

392. Ms Stimpel testified that there were multiple postponements in the disciplinary hearing against her.⁵⁸³ Eventually, she was advised to take the case directly to the Labour Court but then the Court ruled that she had to take her case to the CCMA, which she did. She said that SAA attempted to move and postpone each date arranged with the CCMA. Eventually, after months of this conduct, Ms Stimpel's lawyer advised her that she should just settle because this could continue for another year. So Ms Stimpel relented and settled the case.⁵⁸⁴ The settlement included six months of salary with no benefits and Ms Stimpel went into early retirement. This meant that she received only her pension from her Provident Fund and not any of the travelling benefits she was entitled to as Group Treasurer at retirement. This, together with outstanding salary up to normal retirement age, was valued at around R4million.⁵⁸⁵

393. Ms Stimpel testified that she believes she was suspended because she stood up to SAA against conduct she regarded as irregular and potentially corrupt.⁵⁸⁶ She also testified, with reference to, among others, Mr Bosc and Ms Mpshe, that, if anyone challenged what the Board was directing people to do, or instructions from senior executives, then you were immediately suspended. The charges were not given at the time but made up afterwards. She stated that, at the time of her suspension, at least four other people were suspended. Employees were instructed to sign documents and, if they refused, then SAA would find a way to get the employee

⁵⁸³ Transcript 14 June 2019, p 68-69

⁵⁸⁴ Transcript 14 June 2019, p 70

⁵⁸⁵ Exhibit DD1, p 29, paras 156-157

⁵⁸⁶ Transcript 14 June 2019, p 74-75

concerned suspended. She testified that this appeared to be a prevalent pattern around that time at SAA.⁵⁸⁷

394. Ms Stimpel testified that she was aware of a disciplinary hearing that took place against Ms Nhantsi and Mr Zwane in 2018 once SAA was under a new Board. She was called on behalf of SAA to testify against them regarding their conduct in respect of BNP. She agreed to do so.⁵⁸⁸

395. Ms Nhantsi and Mr Zwane were charged with their roles in facilitating the irregular transaction with BNP and the unlawful cancellation fee.⁵⁸⁹ The findings of the disciplinary process, given by Mr Nazeer Cassim SC on 19 June 2018, were that these employees were both guilty of gross misconduct in that they facilitated corrupt activities and theft that enriched those in control of SAA.⁵⁹⁰ Mr Cassim SC concluded that: "The employees have not shown any remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. There is, in my view, no prospect on any basis for SAA or SAAT to keep these two individuals in their employment. I recommend summary dismissal."⁵⁹¹ He also recommended they be reported to the regulatory authorities responsible for chartered accountants for having breached their ethical duties.⁵⁹²

396. During her testimony at the Commission, Ms Nhantsi made various allegations against Ms Stimpel and impugned her character: She said that Ms Stimpel was bullying towards her, stormed into her office without an appointment, and accused

⁵⁸⁷ Transcript 14 June 2019, p 75-76

⁵⁸⁸ Transcript 14 June 2019, p 80

⁵⁸⁹ Exhibit DD1, p 858, para 40

⁵⁹⁰ Exhibit DD1, p 859 and 864

⁵⁹¹ Exhibit DD1, p 867

⁵⁹² Exhibit DD1, p 866

her of only having her role because of affirmative action. Ms Stimpel denied all of these allegations.⁵⁹³

397. Ms Stimpel's evidence was also put to Ms Myeni. In response, Ms Myeni initially claimed not to know who Ms Stimpel was. Then she just invoked her privilege against self-incrimination in respect of each allegation.⁵⁹⁴

Ms Nhantsi's version

398. As set out above, in November 2015, Ms Nhantsi had been originally seconded to the position of interim CFO of SAA and had then been permanently appointed to the position by Ms Kwinana in May 2017. Ms Nhantsi did not have sufficient experience in this type of position and appeared to have been hand-picked by Ms Kwinana for the role, without a thorough and transparent appointment process.

399. Ms Nhantsi testified that, as a chartered accountant, she understood that, as CFO, she had a fiduciary duty to act in the best interests of SAA and to act in good faith and for a proper purpose.⁵⁹⁵ She testified that she understood that competitive and transparent procurement process had to be followed unless there were exceptional circumstances, in which case departure from the processes had to follow the rules and systems required for such a departure at SAA.⁵⁹⁶

⁵⁹³ Transcript 14 June 2019, p 82-83

⁵⁹⁴ Transcript 6 November 2020, p 195-208 and p 223-227

⁵⁹⁵ Transcript 14 June 2019, p 31

⁵⁹⁶ Transcript 14 June 2019, p 32

400. Ms Nhantsi testified that, soon after she had joined SAA, Ms Myeni gave her Mr Masotsha Mngadi's number and told her that he was an advisor and that, if she had any questions about the submissions she was working on for the swap deal, she should contact him. He was also given Ms Nhantsi's number.⁵⁹⁷ Later on, upon making enquiries with Ms Kwinana in December 2015, she realised that Mr Mngadi was not an SAA-appointed advisor, but was a personal advisor to Ms Myeni and no process had been followed for this appointment.⁵⁹⁸ He was not on SAA's payroll.⁵⁹⁹ Ms Nhantsi testified that Mr Mngadi nevertheless helped her to draft a letter to National Treasury about the aircraft swap deal.⁶⁰⁰

401. It was put to Ms Nhantsi that it was strange that she consulted with a third party who was not employed by SAA about SAA operations because, if SAA required advisors, they should be duly procured.⁶⁰¹ Ms Nhantsi responded that she was just told by Ms Kwinana that this was Ms Myeni's "person" and was told by Ms Myeni, that if there were ever any questions about SAA, she should ask Mr Mngadi and so she did so.⁶⁰² Ms Nhantsi conceded that it was indeed strange that a third party, who was not an executive at SAA, would be contributing to drafting letters to National Treasury from SAA. She noted that she was only at SAA for two weeks at that point and was not entirely sure about protocol yet.⁶⁰³

402. Ms Nhansti testified that many years prior to her arrival at SAA, SAA ordered wide body aircraft, 10 or 20 of them, and wanted to swap them. The deal was at an

⁵⁹⁷ Transcript 14 June 2019, p 33

⁵⁹⁸ Transcript 14 June 2019, p 35

⁵⁹⁹ Transcript 14 June 2019, p 36

⁶⁰⁰ Transcript 14 June 2019, p 37

⁶⁰¹ Transcript 14 June 2019, p 39

⁶⁰² Transcript 14 June 2019, pp39-40

⁶⁰³ Transcript 14 June 2019, p 42

advanced stage when Ms Nhantsi joined SAA. The Minister of Finance then sent an instruction to SAA to stop the transaction.⁶⁰⁴ Mr Mngadi knew all about the transaction because he was the one giving Mr Zwane and Ms Nhantsi the background to the deal.⁶⁰⁵

403. On 30 October 2015 Mr Mngadi wrote a letter to the SAA Board about the Airbus swap transaction.⁶⁰⁶ The letter set out in great detail why leasing the aircraft would be advantageous to SAA. Ms Nhantsi testified that the letter was never shown to her.⁶⁰⁷

404. Ms Nhantsi also testified that she engaged with Mr Mngadi about the BNP transaction. She testified that she began engaging with him after BNP had been successful in the transaction advisor bid. BNP was officially represented by Mr Pholisani Daniel Mahlangu but Ms Nhantsi said that she would often receive calls from Mr Mngadi as part of the BNP team.⁶⁰⁸

405. Ms Nhantsi provided the Commission with some of her whatsapp messages with Mr Mngadi.⁶⁰⁹ They reveal that Ms Nhantsi had saved Mr Mngadi's details as "Masotsha Mngadi SAA/Nedbank". Ms Nhantsi confirmed that she saved his details in that way about two days after starting work at SAA. She accordingly stated that she had always been aware that Mr Mngadi was associated with Nedbank.⁶¹⁰ This association was important because, as set out above, Nedbank was also one of the bidders to provide transaction advisory services to SAA. As a Nedbank employee,

⁶⁰⁴ Transcript 14 June 2019, p 42

⁶⁰⁵ Transcript 14 June 2019, p 43

⁶⁰⁶ Exhibit DD2, p 200

⁶⁰⁷ Transcript 14 June 2019, p 44

⁶⁰⁸ Transcript 14 June 2019, p 45

⁶⁰⁹ Exhibit DD2, p 101

⁶¹⁰ Transcript 14 June 2019, p 57-58

Mr Mngadi could not also be associated with a competitor bidder, such as BNP Capital, in the process.

406. Ms Nhantsi testified that she had supported the decision of the Board to approve the funding of the R15billion debt consolidation by the FDC because the savings on interest with that offer would have been R1.2billion per year. However, in hindsight, she did not support her original decision. She agreed that it was not in the best interests of the company.⁶¹¹ She testified that, at the time, she was not aware (because she did not read the documentation properly as she was new to SAA at the time) that the FDC was using a foreign investor, Grissag, to fund the transaction. She said that she now realised that there was a bigger scheme at play. She said that there were arrangements for the FDC to form a joint venture with the same funder that was behind the SeaCrest offer. She testified that her present view was that there were “people who stood to benefit from the transaction using [her] to conclude the transaction”.⁶¹²

407. Ms Nhantsi testified that she had supported her decision to appoint BNP as transaction advisor.⁶¹³ However, she testified that this had changed and she no longer supported her initial decision to expand the scope of BNP Capital to include sourcing funds.⁶¹⁴ In addition, she testified that she never supported and continued not to support the decision to approve the cancellation fee to be paid to BNP pursuant to the extended scope.⁶¹⁵

⁶¹¹ Transcript 14 June 2019, p 61

⁶¹² Transcript 14 June 2019, pp 60- 61

⁶¹³ Transcript 14 June 2019, p 62

⁶¹⁴ Transcript 14 June 2019, p 62

⁶¹⁵ Transcript 14 June 2019, p 62

408. Ms Nhantsi testified that on 1 December 2015, which was a few days after her secondment to SAA, she received a call from Mr Moyo of the FDC who asked her if SAA still needed funding. She testified that she knew Mr Moyo because they had served articles together and then worked extensively together at SNG.⁶¹⁶ She asked him whether he had a mandate for that and how it would be possible given that the FDC received government grants. Mr Moyo told her that the FDC was in talks with a foreign investor and that the FDC Act allowed the FDC to do the funding transaction. She asked him to put that offer in writing, which he did. Ms Nhantsi presented it to the Board at the meeting on 3 December 2015.⁶¹⁷ Ms Nhantsi testified that the Board considered the SeaCrest offer but was concerned about its responses to the due diligence requests and the recommendation from the banks for R4.3billion defeated the point of debt consolidation.⁶¹⁸ Ms Nhantsi conceded that the Board never called anyone from the Legal Department to address their concerns about SeaCrest and the due diligence. She said she did not recall anyone mentioning the proposed draft contract that was before the Board. This draft contract imposed conditions precedent on the FDC and the foreign investor, that would have required all necessary documentation to be forthcoming *before* a contract would come into being.⁶¹⁹ This would have protected SAA.

409. Ms Nhantsi explained that during the Board meeting it appeared as though the Chair, Ms Myeni, already knew about the FDC proposal. Ms Nhantsi and Mr Zwane were

⁶¹⁶ Transcript 14 June 2019, p 64

⁶¹⁷ Transcript 14 June 2019, p 65. The letter may be found in exhibit DD1, p 287

⁶¹⁸ 14 June 2019, p 66 -67

⁶¹⁹ Transcript 14 June 2019, p 91-96

mandated to urgently facilitate the transaction and do all that was necessary to process it because the company urgently needed funds.⁶²⁰

410. Ms Nhantsi admitted that the Board did not seem to be concerned with following due process with FDC. She stated that, in seeking to impose some kind of process after-the-fact, the Board was doing things in reverse.⁶²¹ She testified that during the Board meeting she was not sure whether what they were doing was lawful in terms of process because she was so new. Ms Nhantsi pointed out that she had no reason to doubt that they knew what was supposed to be done and were acting in accordance with due process.⁶²² She also admitted that the Board did not have sufficient information before them to make the decision – like the terms of the offer (duration, rate of interest, amount advanced, details about the foreign funder), and due diligence⁶²³ – because all they had was the non-committal letter from the FDC.⁶²⁴ Ms Nhantsi conceded that she ought to have raised all of these issues with the Board but had failed to do so. She said that she tried to remedy some of this afterwards by then following due process.⁶²⁵

411. Ms Nhantsi testified that, after the Board meeting, she called the treasury department to inform them about the Board's decision on FDC. She said that during the call, Ms Stimpel "was shouting" and saying this was not allowed. Ms Nhantsi ended the call with Ms Stimpel by stating that they had to comply with the Board's resolution.⁶²⁶ They decided the best way forward was to send the template term sheet and the

⁶²⁰ Transcript 14 June 2019, p 67

⁶²¹ Transcript 14 June 2019, p 83

⁶²² Transcript 14 June 2019, p 109-110

⁶²³ Transcript 14 June 2019, p 116-118

⁶²⁴ Transcript 14 June 2019, p 111

⁶²⁵ Transcript 14 June 2019, p 119-120

⁶²⁶ Transcript 14 June 2019, p 70

RFP to the FDC. FDC's response to the RFP was submitted by 24 December 2015. It was evaluated in early 2016.⁶²⁷

412. Ms Nhantsi conceded that Ms Stimpel told her on 6 January 2016 that she had had a meeting with National Treasury during which they told her in no uncertain terms that FDC did *not* have a mandate to advance funds to SAA. However, she said she went to Mr Moyo and he told her that in terms of section 4A(h), the FDC did have this mandate.⁶²⁸ She testified that she ran this past Ms Ursula Fikelepi, the Head of Legal at SAA, but she did not formally ask for an opinion.⁶²⁹ She testified that it did not worry her at the time that she was being given advice that was directly contradictory to that of National Treasury but that looking back on it now, it should have concerned her.⁶³⁰

413. It was further put to Ms Nhantsi that one of the main reasons given by the Board for rejecting SeaCrest was that it was not satisfied there was an adequate due diligence, but that it had approved the FDC proposal without any due diligence whatsoever. Ms Nhantsi accepted this fact.⁶³¹

414. Ms Nhantsi explained that the reason she believed, at the time of testifying, that the transaction should not have been approved, was that Mr Moyo had mentioned to her that the Chair of the FDC Board was Mr Ace Magashule's sister. Ms Nhantsi said that she had not been aware of all the politics at the time but, looking back and knowing what she later learned, particularly the evidence of Mr Van der Merwe, she then understood how she was used as a "scapegoat" or "a vehicle for people to

⁶²⁷ Transcript 14 June 2019, p 71

⁶²⁸ Transcript 14 June 2019, p 97

⁶²⁹ Transcript 14 June 2019, p 98- 99

⁶³⁰ Transcript 14 June 2019, p 100-101

⁶³¹ Transcript 14 June 2019, p 104

enrich themselves". Mr Van der Merwe was the director of Grissag who was summoned to give evidence at the Commission. His evidence will be dealt with below.

415. BNP was ultimately appointed as transaction advisor on 20 April 2016 and Ms Nhantsi testified that she started engaging with them about two or three weeks after they had received the letter of award. She did not have any interactions with Mr Mahlangu in this regard.⁶³²

416. Ms Nhantsi testified that, although she never met Mr Mahlangu, she did interact with Mr Mngadi about the transaction and she understood him to be part of the BNP team.⁶³³ Ms Nhantsi was asked whether she was concerned that Mr Mngadi worked at Nedbank – a competitor bidder in the process – but seemed to be a representative of BNP, another bidder. Ms Nhantsi said she remembered asking him but could not recall his answer; she did not probe it further. She admitted that it appeared to be irregular that he was part of both companies.⁶³⁴ Indeed, she even said she found it strange at the time because, when SAA had a meeting with Nedbank, Mr Mngadi was there as its representative, but she knew he was also acting for BNP.⁶³⁵

417. It should also be borne in mind that the irregularity goes much further because Mr Mngadi was also being consulted as if he were an internal advisor at SAA to Ms Myeni and then Ms Nhantsi. In fact, Ms Nhantsi testified that she was aware that Mr Mngadi was also having interactions with the Chair, as the Chair's "person", in the background throughout this time and that he would have conversations with the

⁶³² Transcript 14 June 2019, p 161-162

⁶³³ Transcript 14 June 2019, p 163-164

⁶³⁴ Transcript 14 June 2019, p 138

⁶³⁵ Transcript 14 June 2019, p 165

Chair and then feedback these discussions to Ms Nhantsi.⁶³⁶ However, in respect of this conflict of interest, once again, she never enquired further.⁶³⁷

418. When it was put to Ms Nhantsi that there were a number of occasions during her testimony when she conceded that she should have probed things further and failed to do so, she responded that it was because she was new and she took comfort from the fact that this was endorsed by Ms Myeni and so did not feel the need to take her concerns too seriously. However, she also testified that this suspicious conflict and Mr Mngadi's dubious involvement did make her ultimately review the transaction with stricter eyes and, despite great pressure from the Chair, she ultimately pushed for its cancellation.⁶³⁸

419. I also questioned her about whether her failure to push back against the Board and Ms Myeni's say-so was because she lacked some relevant experience in the position. I highlighted that she had only been a chartered accountant for 7 or 8 years at SNG and that perhaps someone with experience in corporate governance in an SOE or in aviation might have been better placed to deal with these pressures and challenges.⁶³⁹ Ms Nhantsi testified that the job itself of CFO was something she felt comfortable with doing but when she considered everything that the job at SAA ultimately entailed, including the politics, unanticipated pressures, the resistance from Ms Myeni to the cancellation of the agreement when it was discovered that BNP had misled SAA concerning the FSB licence and her insistence that they just carry on, then she agreed that "her plate was too full".⁶⁴⁰ She also testified that perhaps

⁶³⁶ Transcript 14 June 2019, p 166-167

⁶³⁷ Transcript 14 June 2019, p 167

⁶³⁸ Transcript 14 June 2019, p 168

⁶³⁹ Transcript 14 June 2019, p 168

⁶⁴⁰ Transcript 14 June 2019, p 169

she was a bit too naïve that she thought all the Board members would be acting in the best interest of the company.⁶⁴¹

420. Ms Nhantsi testified that on 21 April 2015 there was a teleconference with the Board to provide them with an update on the FDC. They advised the Board that the FDC could not provide funding as it did not have a legal mandate to do so. During the discussion, the Chair, Ms Myeni, issued an instruction that they must approach BNP to source the funding for SAA.⁶⁴² The Board then passed a resolution on 21 April 2016, approving the extension of BNP's scope to source the funds.⁶⁴³ Ms Nhantsi testified that she now deeply regrets not raising the issue of the conflict of Mr Mngadi at that meeting.⁶⁴⁴

421. As had become the pattern, *after* the Board resolution had been passed, Ms Nhantsi prepared a recommendation for that very same decision.⁶⁴⁵ Also *after the final Board decision had been taken*, she went back to the legal and procurement teams to ask how they could justify implementing the Board decision while still trying to follow proper process. They then decided that there were some exceptions in the procurement process policies. One was emergencies, and another was confined bidding and they would use that to justify the processes they ultimately employed.⁶⁴⁶

422. Ms Nhantsi testified that SAA did not notify BNP of the decision immediately on 21 April 2015.⁶⁴⁷ Instead, Ms Nhantsi explained that a confined bidding process was

⁶⁴¹ Transcript 14 June 2019, p 170

⁶⁴² Transcript 14 June 2019, p 170

⁶⁴³ Exhibit DD1(b), p 441

⁶⁴⁴ Transcript 14 June 2019, p 171

⁶⁴⁵ Transcript 14 June 2019, p 172

⁶⁴⁶ Transcript 14 June 2019, p 173

⁶⁴⁷ Transcript 14 June 2019, p 175

first carried out and the Board approved the decision *again* on 24 May 2015 and only on 25 May 2016 did a letter go out advising BNP that it had been appointed to source funds.⁶⁴⁸

423. Ms Nhantsi testified that she signed the recommendation to extend the BNP scope to include sourcing funds upon Mr Lester Peter's request.⁶⁴⁹ Ms Nhantsi testified that she was confused as to why she was being asked to sign this when the Board had already made the decision but was assured by Mr Peter that she had to do so as part of a checklist and so she "moved on" and did so.⁶⁵⁰ Thereafter, the BAC also recommended that BNP be appointed – as opposed to merely noting that the Board had already done so.⁶⁵¹

424. Throughout her testimony, Ms Nhantsi appeared not to accept that this order of events was irregular and against good governance practices.⁶⁵²

425. Ms Nhantsi did not appear to comprehend the distinction between these two very different processes:

(1) In the initial RFP, the ordinary process was followed in terms of which the Board initiated a fair and open-ended process for bids and tasked the correct bodies to formulate and then follow that process. It was only once that whole process had been completed and an independent recommendation made to the Board, that the Board was then required to make a decision; and

(2) In the subsequent processes, in which Ms Nhantsi was involved, the Board *first*, and without receiving any recommendation or following any process, reached a *final decision* on who should be appointed and only *thereafter* asked the staff

⁶⁴⁸ Transcript 14 June 2019, p 176

⁶⁴⁹ Transcript, 14 June 2019, p 183-184. The signature appears in exhibit DD1(b), p 450

⁶⁵⁰ Transcript 14 June 2019, p 185-186

⁶⁵¹ Exhibit DD1(b), p 453

⁶⁵² Transcript 14 June 2019, p 187-188

and management at SAA to reverse engineer the process by making an after-the-fact recommendation that supported what the Board had already done. This recommendation would then make it seem as if the proposed appointment had come from staff at SAA when, in actual fact, it came first from the Board.⁶⁵³

426. This is a worrying state of affairs and underscores that Ms Nhantsi's experience as an accountant was not sufficient for the governance knowledge required to be the CFO of a major SoE in a specialised industry. Her inexperience appears to have been exploited by the Board in order to advance their own agenda. It may well be that she went along with what the Board required in order not to oppose the Board. As the findings above makes plain, it was very difficult for the management of SAA when they did decide to take on the Board and disagree with its demands.

