilities provided approximately R13 billion of the required funding. In August 2012 the Transnet board approved the use of a China Development Bank ("CDB") loan facility to fund the acquisition from CSR and CNR of the locomotives that were part of the 1064 locomotives transaction. The original intention had been to borrow USD2.5 billion from the CDB but it was decided later that only USD1.5 billion would be borrowed from the CDB and that the balance would be raised locally through a ZAR club loan.

661. A bipartite cooperation agreement between Transnet and the CDB was signed on 23 March 2013, but Transnet only started engaging with the CDB Johannesburg office on funding the Chinese locomotives in March 2014. The CDB proposed a 15-year loan of up to USD2.5 billion at a rate of 3 months Libor + 260-290 basis points ("bps").[943] This pricing translated into Jibar plus about 450 bps which was about 250 bps more than Transnet's normal pricing.[944] As the pricing was above Transnet's weighted cost of debt Mr Singh and Ms Makgatho travelled to China in July 2014 to discuss the pricing.

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[943] Transcript 7 June 2019, p 21

[944] Transnet paid Jibar+155 bps on the GE tranche of locomotives and Jibar+200 bps on the Bombardier procurement – Transcript 7 June 2019, p 18

662. After returning from China, Ms Makgatho discovered that the CDB was communicating directly with Regiments and that Mr Wood was leading the negotiations in parallel to Transnet. Mr Singh claimed that he got Regiments involved at this stage because Transnet was under pressure to demonstrate to the rating agencies that it had an acceptable AB ratio (comparing available funding to commitments). Mr Singh claimed that the Transnet treasury team had reached a point "where there was no significant traction" in the discussion with the CDB. He then decided to get Regiments involved to accelerate the process.[945]

663. The CDB financing nonetheless remained too expensive.[946] The CDB's pricing was at between 12.9% and 13.3% whereas Transnet's weighted average cost of debt was about 9.4%.[947] Other fees proposed by the CDB were not in line with similar facilities and the covenants were not "investment grade" in that the CDB sought to rate and compare Transnet with Angola.[948] Transnet had diverse sources of funding that were more attractive. At the meeting in Beijing Transnet had requested that the cross-currency swaps be carried by the CDB by providing Transnet with a ZAR loan and the CDB accepting the currency exposure on its balance sheet. Transnet's contracts with CNR and CSR were in ZAR and therefore a ZAR facility was a natural option for Transnet. An additional cost of converting the USD leg of the loan to ZAR via the use of cross-currency swaps made the CDB facility even more expensive. It later became clear that the CDB would only agree to a USD loan thus exposing Transnet to a hedging risk and the cost of a cross-currency swap.[949]

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[945] Transcript 28 May 2021, p 45

[946] Annexure MM 25, Exh BB10(a), MEM-213; and Transcript 7 June 2019, p 56

[947] Annexure MM 27, Exh BB10(a), MEM-229; and Transcript 7 June 2019, p 59-60

[948] Annexure MM 27, Exh BB10(a), MEM-230; and Transcript 7 June 2019, p 60

[949] Transcript 7 June 2019, p 42-47

664. Ms Makgatho repeatedly expressed her concerns about the financing of the procurement to Mr Singh and Mr Molefe and continued to argue against the CDB pricing proposal. She also strongly believed that there was no need to use Regiments because of Transnet's internal treasury capacity. She received information that Nedbank was able to price the swap cheaper at even less than Transnet's internal pricing (aligned to Standard Bank). Transnet's pricing model was tried and tested. However, Mr Wood later came up with a pricing proposal from Nedbank that was more expensive.

665. On 4 August 2014, Ms Makgatho was copied in an email[950] from the CDB to Mr Wood at Regiments which indicated that the CDB was in discussions with Regiments about the pricing of the loan. She then sent an email to Mr Molefe and Mr Singh pointing out that Transnet treasury had been negotiating with CDB since April 2014 regarding the terms and conditions of the facility and was busy comparing the current terms and conditions with similar facilities. She requested clarity about the role of Regiments in this matter at this point of the negotiations and what Transnet treasury's role should be giving the direct communication of Regiments with CDB.[951]

666. Mr Molefe called Ms Makgatho and Mr Singh to his office to discuss the matter. By then Ms Makgatho had lost confidence in Mr Molefe as she believed he was aligned with Mr Singh and intent on concluding the excessively expensive loan.[952] Mr Molefe then convened another meeting at the Melrose Arch Hotel between Transnet and Regiments to resolve the CDB pricing proposal "impasse". The meeting was attended by Mr Singh, Mr Molefe, Ms Makgatho, Mr Wood and Mr

[950] Annexure MM 6, Exh BB10(a), MEM-076

[951] Annexure MM 6, Exh BB10(a), MEM-075; Transcript 7 June 2019, p 63-64

[952] Transcript 7 June 2019, p 64

Pillay. At the meeting Mr Molefe and Mr Singh urged Ms Makgatho to accept the pricing proposed by Regiments. He saw the difference between Ms Makgatho and Mr Singh (as advised by Mr Wood) as a reasonable difference of opinion about which he took "a neutral position" and accepted the majority view put forward by Mr Singh and Mr Wood.[953] Ms Makgatho remained firm that the CDB facility was expensive and not worth it. She recorded her discomfort and disagreement with Regiments' role and pricing in an email on 21 August 2014 sent to Mr Molefe and Mr Singh.[954] She particularly did not support a R26 billion facility being negotiated and led by a transaction advisor "in isolation of Transnet's current R90 billion debt portfolio." She said:

> "The fact that Transnet's biggest ever transaction is negotiated and decided by outsiders (Regiments) is a cause for concern as it exposes the company to undue risk. When we negotiate a facility of this magnitude, we assemble a multi-disciplinary team that includes legal, tax, accounting, structured finance and risk management team members. This is to ensure that all potential risks related to the facility are identified and mitigated to the extent possible. .
>
> It is my belief that the CDB facility in its current form is not in the best interest of the company or the country given potential capital leakage of up to R3.7 billion in excessive interest expense and excessive arrangement fees which may be classified as PFMA violation given the information at our disposal. The additional interest expense will have a negative impact on the already fragile cash interest cover ratio. I therefore recommend that we terminate discussions with China Development Bank and explore other sources of funds...."

667. When Mr Molefe was questioned during his testimony about this email, his reply was non-responsive. He did not take issue directly with Ms Makgatho's claim that

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[953] Transcript 9 March 2021, p 108-109

[954] Annexure MM 30, Exh BB10(a), MEM-241

the CDB facility was not in the best interest of Transnet, provided for excessive fees and was in violation of the PFMA.[955]

668. Mr Singh justified Regiments' involvement in the CDB loan negotiations on the basis that the Transnet treasury did not have the capacity to deal with the complexity of the transaction within the pressurised time-frames and lacked the wherewithal to execute the CDB loan because this was the first time Transnet had dealt with a Chinese development bank.[956] That explanation is implausible considering the evidence of the skills set of the treasury team[957] and the fact that it concluded significant funding transactions with development institutions as a matter of course. No gap analysis was conducted to determine the needs of Transnet for the financial advisory services in relation to the specific funding needs. A gap analysis (as required in terms of paragraph 15.8.2 of the PPM (2013) and NT Instruction 3) would have shown that Transnet had three highly experienced funding managers and an analyst and cumulative experience in excess of 50 years in fundraising in most capital markets. It was well-equipped and able to negotiate the CDB loan and to take responsibility for the lead and arranging of the loan.

669. On 20 August 2014 Ms Makgatho drafted an internal memorandum for Mr Molefe to present to the board for approval of the funding initiatives related to the procurement of the locomotives.[958] She again pointed out that the pricing was above Transnet's weighted cost of debt and that CDB requested the locomotives be used as security as well as the inclusion of financial covenants that Transnet did

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[955] Transcript 9 March 2021, p 111, line 10

[956] Transcript 28 May 2021, p 49-53

[957] The team comprised 32 professionals supported by 8 administrative staff with an extensive and impressive array of skills and experience – Exh BB10 (a), MEM-004, para 7; and Transcript 28 May 2021, p53-54

[958] Annexure MM 37, Exh BB10(a), MEM-288

not offer other lenders.[959] The memorandum recommended that the board approve the initiative to secure the CDB facility, "subject to further terms and conditions negotiations as their proposed terms and conditions are currently not in line with similar asset backed and development finance institutions."[960] On the same day Ms Makgatho sent an email to Mr Singh in which she discussed issues arising in her memorandum for the board. She was concerned that the board should not be misled about the cost of the CDB loan.[961] On 27 August 2014 Mr Singh addressed a memorandum to Mr Molefe in response to the concerns raised by Ms Makgatho.[962] He recommended that Mr Molefe approve his response refuting Ms Makgatho's concerns that the CDB transaction was expensive.

670. Instead of approving Mr Singh's recommendation, on 28 August 2014 Mr Molefe merely "noted" the recommendation which Ms Makgatho understood to mean that he appreciated that Ms Makgatho's concerns had merit. In his testimony Mr Molefe denied that interpretation, again maintaining that he was simply adopting a neutral stance. He said that he believed it was prudent not to take the side of a "junior person" against her manager.[963] Considering the seniority of the Group Treasurer, Mr Molefe's explanation is not convincing and amounts to an abdication of responsibility in relation to a dispute with material financial consequences for Transnet, in respect of which he as GCEO had ultimate authority. He was willing to accept the possibly wrong view of Mr Singh above the correct view of Ms Makgatho simply on the basis that Ms Makgatho reported to Mr Singh as the GCFO.[964] Mr Molefe declined to take any responsibility for Transnet agreeing to the CDB facility

[959] Annexure MM 37, Exh BB10(a), MEM-290, paras 10-11; Transcript 7 June 2019, p 88 *et seq*

[960] Annexure MM 37, Exh BB10(a), MEM-292, para 14(d)

[961] Annexure MM 38, Exh BB10(a), MEM-294

[962] Annexure MM 36, Exh BB10(a), MEM-285

[963] Transcript 9 March 2021, p 114

[964] Transcript 9 March 2021, p 114-116

because by June 2015 when the agreement was signed he had been seconded to Eskom.[965] His stance was inconsistent with his duty as the GCEO and a board member to act with fidelity and integrity in the best interests of Transnet and to prevent any prejudice to its financial interests. As such, there are reasonable grounds to believe that he contravened section 50 of the PFMA.

671. Mr Singh made a PowerPoint presentation to the board[966] that was based on an analysis provided by Regiments rather than Ms Makgatho's memorandum .[967] The analysis advised Transnet to take up the proposed loan because: i) the loan was fairly priced in comparison to foreign issuance of a USD denominated loan under the global medium term note ("the GMTN"); ii) it had a longer capital grace period of 54 months; iii) the starting date of the capital grace period was the first drawdown date as opposed to the date of signing of the loan agreement; iv) there was an improved capital repayment profile with increasing capital repayments towards the end of the loan tenure; v) volume consideration; and vi) the CDB agreed to transact cross-currency swaps such that Transnet would have a ZAR denominated loan on its books.[968]

672. Some of the reasons put forward by Regiments were factually incorrect and included significant misrepresentations, which, according to Ms Makgatho, exposed Transnet to R3.7 billion in capital leakage.[969] She stated that the oft-repeated proposition that the CDB loan was "fairly priced" was misleading, and the claim[970] that the pricing compared favourably to Transnet's average weighted cost

[965] Transcript 9 March 2021, p 118-119

[966] Annexure MM 39, Exh BB10(a), MEM-295

[967] Annexure MM 31, Exh BB10(a), MEM-243

[968] Annexure MM 31, Exh BB10(a), MEM-245

[969] Transcript 7 June 2019, p 74-81; and Exh BB(10)(a), MEM-034, paras 137-141

[970] Annexure MM 39, Exh BB10(a), MEM-300

of debt was false. The loan did not compare favourably to Transnet's weighted average cost of debt which was 9.35% at the time.[971] Transnet's internal pricing of the CDB loan was a fixed rate of 12.71% (between 12.3% and 13.3% depending on the day) or a floating rate of 10.1%-10.5%.[972] The analysis also erroneously compared the CDB loan to the GMTN, a global bond[973], which, according to Ms Makgatho, was inappropriate as the CDB is a development financial institution ("DFI") and should be compared to other DFIs. Also, the CDB was a tied loan with collateral security over the locomotives while the GMTN is a listed bond (an untied loan negotiable in the market).[974]

673. In the memorandum of 27 August 2014 Mr Singh foreshadowed an intention to do an interest rate swap.[975] He stated that Transnet would consider fixing the interest rate exposure in 12 to 18 months "realising potential savings." If the rate was fixed at that point in time, the pricing proposal translated to a fixed rate of 12.09%. Ms Makgatho criticised this as introducing speculation contrary to Transnet's risk management framework. Mr Singh anticipated that going with a floating rate was problematic. As a result of all the funding initiatives related to the locomotives, he argued that an amendment to Transnet's policy on the current fixed rate vs floating debt ratio was required to move to 45% from the current 30% (floating). This amounted to an admission by Mr Singh that the Regiments' proposal was not in line with Transnet's policy regarding the fixed-floating debt ratio. He thus openly breached his duty to prevent expenditure not complying with the operational policies of Transnet in contravention of section 51(1)(b)(iii) of the PFMA.

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[971] See Annexure MM 27, Exh BB 10(a), MEM-229

[972] Transcript 7 June 2019, p 76

[973] Annexure MM 39, Exh BB10(a), MEM-307; Annexure MM 36, Exh BB(10)(a), MEM-286; and Transcript 7 June 2019, p 75

[974] Transcript 7 June 2019, p 75

[975] Annexure MM 36, Exh BB10(a), MEM-286, paras 3(b)(xii) and (xiii)

674. In the memorandum of 27 August 2014 to Mr Molefe, Mr Singh justified an expensive once off arrangement fee proposed by the CDB as follows:

> "The 118bps is high. However on balance taking into account CDB's concessions on the grace period, reduction of the credit margin and the repayment profile, [it] is reasonable...In comparison to arrangement fees of US Exim and ICBC of 100bps each for facilities of USD500 million and ZAR6 billion respectively, the 118bps is reasonable given the quantum".[976]

675. The 118 bps proposed by the CDB translated to R313 million to be paid within seven days of contract signature. Ms Makgatho believed that 50-60 bps would be reasonable which would have reduced the arrangement fee from R313 million to R159 million saving Transnet R154 million. She added that the figure of 100 bps for US Exim was a misrepresentation as the figure was in fact 12 bps.

676. Moreover, Mr Singh's claim in his PowerPoint presentation that the foreign currency exposure was eliminated was also misleading. His statement in the memorandum of 27 August 2014 that the CDB had "agreed to transact cross-currency swaps such that will have a ZAR denominated loan in its books"[977] was equally untrue. At the meeting in Beijing, the CDB had made it clear that it would only do the deal in USD.[978] Transnet thus had the burden to swap from USD to ZAR, which remained a risk. Thus, the statement[979] that the cross-currency swap executed by the CDB would benefit Transnet to the tune of R3.5 billion was another falsehood.

677. Mr Singh and Mr Molefe's refusal to take responsibility for the imprudence of the CDB facility appeared most starkly when they were asked during their testimony

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[976] Annexure MM 36, Exh BB10(a), MEM-286, paras 3(c)(xiv) and (xv)

[977] Annexure MM 36, Exh BB10(a), MEM-286, para 3(d)(xxii)

[978] Transcript 7 June 2019, p 80

[979] Annexure MM 39, Exh BB10(a), MEM-313

before the Commission to comment on the suggestion made by Mr Mahomedy that the terms of loan were not in the interest of Transnet and advanced the money laundering agenda.[980] Mr Singh and Mr Molefe without any foundation accused Mr Mahomedy (who has served as acting GCEO and GCFO of Transnet) of not being competent to comment on the arrangement and of dishonesty.[981]

678. Later in his testimony, in response to Mr Mahomedy's criticism, Mr Singh contended that Regiments had added significant value through its negotiations support and in its interactions with the CDB. He identified the following supposed achievements: i) a 15 year amortising profile was negotiated as opposed to the CDB's proposed 10 year amortising profile; ii) the longer duration of the loan provided better revenue generation and repayment of the loan, and thus a better matching of the revenue generation of the assets; iii) an extension of the capital grace period from 36 to 54 months; iv) the reduction of the CDB's pricing from 300 bps to 257 bps - a 43 bps saving; v) savings from changing the reference rate; vi) "sensitivity in executing a cross-currency swaps with JP Morgan resulted in a saving of a further 112 bps; and vii) the benefit of the standby facility - the facility was initially for USD2.5 billion, but the commitment to draw down was only USD1.5 billion, which meant there was USD1 billion committed to Transnet with no actual drawdown requirement.[982]

679. While these features of the CDB were possibly advantageous, it is not clear what role Regiments played in securing them or why they would not have been obtained by the Transnet treasury team. On the face of them, the realised advantages would

[980] Transcript 15 May 2019, p 145

[981] Transcript 28 May 2021, p 65-66 and Transcript 9 March 2021, p 125-126

[982] Transcript 28 May 2021, p 72-79

not have required much in the way of technical expertise that was not available within the team.

680. Pursuant to Mr Singh's presentation to the board, a Term Facility Agreement[983] was concluded with CDB for a facility of USD1.5 billion on 4 June 2015, committing Transnet to a very expensive loan. Clause 8 of the facility provided that the rate of interest on each loan for each interest period is the percentage rate per annum which is the aggregate of the applicable margin and Libor.[984] The margin is defined to mean 2.57% per annum.[985] Libor+257 bps equates with Jibar+337 bps,[986] a price substantially above the norm.

681. Ms Makgatho decided to resign with effect from 30 November 2014, as she felt that the environment in Transnet was not conducive for her to continue with her employment. She feared for her personal safety and well-being.[987] She was replaced by Mr Ramosebudi, who had previously worked at SAA and ACSA where he had been involved in corruption and associated with Regiments.[988]

The success fee of R166 million paid to Regiments for the CDB loan

682. On 28 April 2015 Mr Ramosebudi, who replaced Ms Makgatho as Group Treasurer, compiled a memorandum seeking approval from the BADC for the appointment by confinement of JP Morgan to hedge the financial risks emanating from the loan of USD1.5 billion from the CDB and of Regiments for transaction

[983] Annexure MM 40, Exh BB10(a), MEM-317
[984] Annexure MM 40, Exh BB10(a), MEM-342
[985] Annexure MM 40, Exh BB10(a), MEM-327
[986] See Annexure MM 36, Exh BB10(a), MEM-287
[987] Transcript 7 June 2019, p 98 *et seq*
[988] FOF-08-005

advisory services to support Transnet on the 1064 locomotive transaction at an additional success fee of R166 million.[989]

683. The memorandum described the role of Regiments as advising on deal structuring, financing and funding options to minimise risk for Transnet. It stated that Regiments, working with the risk management and the middle office of Transnet treasury, had assisted with detailed negotiations to achieve "a better asset/liability match as opposed to CDB's proposed tenure amortizing profile as well as extending the capital grace period thereby lengthening the duration of the loan profile". In order to achieve a reduced blended rate in the funding of the Chinese portion of the locomotives, Regiments had recommended that Transnet only utilise USD1.5 billion of the CDB facility, and blend that with a USD1 billion ZAR syndicated loan issue. The ZAR syndicated loan issue would allow for reduction in the blended rate paid by Transnet of approximately 37 bps. The CDB margin compression, the blending of the ZAR syndicated loan, and the change in the applicable reference rate accrued financial benefits for Transnet in excess of R2.7 billion.

684. The memorandum explained that the financial advice and negotiation support provided by Regiments through the process was done at risk with an expectation of compensation only on successful completion of the transaction. The range of NPV fee outcomes for such work, it was said, can vary between 15 bps and 25 bps on a transaction of a similar nature – i.e. R166 million to R277 million based on yield. Given "the invaluable contribution of Regiments to the successful conclusion of this transaction", it was recommended that Regiments be paid a success based fee of 15 bps on the yield as reflected in the NPV calculation, being R166 million. Mr

[989] Transnet-Ref-Bundle-05579

Ramosebudi's proposal was supported by Mr Pita (GCSCO), Mr Singh (GCFO) and Mr Gama (acting GCEO).

685. The following day, 29 April 2015, the BADC approved the contract extension from R99.5 million to R265.5 million (an increase of R166 million) for the appointment of Regiments for transaction advisory services and support to Transnet on the 1064 locomotive transaction.[990] It is not clear how the figure of R99.5 million was made up, but must have been amounts that had been previously paid in terms of the various invalid contracts involving Regiments. The BADC also granted the acting GCEO (Mr Gama) the authority to approve all documentation.

686. On 16 July 2015 Mr Gama (in response to a request in a memorandum submitted to him by Mr Singh and Mr Pita dated 19 May 2015) approved the increase in the value of the contract to R265.5 million and "the allowance for the contract period to accommodate the successful conclusion of the funding and hedging agreements with CDB and JP Morgan in order to effect the remuneration (success or risk-based fee) to Regiments Capital".[991]

687. Before the final conclusion of the CDB loan and a second addendum to the MSA in July 2015, Regiments submitted an invoice to Transnet on 3 June 2015. The invoice was for "debt origination USD1.5 billion – China Development Bank" and "arrangement of cross-currency swap and credit default swap with JP Morgan". The amount owing was stated to be in respect of a "success contingency fee". The amount of the invoice was R189 240 000, made up of the success contingency fee of R166 million and VAT of R23 240 000.[992]

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[990] Transnet-Ref-Bundle-05516

[991] Transnet-Ref-Bundle-05597

[992] Transnet-Ref-Bundle-06712

688. When the second addendum to the MSA was eventually concluded on 16 July 2015,[993] it varied the MSA by changing the scope of services, the remuneration model, and the duration of the agreement. Clause 3 of the second addendum to the MSA provided for the variation of the conditions of the MSA, including the scope of the work, duration and value. Clause 3.1.1 provided that the scope of the work would be amended to include the following deliverables to be performed by Regiments: i) technical support including building cost escalation models and total cost of ownership models to inform and guide Transnet throughout the negotiation process; ii) develop a detailed funding plan for the acquisition of the 1064 locomotives; iii) matching of assets and liabilities; iv) identification and management of all financial risk (including liquidity, interest rate, credit currency risks); v) assist Transnet in the negotiations with all the identified Chinese potential funders and in particular the CDB; vi) assist Transnet in negotiating with a number of potential Chinese sources of ZAR funding; and vii) recommendation, advice and assistance post the successful conclusion of negotiations with respect to amortisation, interest rates, cross-currency swaps, calculations and forecasts, and blended funding models.

689. The second addendum to the MSA was *ex post facto* – in the sense that most of the deliverables had been performed in the previous year without this contract in respect of them being in existence at the time of performance.[994] The second addendum to the MSA, however, provided that Regiments would be entitled to a success fee or a risk-based fee of 15 bps on yield payable by Transnet which translated to R166 million. There was no legal cause for the success fee due to the fact that on 4 February 2014, Transnet and Regiments had concluded the third addendum to the LOI, which specifically allocated a fixed fee of R15 million for all

[993] Transnet-Ref-Bundle-06647

[994] Transcript 28 May 2021, p 31, line 20

the funding and financing services. The raising of the USD1.5 billion funding fell within the scope of the third addendum to the LOI, and therefore, Regiments should have been remunerated in accordance with the fees as set out in the third addendum to the LOI.[995]

690. Mr Singh disputed the claim that the work fell within the scope of the agreed fee of R15 million. He referred to the specific wording of the agreement of 23 January 2014 between Transnet and Regiments.[996] The original LOI had limited the financial deliverables to "developing finance and financial options and develop deal structure (financing, hedging and de-risking options)".[997] However, the deliverables in the agreement of 23 January 2014 included evaluating all potential funding sources and mechanisms (including local and international banks, development finance institutions, export credit agencies and vendor financing) to select the most appropriate avenues to pursue and execute and providing execution programme management and support in respect to funding.[998] Clause 2.3.6 of the agreement specified the support services to be rendered in respect of funding to include: assisting in the preparation and management of capital raising related tenders/RFPs and RFIs and participation "in the negotiation of the commercial terms of funding from the shortlisted funders" and "in the fulfilment of conditions precedent required by the funders".[999]

691. However, clause 2 of the agreement of 23 January 2014, it will be re-called, (and upon which Mr Singh relied to justify the R166 million fee in the second addendum to the MSA) provided that the proposed fee structure for the services to be

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[995] Transcript 27 May 2021, p 153

[996] Annexure MSM 7, Exh BB3, MSM-177

[997] Transnet-Ref-Bundle-06573-06574

[998] Annexure MSM 7, Exh BB3, MSM-179, clauses 2.3.5-2.3.6

[999] Annexure MSM 7, Exh BB3, MSM-179 , clauses 2.3.6.1-2.3.6.5

rendered was understood by both parties to involve a retainer applicable every month and a performance fee on the funding raised at interest rates below the benchmark. It then stated that the deliverables (*except the actual fundraising*) were to be executed for a fee of R15 million and provision was made for a performance fee equal to 20% of the savings achieved against the benchmark interest rate. One of the handwritten variations, however, provided that "in terms of section 2 there will not be a performance fee for fundraising thus (clause) 2.1.2 will be removed as well". Mr Singh maintained that the performance fee was removed because a fee for actual fundraising would be agreed later. The fee of R15 million did not cover actual fundraising.[1000]

692. Although Mr Singh's argument seems supportable at face value, it is contradicted by the provision for fees in the third addendum to the LOI concluded on 4 February 2014. As set out earlier in this report, that agreement (like the agreement of 23 January 2014) identified the revised deliverables to include evaluating all potential funding sources and mechanisms to select the most appropriate avenues to pursue and execute the full spectrum of funding opportunities including: i) local and international banks; ii) local and international development finance institutions; iii) export credit agencies; and iv) vendor financing. In addition, Regiments/McKinsey was obliged to provide execution support programme management and support in respect of funding to: i) assist in the preparation and management of capital raising related tenders – RFPs and RFIs; ii) participate in road shows and assisting with the preparation of information memorandums; iii) participate in the fulfilment of the conditions precedent required by the funders; and iv) participate in due diligence exercise and responding to all credit queries raised by other funders.

[1000] Transcript 27 May 2021, p 157

693. Clause 4 of the third addendum to the LOI varied the contract price specifically to address the changed scope of variables. It stated that as a result of the additional scope of work *required on the financial phase of the contract*, the initial price of R352 million would increase by R6 million and that the increase of R6 million was intended to provide a fee of R15 million for the funding and finance scope of the work, by utilising funds of R9 million allocated to other deliverables no longer required.[1001]

694. The third addendum to the LOI did not include the deliverable stipulated in clause 2.3.6.3 of the agreement of 23 January 2014, namely "participate in the negotiation of the commercial term of funding from the shortlisted funders".[1002] However, the scope of the deliverables in the third addendum of the LOI contemplates deliverables of that order and the fixed fee was all-inclusive for "the required work on the financial phase of the contract" which included selecting the most appropriate funding sources and mechanisms to pursue and execute.[1003]

695. What is more, in his memorandum of 27 August 2014 to Mr Molefe in which he sought to rebut the assertion of Ms Makgatho that the appointment of Regiments to negotiate the CDB loan was unnecessary, Mr Singh stated:

> "Regiments Capital were appointed as transaction advisers on the 1064 locomotive transaction...to advise on deal structuring, financing and funding options to minimise risk for Transnet...Accordingly, the negotiation with CDB to successfully conclude a ZAR funding facility at a ZAR cost not exceeding 9.3% (depending on Jibar) for a tenor not less than 15 years at no additional fee is part of their mandate."[1004] (Emphasis supplied)

[1001] Transnet-Ref-Bundle-06606; and Transcript 29 May 2019, p 130 *et seq*

[1002] Compare Annexure MSM7, Exh BB3, MSM-179, clause 2.3.3 with Transnet-Ref-Bundle-06606, clause 3.8

[1003] Transnet-Ref-Bundle-06606, clause 3.7

[1004] Annexure MM 36, Exh BB10(a), MEM-285

696. It is thus more than doubtful that Regiments was entitled to an additional success fee for its work on the CDB loan. The work on the CDB loan fell within the scope of deliverables Regiments had agreed to in both the agreement of 23 January 2014 and the third addendum to the LOI.

697. In his evidence before the Commission,[1005] Dr Jonathan Bloom, the financial expert, agreed that most of the services performed under the second addendum to the MSA were envisaged and covered by the third addendum to the LOI. In his opinion, the scope of the work in the second addendum to the MSA was merely "wordsmithed" to imply either an extension of the scope of the LOI or a totally revised scope of tasks stated in the LOI. There was a duplication of work in respect of cost escalation risk management services, development of a funding plan, and the evaluation of all funding sources. There was accordingly no proper basis for Transnet to conclude an agreement to pay Regiments on a risk sharing basis in relation to the funding secured from the CDB.

698. Dr Bloom investigated specifically how the R166 million success fee paid was calculated. The invoice for the R166 million (excluding VAT) claimed payment for two items: R152,756,408 was the fee payable to Regiments as the lead manager and debt originator for the CDB loan; and the balance related to the hedging structure for the CDB loan. The normal and accepted basis for debt originating fees entails the application of a percentage to the amount of money raised. The amount of money raised is calculated either as the original capital loan ("the notional value of the loan") or the aggregate of all repayments made over the full term of the loan ("the yield to maturity"). The notional value of the CDB loan was R18 billion. However, the yield to maturity, being the sum total of all the capital and interest

[1005] Transcript 31 May 2019, p 124-157

payments that would be paid over the loan from commencement to maturity, was much greater and in the amount of R102 billion.

699. The R153 million fee represented 0.15% of the yield to maturity. This was equivalent to 0.85% of the notional amount of R18 billion. This, Dr Bloom maintained, was way beyond the norm of between 0.2% and 0.5% on the notional amount.[1006] Market conventions and Transnet practices normally fix lead arrangement and debt originator fees on the notional value and not on the yield to maturity as Regiments did in this case. Regiments should have charged between 0.2% and 0.5% on the notional value. If one takes the average of 0.35% of the notional value of R18 billion as a fee, Regiments should have earned a fee of R63 million .

700. The market norm applies a much lower percentage to the yield to maturity than that applied to the notional value. Market convention and Transnet practice dictate a percentage of 0.06% of the yield to maturity as an acceptable fee. On a yield maturity of R102 billion, this would amount to a fee of R61.2 million. Dr Bloom suggested that a percentage of 0.01% would even be acceptable. This would amount to a fee of R10.2 million (which approximates the original fixed fee of R15 million agreed with McKinsey) as opposed to the fee of approximately R153 million that was paid.

701. On this basis, Regiments received a fee 10-15 times greater than that which the market would have found acceptable. Later in his evidence, Dr Bloom intimated that the overpayment of the fee was in the region of R90 million. This equates with his calculation of an acceptable fee as being either 0.35% of the notional value of

[1006] Transcript 31 May 2019, p 146

R18 billion or 0.06% of the yield to maturity of R102 billion. In either event, the fee of Regiments was inflated by an amount between R90 million and R140 million.

702. Regiments charged a fee to its obvious advantage that was not in line with market conventions and Transnet practice. Moreover, to repeat, and as Dr Bloom was at pains to emphasise, Regiments in any event should not have been paid such a fee firstly because it had agreed to a transaction advisory fee of substantially less (R15 million) and due to the fact that Transnet had sufficient capacity in internal skills to perform the required functions.[1007]

703. As mentioned, the payment advice from Transnet reflects that the invoice amount of R189.24 million (R166 million plus VAT) was paid to Regiments on 11 June 2015, before the second addendum to the MSA was concluded.[1008] Monies flowed from this payment to the Gupta enterprise via the money laundering scheme. The Advisory Invoice Tracking of 7 December 2015 produced by Regiments[1009] reflects that R147 607 200 was paid to Albatime (the Gupta-linked laundering vehicle) of which R122 million was laundered to Sahara Computers, part of the Gupta enterprise.[1010]

704. Mr Singh justified paying Regiments the R189.24 million prior to the conclusion of the second addendum to the MSA on the unsustainable basis that the BADC had approved the memorandum earlier. The approval of the BADC on 29 April 2015 granted Mr Gama the authority to conclude the second addendum to the MSA; it

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[1007] Exh BB8(d), JB12-JB13

[1008] Transnet-Ref-Bundle-06713

[1009] Transnet-05-761

[1010] Transcript 27 November 2020,p 186, line 3; and Transcript 28 May 2021, p 123, line 15

did not conclude the contract with Regiments.[1011] Mr Singh indisputably authorised payment of R189.24 million before the contract was concluded. [1012]

705. It was accordingly at the very least a breach of fiduciary duty (and likely corruption) on the part of the Transnet officials (Mr Singh and Mr Gama) involved in increasing this fee, as Transnet was entitled to this contractual performance against a fixed fee of R15 million.[1013] If the BADC on 29 April 2015 had properly scrutinised the request for confinement, it may well have established that there was no basis for paying R189.24 million since the third addendum to the LOI had provided for the fixed fee of R15 million. The members of the BADC therefore possibly failed to take reasonable steps to be informed of the matter under consideration and thus may not have exercised the reasonable degree of care, skill and diligence expected of them.[1014] Moreover, the extensive variation in the scope of the advisory contract actually required a new procurement event to be effected in terms of the Procurement Procedures Manual.

706. To recap: the initial contract value for the transaction advisory services was fixed (no performance fees or success fees were payable) at R35.2 million. However, as the role of Regiments expanded, so too did the fees payable to it. The contract value increased from the initial R35.2 million (December 2012) to R41.2 million in February 2014, to R78.4 million in April 2014, and eventually to an amount of R265.5 million (excluding VAT) paid to Regiments in July 2015. The increase in fees amounted to a 754% increase. Dr Bloom testified that professional advisory

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[1011] Transnet-05-1047

[1012] Transcript 27 May 2021, p 170-174

[1013] The examination of Mr Gama on the R166 million success fee is a bit confusing. He pointed out that the decision to pay the fee was made shortly after his appointment as acting GCEO and his move from TFR to Group. His evidence on the issue is inconsequential – see Transcript 11 May 2021, p 260-288

[1014] See MNS Transaction Advisors Report, paras 3.1.21-3.1.27

services, even in financing of the kind involved here, would normally be charged out at an hourly rate. Advisory companies or firms typically charge their staff out at an hourly billable rate. He was of the opinion that the R265 million paid to Regiments was "extremely excessive" in that a large number of consultants would need to work for an extended period of time at very high hourly rates to get close to that fee.[1015]

707. The proceeds paid to Regiments, as corrupt payments in contravention of various provisions of the PFMA and PRECCA were the proceeds of unlawful activities as contemplated in section 1 of POCA. The receipt of them by Regiments (Mr Wood and others) and the laundering of them to the companies of Mr Essa and Mr Moodley probably constitute offences relating to the proceeds of unlawful activity in contravention of section 5 and section 6 of POCA. These planned and continuing Schedule 1 offences may well constitute a pattern of racketeering activity and there are accordingly reasonable grounds to believe that Mr Molefe, Mr Gama, Mr Singh, Mr Ramosebudi and others are guilty of one or more of the offences of in Chapters 2 and 3 of POCA in respect of the fees paid to Regiments.

708. Transnet has issued summons against Regiments to recover the R166 million (excluding VAT) success fee on the basis that no work was rendered which justified such a payment.[1016]

The appointment of JP Morgan, Regiments and Trillian in respect of the ZAR club loan

709. There were also irregularities with regard to the fees paid in respect of the syndicated ZAR club loan. As explained, USD1 billion of the CDB loan facility was

[1015] Transcript 31 May 2019, p 101-102

[1016] Exh BB3(a), MSM-016, paras 5.4.9-5.4.10

shelved in favour of a ZAR12 billion syndicated club loan for 15 years with a floating interest rate. The club loan for ZAR 12 billion that was agreed later in 2015 was made up as follows: Nedbank (R3 billion); Bank of China (R3 billion); Absa (R3 billion); Omsfin (R1 billion); and Future Growth (R1.5 billion).

710. Mr Gama signed a revised term sheet and mandate letter in April 2015 with CDB for a USD1.5 billion loan only.[1017] In the memorandum of 28 April 2015 (prepared by Mr Ramosebudi and submitted by Mr Gama to the BADC),[1018] Mr Gama recommended a dual-tranche denominated loan to fund the Chinese locomotive purchases by utilising only USD1.5 billion of the funding from CDB and the use of the balance sheet of JP Morgan to underwrite a ZAR funding facility of USD1 billion equivalent – the club loan. JP Morgan is an American multinational investment bank and financial services company, which provides hedging of securities, lead arranger and underwriting services. It is one of the largest banks globally.

711. In the memorandum of 28 April 2015 Mr Gama requested the BADC to approve the appointment of JP Morgan by confidential confinement to: i) hedge the financial risks (interest rate, credit and currency risk) emanating from the USD1.5 billion CDB loan; and ii) to lead and underwrite the equivalent syndicated ZAR loan of USD1 billion. At its meeting of 29 April 2015, the BADC approved the appointment of JP Morgan to hedge the financial risks but for reasons that are not evident, it appears not to have considered the appointment of JP Morgan as the lead arranger or underwriter of the ZAR club loan.[1019]

[1017] Transnet-Ref-Bundle-05582, paras 48-50

[1018] Transnet-Ref-Bundle-05579

[1019] See minutes of the BADC meeting of 29 April 2015 - Transnet-Ref-Bundle-05516. Loan syndication starts with the borrower awarding the mandate to one or more arrangers to syndicate the financing. The lead arranger is a commercial or investment bank that is mandated by the borrower to organise and syndicate a financing on

712. No proper case for confinement was made out in that the memorandum did not address what aspects of the economic crisis affected the transaction as to justify urgency.[1020] JP Morgan did not have unique skills in hedging the currency exposure or lead arranging the ZAR club loan. Moreover, once again, no gap analysis was conducted. Before procuring external consultants, Transnet was obliged to determine whether it had the internal skills and resources to perform the relevant tasks. As explained, Transnet treasury had the ability to raise the funds itself from diverse funding sources.

713. On 6 May 2015 Transnet issued the RFP for the provision of hedging financial risks (interest rate, credit and currency) and to lead and underwrite the syndicate ZAR loan.[1021] JP Morgan's bid tendered for the hedging of the USD1.5 billion loan facility at R40 million and for its services as lead arranger and underwriting of the ZAR club loan at R24 million. Based on the above estimates, it tendered 35% of contract value for supplier development, being R22.4 million.

714. Less than two months after the decision to confine the contract, on 8 June 2015, Mr Singh terminated JP Morgan's role as lead arranger on the ZAR club loan on the basis that Transnet had incorrectly assumed JP Morgan would provide the underwriting facility on the balance of the USD 1 billion. In the letter terminating the agreement Mr Singh stated that Transnet had decided to pursue an offer received from the Bank of China and any other available facility. The balance would be

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behalf of the borrower, on the basis of the negotiated terms and conditions set out in the term sheet and mandate letter. The lead arranger is responsible for negotiating the key terms and facility covenants and assigning the syndicate roles and titles. Also, as book runner, a lead arranger manages the syndication process, determines the loan pricing, allocations to each lender, and the final composition of the syndicate. The failure of the BADC to specify whether JP Morgan was appointed as the lead arranger and underwriter of the loan was thus somewhat problematic.

[1020] MNS Transaction Advisors Report, paras 2.7.4-2.7.18

[1021] Transnet-Ref-Bundle-05665

drawn from the USD1 billion standby facility and thus the coordination of ZAR loan was not required.[1022] According to Mr Ramosebudi, the real intention at the time was to award the lead arranger role to Regiments because JP Morgan did not have the capacity.[1023]

715. On 27 August 2015 Mr Wood of Regiments wrote to Mr Ramosebudi attaching a memorandum he had drafted for Mr Ramosebudi to present to Mr Pita for ultimate presentation to the board.[1024] The memorandum stated that in order to reduce the effective cost of funding of the 1064 locomotive acquisition, it was decided to blend the USD1.5 billion funding received from CDB with a ZAR loan which would serve to reduce the all-in cost of the required funding. The memorandum recorded that although JP Morgan was considered as the lead arranger for the ZAR funding and a proposal was received from JP Morgan in this regard, Transnet had subsequently decided to appoint Regiments to lead manage the ZAR club loan in terms of their existing mandate, on an on risk basis. The memorandum continued and said that Regiments was confident that through their experience, intellectual property and market contacts they could achieve significantly better priced funding for Transnet than JP Morgan was able to do.

716. Mr Wood's memorandum of 27 August 2015 stated further that Transnet's decision to appoint Regiments as lead arranger to raise up to R18 billion by means of a ZAR club loan, as opposed to appointing a lead book runner, resulted in a direct fee saving of approximately R36 million (lead manager fees). Mr Wood said that Transnet would also save R54 million in upfront fees payable to the lenders (as Regiments had an arrangement for an upfront fee of 30 bps payable to the lenders,

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[1022] FOF-04-385

[1023] Transcript 27 November 2020, p 191-195

[1024] FOF-04-444

as opposed to 75 bps proposed by JP Morgan). He said that the benchmarking against JP Morgan's proposal had revealed that Transnet achieved a saving of 100 bps on the pricing of the club loan via implementing Regiments' recommendation (3m Jibar+270 bps) as opposed to the option recommended by JP Morgan (3m Jibar+370 bps). The net savings Transnet would realise from securing the club loan at 3m Jibar+270 bps as opposed to the syndication initially contemplated, according to Mr Wood, was approximately R679 million (based on comparative NPV analysis). Regiments' value add to Transnet in relation to the 1064 locomotive ZAR club loan funding was thus stated to be R763 million. It was accordingly proposed that Regiments receive a 10% success fee of R76.3 million.

717. In response, Mr Ramosebudi wrote to Mr Wood suggesting that it would be better to do a comparison with the current CDB loan rather than with what JP Morgan had achieved. Mr Ramosebudi's criticism led to Regiments re-stating the saving to be R502 million and thus it reduced the success fee to R50.2 million.[1025] The final version of the memorandum with the reduced fee was emailed by Mr Wood to Mr Ashok Narayan, a Gupta associate, on 3 September 2015.[1026]

718. Five months after the request to appoint JP Morgan on confinement, Mr Gama approved and submitted a memorandum to the BADC on 22 September 2015 recommending that the BADC approve the appointment of Trillian Capital (Pty) Ltd ("Trillian") to replace JP Morgan as the lead arranger of the USD1 billion ZAR equivalent club loan.[1027] Mr Wood was involved in the establishment of Trillian after

[1025] FOF-04-453-FOF-04-489; and Transcript 27 November 2020, p 198-200

[1026] FOF-04-470; and Transcript 27 November 2020, p 200, line 20

[1027] Transnet-07-250.298

falling out with his associates at Regiments.[1028] Mr Essa was the controlling shareholder of Trillian.[1029]

719. The proposal in the memorandum was recommended by Mr Ramosebudi , Mr Pita and Mr Thomas. The MNS Report (on transaction advisors) describes the memorandum of 22 September 2015 as a "copy and paste" of the memorandum of 28 April 2015 except that all the services attributed to Trillian were those that had already been rendered by Regiments.[1030] The copy and paste was obvious in the first iteration of the Trillian memorandum which erroneously left in one of the original references to Regiments. So paragraph 36 of the draft memorandum motivating payment to Trillian continued to refer to "Regiments value add to Transnet in relation to the 1064 locomotive ZAR club loan."[1031]

720. On 14 September 2015 a few days before Mr Gama submitted to the BADC the proposal for the appointment of Trillian, Mr Ramosebudi forwarded an email (without any comment) to Mr Wood attaching an order made to Land Rover Waterford for a Range Rover Sport valued at about R1.3 million. The balance on the invoice was R800 000 after a trade in.[1032] In his evidence before the Commission , Mr Ramosebudi explained that he knew Mr Wood's partner, Mr Litha Nyhonyha, was a part-owner of Land Rover and he was hoping he could "do something for me". Mr Ramosebudi saw no impropriety in his attempt to secure a

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[1028] Transcript 27 November 2020, p 212

[1029] A memorandum of 9 May 2016 from Mr Gama to the BADC requesting the cession of the GFB contract from Regiments Capital (Pty) Ltd to Trillian Capital (Pty) Ltd with an increase in contract value from R375 million to R463.3 million reflects that Trillian Holdings (Pty) Ltd held 60% of the shares in Trillian Capital (Pty) Ltd and that Trillian Holdings (Pty) Ltd was "wholly owned" by Mr Essa. 25% of the shares in Trillian Capital (Pty) Ltd were held by Numibrite (Pty) Ltd which was "wholly owned" by Mr Wood. Thus, Mr Essa and Mr Wood had 85% control of Trillian Capital (Pty) Ltd –Annexure MSM 34, Exh BB3(b), MSM-521.1, para 14.

[1030] MNS Transaction Advisors Report, para 3.1.34.1; and Transcript 27 November 2020, p 212-214

[1031] Exh VV4-PR-489

[1032] FOF-04-499

discount or a good deal at the time he was involved in closing a deal on behalf of Transnet with Trillian, as the vehicle was ultimately not purchased, and the deal with Trillian was "above board".[1033] Mr Ramosebudi's conduct is *prima facie* evidence that he agreed or offered to accept a gratification from Mr Wood/Trillian for his own benefit in order to improperly influence the procurement of the contract for Trillian and thus there are reasonable grounds to believe that he may be guilty of the offence of corrupt activities relating to contracts as contemplated in section 12 of PRECCA.

721. On 16 September 2015 Mr Thomas addressed an email to Mr Ramosebudi and Mr Pita raising certain queries about the Trillian proposal.[1034] Firstly, he pointed out that JP Morgan was still contracted to perform the currency swaps. Secondly, the confinement was silent on the fees for leading and underwriting the loan which JP Morgan had failed to deliver. If the fee for leading and underwriting the loan was not included in the costs of the funding, then there should have been or needed to be disclosure of that specific fee payable to Trillian. Mr Thomas expressed doubt that Trillian had the capacity to underwrite the loan. It was not a bank with significant assets. It was a company recently conceptualised by Mr Wood. He was also uncertain about how the role of and services to be provided by Trillian would differ to what had been offered by JP Morgan. Finally, he suggested that the prior payment of fees to Regiments had covered the services proposed to be done by Trillian and payment to Trillian would duplicate what was paid to Regiments.

722. On the same day, Mr Ramosebudi replied somewhat cryptically as follows:

[1033] Transcript 27 November 2020,p 216-220

[1034] FOF-04-504

> "Indeed the first point is correct; the fees were not (disclosed), this why we are now disclosing the fees for Trillian; Trillian has capacity and capability; Trillian will provide the same services; no duplication with Regiments."[1035]

723. During his testimony to the Commission, Mr Ramosebudi conceded that Trillian had no capacity (or the balance sheet) to underwrite the loan and thus that the services to be offered by Trillian were not the same as those offered by JP Morgan. Moreover, at the time of proposing the substitution of JP Morgan by Trillian, the persons having the capacity to arrange the loan were still at Regiments. No-one at Trillian had the capacity to arrange the loan. Mr Ramosebudi was thus compelled to admit that his answers to Mr Thomas in his email of 16 September 2015 were false and gave the incorrect impression. He could offer no plausible or credible reason for these misrepresentations.[1036] These concessions add to the case that Mr Ramosebudi was acting corruptly, in breach of PRECCA and the PFMA, and also (given Mr Essa's controlling interest in Trillian and the link to the Gupta enterprise) was associated with the enterprise and participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

724. Mr Gama's memorandum of 22 September 2015 sought: i) the appointment of Trillian; ii) the approval of the termination of JP Morgan on the ZAR club loan; and iii) the delegation of authority to him as GCEO to approve all documentation related to this confined award. Mr Gama justified the appointment of Trillian on the basis that it was a small black SDP.[1037] The BADC met on 1 October 2015.[1038] The meeting was chaired by Mr Shane, whose company Integrated Capital Management, would receive an aggregate amount of R9 370 600 from the

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[1035] FOF-04-514

[1036] Transcript 27 November 2020,p 222-240

[1037] Transnet-07-250.299, para 10-12; and MNS Transaction Advisors Report, para 2.7.21

[1038] See minutes at FOF-04-518

laundered proceeds of the CNR BEX kickback barely a month later.[1039] Mr Ramosebudi joined the meeting to deal with the change and took the BADC through the submission. The minutes noted that Trillian was a black owned company and SDP of Regiments "capable of delivering on the required club loan deal at a more comparable price than the JP Morgan proposal" resulting in a saving of approximately R820 million, with 10% fees being payable to Trillian for the transaction (R82 million). The BADC resolved to: i) appoint Trillian to replace JP Morgan as the "lead manager" of the USD1 billion ZAR equivalent club loan; ii) terminate JP Morgan on the ZAR syndication loan; and iii) grant the GCEO the necessary delegation of authority.[1040]

725. The appointment was problematic in the first place because JP Morgan was never appointed to the lead arranger role but was appointed only for the purpose of hedging the CDB loan. Furthermore, the description of Trillian as a black owned company capable of assuming the role of lead arranger and underwriter was a misrepresentation.[1041] Likewise, it is not clear how the assumed savings escalated from R502 million to R820 million with the concomitant increase in fees paid to Trillian. During his testimony, Mr Ramosebudi was unable to give a coherent account of how Trillian's fee increased by R32 million. He sought to transfer responsibility to other staff members in procurement and finance.[1042]

726. Mr Gama did not attend the meeting of the BADC. During his evidence before the Commission he attempted to eschew responsibility for the presentation to it. He

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[1039] Exh VV10C-Further Docs 032. The payments to Integrated Capital Management were laundered from BEX through two other entities, Green Blossom (Pty) Ltd and Block Mania (Pty) Ltd and were paid to Integrated Capital Management by Green Blossom in seven payments between 9 and 16 November 2015.

[1040] Transnet-07-250.63; and Transnet-Ref-Bundle-05518

[1041] Transcript 27 November 2020, p 244-246

[1042] Transcript 27 November 2020, p 247-252

said that Mr Ramosebudi was the author of the document and he had relied heavily on advice from Mr Pita before signing it. He conceded though that he was ultimately responsible as he, the most senior person, had made the recommendation to the BADC.[1043] He also signed the engagement letter appointing Trillian.[1044]

727. On 18 November 2015 Mr Gama and Mr Pita,[1045] on behalf of Transnet, and Mr Daniel Roy, on behalf of Trillian, concluded an agreement in respect of the ZAR club loan facility.[1046] The engagement letter set out the terms and conditions on which Trillian was engaged by Transnet "to act as Originating, Co-ordinating Mandated Lead Arranger" in relation to the proposed R12 billion facility.

728. Clause 1.1 of the engagement letter defined the scope of the mandate as the appointment of Trillian (acting through its investment banking division or any associate or other division thereof as it determined appropriate) on an exclusive basis as the "Originating and Co-ordinating Mandated Lead Arranger" to perform the following services in connection with the transaction: (a) acting as the principal and primary point of contact for Transnet in respect of the structuring and documentation of the club loan financing; (b) leading negotiations on behalf of Transnet (including co-ordination of lenders' positions) on the full documentation suite for the club loan financing; (c) liaising on behalf of Transnet with appropriate legal counsel, co-ordination of lenders' requests for advice and approval of legal

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[1043] Transcript 30 April 2021,p 95-97

[1044] Transcript 30 April 2021 , p 103, line 15

[1045] Mr Pita attended the BADC meeting and recommended the proposal at that stage. Despite claiming no recollection of receiving the email sent to him including the invoice tracking document prepared by Regiments which reflected that 55% of all fees earned by Regiments were being paid to Homix and Albatime, he was probably aware of the money laundering scheme - see Transcript 30 April 2021, p 98-102 and Transcript 1 June 2012, p 233-242

[1046] Transnet-07-250.64; and Transcript 31 May 2019, p 165

opinions; (d) such other services as Trillian considered expedient and reasonable for the efficient management and completion of the documentation process for the club loan financing; and (e) acting as lead arranger and coordinator in accordance with the executed documentation for the club loan financing. The engagement letter expressly provided that nothing in it would be deemed to be a commitment by Trillian to provide or underwrite any financing. However, Trillian committed to provide financial risk management solutions which could be provided through its alliance with Regiments or any of its associates.

729. Transnet agreed to pay Trillian a fee of R82 million, due and payable upon execution of a club loan facility agreement relating to the transaction (including any facility agreement pursuant to which Trillian and its associates were the advisor, coordinator and provider of financial risk management solutions). Trillian issued an invoice for R93.48 million (R82 million plus VAT) on the same day that the mandate was concluded.[1047]

730. A payment advice signed by Mr Gama and Mr Pita was issued the next day, 19 November 2015.[1048] Mr Gama justified this on the basis that Trillian had carried out the work in the six months prior to the BADC granting approval for their appointment. He referred to paragraph 24 of the memorandum of 22 September 2015 which specifically stated that the financial advice and negotiations support that Trillian provided through the entire process took in excess of five months which was done at risk with the expectation of compensation only on successful completion of the transaction.[1049] At the time Mr Gama signed the payment advice authorising the payment of R93.48 million he had not met any person associated

[1047] FOF-04-568

[1048] FOF-04-569

[1049] Transcript 30 April 2021, p 104-110

with the Trillian group of companies, other than Mr Wood.[1050] Other evidence discussed later confirms that he also knew Mr Essa who had a substantial shareholding in Trillian.

731. The ZAR 12 billion club loan was concluded four days later on 23 November 2015.

732. The next day, 24 November 2015, Mr Ramosebudi compiled and signed a memorandum addressed to Mr Pita and Mr Gama requesting them to sign off on Trillian's invoice "for services rendered" and recording that Trillian had "engaged Transnet with a financing solution".[1051] Mr Pita signed the memorandum and the Trillian invoice on 2 December 2015. Mr Gama signed them on 3 December 2015.[1052] The money (R93.48 million – R82 million plus VAT) was paid into Trillian's bank account on 4 December 2015 – 16 days after the mandate was concluded.[1053] Four days later, on 8 December 2015, R74.784 million of that, being 80%, was transferred by Trillian to the Gupta money laundering vehicle, Albatime.[1054] This amount would ultimately be laundered on to secure a R104.5 million loan from the Bank of Baroda that was used by Tegeta Exploration and Resources to pay part of the purchase price for the Optimum Coal Mine.[1055]

733. According to Mr Sedumedi of MNS, the services specified in the engagement letter of 18 November 2015 had already been rendered by Regiments.[1056] The engagement letter attributed the services previously performed by Regiments (outlined in the memoranda of 28 April 2015 and 27 August 2015) to Trillian. The

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[1050] Transcript 30 April 2021, p 103-104

[1051] Transnet-Ref-Bundle-05613-05615

[1052] Transnet-Ref-Bundle-05615; and FOF-04-568

[1053] Transcript 30 April 2021, p 112-114; and Transnet-07-250.74

[1054] Transcript 27 November 2020,p 259; Transcript 30 April 2021, p 112-114; and Transnet-07-250.74

[1055] Transcript 25 June 2021, p 38-39

[1056] Transcript 29 May 2019, p 170, line 10 *et seq*

MNS Report shows that Regiments rather than Trillian had done the necessary work. It refers to: i) various emails from Regiment's personnel to Transnet; ii) a memorandum from Mr Singh and Mr Pita stating that Regiments "assisted Transnet" in negotiating with a number of potential Chinese sources of ZAR funding for the ZAR syndicated loan facility; and iii) a slide presentation by Regiments in June 2015.[1057]

734. During its investigation, MNS interviewed Ms Mosilo Mothepu (formerly employed by Regiments and then Trillian) and Mr Ramosebudi. Ms Mothepu confirmed that all the work done in relation to the ZAR club loan was executed by Regiments. Mr Ramosebudi confirmed that he had only dealt with Ms Mothepu and Mr Wood from Regiments. Even though he had drafted the memoranda recommending the appointment of and payment to Trillian and drove the process, he never dealt with any personnel from Trillian in relation to the services it supposedly provided. During his testimony to the Commission, Mr Ramosebudi conceded that the work had been done not by Trillian but by Regiments.[1058] His concession amounts to an admission that he misled the BADC, unless, of course, the members of the BADC were themselves aware of the true situation.[1059]

735. Mr Mahomedy testified that there was no documentary evidence at all confirming that Trillian had done any work on the ZAR club loan. He explained that the syndication of the loan was not a complex matter that normally would have been

[1057] See Transnet-Ref-Bundle-05474 *et seq*, which includes a list of deliverables performed by Regiments in respect of the club loan. The memorandum of 19 May 2015 from Mr Singh and Mr Pita to Mr Gama (Transnet-Ref-Bundle-05594) describing the scope of the work performed by Regiments indicates that the work supposedly reserved to Trillian was in fact performed by Regiments for which a success risk based fee was paid to Regiments. The slide presentation of Regiments dated June 2015 is at Transnet-Ref-Bundle-06698. It states at p 6702 that the transaction advisory services performed by Regiments included the funding plan preparation, execution and negotiation support in respect of the ZAR syndicated loan.

[1058] Transcript 27 November 2020, p 232; and Transcript 30 April 2021, p 118-120

[1059] Transcript 30 April 2021, p 120-121

finalised easily by the Transnet treasury on the basis of a straightforward proposal and negotiated terms with commercial banks. There was no documentary evidence indicating that Trillian had done this work.[1060]

736. When asked to comment on Mr Mahomedy's evidence, Mr Gama replied that he was not the person to talk to about this, saying "I did not get involved in these financial things". He had been informed that the work was done by Trillian and had authorised the payment of R93.48 million on what he had been told. He effectively admitted that as GCEO he authorised the payment of this substantial amount of money without satisfying himself fully about the nature of the work performed, when it had been performed, and by whom it had been performed.[1061] His stance in this regard was similar to that which he had assumed in relation to the confinement of the security services contract to GNS/Abalozi in 2009 and for which he had been justifiably dismissed as CEO of TFR.

737. In addition to the indications that the transaction advisory work charged for by Trillian had already been performed by Regiments, Trillian could not practically have done the work it was supposedly mandated to do. The engagement letter was signed on 18 November 2015. The syndicated ZAR club loan agreement was concluded five days later on 23 November 2015. Considering that there were five members of the syndicate and what would normally be involved in finalising the loan, it is inherently improbable that it was negotiated within a few days. It is hard to see how Trillian could have performed any work as the lead arranger of the loan in the time available. The task would have taken months.[1062]

[1060] Transcript 15 May 2019, p 132-133

[1061] Transcript 30 April 2021,p 116

[1062] Transcript 31 May 2019, p 169-170

738. On 12 September 2016, Regiments wrote a letter to Transnet in which it confirmed that it (not Trillian) had completed the work on the ZAR club loan by December 2015 and stated that the fee paid to Trillian was "excessive when compared with the amount Regiments has invoiced for the same work."[1063] The payment of R93.48 million to Trillian for work allegedly performed as part of the transaction advisory services was fraudulent, irregular and unjustified. The fee was paid to a company that did not do the work.

739. JP Morgan had also performed some of the services in respect of negotiating the ZAR club loan. If anything, JP Morgan's replacement by Trillian should have been only for the services that JP Morgan had not performed and by implication should have been for less than the agreed fee of R24 million payable to JP Morgan. The payment of R93.48 million to Trillian was R69 million more than the agreed amount that Transnet would have been liable to pay to JP Morgan in respect of the lead arranger and underwriting services. This deviation alone supports a finding that Mr Gama and Mr Ramosebudi probably acted fraudulently and corruptly.

740. Had the members (directors and officials) of the BADC applied their minds properly they may well have realised that JP Morgan had partnered with Regiments on this transaction and performed the services. Mr Gama, Mr Ramosebudi and the members of the BADC thus did not act in the best interests of Transnet.[1064]

741. Most significantly, the payment of 80% of Trillian 's fee to Albatime confirms that the entire arrangement was part of the money laundering scheme associated with the Gupta enterprise.

[1063] Transnet-Ref-Bundle-05471

[1064] See MNS Transaction Advisors Report, paras 3.1.34-3.1.35

Mr Gama's links with Trillian

742. Mr Gama's involvement in the fraudulent and corrupt payment of R93.48 million to Trillian stands to be assessed in the light of his relationship with Mr Essa and the Guptas. The evidence in relation to his earlier dismissal and reinstatement, his receiving cash payments from Mr Essa, as well as Ms Hogan's evidence about President Zuma's efforts to have him appointed as GCEO, intimate strongly that he was favoured by those supporting State Capture. His appointment as GCEO of Transnet, in April 2016, took place shortly after he expedited the payment of R93.48 million to Trillian.

743. As discussed earlier, Mr Gama sought to distance himself from Mr Essa and the Guptas. He maintained that he only visited the Gupta compound once on invitation by Mr Essa, who he claims to have met only on four occasions:[1065] i) at a meeting with Regiments; [1066] ii) in a Transnet boardroom with Mr Singh in July 2015; iii) at the Gupta compound in Saxonwold in October/November 2015 – a meeting which he said he had angrily terminated and saw as an ambush by Mr Essa and a waste of time;[1067] and iv) in Dubai in January 2016 (shortly after he had approved the payment of R93.48 million to Mr Essa's company, Trillian).

744. The meeting in Dubai (where some of the Gupta businesses are based) is of most relevance to the present discussion. Mr Gama travelled to Davos, Switzerland on 17 January 2016 to attend the World Economic Forum.[1068] On his return from Davos to South Africa he stopped over in Dubai and met Mr Essa on 23 Janua ry 2016 at the Oberoi Hotel at which Mr Essa had made him a booking in a deluxe

[1065] Transcript 11 March 2021, p 44-58

[1066] Transnet-07-048

[1067] Transnet -07-049

[1068] Transcript 30 April 2021,p 19-34; and Transcript 11 May 2021, p 234-260

suite, on the account of Sahara Computers, a Gupta company.[1069] It is undisputed that Mr Essa instructed Sahara Computers to arrange the hotel booking on Mr Gama's behalf and that the invoice was sent to Sahara Computers for payment. Mr Gama however doggedly and unconvincingly insisted that he paid his own hotel bill.[1070]

745. Mr Gama's booking at the Oberoi Hotel by Sahara Computers is confirmed in an email sent by the hotel on 20 January 2016 to Mr Chawla, the CEO of Sahara Computers, who on the same day forwarded the reservation to Mr Essa. An invoice ("the first invoice") from the Oberoi Hotel for AED 4650 (including all the charges for the two-day stay) reflects that the booking was for "Mr Siyabonga Gama of Sahara Computers". The first invoice was signed by Mr Gama on 24 January 2016 when checking out of the hotel under a *pro forma* statement in the invoice which reads: "I agree that I am responsible for the payment of this bill in the event that it is not paid by the company, organisation or the person indicated."[1071] This confirms, at least *prima facie*, that at the time Mr Gama signed the bill, it had not been settled by Mr Gama and was to be paid by the company indicated, namely Sahara Computers.

746. On 2 February 2016, the Oberoi Hotel sent a composite invoice to Sahara Computers in respect of unpaid bills for stays by Mr Koko (of Eskom), Mr Mantsha (of Denel) and Mr Gama, thus again indicating that Mr Gama's bill had not been paid by him on 24 January 2016. Another composite invoice was sent by the

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[1069] Mr Gama testified that his main purpose in stopping over in Dubai was to purchase his daughter a dress – Transcript 30 April 2021, p 82 *et seq*

[1070] Transnet-07-053

[1071] Transnet 07-250.328

Oberoi Hotel to Sahara Computers on 23 February 2016 verifying that Mr Gama's bill still remained unpaid at that stage.[1072]

747. Notwithstanding this clear and convincing evidence, Mr Gama persisted with his contention that he paid the bill on 24 January 2016 when he checked out.[1073] He could not produce any other proof that he had paid the bill on 24 January 2016, nor could he remember if he had done so using his credit card (it seems unlikely that he would have had AED 4650 in cash). Had he paid the bill by credit card, the easiest way to prove it would have been through confirmation by his bank.

748. Mr Gama has not presented any evidence from his bank supporting his version, even though in August 2017 (when the bank records would have been easily accessible) a journalist (who wrote an article in September 2017 suggesting that the payment had been made by the Guptas) afforded him an opportunity to do so. Mr Gama did, however, provide the journalist with an invoice ("the second invoice" - printed in June 2017) which did not have the name of the hotel on it and gave no indication of who had paid the bill, with the journalist having been sceptical about its authenticity in his article.

749. In evidence, Mr Gama produced another invoice ("the third invoice"),[1074] which he said was emailed to him by the Oberoi Hotel on 19 February 2018, after he had requested it a few days earlier.[1075] Initially, Mr Gama adopted the position that he had sent the journalist the third invoice. This was obviously untrue (given the differences in the content and the dates of generation).[1076] He then changed tack,

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[1072] Transnet-07-250.334

[1073] Transcript 30 April 2021, p 24

[1074] Transnet-07-250.450; and Transnet-07-250.341

[1075] Transnet-07-250.447-449

[1076] Transcript 30 April 2021, p 35, lines 19-23

stating that he requested the third invoice because he had changed cell phones and did not have a copy of the second invoice he gave the journalist on his new phone.[1077] The third invoice is in Mr Gama's name, and contains a line item recording that AED 4650 was "Paid" on 24 January 2016.[1078] Mr Gama contended, in effect, that the third invoice settled any controversy about payment. This is not correct. The data in the second and third invoices (obtained in June 2017 and February 2018, respectively) reflecting that Mr Gama paid the invoice cannot be reconciled with the first invoice (signed by him when he booked out on 24 January 2016), which reflects that the invoice would be settled by Sahara Computers or with the two composite invoices issued to Sahara Computers by the Oberoi Hotel, which reflected Mr Gama's invoice was still outstanding on 2 and 23 February 2016, respectively. The first invoice, in the name of Sahara Computers and reflecting that it would settle the bill, is compelling contemporaneous evidence that the intention was that Sahara Computers, or probably Mr Essa, would pay the bill.

750. Mr Gama testified that the topic of discussion with Mr Essa at the Oberoi Hotel meeting was Mr Essa's vision to create a majority black owned management consultancy. Mr Gama stated unequivocally that no mention was made of Trillian or Regiments.[1079] He was, however, unable to hold this line upon being confronted with a newspaper article (published on 7 September 2017),[1080] which recorded that he told the journalist (in written responses to questions) that Mr Essa "raised the issue of his involvement in Trillian which was being formed as an offshoot of Regiments", and that "the expertise would remain the same as core resources

[1077] Transcript 11 May 2021, p 236, lines 17-22

[1078] Transnet-07-250.450

[1079] Transnet-07-053, para 32.6.3; and Transcript 26 April 2021, p 35, line 22 – p 36, line 5

[1080] Titled "*Transnet CEO's Dubai hotel stay – how the Guptas got the bill*" – Transnet-07-250.357

would migrate from Regiments and ... the quality of the work for Transnet would be unaffected".[1081]

751. Mr Gama's desire to put distance between Mr Essa and Trillian (to whom Mr Gama had authorised payment of R93.48 million the previous month in controversial circumstances) is telling.

752. His evidence that he first came to learn that Mr Essa may have been associated with Trillian was when Transnet gave consideration to cancelling its contracts with Trillian and Regiments towards the end of 2016, in the light of the ongoing dispute between them, is equally not credible.[1082] That evidence cannot be reconciled with the memorandum of 9 May 2016 from Mr Gama to the BADC, which sought approval for the cession of the GFB contract from Regiments to Trillian, wherein (following a formal vendor approval process initiated by Transnet)[1083] the shareholding of Trillian was reflected as "Trillian Holdings (Pty) Ltd 60% ... [w]holly owned by Mr Salim Essa".[1084] Mr Gama's suggestion that he just glossed over the memorandum before signing and recommending it (and was thus unaware of Mr Essa's involvement with Trillian at this time)[1085] is inherently implausible.

753. In the final analysis, it is more than unlikely that Mr Essa, the owner of a black owned consultancy (Trillian) which had recently performed under a contract concluded by Mr Gama and been paid R93.48 million in fees, the payment of which had been authorised by Mr Gama a few weeks previously, would not talk about

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[1081] Transnet-07-250.311; Transnet-07.250.361

[1082] Transcript 26 April 2021, p 36, lines 9-22

[1083] Exhibit BB 3(b), MSM-521, para 13

[1084] Exhibit BB 3(b), MSM-521.1, para 14

[1085] Transcript 11 May 2021, p 252, lines 10-12; p 253, lines 7-8

Trillian, but instead confined the conversation to a discussion in the abstract about the hypothetical formation of another black owned consultancy.[1086]

754. Mr Gama's dubious testimony about the extent of his relationship with Mr Essa must also be assessed in the light of other undisputed facts. By the time Mr Gama met Mr Essa in 2015, shortly after his appointment as acting GCEO, Mr Essa had in place the money laundering arrangement whereby 55% of the fees paid by Transnet to Regiments would be distributed through various vehicles to the Gupta enterprise. Mr Essa had also concluded several BDSAs with CSR and CNR on behalf of Tequesta and Regiments Asia in respect of the various locomotive procurements, and in terms of which his companies would be paid 20-21% kickbacks, most of which would be laundered to the Gupta enterprise. Mr Gama had accompanied Mr Essa to a meeting with Mr Rajesh Gupta at the Gupta compound in Saxonwold in November 2015, shortly after which he authorised a corrupt and fraudulent payment of R93.48 million to Trillian in early December 2015, 55% of which was channelled to the Gupta enterprise. A few weeks later, Mr Gama met Mr Essa in Dubai where his luxury hotel accommodation was probably paid for (or was intended to be paid) by the Gupta enterprise. Two months later Mr Gama was promoted to GCEO. Added to that is the evidence that Mr Gama received substantial amounts of cash from Mr Essa during 2017.

755. The undisputed evidence alone establishes strong probable cause (reasonable grounds to believe) that Mr Gama and Trillian were associated with the Gupta racketeering enterprise, and by authorising the wholly unjustifiable payment of R93.48 million to Trillian, Mr Gama acted corruptly and participated in the conduct of the affairs of the enterprise through a pattern of racketeering in contravention of

[1086] Transcript 26 April 2021, p 39; Mr Gama eventually seems to have conceded as much – see Transcript 30 April 2021, p 80-81

sections 3 and 13 of PRECCA and various provisions of Chapters 2 and 3 of POCA.

The interest rate swaps on the ZAR club loan

756. Dr Bloom, the financial expert, analysed the risks associated with the CDB loan for USD2.5 billion and the ZAR12 billion club loan and the mechanisms used to mitigate those risks insofar as they related to interest rate and exchange rate fluctuations, credit risks and the manner in which these risks were addressed.[1087] The Transnet Financial Risk Management Framework ("FRMF") permits hedging (or de-risking) of funding in a foreign currency to mitigate potential risks and deals with how the risks associated with foreign borrowing and financing risks are managed. The risks that needed mitigation in respect of the Chinese locomotive procurement were the fluctuating exchange rates, the credit risks of a default on interest payments attributable to the borrower, a contingent default attributable to circumstances beyond the borrower's control, and the risk of increased financing costs (interest rate fluctuations). Hedging instruments (swaps) were used to hedge both the exchange rate and interest rate risks on the ZAR club loan.[1088] The instruments used particularly in relation to the ZAR club loan were applied corruptly to advance the interests of the Gupta racketeering enterprise.

[1087] Exh BB8(d), JB-01 *et seq*; and Transcript 31 May 2019 , p 85-99. There were three types of risk applicable to the transaction. The first was the possible upward movement in interest rates where the capital is borrowed at a variable rate, resulting in an increase then in the cost of borrowing. The second risk was the possible fluctuations in the exchange rate, as the USD1.5 billion CDB loan was borrowed in USD to be transferred intermittently to South Africa and converted into ZAR. It was a term of the loan that repayment would be in USD with the result that if the ZAR weakened, then the cost of borrowing would also increase. The third risk was the two categories of credit risk: default by Transnet and default factors beyond Transnet's control.

[1088] Transcript 31 May 2019, p 177-212

757. On 3 December 2015, days after the conclusion of the ZAR club loan on 23 November 2015 at a floating rate, Mr Ramosebudi submitted a memorandum to Mr Pita, then still the acting GCFO, seeking approval for hedging the interest rate exposures from a floating to a fixed basis and permission to instruct Regiments to execute the hedges with Transnet approved counterparts. Mr Gama approved the request. The execution costs of the hedges by Regiments would be all inclusive in the rate of the interest rate swap.[1089]

758. Two tranches of interest rate swaps were executed by Regiments on the ZAR club loan with Nedbank as the counterparty, to the significant prejudice of Transnet. R4.5 billion of the ZAR club loan was swapped to a fixed rate of 11.83% for 15 years on 4 December 2015 and three months later R7.5 billion was swapped to a fixed rate of 12.27% for 15 years on 7 March 2016. The CDB debt was also swapped in cross-currency swaps from USD to ZAR at each draw down. There was no significant adverse effect for Transnet in the cross-currency swaps other than the fact that these transactions could have been executed by the Transnet treasury, most likely at a lower cost. Dr Bloom and Mr Mahomedy testified at length about the prejudicial nature of the interest rate swaps.[1090] Their evidence accords in all material respects.

759. An interest rate swap is a transaction between two parties in which fixed and floating interest rate payments on a notional amount of principal debt are exchanged over a specified time. One party pays interest at a fixed rate and receives interest at a floating rate. The other pays interest at the floating rate and receives the fixed-rate payment. The relationship in the hedge is between the

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[1089] Transnet-Ref-Bundle-07528; and Transnet-Ref-Bundle-06853, para 11.2

[1090] Exh BB8(d), JB-01 *et seq*; Transcript 31 May 2019 , p 85-99; Exh BB3(a); MSM-019-023; and Transcript 16 May 2019 , p 3-83

borrower (Transnet) and the counterparty (Nedbank) and does not involve the lender (the syndicate). The lender (the syndicate) will still receive the original interest rate as agreed, namely the floating interest rate. The borrower (Transnet) and the counterparty (Nedbank) enter into an arrangement which is completely separate from the static arrangement of the original loan. The counterparty to the swap arrangement (Nedbank) has nothing to do with the lender (the syndicate). The parties do not actually pay the rates to each other. The amount payable using the floating rate and the amount payable using the fixed rate are calculated, these are then reconciled and only the net portion is paid to the relevant party. This mechanism allows for a net cash flow of the interest payments to either of the parties. A swaps dealer (Nedbank) thus normally will profit from the difference between the fixed rate that it is willing to pay and the lesser floating interest rate which they are obliged to pay in terms of the swap.

760. In this case, the lender on the ZAR club loan, the syndicate, lent Transnet R12 billion, being the principal debt, against floating interest rates, meaning that the interest payable on the loan was subject to a fluctuating rate of interest. However, because Transnet supposedly had concerns about the risk of increasing interest rates (which would have increased borrowing costs and impacted on its cash flow) within days of agreeing the loan at a floating rate, it opted to swap the floating interest rate for a fixed rate by entering into an interest rate swap with Nedbank as the counterparty. Transnet then became liable to pay a fixed interest rate to Nedbank which in turn assumed the obligation to pay the floating rate to the syndicate, the lenders of the ZAR club loan. By fixing the rate and thus swapping it from a floating rate, Transnet aimed to transfer the risk to the counterparty, in this case Nedbank. If interest rates (over the 15-year period of the loan) rise beyond the fixed rate, then Nedbank will bear the cost of that increase. If, on the other

hand, the floating rates remained below the fixed rate, the arrangement will cause a loss to Transnet, as in fact happened.