427. Ms Nhantsi admitted that it was not proper for the Board to expand BNP's scope without knowing a) whether it was possible from a procurement process perspective, b) if BNP had the capacity to do so and, c) on what terms it would provide the additional services.⁶⁵⁴

428. Ms Nhantsi testified that when she received the letter of demand from Webber Wentzel on 7 July 2016, that SAA should cancel the contract with BNP, she called the FSB to check if BNP was in good standing and was sent a letter on 8 July 2016, confirming that BNP had been suspended already in May 2016.⁶⁵⁵

429. When Mr Mahlangu testified at the Commission he claimed that he had alerted Ms Nhantsi to the issue of the FSB licence as far back as 13 May 2016 and pointed to a letter dated 11 July 2016, which referred to that correspondence of 12 May 2016.

⁶⁵³ Transcript 14 June 2019, p 189

⁶⁵⁴ Transcript 14 June 2019, p 191-192

⁶⁵⁵ Transcript 14 June 2019, p 198

However, Ms Nhantsi testified that she had never received the May correspondence.⁶⁵⁶ To support this claim, Ms Nhantsi referred to an email from Mr Moyo of BNP Capital dated 6 July 2016 in which he stated that they can “confirm that the funding entity has an FSB licence and is authorized under South African law to provide this financial product. See attached FSB licence”.⁶⁵⁷ She also produced correspondence that she sent to BNP on 13 July 2016 in response to Mr Mahlangu’s letter of 11 July 2016 claiming that BNP had alerted SAA to the licencing issue in May.⁶⁵⁸ Ms Nhantsi’s letter of 13 July stated that having a licence was one of the critical criteria for the tender and confirmed that SAA did not receive this alleged communication of 13 May 2016.⁶⁵⁹

430. Ms Nhantsi stated that in the BNP acceptance letter of 25 May 2016, BNP had included a claim for a 50% cancellation fee. She said that her engagement with Mr Mngadi and Mr Mahlangu revealed that the fee had never been discussed with the SAA management. She said this demand “came as a shock” to her.⁶⁶⁰ It is not clear why she would have been shocked by a demand that she knew had not been agreed to by SAA. If SAA had not agreed to the demand, it would not have been obliged to pay BNP anything as it did not form part of the agreement between the parties. Ms Nhantsi’s shock may therefore have been a product of her inexperience and ignorance.

431. Ms Nhantsi testified that on around 2 June 2016, BNP sent a term sheet that had the cancellation clause in it and Mr Mngadi called Ms Nhantsi and sent her whatsapp

⁶⁵⁶ Transcript 14 June 2019, p 199. The correspondence from Mr Mahlangu is in exhibit DD4, p 143

⁶⁵⁷ Transcript 14 June 2019, p 215. Exhibit DD1(b), p 575

⁶⁵⁸ Exhibit DD2, p 330-332

⁶⁵⁹ Transcript 19 June 2019, p 7-8

⁶⁶⁰ Transcript 14 June 2019, p 225

messages pressuring her to agree to it. She also stated that Ms Myeni was placing a lot of pressure on her to conclude the term sheet and told her the company would be “going down” if she did not secure the funding. Ms Nhantsi stated that she ultimately signed the term sheet but included a handwritten note that it was not binding until the Board had agreed.⁶⁶¹

432. Ms Nhantsi testified that she contacted Ms Kwinana and told her that she was being pressured to sign things that were outside of her authority and were within the Board’s authority.⁶⁶² Ms Kwinana advised her that, if she felt her integrity was compromised, she should not sign the term sheet agreeing to the cancellation clause. She therefore responded to Mr Mngadi and told him that the decision fell outside her authority.⁶⁶³

433. Ms Nhantsi testified that she believed that Ms Myeni herself stood to gain something from this cancellation fee. She formed this conclusion because of the pressure that Ms Myeni exerted upon her to sign the term sheet, together with Mr Mngadi’s frequent references to the Chair and to them all being part of a “team”, as well as the confidential SAA Board information that the Chair was feeding to Mr Mngadi.⁶⁶⁴

434. The WhatsApp messages from Mr Mngadi are dealt with below:

⁶⁶¹ Transcript 14 June 2019, p 226-227

⁶⁶² Transcript 14 June 2019, p 228

⁶⁶³ Transcript 14 June 2019, p 229

⁶⁶⁴ Transcript 14 June 2019, p 243

- 434.1. On 31 May 2016 Mr Mngadi gave various reasons why he claimed BNP was justified in receiving a cancellation fee, including that various costs had been incurred.⁶⁶⁵
- 434.2. Mr Mngadi stated that he thought Ms Nhantsi was “part of our collective team”.⁶⁶⁶
- 434.3. On 2 June 2016 Mr Mngadi said, “my sister this letter you have sent means nothing – it is of no use to the funders, to me to everyone”.⁶⁶⁷ Ms Nhantsi testified that the only other person he could be referring to was the Chair, Ms Myeni, who had been calling her frequently to place pressure on her to sign the term sheet.⁶⁶⁸ The message went on to state that “we might as well have waited for you to get Board approval for the cancellation fee clause”.⁶⁶⁹ Ms Nhantsi said this was a reference to the caveat she had included in the term sheet that it was subject to Board agreement.⁶⁷⁰ Mr Mngadi stated in the message he thought the Board resolution was circulated the previous day.⁶⁷¹ Ms Nhantsi testified that, as she did not tell Mr Mngadi about Board resolutions, he must have been told this by the Chair, Ms Myeni. Ms Nhantsi testified about earlier messages from 23 May 2016 where Mr Mngadi appeared to have known about resolutions that had been passed by the Board, which he seemed to have been told about by Ms Myeni.⁶⁷² Mr Mngadi then ramped up the pressure in

⁶⁶⁵ Exhibit DD2, p 84-85

⁶⁶⁶ Exhibit DD2, p 85

⁶⁶⁷ Exhibit DD2, p 87. The date of 2 June 2016 was clarified in testimony, see transcript 14 June 2019, p 235

⁶⁶⁸ Transcript 14 June 2019, p 236

⁶⁶⁹ Exhibit DD2, p 87

⁶⁷⁰ Transcript 14 June 2019, p 236

⁶⁷¹ Exhibit DD2, p 87

⁶⁷² Transcript 14 June 2019, p 239

later messages, threatening to withdraw the funding.⁶⁷³ He stated that Ms Nhantsi needed to call the Chair because she was awaiting her call.⁶⁷⁴

434.4. On 3 June 2016 he put even more pressure on Ms Nhantsi to sign the term sheet on an unconditional basis by 9am that morning, failing which, he said he would “inform the stakeholders”.⁶⁷⁵ Ms Nhantsi responded, after her discussion with Ms Kwinana, that she could not, without Board approval, sign documents that were beyond her mandate as it would compromise her career and she had to follow process.⁶⁷⁶

435. Ms Nhantsi testified that she told Ms Myeni that she would only sign the term sheet unconditionally if the issue of the cancellation fee was left out of it and was resolved separately. She eventually signed it on that basis. Soon thereafter, Mr Zwane received a call from Ms Myeni asking what his delegation of authority was as CEO. Mr Zwane said it was R50million. Two days later, SAA received a revised cancellation letter from BNP Capital stating that it had reduced the fee to R49.9million. Ms Nhantsi testified that this was very suspicious because BNP had failed to explain how the original cancellation fee of R128million was made up but, instead, suddenly dropped its fee to below the CEO’s delegation of authority⁶⁷⁷ which was a huge drop from R128 million to R49, 9 million. That was more than a 60% decrease. It is difficult to regard the initial fee as legitimate, if BNP, without explanation, was willing to drop it so substantially.

⁶⁷³ Exhibit DD2, p 89

⁶⁷⁴ Exhibit DD2, p 89. For the translation, see Ms Nhantsi’s testimony, transcript 14 June 2019, p 240-241.

⁶⁷⁵ Exhibit DD2, p 91

⁶⁷⁶ Exhibit DD2, p 93

⁶⁷⁷ Transcript 14 June 2019, p 244

436. Ms Nhantsi testified that she knew that Ms Myeni was behind the drop in the cancellation fee. She stated that this was done so that the transaction did not have to get Board approval. However, what Ms Myeni did not anticipate was that Ms Nhantsi would, nevertheless, put the cancellation fee to the Board for approval by round-robin resolution. Ms Nhantsi prepared the submission for the Board on the justifications given for the cancellation fee. Thereafter, she called Dr Tambi and Ms Kwinana and said that she was not comfortable with the cancellation fee and they should not vote to approve it. Ms Nhantsi herself abstained from the vote.⁶⁷⁸ This was when the Board of SAA consisted of only three non-executive directors namely, Ms Myeni, Ms Kwinana and Dr Tambi.

437. Dr Tambi abstained from the vote and Ms Kwinana and Mr Zwane rejected the resolution.⁶⁷⁹ Ms Myeni was the only Board member to approve it. Ms Myeni called Ms Nhantsi before the vote to ask why she was asking the Board to approve something that did not require its approval. Ms Nhantsi explained that this was an additional term in what was a Board transaction. Ms Nhantsi told Ms Myeni that it had to get Board approval.⁶⁸⁰

438. It was put to Ms Nhantsi that by signing a recommendation on 4 July 2016 to the Board to approve the cancellation fee, she was endorsing the decision. She agreed and admitted that this was because of the mounting pressure she received from Mr

⁶⁷⁸ Transcript 14 June 2019, p 245

⁶⁷⁹ Transcript 14 June 2019, p 262. See Ms Kwinana's vote in exhibit DD1(b), p 560. Ms Nhantsi was under the mistaken impression that she abstained but she actually voted against the cancellation fee

⁶⁸⁰ Transcript 14 June 2019, p 246

Mngadi and Ms Myeni⁶⁸¹ but she had hoped that the other Board members would reject the recommendation.⁶⁸²

439. It was further put to Ms Nhantsi that abstaining was not the same as rejecting a resolution. The MOI for SAA provided that the votes counted for a resolution were based on the number of votes actually cast and not the votes abstaining.⁶⁸³ Ms Nhantsi testified that she was not aware of that. She said that she thought that, in order for the motion to pass, it needed 3 out of 5 votes and she was hoping that would not be reached.⁶⁸⁴ However, her abstention meant that she did not vote against the resolution and she therefore put SAA at risk that it would be passed. Her explanation for this was that she was “too busy” to ensure she voted against the resolution. But this explanation does not make sense in the light of the steps she took to convince other members to vote against it. She also did not appreciate that abstaining did not have the same effect as voting against the decision.⁶⁸⁵ This is further confirmation that she was moved into the position of CFO before she was ready.

440. It is also important to be aware that there was an instruction issued by National Treasury⁶⁸⁶ aimed at combatting abuse in the supply chain management system. It directed all public entities to obtain prior written approval from National Treasury if any existing contract was extended above 15% of the original value.⁶⁸⁷ Ms Nhantsi testified that she was not aware of this and the Board did not appear to be aware of

⁶⁸¹ Transcript 14 June 2019, p 252

⁶⁸² Transcript 14 June 2019, p 249-251

⁶⁸³ Exhibit DD2, p 152. Clause 13.11.7 of the MOI

⁶⁸⁴ Transcript 14 June 2019, p 261

⁶⁸⁵ Transcript 14 June 2019, p 263

⁶⁸⁶ Note 3 of 2016/2017 – Exhibit DD2, p 324

⁶⁸⁷ Section 9, p 327

this requirement either. This National Treasury requirement was applicable to the BNP extension of scope to source funding. She testified that, if there were communications from Treasury, they would have been directed to Ms Myeni.⁶⁸⁸

441. Ms Nhantsi testified that Ms Myeni knew about Mr Mngadi's involvement in BNP and in sourcing the funds. Ms Nhantsi testified that she regarded the cancellation fee as Ms Myeni's scheme in which she was being assisted by Mr Mngadi to enrich themselves. Ms Myeni and Mr Mngadi placed great pressure on her to push through the fee and changed the amount so that it did not require Board approval. This was fortified by the evidence of Mr van der Merwe, the director of Grissag, who testified that Grissag never claimed any cancellation fee from BNP, despite communications from BNP that they were going to charge USD5million if the contract was cancelled.⁶⁸⁹

442. During her testimony Ms Nhantsi explained that she faced three types of pressure from Ms Myeni. First, Ms Myeni told Ms Nhantsi when she joined SAA and on different occasions that no one ever had anything on her (i.e. Ms Myeni) because she never wrote anything down. Second, Ms Nhantsi said that she would then receive a minimum of three calls a day from Ms Myeni. Ms Myeni's consistent message to Ms Nhantsi was that Ms Nhantsi was not moving fast enough and was delaying things and taking unnecessary documents to the Board – she should just go ahead and approve the transaction – in particular the cancellation fee.⁶⁹⁰ Third, Ms Nhantsi stated that Ms Myeni required her to, for example, breach leases relating to aircraft by trying to change the insurers to move to Black and locally owned or

⁶⁸⁸ Transcript 19 June 2019, p 19-20

⁶⁸⁹ Transcript 19 June 2019, p 11-12

⁶⁹⁰ Transcript 19 June 2019, p 12

rural parties and when Ms Nhantsi raised concerns or resisted, Ms Myeni would say that she could see it in Ms Nhantsi's eyes that she would not obey instructions.⁶⁹¹

443. Ms Nhantsi also testified that she was frequently asked to do unlawful things and there was enormous pressure from the Board and Ms Myeni to do things without following proper process. She gave an example that Ms Myeni would give her a CV and say she had appointed a particular person in the procurement department, because they were struggling to get work and that she had a "vision from God" that the person would assist in SAA's problems. Then, when she asked Mr Lester Peter about this, he seemed to know about it already and did not ask any questions. Ms Nhantsi testified that this appeared to indicate that Ms Myeni had instructed him about it already. When the person would then arrive for an interview, he would fail dismally.⁶⁹² When Ms Nhantsi told this to Ms Myeni, she was ordered to fly to Durban to meet with her and was berated and told that she did not follow instructions from the Board. When Ms Nhantsi asked Ms Myeni for the Board resolution, Ms Myeni disapproved of the enquiry.⁶⁹³

444. It was put to Ms Nhantsi that she was obliged under section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, to have reported any knowledge or suspicion that acts of corruption, fraud or theft were taking place at SAA. Ms Nhantsi testified that she was aware of this.⁶⁹⁴ She accepted that she had breached her obligations in that regard.⁶⁹⁵ She said she would perhaps have taken those steps but it was "overtaken by events" because the Webber Wentzel letter had arrived and the BNP agreement had to be cancelled. She also testified that Ms Myeni continued to

⁶⁹¹ Transcript 19 June 2019, p 12-14

⁶⁹² Transcript 19 June 2019, p 24-25

⁶⁹³ Transcript 19 June 2019, p 26

⁶⁹⁴ Transcript 19 June 2019, p 20

⁶⁹⁵ Transcript 19 June 2019, p 22

exert pressure on her thereafter with constant calls not to cancel BNP. She claimed that BNP would sue SAA. This was despite the fact that BNP did not have a valid licence. Ms Myeni was not able to tell Ms Nhantsi on what ground BNP could sue in those circumstances. Therefore, her first priority was ensuring that the cancellation took place and safeguarding SAA's assets.⁶⁹⁶

445. Ms Nhantsi testified that she did not speak out against Ms Myeni or report her because she was scared. She clarified that she was actually scared for her life, particularly when she was in Durban.⁶⁹⁷ She said she knew that she would ultimately lose her job because of the cancellation of BNP and the number of times she resisted instructions from Ms Myeni. She said that she had also been told by Ms Kwinana that employees had "a shelf life" with Ms Myeni. She said that Ms Kwinana had this to say about Ms Myeni and an employee who did not carry out her instructions: if an employee did not follow Ms Myeni's instructions, Ms Myeni would go to Sunnyside Café in disguise, and write whistleblower emails about the employee and then approach the Chief Internal Auditor and put pressure on him to suspend or dismiss the employee, or to appoint an external firm to do the work.⁶⁹⁸

446. Ms Nhantsi also testified that, at some stage, employees at SAA were subjected to a certain vetting process. Ms Nhantsi testified that Ms Myeni informed her that one of the people in her department (Treasury) had "failed" the vetting process. According to Ms Nhantsi, Ms Myeni expressed the view that she could not have someone in that sensitive department who had failed the vetting process. This person was Ms Lindsey Olitzki. Ms Myeni then asked Ms Nhantsi to have a meeting with Ms Olitzki and give her two options: either to be moved to another place in the

⁶⁹⁶ Transcript 19 June 2019, p 21

⁶⁹⁷ Transcript 19 June 2019, p 33 and p 35

⁶⁹⁸ Transcript 19 June 2019, p 34

organisation or be fired. Ms Nhantsi stated that she resisted this because vetting was not part of Ms Olitzki's employment contract and there could be labour disputes. Ms Olitzki was given these options and she refused both. Ms Nhantsi decided with Mr Zwane that they should wait and take a uniform approach to all the results of the vetting. The next day Ms Myeni called Ms Nhantsi and asked if she had spoken to Ms Olitzki. Ms Nhantsi told Ms Myeni what she and Mr Zwane had decided. Ms Myeni was furious with her for not carrying out her instruction.⁶⁹⁹

447. Ms Olitzki was said to have "failed" the vetting because she had dual citizenship. Ms Nhantsi testified that she believed that this was just a pretext given by Ms Myeni to get rid of Ms Olitzki and that she had some other motive for wanting to get rid of her. It seemed that Ms Myeni was attempting to place people who would serve as her "eyes and ears" in all the different departments. She had first attempted this with the procurement department. Ms Nhantsi said that Ms Myeni wanted to replace Ms Olitzki with someone who would play that same role (i.e. Ms Myeni's "eyes and ears") in the Treasury department as well. Ms Nhantsi also testified that she was surprised at the vetting process because the executives were all at different levels and were not generally exposed to confidential information of the nature requiring security vetting.⁷⁰⁰

448. Ms Nhantsi appears to have been somewhat out of her depth in the position of CFO at SAA. She admitted to having succumbed to the pressure that Ms Myeni placed on her during the BNP transactions. To Ms Nhantsi's credit, she was willing to make concessions when she was questioned about her conduct and accepted that the way

⁶⁹⁹ Transcript 19 June 2019, p 28-29

⁷⁰⁰ Transcript 19 June 2019, p 30-32

in which she had behaved was not consistent with either good governance or procurement requirements.

449. In the end, however, it was Ms Nhantsi who recommended that a cancellation fee be paid to BNP Capital for just short of R50 million. As the report details below, had this gone through, it would have amounted to an extraordinary windfall because BNP had not, in fact, incurred any costs in sourcing funding for SAA. The level of pressure exerted on Ms Nhantsi to advance the funding arrangements from both Mr Mngadi and Ms Myeni reveals an inappropriate level of interest on their part in securing that windfall for BNP Capital. Ms Nhantsi was also the person who acted with great determination in pursuing disciplinary proceedings against Dr Dahwa which resulted in Dr Dahwa's dismissal.

BNP Capital's evidence

450. Mr Pholisani Daniel Mahlangu is the CEO of BNP Capital, a company formed in 2010. In 2016, he was responsible for the day to day running of the business⁷⁰¹ and was the sole director of the company.⁷⁰² Mr Mahlangu testified before the Commission that on 9 February 2016 he was approached by Mr Mngadi who said that he had been referred to him by a mutual friend. He said that he would like to work together with BNP to submit to SAA a response to a Request for Information (*RFI*) for transaction advisory services.⁷⁰³ The two men then met and Mr Mngadi explained that he was aware of the financial situation at SAA and that he had come

⁷⁰¹ Transcript 27 June 2019, p 8

⁷⁰² Transcript 27 June 2019, p 9

⁷⁰³ Transcript 27 June 2019, p 45

up with a solution to “help it breathe”.⁷⁰⁴ He told Mr Mahlangu that he was a longstanding consultant for SAA⁷⁰⁵ and suggested that BNP should partner with his entity, InLine Trading.⁷⁰⁶ Mr Mahlangu agreed to this suggestion and the two entities began to work together to present the response to SAA.