761. On 2 December 2015, Mr Smit, Transnet's Deputy Group Treasurer, compiled a memorandum for Mr Ramosebudi and Mr Pita dealing with and making a recommendation concerning the proposed interest rate swaps.[1091] Mr Smit made essentially four points: i) if Transnet needed fixed rates when it was raising the club loan it should have raised a fixed rate club loan then not a floating rate loan; ii) if Transnet did an interest rate swap it would tie up a big proportion of the credit lines it needed; iii) it would be costly; and iv) the extra 2% was going to put pressure on the cash interest cover ratios. He therefore recommended that the ZAR club loan not be switched to a fixed rate exposure by means of an interest rate swap.[1092]

762. Shortly after receiving Mr Smit's memorandum on 2 December 2015, Mr Pita replied indicating his agreement with Mr Smit and asked Mr Ramosebudi for his view. A few hours later, Mr Ramosebudi forwarded the email correspondence to Mr Wood at Regiments remarking: "I need to sort this one out".[1093] When asked during his testimony what he meant when he told Mr Wood that he would sort the matter out, Mr Ramosebudi dissembled and falsely equivocated.[1094] His true intention appears in an email (overriding Mr Smit) sent to Mr Pita 18 minutes after he wrote to Mr Wood, in which he argued that it was prudent in a high inflation environment and volatile exchange rate to fix most of the commitment and promised to send a revised proposal.[1095]

[1091] FOF-04-572; Transcript 27 November 2020, p 262-265

[1092] FOF-04-575

[1093] FOF-04-578

[1094] Transcript 27 November 2020, p 267-271

[1095] FOF-04-580

763. In his evidence before the Commission, Mr Ramosebudi was unable to provide satisfactory answers to Mr Smit's reservations about the proposed interest rate swaps. This suggests that he had reasons other than the interest of Transnet for wanting an interest rate swap that in the end benefitted only Regiments and the Gupta enterprise.[1096] Regiments ultimately received R229 million from these interest rate swaps and others, over R200 million of which was laundered on to the Gupta enterprise to fund the purchase of the Optimum Coal Mine.[1097]

764. A second memorandum[1098] was then prepared seeking approval from the acting GCFO (Mr Pita) to hedge the interest rates exposures from a floating to a fixed basis for the amount of R12 billion and to instruct Regiments to execute the hedges with Transnet's approved counterparts. Paragraph 1.3 of the memorandum provided that the execution cost of hedges by Regiments would be all inclusive in the rate of the interest swap. This meant that the cost of those swaps in terms of the fee to Regiments would be hidden in the rate. The spread on the swap would go up by 20 bps for the benefit of Regiments. This added the R229 million fee[1099] in addition to the amount of R265.5 million (excluding VAT) paid to Regiments for advisory services. More than R200 million of the additional fee was laundered on to secure loans to Tegeta Resources and Exploration of R104.5 million and R152

[1096] Transcript 20 November 2020, p 272-276 – The precise amount paid to Regiments in fees for the interest rate swaps on the ZAR club loan is unknown. An associated company, Regiments Securities received five payments from the Transnet Second Defined Benefit Fund ("TSDBF") (which was managed by another associated company, Regiments Funds Managers) as follows: i) R56.72 million on 4 December 2015; ii) R1.09 million on 8 March 2016; iii) R63.92 million on 8 March 2016; iv) R67.4 million on 4 April 2016; and v) R39.85 million on 11 April 2016. The total paid was R228 983 985 – Exh VV10-SCFOFA-702, paras 98.1-98.5. The dates of the first three payments coincide with the dates of the interest rate swaps on the ZAR club loan. The other payment dates coincide with other interest rate swaps (discussed later) in which the TSDBF acted as the counterparty in relation to R11.3 billion of debt unrelated to the 1064 locomotive transaction. The TSDBF had no role in the ZAR club loan swaps yet may have paid the fee to Regiments Securities in respect of them.

[1097] Transcript 27 November 2020, p 266; Exh VV10-SCFOFA-438 – 445 paras 781- 798 Table 259

[1098] FOF-04-584

[1099] Transcript 27 November 2020, p 284-285

million from the Bank of Baroda to part finance the purchase of the Optimum Coal Mine.[1100]

765. The proposal was approved by Mr Ramosebudi and Mr Pita on 3 December 2015 and the first interest rate swap (at a fixed rate of 11.83%) for the tranche of R4.5 billion was executed the next day. The ZAR club loan was signed on 23 November 2015 subject to floating interest rates, and then, on 4 December 2015, a mere week after entering into the ZAR club loan, the first interest rate swap was executed. The motivation for the swap was supposedly that short term interest rates were expected to increase over the medium period, posing a serious risk to Transnet debt portfolio, and the risk of a volatile currency, and thus it was important to manage the interest rate risk to contain its negative impact to the cash interest cover ratio.[1101]

766. The interest rate swap on the ZAR club loan by Transnet was highly imprudent for two reasons. Firstly, the ZAR club loan was negotiated at floating interest rates and literally within days of the agreement having been concluded the interest rate swaps were entered into changing the rates to expensive fixed rates. If there was concern about risk arising from interest rates a fixed rate should have been agreed to start with. Secondly, the fixed interest rate was set at a high level over a long period of time in an environment where it was likely that interest rates would decline and thus a floating interest rate was more beneficial to Transnet. The floating rates never exceeded the fixed rates and Nedbank's assumption that the floating rate would remain low and go lower, which seemed to be fairly predictable at the time, held true. Dr Bloom presented a graph illustrating that the floating rates did not reach the fixed rate level of 11.83% (the agreed fixed interest rate in terms

[1100] Exh VV10-SCFOFA-438 para 781 – 445-Table 259

[1101] FOF-04-585

of the interest rate swap) at any time between 1 December 2015 and 1 January 2018. Thus, instead of Transnet paying the floating rate which ranged between 8-10%, Transnet ended up paying a much higher rate of interest throughout that period.[1102]

767. In interest rate swaps the dealer (in this case Nedbank) profits not only from the fluctuations between the fixed rate and the floating rate, but benefits also from the difference between the market rate and the negotiated rate. The market rate is the rate at which capital can be borrowed in the market, and the negotiated rate is the rate at which the interest rate swap is concluded with the counterparty. The difference is referred to as the "delta" which is part of the profit that the dealer makes. The delta seeks to compensate for the counterparty risk by adding a couple of bps (a premium) to the fixed base rate. At the time of the conclusion of the ZAR club loan, the floating rate was between 9.18% and 9.22%.[1103] On 4 December 2015 the mid-market blended fixed rate was 11.16%. Regiments facilitated an interest rate swap at a fixed rate of 11.83%. That was 67 bps more than the mid-market blended rate at the time. Had Transnet concluded the loan on a fixed rate in November 2015, rather than at a floating rate, it probably would have paid the mid-market blended rate of 11.16%.

768. Regiments played the role of executing agent, being the party that executes the transaction or the swap every quarter.[1104] There were no special features to the transaction that justified the use of a service provider to execute the swaps. The swaps were so-called "vanilla swaps". Hence, the appointment of Regiments as an

[1102] See Exh BB8(d), JB-36; and Transcript 5 June 2019, p 83 *et seq*

[1103] Transcript 5 June 2019, p 29; and Exh BB8(d), JB-43

[1104] Transcript 31 May 2019, p 207

executing agent was not necessary.[1105] Regiments nevertheless received a commission, or an additional percentage, for every trade or every swap that it did.

769. The decisions regarding the interest rate swaps were not consistent with the FRMF which dictates that the decision to secure funding on a fixed or floating interest rate should be taken at the time of concluding the funding transaction (at the source) to avoid unnecessary costs of revising the position at a later date. Had this been done in this instance, Transnet would have saved a substantial sum of money.[1106] The decisions were also inconsistent with its fixed to floating debt policy. Transnet had previously adopted a "fixed rate" strategy as a matter of practice. The floating to fixed rate ratio of the Transnet debt book stood at 60%-85% (fixed) and 40%-15% (floating) in March 2012. In February 2013 the fixed rate strategy changed to 70%-90% (fixed) and 30%-10% (floating). Had Transnet stuck to this policy, the ZAR club loan would have been entered into on a fixed interest rate basis.

770. The argument by Mr Ramosebudi that short term interest rates were forecast to increase relied inappropriately on a two-year view (for 2016 and 2017 - based on forecasts from the Bureau for Economic Research at Stellenbosch University) in respect of a 15-year loan. The forecast of interest rates is based on various modelling approaches which take into account various variables. The variables that were considered in determining the decision to enter into the ZAR club loan on a floating rate would not have varied in a matter of days.[1107] The decision to first agree to a floating rate for 15 years and then a few days later to fix a very substantial portion in one tranche was therefore unusual[1108] and was done at great

[1105] Transcript 5 June 2019, p 19

[1106] Transcript 5 June 2019, p 80-90; Exh BB8(d), JB-38-39.

[1107] Transcript 5 June 2019, p 64 *et seq*

[1108] Transcript 5 June 2019, p 65-66

cost to Transnet.[1109] The only notable consequence in having done the interest rate swap in the manner it was done and the timing thereof, was that significant fees became payable to Regiments and Nedbank gained significant cash flow benefits.[1110]

771. The justification for making the swap was baseless for a few reasons. Firstly, the decision of Transnet to lock itself into the interest rate swap agreement for 15 years assumed an environment of higher interest rates over a period of 15 years. Transnet assumed a steep increase in the trajectory of long-term interest rates. There was no indication at that point in time and to date that such dramatic upward movement in interest rates would apply.[1111] It is not possible to predict interest rates so far into the future. Secondly, to minimise the fees payable to the execution agent and counterparty, a phased approach of swapping in small increments (based on evolving market conditions or when circumstances dictated) would have been more prudent.

772. The floating rate in respect of the second tranche of R75 billion (swapped on 7 March 2016) was between 9.617% and 9.717%. The mid-market blended fixed rate was 11.444%. The interest rate swap provided for a fixed rate of 12.27%, - 83 bps more than the mid-market blended rate.[1112] Transnet thus significantly overpaid for this swap too.

773. On 16 March 2016 Mr Ramosebudi wrote to Mr Moss Brickman at Nedbank specifically confirming that the interest rate swap on the second tranche was

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[1109] Transcript 5 June 2019, p 50-60; and Exh BB8(d), JB-29-33

[1110] Transcript 5 June 2019, p 80

[1111] Transcript 5 June 2019, p 74 *et seq*; and Exh BB8(d), JB-34

[1112] Transcript 5 June 2019, p 96; and Exh BB8(d), JB-44

executed at 12.37%, being 95 bps over the then mid-market value of 11.42%.[1113] Mr Brickman may have wanted a letter like this because there could be questions about a swap that was priced at 95 bps over mid-market value and he wanted confirmation that Transnet was aware that this was the case and agreed to it.[1114]

774. Looking at both interest rate swaps, it appears that the difference between the fixed to the floating rate on both swaps was exactly the same, approximately 2.65%. This was not in accordance with ordinary practice. Regiments and Nedbank profited from this excessive spread.[1115] Regiments would have known that the unnecessary interest rate swaps would result in it receiving significant fees.

The prejudice suffered by Transnet from the interest rate swaps on the ZAR club loan

775. Dr Bloom presented a table outlining the losses incurred by Transnet entering into these questionable transactions.[1116] The realised total negative cash flow for Transnet resulting from the first interest rate swap on the tranche of R4.5 billion was R299.3 million as at 14 May 2019, while the total negative cash flow for Transnet on the interest rate swap of R7.5 billion was R551.2 million. This translates into a total negative interest rate payment of R850 538 508. This amount of almost R1 billion would not have been payable had Transnet not effected the interest rate swaps. The table also reflects that the amount of the cost of exit[1117] (an unrealised negative cash flow) as at 14 May 2019 would be R980 478 025 in

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[1113] FOF-04-589

[1114] Transcript 27 November 2020, p 287

[1115] Transcript 5 June 2019, p 98-99

[1116] Exh BB8(d), JB-37; and Transcript 5 June 2019, p 86 *et seq*

[1117] The cost of exit is the cost that would be incurred at any point in time if the parties to the interest rate swap (Transnet and its counterparty Nedbank) were to agree that Transnet could exit the arrangement. The liability that would arise, the cost of exit, would be the amount that Nedbank would be able to claim as the amount it would have earned on the balance of the term.

respect of both interest rate swaps. In the result, the realised negative cash flow together with the unrealised cost of exit totalled an amount of R1 831 016 534.

776. Thus, Transnet incurred a realised loss of R850 million from December 2015 until 19 May 2019. Given the trajectory of interest rates since that time and going forward, it is likely that the full loss of R1.8 billion will be realised by Transnet. In other words, Transnet incurred a potential liability of more than R1.8 billion by reason of having entered injudiciously or imprudently into the interest rate swap arrangements negotiated and executed by Regiments.[1118]

777. Dr Bloom also presented a graph indicating Transnet's key debt points comprising a comparison between the interest rate payable in respect of the two tranches of R4.5 billion and R7.5 billion at the fixed rates agreed under the swap and the overall cost of debt paid by Transnet.[1119] The purpose of the graph was to illustrate how the amounts paid in respect of the interest rate swaps related to the overall cost of debt on average in Transnet.

778. The weighted average cost of debt paid by Transnet in the three-year period between 1 September 2015 and 1 March 2018 was approximately 9.4% to 10.7%. This amounted to a weighted average of 10.23% for the entire period. The graph shows that there was a marked increase in the cost of debt that Transnet was paying subsequent to the interest rates swaps in which it significantly increased its fixed rate debt.[1120] From 1 June 2016 until 1 March 2018 Transnet paid significantly more than the average rate for its debt. On the first interest rate swap on R4.5 billion, in respect of which Transnet was paying 11.83% as a fixed rate, it paid 1.6% more than its average rate of debt, which was 10.23%. In relation to the

[1118] Transcript 5 June 2019, p 86 *et seq*

[1119] Transcript 5 June 2019, p 101 *et seq*; and Exh BB8(d), JB-45

[1120] Transcript 5 June 2019, p 107

second tranche, the interest rate swap in relation to R75 billion, upon which Transnet paid a fixed rate of 12.27%, Transnet paid over 2% more than its average rate of debt.

779. Dr Bloom questioned the entire rationale of the interest rate swaps. Interest rates in relation to the swaps would have to become extremely high for an extended period of time before Transnet will be able to recoup the losses that it has incurred in relation to these interest rate swaps. [1121]

780. Shortly after Mr Mahomedy and Dr Bloom had testified before the Commission, Mr Neil McCarthy, the Executive Head of Risk of Corporate and Investment Banking at Nedbank, filed a statement dated 14 June 2019 with the Commission, dealing with the interest rate swaps and the evidence of Mr Mahomedy.[1122] In it he confirmed that Nedbank had worked closely with Regiments in arranging the interest rate swaps on the basis of a mandate signed by Mr Singh on 31 July 2014 appointing Regiments as an advisor in respect of deal structuring, financing and funding options. He said that Transnet and Regiments had always contemplated the possibility of interest rate swaps and contended that the arrangement was not unusual. He also said that at the time the swaps were arranged, Nedbank received no objection from Transnet's treasury about them and they were contractually agreed and legal. He acknowledged that the price of the swaps was above the norm but emphasised that Nedbank played no part in the negotiation of the fees paid to Regiments. He also made no mention of the Regiments money laundering scheme, possibly because he had no or insufficient knowledge of it.

[1121] Transcript 5 June 2019, p 134-135

[1122] SEQ 11/2019-019. On 28 August 2020, after having abandoned its application to lead oral evidence and cross-examine Mr Mahomedy (which had been granted), Nedbank was granted leave to have Mr McCarthy's affidavit admitted into evidence.

The cross-currency and credit default swaps

781. The cross-currency swaps arranged by Regiments were also problematic. A cross-currency swap was necessary to hedge Transnet's liability to repay the loan in the currency in which it was received. A cross-currency swap is an off balance sheet (over the counter) transaction in which two parties exchange principal (capital portion of the loan) in different currencies. The hedge takes the liquidity risk out of the equation.

782. The CDB loan was arranged as a floating rate loan denominated in USD with periodic draw-downs that occurred to pay either CNR or CSR in respect of the 1064 locomotive procurement. The LSAs between Transnet and CNR and CSR provided for payments to be made in ZAR. Consequently, the CDB debt facility needed to be swapped from USD to ZAR at each drawdown. Transnet accordingly entered into hedging transactions with JP Morgan in the form of a series of cross-currency swaps. JP Morgan in this case acted as the sole hedge counterparty to lead and underwrite the equivalent ZAR amount for a loan of USD1.5 billion.

783. There were two troublesome issues here. Firstly, the need for some of the services related to the forex hedging was questionable. There was sufficient capacity and know-how within the Transnet dealer room to price swap structures and to execute the cross-currency swaps. No need existed for external advice due to the nature of the swap being simple or standard (vanilla) swaps. Secondly, the payment of R7.5 million to Regiments as a contingency fee for advisory services in relation to structuring and arranging the cross-currency swaps was unjustified and thus wasteful and irregular expenditure. It is unclear why Regiments should have been paid this amount. The payment had no legal basis. The forex hedging contract was between Transnet and JP Morgan, which was appointed to deal with structuring

and executing the cross-currency swaps. Had Regiments performed any of the work on the cross-currency swaps as JP Morgan's SDP, JP Morgan would have invoiced the work and payment to Regiments would have been an internal matter between JP Morgan and Regiments and not between Transnet and Regiments. Moreover, the agreement to pay Regiments an amount of R166 million as a so-called success or performance fee arguably included R7.5 million for advice on the cross-currency swaps.[1123]

784. Transnet and JP Morgan also had an agreement in terms of which JP Morgan would execute credit default swaps and contingent credit default swaps in relation to the CDB loan. A credit default swap is contingent upon two triggers. The first is an ordinary credit default swap where the buyer receives the face value of the bond or loan from the protection seller in the event of a default. This is termed a credit event, such as defaulting on interest payments. The other trigger is specific to the contingent part of the credit default swap and is another event usually in relation to a macro-economic variable. A contingent credit default swap is designed to provide cover against unfavourable market movements.[1124]

785. In order to hedge the CDB loan and mitigate the risk, there was an apparent need for the application of a contingent credit default swap, introduced at each capital drawdown. Regiments charged a fee of R5.7 million. As with the cross-currency swap, there was no legal basis for Regiments to be paid a fee for the contingent credit default swaps.

786. Regiments claimed to have structured and arranged the contingent credit default swap structure to effectively reduce the ZAR interest rate payable on the loan

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[1123] Transcript 5 June 2019, p 30; see also Transnet-Ref-Bundle-06857, para 12.1

[1124] Transnet-Ref-Bundle-06857, para 12.2; and Transcript 5 June 2019, p 41 *et seq*

structured by Transnet. According to Dr Bloom, this was not true as the intellectual property to conceive, implement and execute the contingent credit default swap structure was introduced by JP Morgan in terms of their agreement with Transnet. There could be no justification for any payment to Regiments for the work they purported to have done.[1125] The financial risk mitigation instrument that was applied in this instance was highly complex and JP Morgan would have used its own intellectual property to execute this instrument. It is unlikely that Regiments could have added any value, yet it was paid the amount of R5.7 million for the work that JP Morgan was appointed to do.

The interest rate swaps involving the Transnet Second Defined Benefit Fund

787. Regiments also executed other interest rate swaps on Transnet debt not directly related to the financing of the 1064 locomotive acquisition.[1126] The decision was to hedge R11.3 billion of other Transnet debt at a floating rate by swapping it for a fixed rate of interest. The counterparty in this instance was the Transnet Second Defined Benefit Fund ("TSDBF").

788. This transaction was extraordinary because Transnet was in effect betting against its own pension fund in the hedging market. An interest rate swap always involves one party winning and one party losing. One party bets on a rise in interest rates and the other on a decline in interest rates.[1127] As it turned out, in this instance the TSDBF and its members benefited considerably at the expense of Transnet.

789. These swaps were done during the tenure of Mr Shane as the chairperson of the TSDBF. Indeed, there is evidence suggesting strongly that the appointment of Mr

[1125] Transcript 5 June 2019, p 40 *et seq*; and Transnet-Ref-Bundle-06857, para 12.2.3

[1126] Transcript 5 June 2019, p 111 *et seq*

[1127] Transcript 5 June 2019,p 115

Shane as Chairperson of the TSDBF was orchestrated by Mr Essa specifically to ensure that the Trustees of the TSDBF appointed Regiments Fund Managers (Pty) Ltd, a wholly owned subsidiary of Regiments, to manage a R9 billion portfolio of TSDBF for the benefit of Mr Essa and the Gupta family.[1128] At the time of the transactions, Regiments Fund Managers (Pty) Ltd) was the fund manager of the TSDBF, while Regiments was the transaction advisor and the execution agent for the swap. Regiments executed the transaction on behalf of Transnet and at the same time was advising Transnet while its associated company was in control of the investments of the pension fund. This gave rise to a clear conflict of interest.

790. The interest rate swaps involving the TSDBF comprised four separate deals relating to four different tranches of capital debt involving different loan counterparties. Dr Bloom presented a schedule indicating that the TSDBF had benefitted by an amount of R720.8 million at the cost of Transnet (the realised cash flow loss) as at 14 May 2019. The cost of exit as at 14 May 2019 (unrealised) was R815.68 million. The total realised and unrealised loss was thus about R1.536 billion. In other words, this swap has already cost Transnet R720 million and over the full period of the swap transaction on present day calculations will cost R1.536 billion.[1129] The two companies in the Regiments stable benefitted handsomely from this transaction. The group was paid an advisory fee for doing the swap, a cut of the profits made by the pension fund as an execution fee and a pension fund management fee.

791. Regiments Fund Managers started managing assets of the TSDBF in October 2015. Its mandate was terminated on 30 September 2016 after it was discovered

[1128] Exh VV10-SCFOFA-069, para 60, Exh VV10-SCFOFA-690, paras 69-71, para 97.7 and Exh VV10-SCFOFA-811

[1129] Transcript 5 June 2019, p 125-129; and Exh BB8(d), JB-50

that Regiments Fund Managers had allocated itself fees of R228 million from the TSDBF relating to the various interest rate swap transactions.

792. The MNS Report commented on the fees paid to Regiments by the TSDBF as follows:

> "Regiments would have been paid 20bps as an execution fee totalling R112.4 million for the swaps related to the Transnet debt... Regiments received or drew R227.8 million from TSDBF for executing the swap transactions on 30 March 2016 and 8 April 2016 at a fee of 20 bps. The alignment of the fee paid to Regiments and the approach adopted for the analysis in this report, indicate that Regiments received 40.537 bps and not 20bps as per the memorandum (dated 28 August 2017 and prepared by the group treasurer) for the execution of each of the four swaps related to the TSDBF as counter party. This is well above market norms where transactions of this size may attract a fee of less than 1 basis point based on yield, and is therefore highly irregular and unwarranted."[1130]

793. In conclusion, all the interest rate swaps were probably planned principally to benefit Regiments and were achieved through the side-lining of Transnet's treasury.[1131] Transnet treasury had and still has the expertise to handle transactions of this kind, interest rate swaps, without the support of external transaction advisors or execution agents such as Regiments. The relevant transactions were typically vanilla (stock-standard) swaps. The treasury dealing room has done and does these periodically without external assistance.

[1130] Transnet-Ref-Bundle-06858, paras 13.3-13.6 – As discussed earlier, the total paid to Regiments for the interest rate swaps was R228 983 905 and was in respect of both the ZAR club loan and the R11.3 billion debt – despite the TSDBF having no involvement in the ZAR club loan interest rate swap.

[1131] Transcript 5 June 2019, p 137-143

794. The TSDBF went on to sue Regiments Fund Managers for amounts paid to it. In November 2019, Regiments settled the TSDBF action by paying it an amount of R500 million.[1132]

795. Regiments received an additional R228 million from the interest rate swaps. Part of these payments was transferred via the laundering vehicles to the Gupta enterprise. There are reasonable grounds to believe that in facilitating the interest rate swaps and incurring the fees and substantial losses associated with them, Mr Ramosebudi and Mr Pita acted in contravention of section 50 of the PFMA by acting without fidelity, integrity and not in the best interests of Transnet in managing its financial affairs. The payments and losses were therefore possibly the proceeds of unlawful activity as defined in section 1 of POCA. Further investigation is required to determine whether Regiments, Trillian, Mr Ramosebudi, Mr Pita, Mr Wood and others corruptly participated in the conduct of the affairs of the Gupta enterprise through a pattern of racketeering activity in relation to these transactions.

796. These findings are to the effect that there are reasonable grounds to believe that the mentioned persons violated the Constitution and other legislation and were involved in corruption of the kind contemplated in TOR 1.4 and TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

[1132] FOF-09-070-72, paras 61-71

CHAPTER 9 - THE MANGANESE EXPANSION PROJECT

797. Two witnesses before the Commission gave evidence of serious allegations of malfeasance in Transnet's Manganese Expansion Project ("MEP"), namely: Ms Deidre Strydom, a senior employee with long service at Transnet, and Mr Henk Bester, an employee of the Hatch group of companies ("Hatch"), a service provider to the MEP.

798. Mr Bester is a qualified professional civil engineer and an expert on railways. He worked for Spoornet between 1990 and 1998 before joining R&H Railway Consultants where he was Managing Director until 2008. He joined Hatch in 2008 as a senior engineer and later became the Global Director and Managing Director Rail responsible for Africa. Hatch is a global engineering company with expertise in rail in the mining, infrastructure and energy sectors. The head office of Hatch is in Canada and it has offices around the globe including in South Africa.[1133]

799. A third witness, Mr Gerhard Bierman, the former CFO of Transnet Capital Projects ("TCP"), filed an affidavit relating to the MEP, but did not testify before the Commission as he has emigrated to Australia.[1134]

800. The evidence of wrongdoing given before the Commission in relation to the MEP has a narrow scope. Essentially, it is contended that persons associated with the Gupta enterprise sought improperly to benefit from the project by seeking appointment as supplier development partners ("SDPs"). The rationale, financing and other commercial aspects of the project have not been directly challenged as corrupt or improper, though there is some suggestion that the budget may have

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[1133] Transcript 20 October 2020, p 12 *et seq*

[1134] Mr Bierman's statement was admitted provisionally - Transcript 20 October 2020, p 79

been inflated to accommodate payments for unqualified SDPs. Nonetheless, it will be helpful to examine the relevant details of the MEP to gain a better contextual understanding of the alleged wrongdoing.

The scope and purpose of the MEP

801. In 2009 Transnet decided to increase export capacity via the manganese ore terminal in Port Elizabeth (PE) to 5.5 mtpa. It was evident that demand for capacity would continuously exceed supply as a result of the unprecedented growth in manganese exports due to South Africa being viewed as a lucrative supply market to China. Transnet conducted feasibility studies into the investment case for expanding capacity to 16 mtpa by 2018/19 through the Port of Ngqura in the Eastern Cape. The MEP came to be seen as an anchor programme of the Market Demand Strategy ("the MDS"), aimed at expanding and modernising the country's ports, rail and pipelines infrastructure to promote economic growth in South Africa.[1135]

802. The MEP proceeded in two phases, Phase 1 and Phase 2. On 17 October 2012, the Group Exco recommended that the board approve the execution of the first two phases to expand the rail network capacity from the Northern Cape to the Port of Ngqura to support the MEP from 5.5 mtpa to 16 mtpa at a cost of R2.4 billion.[1136] An MEP Steering Committee was constituted of which Mr Gama, CEO of TFR, and Mr Singh, the GCFO, were members. Following the completion of the Phase 2 feasibility studies, the MEP Steering Committee endorsed the creation of a centralized Programme Director role for the MEP to which Ms Strydom was appointed and tasked with setting up and managing the MEP structure. She was

[1135] Transcript 20 October 2020, p 15 *et seq* and p 157 *et seq*

[1136] Annexure DS 1, Exh BB20, BB20-DS-39

also required to deliver and maintain the integrity of the approved business case. When she became the MEP Programme Director, Ms Strydom reported to Mr Krish Reddy, the GM: Group Planning.

803. McKinsey developed a standard for capital execution for Transnet called the Platinum 20 Standard, which recommended that the capital expenditure for rail and port should be centralised so there should be from a Group perspective a central authority responsible for the management of the oversight of the capital expenditure reporting, etc. This was a departure from previous practice whereby the operating divisions were accountable for the management of the capital expenditure associated with projects.

804. Although the platinum standard recommended that the programme director should have control over capital expenditure that did not happen in the MEP. Ms Strydom had no financial delegation to manage the scope, cost and schedule of the MEP.[1137] TCP was appointed by the operating divisions to execute the respective capital projects on their behalf. This included the management of the transformation and economic development targets approved in the procurement strategy that accompanied the business case.

The proposed confinement of Phase 1 and the SD criterion

805. Phase 1 of the MEP was managed by TCP. During 2011, Hatch Goba was appointed by TCP via a task order under an existing "Hatch Mott McDonald Goba" contract[1138] to conduct the Front-End Loading ("FEL") 2 and 3 phases of Phase 1,

[1137] Transcript 20 October 2020, p 155; Exh BB20, BB20-DS-07, para 18

[1138] Hatch Goba (which later became only Hatch in South Africa) was appointed by TFR in 2009 as an extension to the Hatch Mott and Goba Contract ("HMG") to assist in options for exporting manganese to Port Elizabeth for volumes up to 12 mtpa. This project was a precursor to Phase 1 and included projects such as the manganese

i.e. rail and port pre-feasibility and feasibility studies supporting the MEP. Most of the outputs for the studies were concluded towards the end of 2012.

806. Given the materiality of the estimated cost of the expansion and the requirements to spend further time on scrubbing the overall cost and schedule, a decision was taken by the Transnet capital projects committee ("CAPIC") towards the end of 2012 to support the ring-fencing and acceleration of critical rail operational and safety related work packages where environmental authorisations had been received. The project was named "Rail Phase 1" or "MEP 1 (Phase 1)".[1139]

807. A memorandum dated 11 January 2013 was submitted by Mr Molefe to the meeting of the BADC of 29 January 2013, chaired by Mr Sharma,[1140] recommending an initial R2.38 billion "no regrets" rail infrastructure investment "in support of the overall manganese ore expansion programme from 5.5 to 16 mtpa". The BADC approved the "no-regrets" investment in the amount of R2.4 billion.[1141]

808. In terms of a memorandum submitted to Mr Molefe by Mr Chari Moller, Group Executive, TCP, dated 6 August 2013, Phase 1 comprised the partial doubling of the line section between Kimberley and De Aar, and the extension of the Rosmead passing loop at an estimated cost of R2.38 billion (equating to the "no-regrets" amount approved by the BADC in January 2013). The Engineering Procurement and Construction Management (EPCM) cost was stated to range between 15-18% of project cost and calculated to be R220 million. Following an internal risk review,

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5.5 mtpa expansion project specifically relating to the Hotazel Yard in the Northern Cape – see Exh BB19 , BB19-HB-003, para 10

[1139] Exh BB20, BB20-DS-13, para 33

[1140] Annexure DS 1, Exh BB20, BB20-DS-31

[1141] Annexure DS 1, Exh BB20, BB20-DS-29

TCP recommended that the EPCM scope of the FEL 4 phase of Phase 1 (in which the project is executed to deliver the defined outcomes) be confined to Hatch.

809. Since the value of the transaction was below R250 million, final approval of the confinement resided with Mr Molefe, the then GCEO, in terms of the delegation of authority framework and thus he had the delegated authority to authorise the expenditure.[1142] Mr Molefe approved the confinement on 19 August 2013.[1143] Ms Strydom was informed by Mr Rudie Basson, then the General Manager of TCP, that the ETC was deliberately reduced to fit in with Mr Molefe's delegated authority so that he could authorise the expenditure without the approval of the BADC.[1144] Mr Molefe denied this.[1145] Be that as it may, Ms Strydom accepted that the confinement to Hatch was justified. Hatch had completed all the pre-feasibility studies so it was familiar with the detailed designs and engineering designs required for the rail scope of work at that stage. It was an extension of rail passing loops mainly and it would not have made sense to bring another company on board at that stage to start from scratch.[1146]

810. In his affidavit, Mr Bierman, the former CFO of TCP,[1147] explained that the supplier development ("SD") threshold was a contentious issue during the procurement process. The confinement for Phase 1 was structured as a fixed-cost contract with specific, high SD targets to be achieved by Hatch. For reasons that will become clearer later, Mr Singh increased the SD targets from 30% to 50% during the

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[1142] Annexures DS 3 and DS 4, Exh BB20, BB20-DS-47-55

[1143] Annexure DS 3, Exh BB20, BB20-DS-53

[1144] Exh BB20, BB20-DS-13, para 35

[1145] Transcript 10 March 2021, p 131

[1146] Transcript 20 October 2020, p 163, lines 1-10

[1147] TCP was responsible for the EPCM of the MEP

approval process.[1148] The final value for SD that was submitted to Mr Molefe for final approval was 50%.[1149] The RFP to Hatch thus included a clause that required 50% of the contract value to be spent on SD initiatives. This was a pre-qualification criterion which had to be met before a bidder could progress to the technical evaluation.[1150]

811. SDPs generally are Qualifying Small Enterprises ("QSEs"), Exempted Medium Enterprises ("EMEs") or emerging black owned companies. Leniency applies where an SDP entity does not have extensive experience. A designated sub-contractor (that is not an SDP) is required to have the necessary extensive experience. This meant that, in terms of the RFQ, 50% of the value of the work had to be sub-contracted by Hatch to QSEs or EMEs. Both Ms Strydom and Mr Bester testified that a SD requirement of 50% was inconsistent with the norm that public sector tenders should have a 30% SD component and was probably a disincentive in that it required bidders to take on 100% of the risk but only do 50% of the work.[1151] Mr Molefe did not consider the 50% threshold as high.[1152]

812. Events in the weeks preceding the confinement to Hatch illustrate why and how this unusual adjustment of the SD requirement came about.

DEC Engineering and PM Africa

813. On or about 15 July 2013, in an internal review session attended by Mr Bierman and others, Mr Singh requested that a company known as DEC Engineering ("DEC") be profiled for capacity and requested it be a designated sub-contractor on

[1148] The draft confinement memorandum dated 31 July 2013 allowed for 40% SD – see Exh BB20, BB20-DS-64

[1149] Annexure DS 3, Exh BB20, BB20-DS-52, para 30

[1150] Transcript 20 October 2020, p 169, line 20

[1151] Transcript 20 October 2020, p 18 *et seq* and p 166 *et seq*

[1152] Transcript 10 March 2021, p 132

Phase 1. Mr Bierman considered the request to be inappropriate because DEC did not have a proven track record within the rail industry in respect of railway tracks. Notwithstanding his concerns, Mr Bierman conducted the profiling and concluded that the company did not possess the core skills for railway track work. As discussed more fully later, he communicated his assessment to Mr Singh who appeared to accept his opinion.

814. However, on 6 August 2013, Mr Singh revised the SD pre-qualifying criteria from 30% to 50%. Mr Singh's possible motive for doing that, as appears from Mr Bester's testimony about the various meetings and engagements leading up to the confinement to Hatch, was seemingly to favour DEC as an SDP (rather than as a sub-contractor that required a proven track record).

815. Before the confinement to Hatch was approved, Mr Bester received a call from Mr Nalen Padayachee from PM Africa ("PMA") to discuss Phase 1. Mr Bester agreed to meet with Mr Padayachee on 22 July 2013 at the Hatch offices. Mr Padayachee was accompanied to the meeting by Mr Dave Reddy from DEC. Mr Padayachee explained that they knew about the potential confinement of Phase 1 to Hatch and wanted to be included as a primary SDP on the project.[1153] Mr Reddy informed Mr Bester that "Number 1" had sent him to form part of the Hatch team in executing Phase 1 of the project. Mr Padayachee and Mr Reddy suggested that their respective companies would form a joint venture to work with Hatch on Phase 1. Mr Bester expressed surprise that they knew about the confinement as this was not public knowledge nor had it been finally confirmed.[1154] Mr Reddy and Mr Padayachee explained that they knew everything about the project and the people "high up" in Transnet. Mr Bester asked Mr Reddy who "Number 1" was. Mr Reddy

[1153] Transcript 20 October 2020,p 19 *et seq*

[1154] Transcript 20 October 2020, p 23, line 20, and p 173, line 13.

responded that he could not divulge but that Mr Bester could figure it out. Mr Bester initially thought "Number 1" was a reference to President Zuma but he later realised in subsequent discussions with Mr Reddy and others that it was probably a reference to Mr Molefe as in "Number 1 at Transnet".

816. Mr Bester explained to Mr Reddy and Mr Padayachee that Hatch had various companies to consider as SDPs and that any approach in respect of SD would be dependent on the various regions where the work would be undertaken. When Mr Bester enquired about the type of work they could contribute towards the project Mr Reddy said that they had access to a lot of engineers in India who could assist with railway engineering. Mr Bester explained to them that SD was about the development of South African businesses and that Hatch did not need railway engineering support but rather other disciplines such as quantity surveying, general civil engineering, etc. Mr Reddy then indicated that this should not be a problem as PMA and DEC have access to resources in all fields of engineering.

817. Mr Bester asked Mr Reddy and Mr Padayachee to send him a Memorandum of Understanding ("MOU") which Hatch would consider before giving an indication of its willingness to use PMA and DEC as potential SDPs in the future.[1155] On 25 July 2013, Mr Bester received a draft MOU from Mr Padayachee by email.[1156] The contents of the MOU made it clear that PMA and DEC wanted to be the sole SDPs.

818. Mr Bester discussed the matter with Mr Alan Grey, the Managing Director (Industrial Infrastructure) at Hatch. Mr Grey and Mr Bester felt that the MOU was too "loose" and vague and that it needed greater precision, clearer definition of the

[1155] Transcript 20 October 2020, p 23-24

[1156] Annexure HB 3, Exh BB19 , BB19-HB-051

scope of the work and roles.[1157] Hatch decided that any MOU concluded with DEC and/or PMA would be on a non-specific and non-exclusive basis as would be applicable for any potential SDP. In other words, Hatch would not agree to include these companies specifically on the MEP.

819. On 26 July 2013, Mr Bester met with Mr Rudie Basson (the General Manager of TCP) and Ms Strydom to inform them about what had transpired and to seek their advice.[1158] Mr Basson was surprised that Mr Padayachee and Mr Reddy had met with Mr Bester. Mr Basson told Mr Bester that Mr Singh wanted a confinement approval condition included which stipulated that PMA and DEC should form part of the SD component for Phase 1, but that he and Mr Bierman had told Mr Singh that it would not be advisable to stipulate specific companies to be used in SD initiatives.[1159] Mr Singh's proposal was subsequently dropped and thus Mr Basson was surprised that Mr Padayachee and Mr Reddy had approached Hatch.

820. In his evidence before the Commission, Mr Singh equivocated and was evasive about whether he had indeed requested Mr Basson and Mr Bierman to include a confinement condition stipulating that PMA and DEC be part of the SD component as SDPs or sub-contractors. At first, he objected to the hearsay nature of the evidence but simultaneously stated that the requirement had been dropped, thus implying that he in fact had raised it with Mr Basson and Mr Bierman.[1160] When that became apparent, he sought to explain his intention in making such a request with reference to the context. He intimated that he made the proposal in the context of advancing the empowerment and SD agenda, as TCP was lagging behind, and the

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[1157] Transcript 20 October 2020, p 30

[1158] Transcript 20 October 2020, p 34 *et seq*. Ms Strydom confirmed the meeting and the events involving her - Exh BB20, BB20-DS-14-16 and Transcript 20 October 2020, p 171 *et seq*

[1159] Transcript 20 October 2020, p 35-37 and p 174-176 ; and Exh BB19, BB19-HB-008, paras 23-24

[1160] Transcript 12 March 2021, p 120, lines 15-16

MEP was an opportunity to drive the agenda.[1161] However, he denied that he gave a "direct instruction" to include the participation of PMA and DEC as a confinement condition.[1162]

821. After some equivocation, Mr Singh eventually settled on the following explanation for what had transpired between him, Mr Basson and Mr Bierman:

> "As I have explained... I wanted them to explore opportunities, alternatives of methods to enable Transnet Capital Projects to meet its mandates as it relates to transformation and supply development. As an example, I said why do you not explore this?"[1163]

822. Mr Singh accepted that it would have been improper to impose the request as a confinement condition.[1164]

823. Mr Singh 's denial that he wanted to include the requirement is inconsistent with the contemporaneous communication that took place between Mr Singh and Mr Bierman at the time. In his affidavit, Mr Bierman explained that Mr Singh had instructed him to profile DEC.[1165] After the profile, Mr Bierman sent Mr Singh the following WhatsApp on 24 July 2013:[1166]

> "On Manganese confinement my Procurement team wants to strangle me. The view is that by designating a specific company as SD or subcontracting the process will fail fairness, transparency and equitable tests. We have considered options and investigated this previously. It would be great to do this but we are not allowed to. If Transnet chooses to go this route we have to still apply this

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[1161] Transcript 12 March 2021, p 121, line 15

[1162] Transcript 12 March 2021, p 122, line 20

[1163] Transcript 12 March 2021, p 122, line 20

[1164] Transcript 12 March 2021, p 124, line 2

[1165] See Annexure GB 1, Exh BB21, BB21-GB-13

[1166] Exh BB21 , BB21-GB-06, para 18

consistently. We can be descriptive to ask them to subcontract to a ?% BO or BWO, but can't stipulate the firm. Your views? GB"

824. This clearly indicates that there was a discussion (probably initiated by Mr Singh) about designating specific companies as SDPs.[1167] In the WhatsApp, Mr Bierman is evidently writing to Mr Singh in response to a request to designate a specific company. In a WhatsApp reply to Mr Bierman, Mr Singh conceded that specific designation was inappropriate.[1168]

825. Confronted with the inconsistency of this WhatsApp communication with his denial, Mr Singh conceded that there was "a request from me to co-hire two companies".[1169] His concession reveals a willingness and proclivity on his part to equivocate and dissemble until confronted with the indisputable, thus introducing significant doubt about his overall credibility.

826. Taking account of Mr Singh's concession, his equivocation and lack of credibility, Mr Bester's hearsay evidence about what Mr Basson told him is a more probable and credible version of what transpired. On Mr Singh's own version, he at the very least suggested that PMA and DEC be included in the confinement. He was intent on advancing the interests of those companies.

827. Mr Bierman expressed a similar opinion in his affidavit. He moreover believed that Mr Singh deliberately revised the SD criteria in order to accommodate PMA and DEC. As mentioned, on 6 August 2013, Mr Singh revised the SD pre-qualifying criteria from 30% to 50% in the confinement submission, without prior notice or consultation. Mr Bierman was initially surprised by the change because 50% was

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[1167] Transcript 12 March 2021, p 128-129

[1168] Exh BB21 , BB21-GB-06, para 19

[1169] Transcript 12 March 2021, p 129, line 21

extremely onerous on the principal contractor. However, after learning from the Commission's investigators about certain meetings that took place between DEC, Mr Singh and Hatch in July-August 2013, he concluded that the change was intended to benefit DEC. In his view, after he advised Mr Singh that DEC could not be appointed by Transnet as a designated sub-contractor and that Transnet could not instruct Hatch which specific entity to appoint as a sub-contractor, Mr Singh found another way for DEC to participate in the contract by increasing the SD component to 50%. As an SDP, DEC would not be subject to the strict experience and skills requirement that would be required of an ordinary sub-contractor. Furthermore, it would also not be questioned why Hatch was contracting an SDP who had such limited experience because there is more leniency with an SDP since the goal is to develop and up-skill.[1170]

828. Ms Strydom testified that she was disconcerted on hearing at the meeting of 26 July 2013 that Mr Padayachee and Mr Reddy had approached Mr Bester to include their companies as sub-contractors or SDPs. Firstly, the information about the pending confinement was not public knowledge and was an internal matter; and secondly, Mr Reddy seemed to claim that he was acting with the authority of Mr Singh.[1171] Ms Strydom and Mr Basson advised Hatch not to sign the MOU. Ms Strydom suspected that corruption was at play.[1172]

829. Later that day, 26 July 2013, Mr Basson phoned Mr Bester and suggested (without giving a clear reason) that Hatch sign the MOU with PMA and DEC. Mr Basson said: "just sign the damn thing".[1173] Mr Bester speculated that Mr Singh must have insisted that the MOU be signed. Mr Singh in his testimony denied that he had

[1170] Exh BB21 , BB21-GB-07, paras 21-26

[1171] Transcript 20 October 2020, p 173-174

[1172] Transcript 20 October 2020, p 175

[1173] Transcript 20 October 2020, p 39, line 5

done so and declined to comment about the discussions concerning the MOU.[1174] He sought to deflect by saying that it was "highly irregular" for Mr Bester to have engaged with Ms Strydom and Mr Basson in the manner they did while the confinement was still in process.[1175]

830. After Mr Bester and Mr Grey discussed the matter further, Hatch then amended the MOU, signed it and sent it back to Mr Padayachee.[1176] The key clause in the original version of the MOU read:

> "DEC PMA JV and Hatch have agreed to enter into this...MOU for the express purpose of partnering where applicable on an Enterprise Development basis and for specified Supplier Development initiatives related to engineering and project (on a project by project basis), of their own free will for the mutual benefit of both parties and hereby agree to honour and be bound by the following terms and conditions."[1177] (Emphasis supplied)

831. This clause was amended by Hatch to read:

> "DEC PMA JV and Hatch have agreed to enter into this...MOU for the express purpose of cooperating where applicable on an Enterprise Development basis and for specified Supplier Development initiatives related to engineering and project. This shall be on a specifically agreed project by project basis and on a non-exclusive basis. The parties shall engage of their own free will for the mutual benefit of both parties and hereby agree to honour and be bound by the following terms and conditions."[1178] (Emphasis supplied)

832. The main differences between the two versions were that the revised MOU specified that the parties would co-operate where applicable, whereas the initial MOU proposed partnering. The revised MOU made it clear that whatever

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[1174] Transcript 12 March 2021, p 125, lines 12-15

[1175] Transcript 12 March 2021, p 126

[1176] Transcript 20 October 2020, p 40-45

[1177] Annexure HB 3, Exh BB19, BB19-HB-051

[1178] Annexure HB 5, Exh BB19 , BB19-HB-058

arrangement the parties agreed on, it would be on a non-exclusive basis whereas the suggested proposal in the initial MOU was that there would be exclusivity.

833. Hatch furthermore added an additional clause which read:

> "Should a project materialize it shall be executed on the basis whereby the DEC PMA JV shall act as a sub consultant to Hatch Goba on agreed scope, price and terms and conditions which shall be finalized prior to either bidding or commencement of the project."

834. Mr Bester met Mr Padayachee again at the latter's request on 5 August 2013.[1179] Mr Padayachee told Mr Bester that the confinement was imminent and Hatch had to sign an addendum before the confinement to Hatch by Transnet could be finalised. For that to happen, the MOU needed to specifically provide for DEC and PMA to be part of the MEP on an exclusive basis.[1180] The addendum[1181] provided:

> "The first project identified that the parties will engage on within the purpose and scope of the MOU is recorded as the Transnet EPCM FEL3/4 for the Manganese Line Upgrade. Hatch Goba will engage DEC PMA JV as the primary SD partner in the project."

835. Mr Bester understood that DEC and PMA were not happy with Hatch's amendment and that Mr Singh and Mr Molefe would not approve the confinement to Hatch unless it agreed to the addendum.[1182] He felt Hatch was being held to ransom.[1183] Mr Singh dismissed Mr Bester's assumption as unsubstantiated and spurious speculation.[1184] Mr Bester discussed the addendum with Mr Grey and they decided that Hatch would not sign the proposed addendum. Mr Bester discussed the matter

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[1179] Exh BB19, BB19-HB-010, para 29

[1180] Transcript 20 October 2020, p 49, line 20 *et seq*

[1181] Annexure HB 7, Exh BB19, BB19-HB-066

[1182] Transcript 20 October 2020, p 46, line 20

[1183] Transcript 20 October 2020, p 47, line 9

[1184] Transcript 12 March 2021 , p 134, lines 2-8

further with Ms Strydom[1185] and given the tone of the interactions became fearful that harm would come to him and the other executives at Hatch. Nonetheless, Mr Bester called Mr Reddy and informed him that Hatch would not be signing the proposed addendum to the MOU. Mr Reddy replied that "Number 1 would not be happy with this".[1186] The following morning, 7 August 2013, Mr Grey and Mr Bester sent an email to Mr Padayachee and Mr Reddy informing them that they were not comfortable signing the addendum confirming the DEC/PMA joint venture as the primary SDP because they had other potential SDPs that needed to be considered in a transparent manner as appropriate in the roll out of Hatch's SD plan.[1187]

836. On the same morning, Mr Grey and Mr Bester met with Ms Strydom, who after discussing the matter with a colleague, Mr Johan Bouwer, escalated the matter to her line manager, Ms Cleopatra Shiceka - then also General Counsel. A meeting was arranged with Ms Shiceka at a restaurant at the Carlton Centre. At the meeting with Mr Grey, Mr Bester and Ms Strydom, Ms Shiceka stated that Hatch had done the right thing to elevate the matter. Ms Shiceka photographed the proposed addendum using her iPad and undertook to inform the right people at Transnet and advised Hatch not to take any further steps.[1188] Ms Strydom told Mr Bester that the matter was elevated to Mr Singh who considered the matter closed and directed that no further action was to be taken.[1189] Mr Singh denied that the matter was ever elevated to him.[1190]

[1185] Transcript 20 October 2020, p 179

[1186] Transcript 20 October 2020, p 56

[1187] Annexure HB 8, Exh BB19, BB19-HB-069

[1188] Transcript 20 October 2020, p 184 *et seq*

[1189] Transcript 20 October 2020, p 59-62 and p 186, line 14; and Exh BB19, BB19-HB-014, para 35

[1190] Transcript 12 March 2021, p 138-139

The confinement of Phase 1 to Hatch and further attempts to influence the appointment of SDPs

837. On 19 August 2013 the confinement was approved by Transnet. A full tender document was issued to Hatch on 27 August 2013. A supplier code of conduct declaration was included in the tender document that Hatch had to complete and sign as part of the tender submission. The document required Hatch to declare that it was satisfied that the process and procedures adopted by Transnet in issuing the tender and the requirements requested from tenderers in responding to the tender were conducted in a fair and transparent manner. Hatch believed that it had acted correctly during the process and there was no proof of any fraudulent or collusive activity on the part of Transnet officials. It had elevated the approach by PMA and DEC to the relevant Transnet officials through the correct channels. Hatch did not intend to engage with Mr Padayachee and Mr Reddy on Phase 1 nor their respective companies going forward. Any influence Mr Padayachee and Mr Reddy claimed to have had with Transnet regarding the award of the contract appears to have had no basis, especially in view of the fact that the confinement had been approved without Hatch having to conclude the MOU on Mr Padayachee and Mr Reddy's terms. Hatch thus concluded that the declaration could be signed and would remain the basis of all of Hatch's dealings in the future as it had been in the past.[1191]

838. There were ongoing engagements between Hatch, Transnet and Mr Reddy which culminated in a meeting at Transnet chaired by Mr Pita on 22 October 2013. This meeting was attended by Mr Grey and Mr Bester on behalf of Hatch and started late after Mr Singh failed to arrive, though Mr Bester saw him in the immediate

[1191] Transcript 20 October 2020, p 62 *et seq*

vicinity of the office in which the meeting was held.[1192] During his evidence, Mr Singh said he had no clear recollection of the meeting.[1193]

839. At the meeting, Mr Pita said that Mr Singh had requested that he speak to Hatch about the SD component. Hatch proposed that Transnet could itself nominate DEC as a SDP in writing if it proposed to do so. Hatch's background checks on DEC and PMA had not revealed any information about it on the Internet. From Hatch's perspective, if DEC was to be appointed as an SDP, it had to come directly from Transnet and not be perceived as a decision that Hatch made of its own accord. Mr Pita responded that Transnet could not instruct Hatch in writing to appoint a particular partner as a SDP, but Hatch insisted that Transnet would have to do so if it wanted it to partner with an SDP not of its own choosing. The meeting became heated with Mr Pita at one point aggressively telling Mr Bester that he must do as he was told.[1194] Mr Pita's involvement was unusual as up until then all the procurement in respect of the major projects was done through TCP's procurement department and not Transnet Group.[1195]

840. On 21 November 2013 Mr Molefe signed off on the memorandum, noting the award of the confinement of Phase 1 to Hatch.[1196] Paragraph 7 of the memorandum recorded that further negotiations led by Mr Pita had been conducted and that the requirement of 30% sub-contracting to emerging black owned companies was met by Hatch.

[1192] Exh BB19, BB19-HB-018, para 47

[1193] Transcript 12 March 2021, p 139-140

[1194] Transcript 20 October 2020, p 70, line 20

[1195] Exh BB20, BB20-DS-16, para 42; Transcript 20 October 2020, p 72 and p 187, line 10 *et seq*

[1196] Annexure HB 15, Exh BB19, BB19-HB-103

841. The conduct of Mr Reddy and Mr Padayachee in strong-arming Hatch to appoint DEC and PMA as SDPs *prima facie* amounted to an offer by them to accept a gratification (appointment as an SDP) from Hatch as an inducement to Hatch for influencing another person (Mr Molefe and other officials at Transnet) to award to Hatch the tender. Alternatively, the conduct amounted to an offer to give a gratification to Hatch in order to improperly influence the procurement of a contract with Transnet. Although Hatch was awarded the Phase 1 contract without it agreeing to the appointment of DEC and PMA as SDPs or sub-contractors, the mere offer to accept the gratification as an inducement to get Mr Molefe and Mr Singh to award the tender is sufficient. Consequently, there are reasonable grounds to believe that the specific offences of corrupt activities relating to contracts or the procuring of a tender as contemplated in section 12(1) and section 13(1) of PRECCA may have been committed in this instance.

842. There is no evidence directly linking Mr Padayachee, DEC or PMA to the Gupta enterprise or that they were employed by or associated with or participated in the conduct of the affairs of the enterprise through a pattern of racketeering. Mr Reddy's conduct though, as discussed later, may be construed as participation in the affairs of a racketeering enterprise as contemplated in section 2(1)(e) of POCA.

The Phase 2 tender and the preferred bidders

843. In May 2014, the then Minister of Public Enterprises, Mr Gigaba, approved the business case for the MEP, which included Phase 1 and 2.[1197] Ms Strydom saw the speed with which this business case was approved - within two months - as suspicious because elections were coming up and there were concerns that there

[1197] Annexure DS 2, Exh BB20, BB20-DS-41

would be a change in the cabinet and in particular within DPE.[1198] Concurrent with the accelerated PFMA approval of the MEP business case, TCP approached the market in April 2014 for the execution of the Phase 2 rail and port EPCM (FEL3b and 4) contracts. The contracts had an estimated value of approximately R700 million to R1 billion respectively. The tender process was managed as an audited high-value tender ("HVT").

844. The SD criterion and small business development criterion were set at high thresholds. Bidders were required firstly to commit to 45% of the contract value being assigned towards SD. Secondly, and distinctly (but not cumulatively) 30% of the contract value had to be sub-contracted to small businesses (EME and QSE start-ups and/or large significant black owned enterprises).[1199] Due to the onerous SD and performance bond requirements put forward in the business case, as advised by McKinsey, it was expected that no company on its own would have the financial backing to meet the tender requirements. Larger EPCMs had to form joint ventures and include smaller EPCM companies in their structures.[1200]

845. Two joint ventures, one comprising Hatch, Aurecon, Mott McDonald and Siyathuta ("H2N") and the other Fluor, Aecom and Gibb ("FLAG"), were identified as the preferred bidders for both the Rail Phase 2 and Port Phase 2 scope EPCM contracts. Both joint ventures were advised that they would be in contention for both contracts depending on the outcome of the contract negotiation process.

[1198] Transcript 20 October 2020, p 154, lines 1-10

[1199] Transcript 20 October 2020, p 195-205

[1200] Exh BB20, BB20-DS-19, para 50

The meeting with Mr Singh and Mr Essa at Melrose Arch

846. Prior to Transnet advertising the tenders for Phase 2 in early 2014, Hatch sought the assistance of Mr Reddy to arrange a meeting with Mr Singh to discuss outstanding invoices due to Hatch for work on the New Multi Product Pipeline ("NMPP") that were causing Hatch serious cash-flow problems.[1201] Mr Reddy agreed to arrange the meeting, mentioning that he had a close relationship with Mr Singh. A meeting was then arranged at a restaurant in Melrose Arch on an unspecified date in early 2014.

847. Mr Bester, Mr Craig Sumption and Mr Craig Simmer represented Hatch at the meeting. On arrival at Melrose Arch, as Mr Bester approached the restaurant, he was met by a man who introduced himself as Mr Salim Essa and said he was there to meet them with Mr Singh. Mr Bester asked where Mr Singh was. Mr Essa replied that he would call him when he was ready. When Mr Bester asked Mr Essa if he worked for Transnet, he responded that he was "doing a lot of things" or had a lot of businesses. Before entering the restaurant, Mr Essa told Mr Bester that he first needed to check if the restaurant was "clean". Mr Essa called Mr Singh, who arrived at the meeting a few minutes later.

848. The meeting focused on both the outstanding payments from Transnet to Hatch for work performed on the NMPP and the appointment of SDPs. Mr Singh did not offer any insight into the reasons for the late payments and Mr Essa was more concerned to convey that Hatch should appoint DEC as an SDP or sub-contractor on Phase 2. The meeting was brief and ended without any clear resolution of the

[1201] Transcript 20 October 2020, p 87-89

problem of the invoices. Mr Bester had the impression that "Mr Essa was the boss and Mr Singh was the subordinate".[1202]

849. In his testimony before the Commission on 23 April 2021, Mr Singh denied that he attended this meeting at Melrose Arch with Mr Essa and the representatives of Hatch. He maintained that Mr Bester's evidence was fabricated,[1203] but could offer no explanation for why Mr Bester would do so. He conceded that there were no issues between them.[1204] Mr Singh did not make application to the Commission for leave to cross-examine Mr Bester.[1205]

850. Mr Singh admitted that there had been problems with the invoices payable to Hatch under the NMPP. However, he sought unconvincingly to cast doubt on the credibility of Mr Bester on the basis that Mr Bester, as Director of Rail at Hatch, would not have been involved with the NMPP and had failed to attach the electronic invites to the meeting for Mr Sumption and Mr Simmer.[1206]

851. In an affidavit filed after Mr Singh had given evidence to the Commission on 23 April 2021, Mr Sumption contradicted Mr Singh's denial and confirmed that Hatch met with Mr Singh to discuss the reasons for delayed payment of invoices and the SD requirement.[1207] Mr Sumption confirmed that on arrival at the restaurant he and his colleagues were introduced to Mr Essa and Mr Singh arrived a few minutes after Mr Essa phoned him. During the meeting Mr Sumption sat next to Mr Singh. He had assumed that Mr Singh would take the lead since he was the GCFO, but in fact Mr Essa dominated the meeting. Although the intention was to discuss non-

[1202] Transcript 20 October 2020, p 91-98; Exh BB19, BB19-HB-022, para 57

[1203] Transcript 23 April 2021, p 41

[1204] Transcript 23 April 2021, p 42

[1205] Transcript 23 April 2021,p 47

[1206] Transcript 12 March 2021, p 141-144; and Transcript 23 April 2021, p 34-40

[1207] Transcript 27 May 2021, p 4-10

payment of invoices and issues with SD on the existing programs, Mr Essa wanted to discuss the SDPs for the next phase of the MEP.

852. Confronted with Mr Sumption's statement, Mr Singh again denied his attendance at the meeting adding that there was nothing further that could be said.[1208] Throughout his testimony Mr Singh sought to distance himself from Mr Essa claiming that he had met him only twice to explore business opportunities.[1209] This is contradicted by the evidence of Mr Gama who testified that he encountered and conversed with Mr Essa in Mr Singh's office at Transnet,[1210] which Mr Singh denied.[1211] It is also gainsaid by the extensive evidence that Mr Singh was shown to have visited Dubai at the same time as Mr Essa, on trips organised by the same travel agent who billed his flights to Mr Essa's accounts, and stayed at the same hotel as Mr Essa with both their hotel bills being paid by the Guptas.[1212] Despite his admission that he was in Dubai on the relevant dates, Mr Singh sought unconvincingly to portray this as pure coincidence and the documentary evidence confirming these facts as fabrications.

853. In response to Mr Singh's denial of Mr Gama's evidence about Mr Essa being at Transnet, the Commission obtained an affidavit under subpoena from Ms Nobahle Takane, Singh's secretary while he was at Transnet.[1213] She could not confirm Mr Gama's claim about Mr Essa meeting Mr Singh at Transnet. However, she described how in late 2012 Mr Essa had come to Mr Singh's office to pick up a document referring to Hatch Goba which Mr Singh had instructed her to place in an

[1208] Transcript 27 May 2021, p 10

[1209] Transcript 12 March 2021, p 26-28; and Transcript 23 April 2021, p 29, line 24

[1210] Transcript 23 April 2021, p 59-62

[1211] Transcript 23 April 2021, p 62

[1212] Transcript 22 April 2021, p 54-120

[1213] Transcript 27 May 2021, p 12-16; and Exh BB23, BB23-AS-1607

envelope and address to "Mr Salim Essa", which name she herself typed on the envelope. She identified Mr Essa in a media photograph in 2015 as the man who collected the envelope from her in 2012. Mr Singh again dismissed this as fabrication, stating variously that Hatch Goba did not exist at that time, Mr Essa could not have obtained access to his office without security clearance, and that it was unlikely that Ms Takane could identify Mr Essa in the manner she had. He could offer no plausible reason why Ms Takane, his trusted secretary, would fabricate this evidence against him.[1214] Moreover, it was shown that Hatch Goba in fact did exist at that time and had during 2011 been appointed by TCP to conclude the MEP Phase 1 FEL 2 and 3 studies.[1215]

854. In the light particularly of the evidence of the trips to Dubai and the statements of Mr Sumption, Ms Takane and Mr Gama, Mr Singh's denials about his relationship with Mr Essa are not credible and again confirm his proclivity for falsehood.[1216] The version of Mr Bester and Mr Sumption of the meeting with Mr Singh and Mr Essa at Melrose Arch is accordingly more probable.

The second meeting with Mr Essa at Melrose Arch

855. Not long after the first meeting with Mr Singh and Mr Essa, Mr Bester received a call from Mr Reddy informing him that Mr Essa had requested a follow up meeting at Melrose Arch. That meeting was attended by Mr Essa, Mr Reddy and Mr Bester.

856. By then, H2N had already prepared its submission for Phase 2. At the meeting Mr Essa told Mr Bester that Hatch should include his company, which he did not name, in H2N's Phase 2 tender submission. Mr Bester told Mr Essa that H2N had

[1214] Transcript 27 May 2021, p 16-26

[1215] Transcript 27 May 2021,p 35-39

[1216] Transcript 22 April 2021 , p 22-28; and Exh BB23, BB23-AS-420

already finalised its SD component and could not include his company in the submission at that stage. Mr Essa, seemingly undeterred, insisted and insinuated that he, Mr Singh and others had a lot of power. Mr Essa explained that they would increase the contract value after the award and that H2N should provide initially for an additional R80 million for SD,[1217] that in time would increase to something in the order of R350 million with the contract value for Phase 2 increasing to R2 billion or more. Mr Bester was dismissive but Mr Essa assured him that he would decide what the budget of the project would be and where it would end up.[1218] Mr Essa further offered to provide Mr Bester with the tender documentation submitted by all the other bidders.[1219]

857. Mr Essa went on to brag that "we" had already decided that the new boss of Eskom would be Mr Brian Molefe and that an announcement would be made in the newspapers soon.[1220] Mr Bester was unable to say whom Mr Essa meant by "we" because at the time he did not know about the Guptas. During his evidence, Mr Bester said that in hindsight (after Mr Molefe's appointment to Eskom and the exposure of the Gupta enterprise in the media) he realised that Mr Essa was referring to the Guptas.[1221]

858. Mr Molefe downplayed Mr Essa's attempt to impress Mr Bester with his insider knowledge about his upcoming appointment.[1222] It is not disputed that Mr Molefe

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[1217] Transcript 20 October 2020, p 100, line 20

[1218] Transcript 20 October 2020, p 101, lines 8-10

[1219] Exh BB19, BB19-HB-024, para 65

[1220] Transcript 20 October 2020, p 103-105; Exh BB19, BB19-HB-023, paras 62-66

[1221] In his written statement to the Commission, Mr Sumption maintained that Mr Essa made the comment about Mr Molefe becoming the new CEO of Eskom at the first meeting at Melrose Arch, after Mr Singh had left the meeting. It is possible that Mr Essa made the comment on both occasions - see Transcript 27 May 2021, p 9-10.

[1222] Transcript 8 March 2021, p 95-130

was a frequent visitor to the Gupta compound in Saxonwold.[1223] As discussed, the Guptas appear to have had some involvement in Mr Molefe's appointments at both Transnet and Eskom. Mr Molefe was appointed as GCEO of Transnet in February 2012 after an article appeared in the *New Age* newspaper predicting his appointment and being nominated and interviewed by Mr Sharma.[1224] An inference may be drawn from these facts that the Guptas or their associates had an evident interest in Mr Molefe's appointment to Transnet, which then subsequently happened. These events lend credence to Mr Bester's testimony that Mr Essa had implied that the Guptas had already decided that in due course Mr Molefe would be appointed GCEO of Eskom.

859. Mr Molefe's attempt during his evidence before the Commission to dismiss these two "predictions" (that turned out to be true) as coincidences and mere gossip was evasive and unconvincing.[1225] He was unconcerned that his name had been used by Mr Essa in the quest of a corrupt arrangement with Mr Bester.[1226] He maintained that he had done nothing wrong and had nothing on his conscience.[1227]

860. The second meeting with Mr Essa concluded with Mr Bester again telling Mr Essa that Hatch could not include Mr Essa's company in the H2N submission. Mr Essa, nevertheless, stated that he would be in contact. Mr Bester returned to Hatch's office and reported the discussion to his colleagues. He drafted an affidavit setting out what had transpired at the meeting for filing with Hatch's auditors.[1228]

[1223] Transcript 8 March 2021, p 142 *et seq*

[1224] Exh BB22, BB22-BM-398; Exh BB22, BB22-BM-399; and Transcript 8 March 2021, p 106; and Transcript 29 April 2021, p 242

[1225] Transcript 8 March 2021, p 112 *et seq*

[1226] Transcript 8 March 2021, p 127-129

[1227] Transcript 10 March 2021,p 134-136

[1228] Transcript 20 October 2020, p 108-109

861. Mr Reddy subsequently phoned Mr Bester and asked for an answer to Mr Essa's proposal. Mr Bester replied that Hatch would not include Mr Essa's company in the H2N bid.

862. The events at the second meeting are *prima facie* proof of corruption.[1229] Mr Essa demanded or solicited (thereby offering to accept) a gratification[1230] (an SDP appointment for his company) from Hatch for the benefit of himself and his unnamed company as an inducement (by influencing Mr Molefe and Mr Singh) to award the tender in relation to a contract for performing work and providing services on Phase 2 to Hatch. Mr Essa's stated intention to inflate the contract price to facilitate the bribe is also evidence of his association with and participation in the Gupta enterprise.

The award of the Phase 2 tender and the post tender negotiations

863. H2N's bid for the Rail project was approximately R800 million and was ultimately successful. However, while H2N's bid for the Port project, for approximately R500 million, was the cheapest, it did not succeed. On 30 November 2014 Mr Molefe signed a letter that awarded the Rail tender to H2N and the Port NMET tender to FLAG. Mr Bester suspected that the appointment of FLAG was possibly due to Mr Essa finding other ways of benefiting from the project.[1231] Mr Molefe denied being influenced by Mr Essa.[1232]

864. The post tender negotiations were led by Ms Corli van Rensburg and Mr Velile Sikhosana of TCP supported by Mr Thomas the GSCM. During the post tender

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[1229] In terms of sections 3, 12 and 13 of PRECCA

[1230] In terms of section 2(3)(a)(i) of PRECCA

[1231] Exh BB19, BB19-HB-026, para 71

[1232] Transcript 10 March 2021, p 129

negotiations, Mr Bester told Ms Strydom about the meetings with Mr Essa. She saw the proposed increase of the contract value by R80 million as a bribe. She testified that experience has shown that it is possible to create a surplus of R80 million on a project of this nature either by increasing the contract value during negotiations (after award) or by increasing the delegated contract value internally. She believed that there was a network inside and outside of Transnet acting "to improperly secure tenders to the benefit of the few".[1233]

865. Mr Pita and Mr Singh were in control of the approval of the contract value. During the post tender negotiations, the H2N bid for the rail project decreased by R287 million (from R1063 million to R776 million); while the FLAG bid for the port project increased by R64 million (from R687 million to R751 million).[1234]

866. Mr Bester testified that the post tender negotiations were fraught and matters escalated to the point where H2N left the negotiations until Ms Van Rensburg requested its return. Upon its return Mr Pita met with the H2N team and requested the team to calm down. On one occasion Mr Sikhosana warned Mr Bester to be careful saying "they will fuck you up" and that H2N was "dealing with very powerful people within Transnet" or something to that effect.[1235]

867. The post tender negotiations in respect of both Phase 2 Rail and Phase 2 Port contracts concluded in early December 2014. H2N was confirmed as the successful bidder for Phase 2 Rail scope, and FLAG as the successful bidder for Phase 2 Port scope. Ms Strydom considered the award of the Phase 2 Port scope to FLAG at an amount of approximately R200m more than the H2N bid for Port as

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[1233] Transcript 20 October 2020, p 209, lines 5-10 and p 211-212; and Exh BB20, BB20-DS-21, para 58

[1234] Annexure DS 8, Exh BB20, BB20-DS-85 - see Transcript 20 October 2020, p 212-215 where Ms Strydom presents a somewhat confusing account of the figures in Annexure DS 8.

[1235] Transcript 20 October 2020, p 130-138

suspicious, and in direct conflict with the project scrubbing process where the focus was to reduce capital estimates across all work packages.[1236] She rejected the rationale of awarding the Phase 2 Port scope to FLAG at the higher price as business risk mitigation. Price should have been the overriding qualifier or criterion at that stage and the award to FLAG was not consistent with the procurement policies.

868. After the post tender negotiations, but before the project kicked off in early 2015, the senior people of H2N were invited to a meeting with Mr Singh and Mr Pita at the Carlton Centre. Mr Singh told them that they were "very lucky" to have been awarded the tender and said he would watch H2N very closely. The H2N directors viewed Mr Singh's comments as negative and signifying that he was against the appointment of H2N. They surmised that this was because Hatch had refused to include Mr Essa's company in its submission. Mr Singh made similar negative comments at a small celebratory function.[1237] Mr Singh denied being negative or making the comment about H2N being lucky, but conceded that he had admonished Hatch on that occasion, supposedly to exhort it to observe a high standard.[1238]

869. Both Mr Bester and Ms Strydom were critical of the role played by McKinsey.[1239] During the execution of the Phase 2 project, McKinsey was always present on what H2N were told was a "review" basis. McKinsey apparently enjoyed unrestrained access to Mr Singh. On Phase 2, McKinsey's contract value to "oversee" the Project was in the region of R340 million, yet, according to Mr Bester, nobody on

[1236] Transcript 20 October 2020, p 217-218

[1237] Exh BB19, BB19-HB-029

[1238] Transcript 23 April 2021, p 52-58

[1239] Transcript 20 October 2020, p 218, line 5

the Transnet management team had a clear sense of what McKinsey's brief or deliverables were.[1240]

870. According to Ms Strydom, prevailing market conditions, in addition to Transnet's increasing capital affordability constraints, resulted in Transnet deciding to suspend the MEP and terminate the EPCM contracts in March 2017. Transnet was in a dire financial situation at that time and the manganese ore price bottomed out to the extent that customers questioned the viability of the expansion. Notwithstanding an intensive capital optimisation exercise jointly executed with the respective joint ventures, a decision was taken to put the expansion on hold and to terminate the rail and port EPCM contracts.

Corruption and racketeering

871. Towards the end of 2014, Mr Strydom reported her suspicions of fraud and procurement irregularities in relation to the MEP to Mr Bramley May, head of forensic investigations at TFR, who appears not to have pursued the matter and destroyed the tape recording of the interview as he felt it was irrelevant as it was not a TFR matter.[1241]

872. As explained, the evidence regarding the attempts by Mr Reddy and Mr Essa, with the assistance of Mr Singh, to secure appointment of their companies as SDPs on both the Phase 1 and Phase 2 contracts, provides reasonable grounds to believe that the offence of corruption was committed in those instances.

873. Mr Singh and Mr Essa's proven association with the Gupta enterprise, Mr Singh's earlier attempts to make the appointment of DEC a pre-condition to the award, his

[1240] Transcript 20 October 2020, p 140-145

[1241] Exh BB20, BB20-DS-24, para 69

manipulation of the SD component, the manner in which the meetings with Mr Essa were set up and their purpose, Mr Essa's disclosure of the *modus operandi* of inflating tenders for illegal purposes, together with Mr Reddy and Mr Essa's boasts about their access to Mr Molefe and their corporate and political influence, all may point to a pattern of racketeering involving the Gupta enterprise. There are thus reasonable grounds to believe that Mr Essa and Mr Singh may have committed corruption (a scheduled offence under schedule 1 of POCA) and, in the circumstances surrounding the award to Hatch of the tenders for Phase 1 and Phase 2 of the MEP, reasonable grounds exist to suspect that Mr Singh, Mr Essa, Mr Reddy and Mr Padayachee, whilst associated with the Gupta enterprise participated in the conduct of the enterprise's affairs through a pattern of racketeering in contravention of section 2(1)(e) of POCA.

874. These findings are to the effect that there are reasonable grounds to believe that Mr Essa, Mr Singh, Mr Reddy and Mr Padayachee violated the Constitution and other legislation and were involved in corruption of the kind contemplated in TOR 1.4 and TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 for investigation by the law enforcement authorities.

CHAPTER 10-NEOTEL AND HOMIX

Introduction

875. Three witnesses testified in relation to the procurement process and transactions associated with contracts concluded between Transnet and Neotel (Pty) Ltd ("Neotel") – Mr Peter Volmink,[1242] Ms Sharla Chetty[1243] and Mr Gerhardus Van der Westhuizen.[1244] Two other witnesses, Mr Chetan Vaghela[1245] and Mr Shiwa Mazibuko,[1246] gave additional evidence regarding improper payments made by Neotel to Homix (Pty) Ltd ("Homix"), part of the Gupta enterprise.

876. Mr Van der Westhuizen is a qualified chartered accountant with experience *inter alia* in information technology audits and vendor management. From mid-2012 to April 2013 he was seconded to the Enterprise Information Management Services Department ("EIMS") where he reported to Mr Singh. His key responsibilities included oversight of network security and the management of service providers, specifically Neotel and T-Systems South Africa (Pty) Ltd ("T-Systems"). From April 2013 to December 2014 he was the Executive Manager: Office of the Chief Information Officer ("CIO") and responsible as the "business owner" for ICT procurement for the computer network and communications systems in the whole of Transnet.

877. The evidence in relation to the Neotel transactions reveals irregular conduct and a motive other than a business rationale for the decisions made in relation to the

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[1242] Exh BB2.1 and BB2.2; Transcript 10 May 2019

[1243] Exh BB6; Transcript 24 May 2019

[1244] Exh BB7(a) and BB7(b); Transcript 27 May 2019

[1245] Exh BB9; Transcript 11 June 2019

[1246] Exh BB12; Transcript 7 and 10 June 2019

tender awarded to Neotel, which sought to extract money from Transnet for the benefit of the Gupta enterprise, in particular by Homix, an entity related to Mr Essa.

The history of the Master Network Services Agreements

878. During the period January 2007 to December 2014, Transnet concluded three key contracts with Neotel: the 2007 Master Network Services Agreement ("the 2007 MSA"); the procurement of Cisco Equipment ("the Cisco Transaction"); and the 2014 Master Network Services and Asset Buyback Agreement ("the 2014 MSA").