451. On 13 February 2016, Mr Mngadi sent an email to Mr Mahlangu with amendments to the response to the RFI in which he told Mr Mahlangu to delete any reference to his name and to use the company name: InLine Trading.⁷⁰⁷ Mr Mahlangu testified that he understood the bid was for transaction advisory services on how to consolidate SAA’s debt and to analyse the financials. He accepted that this was an entirely different mandate to one for sourcing funding.⁷⁰⁸

452. During his testimony Mr Mahlangu admitted that BNP bid as part of a joint venture with InLine Trading for the transaction advisory services. He stated that he did not provide InLine Trading’s financials in the bid, because they had not been prepared. He stated that, for that reason, he wrote in his statement to the Commission that this was because they had not been a trading entity. He eventually admitted during questioning, however, that this was just an assumption he had made and that this assumption was in fact inconsistent with what he had written in the bid submission. In the bid submission he had written that InLine Trading had 10 years of experience in the aviation sector.⁷⁰⁹ Mr Mahlangu admitted that BNP did not, in fact, do any due diligence on InLine Trading before it decided to enter into this partnership and did not probe them for information. At first, he claimed that this was because of the short

⁷⁰⁴ Transcript 27 June 2019, p 48-49

⁷⁰⁵ Transcript 27 June 2019, p 49 and p 52

⁷⁰⁶ Transcript 27 June 2019, p 57

⁷⁰⁷ Exhibit DD4, p 22. See transcript 27 June 2019, p 58

⁷⁰⁸ Transcript 27 June 2019, p 60-61

⁷⁰⁹ Transcript 27 June 2019, p 79-81

deadline for the RFI but later admitted that the RFP was only due a full month later on 18 March 2016 and, that, therefore, there would have been time to do a check on the entity, but they had elected not to do so.⁷¹⁰ Mr Mahlangu could generally not give any satisfactory answer for why InLine Trading actually needed BNP as a partner in this bid as it had the necessary experience and BEE credentials itself.

453. Mr Mahlangu testified that Mr Mngadi assumed a dominant role in relation to the bidding with SAA. He said that Mr Mngadi prepared the sourcing of funds proposal and drafted the relevant correspondence which would be sent off under the BNP Capital logo and letterhead.⁷¹¹ He stated that Mr Mngadi was also responsible for liaising directly with SAA.⁷¹² However, while Mr Mahlangu confirmed that the partnership with InLine Trading was pitched to him by Mr Mngadi on the basis that InLine Trading would do all the communication with SAA, what transpired was that none of the correspondence with SAA ever came from InLine Trading. It always came from BNP and then informally through Mr Mngadi.⁷¹³

454. On 18 March 2016 Nedbank submitted its bid as a transaction advisor. Mr Mngadi featured as part of the Nedbank transaction team in the bid.⁷¹⁴ Mr Mahlangu testified that he was not aware at the time that Mr Mngadi was employed by Nedbank. He also stated that he was not aware that Nedbank was also bidding for the same award⁷¹⁵ or that Mr Mngadi was on that very bidding team.⁷¹⁶

⁷¹⁰ Transcript 27 June 2019, p 99-100

⁷¹¹ Transcript 27 June 2019, p 109-110

⁷¹² Transcript 27 June 2019, p 112

⁷¹³ Transcript 27 June 2019, p 115-116

⁷¹⁴ Exhibit DD2, p 198-199

⁷¹⁵ Transcript 27 June 2019, p 116

⁷¹⁶ Transcript 27 June 2019, p 139

455. Mr Mahlangu was not able to deny any of the following shortfalls in the BNP bid submission.⁷¹⁷ For example, it was put to Mr Mahlangu that InLine Trading was actually a car dealership. Mr Mahlangu testified that he was not aware of that and did not actually know what its business was.⁷¹⁸ In addition, it was put to Mr Mahlangu that the person who Mr Mngadi insisted be the representative of Inline Trading and whose name appeared in the bid documents instead of his own, Mr Brendan King, had actually resigned as a director of InLine Trading⁷¹⁹ prior to the submission of the bid.⁷²⁰ Mr Mahlangu testified that he did not know any of that and that Mr Mngadi had told him at a later stage that the CEO of InLine Trading had actually passed away.⁷²¹

456. Mr King provided an affidavit to the Commission in which he said that he knew Mr Mngadi as a customer of InLine Trading who purchased some cars from them and occasionally sent business their way.⁷²² He also stated that a Mr Eric Mbezi had taken over InLine Trading around the time when he (i.e. Mr King) retired. Later, on 9 February 2016, Mr Mbezi passed away.⁷²³ Mr Mahlangu confirmed that, had he known all of this information, he would never have partnered with InLine Trading in a bid for SAA business.⁷²⁴

457. Mr Mahlangu certified in the bid documentation that BNP submitted that all of its contents were correct. He also certified that no one involved in the bid had any personal relationship with anyone who would be evaluating the bid. However, he

⁷¹⁷ Transcript 27 June 2019, p 128-134. See also p 142-151

⁷¹⁸ Transcript 27 June 2019, p 156

⁷¹⁹ See Mr King's affidavit confirming this in exhibit DD2, p 317

⁷²⁰ Transcript 28 June 2019, p 4

⁷²¹ Transcript 28 June 2019, p 5

⁷²² Exhibit DD2, p 317

⁷²³ Exhibit DD2, p 317-318

⁷²⁴ Transcript 28 June 2019, p 10

admitted in his evidence that he had never checked whether Mr Mngadi had any such relationship, despite knowing that Mr Mngadi had long ties to SAA.⁷²⁵

458. Mr Mahlangu sent a letter to Grissag, BNP's funder, on 22 April 2016.⁷²⁶ Attached to the letter was a "mandate from SAA to raise and arrange funding for and on behalf of SAA for purposes of consolidation of SAA's debt of R15 billion".⁷²⁷ However, the letter of award from SAA for the sourcing of funds was only received by BNP from SAA on 26 May 2016. He explained that Mr Mngadi had drafted the letter. He confessed that had not checked it carefully. He accepted, however, that the letter was false because in April 2016, BNP's mandate was only for transaction advisory services and not for sourcing of funds.⁷²⁸

459. Mr Mahlangu also testified that, with respect to the correspondence that was sent to SAA regarding the justification for the cancellation fee, Mr Mngadi was responsible for sourcing these facts from Grissag.⁷²⁹ He testified that it was Mr Mngadi's role to communicate with the client and that he introduced Grissag as the funder. Mr Mahlangu said that he never had interactions with and had never heard of Grissag. BNP had, therefore, assumed that the information they were receiving from Mr Mngadi about the funding was correct and coming from Grissag itself.⁷³⁰ According to Mr Mahlangu, all facts in the letter to SAA about the cancellation fee had come

⁷²⁵ Transcript 27 June 2019, p 171-172

⁷²⁶ Exhibit DD3, p 18

⁷²⁷ Transcript 27 June 2019, p 176

⁷²⁸ Transcript 27 June 2019, p 183

⁷²⁹ Transcript 27 June 2019, p 184

⁷³⁰ Transcript 27 June 2019, p 186-187

from Mr Mngadi and Mr Mngadi had claimed that those facts had been communicated to him by Grissag.⁷³¹

460. Mr Mahlangu, therefore, conceded that he had no basis to dispute what Grissag's director, Mr van der Merwe, had said when he testified before the Commission. According to Mr van der Merwe's testimony, the representations made in those letters to SAA concerning the basis for the cancellation fee were all false.⁷³² Mr Mahlangu conceded that in the letter he sent to SAA stating that the cancellation fee had to do with the substantial penalty cost Grissag would impose, he had relied on Mr Mngadi's say so for this.⁷³³ He therefore could not deny Mr van der Merwe's testimony that there was no such penalty.⁷³⁴

461. In addition, he clarified that, on his understanding, the cancellation fee would not have been payable immediately on 25 May 2015 when the mandate was given – it was only payable if actual work had been done to justify the payment. His intention behind the letter was that, if they carried forward the mandate from that date and performed work, they wanted to be covered by a cancellation fee in case they raised the funds and SAA decided not to use them.⁷³⁵ He confirmed that the fee could only be payable if they actually met their mandate and raised the money – but not before.⁷³⁶ This would mean that funds would have been raised; SAA would have actually signed a term sheet on those funds; draft agreements on those funds would have been prepared and finalized and then, at the end of the day, it was only if SAA had not actually used the funds, that the cancellation fee would have been payable.

⁷³¹ Transcript, 28 June 2019, p 49

⁷³² Transcript 28 June 2019, p 79

⁷³³ Transcript 28 June 2019, p 80

⁷³⁴ Transcript 28 June 2019, p 81

⁷³⁵ Transcript 28 June 2019, p 61-62

⁷³⁶ Transcript 28 June 2019, p 62-63

According to Mr Mahlangu, those were the only circumstances in which the cancellation fee would apply.⁷³⁷

462. Mr Mahlangu admitted that having a valid FSB licence was a requirement for the tender for transaction advisory services. He confirmed that BNP did have this licence when the bid was submitted. However, on 23 March 2016⁷³⁸ the FSB sent correspondence to BNP to the effect that the FSB intended to suspend the licence. Then on 12 May 2016⁷³⁹ the FSB actually suspended the licence.⁷⁴⁰ The notice of suspension stipulated that the BNP had to inform all affected clients and product suppliers about the suspension.⁷⁴¹ Mr Mahlangu claimed that he fulfilled that requirement by sending a letter on 13 May 2016 to SAA. However, he could not provide any documentation to demonstrate that it was actually sent to and/or received by SAA or, indeed, who actually sent it and to whom. The letter itself is undated.⁷⁴² Mr Mahlangu could also not deny Ms Nhantsi's evidence that she never received the notification.⁷⁴³ Mr Mahlangu said that he was "surprised" that one of his staff, Mr Moyo, wrote to SAA to say that they had a valid licence on 6 July 2016 when that was not the case.⁷⁴⁴ He testified that, even though the email was copied to him, he was very busy and he did not notice it.⁷⁴⁵

463. It was put to Mr Mahlangu that, even in the later letter of 8 July 2016, in which he explained that he had already notified SAA of the 12 May 2016 suspension, he still

⁷³⁷ Transcript 28 June 2019, p 69

⁷³⁸ Exhibit DD1(c), p 597

⁷³⁹ Exhibit DD1(c), p 603

⁷⁴⁰ Transcript 27 June 2019, p 189-190. The notice of suspension is in exhibit DD1(c), p 614

⁷⁴¹ Transcript 27 June 2019, p 193-194

⁷⁴² Exhibit DD14, p 143

⁷⁴³ Transcript 27 June 2019, pp 194-196

⁷⁴⁴ Transcript 27 June 2019, p 199

⁷⁴⁵ Transcript 27 June 2019, p 200-201

misrepresented the notification as a letter of “intention to temporarily suspend” whereas it was an actual suspension notice. Mr Mahlangu admitted that he had not correctly described the notice. He claimed that he did not mean to mislead anyone with his choice of words.⁷⁴⁶

464. Mr Mahlangu testified that the additional fee of 1% from any drawdowns, which the term sheet signed on 8 June 2016 provided, would go to Grissag and would not be shared with BNP because only the fundraising entity would be entitled to that share. That was his understanding but he never spoke to Mr van der Merwe about it. He said that he was under the impression that BNP was entitled only to a success fee but not this additional “commitment fee”. When it was put to him that Mr van der Merwe testified that Grissag and Mr Mngadi had agreed that the fee would be shared between the two parties, he conceded that it was possible that that could have happened but said that he did not know about it.⁷⁴⁷

465. Mr Mahlangu testified that, as far as he was concerned, he had no agreement with SAA about the success fee. He believed they were running the process through proposals and that BNP had proposed a fee of 1.25% but that, as far as he knew, SAA never came back to him about that. He was never aware of an agreement to pay a success fee of 1.5%.⁷⁴⁸

466. Mr Mahlangu testified that in 2017, Mr Mngadi called him and wanted him to confirm in an affidavit that Mr Mngadi was not an employee of BNP and that he did not compile the bid himself. Mr Mahlangu said that he agreed because both of those points were technically true, even though Mr Mngadi provided the inputs to the bid

⁷⁴⁶ Transcript 27 June 2019, p 204

⁷⁴⁷ Transcript 27 June 2019, p 217-218

⁷⁴⁸ Transcript 28 June 2019, p 48

that was compiled by BNP. He testified that he later realised that Mr Mngadi was trying to distance himself from the transaction and pretend not to have been involved in it.⁷⁴⁹ He also stated that he did not read the whole affidavit properly before signing it.⁷⁵⁰ Mr Mahlangu testified that Mr Mngadi asked him to sign the affidavit because there had been press reporting on the issue and he was an employee of Nedbank, which had been a competing bidder.⁷⁵¹

Grissag

467. Mr Pieter Johannes Van der Merwe testified that he started Grissag in 2014/2105, with another man, Mr Sergey Pokusaev, with the intention of funding South African public entities.⁷⁵² Both men had worked for the Russian Federation and, before that, the Soviet Union. At the stage that they formed Grissag, Mr Pokusaev was retired. They registered Grissag SA (Pty) Ltd in South Africa with the two of them as directors.⁷⁵³

468. Mr Van der Merwe testified that, as Grissag, they approached various governments and also the FDC. They proposed to the FDC that Grissag could get involved with the FDC's funding and wrote them a proposal for funding for housing projects.⁷⁵⁴ The proposal did not come to fruition because Grissag insisted on a guarantee for any capital advanced and the FDC said that they could not get a Treasury guarantee and they had no other large enough assets to guarantee the financing.⁷⁵⁵

⁷⁴⁹ Transcript 28 June 2019, p 91

⁷⁵⁰ Transcript 28 June 2019, p 94

⁷⁵¹ Transcript 28 June 2019, p 95

⁷⁵² Transcript 14 June 2019, p 88

⁷⁵³ Transcript 14 June 2019, p 89

⁷⁵⁴ Transcript 14 June 2019, p 93

⁷⁵⁵ Transcript 14 June 2019, p 94

469. In or around August 2015 a representative for SeaCrest a Mr “Rambal” represented by an attorney, Mr Leon Etzbeth asked Mr Van der Merwe whether Grissag would be interested in funding SAA for R14billion. That representative made it clear to Mr Van der Merwe that as Grissag had neither an FSB licence nor BEE credentials, it could not go on tender alone. He said that its bid would have to be through a joint venture arrangement.⁷⁵⁶ On 27 August 2015 the parties signed a memorandum of agreement.⁷⁵⁷ The agreement provided for a fixed interest rate of 4.5% per annum.⁷⁵⁸ Then SeaCrest would get whatever margin above that (markup) that it could manage to negotiate with SAA.⁷⁵⁹

470. Mr Van der Merwe testified that he never checked with SeaCrest what its ultimate markup was. When it was put to him that it was 1.3% bringing the total to 5.8%, he said that was much higher than international standards. He said that it would normally be somewhere in the region of 0.5% on an amount that large.⁷⁶⁰ This accorded with Ms Stimpel’s quotes from the banks at the time.

471. Mr Van der Merwe explained that, when SeaCrest asked Grissag for proof of funds, it was not possible to provide such proof because the international banks it worked with would only make a decision based on a final signed agreement as they had to get permission from their central banks.⁷⁶¹ Mr Van der Merwe testified that it would have been in order to have conditions precedent in the agreement that the information be provided and a due diligence performed before the agreement came

⁷⁵⁶ Transcript 14 June 2019, p 95

⁷⁵⁷ Transcript 14 June 2019, p 96. The agreement is in exhibit DD3, p 12

⁷⁵⁸ Transcript 14 June 2019, p 97

⁷⁵⁹ Transcript 14 June 2019, p 98

⁷⁶⁰ Transcript 14 June 2019, p 107

⁷⁶¹ Transcript 14 June 2019, p 108

into effect, but he needed a finalized signed agreement for purposes of sourcing the funding.⁷⁶²

472. Mr Van der Merwe testified that in or around November or December 2015 he was concerned that the SeaCrest transaction was not going anywhere. He said that he asked FDC whether Grissag could instead fund SAA through the FDC.⁷⁶³ He testified that the FDC told him that it had an FSP (financial services provider) licence.⁷⁶⁴ He was not aware that there might be any other legal limitation on FDC's ability to finance SAA.⁷⁶⁵ Mr Van der Merwe sent the FDC a standard term sheet for the amount of R15billion.⁷⁶⁶ The terms were 4% interest fixed per annum to be calculated on each draw down and then lower rates depending on different factors, down to 3%.⁷⁶⁷ The lower rate was achieved through negotiations with their international funders who were quite keen for the transaction to go through.⁷⁶⁸ The actual term sheet sent to SAA by Mr Moyo of FDC did not include the changes in the interest rate. It just said 4% and was not actually a term sheet prepared by Grissag – though the FDC appears to have used Grissag's logo.⁷⁶⁹

473. A few weeks later, the FDC came back to Mr Van der Merwe and advised that it was not possible for one state entity to finance another. Mr Van der Merwe accepted this.⁷⁷⁰ He placed the date at around January 2016 when he was told this. He confirmed that it was never as late as March or April 2016.⁷⁷¹ This is significant

⁷⁶² Transcript 14 June 2019, p 109-110

⁷⁶³ Transcript 14 June 2019, p 110-111

⁷⁶⁴ Transcript 14 June 2019, p 111

⁷⁶⁵ Transcript 14 June 2019, p 111-112

⁷⁶⁶ Exhibit DD3, p 16. See transcript 14 June 2019, p 112

⁷⁶⁷ Transcript 14 June 2019, p 113-114

⁷⁶⁸ Transcript 14 June 2019, p 114.

⁷⁶⁹ Transcript 14 June 2019, p 115. Exhibit DD1, p 313- 316

⁷⁷⁰ Transcript 14 June 2019, p 112

⁷⁷¹ Transcript 14 June 2019, p 117-118

because SAA was only advised about this problem by the FDC in April 2016. This date issue is important as it was that delay in the process until April 2016 and the “sudden” revelation from FDC that it could not fund SAA that was used to justify the urgency of the situation and the confinement to BNP of the tender for the sourcing of funding.

474. In around February or latest March 2016 Mr Van der Merwe was approached by someone who told him that BNP had been appointed to source the R15billion for SAA.⁷⁷² He testified that his main reason for entering into a partnership with BNP was its BBBEE status and the fact that it had an FSP licence.⁷⁷³

475. On 22 April 2016 Mr Mahlangu from BNP sent Mr Van der Merwe an email confirming that they had been awarded the contract by SAA to source the funds. Mr Mahlangu confirmed in his evidence that this had been incorrect because they were only awarded that tender in May 2016.⁷⁷⁴ However, it should be noted that there had, by that stage, on 21 April 2016 (the day before), been an internal decision by the Board to extend the scope of BNP’s mandate to include sourcing funds. However, no process had yet been followed to approve that appointment.⁷⁷⁵ This means that someone on the Board or privy to the Board’s resolution must have advised BNP about the decision.

⁷⁷² Transcript 14 June 2019, p 118

⁷⁷³ Transcript 14 June 2019, p 122

⁷⁷⁴ Transcript 14 June 2019, p 128

⁷⁷⁵ Transcript 14 June 2019, p 128

476. Mr Van der Merwe did not appreciate the difference between a transaction advisor and a funding source and so did not realise that the letter attached to the email from BNP was not a fund-sourcing award.⁷⁷⁶
477. The email from BNP asked Grissag to provide proof of funds of between R3 billion and R7 billion. Mr Van der Merwe testified that he responded that this was not possible up front. He required at least a signed term sheet that committed SAA to the terms and conditions and then a formal funding agreement would need to be signed.⁷⁷⁷
478. On 2 June 2016 Mr Van der Merwe noted that Ms Nhantsi had provided him with a term sheet that stated that it was non-binding. He testified that a non-binding term sheet was meaningless and so he could not accept it.⁷⁷⁸
479. Mr Van der Merwe testified that on 8 June 2016 he travelled to SAA's offices and attended a meeting with Ms Nhantsi that was set up by BNP. She signed the term sheet before him and he then left.⁷⁷⁹ By that stage, Mr Van der Merwe had managed to secure an even lower rate from his funder and so the term sheet reflected 3.5% interest. However, another fee was added on top of that.⁷⁸⁰ This was the 1% payable to Grissag for every draw down. Mr Van der Merwe testified that this 1% was a once off fee so it did not amount to a 1% increase in interest. It would be around 0.1% overall. So the additional 1% figure would lead to an effective interest rate of 3.6%.⁷⁸¹

⁷⁷⁶ Transcript 14 June 2019, p 130

⁷⁷⁷ Transcript 14 June 2019, p 131

⁷⁷⁸ Transcript 14 June 2019, p 133-134

⁷⁷⁹ Transcript 14 June 2019, p 132

⁷⁸⁰ Transcript 14 June 2019, p 142

⁷⁸¹ Transcript 14 June 2019, p 143

480. Mr Van der Merwe testified that this 1% fee, which would amount to R150million, would be split between BNP and Grissag. Each party would receive R75million. This was, as far as Mr van der Merwe was concerned, the entire remuneration BNP would get for being Grissag's intermediary and providing the FSP licence and BEE credentials.⁷⁸²

481. Mr Van der Merwe testified that he was totally unaware that BNP would be receiving an additional 1.5% on the transaction for finding the Grissag funding. He said that he was shocked at learning about that because BNP did not find Grissag. On the contrary, Grissag had been attempting to fund SAA and was also well known as a funder in the market. It therefore could not have been a finder's fee.⁷⁸³

482. Mr Van der Merwe testified that he had various interactions with BNP but he did not know the names of the people to whom he had spoken. It could have been Mr Mngadi but he could not say for certain.⁷⁸⁴ He also confirmed that he never saw nor was he aware of the letters exchanged between SAA and BNP about the cancellation fee.⁷⁸⁵ He also confirmed that none of the statements made in those letters about costs already incurred or to be incurred by Grissag was true. Mr Van der Merwe stated that Grissag had not incurred any costs at that time and the funding partners listed in the letters were all fabricated because Grissag did not disclose its funders to anyone. He said that it was also false that Grissag was imposing a penalty or cancellation fee in dollars on BNP. He denied that Grissag had been flying around the world sourcing funding. Every single fact in those letters about Grissag was

⁷⁸² Transcript 14 June 2019, p 144

⁷⁸³ Transcript 14 June 2019, p 145

⁷⁸⁴ Transcript 14 June 2019, p 153

⁷⁸⁵ Transcript 14 June 2019, p 154

inaccurate and made up.⁷⁸⁶ Mr Van der Merwe confirmed that, in order to have imposed a cancellation fee, a contract would have had to be concluded and there was no such contract at that point – only a signed term sheet that referred to a future contract.⁷⁸⁷

Connection between BNP and the Myenis

483. Ms Myeni's conduct in respect of BNP becomes more explicable when the following evidence is considered.

484. In August 2016 at an interview with OUTA, Ms Kwinana said that Ms Myeni's son, Thalente Myeni, had a close relationship with Mr Mngadi of BNP Capital. The Commission did not procure a formal transcript of this aspect of the interview, but the audio recording of the interview reveals the following.