879. Prior to 2009 two entities existed within Transnet which supplied IT services to Transnet. The first was Arivia which was the owner of Transnet's data centre, including all of the servers, information and data assets. It owned and operated all the hardware and software on which all the data of Transnet was kept. All the computer or electronic based information necessary for the operation of Transnet was thus centralised under the auspices of Arivia. The second entity was Transtel (Pty) Ltd ("Transtel"), a subsidiary of Transnet, the network services provider which controlled the information communications network. It was responsible for and owned all of Transnet's fibre assets, copper assets, routers and switches that enabled all of Transnet's information applications to talk to each other. This comprised more than 9000 kilometres of fibre and copper cabling for regional communication and within Transnet campuses, as well as other substantial infrastructure including the switches and routers necessary for the electronic communication to take place. A decision was made in 2007 by Transnet to dispose of both businesses on the basis that they were not core to the operations of

Transnet. A competitive procurement process resulted in T-Systems and Neotel respectively being the successful bidders for the data centre and the network.[1247]

880. The network services (telecommunications business) previously provided by Transtel were sold by Transtel to Neotel as a going concern in terms of a sale and purchase agreement ("SPA") prior to the conclusion of the 2007 MSA[1248] in December 2007. As will become clearer later, this sale had significant strategic repercussions as it transferred control of Transnet's network assets to an outside service provider, making it difficult (and prohibitively expensive) for Transnet to contract with any other service provider to take over the network at a later date.

881. The 2007 MSA required Neotel to provide network services for a period of five years from 1 April 2008 until 31 March 2013. Clause 2.1 of the 2007 MSA provided that Neotel would "operate the business, assets, and infrastructure heretofore owned by Transnet and operated by Transtel in the provision of voice and data and additional telecommunications services to Transnet and its various divisions". Hence, after the sale of Transtel, Transnet's IT network, upon which it relied completely for the conduct of its business, was wholly outsourced and owned and managed by Neotel as an external service provider. At the same time, T-Systems managed Transnet's data centre.[1249] Thus, the network was managed by Neotel and the data centre by T-Systems.

[1247] Transcript 27 May 2019, p 13-18

[1248] Annexure A, Exh BB7(a), GJJVDW-023

[1249] Transcript 27 May 2019, p 11, line 20

882. In 2012 Transnet opted not to extend the 2007 MSA with Neotel, but to put the IT network contract out to open tender.[1250] The time consuming procurement process led to the extension of the 2007 MSA until late 2013.

The **RFP for the 2014 MSA**

883. In June 2012 nine months before the due expiry of the 2007 MSA, Transnet issued an RFP for a service provider to conduct a comprehensive due diligence exercise on its network assets and to develop a network sourcing strategy. The due diligence bid was awarded to Detecon International GmbH ("Detecon"), a company associated with T-Systems. Transnet further procured the services of another consulting firm, Gartner, to assist with the development of an RFP for the IT network services.

884. At a special meeting of the BADC held on 29 May 2013, the BADC resolved to authorise the GCEO "to approve the network services RFP, advertise, negotiate, award, contract and sign all relevant documentation in line with the approved strategy".[1251] On the same day, Mr Singh and Mr Pita addressed a memorandum to Mr Molefe requesting him to approve the network services sourcing strategy and to grant authority to advertise an RFP to the open market for the provision of network services from August 2013 for three years with an option to extend for two years.[1252] The estimated spend for the network services contract was R1.5 billion over a period of three years, or R2.5 billion over five years, based on an estimate of R500 million per year. Mr Molefe approved the request and granted the necessary authority on 9 June 2013.

[1250] See minutes of the BADC meeting of 27 February 2013 - Annexure C1, Exh BB7(a), GJJVDW-099

[1251] Annexure PV 16(a), Exh BB2.1(c), PV-0983

[1252] Annexure D1, Exh BB7(a), GJJVDW-119

885. The RFP was issued on 14 June 2013 with an initial closing date of 16 July 2013 and later extended to 13 August 2013.[1253] Five bidders submitted proposals: i) Neotel; ii) Telkom SA SOC; iii) Dimension Data; iv) Vodacom (Pty) Ltd; and v) T-Systems in collaboration with Broadband Infraco SOC Ltd ("BBI"). BBI is a state owned company ("SOC"), which at the time was working in co-operation with T-Systems. Mr Essa was appointed a director of BBI on 3 October 2011 and resigned on 14 October 2014.[1254]

886. The procurement process could not be completed by 31 August 2013, mainly due to extensions requested by the bidders, and thus the 2007 MSA was extended from 1 September 2013 to 31 October 2013 at a flat rate fee of R42.3 million per month (excluding VAT) less a discount of 0.25% per month, regardless of usage by Transnet.[1255]

The evaluation of the bids for the 2014 MSA and the initial award of preferred bidder status to Neotel

887. Mr Molefe favoured T-Systems (a company linked to the Gupta enterprise)[1256] and attempted (in the end unsuccessfully) to award the network services contract to it, in addition to the data contract it already had. For that to have happened, the assets underlying the network business (the cables, the switches and the routers sold to Neotel by Transtel) needed to be transferred from Neotel. T-Systems, or for

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[1253] Annexure E3, Exh BB7(a), GJJVDW-215

[1254] Annexure L1, Exh BB7(b), GJJVDW-349. Mr Essa was appointed by Mr Gigaba – Transcript 27 May 2019, p 43, line 14

[1255] Annexure G2, Exh BB7(a), GJJVDW-225

[1256] T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems. Sechaba was T-Systems' SDP in Transnet contracts. T-Systems paid Sechaba more than R323 million between February 2015 and December 2017. The Gupta enterprise controlled Sechaba from mid-2015. Sechaba made multiple payments to Gupta laundry vehicles (including Albatime and Homix) running to R2.8 million while it was T-Systems' SDP - FOF-09-93-99; and FOF-09-182-184.

that matter, any other bidder for the 2014 MSA, required the network assets in order to provide the service to Transnet. However, after the sale and purchase agreement ("SPA") those assets were owned by Neotel and had been securitised by it after it concluded the 2007 MSA. Neotel had borrowed money and put up the assets as security for its loans.

888. The arrangement under the 2007 MSA had exposed Transnet to significant risk. Neotel as owner of the network assets had it in its power to switch off Transnet's network preventing it from using the network infrastructure, rendering it a "captive client". In addition , there was an exclusivity clause in the 2007 MSA which obliged Transnet to purchase all network equipment from Neotel.[1257] So it was impossible for any other service provider (such as T-Systems) to provide the services unless it leased or bought the assets from Neotel; or Transnet replaced the assets at a significant cost.[1258] This led to the procurement of new equipment from Cisco, the supplier of the equipment, and efforts to buy back some of the assets from Neotel during the negotiations of the 2014 MSA. Once it seemed likely that T-Systems would get the contract, and considering that much of the equipment was near the end of its life, Transnet officials entered into proactive discussions with Cisco to acquire the equipment through Neotel (due to the exclusivity clause) in order to start installing it and to transition the network from Neotel to T-Systems. Transnet at that point wanted to re-acquire ownership of the equipment but had to buy any new Cisco equipment via Neotel.

[1257] Clauses 2.2 and 3.2 of the 2007 MSA appointed Neotel as the sole service provider and supplier and Clause 3.2.1.3 provided that the acquisition and management process included the purchase of all networking equipment, including new equipment, upgrades to existing equipment, or purchase resulting for a service or repair request - see Annexure W2, Exh BB7(b), GJJVDW-527, paras 9-11.

[1258] Transcript 27 May 2019, p 20-29

889. Two issues arose during the tender evaluations that gave rise to concern. The first related to a conflict of interest involving T-Systems and Detecon. T-Systems International GmbH was the majority shareholder in T-Systems and also the sole shareholder of Detecon, the company awarded the due diligence tender. The HVT team at Transnet took the position that T-Systems SA was an "affiliate" of Detecon by virtue of their common parent, T-Systems International and should be disqualified from the bidding process in terms of the RFP and LOI.[1259] Governance did not support the disqualification of T-Systems because of certain ambiguities in the governing provisions. The matter was resolved by T-Systems furnishing an affidavit stating that it had not gained any information from Detecon, agreeing that Transnet was entitled to take the necessary remedial steps against it if it was shown otherwise.[1260]

890. The second concern related to the rounding off of T-System's score for functionality. T-Systems scored 69.93% and thus missed the functionality threshold of 70% by a fraction. Regulation 11(4) of the PPPFA Regulations 2011 provided that points had to be rounded off to the nearest two decimal places. Rounding off to the nearest two decimals would have meant that T-Systems achieved 69.94% and still failed the functionality threshold. However, if the score was rounded off to the nearest whole number (70%) T-Systems would have qualified. Paragraph 13.1.3 of the Implementation Guide to the PPPFA Regulations, the provision dealing with rounding off scores, only dealt with the principle of rounding off in the context of the price and preference stage, and not the functionality stage. Governance opposed the idea of rounding off T-System's scores to the nearest whole number as that would be inconsistent with the PPPFA Regulations.

[1259] Transcript 9 May 2019 , p 131 *et seq*; and Exh BB2.1(a), PSV-0035, para 82 and Annexure PV 9 Exh BB2.1(c), PSV-0839

[1260] Transcript 9 May 2019, p 135-16; and Exh BB2.1(a), PSV-0036, para 82.7

891. Transnet accordingly sought the advice of National Treasury on the matter. National Treasury advised that the manner in which points were to be rounded off should have been explained in the RFP. It added that if at the time of evaluation the evaluation committee had to deal with decimals that were not anticipated at the bid planning stage (and thus not dealt with in the RFP) it could either round off to the whole number or round off to the nearest two decimal points.[1261] In response to this advice, Transnet took a decision to round off to the nearest whole number, with the result that T-Systems met the threshold for functionality.[1262]

892. Neotel, Dimension Data and T-Systems were the only bidders that passed the functionality threshold and were thus considered for commercial evaluation. After a series of clarification sessions with the bidders and BAFOs were received, Neotel was ranked first of the bidders based on price and preference, with a price of R1.363 billion and preference points of 90. Dimension Data was ranked second with a price of R1.585 billion and preference points of 75.37. T-Systems was ranked third with a price of R1.737 and preference points of 65.35.

893. During the final clarification session held with the bidders, T-Systems indicated that its joint venture partner, BBi, was willing to negotiate optimization with its shareholders which would result in an overall reduction of R248 million on their tendered pricing. T-Systems made this offer unilaterally and without being invited to do so at a time when the price negotiations were completed.[1263] Other bidders were not invited to make a corresponding offer of a price reduction, but some may have indicated the possibility of minor price adjustments. These proposals however were

[1261] Annexure PV 12, Exh BB2.1(c), PSV-0913

[1262] Transcript 9 May 2019, p 138-151; and Exh BB2.1(a), PSV-0037, para 83

[1263] Transcript 9 May 2019, p 159

not taken into consideration by the evaluation team.[1264] Had T-System's offer been taken into account, it would have been placed second and Dimension Data third.

894. The evaluation team recommended that the tender should be awarded to Neotel. According to Mr Volmink, "the officials from Group Strategic Sourcing, the technical people, the Governance people, supply chain officer, the chief information officer, the CFO, everyone had looked at it and were happy for the award to be made to Neotel".[1265]

895. On 30 October 2013 Mr Mahomedy (acting GCFO), Mr Matooane (CIO) and Mr Pita (GCSCO) addressed a memorandum to the acting GCEO at the time, Ms Chetty (then Pillay), requesting her, in accordance with the recommendation made by the CFET, to approve the procurement process, the award of business to Neotel and to sign the letter of intent ("LOI") and the letters of regret to the four unsuccessful bidders. Mr Molefe had appointed Ms Chetty to act in his position as the GCEO for the period 28 October 2013 – 1 November 2013 and delegated his powers to her.[1266] After considering the TEAR report,[1267] three TIA reports (confirming that the procurement process was compliant with Transnet policies), and an excerpt of the decision of the board approving the extension of the 2007 MSA, Ms Chetty approved the procurement and signed the letters as requested.[1268]

[1264] See the Tender Evaluation and Recommendation Report ("TEAR report") - Annexure H3, BB7(a), GJJVDW-239

[1265] Transcript 9 May 2019, p 63, line 10

[1266] Exh BB6; SC-002, para 5

[1267] The TEAR report discussed the entire procurement process, from stages 1-5 and highlighted certain discrepancies that were identified during stage 3 and clarified the corrective measures that were taken to resolve them. Ms Chetty was satisfied that the conflict of interest had been resolved and the issue regarding the rounding-off of the scores had been sufficiently addressed through the confirmation received from National Treasury.

[1268] Transcript 24 May 2019, p 51-59; and Exh BB6, SC-002-004, paras 7-11 and Annexures SC9-15

The reversal of the award to Neotel

896. After Ms Chetty approved the award to Neotel and signed the letters of intent and regret, Mr Pita requested Mr Van der Westhuizen not to issue the letters, as he had been directed by Mr Singh not to do so, on the instruction of Mr Molefe, who was abroad at that stage and apparently wished to review the process upon his return.[1269] Neotel was then requested to continue providing the services.[1270]

897. During November 2013, Mr Van der Westhuizen was called to a meeting with Mr Molefe, Mr Matooane, Mr Thomas and Mr Singh. When he arrived for the meeting, he was requested by Mr Molefe's personal assistant to hand over his cellular phone to her before entering his office.[1271] The other attendees were requested to do the same. He thought this was strange as he had previously attended meetings in Mr Molefe's office and had not been requested to hand in his phone.[1272] During the meeting,[1273] Mr Molefe indicated that he did not support the recommendation to issue a LOI to Neotel as the preferred bidder for various reasons which he later set out in a memorandum dated 20 November 2013. Mr Van der Westhuizen did not agree and raised various objections which Mr Molefe ignored. Mr Van der Westhuizen realised that his viewpoint was not being well received and decided in the interests of his career to refrain from challenging Mr Molefe.[1274]

[1269] Transcript 27 May 2019, p 45-46

[1270] Annexure J, Exh BB7(b), GJJVDW-326

[1271] Mr Molefe confirmed during his testimony that he had requested the handover of cell phones because he feared outside persons would listen in or the meeting would be taped by one of the participants - Transcript 10 March 2021, p 109-110.

[1272] Transcript 27 May 2019, p 47

[1273] Transcript 27 May 2019, p 48 *et seq*

[1274] Transcript 27 May 2019, p 64

898. Mr Van der Westhuizen saw the collaboration between T-Systems and BBI, of which Mr Essa at that time was a director,[1275] as factoring into Mr Molefe's decision.[1276] During his evidence, Mr Molefe admitted knowing that BBI was an SOE but denied knowing that Mr Essa was a director of it.[1277] Mr Essa was involved in other companies associated with T-Systems, besides BBI. As explained, T-Systems had been appointed by Transnet to manage part of its IT infrastructure. In 2013-2014 Transnet Group Capital leased approximately 2200 computers through the T-Systems contract. Despite paying for 2200 computers only 1100 were employed. The contract for the computers was ceded[1278] on 1 December 2014 initially to Zestilor (Pty) Ltd ("Zestilor") the company of Ms Osmany who is married to Mr Essa. Mr Molefe signed the cession to Zestilor on behalf of Transnet.[1279] Mr Molefe denied knowing Mr Essa or his wife or of her interests in Zestilor.[1280]

899. After the meeting, Mr Singh instructed Mr Van der Westhuizen to draft a memorandum to record the outcome of the meeting. Mr Van der Westhuizen then prepared a draft memorandum, which was signed by Mr Molefe and sent to Mr Singh, Mr Matooane and Mr Pita on 20 November 2013. The memorandum[1281] overturned the decision of Ms Chetty to award the tender to Neotel and awarded it instead to T-Systems. Mr Molefe specifically approved taking the R248 million into consideration as part of T-Systems' best and final offer ("BAFO") and referred to the following: i) Neotel had indicated an intention to sell the network assets to

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[1275] Annexure L1, Exh BB7(b), GJJVDW-349; and Transcript 10 March 2021, p 115-116

[1276] Exh BB7(a), GJJVDW-009, para 33

[1277] Transcript 10 March 2021, p 114

[1278] Annexure MSM 40, Exh BB3(b), MSM-580

[1279] Exh BB3(a), MSM-031, para 5.12.3; Transcript 10 March 2021, p 118-123; and Transnet-05-405.89

[1280] Transcript 10 March 2021, p 124

[1281] Annexure K2, Exh BB7(b), GJJVDW-331

Vodacom; ii) the concentration risk arising from Transnet being Neotel's largest client; iii) information that Neotel had diluted black ownership of the company; iv) an information security incident at Neotel that had exposed Transnet to unnecessary risk; and v) problems with the functioning of Neotel's security cameras in the ports. Mr Molefe recorded his view that awarding the business to Neotel would expose Transnet to unnecessary risk.[1282]

900. Management, including the technical experts, were of the view that the perceived risks had been mitigated and that these risks posed no obstacle to the award to Neotel and provided no basis for excluding Neotel.[1283] The counterparty risk was mitigated by the possible benefits of convergence with Vodacom and could also have been firmed up in the contractual negotiations. Concentration was not a serious risk as Transnet only contributed 15% of Neotel's revenue. Awarding the bid to T-Systems would have increased the concentration risk since T-Systems already managed Transnet's Data Centre. The due diligence report also indicated an amber status for T-Systems which indicated a risk of them not adequately supplying the service to Transnet. Moreover, the B-BBEE component was part of the evaluation criteria and considered in arriving at the recommendation. It should not have been considered again in isolation from the other evaluation criteria. The report that Neotel was busy diluting its shareholders to the detriment of its B-BBEE partners was a mere allegation to which Neotel had not been given an opportunity to respond.[1284]

901. As for the information security incident, in terms of the Procurement Procedures Manual ("PPM") unless a bidder has been disqualified or backlisted it is not

[1282] Annexure K2, Exh BB7(b), GJJVDW-336, para 20

[1283] Annexure PV 18, Exh BB2.1(c), PSV-0992

[1284] Transcript 27 May 2019, p 50, lines 1-10

permissible to use previous contract experience not to award business to the bidder if the process followed was fair and transparent. The incident mentioned should have been managed through the current contract and not used to prejudice the bidder. Likewise, with the CCTV network issues. This should have been dealt with contractually with Neotel.[1285] Mr Molefe's reliance on the identified risks was thus inappropriate.[1286]

902. Mr Molefe justified his decision on the basis of the BADC's delegation of authority to him and stated (for the first time during his evidence)[1287] that he was entitled to reverse the award because Ms Chetty had made the award conditional upon Neotel giving certain assurances about its relationship with Vodacom.[1288] There is no evidence of such conditions. However, and more importantly, the powers vested in the GCEO by the BADC to award business to Neotel had already been exercised by the acting GCEO, Ms Chetty, and could not be exercised again or rescinded. Ms Chetty had exercised the power sub-delegated to the GCEO by the BADC.[1289] The BADC did not delegate the approval authority for the MSA to Mr Molefe personally, but rather to the holder of the post. The decision was also taken in a procedurally unfair manner. Neotel was not afforded an opportunity to make representations regarding the rescission.

903. Finally, as Mr Van der Westhuizen had told Mr Molefe in the meeting, it was inappropriate to take into account T-System's offer to reduce the price by a further R248 million because that gave T-Systems an opportunity to improve its pricing after the BAFO stage had closed without re-opening price negotiations for the other

[1285] Transcript 24 May 2019, p 79

[1286] Transcript 24 May 2019, p 78 *et seq*

[1287] Transcript 10 March 2021, p 101-103

[1288] Transcript 10 March 2021,p 95-97

[1289] Transcript 9 May 2019, p 166-172

bidders. The decision thus violated the principles of equal treatment and fairness.[1290] Even if the R248 million discount offered by T-Systems and BBI was taken into account, T-Systems would still only be the second best bidder, after Neotel. Mr Molefe admitted during his testimony that he was wrong to have taken the proposed price reduction into account.[1291]

904. On 20 November 2013 pursuant to Mr Molefe's decision, letters of regret were issued to Neotel, Telkom, Dimension Data and Vodacom and a LOI was issued to T-Systems, informing it that it had been identified as the preferred bidder and inviting it to post tender negotiations to conclude an MSA.[1292] Neotel wrote to Mr Molefe to obtain clarity but did not challenge the award of the tender to T-Systems.[1293]

The procurement of equipment from Cisco and the first payment to Homix

905. The award of the preferred bidder status to T-Systems by Mr Molefe made it necessary to plan for a transition of network services from Neotel to T-Systems. At the time, Neotel was still managing the ICT network and the relationship between it and Transnet had become strained. Mr Molefe was obliged to extend the 2007 MSA on 11 December 2013 for a period of 12 months at a substantially increased monthly fee.[1294] Having sold its network assets to Neotel in 2007, Transnet was in a weak bargaining position.[1295] Neotel also advised that certain network equipment had reached end-of-life and needed to be replaced. Transnet accordingly engaged with Neotel in an effort to purchase or lease the network related hardware and

[1290] Transcript 9 May 2019, p 189-191

[1291] Transcript 10 March 2021, p 106, line 23

[1292] Annexure PV17, Exh BB2.1(c), PSV-0990; and Annexures K3 and K4, Exh BB7(b), GJJVDW-338-346

[1293] Transcript 27 May 2019, p 80 *et seq*; and Exh BB7(a), GJJVDW-010-011, paras 34-40

[1294] Annexure O3, Exh BB7(b), GJJVDW-421-423; and Transcript 27 May 2019, p 83-84

[1295] Transcript 27 May 2019, p 86-88

infrastructure deployed in the yards and ports of Transnet. Neotel was not amenable to the sale of these assets due to the fact that they had been securitised. It was also reluctant to replace any equipment during the extension period as the duration of the extension was uncertain.[1296]

906. On 21 February 2014 Mr Van der Westhuizen addressed a memorandum to Mr Singh requesting approval to procure equipment (switches and routers for all Transnet campuses) from Cisco via Neotel (which had an exclusivity agreement) to a maximum value of R305 million.[1297] T-Systems undertook to remove this cost from their tender.[1298] Mr Singh approved the request on 21 February 2014 and Mr Van der Westhuizen immediately directed Mr Francois Van der Merwe, the executive at Neotel responsible for the Transnet account,[1299] to proceed with ordering the equipment from Cisco.[1300]

907. On the same day, 21 February 2014, Mr Taufique Hasware Khan, the CFO of Homix (a company associated with Mr Essa), sent an email[1301] to Mr Van der Merwe at Neotel which read:

> "Enclosed please find a copy of the letter which was faxed to you on Jan 6 2014. We would request you to kindly revert on the proposal outlined in the letter at your earliest convenience."

908. The letter attached to the email read:

> "Following our discussions, we are pleased to confirm that we are in a position to deliver on an opportunity at Transnet that we have been working on for some time.

[1296] Transcript 27 May 2019, p 150 *et seq*
[1297] Annexure W2, Exh BB7(b), GJJVDW-525
[1298] Transcript 27 May 2019, p 151, line 20
[1299] Transcript 27 May 2019, p 155
[1300] Annexure W5, Exh BB7(b), GJJVDW-544
[1301] Annexure W3, Exh BB7(b), GJJVDW-539

> The opportunity involves replacement of Network Equipment for a value of approximately R315 million excluding VAT. The full details of the opportunity will be disclosed to you after we have agreed on the conditions of the deal as listed below.
>
> We are in a position to offer Advisory Services to Neotel for this opportunity and ensure that support from the current contract holder is obtained to facilitate a direct award of the Contract from Transnet to Neotel.
>
> In lieu of the services so provided to Neotel, and in consideration of the risk factor undertaken by us in the entire project, we would request a success fee to be paid to us to the value of 10% of the contract, excluding VAT, payable to us within 14 days from the date of the award of Contract to Neotel.
>
> Please advise if you are in agreement with our proposal. In the affirmative, please advise if you wish to enter into a separate agreement pursuant to this letter to enable all stakeholders to have a level of comfort with respect to the deal." [1302]

909. The next day, 22 February 2014, Mr Van der Merwe emailed Mr Khan at Homix attaching a letter of acceptance that read:

> "We hereby confirm our acceptance in principle of the proposal on the conditions stipulated by you in paragraph 5 of the proposal that the parties enter into a detailed written agreement pursuant to the proposal which detailed agreement will contain the terms of the proposal and incorporate other commercial terms pertinent to transactions of this nature. The parties shall conclude such detailed agreement within fourteen days of the date of this letter."[1303]

910. Mr Van der Westhuizen testified that he had not met any person or representative from Homix during the interaction with Neotel on the Cisco switches transaction. It was unclear to him how Homix identified this "opportunity" and was surprised that Homix knew about the approval of the transaction by Mr Singh on the very day of approval.[1304] He doubted whether Homix could have added any value. The

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[1302] Annexure W4, Exh BB7(b), GJJVDW-541

[1303] Transcript 27 May 2019, p 157, line 12

[1304] Transcript 27 May 2019, p 156

exclusivity arrangement obliged Transnet to procure network equipment from Neotel and thus Neotel would have had no need at all for any services from Homix. Moreover, if there had been a genuine need for Homix's facilitation services on the Cisco transaction, it would have been brought to Mr Van der Westhuizen's attention as he was the team leader of the commercial team. This did not happen, which strongly intimates that no facilitation by Homix in fact took place .[1305]

911. A fee of R30.3 million (excluding VAT) was nonetheless paid by Neotel to Homix in respect of its alleged rendering of services in the Cisco transaction.[1306] There is no documentary evidence supporting this payment. However, the evidence of Mr Mazibuko, Head of Financial Surveillance at the SARB, confirms that Homix was paid R75.5 million by Neotel in 2015.[1307] This amount seems to be made up of the payment for the Cisco transaction and the payment in terms of a business consultancy agreement that is discussed below. It is likely that the additional cost was passed on to Transnet.[1308]

912. In the premises, there are reasonable grounds to believe that Mr Khan at Homix, Mr Van der Merwe at Neotel, and perhaps others, committed the offence of corruption relating to procuring the tender of R305 million from Transnet, as contemplated in section 13 of PRECCA. Mr Khan offered to accept a 10% commission, ultimately R30.3 million, (a gratification) from Neotel as an inducement (by influencing persons at Transnet) to award a tender for supplying the Cisco equipment. As Homix was an entity associated in fact with the Gupta enterprise, the planned participation and involvement in that corruption may be relied on to establish that Homix, Mr Khan, Mr Van der Merwe, Neotel, and

[1305] Transcript 27 May 2019, p 162-165

[1306] Exh BB9, CV-025, para 86

[1307] Exh BB12, SEM-025, para 72.2

[1308] Transcript 27 May 2019, p 165, lines 10-20

possibly some officials at Transnet, by virtue of their involvement with this transaction, were associated with and participated in the affairs of the Gupta racketeering enterprise through a pattern of racketeering activity, and hence committed the offence envisaged in section 2(1)(e) of POCA. The likely offences should accordingly be referred in terms of TOR 7 for further investigation by the law enforcement authorities.

The decision to reverse the award of preferred bidder status to T-Systems

913. During April 2014 Transnet's external auditors reported that T-Systems should have been disqualified from the tender due to the conflict of interest issue and the rounding-off issue.[1309] They also questioned Mr Molefe's authority to revoke the award and expressed the view that the factors which Mr Molefe took into consideration undermined the fairness and transparency of the tender process.[1310]

914. After considering various legal opinions and representations received from T-Systems, Mr Molefe took a decision to revoke its status as preferred bidder.[1311] The concerns of the auditors and the three legal opinions were set out in a memorandum from Mr Singh and Mr Pita to Mr Molefe in early June 2014, which recommended that Mr Molefe revoke T-System's status as preferred bidder. Mr Molefe approved the request by signing the memorandum on 6 June 2014.[1312] T-Systems accepted and consented to the revocation of its preferred bidder status.[1313] The award of the tender was then made to Neotel. On 1 July 2014 Mr

[1309] Exh BB2.1(a), PSV-0043, para 95

[1310] Annexure PV 20, Exh BB2.1(c), PSV-1007

[1311] Annexure PV 24, Exh BB2.1(c), PSV-1051

[1312] Annexure Q1, Exh BB7(a), GJJVDW-435

[1313] Annexure PV24, Exh BB2.1(c), PSV-1052

Singh and Mr Molefe addressed a memorandum to the BADC explaining what had transpired in relation to the tender.[1314]

915. Mr Molefe's conduct in relation to the tender for the 2014 MSA is questionable and of relevance on two fronts. Together with the inappropriate rounding-off of the scores favouring T-Systems, the reliance on the belated offer by BBi to reduce its price by R248 million, his dubious rationale for rescinding the award to Neotel, the supposed risks, and his refusal to entertain the opposition of the business owner to his irregular conduct, all exhibit a lack of honesty and integrity not in the best interests of Transnet in the managing of its financial affairs. The award of preferred bidder status to T-Systems was not fair and would have amounted to expenditure not complying with the operational policies of Transnet. There are strong reasonable grounds to believe that his conduct was in contravention of section 50(1)(b) and section 51(1)(b)(ii) of the PFMA and of evidential value in establishing that he was one of the individuals "associated in fact" with the other persons of the union or group constituting the Gupta "enterprise" and participated in the conduct of the enterprise's affairs through a pattern of racketeering established by his involvement in other Schedule 1 offences not linked to this particular tender.

The **2014 MSA negotiations**

916. The negotiations with Neotel to finalise the 2014 MSA took place in the final quarter of 2014. There were two streams in the negotiations: a commercial stream and a technical stream. Mr Van der Westhuizen led the negotiation team in the commercial stream. A contentious issue during the negotiations was the buyback by Transnet of its ICT network assets and infrastructure. Transnet sought to re-

[1314] Annexure PV25, Exh BB2.1(c), PSV-1053-1064

acquire ownership of the equipment and infrastructure that it had imprudently sold to Neotel as part of the Transtel sale.

917. The negotiations were difficult and at a point in time there was a temporary stalemate when the negotiations came to a standstill as a result of the inability of Transnet and Neotel to find agreement on a number of issues.[1315] In an attempt to resolve the stalemate, Mr Singh became involved as did Mr Sunil Joshi, the CEO of Neotel. A meeting took place between Mr Van der Merwe from Neotel and Mr Singh, on 8 December 2014, in Umhlanga. Mr Van der Westhuizen was unaware of the purpose of that meeting or why the Transnet GCFO would meet directly with the supplier during the contractual negotiations without including anyone from the Transnet negotiating team. Mr Singh testified that he could not recall the meeting.[1316]

918. Three days later, on 11 December 2014, another meeting took place at the "SLOW Lounge" in Sandton attended by Mr Van der Westhuizen and Mr Singh from Transnet and Mr Joshi and Mr Van der Merwe from Neotel. Mr Singh testified that the meeting was proposed either by Mr Van der Westhuizen or the negotiating team. A long list of issues still needed to be finalised and the negotiations had become strained. Mr Singh testified that a meeting was justified and there was nothing untoward in meeting Mr Joshi to discuss the matter because a stalemate had been reached by the two parties. It was necessary to engage with Neotel constructively at a senior management level to regularise the relationship.[1317] At some stage during this meeting, Mr Singh and Mr Joshi met separately to discuss

[1315] See Exh BB7(a), GJJVDW-014-015, para 49.4

[1316] Transcript 17 June 2021, p 175

[1317] Transcript 17 June 2021, p 163-176

the final terms of the repurchase of the network assets and infrastructure. Mr Van der Westhuizen was not provided with feedback after this breakaway meeting.[1318]

919. A final meeting to finalise the MSA took place on Saturday 13 December 2014 at the offices of Neotel. When all was done, Mr Van der Westhuizen gave Mr Singh the final draft of the negotiated MSA and relevant approval documents. That day was Mr Van der Westhuizen's last day in the employment of Transnet. The 2014 MSA was signed by Transnet on 15 December 2014 and by Neotel on 19 December 2014.[1319]

920. Clause 25 of the 2014 MSA governed the asset buy-back issue. It dealt with distinct classes of assets differently. It provided inter *alia* that on the termination or expiration of the MSA, Transnet could exercise its rights to purchase any Service Provider Owned Equipment dedicated to the provision of services in accordance with clause 54.3.6 of the 2014 MSA. Clause 54.3.6 essentially provided that if and as requested by Transnet, as part of the disengagement, Neotel would convey to Transnet (from among those dedicated assets used by Neotel to provide the services) such assets as Transnet might select at specified prices. Further, in terms of clause 25.4, Neotel agreed to sell immediately to Transnet the assets identified in Attachment P to the agreement, used exclusively to provide services to Transnet and physically held within Transnet premises, for an amount of R200 million. Evidently then, the asset buy-back had been successfully resolved by Monday 15 December 2014 when Transnet signed the 2014 MSA.

[1318] Transcript 27 May 2019, p 102-106; and Exh BB7(a), GJJVDW 016-017, paras 51-55

[1319] Annexure V4, Exh BB7(c), GJJVDW–SUP-003-178

The business consultancy agreements between Neotel and Homix

921. On Friday 12 December 2014, unknown to Mr Van der Westhuizen, the CFO of Homix, Mr Khan (who was also associated with BEX, the Gupta linked company that benefited from the relocation of CNR to Durban), addressed a letter to Mr Joshi which read:

> "This letter serves to confirm today's engagement with Neotel pertaining to their Master Services Agreement and the related Asset Sale Negotiation with Transnet SOC. The talks have reached an impasse and Neotel wishes to engage the services of Homix to analyse both entities requirements to find a workable solution.
>
> The work is to be carried out on a Pure Risk basis and Homix shall not bill for any time and material or any out of pocket expense. If successful, Neotel shall pay Homix:
>
> - For the Asset Sale a Full and Final once off fee of R25 000 000 (Twenty Five Million Rand), payable 30 days after signature.
> - For the Master Services Agreement a fee of 2% of the contract (currently at R1.8 billion).
> - These fees are excluding VAT.
>
> These Fees are Success Fee Commissions payable because of the assistance and expertise provided by Homix enabling Neotel to close these two deals that are currently agreed to be lost business as confirmed by both Neotel and Transnet.
>
> Please concur the above together with the success-fee structure, where the latter shall become binding on Neotel."[1320]

922. This proposal by Homix thus envisaged that Neotel would pay Homix two amounts totalling R61 million: R25 million for the asset buy-back agreement and R36 million (2% of R1.8 billion) on conclusion of the MSA. The letter was sent by Homix shortly after Mr Van der Merwe on 11 December 2014 shared confidential Neotel

[1320] Annexure V3, Exh BB7(b), GJJVDW- 519

documents with Homix, including a briefing document for Mr Joshi, the CEO of Neotel, in preparation for his meeting with Transnet later that day.[1321]

923. The assertion in the letter that the two deals (the 2014 MSA and the asset buy-back) were "lost business" on Friday 12 December 2014 (and confirmed as such by both Neotel and Transnet) is not credible considering that both deals were closed the next day (Saturday 13 December 2014) and signed by Transnet on Monday 15 December 2014. It seems improbable that services of Homix to the value of R61 million were either necessary or rendered in the 24 hours from Homix's proposal to the conclusion of the 2014 MSA and asset buy-back.

924. Mr Joshi signed two "business consultancy agreements" with Homix, which are annexed to the statement of Mr Van der Westhuizen and are referred to hereafter for convenience respectively as "Annexure V1" and "Annexure V2" - on 19 February 2015, two months after the 2014 MSA and asset buy-back was concluded.[1322] Both are signed and dated by Mr Joshi, and signed but not dated by Mr Khan.[1323] Neotel paid Homix R41.04 million (being R36 million plus VAT of R5 040 000) on 27 February 2015.[1324]

925. Although the preamble and other clauses intimate that the two agreements were concluded in respect of future services, the other terms of the agreements indicate that in important respects they related to the 2014 MSA and the asset buy-back which had been concluded two months earlier. Thus clause 4.1 of Annexure V1 provided that Homix undertook to facilitate the successful conclusion of the asset sale referred to in the MSA concluded between Neotel and Transnet and clause

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[1321] Annexure CV14, Exh BB9, CV-090

[1322] Annexure V1, Exh BB7(b), GJJVDW-493; and Annexure V2, Exh BB7(b), GJJVDW-506

[1323] Annexure V2, Exh BB7(b), GJJVDW-504 and 517

[1324] See Exh BB9, CV-004, paras 9-10

4.2 defined the "Project" to mean "the successful conclusion and signature of the asset sale".

926. Clause 6 of Annexure V1 dealt with the fees payable to Homix. It provided for the payment of a fee of R25 million for the successful implementation and finalization of an operational agreement relating to the assets bought by Transnet from Neotel. The fee was stated to be "a success fee commission payable because of the assistance and expertise provided by the Consultant enabling Neotel to successfully close the Project which Project is currently agreed to be lost business as confirmed by both Neotel and Transnet..." Satisfactory performance would be evidenced by the successful conclusion of an agreement giving effect to the sale of assets as contemplated in the MSA concluded between Neotel and Transnet on 19 December 2014, and confirmation and agreement of a related asset sale and the conclusion of an operational agreement in that regard by no later than 18 March 2015. It was agreed further that Homix would only become entitled to a fee upon payment by Transnet to Neotel of the upfront payments agreed to in the MSA, suggesting that it had been factored as a cost into the 2014 MSA.[1325]

927. Annexure V1 was thus restricted to the asset buy-back agreed in principle in the 2014 MSA. Clause 6 of Annexure V1 recognised that, but in contradictory fashion, described the issue as "lost business" and provided for an "operational agreement" to be concluded by 18 March 2015, presumably to rescue that "lost business". That characterisation of the services to be rendered under Annexure V1 is inconsistent with the tenor and express terms of clause 25 of the 2014 MSA which on the face of it constituted an adequate contractual mechanism making provision for the asset buy-back.

[1325] Transcript 27 May 2019, p 143-45

928. Although Annexure V1 was signed by both Neotel and Homix, no fee appears to have been paid to Homix in terms of it. Moreover, there is no evidence that the contemplated "operational agreement" was concluded by 18 March 2015.

929. Annexure V2, the second "business consultancy agreement", is almost identical to Annexure V1, except that clauses 4 and 6 differ significantly. Clause 4 of Annexure V2 defined the "consultancy services" as follows:

> "The Consultant agrees to undertake to analyse the requirements of both Neotel and Transnet SOC to find a workable solution to the impasse in negotiations between Neotel and Transnet in regard to their Master Services Agreement."