484.1. during her interview, Ms Kwinana confirmed that Mr Thalente Myeni was "involved" in BNP because where Mr Mngadi was, "Thalente" would be. They were either close friends or perhaps more likely associates/business partners given the age gap between them.

484.2. Ms Kwinana also testified about a number of occasions on which Mr Myeni had been seen with Mr Mngadi. First, there was a time when Ms Nontsasa Memela, who was the Head of Supply Chain Management at SAAT, told Ms Kwinana that she had had a meeting with Ms Myeni in respect of Air France and Mr Thalente Myeni was at the meeting. When they had a second meeting with

⁷⁸⁶ Transcript 14 June 2019, p 156. See also p 158-161

⁷⁸⁷ Transcript 14 June 2019, p 163

Airbus, Mr Mngadi was at SAA with Mr Thalente Myeni but Mr Thalente Myeni did not form part of the meeting. However, they arrived and left together and, when Ms Kwinana and other attendees arrived at the meeting venue, Mr Mngadi and Mr Thalente Myeni were sitting together. Ms Kwinana said that she did “not trust” Mr Mngadi. When asked where else she had seen Mr Mngadi and Mr Thalente Myeni together, she said that they could be seen in Sandton together. When Ms Kwinana was pushed for further locations where she had seen Mr Mngadi, she just said she knew they used to hang out together.

485. During her testimony, Ms Kwinana denied ever having said this.⁷⁸⁸ However, as the report sets out above in relation to her denials regarding the false whistleblower reports that used to be prepared by Ms Myeni, her version can be rejected. The audio recordings clearly reveal that she did say these things to OUTA. Her efforts to contend that there was a language barrier to her being properly understood are so far-fetched that they can safely be rejected.

486. The evidence therefore appears to establish a relationship between Ms Myeni and Mr Myeni, on the one hand, and Mr Mngadi, on the other. The relationship between Ms Myeni and Mr Mngadi was a key feature of Ms Nhantsi’s evidence before the Commission. Mr Mngadi was provided with an opportunity to respond to the evidence of both Ms Nhantsi and Mr Mahlangu. His response is dealt with in the next section. Notably, he does not ever deal with his relationship with Ms Myeni. Given how important that relationship was, on the evidence of Ms Nhantsi, Mr Mngadi’s failure to deal with it indicates that he did not have an adequate answer to the allegation that he had a close relationship with Ms Myeni.

⁷⁸⁸ Transcript 7 November 2020, p 236-237

Mr Mngadi

487. Mr Mngadi did not testify before the Commission but he did provide an affidavit to the Commission after Ms Nhantsi and Mr Mahlangu had given evidence.⁷⁸⁹
488. Mr Mngadi explained in his statement that he had had a number of interactions over the years with officials at SAA as a result of the position he held at Nedbank.⁷⁹⁰ He said that he was introduced to Ms Nhantsi by Ms Kwinana of SAA and he had agreed to assist her “informally” to deal with the challenges facing SAA regarding its debt position.⁷⁹¹
489. Mr Mngadi contended that providing this informal advice to SAA was not in conflict with his position at Nedbank because Nedbank had not submitted any proposal to SAA in response to an RFI.⁷⁹² However, this misses the point. Nedbank had certainly tendered for the transaction advisory services at SAA. Its bid submission formed part of the documents presented during Mr Mahlangu’s evidence before the Commission.⁷⁹³
490. Despite this, and despite the fact that Mr Mahlangu provided his affidavit to the Commission after Mr Mahlangu had given evidence, Mr Mngadi claimed that Nedbank did not participate in this tender.⁷⁹⁴ He provided a copy of a BAC document

⁷⁸⁹ The Commission’s efforts to obtain a signed affidavit from Mr Mngadi have been unsuccessful

⁷⁹⁰ Mr Mngadi affidavit para 26

⁷⁹¹ Mr Mngadi affidavit paras 28 and 34

⁷⁹² Mr Mngadi affidavit para 35

⁷⁹³ Exhibit DD2, p 198-199

⁷⁹⁴ Mr Mngadi affidavit para 76.1.2

from February 2016, which did not list Nedbank as a bidder.⁷⁹⁵ The origins of that specific document is not disclosed in Mr Mngadi's statement. It is contradicted by the evidence already before the Commission regarding the tender for transaction advisory services, which clearly shows that Nedbank submitted a bid.⁷⁹⁶

491. Mr Mngadi's affidavit also fails to engage properly with the text and tenor of his whatsapp messages to Ms Nhantsi. Ms Nhantsi provided the Commission with the whatsapp messages she was receiving from Mr Mngadi while the sourcing of funds was underway at SAA. Those messages reveal a level of familiarity between Mr Mngadi and Ms Myeni. They also evidence an increasing amount of pressure being placed on Ms Nhantsi to ensure that the funding transaction went through.

492. Despite this, Mr Mngadi never dealt with his relationship with Ms Myeni in his affidavit. He also failed to deal with the clear import of his whatsapp communications with Ms Nhantsi.

493. Mr Mngadi denied the role that Mr Mahlangu said he played in the BNP bid and subsequent interactions with SAA,⁷⁹⁷ but the contemporaneous communications to Ms Nhantsi at the time, which are not addressed in Mr Mngadi's affidavit at all, show clearly that he was involved.

Conclusion

494. There can be little doubt that, but for the actions of Ms Stimpel, the BNP transaction would have gone ahead in one form or another. It was her unwavering commitment

⁷⁹⁵ Mr Mngadi affidavit – annexure MM18 referred to in para 76.1.3

⁷⁹⁶ Exhibit DD1, p 429

⁷⁹⁷ Mr Mngadi affidavit para 76.3.2

to proper procurement processes that made her stand up to what was going on around her, at great personal cost to herself.

495. Whistleblowers like Ms Stimpel are the final defence against corruption and state capture taking hold in SOEs. Without people like her, who are willing to resist the pressures being applied on them to bend the rules, the chances that these illegal activities at SOEs will be exposed reduces considerably.

496. As will be seen in the next section, there was no-one like Ms Stimpel involved when the Boards of SAA and SAAT decided on the Swissport and AAR/JM Aviation transactions. Also, by the time that the key decisions on these transactions were made, Dr Dahwa had been removed and Ms Mpshe had been relieved of her Acting-CEO duties. Without these people to stop them, the transactions were allowed to proceed, with benefits and kickbacks paid to key decision makers within SAA and SAAT.

Swissport

497. By way of background, Swissport is a large international, Swiss-based cargo and aircraft ground handling services provider founded in 1996. It has a South African-incorporated subsidiary, Swissport South Africa (Pty) Ltd (*Swissport*). It is a level 6 BEE contributor and has over 40% Black ownership. Swissport, prior to the impugned ground handling contract discussed in detail below, had an ongoing business relationship with SAA as a ground handling service provider.

498. In February 2020 Mr Schalk Human was the Head of Department for Technical Materials at SAAT. In his position, he was responsible for procurement, logistics and

inventory management. He gave evidence before the Commission and was able to testify to a chronology of events relating to tenders at SAAT through the written documentation available to him, including forensic reports, minutes of meetings and other documents.⁷⁹⁸

499. Mr Human testified that ground handling services involve positioning power units, towing services, tugs, loading aircraft, baggage transportation, steps and ramps.⁷⁹⁹

500. The ground handling contract was awarded by SAA itself. It was published in May 2011. Then on 31 July 2012, the Board awarded the contract to Swissport for five years from 2012 onwards.⁸⁰⁰ The contract with Swissport was never actually signed or concluded but it nevertheless provided the services to SAA. An amount of R1.139 billion was paid to Swissport without any contract being in place during this period.⁸⁰¹

501. In 2016, SAAT eventually took the decision to conclude a contract with Swissport for a further five years notwithstanding that the original tender awarded in 2012 was for five years, expiring in 2017, and notwithstanding that no further procurement process was carried out before this occurred.⁸⁰² The contract value would therefore end up being double the original tender value.⁸⁰³

502. When the ground handling contract was concluded with Swissport in 2016, it was a condition of the contract that Swissport had to contract with a BEE company that had representation of Black women, youth, military veterans and disabled persons, from

⁷⁹⁸ Transcript 6 February 2020, p 14

⁷⁹⁹ Transcript 6 February 2020, p 129

⁸⁰⁰ Transcript 6 February 2020, p 131

⁸⁰¹ Transcript 6 February 2020, p 132

⁸⁰² Transcript 6 February 2020, p 135

⁸⁰³ Transcript 6 February 2020, p 136

which Swissport would purchase all the equipment required for the SAA contract.⁸⁰⁴

It was also a condition of the contract that Swissport was to acquire all SAAT's ground power units.

503. Mr Peter Kohl, a former CEO of Swissport, provided the Commission with a number of affidavits. In his first affidavit, he stated that:

503.1. Swissport was successful in the 2012 tender for offering ground handling services to SAA but there was an inordinate delay in preparing the agreement because of SAA's frequent changes in management; he said that by 2014 it appeared that SAA was not going to honour its tender award and conclude a contract with Swissport.⁸⁰⁵

503.2. Nevertheless, Swissport continued to provide services to SAA on a month-to-month basis. This eventually became untenable for Swissport and it attempted to get SAA to sign a contract. SAA not only resisted signing an agreement, but it also changed the requirements for the tender by introducing new conditions for Swissport about BEE supplier requirements, as set out below;⁸⁰⁶

503.3. Swissport was already 49% BEE-owned and had the required BBBEE contributor rating for the tender;⁸⁰⁷

503.4. SAA accounted for 70% of Swissport SA's business at the time;⁸⁰⁸

⁸⁰⁴ Transcript 6 February 2020, p 137

⁸⁰⁵ Exhibit DD25, p 230, paras 5.3 and 5.4

⁸⁰⁶ Exhibit DD25, p 231-232

⁸⁰⁷ Exhibit DD25, p 234

⁸⁰⁸ Exhibit DD25, p 234

503.5. If Swissport lost SAA's business, it would have been liquidated;⁸⁰⁹

503.6. It eventually came to Swissport's attention that SAA would award it a ground handling contract with a 30% share for BEE SMMEs set aside;⁸¹⁰ SAA suggested to Swissport that it partner with an entity called "Jamicron" as a BEE partner but Swissport ultimately never partnered with Jamicron.⁸¹¹ A 30% BEE SMME set aside meant that Swissport had to give 30% of the value of the contract to a BEE partner. The 30% set aside policy was said to be aimed at promoting transformation and to give business to Black-owned companies.

503.7. In December 2015 Mr Lester Peter from Global Supply Management at SAA sent Swissport SA a draft contract including the 30% set aside. Swissport responded that this was likely an illegal agreement and would not genuinely help with transformation;⁸¹²

503.8. On 10 February 2016 Mr Kohl, Mr Vuyisile Ndzoku, who was a shareholder of Swissport and a shareholder and director of JM Aviation, and a number of other Swissport representatives met with Ms Kwinana and other officials from SAA. At the meeting, Ms Kwinana insisted that Swissport sign the agreement with the 30% set aside, which would be allocated to a BEE partner as selected by SAA.⁸¹³ Swissport refused to sign that agreement;

⁸⁰⁹ Exhibit DD25, p 235

⁸¹⁰ Exhibit DD25, p 236

⁸¹¹ Exhibit DD25, p 239

⁸¹² Exhibit DD25, p 281

⁸¹³ Exhibit DD25, p 245

503.9. When Swissport refused to sign the agreement, SAA sent Swissport a letter which would have put an end to the entire business that Swissport was getting from SAA. Nevertheless, the parties did not get to that point;⁸¹⁴

503.10. They ended up concluding a contract in March 2016. It was a condition of the contract, set out in clause 8.1, that Swissport would subcontract some of its services to BEE companies. Clause 8.2 required Swissport to purchase the SAAT ground power units (GPUs) at market value or book value;⁸¹⁵

503.11. In terms of the agreement, SAA would select a BEE partner that Swissport had to work with. It chose JM Aviation South Africa (Pty) Ltd (*JM Aviation*);⁸¹⁶ JM Aviation would purchase the GPUs and sell them on to Swissport;⁸¹⁷ Mr Kohl said that he was not aware that Mr Ndzeke was also involved in JM Aviation.⁸¹⁸

The ground handling agreement and Jamicron

504. In 2015 and 2016 Mr Vuyisile Ndzeke was a shareholder⁸¹⁹ and director of Swissport.⁸²⁰ Mr Ndzeke testified that he ceased being a director of Swissport in early 2020, which was around the time he was originally scheduled to give evidence at the Commission.⁸²¹

⁸¹⁴ Exhibit DD25, p 245

⁸¹⁵ Exhibit DD25, p 250-254

⁸¹⁶ Exhibit DD25, p 256

⁸¹⁷ Exhibit DD25, p 257 and p 265

⁸¹⁸ Exhibit DD25, p 268

⁸¹⁹ Transcript 26 August 2020, p 39. He estimated between 9 and 15%

⁸²⁰ Transcript 26 August 2020, p 43

⁸²¹ Transcript 26 August 2020, p 43-44

505. Mr Vuyisile Ndzeku was also a shareholder⁸²² and director of JM Aviation and had held these positions since around 2015.⁸²³ Prior to this, Mr Ndzeku testified that he worked with JM Aviation International.⁸²⁴ Mr Jules Aires was the founder of JM Aviation and was also a shareholder of the company in 2015/2016.⁸²⁵ The other two shareholders of JM Aviation are Mr Ndzeku's daughters, Ms Khosi Sokhulu and Ms Natasha van Louw.⁸²⁶ Since October 2015, these four shareholders have also been directors of JM Aviation.⁸²⁷ Mr Ndzeku's wife, Ms Hendricks, was also an employee of JM Aviation.⁸²⁸

506. Mr Ndzeku conceded that he did not disclose to Swissport that he was a director and shareholder of JM Aviation.⁸²⁹ He confirmed that he did not recuse himself from any meetings where transactions between the two entities were discussed or voted on.⁸³⁰ Mr Ndzeku admitted that he spoke regularly to Ms Yakhe Kwinana on the phone during 2016.⁸³¹ He admitted that he and Ms Kwinana discussed how to facilitate the 30% set aside for the Swissport contract to Jamicron. Mr Daluxolo Peter was a director of Jamicron at the time and his evidence will be referred to below.⁸³²

507. Mr Ndzeku confirmed that he and Ms Kwinana had discussed Swissport's empowerment partner "many times".⁸³³ He testified that during their first interactions

⁸²² Transcript 26 August 2020, p 45. He is a 20% shareholder

⁸²³ Transcript, 26 August 2020, p 44

⁸²⁴ Transcript 26 August 2020, p 45

⁸²⁵ Transcript 26 August 2020, p 48. He was a 15% shareholder

⁸²⁶ Transcript 26 August 2020, p 49. Ms Sokhulu held 35% and Ms van Louw held 30%

⁸²⁷ Transcript 26 August 2020, p 52

⁸²⁸ Transcript 26 August 2020, p 54

⁸²⁹ Transcript 26 August 2020, p 51

⁸³⁰ Transcript 26 August 2020, p 75

⁸³¹ Transcript 26 August 2020, p 118

⁸³² Transcript 26 August 2020, p 132

⁸³³ Transcript 26 August 2020, p 133

about an empowerment partner, Ms Kwinana had Mr Daluxolo Peter with her and stated that she and Ms Myeni insisted that Swissport use him as an empowerment partner. Mr Ndzeku said that he had resisted this because Swissport already had empowerment credentials.⁸³⁴

508. Mr Ndzeku testified that on 10 February 2016, he attended the meeting referred to above at SAA with Mr Peter Kohl on behalf of Swissport. Ms Kwinana and Mr Lester Peter were present for SAA. Mr Daluxolo Peter was also there. Mr Ndzeku and Mr Dulaxolo Peter knew each other and had interacted in the past. For example, they had attended a soccer world cup match together in 2010.⁸³⁵ At this meeting on 10 February 2016, SAA told Swissport that it wanted Swissport to set aside 30% of its revenues to an empowerment firm, and in particular, to Mr Daluxolo Peter.⁸³⁶

509. Mr Ndzeku testified that at some point in 2016, he was told by Mr Kohl that Swissport was going to pay JM Aviation R28.5million.⁸³⁷ Despite being a director of JM Aviation, he professed to know nothing about any contract in terms of which this payment from Swissport was to be made to JM Aviation.⁸³⁸

510. The Commission's investigations revealed that this payment of R28.5 million was made to JM Aviation in March 2016, the month before the ground handling contract between SAA and Swissport was finally concluded.

⁸³⁴ Transcript 26 August 2020, p 134

⁸³⁵ Transcript 26 August 2020, p 111-113

⁸³⁶ Transcript 26 August 2020, p 129-131

⁸³⁷ Transcript 26 August 2020, p 159

⁸³⁸ Transcript 26 August 2020, p 144. The contract may be found in exhibit DD26, p 235. It was signed by Ms Sokhulu on behalf of JM Aviation. It provided at clause 7.1 that JM Aviation was going to restructure the company's workshops throughout South Africa with the aim to improve maintenance processes and procedures to optimize the company's GSC support services

511. Mr Ndzeku also testified that Mr Kohl had instructed him to pay R20million of the R28.5 million to Jamicron.⁸³⁹ Mr Ndzeku testified that Mr Kohl said that this was because Jamicron was going to be the empowerment partner in the Swissport ground handling contract.⁸⁴⁰
512. Mr Daluxolo Peter provided the Commission with an affidavit about the payment to Jamicron. He stated that it was not Mr Kohl who had instructed JM Aviation to pay Jamicron. Instead, he said that it was an arrangement that had been devised entirely by Mr Ndzeku. Mr Peter's version was that it was Mr Ndzeku who had established Jamicron, installed his daughter as a director of Jamicron, together with Mr Peter, and then facilitated the R20million payment to Jamicron.⁸⁴¹ Mr Ndzeku then told Mr Peter what to do with that R20million and who to pay with it.⁸⁴² This involved withdrawing cash over three days, totalling R5million and handing it over to Mr Kolisi of BMK Attorneys.⁸⁴³ This was the same Mr Kolisi who was, at the time, running a disciplinary hearing against Dr Dahwa. As this report detailed above, Dr Dahwa had refused Ms Kwinana and Ms Myeni's unlawful instruction regarding awarding the ground handling contract to Swissport. This was also the same Mr Kolisi who had drafted the letter that was used to suspend Ms Mpshe. Mr Peter also stated that he took R5million of the R20 million for himself,⁸⁴⁴ as payment for the work he had done

⁸³⁹ Transcript 26 August 2020, p 159-160. See also p 182

⁸⁴⁰ Transcript 26 August 2020, p 141

⁸⁴¹ Transcript 26 August 2020, p 187

⁸⁴² Transcript 26 August 2020, p 192

⁸⁴³ Transcript 26 August 2020, p 193

⁸⁴⁴ Transcript 26 August 2020, p 194

in facilitating the ground handling transaction.⁸⁴⁵ He was then also instructed by Mr Ndzeke to pay R10million over to BMK Attorneys directly.⁸⁴⁶

513. In response to these allegations, Mr Ndzeke denied being the mastermind behind the creation of Jamicron. He said that he could not have been the mastermind because he did not receive any payments himself for facilitating the transaction.⁸⁴⁷ This was, however, false. During his evidence, Mr Ndzeke was shown bank statements evidencing that he had received R2.5 million out of the R28.5million paid by Swissport to JM Aviation.⁸⁴⁸ In response he said, “Okay that’s good, I’m happy, it’s good if I did get some money, Swissport gave me some money”.⁸⁴⁹ Mr Ndzeke could not explain the reason why he received that money. He said “maybe it was an agreement between myself and Jules”.⁸⁵⁰ The reference to Jules is reference to Mr Jules Aires of JM Aviation.

514. The bank records also showed that a further R2.5million of the Swissport payment to JM Aviation was paid out to BMK Attorneys, with the reference “Pete”.⁸⁵¹ This money was used by BMK Attorneys⁸⁵² to pay for Mr Lester Peter, the Head of Procurement of SAA, to buy two luxury sports cars the following day.⁸⁵³

⁸⁴⁵ Affidavit of Dulaxolo Peter, dated 25 August 2020, para 12

⁸⁴⁶ Transcript 26 August 2020, p 194

⁸⁴⁷ Transcript 26 August 2020, p 187

⁸⁴⁸ Transcript 26 August 2020, pp 87-88. See exhibit DD26, p 44. These are the bank records of JM Aviation SA. This shows a balance of only R1000; then payment on 23 March 2016 from Swissport of R28.5million; then R20million is paid out to Jamicron; then R2.5million is paid to Mr Ndzeke. Mr Ndzeke’s bank statement evidencing this payment are at exhibit DD26, p 198. It was paid on 23 March 2016

⁸⁴⁹ Transcript 26 August 2020, p 199

⁸⁵⁰ Transcript 26 August 2020, p 204

⁸⁵¹ Exhibit DD25, p 45

⁸⁵² Transcript 26 August 2020, p 230

⁸⁵³ Transcript 26 August 2020, p 227-228

515. In preparation for Mr Ndzeke's evidence before the Commissions, its investigators again engaged Swissport and asked it to explain the R28.5 million it had paid to JMAviation. According to a second affidavit furnished to the Commission by Mr Kohl, Swissport claimed that it had entered into a service level agreement with JM Aviation to upgrade its ground support equipment (GSE) workshops.⁸⁵⁴ As set out above, Mr Ndzeke professed to know nothing about this arrangement nor about the services allegedly rendered by JM Aviation to Swissport entitling it to be paid R28.5 million.⁸⁵⁵

516. The bank account of JM Aviation had only R1000 in it when this R28.5million payment from Swissport was made.⁸⁵⁶ Despite this, Mr Ndzeke testified that that JM Aviation South Africa had engaged in various transactions during its business dealings before the payment from Swissport. But then it was put to Mr Ndzeke that this could not be correct because the JM Aviation bank account had been inactive prior to the R28.5million payment from Swissport, save for the initial deposit of R1000. Mr Ndzeke was then forced to admit that the previous transactions had actually been conducted through JM Aviation International.⁸⁵⁷ He confirmed that JM Aviation South African had engaged in no transactions at all until it received Swissport's payment in March 2016.⁸⁵⁸

517. After Mr Ndzeke's evidence, Swissport provided a further affidavit dated 19 November 2020 to the Commission in which Mr Kohl disputed Mr Ndzeke's version. He denied having any knowledge of Mr Ndzeke's dealings with Jamicron and denied

⁸⁵⁴ Transcript 26 August 2020, p 143

⁸⁵⁵ Transcript 26 August 2020, p 144. The contract may be found in exhibit DD26, p 235. It was signed by Ms Sokhulu on behalf of JM Aviation. It provided at clause 7.1 that JM Aviation was going to restructure the company's workshops throughout South Africa with the aim to improve maintenance processes and procedures to optimize the company's GSC support services

⁸⁵⁶ Transcript 26 August 2020, p 149

⁸⁵⁷ Transcript 26 August 2020, p 164-165

⁸⁵⁸ Transcript 26 August 2020, p 170

that he had instructed Mr Ndzeku to make the payments that he did from the R28.5 million received from Swissport.

518. In order to try to get to the bottom of whether there was, in fact, a genuine agreement concluded between Swissport and JM Aviation for the upgrade of Swissport's GSE or whether the payment of R28.5 was nothing more than a "facilitation" fee for securing the ground handling contract, the Commission's investigators asked Swissport to produce any and all documents evidencing the services that were provided by JM Aviation pursuant to the GSE workshop upgrade. Swissport, however, advised the Commission that it did not have a single scrap of paper that evidenced any aspect of the alleged contract having been entered into between the parties. There was not a single email. There were no meeting notices, no invoices, no slideshows, no logs, no design documents – absolutely nothing. Although Mr Kohl stated that he had taken some handwritten notes in his interactions with Mr Jules Aires when JM Aviation provided its services, his office had apparently been "cleaned out" after he had left his CEO position in South Africa and any such records were destroyed in the process.⁸⁵⁹

519. It is extremely unlikely that a genuine agreement, in terms of which Swissport was to receive services worth R28.5 million, would have generated nothing more than some handwritten notes which were subsequently thrown away. The only reasonable inference to draw from the evidence is that Swissport was in dire straits when SAA terminated its month to month ground handling services contract in February 2016. At that stage, Swissport was not willing to accede to SAA's demand that it part with 30% of the revenue under the agreement. However, it faced liquidation in South Africa if it did not retain the SAA work. It therefore was willing to

⁸⁵⁹ Kohl affidavit provided to the Commission on 11 May 2020 unsigned because of COVID-19 lockdown circumstances, para 23

procure the services of JM Aviation and Jamicron (Mr Ndzeku and Mr Peter) to facilitate the conclusion of the contract with SAA. These parties then paid certain crucial decision-makers at SAAT (Ms Yakhe Kwinana, Ms Nontsasa Memela and Mr Lseter Peter) and the contract was indeed awarded to them. JM Aviation and Jamicron then took a share of that payment. If Swissport paid this amount in order to secure the ground handling contract with SAA and knew that it would be used to pay bribes to SAA and SAAT officials, then it committed an act of corruption.

520. It has, unfortunately, not been possible to get to the bottom of Swissport's knowledge on these matters. This is because Swissport declined the invitations extended to it to meet with the Commission's investigators and legal team. It preferred, instead, to answer the Commission's on-going enquiries as the investigation developed with affidavits produced by Mr Kohl. When the Commission enquired about Mr Kohl's availability to give oral evidence, it was told that he was located in the United States of America and was not in a position to testify in the Commission. This has meant that the Commission has not been in a position to test his version through questioning.

521. Notwithstanding this limitation, the evidence to the effect that corruption took place in this deal is supported by two undisputed facts:

521.1. Swissport's inability, despite two requests from the Commission, to provide any documentary confirmation that genuine services were provided by JM Aviation to Swissport in exchange for the R28.5 million it received a month before the ground-handling contract was concluded between it and SAA;

521.2. What JM Aviation actually did with the money. If services were genuinely to be rendered under the contract with Swissport, JM Aviation would likely have had to pay salaries and made at least some purchases to equip itself to provide the

services. However, the bank statements of JM Aviation show that no such payments were made. Instead, the money came into the account and, within a matter of days, it was paid out to those connected with SAA. It was paid to Mr Daluxolo Peter, whose own affidavit before the Commission confirms that he was paid this money for facilitating the ground handling agreement with SAA. It was paid to Mr Ndzeku who, on his own version, knew nothing about the GSE workshop upgrade with Swissport. It was also paid to Mr Kolisi, who, in turn, bought two luxury cars for Mr Lester Peter, the head of procurement at SAA.

522. In the light of this substantial evidence that corrupt payments were made to secure the ground handling contract with SAA, the Commission will recommend that the NPA consider prosecutions of all those involved in these transactions.

523. In her evidence before the Commission, Ms Kwinana admitted that she had attended the meeting with Swissport on 10 February 2016 that Mr Ndzeku also attended. She claimed that it was a short engagement because she simply informed Swissport that SAA was going to go out on tender because the existing contract was irregular.⁸⁶⁰ However, this version of the events that transpired at the meeting is in conflict with contemporaneous notes prepared immediately after the meeting.

524. On 12 February 2016 Mr Kohl wrote an email to his fellow directors at Swissport recording what was said at the meeting of the 10th February 2016.⁸⁶¹ He said that Ms Kwinana had chaired the meeting and declared that its purpose was to conclude the contract and no one would leave the room until it was concluded. Thereafter, Mr Lester Peter and Ms Kwinana had insisted that Swissport sign the supplementary

⁸⁶⁰ Transcript 2 November 2020, p 45

⁸⁶¹ Exhibit DD25, p 300

agreements that Mr Peter had emailed to Swissport in December 2015. These were the draft agreements that stipulated the 30% set aside for an as-yet-unidentified BEE partner.

525. Mr Kohl's email further recorded that they were told that, if Swissport did not sign the agreements, SAA would terminate its business with Swissport. The email said that, apart from being illegal and outside of the provision of South Africa's B-BBEE Act, these demands would bankrupt Swissport.

526. Ms Kwinana testified that she had no memory of this being discussed at the meeting and demanded to see minutes of the meeting.⁸⁶² However, Mr Kohl's affidavit explained that Swissport had sought minutes recording these demands from SAA but they were never forthcoming.

527. There was also another of Swissport's representatives at the meeting, who took independent notes of what transpired at the meeting. They accord with Mr Kohl's emailed account of the meeting.⁸⁶³ When this further corroboration of Mr Kohl's notes was shown to Mr Kwinana, she again claimed that they were false.⁸⁶⁴ Ms Kwinana testified that she also had no knowledge of the draft agreement that was circulated to Swissport in December 2015 by Mr Lester Peter.⁸⁶⁵

⁸⁶² Transcript 2 November 2020, p 63

⁸⁶³ Exhibit DD25, p 309

⁸⁶⁴ Transcript 2 November 2020, p 76

⁸⁶⁵ Exhibit DD25, p 291. Transcript 2 November 2020, p 80 and p 82

528. Ms Kwinana did admit that she knew Mr Daluxolo Peter from the supplier development roadshows, but she could not recall if he was at the meeting of 10 February with Swissport.⁸⁶⁶
529. It was put to Ms Kwinana that it was not appropriate for a non-executive Board member to attend these types of operational meetings.⁸⁶⁷ She simply answered that she went “to give support”.⁸⁶⁸ Later on, when challenged about getting herself involved in operational matters as a non-executive Board member Ms Kwinana claimed that she attended such meetings in order to offer strategic direction because this was a BEE issue.⁸⁶⁹ This later version contradicted her earlier version to have only attended such meetings to offer “support”. It also tends to corroborate the version of Mr Kohl that Ms Kwinana played a leading role in the meeting by putting pressure on Swissport to accept a 30% set aside BEE partner.
530. In fact, it was put to Ms Kwinana that there was evidence from her own emails that confirmed Swissport’s claim. On 20 January 2016 she sent an email to Mr Lester Peter,⁸⁷⁰ which said: “yesterday I had a meeting with one of the shareholders of Swissport, Mr Vuyo Ndzeku, Mr Peter Kohl (CEO/CFO Swissport), Mr Daluxolo Peter, a BEE partner of Swissport. The purpose of the meeting was that the BEE partner was concerned about the status of the contract.” Ms Kwinana’s response to this clear written confirmation that she was intimately involved in trying to secure a set aside for a BEE partner under the Swissport deal was that she had never seen

⁸⁶⁶ Transcript 2 November 2020, p 52

⁸⁶⁷ Transcript 2 November 2020, p 86

⁸⁶⁸ Transcript 2 November 2020, p 87

⁸⁶⁹ Transcript 2 November 2020, p 93

⁸⁷⁰ Exhibit DD33.23, referred to in evidence on transcript 3 November 2020, p 168-170

this email. Given that she had written the email herself, this claim is simply preposterous and should be rejected.⁸⁷¹

531. In an effort to probe Ms Kwinana's version of what transpired at the meeting on 10 February 2016, she was asked why, if she went to the meeting to advise Swissport that its contract was irregular and would be put out to tender, SAA did not ultimately go out to tender thereafter.⁸⁷² Ms Kwinana provided no satisfactory answer to this question. She said that "maybe it was because of the processes."⁸⁷³ She then claimed that, while the Board may have thought that the contract was irregular, perhaps the processes required to "regularise it" were not implementable.⁸⁷⁴ None of this was convincing.

532. Ms Kwinana's testimony about the Swissport transaction was evasive and, at times, nonsensical. The evidence is overwhelming that she insisted that Swissport sign a contract to give away 30% of its revenue to an entity that SAA would select. When Swissport refused, Ms Kwinana changed tack and, after many calls in early 2016 between her and Mr Ndzeke, an arrangement was concluded in terms of which millions of Rands were paid by Swissport to JM Aviation for services it did not receive so that JM Aviation would be able to pay kick-backs to various important decision-makers within SAA.

⁸⁷¹ Transcript 3 November 2020, p 169

⁸⁷² Transcript 2 November 2020, p 88

⁸⁷³ Transcript 2 November 2020, p 88

⁸⁷⁴ Transcript 2 November 2020, p 90

GPUs

533. Mr Human testified that GPUs are ground power units, or generators, that aircraft need to maintain their power supply when grounded.⁸⁷⁵ In 2015, SAAT purchased eight GPUs for use during SAAT's maintenance operations.⁸⁷⁶ The GPUs were purchased for a total of R9 193 981.20 including VAT.⁸⁷⁷
534. It was a condition of the ground handling contract concluded between Swissport and SAA in March 2016 that Swissport would be required to purchase those GPUS from SAAT at market value or book value.⁸⁷⁸ SAAT sold the GPUs to Mr Ndzeke's company, JM Aviation, for an amount of R248 000 per unit, totaling R3 392 640. The book value of the units at the time was R7 968 117. In terms of the ground handling agreement, Swissport was then required to purchase the units from JM Aviation.⁸⁷⁹ The day after SAAT had agreed to sell the GPUs to JM Aviation for just more than R3 million, JM Aviation sold the very same GPUs to Swissport for more than R9 million.
535. Since the sale of the units, SAAT has, to date, spent R8.4 million in fees for leasing the very same units back from Swissport.⁸⁸⁰ This means that SAAT lost, in total, around R14.5million on the transaction.⁸⁸¹

⁸⁷⁵ Transcript 6 February 2020, p 129

⁸⁷⁶ Transcript 6 February 2020, p 133

⁸⁷⁷ Exhibit DD22(b), p 684

⁸⁷⁸ Transcript 6 February 2020, p 134

⁸⁷⁹ Transcript 6 February 2020, p 138

⁸⁸⁰ Transcript 6 February 2020, p 141

⁸⁸¹ Transcript 6 February 2020, p 141

536. Mr Arson Malola Phiri, the Acting CEO of SAAT at the time of the transaction, provided the Commission with an affidavit. He explained that SAAT acquired the 12 GPUs so that they could eventually insource SAA's ground handling services to SAAT.⁸⁸² This required licencing from ACSA. It was awarded the licence in 2012 for two years. The plan was to take over the ground handling services from Swissport.⁸⁸³
537. Despite SAAT's decision to purchase the GPUs and commence a process of insourcing, SAA's Board then authorised its management to conclude a ground handling contract with Swissport on 15 March 2016, signed by Ms Nhantsi and Mr Zwane. It was a term of this agreement, as set out above, that Swissport would buy the GPUs from SAAT at their book value or market value.⁸⁸⁴ According to Mr Malola Phiri, this reversal of the decision to insource these services to SAAT had significant commercial and financial implications for SAAT.⁸⁸⁵
538. At the time Ms Memela was the Head of Procurement at SAAT. The SAAT Board met on 15 June 2016 to discuss the sale of the GPUs. The minutes of the meeting⁸⁸⁶ recorded that the Board had been asked to consider and approve the disposal of 12 GPUs "as the services they were purchased to offer had been outsourced to an external service provider, Swissport, by SAA." The minutes record that the "GPUs would be sold to Swissport at their current asset value. The Board was informed that SAA's contract with Swissport provided for Swissport to purchase the GPUs from SAAT". The Board ultimately resolved that "the disposal of SAAT's 12 . . . GPSs, as

⁸⁸² Exhibit DD26, p 776

⁸⁸³ Exhibit DD26, p 777

⁸⁸⁴ Exhibit DD26, p 777

⁸⁸⁵ Exhibit DD26, p 778

⁸⁸⁶ Exhibit DD25(b), p 609

a result of SAA awarding the ground handling services to an external service provider be and is hereby approved”.

539. The Board resolved to sell the GPUs at the best possible price in the light of the book value.⁸⁸⁷

540. Ms Memela testified that she was tasked by the Acting CEO of SAAT, Mr Zwane, to negotiate the sale of the GPUs. She attended a meeting on 21 June 2016 with a Mr Makaleng, whose department at SAAT owned the GPUs, and Mr Stan Vosloo, who was responsible for materials management at SAAT. She testified that, although she invited Mr Leon Roberts, the logistics and inventory manager at SAAT, to attend the meeting, he did not do so. They were joined in the meeting by Mr Jules Aires and Ms Sokhulu of JM Aviation. They discussed the proposal that Mr Malola Phiri had made to the Board of SAAT for the sale of the GPUs. Ms Memela explained that her role began with negotiating the price that JM Aviation would pay to purchase the GPUs at this meeting and ended with her and the CEO signing an invoice for the sale.⁸⁸⁸

541. Mr Makaleng and Mr Vosloo⁸⁸⁹ provided affidavits to the Commission in which they both denied having attended this meeting with Ms Memela.⁸⁹⁰ Mr Makaleng provided a copy of the meeting invite which reflected that he had not accepted the invitation.⁸⁹¹ Mr Vosloo sent an email to Ms Memela after the meeting on 21 June 2016 asking her to confirm the sale price for the GPUs.⁸⁹² In her response, Ms Memela did not

⁸⁸⁷ Exhibit DD26, p 783

⁸⁸⁸ Transcript 7 February 2020, p 38

⁸⁸⁹ DD25(b), p 742

⁸⁹⁰ DD25(b), p 612

⁸⁹¹ DD25(b), p 647

⁸⁹² DD25(b) p 747

question why Mr Vosloo was asking this question given that, according to her, Mr Vosloo had been at the meeting where the price was discussed.⁸⁹³ Instead, she just confirmed the sale price.⁸⁹⁴

542. Ms Memela was asked what research she had done or information she had gathered before agreeing on a purchase price for the GPUs.

542.1. She confirmed that she had not established how much they had been purchased for the year before.⁸⁹⁵

542.2. Ms Memela testified that she did consider the book value of the GPUs,⁸⁹⁶ which Mr Phiri had also considered relevant because he had included it in his submission to the Board of SAAT on whether to sell the GPUs.⁸⁹⁷ The book value was contained in the asset register of SAAT, as it was in June 2016, which was provided to the Commission by Mr Human from SAAT.⁸⁹⁸ However, Ms Memela testified that she did not have regard to that particular document before negotiating with JM Aviation and spent a very long time, together with her lawyer, detaining the proceedings of the Commission by challenging the authenticity and validity of the document instead of addressing the questions put to her.⁸⁹⁹

542.3. Because Ms Memela testified that she had not seen the asset register extract, she was asked about the submission that Mr Malola Phiri had made to the

⁸⁹³ Transcript 10 February 2020, p 81

⁸⁹⁴ Transcript 10 February 2020, p 81

⁸⁹⁵ Transcript 10 February 2020, p 35-36

⁸⁹⁶ Transcript 10 February 2020, p 37

⁸⁹⁷ Transcript 10 February 2020, p 41

⁸⁹⁸ Exhibit DD22(b), p 694

⁸⁹⁹ Transcript 10 February 2020, p 48-54

Board on 15 June 2016 about the book value of the GPUs to which she had previously referred in her evidence.⁹⁰⁰ The submission stated that each unit was purchased for R766 165.10 with a total of over R9million; the current value of the 12 units, was R682 890.62 per unit, as per the SAAT asset register. The total in June 2016 was R4.7million. Ms Memela then claimed that she had never seen this document either and was not aware of these amounts. This, despite the fact that Mr Makeleng, who she claimed had attended the negotiations with her, confirmed on affidavit that these values were correct, and that they came from the SAAT asset register.⁹⁰¹

542.4. Ms Memela's attorney again detained the Commission with objections that they demanded to see the authenticated asset register before Ms Memela would answer any questions.⁹⁰²

542.5. Ms Memela then testified that all she had been given was the proposal from Mr Aires and the Board resolution.⁹⁰³

542.6. Therefore, although Ms Memela testified that she had regard to the book value of the GPUs, she could not tell the Commission what the book value actually was because she denied seeing any of the contemporaneous documents put to her.