930. Clause 6 of Annexure V2 provided for a success fee of "2% of the value of the contract (currently at R1.8 billion)" for the successful conclusion of the MSA and "the assistance and expertise provided by the Consultant enabling Neotel to successfully close the Master Services Agreement currently agreed to be lost business as confirmed by both Neotel and Transnet..." The payment was also conditional upon payment by Transnet to Neotel of the upfront payments agreed to in the MSA.

931. It is notable that Annexure V2 characterised the MSA as "lost business", two months after the satisfactory conclusion of it. It also spoke about the MSA prospectively as if it had not been concluded with the entitlement to a fee vesting at some future date on conclusion and signature of a contract that had already been concluded. These aspects point to the inauthentic, fraudulent and corrupt nature of this contract.

932. The amount payable under Annexure V2 was R41.04 million (being R36 million plus VAT of R5 040 000). There is an invoice for this amount addressed by Homix

to Neotel dated 2 January 2015 included in Annexure V1.[1326] It is stated to be for "Master Services Agreement Successful Conclusion Success Fee". As mentioned, this amount was paid to Homix by Neotel on 27 February 2015, about a week after Annexures V1 and V2 were signed by Mr Joshi and Mr Khan.

933. Mr Van der Westhuizen, who successfully led the negotiation of the MSA to a conclusion on 13 December 2014 (the day after Homix's initial letter proposing a business consultancy agreement with Neotel) was unaware of the existence of Homix at the time he closed the deal. He said that he subsequently learned in the media that Homix was paid by Neotel for allegedly facilitating negotiations between Neotel and Transnet. He testified that he never met or had anything to do with any person or representative of Homix during the negotiations with Neotel.[1327] No member of his team had anything to do with any person from Homix during the negotiations or on the day prior to or of the closing of the deal.[1328] He said that the reference in the letter of 12 December 2014 to "lost business" and the representation of the negotiations as being at "impasse" was nonsensical in the light of the successful conclusion of the deal the next day. The idea that any representative from Homix would have been able to get the parties to reach agreement within a single day is implausible.[1329]

[1326] Transcript 27 May 2019, p 136-136; Annexure V1, Exh BB7(b), GJJVDW-493 at p 505

[1327] Transcript 27 May 2019, p 107; and Exh BB7(a), GJJVDW-017, para 56; and Transcript 27 May 2019, p 111-147

[1328] Transcript 27 May 2019, p 140-141 – Mr Van der Westhuizen could not recall all the persons present in the final hours of the negotiations; he mentioned: Mr Maluleke (Procurement), Mr "Belfie" (Supplier Development), Mr McLaren (External Consultant), Mr Matthews (Gartner), Mr Molebatsi (External Legal), Mr Clara (Neotel) and Mr Van der Merwe (Neotel). None of them mentioned any contact with Homix.

[1329] Transcript 27 May 2019, p 142

934. Mr Singh could not confirm that Homix had performed in terms of the agreements and had no idea why Neotel had paid Homix R41 million. He testified that he had no interaction with Homix.[1330]

Homix's justification of its fee of R4104 million

935. After the auditors of Neotel, Deloitte, queried this transaction, Neotel was compelled to conduct an investigation into it. During the course of that investigation, Mr Ashok Narayan of Homix wrote a letter to Mr Joshi dated 2 July 2015 justifying the fee it received.[1331] No witness for Homix has testified before the Commission regarding the content of this letter. It is nonetheless the only account of Homix's version on record.[1332]

936. The letter commences with the inaccurate statement that "both the Asset Sale and the MSA were covered under a single Agreement between Homix and Neotel." That is not correct. There were two agreements – Annexure V1 and Annexure V2. Moreover, the fee (R36 million) paid to Homix in terms of the invoice of 2 January 2015 was limited to a "success fee" for the successful conclusion of the MSA. No fee was paid (R25 million) for the asset buy-back. The letter sets out that Mr Van der Merwe met Homix's representative, Mr Mandia, at JB's Restaurant in Melrose Arch (the same restaurant at which Mr Bester of Hatch met Mr Essa in relation to Transnet's MEP project) on 11 December 2014. At the meeting Mr Van der Merwe "requested consulting assistance with a fresh perspective to help Neotel close the deal". The following day, 12 December 2014, Mr Van der Merwe and Mr Mandia met again and agreed on a fee of 2%. The letter sets out the services rendered over three days supposedly justifying a fee of R36 million as follows:

[1330] Transcript 17 June 2021, p 173-174

[1331] Annexure CV 15, Exh BB9, CV-105

[1332] The letter is discussed by Mr Vaghela the Deloitte auditor at Transcript 11 June 2019, p 110 *et seq*

"Dec 11 2014 – Homix deputed senior consultants with a high level of Telecom expertise to quickly de-construct the deal with a view to understand both parties' view of the transaction. After the team reported back, it became evident to Homix that the conceptual understanding from the Transnet negotiation team (senior managers) was not the same as the view given by Neotel. Thus Homix immediately realised that they could add value by finding a lever that could possibly help Neotel to negotiate an agreed position.

Dec 12 2014 – Subsequent to receiving verbal confirmation from FvdM, we immediately assigned our senior consultants, who were on standby, to work round the clock and conduct intensive research from various sources, with a view to find the lever that would help Neotel get back to the negotiating table and bring all on the same page on the real issues. Fortunately, our team was successful in coming up with a tangible solution which pinpointed several key factors and a principal lever (as detailed below) that FvdM could use. FvdM subsequently used the material provided to interact with Transnet. We also advised FvdM to adopt an urgent approach with Transnet citing the grounds that Transnet were scheduled to go on leave and if this matter was not urgently resolved, the extension period would kick in and Transnet would be liable for wasteful expenditure, which would be reported to Parliament. Using this approach, FvdM was able to convince the Transnet negotiating team and executives to agree on a course of action and minimum terms with deadlines no later than Monday the next week. This was Homix's first step to get both parties back to the negotiating table.

Dec 12 2014 – Homix advised FvdM to facilitate a meeting between Transnet CFO and the Neotel CEO, which he did. The meeting took place and both stakeholders agreed that their respective teams would meet on Dec 13 2014 and not leave until they addressed all issues outstanding. In this context, Homix strongly advised FvdM to ensure that the Neotel executive decision makers be present in the meeting to ensure immediate decisions could be taken.

Finally, due to Homix's intervention, both parties understood each other's position and now that the executives were on the same page, agreement was reached on the outstanding points of dissension."

937. The first observation that can be made about this explanation, besides its lack of specificity, is that it implies that Homix consulted with Transnet senior managers to assess the problem. The letter does not disclose who at Homix engaged with whom at Transnet and Neotel, besides Mr Van der Merwe. Mr Van der Westhuizen

made it clear that neither he nor any member of his team knew of the existence of Homix or discussed the 2014 MSA or asset buy-back with it. Mr Singh confirmed that. Secondly, the claim that research by unidentified senior consultants (with unstated expertise) unearthed "a lever" is not substantiated. The auditors were unable to find any evidence that corroborated any of the assertions in the letter.[1333]

938. Furthermore, the advice allegedly given by Homix was so banal as to render the explanation wholly incredible. What it boils down to is that Homix advised Mr Van der Merwe, an experienced manager with negotiating experience, to: i) act urgently to avoid censure by Parliament; ii) arrange a meeting between Mr Singh and Mr Joshi; and iii) ensure the presence of Neotel executives in the negotiations. This intervention, together with the pinpointing of "several key factors and a principal lever", Homix contended led both parties to understand each other's positions and reach agreement without further difficulty, thus justifying a fee of R36 million. It achieved this result without meeting with or consulting a single member of the Transnet team and by limiting its contact with Neotel to one or two meetings with Mr Van der Merwe.

939. The lever supposedly unearthed related to the asset-buy back and to the trite considerations of the preferred duration of the 2014 MSA and the financing of the asset buy-back. Clause 25.4 of the 2014 MSA (the terms of which would have been agreed on 13 December 2014) provided for an asset buy-back of R200 million. That was simply not the result of any effort by Homix. Importantly though, the fee of R36 million paid to Homix was not paid in terms of Annexure V1 but in terms of Annexure V2. The agreement under Annexure V1 was to pay R25 million for "the successful implementation and finalization of an operational

[1333] Transcript 11 June 2019, p 116, line 20

agreement" relating to the asset buy-back. No operational agreement is on record and that fee was never paid - though it may have reflected in the accounts as an accrual.[1334] One may assume that if Homix had played a role in agreeing the asset buy-back, it would have immediately submitted an invoice for it. There is no invoice for the R25 million on record.

940. The supposed "value add" by the intervention of Homix in the last hours of the negotiations is wholly improbable and a likely *ex post facto* false justification of a corrupt payment made to the Gupta enterprise as part of a pattern of racketeering activity. The whole story in the letter is a complete fabrication.

941. Mr Van der Westhuizen was not able to say whether Neotel inflated its price in order to use the additional money to pay the fee to Homix.[1335] He did consider the final price to be excessive, but Transnet was in a weak bargaining position because Neotel was in possession of the network assets, the 2007 MSA was about to expire and a further extension of the 2007 MSA would have been expensive.[1336]

942. In paying the R41.04 million to Homix, Neotel breached clause 65.6 of the 2014 MSA which included a warranty against corrupt payments and permitted Transnet to cancel the 2014 MSA. There are strong grounds to conclude that Neotel and Homix were involved in fraud and corruption.

The **Deloitte investigation** of the **Homix** transactions

943. During the audit of Neotel for the 2015 financial year, Neotel's auditors, Deloitte, became concerned that the payments by Neotel to Homix were irregular. As part of

[1334] Transcript 11 June 2019, p 67-69

[1335] Transcript 27 May 2019, p 143-144

[1336] Transcript 27 May 2019, p 146-147

its routine audit testing, the Deloitte audit team was provided with a creditors' age analysis at 28 February 2015, which identified Homix as a new vendor and reflected a debit balance of an amount of R41.04 million which was not disclosed properly in the financial statements.[1337] The incomplete and questionable nature of the available information prompted Mr Andre Dennis and Mr Vaghela of Deloitte to meet with Mr Steven Whiley the CFO of Neotel on 9 April 2015, and with Mr Joshi and Mr Whiley again on 11 April 2015.[1338]

944. Mr Joshi and Mr Whiley confirmed that Neotel had made two payments to Homix during the 2015 financial year totalling R75.57 million: an amount of R34.53 million was paid on 3 April 2014 in relation to the Cisco deal and R41.04 million was paid on 27 February 2015 in relation to the MSA.[1339] The controls applied by Neotel for the loading of creditors on its system were not followed in respect of Homix. The contract with Homix in relation to the 2014 MSA was concluded by Mr Joshi, without board approval and in the opinion of the auditors fell outside the scope of his authority. The payments were approved by both Mr Whiley and Mr Joshi.[1340] They explained to the auditors that Homix had come on board on 12 December 2014 to assist with the supposed impasse in the 2014 MSA negotiations and was paid R41.04 million for one day's work. The suggestion to use Homix had come from Mr Van der Merwe. Neither Mr Joshi nor Mr Whiley could offer much in the way of description or explanation of the work performed by Homix other than to say that it had resolved the impasse.[1341]

[1337] Transcript 11 June 2019,p 9-10

[1338] Annexure CV1, Exh BB9, CV-030; and Annexure CV2, Exh BB9, CV-032

[1339] Transcript 11 June 2019,p 17-20

[1340] Transcript 11 June 2019,p 55-56; and Exh BB9, CV-10-11, para 38

[1341] Transcript 11 June 2019,p 25

945. Mr Vaghela met with Mr Van der Merwe on 13 April 2015.[1342] He became aware of Homix for the first time when he received the letter from Homix in early 2014 notifying him of the Cisco deal for which Neotel had not been invited to tender. This explanation is inconsistent with the fact that Transnet was tied into an exclusive supplier agreement with Neotel and thus did not need to tender. Mr Van der Merwe claimed Homix was a Dubai based company offering specialised consultancy services with a staff of 100 employees and offices in Silverton, Pretoria. He usually met with Homix, particularly Mr Ashok Puthenveedu, at Melrose Arch.[1343] Mr Van der Merwe believed that the fee of R41.04 million for work of one or two days by Homix was justifiable. The Deloitte audit team doubted the commerciality of the fee paid and assumed it was a "facilitation payment" (a payment of a fee for no value).[1344]

946. Subsequent investigations established that Homix was a shell company with little or no resources.[1345] A CIPC search on the registration number of Homix returned no result; telephone calls made to the specified contact details were unanswered; an internet search on the registered address of Homix returned the address as being registered to a charity; and the website address mentioned in the Homix contract did not return a valid webpage. Searches on Mr Puthenveedu revealed that he was associated with Sahara Computers, a company linked to the Gupta enterprise.[1346]

947. The auditors were of the opini on that Mr Joshi had breached the Neotel delegation of authority when he authorised the transaction and payment to Homix without

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[1342] See the minutes - Annexure CV3, Exh BB9, CV-034; and Transcript 11 June 2019, p 38 *et seq*

[1343] Transcript 11 June 2019, p 41-48

[1344] Transcript 11 June 2019, p 31, line 20

[1345] Transcript 11 June 2019, p 31, line 10

[1346] Transcript 11 June 2019,p 50-51; and Exh BB9, CV-009, para 35

board approval, breached section 76(3) of the Companies Act, obliging him to act in the best interests of Neotel, and that the payment made by Neotel to Homix caused material financial loss to Neotel. Deloitte then, on 28 April 2015, reported a reportable irregularity ("the first RI") to the IRBA in terms of section 45 of the Auditing Profession Act ("APA").[1347]

948. Further engagements and correspondence[1348] did not lead to a satisfactory resolution. However, subsequent to a special audit committee meeting, the board of Neotel initiated an independent professional investigation into the transaction by Werksmans Attorneys. During the investigation, on 19 May 2015 (a few weeks after he had been appointed as acting GCEO of Transnet), Mr Gama addressed a letter to the chairman of the board of Neotel stating that Transnet was "comfortable and confident of the veracity of its procurement process" and that there had been no irregularity in the award of the contract to Neotel. He confirmed that it was normal practice for Transnet to engage business consultants or advisors "to navigate complex financial, technical and commercial aspects of transactions" and that Transnet was aware that Homix had played a similar role on behalf of Neotel.[1349] In saying this about Homix, Mr Gama exposed his dishonesty. Homix was a shell company, with which Neotel was engaged in fraudulent and corrupt activity to the detriment of Transnet. Yet, Mr Gama essentially vouched for it.

949. In a letter to Deloitte, dated 26 May 2015,[1350] Mr Srinath (the chairman of Neotel) disputed the auditors' contention that Mr Joshi lacked the delegated authority to incur expenditure, arguing that it fell within his powers and authorities "in respect of the day-to-day management of the company" and his authority to sign all

[1347] Annexure CV6, Exh BB9, CV-043

[1348] Exh BB9, CV-014-016, paras 50-57

[1349] Annexure CV14, Exh BB9, CV-097

[1350] Annexure CV11, Exh BB9, CV-078-079

documents and contracts for and on behalf of the company.[1351] Deloitte disputed that interpretation.[1352] In a subsequent letter,[1353] dated 5 June 2015, Mr Srinath provided a summary of the findings of the investigation conducted by Werksmans, and answered questions posed by Deloitte in a letter of 17 April 2015.[1354] He conceded that Mr Van der Merwe had acted wrongfully but informed Deloitte that he had resigned before disciplinary action could be taken. Mr Srinath, however, held firm in the view that the payment of Homix for its role in supposedly resolving the impasse in the 2014 MSA negotiations justified the fee.[1355] Due to the severe time constraints no service providers other than Homix were considered. The credentials and expertise of Homix that Neotel relied on was its prior successful engagement with Transnet during the Cisco transaction. The work to be done by Homix was: i) engage relevant procurement and financial executives at Transnet; ii) present the "value proposition" of the Neotel bid; iii) assist with resolving the issues causing the impasse; and iv) conclude the 2014 MSA and asset buy-back.[1356]

950. Mr Srinath did not explain why staff members of Neotel were incapable of performing these routine tasks. In answering the question about what Homix "brought to the table", Mr Srinath stated: "Homix was doing business in Transnet and understood the procurement processes as well as having visibility in regard to opportunities in Transnet as demonstrated by the previous CISCO contract". He added that management at Neotel understood that Homix "had the capacity to provide the resources" to engage executives, present the value proposition, resolve

[1351] Annexure CV11, Exh BB9, CV-078-079, paras 3.1 and 3.6

[1352] Transcript 11 June 2019, p 86-87

[1353] Annexure CV14, Exh BB9, CV-089

[1354] Annexure CV4, Exh BB9, CV-037; and Transcript 11 June 2019, p 92 *et seq*

[1355] Annexure CV14, Exh BB9, CV-093, para 4.1

[1356] Annexure CV14, Exh BB9, CV-091-095

disputes and close the deal.[1357] The letter is vague as to what precisely those resources were, how they would be applied and why Neotel lacked them.

951. On 9 June 2015 Deloitte responded to Neotel's letter. It remained convinced that the commerciality of the transaction was questionable. It accordingly advised Neotel that persons in authority at Neotel had reporting obligations in terms of section 34 of PRECCA and that failure to report the transaction could in itself constitute a reportable irregularity.[1358] Neotel subsequently reported the Homix transactions and laid the blame for any wrongdoing exclusively with Mr Van der Merwe alleging that his conduct constituted fraud.[1359] Deloitte reported a second reportable irregularity to the IRBA on 14 July 2015 on the basis that Mr Joshi and Mr Whiley had breached the Companies Act and their common law duties as directors of a company to act in the best interests of the company, resulting in a substantial financial loss to Neotel.[1360] After further engagements,[1361] the auditors on 8 February 2016 reported other reportable irregularities to the IRBA,[1362] in particular that the directors of Neotel had failed to report the corrupt transactions to the Financial Intelligence Centre within 15 days as required in terms of section 29 of FICA[1363] and section 34 of PRECCA.[1364] Neotel took issue with some of the

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[1357] Annexure CV14, Exh BB9, CV-094, para 8

[1358] Transcript 11 June 2019, p 107; and Annexure CV15, Exh BB9, CV-100

[1359] Annexure CV16, Exh BB9, CV-102-103

[1360] Annexure CV18, Exh BB9, CV-117

[1361] Transcript 11 June 2019, p 120-135; and Exh BB9, CV-18-25, paras 67-84

[1362] Annexures CV22-26, Exh BB9, CV-137-153

[1363] Section 29(1) of FICA provides that a person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that a transaction or series of transactions to which the business is a party has no apparent business or lawful purpose must within the prescribed period (15 days) after knowledge was acquired or the suspicion arose, report the transaction and relevant details to the FIC.

[1364] Section 34(1) of PRECCA provides that any person who holds a position of authority and who knows or who ought reasonably to have known or suspected that any person has committed corruption must report that to a police official.

reporting obligations which the auditors alleged applied to it in terms of FICA and PRECCA.[1365] However, it agreed on the advice of counsel to file some reports out of an abundance of caution, but denied that there had been any breach of fiduciary duty in the failure to report and contended that in some instances it had complied with its PRECCA obligations.

952. Mr Joshi and Mr Whiley were placed on special leave by Neotel on 31 July 2015 and eventually resigned on 30 November 2015 during the discip linary proceedings against them. The audited financial statements were qualified in respect of the commerciality of the Homix transactions and disclosure on the matter is noted in the financial statements.

The **SARB investigation of Homix**

953. Mr Mazibuko, the Head of Department: Financial Surveillance ("FinSurv") of the South African Reserve Bank ("SARB") testified before the Commission in respect of Homix and its directors (Mr Taufique Shaukat Hasware (Mr Khan), Mr Yakub Ahmed Suleman Bhikhu and Mr Gamat Shakif Adams) and the flow of funds on bank accounts held by Homix domestically and internationally.

954. FinSurv established that Homix operated accounts at Standard Bank.[1366] From March 2014 (about the time of the Cisco transaction) there was a marked increase in the number of transactions in the accounts. During this period, the accounts received several large deposits. A cash flow analysis for the period 28 March 2014 to 3 December 2015 showed credits of more than R660 million among which were

[1365] Annexure CV 28, Exh BB9, CV-164

[1366] Transcript 10 June 2019, p 29 *et seq*

the two payments totalling R75.57 million from Neotel. Homix also received R179.5 million from Regiments Capital (Pty) Ltd during this same period.[1367]

955. The bank statements of Homix reflect regular large transfers to the accounts of two local entities, Ballatore Brands (Pty) Ltd ("Ballatore Brands") and Bapu Trading Close Corporation ("Bapu Trading") respectively. Notably, during April 2014, an amount of R34.5 million (including VAT) in respect of the Cisco transaction was transferred from Neotel to the Homix account at Standard Bank, after which the entire amount was depleted by means of electronic transfers to Ballatore Brands and Bapu Trading.[1368] The sole director of Ballatore Brands was Mr Mohamed Akram Khan who was the sole director of Syngen Distribution (Pty) Ltd ("Syngen"). It appears from the statements of Bapu Trading's bank account held with Standard Bank that funds received from Homix were mainly transferred to Syngen's bank accounts.[1369]

956. The disbursement of the funds in the Homix Standard Bank accounts (including the money paid by Neotel) breached the Exchange Control Regulations.[1370] The exchange control function of the SARB is primarily governed by section 9 of the Currency and Exchanges Act[1371] read with the Exchange Control Regulations. The Exchange Control Regulations prohibit various transactions which may only be entered into with the permission of the Treasury or persons authorised by the Treasury.

[1367] Exh BB12, SEM-23-26; and Annexure 20, SEM-353 *et seq*

[1368] Transcript 10 June 2019, p 48-49

[1369] Exh BB12, SEM-25-26, paras 73-76

[1370] Promulgated on 1 December 1961 in Government Notice R.1111

[1371] Act 9 of 1933

957. Most foreign exchange transactions are dealt with by authorised dealers, appointed to act as such in terms of the Exchange Control Regulations. No person may use or apply foreign currency acquired from an authorised dealer for any purpose other than that stated in the relevant application.[1372] The authorised dealers administer exchange control transactions within the parameters of the Currency and Exchanges Manual for Authorised Dealers ("the Manual"). Section B.1(B) of the Manual provides that authorised dealers may only effect foreign currency payments for imports against relevant documentation including the prescribed SARS customs clearance declaration ("declaration") bearing the "movement reference number" ("the MRN") as evidence that goods in respect of which transfers have been effected have been cleared. The MRN is a unique number generated by SARS under its Electronic Data Interchange ("EDI") system in response to a declaration lodged by or on behalf of an importer of goods.

958. In May 2015, Mercantile Bank Ltd ("Mercantile"), an authorised dealer, referred certain suspicious foreign exchange transactions involving Homix to FinSurv. During the period 21 to 28 May 2015, Homix effected 13 cross-border foreign exchange transactions via Mercantile, with an aggregate value of approximately R51.8 million at the relevant time.[1373] On 29 May 2015, Homix attempted to effect a further three transactions, to the value of an additional R14.47 million, but was prevented from doing so by FinSurv. The relevant documentation revealed that Homix effected 16 payments in favour of only two beneficiaries domiciled in Hong Kong, being Morningstar International Trade Ltd ("Morningstar") and YKA International Trading Company ("YKA") that had little online or other commercial presence. Three movement reference numbers (MRNs) were supplied by Homix to justify the 16 transactions. Investigations on the SARS system revealed that while

[1372] Regulation 2(4)(a)

[1373] Transcript 7 June 2019, p 142 *et seq*; and Annexure SEM 7, Exh BB12, SEM-315

the MRNs were valid, the total value of goods cleared amounted to less than R50 000. Hence, the value of the payments made out of South Africa did not match the value of the goods claimed to be imported. Authorisation was sought for R51.8 million to leave the country, while only R50 000 worth of goods were to be imported.[1374]

959. All of the relevant transactions were "booked" with Mercantile via Peritus Forex Solutions (Pty) Ltd ("Peritus"), a treasury outsourcing company which acts as intermediary between an authorised dealer and a client attending to foreign exchange transactions on behalf of the client. A "trading account" was opened for Homix at Mercantile, and a mandate provided to Peritus to transact on its behalf. Peritus received instructions for the relevant foreign exchange transactions for Homix from Bhikhu. After examining other documents, FinSurv was persuaded that the SARS EDI documentation provided to Mercantile by Homix was falsified.[1375]

960. After the finalisation of the investigation, a letter was sent by email and registered mail to Homix inviting it to make representations as to why the funds "blocked" in the Mercantile account should not be declared forfeit to the State. FinSurv never received a response to this letter, nor did any person contact it in regard to the contents thereof. The amount of R14.47 million was declared forfeit to the State in terms of Regulation 228 on 30 December 2016.

961. Mr Mazibuko testified that the Homix transactions displayed all the hallmarks of a money laundering scheme aimed at disguising the origin, true nature and ultimate

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[1374] Transcript 7 June 2019, p 161 *et seq*

[1375] Transcript 7 June 2019, p 180-196; and Transcript 10 June 2019, p 1-7; and Annexures SEM12 and SEM14, Exh BB12, SEM 18-19, paras 50-53

destination of funds.[1376] This was the company that Mr Gama defended in his letter of 19 May 2015 as having rendered the services it alleged it had rendered when it in fact had done no such thing.

962. The evidence as a whole therefore provides reasonable grounds to believe that in relation to the payment of the R41.04 million to Homix, there was planned participation by Mr Joshi and Mr Van der Merwe in the offences of corruption, money laundering and fraud, as well as contraventions of the exchange control legislation (all scheduled offences under schedule 1 of POCA) for the benefit of the Gupta enterprise. The authorisation and facilitation by Mr Joshi, Mr Whiley and Mr Van der Merwe of the illegal payments to Homix whilst associated with the racketeering enterprise, in particular, give rise to reasonable grounds to believe that they participated (possibly along with Mr Singh) in the conduct of the enterprise's affairs through a pattern of racketeering and thus contravened section 2(1)(e) of POCA. These findings are to the effect that there are reasonable grounds to believe that these persons violated relevant legislation and were involved in corruption of the kind contemplated in TOR 1.4 and TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

[1376] Mr Mazibuko also testified to the existence of a link between the Homix transactions and two other entities that were previously under investigation being Viper Wholesalers (Pty) Ltd ("Viper") and FGC Commodities (Pty) Ltd ("FGC Commodities"). Morningstar, Viper and FGC Commodities share the same sole director, being Mr Mahashveran Govender. Other persons involved in Homix were Mr Sheldon Breet and Mr Matthew Breet who transferred money from Homix to Morningstar in August 2016 - See Exh BB12, SEM 21-22, paras 59-66

CHAPTER 11-T-SYSTEMS: THE IT DATA TENDER

The 2015 RFP for IT data services

963. During January 2010, Transnet entered into an agreement with T-Systems for the provision of IT data services. Five extensions of the contract took place between 2010 (when the contract was concluded) and 2019.[1377] The total value of the contract over the nine years of its operation was approximately R4.8 billion.

964. Issues arose with T-Systems in 2015 when it was discovered that Transnet Group Capital was paying T-Systems for approximately 2200 computers when only 1100 were employed by the division. Furthermore, 450 computers leased through the T-Systems contract in July 2015 were delivered to Transnet but disappeared. The forensic team of Transnet found that these computers could not be traced as the tracking software was not installed. The relevant contract was subsequently ceded initially to Zestilor and then later to Innovent Rental and Asset Management Solutions (Pty) Ltd ("Innovent"). Zestilor, as discussed earlier, was owned by Mr Essa's wife.[1378] Transnet carried on paying rent for these leased computers for a number of years without having the benefit of them. Other evidence (discussed below) shows that T-Systems made regular monthly payments to Zestilor for the benefit of Mr Essa and his wife, thus establishing some link between T-Systems and an associate of the Gupta enterprise.

965. During November 2015, Transnet issued an RFP to the open market for the supply of IT data services. Prior to issuing the RFP, Transnet contracted Gartner Ireland to review the services procured from T-Systems through the IT Outsourcing Master

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[1377] Transcript 10 May 2019, p 1 *et seq*

[1378] Exhibit BB3(a), MSM-030, para 5.12; and Transcript 16 May 2019, p 154 *et seq*

Services Agreement and to draft new technical specifications, technical evaluation criteria and improved service level agreements. The process was initiated by the Group Chief Information Officer ("the GCIO") of the time, Dr Mantsika Matooane, who approved the business case, the service requirement specifications, the evaluation criteria and the appointment of the cross functional evaluation team ("CFET").[1379] Before the RFP was issued, Transnet extended the T-Systems contract until 31 December 2016. The Transnet board sub-delegated its authority to the GCEO (Mr Gama) to approve the RFP, issue the RFP and conduct due diligence and post tender negotiations.[1380]

966. The RFP was for the outsourcing of data services for the whole of Transnet. The outsourced services related to the build and upkeep of Transnet's IT estate which included: i) the data centre and hosting services - which included servers, databases, storage, mainframe and the disaster recovery of these services; ii) the help and services desk; iii) the collaboration services and applications used by Transnet; and iv) end user computing (desktop support). The tender, estimated to cost R1.85 billion over five years, was a consumption based contract and had an un-costed portion driven by new projects when required.[1381]

967. Four witnesses testified in relation to the award of the RFP and the controversy that arose in relation to it: Mr Popo Molefe,[1382] Mr Volmink,[1383] Mr Mahomedy[1384] and Ms Makano Mosidi.[1385]

[1379] Exh BB11, MMAM-003, para 8

[1380] Annexure MMAM 02, Exh BB11, MMAM-029, para 5

[1381] Exh BB11, MMAM-005, paras 13 and 14

[1382] Exh BB 1(a), PSM-001, para 10.12.12 *et seq*; Transcript 7 May 2019, p 86 *et seq*

[1383] Exh BB2.1(a), PSV-048, para 105 *et seq*; and Transcript 10 May 2019, p 1 *et seq*

[1384] Exh BB3(a), MSM-30, para 5.12; and Transcript 16 May 2019,p 154 *et seq*

[1385] Exh BB11, MMAM-01; and Transcript 10 June 2019, p 64 *et seq*

968. Ms Mosidi held the position of GCIO at Transnet from 1 June 2016 until she resigned on 30 September 2018. She is an information and technology specialist with senior management and executive experience.[1386] The RFP process for the IT data services was already underway when Ms Mosidi took up her position with Transnet. She became the business owner of the tender when she assumed her position as GCIO in June 2016.

969. In January 2017, the T-Systems contract was extended for a second time by a further nine months to enable Transnet to finalise the award of the RFP, which at that time was still at the adjudication stage. Transnet was obliged to extend the contract three more times between October 2017 and 8 March 2019.[1387]

970. The evaluation process resulted in seven bidders meeting the technical standards of the tender: T-Systems; Gijima Holdings (Pty) Ltd ("Gijima"); Ubuntu Technologies (Pty) Ltd ("Ubuntu"); Wipro Technologies South Africa (Pty) Ltd; Business Connexion (Pty) Ltd; EOH Mthombolo (Pty) Ltd; and Mobile Telekom Networks (Pty) Ltd.[1388]

The shortlisting of T-Systems and Gijima

971. Ms Mosidi became involved with the procurement process at Step 7 of Stage 2 after the evaluation process was complete.[1389] All the bidders that reached Step 7 had met the mandatory requirements (pre-qualification administrative and substantive responsiveness) and the minimum thresholds of the tender (local content, supplier development and functionality/technical). The mandatory

[1386] Transcript 10 June 2019, p 72-75

[1387] Transcript 10 May 2019, p 9 *et seq*; Exh BB2.1(a), PSV-0048, para 105; and Annexure PSV 28, Exh BB2.1(c), PSV-1085

[1388] Transcript 10 June 2019, p 90

[1389] Transcript 10 June 2019, p 80

technical, risk and financial requirements had all been met.[1390] The final determining criterion for the award of the tender at this point was the best and final offer ("BAFO") submitted by the bidders.

972. On 30 June 2016, Ms Mosidi received an email from Mr Pita recommending a shortlist of only two bidders for the final round of adjudication, namely T-Systems and Ubuntu. These, he explained, provided the first and second lowest priced bids in terms of the PPPFA 90/10 principle - 99% and 86.2% respectively.[1391] Ms Mosidi responded recommending to Mr Pita and Mr Gama (then GCEO) that four bidders be shortlisted because she was concerned that bidders sometimes would withdraw unexpectedly in complex and commercially sizeable tenders, resulting in the extension of the evaluation process unnecessarily. She thought that a shortlist of two bidders was cutting it too fine. Seven bidders had successfully satisfied the technical requirements and increasing the shortlist from two to four would not be onerous.[1392]

973. In an email[1393] addressed to Ms Mosidi and Mr Pita dated 6 July 2016, Mr Gama rejected Ms Mosidi's proposal saying it was "adialectic to think negotiating with more will save more time or money". Ms Mosidi in reply pointed out that due diligence exercises often revealed what proposals on paper did not and limiting the negotiation to two bidders could lose more time.[1394] Ms Mosidi's view proved to be correct. On 20 July 2016, Ubuntu withdrew from the PTN process. On the

[1390] Transcript 10 June 2019, p 91

[1391] Annexure MMAM 01, Exh BB11, MMAM-025

[1392] Transcript 10 June 2019, p 106-107

[1393] Annexure MMAM 01, Exh BB11, MMAM-024

[1394] Annexure MMAM 01, Exh BB11, MMAM-024

instructions of Mr Gama, the third highest ranking bidder, Gijima, was then added to the shortlist.[1395]

The due diligence and the initial recommendation of Gijima

974. During July-August 2016, due diligence was conducted on T-Systems and Gijima, after which they were requested to submit their BAFO. Gijima provided the lowest priced bid and scored a final score of 99%. T-Systems scored a final score of 85.07%.[1396]

975. Section 2(1)(f) of the PPPFA provides that a contract must be awarded to the tenderer that scores the highest points, unless objective criteria justify the award to another tenderer. The term "objective criteria" is not defined in the PPPFA. However, the PPM (2013) provides examples of what may be regarded as objective criteria in the Transnet procurement process.[1397] These include the existence of a "material risk" in the award of the business to the top-ranked bidder.[1398] Paragraph 20.3 of the PPM states that the concept of "material risk" must be interpreted restrictively and be limited to instances where Transnet would be seriously prejudiced by the award of business to the top-ranked bidder. A factor that featured during the evaluation of a bid cannot be revisited under the guise of "objective criteria" which are criteria "other than the criteria used to evaluate the bid".[1399] It would be unfair to rely on particular criteria to evaluate a bidder for functionality, and then once the bidder is found to have passed the functionality

[1395] Transnet-07-160, para 38.4

[1396] Annexure MMAM 02, Exh BB11, MMAM-033, para 24

[1397] See Transcript 10 June 2019, p 118-122

[1398] PPM para 18.7.3

[1399] PPM para 18.7.3(b)

threshold and scores the highest points overall, to use the very same criteria as "objective criteria" to deny the highest scoring bidder the tender award.[1400]

976. After the due diligence exercise (done by Gartner Ireland),[1401] Mr Pita and Mr Thomas prepared a memorandum addressed to Mr Gama recommending the award of the tender to T-Systems.[1402] The purpose of the due diligence was to identify business risks in order to minimize Transnet's operational risks after contract award. No major risks were identified on T-System's bid. However, a number of risks were identified in relation to Gijima's bid. These included: i) a risk that the data centre still needed to be built and outstanding equipment needed to be procured from overseas, which may have delayed the transition; ii) a marginal security risk that Gijima did not have a dedicated security operations centre; and iii) a major risk with regards to Gijima's transition commitment from the current service provider (T-Systems) which would lead to additional cost for Transnet in the migration from current mode of operation to future mode of operation.

977. An engagement with Gijima about addressing the risks did not prove satisfactory. The CFET felt that Gijima did not provide a strategy on mitigating the risks, which it believed were material. It was concerned that by selecting Gijima "with their current proposition", Transnet ran the risk of not being at either current mode of operation or future mode of operation within six months. There was also a risk of the transition project over-running, which meant that T-Systems would have to continue to service Transnet for some of the services that were not fully transitioned – this would be costly for Transnet.[1403]

[1400] Transcript 10 May 2019, p 16-17

[1401] Annexure MMAM 03, Exh BB11, MMAM-041

[1402] Annexure MMAM 02, Exh BB11, MMAM-029

[1403] Annexure MMAM 02, Exh BB11, MMAM-034, paras 30-36

978. Based on the identified business risks, the CFET decided that Gijima should not be recommended for the award of the tender and that T-Systems instead be recommended as the successful bidder.

979. On 22 September 2016, Ms Mosidi was presented with the complete file of the evaluation process by Mr Thomas, the then GCSCO, and was requested to sign the memorandum to Mr Gama recommending the award to T-Systems. She went through the file and could not "reconcile some evaluation aspects to the final recommendation". While the procurement process was in accordance with the procurement policy, she felt the recommendation was not in line with the evaluation outcome. The bidders had submitted their BAFO in August 2016, which meant that all technical evaluations and risks had been assessed and finalised, with the result that the only consideration left for bid assessment was pricing. As mentioned, Gijima had offered the lowest priced bid in the BAFO stage. The recommendation of T-Systems as the preferred bidder, in her opinion, was accordingly inconsistent with the outcome of the BAFO evaluation process.[1404]

980. Ms Mosidi was later called to a meeting at the Carlton Centre to conclude the adjudication process and append her signature to the memorandum as the business owner.[1405] The memorandum presented at the meeting was similar to the memorandum she had seen earlier. It was compiled by Ms Pheladi Xaba, Commodity Manager: Group Strategic Sourcing.[1406] Despite her ambivalence and not wanting to delay the process,[1407] Ms Mosidi appended her signature to the

[1404] Transcript 10 June 2019, p 106-111

[1405] The following persons were present at the meeting: the Procurement Officers, Ms Pheladi Xaba and Mr Macdonald Maluleke as well as Mr Thulani Mtshwene and Mr Martin Sehlapelo. The events of the meeting are discussed at Transcript 10 June 2019, p 122-132.