543. Ms Memela conceded that the Board resolution required the GPUs to be sold at their asset value as at that time.⁹⁰⁴ It was put to her that R248 000 per unit did not accord

⁹⁰⁰ Transcript 10 February 2020, p 56. The submission is in exhibit DD22(b), p 811

⁹⁰¹ Exhibit DD25(b), p 632

⁹⁰² Transcript 10 February 2020, pp 61-62

⁹⁰³ Transcript 10 February 2020, p 62

⁹⁰⁴ Transcript 10 February 2020, p 107

with the current asset value.⁹⁰⁵ Ms Memela then pointed to a part of the minutes of the meeting of the SAAT Board of 15 June 2016, where the Board discussed the discrepancy between the purchase price of the GPUs in 2015 (R782 000) versus the depreciated asset value that Mr Phiri presented to the Board as at June 2016 (R648 000) which the Board assumed was the price at which the GPUs would be sold. The Board then debated whether to claim that shortfall from SAA because it was in terms of the SAA agreement with Swissport that SAAT was being forced to sell the GPUs.⁹⁰⁶

544. Ms Memela attempted to claim that this is why she was not worried about the shortfall in the offer from JM Aviation for R248 000 because SAA would pay it.⁹⁰⁷ However, it is clear that Ms Memela based her claim on a portion of the minutes that had nothing to do with the price that was eventually agreed upon with JM Aviation. That portion of the minutes related to *internal accounting matters* between SAA and SAAT. When this was put to Ms Memela, she again went on a tangent about the fact that there was no proof that the amount given by Mr Malola Phiri was the correct asset register amount for the GPUs. Once again, Ms Memela disputed the authenticity of the asset register of SAAT.⁹⁰⁸ But this misses the point and is entirely evasive. Ms Memela was required to negotiate a price with JM Aviation and did not appear to have had any regard to any information about the value of the goods in respect of which she was asked to negotiate the price. Ultimately, Ms Memela admitted that she did not

⁹⁰⁵ Transcript 10 February 2020, p 107

⁹⁰⁶ Exhibit DD25(b), p 193

⁹⁰⁷ Transcript 10 February 2020, p 110

⁹⁰⁸ Transcript 10 February 2020, p 110-118

do anything to establish the current asset value or book value or any value of the GPUs. She simply took the word of JM Aviation.⁹⁰⁹

545. It was put to Ms Memela that clause 8.2 of the agreement with Swissport required that the sale would be at either book value or fair market value and yet she had done nothing to establish either one before agreeing to a price.⁹¹⁰ She was evasive and gave an answer that did not make sense.⁹¹¹

546. Ms Memela, in any event, confirmed that the final price was not agreed at the meeting with JM Aviation on 21 June 2016, which Mr Vosloo and Mr Makaleng denied attending. She said that it was only approved thereafter.⁹¹² When she was asked who from SAAT did determine or approve the final price, Ms Memela would just not answer this straightforward question. She kept asking for clarification and

⁹⁰⁹ Transcript 10 February 2020, p 119-121

⁹¹⁰ Transcript 10 February 2020, p 121

⁹¹¹ Transcript 10 February 2020, p 121-122:

“Chairperson, the provision that Ms Hofmeyr is referring to of the Swissport and SAA Contract was concluded between – it went to the Board of SAAT. You see if maybe the owner of the GPU’s – at that time when he actually was showing discomfort or maybe he was uncomfortable with selling all 12, but he wanted to sell seven. Maybe he came to SCM. Give the instruction or requisition request to go out on the market and test the market in terms of what could be found here before it went to the Board. I would have understood, because like then I will have some thing that says there is a requisition form where I mean the owner of these GPU’s had requested a procurement to say okay. Let us test the market. Even if so Chair that he had – if he had maybe asked us. Maybe he was going to be told again that okay, but this thing has already been decided on the Swissport/SAA Contract. Remember I said earlier Chair yes Mr Makaleng raised the fact that he was not happy with selling all GPU’s and I said Mr Malola-Phiri, Acting CEO, said our hands are tied. The Acting CEO said that our hands are tied, because this thing has been agreed upon to do this by the high powers. There is absolutely nothing that he could have done and for me to run or test the market to get the fair price would have been before the Board . . . And after the instruction Chair, because we do not just go out on a tender as we please. These letters Chair we usually write after we have spoken to the person who has given you instruction. Hence I said I am sure after – as much as we do not have evidence. You do not have evidence as well, but after receiving the email from Ms Sohkuu confirming that okay this now is the price . . . “

⁹¹² Transcript 10 February 2020, p 82

then failed to get to the point.⁹¹³ She eventually stated that acceptance of the revised offer would have been through the invoice that she and Mr Phiri signed.⁹¹⁴ When asked directly whether she discussed the amount with Mr Phiri *before* she told Mr Vosloo that this was the approved “reviewed” price and to generate an invoice, or *before* signing the invoice, her answer was again evasive. She said “I do not remember I understand [Mr Phiri] as a person who would not sign anything until he understands or until he knows that, okay here is the feedback.”⁹¹⁵

547. It was put to Ms Memela that she was the only person who was sent the revised price on 21 June 2016. She accepted this. It was further put to her that her testimony was that she did not have the authority to agree to that price. She also accepted this. But then she added “But when it was signed by the CEO it means that I had a discussion with him”.⁹¹⁶ She could not recall when it was that she spoke to Mr Phiri but confirmed it would have had to have been after Ms Sokhulu had sent the revised price on 21 June 2016 (at 2:49pm).⁹¹⁷

548. On 22 June 2016 Ms Memela sent a notification to Ms Sokhulu at JM Aviation that their revised offer to purchase the GPUs had been accepted.⁹¹⁸ This letter stated, “your proposal for the purchase of the GPU’s on behalf of Swissport was approved by the Board.” It was put to Ms Memela that this was contrary to her previous testimony that she did not believe JM Aviation was acting on behalf of Swissport or would on-sell the GPUs to Swissport.⁹¹⁹ After speaking in circles for a long time, Ms

⁹¹³ Transcript 10 February 2020, p 82-86

⁹¹⁴ Transcript 10 February 2020, p 86

⁹¹⁵ Transcript 10 February 2020, p 87

⁹¹⁶ Transcript 10 February 2020, p 89

⁹¹⁷ Transcript 10 February 2020, p 95

⁹¹⁸ Exhibit DD25(b), p 615

⁹¹⁹ Transcript 10 February 2020, p 98

Memela eventually conceded that, in fact, she was aware, at the time, that JM Aviation was purchasing the GPUs on behalf of Swissport.⁹²⁰

549. Ms Memela conceded that she did not ask JM Aviation what price Swissport was willing to pay for the GPUs.⁹²¹

550. The letter of 22 June 2016 stated further, “Kindly note that the approval is based on the latest price review by yourselves.” Ms Memela testified therefore that she had received Mr Phiri’s approval on the price between receiving Ms Sokhulu’s email on 21 June 2016 and responding with this acceptance on 22 June 2016.⁹²²

551. Mr Phiri provided the Commission with an affidavit in which he denied having spoken to Ms Memela between 21 and 22 June 2016 or ever having approved the final revised price.⁹²³ He explained that he could not have had that discussion with her because he was in an EXCO meeting the entire day on 21 June 2016 and the email of 22 June 2016 was sent off at 5:43am and therefore the discussion could not have taken place on 22 June 2016 either.⁹²⁴ He stated that, when Ms Memela gave him the invoice to sign, he was assured that this was the best price she could negotiate and that this had been done together with Mr Vosloo and Mr Makaleng.⁹²⁵ However, as set out above, both Mr Vosloo and Mr Makaleng deny having been at that meeting. When this version was put to Ms Memela during her testimony, she

⁹²⁰ Transcript 10 February 2020, p 98-101

⁹²¹ Transcript 10 February 2020, p 101

⁹²² Transcript 10 February 2020, p 103

⁹²³ Exhibit DD26, p 785, paras 72-74

⁹²⁴ Exhibit DD26, p 786, para 82. He also attached minutes of the meeting

⁹²⁵ Exhibit DD26, p 786, paras 75-76

persisted in her version and claimed that she had consulted Mr Phiri about the price during a break in the EXCO meeting.⁹²⁶ Mr Phiri says they had no such discussion.

552. The day after JM Aviation had purchased the GPUs from SAAT, it sold them to Swissport for approximately R9.8million.⁹²⁷

553. As set out below, Ms Memela's willingness to sell the GPUs to JM Aviation at an amount well below their book value and without making any effort to assess their true market value benefitted JM Aviation to the tune of R 6 million.

⁹²⁶ Transcript 1 October 2020, p 298

⁹²⁷ Transcript 7 November 2020, p 61

JM Aviation and AAR

555. The Commission also heard evidence about irregularities in the tender for components services at SAAT.

556. Mr Schalk Human testified about SAAT's components tender. He explained that holding excessive stock is very expensive so companies will conclude a component contract where inventory is centralised by a service provider and the company uses the service and pays a premium on a monthly basis – usually at an hourly rate – for the use of those components. He said that this allowed the quick provision of replacement component parts.⁹²⁸ He explained there are normally three components. The first is a base kit with core components that are placed on site so that there is quick access; then advance exchange services where the company can request a specific part to be shipped; and the third is the repair services in respect of those components.⁹²⁹ The pricing is known as “power by the hour” or “PBH” – where the payment rate is charged only when the airplane is in flight and the component is being used, otherwise there is no charge on the component.⁹³⁰

557. Mr Human explained that, as an SOE, SAAT had to follow the procurement requirements of section 217 of the Constitution, and those in the SCM Policy of the Group. The SCM Policy provides that tenders should be advertised on the website and tender bulletin. The Policy allows for a fair chance for receipt of a responsive bid in response to a published request for proposals (RFP) that sets out the critical criteria. The Policy also distinguishes between those who compile the specifications of the bid and those who are responsible for its evaluation. The evaluation is

⁹²⁸ Transcript 6 February 2020, p 14

⁹²⁹ Transcript 6 February 2020, p 15

⁹³⁰ Transcript 6 February 2020, p 16

conducted by the Bid Adjudication Committee (BAC).⁹³¹ During 2016, SAA and SAAT also had a Cross Functional Sourcing Team (CFST) that both compiled the specifications and conducted the evaluation but, pursuant to National Treasury Instruction 3 of 2016, this had to be a strict segregation of duties so that the same people that designed the bid would be different to those who evaluated it and those who made the ultimate decision. This led to a practice where the team was divided into three different committees.⁹³² The three Committees were the Bid Specification Committee; Bid Evaluation Committee; and Bid Adjudication Committee.⁹³³

558. Prior to February 2013 Air France provided component support services to SAAT. This contract was then advertised five times, each time with a separate bid number.⁹³⁴

First tender

559. The first tender was advertised on 16 February 2013, with a deadline of 30 March 2013.⁹³⁵ The CFST recommended that the first tender be awarded to Israel Aerospace for the Boeing Fleet and Air France for the Airbus Fleet.⁹³⁶ However, the tender was then retracted.⁹³⁷ This was to allow an integrated approach where both the logistics (transport of components) and components would be combined in one award.⁹³⁸

⁹³¹ Transcript 6 February 2020, p 17-18

⁹³² Transcript 6 February 2020, p 18-19

⁹³³ Exhibit DD22, p 8, paras 27-28

⁹³⁴ Transcript, 6 February 2020, p 20

⁹³⁵ Exhibit DD22, p 8, para 29

⁹³⁶ Transcript 6 February 2020, p 21-22

⁹³⁷ Transcript 6 February 2020, p 22

⁹³⁸ Transcript 6 February 2020, p 23

Second tender

560. The second tender was advertised on 29 October 2014 with of 2 December 2014 as the closing date. Bids were received. On 29 April 2015, the Board asked the CFST to stop the evaluation of the bids, and to put this process on hold for three months while they engaged with an American company, AAR Inc, on the possibility of concluding a memorandum of understanding (MOU) with that company. The Board then formally withdrew the tender on 18 June 2015.⁹³⁹ The Board passed this resolution to allow the finalisation of a strategic partnership with AAR and to allow SAAT to test the market by requesting quotations from other parties for 6 months.⁹⁴⁰ The purpose of this was to allow a confined bid to one party but to ensure that there was economic value by testing it against the market.⁹⁴¹

561. The relationship between SAAT and AAR began in February 2015 when Ms Cheryl Jackson, who was the Vice-President: Government Affairs and Corporate Development of AAR, approached Mr Nico Bezuidenhout, the then Acting-CEO of SAA, and submitted a proposal for a partnership between AAR and SAAT. Despite there being an open tender process at the time, SAAT decided to put it on hold to explore this partnership.⁹⁴² Mr Human testified that it was generally prohibited for suppliers to have any interaction with bidders when a tender was open. This is explicitly prohibited in the SCM Policy of SAA and SAAT.⁹⁴³ Nevertheless, the proposal – which offered the same services that were subject to the open tender⁹⁴⁴

⁹³⁹ Transcript 6 February 2020, pp 26-27 and p 30

⁹⁴⁰ Transcript 6 February 2020, p 32

⁹⁴¹ Transcript 6 February 2020, p 32

⁹⁴² Transcript 6 February 2020, p 34

⁹⁴³ Transcript 6 February 2020, p 35

⁹⁴⁴ Transcript 6 February 2020, p 37

– was sent to Mr Zwane regarding the provisioning of components.⁹⁴⁵ The Board resolved thereafter to approve the strategic partnership between SAAT and ARR. The Board also resolved to visit the headquarters of AAR in the USA in May 2015. The Board's idea was that a collaboration agreement would be signed between SAAT and AAR which would be the basis for a later memorandum of understanding.⁹⁴⁶ It was resolved that Mr Zwane would be authorised to sign all necessary documents to effect the collaboration agreement and that, in the meantime, the tender process would be suspended for three months to allow this process to take place.⁹⁴⁷ Mr Human testified that this was an unsolicited bid that was accepted without a competitive procurement process.⁹⁴⁸

562. SAAT's travel records reflect that Dr Tambi, Ms Kwinana, Mr Zwane and Ms Memela visited AAR in the US from 2-8 May 2015.⁹⁴⁹ At this time, the second tender process was still open and AAR was one of the bidders. Mr Human testified that the SCM only allowed engagement with bidders in very circumscribed circumstances where the suppliers would all be protected. One example is where, during the evaluation stage, samples may be provided. However, there is nothing in the policy allowing the Board and head of procurement to engage with bidders.⁹⁵⁰ Ms Kwinana claimed in response to a rule 3(3) notice relating to Mr Human's evidence that supplier visits were not unusual and SAAT needed to know who they were dealing with before signing an MOU. Mr Human responded that, if this was for the evaluation of a service, then members of the CFST might be justified in undertaking such a visit. The type

⁹⁴⁵ The proposal is in DD22(c), p 1128

⁹⁴⁶ Exhibit DD22(c), p 1056. See also transcript 6 February 2020, p 40

⁹⁴⁷ Exhibit DD22(c), p 1058. See also p 1079

⁹⁴⁸ Transcript 6 February 2020, p 41

⁹⁴⁹ Transcript 6 February 2020, p 46

⁹⁵⁰ Transcript 6 February 2020, p 46

of visit would be confined only to the evaluation part of the tender. The evaluation would not be performed by the Board or executives of SAA.⁹⁵¹

563. The Commission's investigations also revealed that a representative of AAR had met with Ms Memela to get an understanding of SAAT support requirements and needs apart from what was contained in the RFP. Mr Human testified that this type of interaction would have been totally inappropriate given that this was a bidder in an open tender process.⁹⁵² This inappropriateness was in fact confirmed by Mr Mike Kenny who was the General Manager for Marketing at SAAT at the time. He sent an email to Ms Memela in response to an invitation from her that he should attend a meeting with AAR. In the email, he said that he was concerned about discussing component support issues with a bidder when the tender process was still ongoing.⁹⁵³

564. There was also correspondence between Ms Jackson and representatives of SAA during the time that the second tender was still open that revealed that she was already aware, before any Board decision had been taken on the matter, that the tender was going to be cancelled. Mr Human testified that it was irregular for a bidder to be aware of an intended cancellation of a bid before it actually occurred. He said that it suggested that information had been made available to a supplier outside of the normal procurement process.⁹⁵⁴

565. After the tender had been cancelled, a memorandum of understanding for the same services as sought in the tender was concluded between SAAT and AAR at the Paris

⁹⁵¹ Transcript 6 February 2020, p 47

⁹⁵² Transcript 6 February 2020, p 49

⁹⁵³ Transcript 6 February 2020, p 51-52

⁹⁵⁴ Transcript 6 February 2020, p 55-56

Air show in June 2015. The memorandum provided for collaboration between AAR and SAAT in connection with the provisioning of components as part of a joint venture.⁹⁵⁵ The MOU was in breach of section 54 of the PFMA which required the Board to seek permission from National Treasury if it intended to conclude an unincorporated joint venture.⁹⁵⁶ The MOU contemplated such a joint venture. One of the SAAT Board members at the time, Mr Barry Parsons, raised concerns about this with the Board but his concerns were not addressed⁹⁵⁷. He then submitted his resignation on 24 July 2015.⁹⁵⁸ In the letter, he said that there appeared to be some “hidden agenda” in the AAR strategic partnership with SAA that required urgent independent investigation.⁹⁶⁰

Third tender

566. On 14 July 2015⁹⁶¹ SAAT issued a closed bid for a short-term tender to obtain services pertaining to components for five months – it was issued to Air France, Israel Aerospace, Pegasus, and Lufthansa. The reasons for the short-term nature of the tender was to give SAAT time to conclude a final agreement with AAR. The MOU had to be converted to a final collaboration agreement.⁹⁶²

⁹⁵⁵ Transcript 6 February 2020, p 57

⁹⁵⁶ Transcript 6 February 2020, p 59

⁹⁵⁷ Transcript 6 February 2020, p 60

⁹⁵⁸ Transcript 6 February 2020, p 66

⁹⁵⁹ Transcript 6 February 2020, p 60

⁹⁶⁰ Exhibit DD22(d), p 1676

⁹⁶¹ Exhibit DD22, p 28, para 98

⁹⁶² Transcript 6 February 2020, p 68

567. This tender had not, however, been provided to AAR and SAA received legal advice at the time that AAR's exclusion from the process could be challenged. The tender was then withdrawn.⁹⁶³

Fourth tender

568. The same tender was then reissued with the only difference being that it also included AAR.⁹⁶⁴

569. AAR submitted a bid for this tender, with Nziza Aviation as its BEE partner.⁹⁶⁵

570. SAAT awarded the tender for five months to Air France to ensure continuity of the service while it tried to finalise an agreement with AAR arising from the MOU in the meantime.⁹⁶⁶

Fifth tender

571. The fifth tender was issued on 8 December 2015, with 19 January 2016 as the closing date. It was for a five-year period.⁹⁶⁷ Part of the critical criteria for its award included that the bidder must have sufficient experience and equipment; be financially sound; be certified by various aviation authorities; provide access to pool or exchange bases; agree to a No Fault Rate of 20% and a Beyond Economic Repair Rate of 70%.⁹⁶⁸ Another critical criteria was supplier development. The bid document stated that a bidder had to indicate what value they would place on each area of

⁹⁶³ Transcript 6 February 2020, p 68

⁹⁶⁴ Transcript 6 February 2020, p 68

⁹⁶⁵ Transcript 6 February 2020, p 69

⁹⁶⁶ Transcript 6 February 2020, p 69

⁹⁶⁷ Transcript 6 February 2020, p 70-71

⁹⁶⁸ Transcript 6 February 2020, p 72

development outlined above which they would be imparting to the local vendor. The document also provided for the National Industrial Participation (*NIP*) obligations, which requires foreign entities, in contracts over USD10million, to conclude an agreement with the DTI, where 30% of the contract value had to go back to South African development.⁹⁶⁹

572. AAR submitted its bid for this tender together with its new joint-venture partner, JM Aviation.

573. The CFST was responsible for evaluating the tender. The team recommended that Lufthansa be appointed for both the Boeing and Airbus fleets. Lufthansa had offered the lowest price. The next lowest was AAR together with JM Aviation and then Air France.⁹⁷⁰ On 25 April 2016, the CFST met again and decided to ask the bidders to confirm that they understood the scope correctly and to list their current customers because the prices that were provided appeared to be too low. This is known in the industry as “low balling”. It occurs when a bidder underquotes and then the service is compromised due to financial constraints.⁹⁷¹

574. Ms Memela, who at the time was the Chair of the BAC, joined the CFST meeting on 25 April 2016 and emphasised the need to urgently finalise the project. Thereafter, the team decided that even though Lufthansa was the lowest price, because of the risk of low balling and the outstanding NIP obligations from Lufthansa, they changed their recommendation to be for Air France. There was similarly a concern about low-balling from AAR/JM Aviation which is why Air France was ultimately chosen.⁹⁷²

⁹⁶⁹ Transcript 6 February 2020, p 76-77

⁹⁷⁰ Transcript 6 February 2020, p 80-81 and p 83

⁹⁷¹ Transcript 6 February 2020, p 84-85

⁹⁷² Transcript 6 February 2020, p 91

575. Mr Human testified that it is not common practice for the chair of the BAC to attend the evaluation committee meeting as the adjudication and evaluation are supposed to be performed as separate functions, so that they serve as checks and balances on the process.⁹⁷³ On 6 May 2016, the BAC also resolved by round robin resolution that their recommendation was for Air France to be awarded the tender.⁹⁷⁴
576. On 9 May 2016 the Board of SAAT held a special meeting to deal with the award of the components tender.⁹⁷⁵ At the meeting, the Board noted that management (Exco) had recommended that the tender be awarded to Air France. The Board did not accept this recommendation. Its reason was that Air France was resistant to “align itself with SAAT’s development agenda”. This was said to be a reference to “supply development”. It also stated that “the benefits as outlined by the submission as a result of selecting Air France were not compelling enough to position the latter as the preferred bidder”. The Board concluded that the concerns regarding JM/AAR “low balling” could be mitigated by reducing each party’s obligations to writing. The Board resolved, therefore, not to follow management’s recommendation and rather to award the components support services tender for both Boeing and Airbus fleets to the joint venture of AAR and JM Aviation for five years “subject to the mitigation of risk”.⁹⁷⁶
577. In his evidence Mr Human accepted that it was the Board’s role to interrogate recommendations received from BAC or the CFST, but he testified that, generally, when it did so in a procurement context, the appropriate SCM policy-stipulated action would be to then refer the matter back to the BAC and to tell them how they had erred so they could reconsider. The BAC is then also in a position to refer the matter

⁹⁷³ Transcript 6 February 2020, p 86

⁹⁷⁴ Transcript 6 February 2020, p 92

⁹⁷⁵ The minutes may be found in exhibit DD22(e), p 2302

⁹⁷⁶ Exhibit DD22(e), p 2305

back to the CFST to reconsider if there are grounds for doing so. After the recommendation has been referred back to these bodies, a new recommendation can then be made to the Board. He stated that it was unusual for the Board simply to make a decision that was entirely different to the recommended one without reverting to these bodies.⁹⁷⁷

578. On 13 May 2016 a letter of award was sent out to AAR/JM Aviation.⁹⁷⁸ On 7 July 2016⁹⁷⁹ the contract was concluded between the parties. Mr Kenny provided the Commission with an affidavit explaining that the negotiation process had been quite contentious. He said that, once the contract had been signed, he asked Ms Memela for a copy of the contract. However, she refused to give him the whole contract, which he noted was extremely unusual, and she told him that she only gave him part of the contract in order “to protect [him]”.⁹⁸⁰

579. The contract⁹⁸¹ provided that, prior to the commencement date, JM/AAR would invoice SAAT for the deposit. It also provided that SAAT would pay the deposit by way of an irrevocable letter of credit from a bank and that JM/AAR would have the right to set off any SAAT invoices not paid by the due date against the deposit. If this occurred, SAAT would have to continue to replenish the deposit. Mr Human testified that this was a normal clause for such an agreement.⁹⁸²

580. However, the Commission’s investigations revealed that the manner in which the clause was actually implemented was unusual. JM/AAR in fact invoiced SAAT for

⁹⁷⁷ Transcript 6 February 2020, p 104-105

⁹⁷⁸ Transcript 6 February 2020, p 110

⁹⁷⁹ Transcript 6 February 2020, p 112

⁹⁸⁰ Exhibit DD22(g), p 3150

⁹⁸¹ Exhibit DD22(f), p 2325. See clause 4.26

⁹⁸² Transcript 6 February 2020, p 114-115

the value of the deposit, amounting to USD4.382million (around R60million), and this invoice was paid in cash and not by credit letter.⁹⁸³ Mr Human testified that he was unable to find any justification for this payment in cash, which would have put a great deal of strain on SAAT's cash flow and would put SAAT at risk if AAR did not deliver. He also explained that, to his knowledge, there had never been any drawdowns from that deposit for outstanding invoices.⁹⁸⁴

581. In 2018 SAAT conducted a review of the contract. SAAT was dissatisfied with various aspects of the performance, including the long turnaround times for the repair of components. Some components were out for repairs for more than 600 days; there was incorrect invoicing; the contract provided that SAAT would only be responsible for 35% of the beyond economic repair costs but was being invoiced up to 100% with an additional mark up and handling fee; AAR was charging excessive penalties against SAAT for slow returns of components but did not itself suffer any penalty for late repair; there had been no NIP obligation benefits;⁹⁸⁵ the contract provided for reciprocal work to be given to SAAT to be done at its workshops but no such work had materialised.⁹⁸⁶ The review revealed that the total contract expenditure paid by SAAT was R1.8billion.⁹⁸⁷

582. In terms of JM Aviation's JV agreement with AAR, 5% of all revenue was to go to JM Aviation. This amounted to approximately R53million.⁹⁸⁸

⁹⁸³ Transcript 6 February 2020, p 115

⁹⁸⁴ Transcript 6 February 2020, p 116

⁹⁸⁵ Transcript 6 February 2020, p 117

⁹⁸⁶ Transcript 6 February 2020, p 118

⁹⁸⁷ Transcript d6 February 2020, p 121

⁹⁸⁸ Transcript 6 February 2020, p 123

583. In so far as the NIP obligations under the components' tender was concerned, a representative of the Department of Trade and Industry furnished the Commission with an affidavit which stated that SAAT and JM Aviation both had an obligation to inform it about the conclusion of the contract within 5 days but had failed to do so at all.⁹⁸⁹

584. Mr Human testified that Air France instituted litigation proceedings to challenge the award of the tender. However, the Court had refused to grant an urgent interim interdict and Air France did not pursue final review relief.⁹⁹⁰

Ms Sambo and AAR

585. Ms Sibongile Rejoyce Sambo testified before the Commission that she was a young entrepreneur who was attempting to break into the aviation industry. In 2004, she registered a company, SRS Aviation, and tendered for various businesses in the industry. SRS was the first 100% Black female owned aviation company in South Africa that provided private jets and helicopters licenced by the Civil Aviation Authority (CAA).⁹⁹¹ In 2009, after the 2008 economic crisis, SRS decided to diversify into providing airplane parts and jet fuel for airlines. SRS was introduced to the SAAT database and it would receive quotations and requests to supply parts and components.⁹⁹²

586. Ms Sambo testified that she was invited by the DTI to be part of a business delegation to Chicago where she was introduced to AAR. She had already identified AAR as a possible business partner and thought she could use the opportunity to try

⁹⁸⁹ Exhibit DD22(g), p 2972. See in particular p 2976, para 16

⁹⁹⁰ Transcript 6 February 2020, p 127-128

⁹⁹¹ Transcript 4 February 2020, p 194

⁹⁹² Transcript 4 February 2020, p 195

and forge a business relationship.⁹⁹³ She proposed that she become AAR's African partner to explore business opportunities on the continent.⁹⁹⁴ In particular, she met with Ms Cheryl Jackson and suggested business opportunities with SAA's subsidiary SAAT, which provides technical services to airlines.⁹⁹⁵

587. Ms Sambo proposed that they conclude an agency agreement so that AAR would be SRS's official partner. Ms Jackson indicated that AAR did not conclude agency agreements with foreign companies unless there was a concrete deal on the table. Ms Jackson wanted more information about exactly what the opportunities were at SAAT. She did state verbally to Ms Sambo that AAR would pay SRS 8% of the value of a contract if SRS facilitated a contract between SAAT and AAR, and SRS could act as the BEE partner in the transaction.⁹⁹⁶

588. Between 2013 and 2015 Ms Sambo engaged with AAR and became its bid-partner in SAAT's first and second components tenders. During this period, she introduced AAR to Mr Zwane, in his capacity as Acting-CEO at SAA. It was during a meeting with Mr Zwane that Ms Sambo was first introduced to Ms Memela as the head of procurement at SAAT.⁹⁹⁷

589. Ms Sambo testified that, over time, she and Ms Memela became friends. They were friends on Facebook. In April 2015, Ms Memela told Ms Sambo that various members of SAAT would be visiting AAR in Chicago.⁹⁹⁸ Ms Sambo asked Ms

⁹⁹³ Transcript 4 February 2020, p 197

⁹⁹⁴ Transcript 4 February 2020, p 198

⁹⁹⁵ Transcript 4 February 2020, p 198-199

⁹⁹⁶ Transcript 4 February 2020, p 201-202. See also p 203

⁹⁹⁷ Transcript 5 February 2020, p 13

⁹⁹⁸ Transcript 5 February 2020, p 50

Jackson if she could also attend the trip – even financing herself – but Ms Jackson refused.⁹⁹⁹

590. Ms Sambo arranged for Ms Memela's visa for the US trip to be processed on an expedited basis.¹⁰⁰⁰ Ms Sambo noted from Facebook that the trip to the US went ahead in May 2015.¹⁰⁰¹

591. Some time in 2015 before the trip, Ms Memela called Ms Sambo and told her that Ms Kwinana would like to speak to her. Ms Kwinana then came for a meeting at Ms Sambo's residence. She told Ms Sambo at the meeting that she intended to resign from SAAT. She wanted to know the nature of Ms Sambo's relationship with AAR. She indicated that, when she left as Chair, she "wanted to get her hands on other contracts at SAA such as . . . a contract for aircraft tyres, a contract for logistics" and components. She asked Ms Sambo to introduce her to Ms Jackson directly. Ms Sambo did so and Ms Kwinana began talking to Ms Jackson directly.¹⁰⁰² Ms Sambo testified that the meeting made her uncomfortable because it seemed as if something untoward was happening. She therefore did not want to know the details of what Ms Kwinana meant about "getting her hands on" certain contracts. Ms Sambo said she "did not want to really entertain it".¹⁰⁰³

592. Within a few weeks of this meeting, Ms Kwinana called Ms Sambo again and asked to meet with her. They met at the Protea Hotel with Dr Tambi. Ms Kwinana explained to Ms Sambo that, once she had left SAAT, Dr Tambi would "look after her interests at SAAT", which were the contracts she wanted to "get her hands on".¹⁰⁰⁴ Ms

⁹⁹⁹ Transcript 5 February 2020, p 51

¹⁰⁰⁰ Transcript 5 February 2020, p 54-55

¹⁰⁰¹ Transcript 5 February 2020, p 55-56

¹⁰⁰² Transcript 5 February 2020, p 57

¹⁰⁰³ Transcript 5 February 2020, p 59

¹⁰⁰⁴ Transcript 5 February 2020, p 62

Kwinana then also introduced Ms Sambo to Ms Koekie Mdlulwa and introduced her as “ihashi” (which is a horse in isiZulu). Ms Kwinana said that what she meant by that was that Ms Mdlulwa was a runner, a person that is a go-between for making deals for her. Ms Kwinana explained that as part of her interest in the components tender, she wanted Ms Mdlulwa to go and negotiate on her behalf with AAR, and that she would make sure that AAR got the contract. Ms Kwinana explained that in order to secure the contract, AAR would have to pay her and other parties R100million. The idea was that Ms Mdlulwa would go and negotiate and collect this money.¹⁰⁰⁵

593. Ms Sambo testified that it then became clear to her that things had moved into “corruption mode”. Ms Kwinana said to her that Ms Sambo would not be part of the group receiving the R100million that would be negotiated for herself and “my people inside SAAT”.¹⁰⁰⁶ She explained that “her people” inside SAAT were Mr Zwane, the CEO of SAAT, and Ms Memela, the Head of Procurement at SAAT.¹⁰⁰⁷

594. In her response to the rule 3(3) notice relating to Ms Sambo’s evidence, Ms Kwinana confirmed that she had this meeting at the Protea Hotel with Ms Sambo and Dr Tambi. However, she said that she did not understand why she would tell Ms Sambo that she wanted to get her hands on certain contracts because she had an audit firm and a property development company and was, therefore, not going to be “destitute” after leaving SAAT. In fact, Ms Kwinana claimed that it was Ms Sambo who told her that she (i.e. Ms Sambo) had been the “ihashi” for AAR since 2011 without any

¹⁰⁰⁵ Transcript 5 February 2020, p 63-64

¹⁰⁰⁶ Transcript 5 February 2020, p 64-66

¹⁰⁰⁷ Transcript 5 February 2020, p 68

remuneration and that “*they*” owed Ms Sambo R100 million. Ms Kwinana said that she told Ms Sambo that SAAT could not intervene in such a matter.¹⁰⁰⁸

595. Ms Sambo testified that she never said any of those things. She said that she did not even know what an “*ihashi*” was until Ms Kwinana explained it to her. Ms Sambo stated that she also did not mention to Ms Kwinana her problems with AAR at the time.¹⁰⁰⁹ It must be noted that Ms Kwinana’s response to the Commission did not deal at all with Ms Sambo’s evidence regarding the first meeting at Ms Sambo’s residence.¹⁰¹⁰ Ms Sambo testified that after this meeting with Ms Kwinana, she told her team at SRS about the discussion.¹⁰¹¹

596. After Ms Sambo’s meeting with Ms Kwinana, Ms Jackson contacted her and gave her feedback on the SAAT trip to AAR’s premises and told her that AAR was planning a trip to SAAT’s premises.¹⁰¹² The CEO of AAR, Mr David Storch, invited Ms Sambo to a party at the Paris Air Show on 16 June 2015. Ms Sambo testified that she declined the invitation because she felt that AAR had been excluding her from activities surrounding the contract with SAAT despite the expense and time she had taken to introduce AAR to the South African market. When the SAAT delegation returned from the Paris Air Show, AAR had concluded the MOU referred to above with SAAT.¹⁰¹³

597. In August 2015 Ms Sambo had a meeting with Ms Jackson at a restaurant. Ms Sambo testified that Ms Jackson was very frustrated about not managing to secure

¹⁰⁰⁸ Exhibit DD18, p 502.

¹⁰⁰⁹ Transcript 5 February 2020, p 74-75

¹⁰¹⁰ Transcript 5 February 2020, p 77

¹⁰¹¹ Transcript 5 February 2020, p 78

¹⁰¹² Transcript 5 February 2020, p 79

¹⁰¹³ Transcript 5 February 2020, p 80

a contract with SAAT and said that AAR was putting so much pressure on her to get the contract. According to Ms Sambo, Ms Jackson insisted on getting information from Ms Sambo to help them win the bid.¹⁰¹⁴ Ms Sambo then contacted Ms Memela explaining that AAR was frustrated and wanted information on the bid. Ms Memela asked her to meet her at a Shell garage in Alberton, Johannesburg, that evening to get information.¹⁰¹⁵

598. That evening, Ms Sambo went to meet Ms Memela at the Shell Garage near the SARS offices in Alberton. Ms Sambo testified that she got into Ms Memela's vehicle and Ms Memela gave her information on a flash disk. It was an excel spreadsheet of previous pricing for the components bid. She then drove back to the restaurant where Ms Jackson was. She told Ms Jackson that she had this information but AAR kept refusing to pay her and put her on a retainer. She wanted to use this information as leverage¹⁰¹⁶ to secure a retainer.¹⁰¹⁷

599. In her response to the rule 3(3) notice relating to Ms Sambo's evidence, Ms Memela denied having met Ms Sambo in Alberton. She denied having given her any information suggested by Ms Sambo. She stated that she never met with Ms Sambo anywhere outside of SAAT and never gave her a memory stick with bidder identities and prices and claimed that she did not even have access to that information as she was not on the CFST.¹⁰¹⁸ However, Ms Memela's version was shown to be false because Ms Sambo then produced the actual memory stick and gave it to the

¹⁰¹⁴ Transcript 5 February 2020, p 95-96

¹⁰¹⁵ Transcript 5 February 2020, p 96

¹⁰¹⁶ Transcript 5 February 2020, p 111

¹⁰¹⁷ Transcript 5 February 2020, p 97

¹⁰¹⁸ Exhibit DD18, p 512

Commission. The memory stick contained an excel spreadsheet with pricing information on it.¹⁰¹⁹

600. The data forensic team at the Commission imaged the memory stick that Ms Sambo produced and advised that the spreadsheet was indeed created and last saved on 3 August 2015 and that the user who saved it was Ms Memela. 3 August 2015 was 16 days before AAR submitted its tender on the five month components contract.¹⁰²⁰

601. This was put to Ms Memela when she testified before the Commission.¹⁰²¹

602. Ms Memela denied that she had given the memory stick to Ms Sambo and then her lawyer, Ms Mbanjwa, objected to the line of questioning and indicated that they wanted to have their own expert consider the metadata on memory stick.¹⁰²² However, despite being given numerous opportunities by the Commission to collect the memory stick and have it analysed, Ms Memela never did so. The evidence therefore remains unchallenged. It must be considered together with the affidavit from the author of the excel pricing document, Mr Leon Robbertse, who explained exactly how and when he created the document, and confirmed that it was a document with confidential bidder information on it, created in 2015.¹⁰²³ In the light of this evidence, the reasonable conclusion to draw is that that Ms Memela provided Ms Sambo, a bidder, with confidential bid pricing information.

603. According to Ms Sambo, after her meeting with Ms Memela at the Shell Garage in Alberton, she drove back to the restaurant where Ms Jackson was waiting for her.

¹⁰¹⁹ Transcript 5 February 2020, p 102

¹⁰²⁰ Transcript 5 February 2020, p 105. The actual spreadsheet is in exhibit DD18, p 553-557

¹⁰²¹ Transcript 10 February 2020, p 139-141. The affidavit of the forensic expert is in exhibit DD25(b), p 653

¹⁰²² Transcript 10 February 2020, p 144-146

¹⁰²³ Transcript 11 February 2020, p 14 -15

When Ms Sambo returned with the memory stick and asked for AAR to review their decision not to put her on retainer, Ms Jackson told her that she could not pay her in return for the information because that would be regarded as bribery and corruption. Ms Sambo said at the time that she had not thought about it like that but realised that it would actually be inappropriate. Ms Sambo testified that she decided not to give the information to AAR. Ms Sambo conceded that asking SAAT for information while there was an open bid was improper. She stated that she felt under pressure to deliver something to AAR as she felt that she was being sidelined. Ms Sambo stated that, when she realised that it was wrong, she asked her employees to take the memory stick and keep it far away from her. It therefore proved difficult to find it when the Commission began engaging Ms Sambo but in the end, she managed to secure it from one of her former employees and it was handed over to the Commission. Ms Sambo testified that she ultimately never actually gave Ms Jackson the information.¹⁰²⁴

604. In September 2015 Ms Jackson invited Ms Sambo to a discussion about the five-year components' services bid. Ms Sambo was surprised to receive this invitation given their previous interaction.¹⁰²⁵ However, when Ms Sambo went to meet Ms Jackson, she found her sitting with Mr Ndzeke.¹⁰²⁶ Mr Ndzeke explained that he was introduced to Ms Jackson through a mutual friend and then left indicating that he and Ms Jackson were going to meet later.¹⁰²⁷ Ms Sambo had previously been introduced to Mr Ndzeke as being part of Swissport.¹⁰²⁸

¹⁰²⁴ Transcript 5 February 2020, p 112

¹⁰²⁵ Transcript 5 February 2020, p 119

¹⁰²⁶ Transcript 5 February 2020, p 120

¹⁰²⁷ Transcript 5 February 2020, p 121

¹⁰²⁸ Transcript 5 February 2020, p 121

605. Ms Jackson and Ms Sambo then proceeded to a meeting that had been arranged with Ms Mdlulwa.¹⁰²⁹ Ms Mdlulwa stated that she was representing Ms Kwinana and her people at SAAT and that they wanted R100million from AAR to make sure it got the contract. Ms Sambo agreed that she would continue to be the direct liaison with AAR.¹⁰³⁰ Ms Jackson told Ms Mdlulwa that she did not have the authority to agree to this arrangement and payment but that she would go back and speak with her principals.¹⁰³¹

606. After the final five-year components tender had been issued in December 2015, Ms Memela told Ms Sambo that Ms Kwinana wanted to meet with her again. Ms Sambo also testified that, around this time, Ms Memela had told her that AAR was at that time partnering with JM Aviation, which was Mr Ndzeke's company.¹⁰³²

607. The purpose of the meeting was to find out what Ms Sambo knew about Mr Ndzeke, whether he had interactions with Ms Jackson before the tender was advertised and also to discuss another BBBEE structure.¹⁰³³ At the meeting with Ms Kwinana, Ms Kwinana asked whether Ms Sambo had resolved her issues with AAR. Ms Sambo explained that this was because she had complained regularly to Ms Memela over this period about feeling excluded by AAR and she assumed Ms Kwinana had heard about it through Ms Memela.¹⁰³⁴ Ms Sambo explained that it seemed from the meeting that Ms Kwinana was driving the process and was in control of who would ultimately partner with AAR. She even called Ms Jackson during the meeting to ask if they could drop Mr Ndzeke and revive the partnership with SRS. There was no

¹⁰²⁹ Transcript 5 February 2020, p 121-122

¹⁰³⁰ Transcript 5 February 2020, p 122

¹⁰³¹ Transcript 5 February 2020, p 125

¹⁰³² Transcript 5 February 2020, p 128-129

¹⁰³³ Exhibit DD18, p 33, para 114

¹⁰³⁴ Transcript 5 February 2020, p 128-129

conclusion to that suggestion during the telephone call in the meeting. Ms Sambo said she could not remember any further details about the meeting, save that Ms Kwinana wanted to know if Ms Sambo knew Mr Ndzeke and appeared to want to know more about him. Ms Sambo told her to google him.¹⁰³⁵

608. At some stage, Ms Memela called Ms Sambo to a meeting in Alberton where she told her that the five-year tender had been awarded to AAR (with JM Aviation). Ms Sambo testified that she broke down because she had been so betrayed and had put so much effort and financial resources into introducing AAR and then some other party, JM Aviation, got involved at the last minute in a R1.3billion contract.¹⁰³⁶

609. Ms Memela told Ms Sambo in the meeting that Ms Kwinana had introduced Mr Ndzeke to her and asked her to assist Mr Ndzeke in preparing the bid.¹⁰³⁷ She even forwarded emails to Ms Sambo showing that Ms Memela had helped JM Aviation to finalise the draft joint venture agreement and had been requested to help JM Aviation and AAR to finalise their bid documentation.¹⁰³⁸ These emails were presented to the Commission.