[1406] Transcript 10 June 2019,p 138

[1407] Transcript 10 June 2019, p 10, line 20

recommendation but added in manuscript at the end of the document that she thought the risks as captured could be mitigated, Gijima could deliver against the requirements and had the right profile.[1408] Mr Thulani Mtshwene, the Executive Manager: Governance also had some reservations and noted on the memorandum that his signature was conditional on the high value tender report being satisfactory and that objective criteria were applied.[1409]

981. The discomfort that Ms Mosidi experienced about the recommendation to award the bid to T-Systems led her to write a detailed response regarding each mentioned risk, explaining why they were not real risks.[1410] She gave the document to Mr Mboniso Sigonyela, the Executive Manager in Mr Gama's office who advised her to hold back her response for "the right time".

982. At about the same time, Ms Mosidi was made aware of a letter, dated 5 October 2016, addressed anonymously by a group of "Concerned and Proud Transnet Employees" to Ms Disebo Moephuli, the then Chief Corporate and Regulatory Officer, pertaining to the tender.[1411] It is clear from its contents that the employees were either members of the CFET or worked closely with it.[1412] The letter made several allegations including: i) the procurement process had been corruptly manipulated as part of state capture; ii) the Gijima award was R230 million cheaper; iii) the identified risks were manufactured to award the bid to T-Systems despite it losing on merit; and iv) Gijima, a local company with better B-BBEE credentials, had been prejudiced by a deliberate flouting of the procurement

[1408] Exh BB11, MMAM-010, para 25

[1409] Annexure MMAM 02, Exh BB11, MMAM-039; and Transcript 10 June 2019, p 133, line 25

[1410] Ms Mosidi was unable to locate a copy of the document

[1411] Annexure MMAM 04, Exh BB11, MMAM-066; and Transcript 10 June 2019, p 143-152

[1412] Transcript 10 June 2019, p 153

policies. The letter confirmed Ms Mosidi's discomfort about there having been something untoward in the process.[1413]

983. Around the same time (October 2016), Ms Mosidi met Mr Gama at the Tintswalo Hotel in Waterfall Estate, Johannesburg where they discussed the tender.[1414] She assumed that he had read her memorandum and knew of her objections.[1415] Mr Gama had not at any point in the past taken a contrary position to her or openly disagreed with her reasoning.[1416] Ms Mosidi explained to Mr Gama that the decision to award the tender to Gijima was the right one,[1417] as it was inappropriate for risks which were an integral part of the evaluation process up to Step 8 to be re-introduced post the BAFO stage. The risks were irrelevant, misleading or immaterial.[1418] Mr Gama in response prevailed upon Ms Mosidi to get her facts straight as procurement could be a life endangering business if one scuttles a party.[1419] Mr Gama's warning rattled Ms Mosidi.[1420] She understood him to be asking her if she was aware of the dangers of going against the tide.[14 21]

984. In his evidence before the Commission, Mr Gama denied that he attempted to intimidate Ms Mosidi at the meeting at the Tintswalo Hotel. He said that he intended to assure her that she had his full support to carry out her role as the GCIO and to determine why she had signed the September 2016 memorandum recommending that T-Systems should be awarded the business, despite her discomfort. He also said he had a sense that she may have been intimidated to

[1413] Transcript 10 June 2019, p 152
[1414] Transcript 10 June 2019, p 157-161
[1415] Transcript 10 June 2019, p 163, line 10
[1416] Transcript 10 June 2019, p 162, line 15
[1417] Exh BB11, MMAM-011, para 28
[1418] Exh BB11, MMAM-004, para 11; and Transcript 10 June 2019, p 115-116 and p 140-141
[1419] Transcript 10 June 2019, p 159
[1420] Transcript 10 June 2019, p 161
[1421] Transcript 10 June 2019, p 161, line 25

sign the document and he needed to engage with her to give her the comfort that she could disagree with things. He also needed to get a sense of whether she had the courage to disagree and put forward facts of her own in order for her to be able to make those decisions. He admitted though that he might have said people are willing to pay lots of money to do surveillance on people who are making decisions about procurement.[1422]

985. The version that Mr Gama may have put pressure on Ms Mosidi gains a measure of credibility from the ultimate award of the tender to T-Systems. As will become clearer later, key decision-makers at Transnet were determined to give the contract to T-Systems and most likely wanted the support of the GCIO to advance that preference.

986. In late December 2016 Ms Mosidi met with Mr Gama and Mr Thomas in Mr Gama's office. Mr Gama suggested that she as GCIO and the business owner of the tender should test the identified risks with Gijima. He also directed that the procurement department should facilitate an engagement and send questions to Gijima.

987. On 19 January 2017 Mr Macdonald Maluleke, Category Manager: Group Strategic Sourcing, addressed a letter to Gijima posing a number of questions related to the identified risks associated with Gijima's transition plan, possible delays; the reduction of its final price by 31% and the like.[1423] At a meeting held at the offices of Transnet Engineering in Kilner Park on 23 January 2017, Gijima was able to address all the issues raised concerning the transition from the current mode of operation to the future mode of operation, their R500 million price reduction, the steps to be taken in getting the data centre operational, the pre-ordering of

[1422] Transcript 12 May 2021, p 257-266

[1423] Annexure MMAM 05, Exh BB11, MMAM-071

equipment etc.[1424] At the end of the meeting, the Transnet team agreed that all risks had been mitigated and agreed that the tender should be awarded to Gijima.[1425]

988. In early February 2017, two separate memoranda were drawn up with different recommendations for Mr Gama's signature. The one memorandum from Mr Pita (then GCFO)[1426] recommended the award of the tender to T-Systems, and the other from Ms Mosidi[1427] recommended the award of the tender to Gijima. Mr Gama requested Mr Pita and Ms Mosidi to "iron out" their differences and submit one memorandum to him for approval.[1428] They finally signed a memorandum dated 8 February 2017 recommending that the tender be awarded to Gijima.[1429]

The BADC and board meetings and the award to T-Systems

989. The BADC met on 13 February 2017 to consider the award of the tender. Before the commencement of the BADC meeting, Mr Shane, the chairperson of the BADC (who replaced Mr Sharma as chair of the BADC and was a business associate of Mr Essa at the time),[1430] requested that the meeting be adjourned in order to brief Mr Gama. During the adjournment, Mr Shane informed Mr Gama that the non-executive directors intended to overturn the recommendation of management to

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[1424] Transcript 10 June 2019, p 171-173

[1425] Exh BB11, MMAM-0012, para 31

[1426] Annexure MMAM 06, Exh BB11, MMAM-075

[1427] Annexure MMAM 07, Exh BB11, MMAM-087

[1428] Transcript 10 June 2019,p 175-181

[1429] Annexure MMAM 08, Exh BB11, MMAM-109

[1430] Transcript 12 May 2021, p 266-267

award the contract to Gijima because they believed that management had not properly assessed the risks.[1431]

990. The tender was discussed in detail when the BADC meeting re-convened. Mr Thomas, Mr Mosidi and Mr Silinga made extensive submissions in support of the recommendation.[1432] Most members of the BADC were not favourably disposed to awarding the tender to Gijima. The minutes of the meeting[1433] accurately summarise the different points of view that were expressed and are reflected in the transcript[1434] of the meeting. The transcript of the meeting discloses a degree of irrationality and adverse animus or bias against Gijima on the part of some members of the BADC.

991. The interventions by Mr Shane in particular were troubling. His contribution was at times rambling, intemperate, incoherent and of a low standard. His tone was generally condescending and derogatory. He seemed mostly concerned about not attracting adverse publicity for himself in the media. He was apprehensive that people in his community would regard him as a "crook".[1435] He referred to the actions of the previous chair of Transnet, "the great Ms Maria Ramos",[1436] as "stupid"[1437] and to both bidders as "disingenuous, dishonest, thieving outsource partners".[1438] His pre-disposition favouring T-Systems was plainly evident, improperly motivated by irrelevant extraneous factors and demonstrated a failure to appreciate his fiduciary duty to act in good faith by testing the market and to

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[1431] Transcript 12 May 2021, p 267-270; and Exh BB22, BB28-SG-159

[1432] Transcript 10 June 2019, p 191-192

[1433] Annexure MMAM 09, Exh BB11, MMAM-130

[1434] Annexure MMAM 10, Exh BB11, MMAM-137

[1435] Annexure MMAM 10, Exh BB11, MMAM-159, line 10

[1436] Annexure MMAM 10, Exh BB11, MMAM-159, line 22

[1437] Annexure MMAM 10, Exh BB11, MMAM-163, lines 15-20

[1438] Annexure MMAM 10, Exh BB11, MMAM-159, line 25

seek alternative partners where there was compelling evidence that the incumbent was performing below par. His stance was sufficient reason to set aside the award of the tender to T-Systems.[1439]

992. Interventions by other members of the BADC were equally unedifying. Mr Nagdee (another member of the BADC alleged to have links to the Guptas) revealed a lack of understanding about the purpose of the clarification meeting with Gijima when he expressed the concern that Gijima was "given so many opportunities to fix things, to mitigate the risks you know, and there is no opportunity for anybody else".[1440] Ms Mabaso also believed that Gijima acted illegitimately when "all of a sudden they tricked and changed their price all of a sudden".[1441] Other members supported awarding the tender to T-Systems on the basis of the risks which were accepted to be "objective criteria". Some were concerned about the price reduction and Transnet having been too lenient to Gijima in affording it an opportunity to mitigate the risks.

993. Ms Mosidi made a valiant attempt to assure the members of the BADC that a proper assessment had been done on Gijima and that the risks had been appropriately mitigated. She explained that the R500 million reduction of the price came about after Gijima received further clarification on the scope of the contract, which it had previously misunderstood. The pricing risk could be easily mitigated and managed. The cost of data was progressively declining which also contributed

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[1439] Annexure MMAM 10, Exh BB11, MMAM-163, line 20 and MMAM-164, line 20; see the remarks of Mr Popo Molefe at Transcript 7 May 2019, p 89-90

[1440] Annexure MMAM 10, Exh BB11, MMAM-146, line 15. In his report Mr Holden stated that there is strong evidence suggesting that Mr Nagdee had, by February 2017 (the time of the BADC meeting), been operating as a money launderer for the Gupta enterprise and had used his company, Lechabile Technologies, to expatriate more than R5 million in proceeds of kickbacks paid to the Gupta enterprise in respect of corruptly procured public sector contracts – FOF-09-092, para 101

[1441] Annexure MMAM 10, Exh BB11, MMAM-148, line 10

to the reduction in price. As for the "perceived leniency" towards Gijima , Ms Mosidi explained that the clarification meetings were a standard process of engagement. Moreover, the tender to Gijima would introduce a saving of R1 billion. The entire motivation for issuing an RFP to the open market was for Transnet to test the market and consider new partners. Over the seven years T-Systems had provided services to Transnet, it had not abided the guiding principles of the tender.

994. The BADC (particularly the chairperson) said it did not have faith that the risks could be adequately monitored and managed through contract management due to the existing challenges related to contract management that plagued Transnet. Mr Shane described the performance of those responsible for contract management in derogatory terms.[1442] The BADC accordingly chose not to support the award of the tender to Gijima and recommended to the board that it approve the award of the tender to T-Systems.

995. In his affidavit filed with the Commission , Mr Gama maintained that he supported the recommendation that Gijima be awarded the tender.[1443] The transcript shows that his support was not as unequivocal as he suggested. He told the BADC that he could live with either scenario and essentially deferred to the BADC.[1444]

996. During the meeting, Mr Gama sent Ms Mosidi an SMS or WhatsApp telling her to "stop fighting because it was clear what the board wanted." She only saw the message after the meeting. Mr Gama explained that he sent the message because

[1442] Annexure MMAM 10, Exh BB11, MMAM-166, line 16

[1443] Transnet -07-163, para 42.4

[1444] Annexure MMAM 10, Exh BB11, MMAM-157-158

it was clear to him that the non-executives, led by Mr Shane, had made up their minds to overturn management's recommendation.[1445]

997. On 15 February 2017 Mr Gama and Mr Pita addressed a memorandum to the board of Transnet recommending that it approve the award of the contract to T-Systems for a period of five years with an option to extend for a further two years.[1446] The memorandum explained that the BADC had not supported the recommendation for the award of the contract to Gijima, the first ranked bidder, based on the identified "objective risks". On 22 February 2017 the board decided not to award the IT data services contract to Gijima based on the various risk factors and awarded it to T-Systems.[1447] This in Mr Volmink's view amounted to an "opportunistic use of risk" to illegitimately disqualify a deserving bidder.[1448]

Gijima's complaint and the final award of the tender

998. During March 2017 Gijima lodged a complaint with the Transnet Procurement Ombudsman objecting to the invocation of the perceived risks as "objective criteria" to justify not awarding it the contract. Because the complaint related to a decision taken by the board, Transnet referred the matter to National Treasury for investigation.[1449]

999. National Treasury, in a letter dated 29 July 2017, concluded that the award had to be made to Gijima, as the highest scoring bidder. It held that the objective criteria on which the board sought to rely ought to have been stated upfront in the tender

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[1445] Transcript 12 May 2021, p 270; and Transnet-07-163, para 42.5

[1446] Annexure MMAM 11, Exh BB11, MMAM-189

[1447] Annexure PV 30, Exh BB2.1(c), PSV-1097, para 3

[1448] Transcript 10 May 2019, p 18

[1449] In terms of para 3.3 of SCM Instruction 3 of 2016 /17 on Preventing and Combatting Abuse in Supply Chain Management System

document. The letter said that since the bid document did not specify the objective criteria, Transnet was obliged to award the bid to Gijima as the highest scoring bidder.[1450] Factors already considered during the evaluation of the bid may not be revisited under the guise of "objective criteria". When Gijima's bid was evaluated it was found that it had passed all relevant thresholds and met all bid requirements. The same factors were taken into account a second time as objective criteria by the BADC and board in disqualifying Gijima in a procedurally unfair and irrational manner. The evidence showed that the perceived risks had been mitigated.[1451]

1000. On 27 July 2017, Mr Silinga and Mr Volmink recommended to Mr Gama that: i) Transnet abide by the ruling of National Treasury; ii) T-Systems be invited to make representations on Transnet's proposed decision to abide the ruling of National Treasury; and iii) Transnet proceed to make the award to Gijima, after following a judicial process to set aside its award of the tender to T-Systems.[1452] On 27 September 2017, the board resolved to set aside its earlier award to T-Systems.[1453] In 2018, Transnet approached the High Court for an order declaring its decision to award the tender to T-Systems to be invalid and a direction that the tender be awarded to Gijima. T-Systems and Gijima eventually indicated that they would abide the decision of the court. On 12 December 2018, the Johannesburg High Court granted the order as prayed for by Transnet.[1454] Referring to Mr Shane's performance during the BADC meeting, the court remarked that it was left wondering whether the BADC was not driven by "extraneous considerations" (despite management's satisfaction with Gijima's bid) to award the tender to the lower scoring bidder.

[1450] Transcript 10 May 2019, p 19 *et seq*; and Annexure PV 30, Exh BB2.1(c), PSV-1099, para 10

[1451] Annexure PV 31, Exh BB2.1(d), PSV-1119

[1452] Annexure PV 30, Exh BB2.1(c), PSV-1111, para 50

[1453] Annexure MMAM12, Exh BB11, MMAM-203

[1454] Annexure PM 11, Exh BB1(b), PSM-483

1001. The conduct of Mr Shane and Mr Nagdee in relation to this tender was suspect and evinces a clear intention to favour T-Systems above Gijima. T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems. Sechaba was T-Systems' SDP in Transnet contracts. T-Systems paid Sechaba more than R323 million between February 2015 and December 2017 (while the MSA was extended). The Gupta enterprise took over, controlled or owned Sechaba from mid-2015. Sechaba made multiple payments to Gupta laundry vehicles (including Albatime and Homix) running to R28 million while it was T-Systems' SDP.[1455]

1002. Zestilor (owned by Mr Essa's wife) was paid a monthly retainer by Sechaba of R228 000 between October 2015 and May 2016, rising to R342 000 per month between June 2016 and October 2016. In total Zestilor was paid more than R5 million by Sechaba. Zestilor itself made payments to first-level laundry entities during the period July 2014 to November 2016 totalling over R2 million. From 2012 to 2015 T-Systems made regular monthly payments of more than R80 000 to Zestilor. More than R3 million was paid over that period. Moreover, as mentioned, T-Systems ceded to Zestilor the equipment sale and rental elements of the MSA that it had with Transnet. Following the cession by T-Systems of the equipment rental and supply elements of the MSA to Zestilor, Zestilor made a number of large payments to Sahara Computers using funds paid to it by Transnet.[1456]

1003. As already mentioned, both Mr Shane and Mr Nagdee have links to the Gupta enterprise. Mr Gama stated that he was not aware of these things.[1457] There is a *prima facie* case that in seeking to favour T-Systems they did not act with fidelity, honesty, integrity and in the best interests of Transnet. They acted prejudicially to

[1455] FOF-09-93-99; and FOF-09-182-184

[1456] FOF-09-93-99; and FOF-09-182-184

[1457] Transcript 12 May 2011, p 275-277

Transnet's financial interests by unjustifiably favouring a bid that was R1 billion more expensive on spurious "objective criteria". There are accordingly reasonable grounds to believe that they contravened section 50(1)(b) and (d) of the PFMA.

1004. The evidence does not disclose any basis for concluding that Mr Gama, Mr Shane or Mr Nagdee accepted any gratification connected to their failed attempt to favour T-Systems and hence any reasonable grounds to believe the offence of corruption was committed by them in relation to this transaction. However, given the links of T-Systems, Mr Shane, Mr Essa and Mr Nagdee to the Gupta enterprise, their conduct may be of evidential value in establishing that they were individuals "associated in fact" with the other persons of the union or group constituting the Gupta "enterprise" as defined in section 1 POCA and may be criminally liable in terms of section 2(1)(e) of POCA for participating in the conduct of the enterprise's affairs through a pattern of racketeering established by their involvement (if any) in other Schedule 1 offences not linked to this particular tender.

CHAPTER 12 – REMEDIAL ACTION AND RECOMMENDATIONS BY THE BOARD OF TRANSNET

1005. Mr Popo Molefe, the chairperson of Transnet, testified before the Commission on 7 May 2019 about specific remedial steps taken by the new board of Transnet since he became chairperson of the board in 2018. Subsequent to his giving evidence to the Commission, he filed a supplementary affidavit in 2020 dealing with broader remedial action taken and required.[1458]

Remedying state capture at Transnet

1006. Criminal investigations are underway in respect of the individuals and companies involved in the purchase of the 1064 locomotives. Transnet is also in the process of launching legal proceedings against the four OEMs which were contracted to provide the 1064 locomotives. The intention is to set aside the contracts as unlawful.

1007. Disciplinary action has been taken and claims for damages instituted against several former Transnet executives including Mr Gama, Mr Jiyane, Ms Mdletshe, Mr Thomas, Mr Ramosebudi, Mr Singh, Mr Pita and Mr Brian Molefe.

1008. Transnet has instituted multiple actions against persons who have been found to have either been paid without just cause or colluded in the payment of those persons. Two actions were instituted against Regiments for the amount of R189.24 million and R79.23 million respectively relating to unjustified overpayments. Transnet instituted four claims against Trillian for varying amounts totalling the sum of R145.92 million for monies paid without just cause for work

[1458] Exh BB1(b), PSM-516

purportedly executed by it as lead arranger of the ZAR club loan and other supposed financial structuring advisory services. Transnet has recovered R618 million from CSR unjustifiably paid under the maintenance agreement.

1009. Through the office of the Chief Legal Officer, Transnet has strengthened its relationship with the SIU. This has resulted in the referral of cases to the SIU where there are suspicions of fraud, corruption, money laundering and any illegal activity. The relationship between Transnet and the SIU, particularly the use of the SIU's subpoena powers, has already yielded positive results by enabling Transnet to successfully discipline and secure the dismissal of executives who have misconducted themselves.

1010. The Forensic Department at Transnet has undergone restructuring. All investigations are now centrally managed with investigators no longer allocated to a particular operating division. The operating divisions no longer have a forensics function. Reports are now processed through the Chief Security Officer who serves on the Exco and reports directly to the GCEO. This allows for the central management of all investigations as opposed to the CEOs of the operating division being left to decide on matters that require forensic investigation.

1011. During the period under investigation, the Transnet Internal Audit ("TIA") completely outsourced its function to external audit firms. This in turn reduced the level of exercise and control that Transnet had over this function. The complete outsourcing of this function was highly problematic especially where it emerged that some of the firms had been complicit in the corruption within the organisation. As a measure of increasing accountability over the audit function, Transnet has adopted a hybrid model whereby the audit function is outsourced and insourced. The insourcing of this function will enable Transnet to develop the audit function

internally. This will allow Transnet to hold the external audit firms to a high standard of accountability going forward.

1012. Transnet has recognised the importance of lifestyle audits in addressing corruption in the organisation. Accordingly, with effect from 1 March 2020, Transnet adopted its Lifestyle Audit Policy, applicable to all employees.

Restructuring governance and oversight at Transnet

1013. Following the dismissal of Mr Gama in October 2018, the position of GCEO was occupied in an acting capacity by Messrs Tau Morwe (November 2018 to May 2019) and Mohammed Mahomedy (May 2019 to January 2020). On 31 January 2020, Cabinet approved the appointment of Ms Portia Derby as GCEO. This appointment was the first step to bring about certainty in the executive leadership of Transnet and the strengthening of its response to state capture. For all intents and purposes Ms Derby came to clean up and rebuild where Mr Brian Molefe and Mr Gama had inflicted considerable damage.

1014. Upon becoming GCEO in 2016, Mr Gama restructured his executive. He created an Exco of mainly support services with all the CEOs of the operating divisions reporting to the Group Chief Operations Officer ("GCOO") (a position he created). The GCOO was the direct line of report for all the CEOs of the operating divisions. By virtue of reporting to the GCOO, the CEOs were not members of the Exco. That organisational structure has since been changed and the CEOs of the operating divisions now participate directly in the Exco which holds each CEO accountable for the performance of the operating division. This restructuring saw the dissolution of the position of GCOO. Ms Derby has overseen the appointment of new permanent CEOs to head up the operating divisions. The new Exco structure is an essential step in the stabilisation of the organisation. The new management team

brings an impressive and diverse range of skills, coupled with a wealth of experience and knowledge to help steer Transnet's business operations going forward.

1015. The sole shareholder of Transnet is the government duly represented by the Minister of Public Enterprises. The Department of Public Enterprises remains responsible in terms of oversight in the discharge of its mandate to the Parliament of the Republic of South Africa. A greater oversight role must be played particularly by the Parliamentary Portfolio Committee on Public Enterprises in ensuring that SOEs are not vessels of corruption, fraud and state capture.

1016. The Minister is vested with wide powers to make appointments of not only the non-executive directors but also the executive directors, the GCEO and the GCFO. The power to appoint the GCEO is not in the hands of the board and is placed solely in the hands of the Minister. This could be abused and result in the deployment of a candidate whose loyalties are to the Minister rather than the organisation.

1017. The recent history of state capture is replete with instances where the boards, CEOs and CFOs of SOEs were appointed for ulterior purposes and not in the best interests of the SOE. This, according to Mr Popo Molefe, raises the question whether government should allow the boards of SOEs to make the appointments without political interference. He contends that it will be sensible for the board to appoint the GCEO and GCFO as it interviews the candidates and is thus best placed to determine the most suitable candidate.

1018. The GCEO and GCFO should feel that they are first and foremost loyal to the company and not the Minister. As directors, their fiduciary duties are owed to the company. Enabling the board to direct the course of the company through the appointment of the key executive directors would reintroduce the balance of power

and increase the executive directors' accountability to the board and shatter any illusions of such accountability being to the Minister. This in turn would foster a better professional relationship as the board would not find itself in a position where the executive directors have in essence been imposed on them by the Minister.

1019. Board appointments have also been the prerogative of the Minister. Politicians invariably will seek to influence the appointment of their allies so that they can make decisions that would materially benefit them. Mr Popo Molefe proposed that the appointment process ought to be more rigorous. He suggested that candidates for appointment should be interviewed by a body or committee that is representative of various stakeholders, in a similar manner as judges are interviewed and screened by the Judicial Service Commission. The relevant body or committee ought then to make recommendations to the Minister. This will shift the balance of power from a single political figure, being the Minister, to the body or committee. This will allow for more transparency in the appointment process and in turn reduce appointments that are based on cronyism and the returning of favours. The reconfiguration on the appointment of directors to boards of SOEs will minimise any political influence that a Minister may be under.

1020. Good governance at board level across all SOEs begins with the appointment of individuals who possess the necessary competency, skills and expertise to provide leadership and guidance in attainment of the SOE's objectives. Directors appointed to boards must always remember that they are appointed to serve the company and thus owe their loyalty to it as opposed to the politicians that appointed them.

Reform of procurement processes

1021. The evidence before the Commission points to the shortcomings in the procurement processes at Transnet. It further demonstrates the degree to which

the procurement function within Transnet was manipulated, particularly at TFR during the acquisition of the locomotives. Transnet has committed to restructuring and reorganising the procurement function across the organisation in accordance with the following principles: i) transparency of the procurement process; ii) standardisation of the procurement process across Transnet; iii) ensuring that procurement staff are competent and accordingly skilled; and iv) ensuring that doing business with Transnet is not complicated.

1022. Much of the irregular expenditure at Transnet during the state capture period is directly attributable to decisions made by executives and board members. All the transactions that lie at the heart of the state capture allegations at Transnet were decided by Exco and/or board members. Decisions were made at that level with less regard to applicable procurement rules. Mr Volmink accordingly recommended that Supply Chain Management ("SCM") should have representation at Exco level. Currently, SCM reports to the GCFO who represents the function at Exco level. Past experience has shown that the function should rather be represented by an executive whose primary focus is the overall management of the SCM function, namely the GSCO.[1459] This representation could be limited to attendance by the GSCO when SCM matters are on the agenda. Mr Volmink however urged for the GSCO to be a full member of Exco in order to provide an SCM perspective to matters that might be of impact to ongoing procurements and financing.

1023. According to Mr Volmink, a fundamental overhaul of the regulatory system is also required. The regulatory framework is fragmented and on the whole, poorly drafted. Regulatory provisions are scattered over a myriad pieces of legislation, regulations, instruction notes, guidelines and standards. This gives rise to confusion and

[1459] Transcript 9 May 2019, p 106-109

competing interpretations of instruments often in conflict with each other.[1460] Mr Volmink thus urged for the passage of the Procurement Bill through the legislative process to be expedited.

1024. There also needs to be greater transparency on how procurement awards are made in the SOEs. In his opinion, an independent body must be created with powers to review procurement awards. The current practice of appointing firms of auditors to review procurement transactions has not been very effective within Transnet. Instead, in his opinion, an independent body with legislative powers should be established to perform this function.

[1460] Transcript 9 May 2019, p 19

CHAPTER 13 – SUMMATION AND RECOMMENDATIONS

1025. The evidence establishes convincingly that State Capture occurred at Transnet in the period between 2009 and 2018. This was accomplished primarily through the Gupta racketeering enterprise and those associated with it who engaged in a pattern of racketeering activity.

The Gupta racketeering enterprise

1026. Racketeering is not *per se* an offence in our law. POCA does not provide for an offence of racketeering, nor does it define the term. Instead it specifies and proscribes particular conduct which may be regarded as racketeering offences. As discussed earlier in this report, section 2(1) of POCA provides for two categories of offence: i) offences associated with receiving and using property derived from racketeering activities; and ii) participation offences committed by persons managing, controlling and associated with the racketeering enterprise.

1027. The recurring elements in all of the offences are a pattern of racketeering activity and the existence of the racketeering enterprise. A pattern of racketeering activity is defined in section 1 of POCA to mean "the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in schedule 1 and includes at least two offences referred to in schedule 1 of which one of the offences occurred after the commencement of this Act and the last offence occurred within ten years (excluding any period of imprisonment) after the commission of such prior offence referred to in schedule 1."

1028. Section 1 of POCA defines an enterprise to include: "any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity."

The Gupta network was a group of individuals and entities associated in fact, and thus an "enterprise".

1029. The offences in section 2(1) of POCA related to the receipt or use of property all require that the property be derived from a pattern of racketeering activity and be used or invested in the acquisition of any interest in, or the operation, establishment or activities of the enterprise. The participation offences require the accused to have participated in the affairs of the enterprise "through a pattern of racketeering activity."

1030. Thus, a successful prosecution on any of the racketeering offences in section 2(1) of POCA will require proof that the recipient of property or the participant in the affairs of the enterprise committed two predicate or underlying offences in addition to the receipt of property or participation in relation to the enterprise. Schedule 1 of POCA includes more than 30 predicate offences. Most important for the purpose of this report are: i) corruption; ii) the common law offences of extortion, theft, fraud, forgery and uttering; iii) offences related to exchange control; and iv) offences relating to the proceeds of unlawful activities, including money laundering.

1031. Some of the instances of wrongdoing that took place at Transnet during the period under consideration constitute (at least *prima facie*) Schedule 1 offences and thus possible predicate offences on a charge of racketeering. However, a successful prosecution of any individual on racketeering, as just said, will require proof of two predicate offences by that person within ten years of each other. There would be no requirement that both predicate offences relate to the activities at Transnet. The activities of the Gupta enterprise extended to various SOEs and the commission of predicate offences by any person associated with the enterprise at different SOEs

will be sufficient to sustain a racketeering conviction in addition to any conviction for the predicate offences themselves.

1032. As stated, the extensive scheme of wrongdoing that afflicted Transnet between 2009 and 2018 was conducted by a racketeering enterprise (comprising a group of individuals and companies associated in fact) aligned with the Gupta family and its associated companies. Racketeering is by nature a group activity undertaken by the enterprise. Any analysis of the operation, activities and the affairs of a racketeering enterprise therefore must focus on the relationship between those who participated, the enterprise and the pattern of racketeering activities. A racketeering activity is an event. The relationship of the events to one another, or of an event to the enterprise, or of an event to the common objective of the enterprise, establishes a pattern.

1033. The central elements of the pattern of the racketeering activity at Transnet, as set out earlier in this volume of the report, comprised: i) the kickback agreements between CNR/CSR/CRRC and Mr Essa's companies; ii) the inclusion of Gupta linked companies as supplier development partners ("SDPs") on Transnet contracts; iii) the money laundering arrangements between Regiments and the companies associated with Mr Essa and Mr Moodley; and iv) the payment of cash bribes to officials and employees associated with Transnet presumably for their role in facilitating transactions that favoured the Gupta enterprise. Other instances of wrongdoing also advanced the interests of the Gupta enterprise and the racketeering scheme all of which require further investigation and possible prosecution by the law enforcement authorities on charges related to the specific offences and also (where appropriate) on racketeering charges.

A chronological summation of the pattern of wrongdoing at Transnet during 2009-2018

1034. State Capture at Transnet began after the resignation of Ms Ramos as GCEO in 2009. Thereafter, President Zuma thwarted the efforts of Ms Hogan to appoint a GCEO for a period of 18 months because he preferred Mr Gama, the then CEO of TFR who was facing serious charges of misconduct, until he replaced her in November 2010 as Minister of Public Enterprises with Mr Gigaba, an admitted associate of the Gupta enterprise who had regular and frequent contact with Gupta family members.

1035. Mr Gigaba immediately reconstituted the board of Transnet with his preferred appointees and initiated the process that led to the appointment of Mr Molefe as GCEO. Mr Molefe was also an associate of the Guptas and a regular visitor to the Gupta Saxonwold compound. Mr Molefe's appointment was accurately predicted by the Gupta owned newspaper, the *New Age*, and he was recommended for appointment by Mr Sharma who Mr Gigaba attempted unsuccessfully to have appointed as chairman of the Transnet board. Mr Sharma was a business associate of Mr Essa, a key associate of the Gupta enterprise. Around about the same time, Mr Gigaba appointed Mr Essa as a director of BBI (an SOE in the IT sector), which played some role in attempting to secure IT contracts from Transnet for the benefit of the Gupta enterprise.

1036. Mr Molefe (although not being the highest scoring candidate) was appointed GCEO on the recommendation of Mr Gigaba on 16 February 2011. Thus, Mr Gigaba (a friend of the Guptas) was instrumental in the appointment of Mr Molefe (another friend of the Guptas), with his appointment predicted in the Gupta

owned newspaper, the *New Age*, and initiated by Mr Sharma (another Gupta associate).

1037. Mr Sharma went on to serve as the chairperson of BADC, which was established in February 2011 as a subcommittee of the board. Prior to the establishment of the BADC in February 2011, the board of Transnet was not directly involved in procurement. Many of the procurement transactions which favoured the Gupta enterprise after 2011 arose in the context of the Market Demand Strategy ("the MDS") which was developed by Mr Molefe and Mr Singh (then the acting GCFO) and approved by the BADC (chaired by Mr Sharma under its increased authority) in 2011.

1038. One week after Mr Molefe was appointed, Mr Gama, who had been dismissed for serious irregularities in 2010, was reinstated as CEO of TFR on 23 February 2011, in terms of a wholly indefensible settlement agreement that included a payment of R17 million to Mr Gama for benefits and legal costs. Mr Gama's early efforts to be appointed as GCEO in 2009 (despite the allegations of impropriety against him and the board of Transnet considering him unsuitable for the position) was vocally and publicly supported by members of President Zuma's cabinet, Mr Gwede Mantashe (then the Secretary-General of the ANC), other high profile persons associated with the ANC, and presumably by the deployment committee of the ANC. After his reinstatement, Mr Gama was centrally involved in key transactions that favoured the Gupta enterprise. The evidence on record gives rise to reasonable grounds to believe that Mr Gama was reinstated as a consequence of an instruction or direction by President Zuma.

1039. It is undisputed that from July 2011 Mr Molefe intensified his contact with the Gupta family, frequently visited the Gupta compound in Saxonwold and was in

regular contact with Mr Ajay Gupta in particular. Mr Molefe's driver testified that in the period between July 2011 and August 2014, he transported Mr Molefe to the Gupta compound and reasonably suspected that Mr Molefe received substantial cash payments during those visits. The testimony of the drivers of Mr Gama, Mr Gigaba, Mr Singh and Mr Pita gives rise to reasonable grounds to believe (or suspect in the case of Mr Pita) that they too received cash payments from the Gupta enterprise during the period under consideration.

1040. The first transactions tainted by corruption and advancing the interests of the Gupta enterprise concerned the procurement of cranes from ZPMC and Liebherr. As explained earlier, these transactions are not analysed in this volume of the report. However, the evidence shows that the contracts were procured in 2011-2014 by corrupt payments to the Gupta enterprise.

1041. Following the Transnet board's approval of the locomotive fleet modernization plan in April 2011, there were three significant locomotive transactions involving respectively the procurement of 95, 100 and 1064 locomotives.

1042. The procurement of 95 electric locomotives from CSR, shortly after the appointment of Mr Molefe as GCEO and the reinstatement of Mr Gama as CEO of TFR, was the first significant locomotive transaction tainted by corruption. The board approved the acquisition of 95 electric locomotives at its meeting of 31 August 2011. The transaction was approved by Mr Gigaba on 21 December 2011 at an ETC of R2.7 billion.

1043. The evidence in relation to the procurement of the 95 locomotives founds reasonable grounds to believe that it was attended by irregularities including: i) a prior decision by Mr Molefe to favour CSR as a bidder; ii) inappropriate communication with CSR prior to the closing of the bid; iii) communication between

CSR and the Gupta enterprise during the bidding process; iv) the failure to disqualify the bid by CSR on the grounds of it being non-responsive by not furnishing returnable documents; v) the improper changing of the evaluation criteria to favour CSR; vi) the failure to obtain the authorisation of the Minister for a cost overrun of R700 million; and vii) the non-recovery of late delivery penalties.

1044. All these irregularities favoured CSR and were against the best interests of Transnet. In addition to forming the basis of recommendations for further investigation and prosecution by the law enforcement authorities, the relationship of these events to one another and to the common objective of the Gupta enterprise is of evidentiary value in establishing a pattern, as part of the requirement of a pattern of racketeering activity, on a racketeering charge. They must be assessed in the light of the corrupt payment of USD 16.7 million (made in terms of an agency agreement concluded in relation to the "95 project" in April 2012) by CSR (Hong Kong) to Regiments Asia (Pty) Ltd (a company associated with Mr Essa) and the subsequent laundering of these unlawful proceeds onto companies forming part of the Gupta enterprise.

1045. During 2011, work had commenced on the business case of the 1064 locomotives transaction. In May 2012, Mr Molefe approved the confinement to the McKinsey consortium of the contract for advisory services related to the acquisition of the 1064 locomotives aimed at strengthening the business case by validating the market demand, reviewing funding options and mitigation of various risks. The contract was only signed in August 2014, but McKinsey commenced work in 2012 in terms of a LOI dated 6 December 2012. On 30 November 2013 the LOI expired with the consequence that although work continued to be performed by the McKinsey consortium there was no valid agreement governing its services to Transnet from that date. Moreover, the contract should never have been awarded

to McKinsey as its bid was non-responsive on account of it refusing to furnish its financial statements.

1046. The RFPs for the acquisition of the 1064 locomotives was issued in July 2012. Mr Singh was appointed as GCFO in July 2012 and Mr Sharma was appointed chairperson of the BADC in August 2012. The BADC's authority was increased to R2 billion at the same time. The board in August 2012 also approved the use of a loan facility from the China Development Bank ("the CDB") to fund the 1064 acquisition.

1047. In December 2012, Mr Essa appears to have facilitated a meeting between Mr Singh and Mr Pillay of Regiments in close proximity to Regiments replacing Letsema in the McKinsey consortium in terms of the LOI. Regiments thus became a member of the consortium without having tendered as part of it. Shortly before this, in October 2012, according to the evidence of Mr Sinton of Standard Bank, McKinsey agreed to appoint Regiments as its SDP subject to Regiments agreeing to share with Mr Essa (or one of his companies) 30% (later increased to 50%) and Mr Moodley (or one of his companies) 5% of all income received from Transnet. It is not disputed that neither Mr Essa nor Mr Moodley (or any of their companies) rendered any services of any kind to McKinsey or Transnet beyond the introduction of Regiments to McKinsey. This money laundering arrangement is further evidenced in the so-called "advisory invoice tracking" document which was sent by Regiments to Mr Singh and Mr Pita in 2015.

1048. The board approved the business case for the 1064 locomotive acquisition on 25 April 2013. The closing date for the bids was 30 April 2013 and the evaluation commenced in May 2013. During March 2013 to May 2013, prior to the submission of the bids for the 1064 locomotive procurement, Transnet engaged in direct

negotiations with CSR and the CDB with a view to concluding a tripartite agreement, the original draft of which explicitly provided for cooperation on the procurement of the locomotives. This is again an indication that the senior executives of Transnet were favourably disposed to CSR and CNR. The final version of the agreement merely provided for Transnet and the CDB to identify opportunities for CDB to participate in funding. Even then, given the relationship between the CDB and CSR, the perception that Transnet was favourably disposed to the Chinese OEMs is inescapable. Mr Gigaba, the Minister of Public Enterprises, approved the business case for the 1064 locomotive procurement in August 2013.

1049. The *modus operandi* of the Gupta enterprise was revealed in another transaction involving Transnet at this time. During July and August 2013, Mr Singh and Mr Essa engaged with Hatch, a bidder for work on Transnet's Manganese Expansion Project ("the MEP") in an attempt to strong arm it into agreeing to their preferred companies, DEC and PMA, being included as SDPs in the successful consortium that bid for the tender. The evidence in relation to these incidents provides reasonable grounds to suspect corruption in that Mr Essa and Mr Singh attempted to make the award of the tender conditional on Hatch's appointment of their preferred SDPs, to be paid an inflated fee of R80 million (later to be increased to R350 million) that would be laundered onto the Gupta enterprise. Hatch resisted these efforts to involve it in the corrupt scheme.

1050. Besides the evident corruption in relation to the MEP tender, the proven association of Mr Singh and Mr Essa with the Gupta enterprise at this time, the manipulation of the supplier development ("SD") component in the transaction by Mr Singh, Mr Essa's disclosure at a meeting with Hatch of the *modus operandi* of inflating the price of Transnet tenders for illegal purposes and a claim by him that

he and his associates would have influence in the subsequent appointment of Mr Molefe as CEO of Eskom, all point to a pattern of racketeering activity.

1051. In late 2013 Mr Singh agreed to an increased scope of work for Regiments on the financial services contract in relation to the 1064 locomotive procurement by replacing Nedbank with Regiments in the McKinsey consortium. This increased the scope of work of Regiments on the contract to 30% and thus the fee paid to it, 55% of which was intended to be laundered onto the Gupta enterprise. Around the same time, Regiments presented the so-called "R5 billion proposal" proposing a R5 billion loan facility to be funded by Nedbank through an "in-between structure" which had the potential to cause Transnet a R750 million loss and from which only Regiments would have benefitted in fees. Although the proposal was not implemented, it again evidences a pattern of conduct.

1052. In October 2013, the board approved the business case for the second significant locomotive transaction, being the procurement of 100 additional locomotives for use on the coal export line aimed also at the release of older locomotives from the coal export line for use in general freight business ("GFB"). The original intention was to acquire the locomotives by confinement on grounds of urgency and standardization from Mitsui which had supplied similar locomotives in the recent past. The evidence reveals that Mr Molefe, Mr Singh, Mr Pita and Mr Sharma all played a role in altering the confinement memorandum to award the contract to CSR which undermined the rationale of urgency and standardization as CSR had not produced similar locomotives.

1053. The alleged wrongdoing in relation to the procurement of the 100 locomotives during the course of 2014 included: i) management misled the BADC and the board in early 2014 by misstating the rationale by confinement and not disclosing

the concerns of the technical staff about CSR's inability to deliver the 100 locomotives in accordance with the required specifications; ii) non-compliance with the urgent delivery requirement; iii) non-compliance with the local content requirement; iv) the payment of excessive advance payments (60%) prior to the delivery of any locomotives; v) the payment of the advance payments without CSR furnishing the requisite security (advance payment guarantee); vi) the unjustifiable increase in the price of the procurement by R740 million without prior authorization of the board; and vii) the unjustifiable inflation of the base price of the locomotives and the reliance on incorrect assumptions in relation to cost factors and escalations. CSR (or CRRC) paid a kickback of R925 million on this contract to one of Mr Essa's companies, JJ Trading FZE.

1054. The most significant locomotive transaction was the procurement of the 1064 locomotives at a cost of R54.5 billion. As mentioned, the board approved the business case for the 1064 locomotives on 25 April 2013. The evaluation process and BAFO stage of the procurement process for the 1064 locomotives endured from May 2013 to January 2014. On 24 January 2014, the BADC and the board resolved to split the procurement into four contracts and appointed four OEMs as preferred bidders. Post tender negotiations took place in February 2014 and the locomotive supply agreements ("the LSAs") were concluded on 17 March 2014.

1055. While the post tender negotiations in relation to the 1064 procurement were under way, on 5 February 2014, McKinsey purported to cede its rights under the contract for the provision of advisory services to Regiments and informed Transnet that all the work related to the mandate had in fact been performed by Regiments.

1056. During the evaluation process, CSR's bid was favoured through the irregular adjustment of its price to account for its use of Transnet Engineering ("TE") as a

subcontractor and CNR was favoured by the exclusion of key costs from its best and final offer ("BAFO") that normally would have been included. There are thus reasonable grounds to believe that but for these irregular adjustments, CSR and CNR would not have succeeded as bidders. It is not clear from the evidence which employees of Transnet were responsible for these irregular adjustments and thus further investigation is required to determine the nature of any criminal or civil liability in this regard.

1057. During the post tender negotiations in relation to the 1064 locomotives, the price of the procurement increased substantially to the detriment of Transnet's interests, partly as a result of an improper agreement by Mr Singh and Mr Jiyane (overriding Mr Laher) to include batch pricing at a cost of R27 billion in the agreed price. In addition, the negotiations team, led by Mr Singh and Mr Wood of Regiments, imprudently agreed to excessive advance payments particularly to favour CSR and CNR which negatively impacted Transnet's cash flow going forward. Furthermore, the negotiations team agreed to terms of the contract contrary to the local content requirement of the RFPs that should have disqualified the bidders at that stage.

1058. As stated, the LSAs were concluded on 17 March 2014 at an increased price of R54.5 billion, being R15.9 billion more than the ETC stipulated in the business case. On 28 May 2014, the board accepted the recommendation of Mr Molefe and Mr Singh to increase the ETC from R38.6 billion to R54.5 billion on the premise that the original ETC stipulated in the business case had excluded forex and escalation costs. This was a false premise, following a misrepresentation by Mr Molefe and Mr Singh in a memorandum dated 18 April 2013, in that the ETC had in fact included forex and escalation costs in an amount of R5.9 billion. Mr Singh repeated the misrepresentation in correspondence to the Minister of Public Enterprises on 31 March 2014. Mr Singh and Mr Molefe furthermore failed to obtain

the approval and authorization from the Minister for the price increase in contravention of section 54 of the PFMA with the result that the legality of the LSA is brought into question.

1059. Mr Molefe and Mr Singh , in their memorandum to the board dated 23 May 2014 justifying the price increase of the procurement of the 1064 locomotives, also misrepresented the profitability of the procurement. The business case provided for a positive net present value ("NPV") of R2.7 billion based on the original ETC using a hurdle rate of 18.56%. The increase in price to R54.5 billion produced a negative NPV. Mr Molefe and Mr Singh however informed the board that the NPV remained positive using a changed hurdle rate of 15.2%. Mr Singh, in his capacity as GCFO, had changed the rate from 18.56% to 16.24% on 20 May 2014, but rather than use that reduced rate, he used an even lesser rate of 15.2% in his submission to the board. There are reasonable grounds to believe that Mr Singh used this lower hurdle rate to ensure a positive NPV, in the context of the 41% increase in the price of the procurement, in order to persuade the board that the NPV remained positive when in fact there were doubts about the profitability of the project overall.

1060. The actuarial evidence presented to the Commission provides a reasonable basis to conclude that the increase in the ETC by R15.9 billion included amounts totalling R9.124 billion that were unjustifiable expenditure. The unjustifiable amounts related to inflated provision for backward and forward forex and escalation costs, batch pricing and an excessive provision for contingencies. The evidence further indicates that Regiments, led by Mr Wood, played a key role in finalising and agreeing the unjustifiable forex and escalation costs during the post tender negotiations. The memorandum of 23 May 2014 submitted by Mr Molefe to the board justifying the increase specifically stated that the escalations had been

verified by Regiments "using their intellectual property methodology and techniques".

1061. CSR paid a R3.81 billion kickback in respect of the 359 electric locomotives awarded to it as part of the 1064 locomotive transaction (of which 85% was laundered further onto companies associated with the Gupta enterprise). It is also reasonable to conclude that the unjustifiable expenditure of R9.124 billion which increased the price paid to CSR probably facilitated the ability of CSR to make the kickback payment. The kickback in this instance was made in terms of a BDSA concluded in May 2015 by Mr Essa acting on behalf of Tequesta and CSR (Hong Kong) and in terms of an earlier agreement between CSR Zhuzhou Electric Locomotive Co Ltd and JJ Trading FZE.

1062. A kickback of R2.088 billion was paid by CNR to Mr Essa's company Tequesta in terms of an exclusive agency agreement (which superseded an earlier agreement of 8 July 2013 between CNR and CGT). This kickback was in respect of the 232 diesel locomotives awarded to CNR as part of the 1064 locomotive procurement.

1063. Thus, CSR and CNR (later amalgamated as CRRC) paid approximately R5.9 billion in kickbacks in relation to the 1064 locomotive procurement. This amount fell within the R9.124 billion margin of unjustifiable expenditure in respect of all the 1064 locomotives.

1064. In March 2014, shortly before the conclusion of the LSA in relation to the 1064 locomotives, a decision was taken to locate the manufacturing and assembly of the CNR and Bombardier locomotives in Durban. The initial costing of the relocation of CNR was estimated to be R98 million. Transnet eventually agreed to pay approximately R647 million to CNR (CNRRSSA) and approximately R618 million to Bombardier, a total of R1.261 billion of which R617.6 million was actually paid.

Further investigation is required to definitively determine the justifiability of these costs. However, the available evidence establishes strong grounds to believe that CNRRSSA made a corrupt payment of approximately R77 million to BEX (a company associated with the Gupta enterprise) which was laundered onto other shell companies including Integrated Capital Management of which Mr Shane (a director of Transnet who succeeded Mr Sharma as chairperson of the BADC) was a director. The payment to BEX was ostensibly for services rendered in relation to the relocation. However, the BDSA with BEX resembled the other kickback BDSAs facilitated by Mr Essa in relation to the locomotive transactions with the services rendered being of dubious value. The inclusion of BEX in the arrangement was consistent with the methodology of the Gupta enterprise of inflating the value of tenders to enable payments to the enterprise via chosen SDPs that were typically shell companies.

1065. The LSA concluded between CSR and Transnet in relation to the 359 locomotives as part of the 1064 locomotive transaction envisaged the parties concluding a maintenance services agreement for the locomotives supplied. In June 2015, CSR concluded a BDSA with Mr Essa's company, Regiments Asia, in relation to a proposed 12-year maintenance plan in terms of which Regiments Asia would supposedly provide advisory consulting services in exchange for a fee of 21% of the contract price of the maintenance services amounting potentially to R1.3 billion. The Transnet board approved the conclusion of a 12-year maintenance plan for an amount of R6.18 billion on 28 July 2016. Transnet paid CSR an advance payment of approximately R705 million in terms of this agreement in October 2016. The evidence indicates that R9.4 million of this was paid to Tequesta (another company associated with Mr Essa). Amidst allegations of corruption, Transnet terminated this agreement in October 2017 and sought repayment of the monies that had been advanced. In December 2018, CSR refunded Transnet R618 million. It is

unclear whether CSR has repaid to Transnet the VAT and interest in the amount of R223 million in respect of the R705 million advanced.

1066. The wrongdoing in relation to the 1064 locomotive procurement comprised, *inter alia*: i) the misrepresentation to the board of the components of the ETC; ii) non-compliance with the preferential points system; iii) the unfair favouring of CSR through the TE adjustment; iv) the factoring of a R2.01 million discount for TE back into the price of CSR's locomotives; v) the irregular understating of CNR's BAFO price by approximately R13 million per locomotive; vi) the marginalizing of Transnet's treasury; vii) the inflation of the price through the inappropriate use of batch pricing; viii) the inappropriate calculation of escalation costs, forex and contingencies; ix) the manipulation of the delivery schedule; x) the payment of excessive advance payments favouring CSR and CNR; xi) non-compliance with the local content requirements; xii) the failure to obtain the approval of the Minister for the substantial increase; xiii) the misrepresentation to the board of the NPV by using the wrong hurdle rate; xiv) the dubious maintenance services agreement and the failure to recoup the excessive advance payment timeously and the VAT and interest on it; and xv) the BDSA kickbacks.

1067. Regiments began to assume a greater role at Transnet in the immediate period leading up to the conclusion of the LSA's in respect of the procurement of the 1064 locomotives and the 100 locomotives confined to CSR on 17 March 2014 and in the subsequent period in which the financing of the 1064 transaction was finalised. On 23 January 2014, Mr Singh, without appropriate authority concluded a contract with Regiments in relation to the 1064 locomotive procurement. This was followed on 4 February 2014 by Mr Singh concluding with Regiments a third addendum to the LOI with McKinsey. McKinsey then purported to cede its rights to Regiments on 5 February 2014 in terms of an invalid cession. Regiments was then paid

R36.77 million between 18 February 2014 and 7 April 2014 in terms of the purported invalid third amendment to the LOI concluded on 4 February 2014. An additional payment of R79.23 million without any legal basis was paid by Transnet to Regiments on 30 April 2014.

1068. During 2014-2015, McKinsey and Regiments were awarded contracts valued at R2.2 billion by way of confinement rather than by open public tender. Half of the revenue received by Regiments under these contracts was directed to Homix, a Gupta associated company, in terms of the agreement with Mr Essa and Mr Moodley. The evidence establishes that McKinsey and Regiments were irregularly in possession of the confinement memoranda prior to making the bids on their contracts. Four of the confinements were approved by Mr Molefe over a period of four days between 31 March 2014 and 3 April 2014. These contracts all appointed Homix and Albatime (Gupta linked laundry vehicles) as SDPs. Fee payments (in an unknown amount) were irregularly made to McKinsey and Regiments in July 2014 in terms of these contracts prior to the conclusion of the tender process. Correspondence of 13 June 2014 confirms that provision for fee payments to Homix and Albatime in excess of R100 million were to be made in terms of these contracts. Mr Fine of McKinsey confirmed in a statement to Parliament that neither Homix nor Albatime were involved in providing any services on any project in which McKinsey was involved.

1069. In April 2014, shortly after the conclusion of the LSAs in respect of the 1064 locomotives, negotiations began in earnest with the CDB for the financing of the procurement of the locomotives from the Chinese companies. Regiments assumed a lead role in the negotiations while the Group Treasurer and treasury team of Transnet were side-lined. The Group Treasurer, Ms Makgatho, valiantly challenged the relegation of the Transnet treasury team. She repeatedly raised her concerns

about her marginalisation and the unsatisfactory proposed terms of the CDB facility with Mr Molefe and Mr Singh, but to no avail. Ms Makgatho resigned from Transnet in November 2014 as she feared for her safety and wellbeing. She was replaced by Mr Ramosebudi who had links with the Gupta enterprise.

1070. During August 2014, Mr Singh, with the assistance of Regiments, presented misleading information to the board which committed Transnet to a loan of USD1.5 billion from the CDB on relatively unfavourable terms.

1071. During this period, on 4 August 2014, Mr Molefe signed a deed of settlement agreeing that Transnet would pay the costs of GNS/Abalozi and its directors (including General Nyanda, a member of President Zuma's cabinet) on a punitive scale in litigation about the termination of a services contract with GNS /Abalozi, which had led to the dismissal of Mr Gama in 2010. The deed was apparently signed on behalf of GNS/Abalozi by General Nyanda, who was a friendly acquaintance of Mr Gama. The agreement to pay these costs was unjustifiable in a number of respects and should not have been concluded. Moreover, properly taxed the costs envisaged in the questionable settlement agreement would not have exceeded R200 000 at that particular stage of the litigation between Transnet and GNS/Abalozi. Yet, on 16 January 2016, Mr Molefe agreed to pay GNS/Abalozi R20 million to settle all legal claims against Transnet. The amount paid was an excessively inflated assessment of the legal costs payable and was paid to settle claims that had already been settled or had prescribed. This expenditure was wholly unjustifiable.

1072. On 17 April 2015, consistent with what Mr Essa had told Mr Bester of Hatch during the course of 2014, Mr Molefe was seconded from Transnet and became acting CEO of Eskom. On 20 April 2015, the board of Transnet appointed Mr Gama as

acting GCEO of Transnet. Four days earlier, on 16 April 2015, Transnet paid Mr Gama's attorneys R1.4 million in relation to his dismissal and reinstatement in 2010/2011 (four years previously). This payment was without any legal basis as it was probably a duplication of a costs payment made to Mr Gama's attorneys earlier which itself should never have been paid for various reasons, including the fact that it related in part to costs that had been awarded to Transnet in Mr Gama's failed High Court application and moreover was in any event not due in terms of the indefensible settlement agreement to reinstate Mr Gama.

1073. A week after Mr Gama's appointment as acting GCEO, Mr Ramosebudi who had succeeded Ms Makgatho as Group Treasurer of Transnet, compiled a memorandum seeking *inter alia* approval from the BADC for the payment to Regiments of R189.24 million as a "success fee" in relation to the USD1.5 billion facility with CDB (concluded eventually on 4 June 2015). The proposal was supported by Mr Gama, Mr Singh and Mr Pita. The BADC approved the request on 29 April 2015. Mr Gama approved the additional fee on 16 July 2015. Before the conclusion of the CDB loan, Regiments submitted an invoice for R189.24 million on 3 June 2015. The evidence discloses that the work performed in respect of this fee fell within the scope of an earlier agreed fee of R15 million. Additionally, the expert evidence of Dr Bloom confirms that the fee of R189.24 million was 10-15 times greater than the market norm for the work supposedly performed by Regiments, and was probably inflated by an amount of between R90 million and R140 million. The fee was paid to Regiments on 11 June 2015 and the record shows that R147.6 million of it was paid to Albatime (the Gupta linked laundry vehicle) of which R122 million was laundered further to Sahara Computers, another company in the Gupta enterprise.

1074. As discussed earlier in this report, USD1 billion of the USD2.5 billion CDB loan facility was shelved and Regiments advised and arranged for Transnet to conclude a ZAR12 billion club loan instead. Regiments originally replaced JP Morgan as the lead arranger on this loan. However, when Mr Wood moved from Regiments to Trillian Capital (Pty) Ltd (a company which Mr Wood helped to establish and in which Mr Essa was a controlling shareholder), Mr Gama submitted a memorandum to the BADC on 22 September 2015 recommending that the BADC approve the appointment of Trillian to replace JP Morgan as the lead arranger on the ZAR club loan.

1075. The proposal to appoint Trillian was supported by Mr Ramosebudi, Mr Pita and Mr Thomas. It was initially intended to pay Regiments a success fee of R50.2 million. However, Trillian was eventually paid a success fee of R93.48 million. Mr Thomas in an email to Mr Ramosebudi and Mr Pita challenged the propriety of the proposal on the grounds that prior payments to Regiments had covered the services supposedly performed by Trillian and expressed doubt that the newly incorporated Trillian had the capacity to underwrite the loan. Trillian was not a bank with significant assets but a company recently conceptualized by Mr Wood.

1076. On 14 September 2015, a few days before Mr Gama submitted the proposal to the BADC, Mr Ramosebudi forwarded an email to Mr Wood to which he attached an order to Land Rover Waterford (a dealership partly owned by Mr Wood's partner, Mr Nyhonyha) for a Range Rover Sport valued at R1.23 million in the corrupt hope that Mr Wood could "do something for him".

1077. On 18 November 2015, Mr Gama and Mr Pita concluded a mandate with Mr Roy of Trillian engaging it as the lead arranger for the ZAR12 billion club loan. On the same day Trillian issued an invoice for R93.48 million. The next day, 19 November

2015, Mr Gama and Mr Pita signed a payment advice. Four days later on 23 November 2015, the ZAR club loan was concluded. The next day, 24 November 2015, Mr Ramosebudi compiled a memorandum requesting Mr Gama and Mr Singh to sign off on the Trillian invoice which they did in early December 2015. The money was paid into Trillian's account on 4 December 2015, a mere 16 days after the mandate was concluded. Four days later on 8 December 2015, R74.8 million of that fee was transferred by Trillian to the Gupta money laundering vehicle Albatime.

1078. The evidence convincingly confirms that Trillian had not in fact performed any services in relation to the ZAR club loan and that the lead arranging work had been performed earlier by JP Morgan and Regiments. In additio n, Trillian could not have practically done the work in the limited time available to it as it would have needed to be done in the months leading up to the conclusion of the ZAR club loan.

1079. Shortly after Mr Gama approved the wholly unjustifiable payment of R93.48 million to Trillian , he met with Mr Essa at the Oberoi Hotel in Dubai on 23 January 2016. Evidence before the Commission confirms that Mr Gama 's hotel bill in Dubai was either paid or was intended to be paid by Sahara Computers or Mr Essa, both associates of the Gupta Enterprise. A few weeks later, on 24 February 2016, Ms Mabaso, the chairperson of the Transnet board recommended the appointment of Mr Gama as GCEO to replace Mr Molefe (who had resigned in September 2015 to assume the position of CEO at Eskom). Ms Mabaso recommended the appointment of Mr Gama without any formal, competitive recruitment process. Ms Brown, the then Minister of Public Enterprises (appointed by President Zuma) appointed Mr Gama as GCEO on 12 March 2016, despite the fact that Mr Gama had on two prior occasions been found unsuitable for the post by the Transnet board.

1080. On the same day that Mr Gama authorized the unjustifiable payment of R93.48 million to Trillian – and just 10 days after the conclusion of the ZAR12 billion club loan, at a floating interest rate – Mr Ramosebudi submitted a memorandum to Mr Pita, the then acting GCFO, seeking approval for hedging the interest rate exposure from a floating rate to a fixed rate and permission to instruct Regiments to execute the hedges with approved counterparties. Mr Gama approved the proposal and two tranches of interest rate swaps were executed by Regiments on the ZAR club loan. R4.5 billion was swapped to a fixed rate of 11.83% for 15 years on 4 December 2015. Seven months later, on 7 March 2016, R7.5 billion was swapped to a fixed rate of 12.27% for 15 years.

1081. These interest rate swaps were highly imprudent for various reasons, caused substantial losses to Transnet, and should never have been concluded. The realised total negative cash flow for Transnet on these interest rate swaps was R850.5 million by 2019. This amount would not have been payable had Transnet not effected the interest rate swaps. As at 14 May 2019, the amount of the cost of exit (an unrealised negative cash flow) would have been an additional R918.48 million, giving a total negative cash flow of R1.83 billion at that date.

1082. Other interest rate swaps executed by Regiments on Transnet debt in the amount of R11.3 billion, not directly related to financing the 1064 locomotive transaction, and unusually using the TSDBF as a counterparty, resulted in an additional realised cash flow loss of R720.8 million and an unrealised loss of R815.7 million, totalling R1.5 billion, for Transnet. Regiments received a fee of R229 million in respect of these transactions.

1083. Other transactions in relation to Transnet's IT and data network were tainted with corruption and irregularity. In October 2013, the acting GCEO of Transnet awarded

the tender for Transnet's network services to Neotel when Mr Molefe, the GCEO, was absent on business elsewhere. On his return, and most likely in contravention of the PFMA, Mr Molefe revised the award and granted the tender to T-Systems which had bid for the contract in conjunction with BBI, the SOE to which Mr Essa had been appointed as a director by Mr Gigaba. T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems, its SDP, which made various payments to Gupta laundry vehicles (including Homix and Albatime) and which during 2015 and 2016 paid Zestllor (a company owned by Mr Essa's wife) a monthly retainer of R228 000.

1084. Mr Molefe's decision was subsequently reversed and the award to Neotel was reinstated after Transnet received a negative opinion from its auditors and legal advice that Mr Molefe's decision was irregular.

1085. The evidence establishes convincingly that during 2014-2015, Neotel made two corrupt payments to Homix (a Gupta enterprise laundry vehicle), in the amount of approximately R75 million. The first payment of R34.5 million was in respect of the acquisition of equipment from Cisco for use in the Transnet IT network and another payment of R41 million supposedly for services rendered over two days in concluding the Master Services Agreement ("the MSA") for the network services between Neotel and Transnet. Neotel also agreed to pay R25 million to Homix for services it supposedly rendered (over the same two-day period) in relation to an asset buy back agreement between Transnet and Neotel. The amounts paid to Homix by Neotel were then laundered onto the Gupta enterprises in contravention to the exchange control regulations.

1086. A further unsuccessful attempt to favour T-Systems was made in 2017. On that occasion, the BADC chaired by Mr Shane (seemingly supported by Mr Gama)

refused on dubious grounds to award the tender to the first placed bidder, Gijima, and instead awarded it to T-Systems, the lowest scoring bidder whose bid was R1 billion more expensive. The decision was eventually reversed and the tender was awarded to Gijima, but the conduct of the members of the BADC, particularly Mr Shane and Mr Nagdee (both with links to the Gupta enterprise) evinced a clear intention to favour T-Systems. There are reasonable grounds to believe that their conduct contravened section 50 of the PFMA and is evidence establishing their links to the Gupta racketeering enterprise.

1087. In the light of this extensive range of wrongdoing, viewed in the light of the evidence in relation to the cash bribes and the kickback agreements, the following recommendations are made in terms of TOR 7 of the Commission's terms of reference.

Recommendations in relation to the kickback and laundering of the proceeds of unlawful activities

1088. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution here or abroad of Mr Essa and his various companies (Regiments Asia, Tequesta, JJ Trading FZE and Century General Trading FZE) and the relevant functionaries of CSR Zhuzhou Electric Locomotives Co, CNR and CRRC on charges of corruption as contemplated in any law, including Chapter 2 of PRECCA, and the racketeering offences and the offences relating to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA, in relation to the various contracts (including BDSAs and exclusive agency agreements) concluded between 2012 and 2016 that led to the payment of at least R7.34 billion in kickbacks to companies controlled by Mr Essa and the Gupta enterprise.

1089. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with the view to the possible prosecution of Regiments Capital (Pty) Ltd, Mr Wood, Mr Essa (and any company under his control), Mr Moodley (and any company under his control) and Mr Singh, as well as any persons associated with them in illegal conduct, on charges of fraud, corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the alleged arrangement and agreement whereby it was agreed to appoint Regiments as an SDP on Transnet contracts in exchange for Regiments paying 30-50% of its fees to Mr Essa and/or his associated companies and 5% of its fees to Mr Moodley and/or his associated companies amounting to more than R1 billion for little or no consideration.

Recommendations in relation to the receipt of gratification by individuals

1090. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Gigaba , Mr Gama, Mr Pita and Mr Jiyane on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to cash payments allegedly received by them during visits to the Gupta compound in Saxonwold in the period 2010-2018.

1091. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to cash payments that were allegedly made to them at the Three Rivers Lodge, Vereeniging in July 2014 by two unidentified Chinese men.

1092. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to his Dubai travel expenses during the period between April 2014 and June 2015, which were allegedly paid for by Sahara Computers or Mr Essa.

1093. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to the payment of his Oberoi Hotel bill for 22-24 January 2016, which was allegedly paid by Sahara Computers.

Recommendations in relation to the unjustifiable reinstatement of Mr Gama

1094. It is recommended that steps should be taken by Transnet in terms of section 77 of the Companies Act 71 of 2008 to recover from those members of the board who supported the unjustifiable settlement agreement between Transnet and Mr Gama concluded on 23 February 2011, the amount of approximately R17 million paid to and for the benefit of Mr Gama pursuant to the agreement.

1095. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether the crime of fraud was committed by any person in relation to the payment of R1 399 307.11 on 16 April 2015 by Transnet to Langa Attorneys (in respect of costs allegedly owed to Mr Gama).

1096. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary, with a view to the possible prosecution on a charge of corruption in terms of Chapter 2 of PRECCA, and/or a racketeering

charge in terms of Chapter 2 of POCA, to determine whether the reinstatement of Mr Gama as CEO of TFR at the instance of Mr Zuma, Mr Gigaba and Mr Mkwanazi constituted an improper inducement to Mr Gama to do anything, thus amounting to corruption.

Recommendation in relation to the settlement agreement with GNS/Abalozi

1097. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether Mr Brian Molefe acted wilfully or grossly negligently in contravention of sections 50 or 51 of the PFMA with a view to his prosecution on a charge in terms of section 86(2) of the PFMA in relation to his agreement on 16 January 2016 to pay GNS/Abalozi an unjustifiable payment of R20 million.

Recommendations in relation to the procurement of the 95 locomotives

1098. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Gama on a charge of contravening section 50(1)(a) of the PFMA and/or on an offence relating to the proceeds of unlawful activities and/or racketeering as contemplated in Chapter 2 and 3 of POCA in relation to their decision to recommend to the board the change in the evaluation criteria in the procurement of the 95 locomotives so as to favour CSR as a bidder for the tender.

1099. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine if the board (the accounting authority) of Transnet wilfully or grossly negligently contravened section 51(1)(b)(i) of the PFMA by failing to recover delay penalties allegedly due to Transnet in terms

of the LSA concluded between Transnet and CSR in 2012 in respect of the procurement of the 95 electric locomotives.

Recommendations in relation to the procurement of the 100 locomotives

1100. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Jiyane and Mr Gama on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by presenting misleading information and failing to disclose material information to the board of Transnet in January 2014 regarding the acquisition of 100 electric locomotives from CSR by means of confinement.

1101. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet in terms of section 86(2) of the PFMA in respect of the authorisation of advance payments of approximately R3 billion to CSR in the period between March 2014 and November 2014 with no security in the form of advance payment guarantees being in place.

1102. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R740 million in relation to the procurement of 100 electric locomotives from CSR.

Recommendations in relation to the procurement of the 1064 locomotives

1103. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet on a charge in terms of section 86(2) of the PFMA by wilfully or grossly negligently contravening section 51 of the PFMA by wrongfully deviating from the evaluation criteria of the instruction note of National Treasury of 16 July 2012 and the provisions of regulations 5 and 6 of the PPPFA regulations in relation to the evaluation of the bids for the 1064 locomotives

1104. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh and Mr Gama for fraud and on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by misrepresenting to the board of Transnet in April 2013 and May 2014 that the ETC of R38.6 billion for the procurement of the 1064 locomotives excluded provision for forex and escalations when it in fact did so in the amount of R5.892 billion.

1105. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the Minister of Public Enterprises in an email of 31 March 2014 that the ETC of R38.6 billion approved by the Minister in August 2013 excluded provision for the impacts of foreign exchange and escalations when it in fact included provision for such costs in the amount of R5.892 billion.

1106. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any official or employee or former employee of Transnet on a charge of fraud or in

terms of section 86(2) of the PFMA in wrongfully adjusting the prices of the bid of CSR by an irregular adjustment for the TE scope and by an inappropriate reduction of CNR's BAFO price in the procurement of the 1064 locomotives so as to favour them and with the result that their bids succeeded when they should not have.

1107. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh and Mr Jiyane on a charge of fraud or in terms of section 86(2) of the PFMA by wrongfully agreeing to increase the price of the procurement of the 1064 locomotives by including an unjustifiable provision of R2.7 billion for batch pricing when there was no contractual obligation to do so.

1108. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the negotiations team that conducted the post tender negotiations on behalf of Transnet in relation to the procurement of the 1064 locomotives on charges of corruption in terms of Chapter 2 of PRECCA, or in terms of section 86(2) of the PFMA for wilfully or grossly negligently contravening section 50(1)(b) of the PFMA, by acting corruptly or not acting in the best interests of Transnet in managing its financial affairs by agreeing to the payment of excessive advance payments to CSR and CNR and not complying with the local content requirements of the RFPs of the tender in relation to this transaction.

1109. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the board of Transnet that the 1064 locomotive project was NPV positive and profitable by applying an

inappropriate hurdle rate of 15.2% when the project may in fact have had a negative NPV.

1110. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or in a grossly negligent way contravening sections 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R9.124 billion in relation to the procurement of the 1064 locomotives from the relevant OEMs.

1111. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of the majority directors of CNRRSSA, BEX, Mr Shaw, Integrated Capital Management, Confident Concepts and any other associated persons and companies on a charge of corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the payment of approximately R76.59 million made by CNRRSSA to BEX on 25 September 2015.

1112. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Nair and the members of the negotiations team that represented Transnet in the negotiations with CNRRSSA and Bombardier concerning the relocation of the manufacturing and assembly lines to Durban in 2014-2015 on a charge in terms of section 86(2) of the PFMA for contravening section 50(1)(b) of the PFMA by failing to act in the best interests of Transnet in managing its financial affairs by negotiating and agreeing to variation orders in the total amount of

approximately R1.2 billion, when there may in fact have been no proper basis for agreeing to the payment of that amount.

Recommendations in relation to the financial advisors

1113. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Wood, Regiments and any other person associated with them in illegal conduct on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA, and in terms of section 86(2) of the PFMA (where appropriate) for contravening section 50(1)(b) of the PFMA by acting corruptly and receiving and laundering an amount of R79.23 million paid by Transnet to Regiments on 30 April 2014.

1114. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama on a charge in terms of section 86(2) of the PFMA for contravening section 51(h) of the PFMA by concluding a contract in 2017 with Nkonki valued at R500 million in contravention of paragraph 9 of National Treasury Practice Note 3 of 2016 thereby not complying with legislation applicable to Transnet.

1115. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 51(1)(b)(iii) of the PFMA in that on 27 August 2014 he breached his duty to prevent expenditure not complying with the operational policies of Transnet by recommending to the board a proposal made by Regiments that was not in line with Transnet's policy regarding the fixed-floating debt ratio.

1116. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by not acting in the best interests of Transnet by recommending to the board the conclusion of a loan of USD1.5 billion on 4 June 2015 at a price substantially above the market norm.

1117. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Singh, Regiments, Mr Wood, Mr Moodley, Albatime and Sahara Computers on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA and (where appropriate) in terms of section 86(2) of the PFMA in relation to the payment by Transnet to Regiments on 11 June 2015 of an amount of R189.24 million and the on payment of R147.6 million of that amount to Albatime and Sahara Computers by Regiments.

1118. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Ramosebudi, Mr Pita, Mr Wood, Mr Essa, Trillian and Albatime on charges of fraud, corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activities in terms of Chapter 2 and 3 of POCA in relation to the payment by Transnet to Trillian on 4 December 2015 of an amount of R93.48 million and the on payment of R74.78 million of that amount to Albatime.

1119. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr

Ramosebudi and Mr Wood on a charge of corruption in terms of sections 12 and 13 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in relation to his soliciting or offering to accept a gratification from Mr Wood, Trillian or Mr Nyhonyha on 12 September 2015 in the form of a discount or reduction of the price payable for a Range Rover Sport motor vehicle from Land Rover Waterford for his benefit as an inducement to award a contract appointing Trillian for a fee of R93.4 million to replace JP Morgan as the lead arranger of the ZAR12 billion club loan.

1120. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Ramosebudi, Mr Pita, Regiments Capital (Pty) Ltd, Regiments Fund Managers (Pty) Ltd, Mr Wood, Mr Shane and any other persons associated with them in illegal activity on charges of fraud, corruption or in terms of Chapter 2 of PRECCA, racketeering and the offences relating to the proceeds of unlawful activity under Chapter 2 and 3 of POCA, or where appropriate in terms of section 86(2) read with section 50(1)(b) of the PFMA, in relation to the realised losses of more than R1.5 billion caused to Transnet and the fees paid to Regiments Fund Managers in the amount of R229 million in respect of various interest rate swaps, cross-currency swaps and credit default swaps executed by Regiments on behalf of Transnet in the period between 2015 and 2019.

Recommendations in relation to the MEP

1121. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Reddy and Mr Padayachee with corruption as contemplated in section 3, section 12(1) or section 13 of PRECCA in their offering in July 2013 to accept a

gratification (in the form of an appointment as an SDP) from Hatch as an inducement for influencing officials at Transnet to award Hatch the tender in relation to phase 1 of the MEP.

1122. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Essa and Mr Singh on charges of corruption in terms of Chapter 2 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in demanding or soliciting in early 2014 a gratification (an SDP appointment for a company favoured by Mr Essa) for the benefit of Mr Essa's company and himself and as an inducement (by influencing officials at Transnet) to award the tender in relation to a contract for performing work and providing services on phase 2 of the MEP to Hatch.

Recommendations in relation to the IT contracts

1123. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Khan, Homix, Neotel and Mr Van der Merwe on charges of corruption in terms of section 13 of PRECCA and on racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA in relation to the offering by Mr Khan to accept 10% commission, in the amount of approximately R34 million, from Neotel as an inducement to influence officials at Transnet to award a tender to Neotel for supplying equipment to Transnet from Cisco and in relation to the on payment of such funds to the laundering vehicles of the Gupta enterprise.

1124. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Neotel, Mr Joshi, Mr Van der Merwe, Mr Khan, Homix and any other person associated with them in illegal activity on charges of corruption in terms of Chapter

2 of PRECCA, racketeering offences in terms of Chapter 2 of POCA and offences relating to the proceeds of unlawful activity in terms of Chapter 3 of POCA, in relation to the payment by Neotel of R41.04 million to Homix and the promise by Neotel to pay R25 million to Homix in the period between December 2014 and February 2015 supposedly for services rendered in relation to the MSA and asset buyback agreement concluded between Neotel and Transnet in December 2014.

1125. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Shane and Mr Nagdee on a charge in terms of section 86(2) of the PFMA for contravening section 50 of the PFMA by acting prejudicially to Transnet's financial interests in a meeting of the BADC on 13 February 2017 by unjustifiably favouring the bid of T-Systems on spurious grounds.