610. During her testimony, Ms Memela denied that it was inappropriate for her to have had such communication with JM Aviation while the bid was still open. She said that there was no problem with such communication because she was not on the bid evaluation committee and it was part of her job to educate BEE companies about tender requirements. She denied that she said Ms Kwinana had asked her to help JM Aviation, and also said Ms Sambo was making this story up because Ms Memela

¹⁰³⁵ Transcript 5 February 2020, p 131

¹⁰³⁶ Transcript 5 February 2020, p 132-133

¹⁰³⁷ Transcript 5 February 2020, p 133

¹⁰³⁸ Transcript 5 February 2020, p 135. The emails may be found in exhibit DD18, p 367-442 and p 339

had refused to give her pricing and other information when she had asked previously.¹⁰³⁹ As the report sets out below, Ms Memela's version on this issue was not credible.

611. After the meeting and having received these documents, Ms Sambo told Ms Memela that she intended to sue her and AAR about the whole process of the award of the bid. Ms Memela told her that there were others who had helped JM Aviation to compile the bid, including Ms Princess Tshabalala, senior manager of SCM at SAAT,¹⁰⁴⁰ and Mr Zwane, the CEO of SAAT.¹⁰⁴¹ Ms Sambo testified that Ms Tshabalala approached her at SAAT later and asked her not to sue because she would lose her job. She told Ms Sambo that Ms Memela had promised her that they would get paid once AAR and JM Aviation had been awarded the tender.¹⁰⁴²

612. Ms Sambo provided the Commission with whatsapp messages sent to her by Ms Memela.¹⁰⁴³ One of the messages from Ms Memela stated, among other things: "All I ever did was help you. Even the info that you are using now was sent to you in good faith to help you. Even before that when you wanted price info for Cheryl. I gave that to you as I never thought you would one day plan to use it against me". The whatsapp message also said: "I had to tell the CEO, Yakhe and Princess, because as much as you would think you are destroying me they will also get affected."

¹⁰³⁹ Exhibit DD18, p 512

¹⁰⁴⁰ Transcript 5 February 2020, p 157-159

¹⁰⁴¹ Transcript 5 February 2020, p 164

¹⁰⁴² Transcript 5 February 2020, p 160

¹⁰⁴³ Exhibit DD18, p 517-532

613. The whatsapp communications between Ms Sambo and Ms Memela were also put to Ms Memela.¹⁰⁴⁴ Her lawyer, Ms Mbanjwa, objected to Ms Memela being asked any questions on the whatsapp messages because they wished to challenge their authenticity, given that the evidence was of an electronic nature.¹⁰⁴⁵ I, nonetheless, permitted the questioning and indicated to Ms Memela that she could challenge the authenticity of the messages in due course with expert evidence if she wished to do so.¹⁰⁴⁶ However, she never did so. When questions were put to Ms Memela about the content of the whatsapp messages, Ms Memela never actually denied that she had sent them. Instead, she simply argued about what their content meant.

614. For example, it was put to Ms Memela that the whatsapp messages confirmed that she had given pricing information to Ms Sambo, despite the fact that Ms Memela had denied doing so in her response to the rule 3.3 notice arising from Ms Sambo's evidence. As set out above, In the whatsapp messages, Ms Memela had said that, when she gave Ms Sambo pricing information for Ms Jackson, she did not expect that it would later be used against her.

615. In response to this, Ms Memela made the remarkable claim that any pricing information that she was referring to in the messages was in the public domain. However, it was then put to her that pricing information in the public domain could never be used against her later. Ms Memela had no adequate answer to this obvious point.¹⁰⁴⁷

¹⁰⁴⁴ Exhibit DD18, p 532

¹⁰⁴⁵ Transcript 11 February 2020, p 4-5

¹⁰⁴⁶ Transcript 11 February 2020, p 4-5

¹⁰⁴⁷ Transcript 11 February 2020, p 25-29

Ms Memela's response

616. Ms Memela testified that, in her role as head of procurement at SAAT, she would receive a recommendation from the bid evaluation committee (part of the CFST). She would make sure that she was satisfied with it from a legal perspective and would then sign off to indicate that she supported the recommendation as head of department of supply chain management.¹⁰⁴⁸ This would then go to Exco, which was made up of the general managers of SAAT. Once Exco had confirmed that it supported the recommendation, it would then go to the BAC. The BAC would then check whether the evaluation had been done regularly and transparently in terms of section 217 of the Constitution and the PPFA and all other legal requirements.¹⁰⁴⁹ After the BAC process had been completed, the CEO,¹⁰⁵⁰ on behalf of management,¹⁰⁵¹ would place the final recommendation before the Board for consideration.¹⁰⁵² Ms Memela confirmed that in May 2015 she was the Chair of the BAC,¹⁰⁵³ but that she recused herself from the components tender.¹⁰⁵⁴

617. As set out above, before AAR and JM Aviation submitted their bid in early 2016 for the final components' tender, there were emails exchanged between Ms Sokhulu, of JM Aviation, and Ms Memela on 14 January 2016. During her testimony before the Commission, Ms Memela was asked to comment on the appropriateness of her communication with Ms Sokhulu about AAR/JM Aviation's tender documents in circumstances where the tender was still open. These emails asked for approval of

¹⁰⁴⁸ Transcript 7 February 2020, p 52

¹⁰⁴⁹ Transcript 7 February 2020, pp 47-48

¹⁰⁵⁰ Transcript 7 February 2020, p 54

¹⁰⁵¹ Transcript 7 February 2020, p 55

¹⁰⁵² Transcript 7 February 2020, p 49

¹⁰⁵³ Transcript 7 February 2020, p 57

¹⁰⁵⁴ Transcript 7 February 2020, p 58

the joint venture agreement between AAR and JM and for approval of the actual bid submission.¹⁰⁵⁵ Ms Memela did not deny having communicated with Ms Sokhulu as set out in the emails. Instead, she claimed that the communication was not in breach of the tender requirements or was not untoward in any way. She testified that it was only if someone was sitting in the evaluation committee, the CFST, that there would be a conflict of interest.¹⁰⁵⁶ She also said that, because there was no email in response with track changes on the document in the Commission's possession, then there was nothing wrong with her interactions with Ms Sokhulu.¹⁰⁵⁷ However, she later testified that she probably did respond to the email later by telephone to say that the supplier development aspect of the bid was in order.¹⁰⁵⁸ It is noteworthy that the emails were not sent to Ms Memela's official SAAT email address but to a personal one.¹⁰⁵⁹ Ms Memela claimed that this was just because, when she was at home, she would only use her private email account.¹⁰⁶⁰ However, the email in question was sent at 4pm on a week day which is a time when she ought to have been at work.¹⁰⁶¹

618. It was put to Ms Memela that the bid document provided that it was prohibited under the bid for there to be any communication between a bidder and somebody other than the project manager at SAAT and that any such communication would mean the bidder would be eliminated.¹⁰⁶² Ms Memela testified that she was aware of this

¹⁰⁵⁵ Transcript 10 February 2020, p 149

¹⁰⁵⁶ Transcript 10 February 2020, p 150

¹⁰⁵⁷ Transcript 10 February 2020, p 151

¹⁰⁵⁸ Transcript 10 February 2020, p 152-153

¹⁰⁵⁹ Transcript 10 February 2020, p 161

¹⁰⁶⁰ Transcript 10 February 2020, p 162

¹⁰⁶¹ Transcript 10 February 2020, p 163

¹⁰⁶² Transcript 10 February 2020, p 165. The relevant extract is in DD22(e), p 2052, clause 1.6. It read: "All queries or information relating to this document or surrounding the bid must be addressed to the Project Manager as stipulated on page 1 of this RFP in writing". The Project Manager is stipulated on p 2043 as Leon Roberts and

prohibition.¹⁰⁶³ However, Ms Memela claimed that this communication did not eliminate JM Aviation from the bidding process because the clause was meant to refer only to those who are sitting on the bid evaluation committee, the CFST. When asked to identify where in the clause or in the bid document as a whole this was set out, Ms Memela conceded it was not there.¹⁰⁶⁴ Eventually, Ms Memela changed her version and claimed that she was actually not aware of this prohibition at the time. She said that she did not know that there was anything wrong in what she was doing.¹⁰⁶⁵ She ultimately conceded, that had she known about the bid condition, she would have raised it with the Project Manager.¹⁰⁶⁶

619. JM Aviation/AAR also breached the tender requirements in other ways. They failed to uphold the *NIP* obligations in the tender. When asked about this, Ms Memela testified that even though the tender amount fell within the threshold for the imposition of NIP obligations, SAAT was permitted not to apply NIP obligations to the contract provided that they imposed their own supplier development requirements instead and that this was set out in the tender document.¹⁰⁶⁷ However, she conceded that in fact, in the tender itself, NIP obligations were imposed.¹⁰⁶⁸ However, she claimed that that was an error and that, because the supplier development requirements applied, NIP was not obligatory.¹⁰⁶⁹ She later claimed that

Evelyn Fallot. Clause 1.6.2 provides: "Any queries addressed to individuals other than as stipulated whether verbal, telephonic, handwritten or in any other form, will eliminate the bidder from this process"

¹⁰⁶³ Transcript 10 February 2020, p 166

¹⁰⁶⁴ Transcript 10 February 2020, p 167

¹⁰⁶⁵ Transcript 10 February 2020, p 172-173

¹⁰⁶⁶ Transcript 10 February 2020, p 178

¹⁰⁶⁷ Transcript 10 February 2020, p 180

¹⁰⁶⁸ Exhibit DD22(e), p 2083. At page 2085, clause 4.1 it provided that the successful bidder must make contact with the DI and then it states that the bidder must satisfy NIP obligations and set out how it will do so. Then further on p 2047 are the conditions of the bid, and in clause 1.2 it says "This bid is subject to an offset obligation under the National Industrial Participation requirements mandated by the South African Department of Trade and Industry."

¹⁰⁶⁹ Transcript 10 February 2020, p 182-183

it was because one could have either direct or indirect NIP obligations and indirect obligations could actually encompass supplier development.¹⁰⁷⁰

620. It was put to Ms Memela that the DTI had reviewed the tender and the AAR/JM Aviation bid in March 2019 and concluded that SAAT or JM Aviation ought to have immediately alerted DTI to the fact that the agreement had been concluded.¹⁰⁷¹ Ms Memela's answer was evasive.¹⁰⁷² It is clear from the terms of the RFP that the NIP obligation applied and either JM Aviation or SAAT was required to notify the DTI of the contract but both failed to do so.

621. In addition, the RFP provided that, if any person employed by the bidder directly or indirectly offered or gave anyone in the employ of SAAT any consideration or gift, they would be disqualified and excluded from any future bid with SAA.¹⁰⁷³ It was put to Ms Memela that JM Aviation had in fact made a payment to Ms Memela of R2.5million, and that this was in breach of the tender requirement which should have excluded JM Aviation/ AAR from the tender process.¹⁰⁷⁴ Ms Memela denied this on the basis that she was not on the bid evaluation committee and so there was no possible reciprocation for the payment.¹⁰⁷⁵ She claimed that, because the R2.5million payment to her was in respect of her mother's property, it was not a gift or gratuity.¹⁰⁷⁶

¹⁰⁷⁰ Transcript 10 February 2020, p 192-194

¹⁰⁷¹ Transcript 10 February 2020, p 194. The affidavit from Mr October of the DTI is in exhibit 22(g), p 2972 and the relevant paragraph is 2975, para 15

¹⁰⁷² Transcript 10 February 2020, p 199-201

¹⁰⁷³ Exhibit DD22(e), p 2054, clause 1.13, headed "Corruption". "If a bidder or any person employed by the bidder is found to have either directly or indirectly offered, promised or given to any person in the employ of SAAT any commission, gratuity, gift or other consideration, SAAT shall have the right and without prejudice to any other legal remedy which it may have in regard to any loss or additional cost or expenses to disqualify the RFP bidder from further participation in this process and any other subsequent process in this regard... SAAT reserves the right to exclude such bidder from future transactions within SAA

¹⁰⁷⁴ Transcript 10 February 2020, p 203

¹⁰⁷⁵ Transcript 10 February 2020, p 204

¹⁰⁷⁶ Transcript 10 February 2020, p 207

However, the policy also says “any consideration”. The report deals with this R2.5 million payment to Ms Memela in more detail below.

622. Ms Memela was also questioned about the trip she had made to the US to visit AAR. Her attention was drawn to the fact that the components tender that was issued on 29 October 2014 and was only retracted on 22 June 2015. This meant that the tender was still open in May 2015¹⁰⁷⁷ when Ms Memela, together with members of the Board including Ms Kwinana, Mr Zwane and Dr Tambi, had travelled to the US. AAR was one of the bidders in that very tender.¹⁰⁷⁸ Ms Memela was asked, in the light of her evidence that people who are involved in evaluating the bid and making decisions on it should not communicate with bidders when a bid was still open, whether she warned the Board members that they should not be communicating with AAR, let alone going on the trip.¹⁰⁷⁹ Ms Memela testified that she did not.¹⁰⁸⁰

623. It was put to Ms Memela that it is problematic that Board members of SAAT went to visit one of the bidders while a bid was open and then subsequently retracted the bid, to the prejudice of other competing bidders, so that they could embark on a partnership with one of the bidders.¹⁰⁸¹ Ms Memela's answer was that it was not problematic but her reasons did not justify her answer. She kept insisting that there needed to be section 54 shareholder approval before any partnership was embarked upon. But at the time of the retraction there was no such approval and, in any event, this should not have any impact on section 217 of the Constitution and a free and

¹⁰⁷⁷ Transcript 11 February 2020, p 58

¹⁰⁷⁸ Transcript 11 February 2020, p 59

¹⁰⁷⁹ Transcript 11 February 2020, p 60

¹⁰⁸⁰ Transcript 11 February 2020, p 60-61

¹⁰⁸¹ Transcript 11 February 2020, p 63

fair tender process. Shareholder approval does not negate the need for proper procurement processes to be followed.¹⁰⁸²

624. It was also put to Ms Memela that the meeting she had with AAR on 27 May 2016 was also at a time when the tender was still open and that Mr Kenny had objected to attending the meeting for that very reason. Ms Memela claimed that Mr Kenny never objected to the meeting. She also claimed there was nothing wrong with the meeting because she was not the decision maker in respect of the tender.¹⁰⁸³ But then Ms Memela was shown the email from Mr Kenny setting out his reservations about the corporate governance problems associated with meeting with a bidder whilst the bid was open.¹⁰⁸⁴ Ms Memela's answer was again evasive, circuitous and made no sense. Her ultimate answer was to reiterate that she had no concerns about the meeting.¹⁰⁸⁵

625. Ms Memela also confirmed attending yet another meeting on 29 May 2016, when the tender was open, with Ms Jackson.¹⁰⁸⁶

626. It was put to Ms Memela that Ms Jackson appeared to know in advance that the RFP was going to be cancelled, as she had referred to it in an email.¹⁰⁸⁷ Ms Memela was asked how Ms Jackson would have known that in advance, and she answered that she did not remember and "cannot answer for that".¹⁰⁸⁸

¹⁰⁸² Transcript 11 February 2020, p 64-65

¹⁰⁸³ Transcript 11 February 2020, p 80

¹⁰⁸⁴ Transcript 11 February 2020, p 90

¹⁰⁸⁵ Transcript 11 February 2020, p 92

¹⁰⁸⁶ Transcript 11 February 2020, p 94

¹⁰⁸⁷ Exhibit DD25, p 1280

¹⁰⁸⁸ Transcript 11 February 2020, p 99

627. Ms Memela confirmed that she attended the CFST meeting where the committee decided that even though Lufthansa was the cheapest bidder, it would not be selected because, among other things, it had outstanding NIP obligations from a previous tender.¹⁰⁸⁹ Ms Memela was asked whether anyone actually found out whether Lufthansa had complied with its NIP obligations.¹⁰⁹⁰ This was asked because the DTI provided the Commission with an affidavit that confirmed that Lufthansa had no instances of non-compliance with its NIP obligations in respect of the other contract it had with SAAT at the time.¹⁰⁹¹ Ms Memela's response to this was that they had probably been referring to Lufthansa's non-compliance with NIP obligations prior to 2008 when it used to be the components provider before Air France. She then said that, if this was not the case, then they could have been referring to Lufthansa's reluctance to agree to NIP obligations in other tenders that were not awarded to it despite the fact that it clearly undertook to comply with any supplier development obligations under those tenders.¹⁰⁹² This, again, was an unsatisfactory answer because it failed to deal with the real issue. The evidence from the DTI showed that Lufthansa had not been selected for the bid, despite being the cheapest, based on alleged outstanding NIP obligations that simply did not exist. Furthermore, given Ms Memela's previous evidence that NIP obligations could simply be ignored by SAAT, the failure to comply with NIP obligations could never have been a valid basis on which to reject Lufthansa's bid.

628. The Board meeting of 9 May 2016 in which the tender was awarded to AAR/JM Aviation¹⁰⁹³ reflected that the Board rejected CFST's recommendation that the tender be awarded to Air France because it was resistant to align itself with

¹⁰⁸⁹ Transcript 11 February 2020, p 103. This is recorded in exhibit DD22(f), p 2294

¹⁰⁹⁰ Transcript 11 February 2020, p 107

¹⁰⁹¹ Exhibit DD22(g), p 2977

¹⁰⁹² Transcript 11 February 2020, p 123

¹⁰⁹³ Exhibit DD22(f), p 2304

SAAT's development agenda, i.e. supplier development and the benefits were not compelling enough to position it as the preferred bidder. The Board further resolved that the concerns about JM/AAR "lowballing" could be mitigated by reducing the terms in writing.

629. Ms Memela testified that she was "shocked" at this decision because normally, if the Board disagreed with CFST or the committees, the matter would get referred back for reconsideration and not simply a different and unrecommended decision taken by the Board instead.¹⁰⁹⁴ However, despite Ms Memela confirming earlier that she was not at this meeting, the minutes reflect that she was.¹⁰⁹⁵ Ms Memela stated that perhaps she was there for a specific matter but not the whole meeting. She said that she did not recall being in attendance.¹⁰⁹⁶

630. Despite Ms Memela's evidence that she was "shocked" at the Board's decision, she attended a Board meeting on 15 June 2016, a month later, where the AAR tender was discussed. At the meeting, Ms Memela was recorded as having stated that management supported the decision to award the tender to AAR and that it was justifiable.¹⁰⁹⁷ Ms Memela tried to explain this contradiction in her attitude to the award by saying that she only supported the contract because of litigation that had been instituted by Air France and because of pressure from the Chair of SAA, Ms Myeni, to cancel the contract. But, as the report sets out below, all of Ms Memela's protestations about the legitimacy of her actions has to be evaluated against the fact

¹⁰⁹⁴ Transcript 11 February 2020, p 131

¹⁰⁹⁵ Exhibit DD22(f), p 2304

¹⁰⁹⁶ Transcript 11 February 2020, p 134

¹⁰⁹⁷ Exhibit DD25(b), p 621

that she received R2.5 million from JM Aviation that she then used to buy herself a new house.

631. Ms Memela's answers about her support for the contract and her involvement in it were generally evasive and sometimes made no sense.¹⁰⁹⁸ Her evidence on this score needs to be viewed in the light of Mr Kenny's evidence that Ms Memela and Ms Koekie Constance Mbeki were responsible for the legal aspects of the contract negotiation and drafting.¹⁰⁹⁹

632. Ms Mbeki from SAAT provided the Commission with an affidavit explaining that Ms Memela was the leader of the contract negotiations with AAR/JM Aviation.¹¹⁰⁰ Ms Memela was once again evasive and could not give a clear answer about whether or not this was true and what the extent of her role had been. She tried to avoid questions about the contract altogether and appeared to want to distance herself from those negotiations.¹¹⁰¹ In her affidavit, Ms Mbeki stated that Ms Memela called her and reprimanded her for raising concerns during the negotiation process that "had already been resolved" and delaying the process.¹¹⁰² When Ms Memela was confronted with this during her testimony, she claimed that she did not remember this.¹¹⁰³ It is significant that Ms Memela did not dispute Ms Mbeki's version in this regard.

633. Ms Mbeki stated that one of the things she wanted included in the contract was a clause on penalties in favour of SAAT but that this was not included in the ultimate

¹⁰⁹⁸ Transcript 11 February 2020, p 139-151

¹⁰⁹⁹ Exhibit DD22(g), p 3154-3155, para 21

¹¹⁰⁰ Exhibit DD25(b), p 464

¹¹⁰¹ Transcript 11 February 2020, p 152-160

¹¹⁰² Transcript 11 February 2020, p 473

¹¹⁰³ Transcript 11 February 2020, p 162

contract.¹¹⁰⁴ The very absence of a clause on penalties was something that was highlighted in the 2019 review of the contract undertaken by SAAT. As already stated above, Mr Human testified that the absence of such a clause was a serious disadvantage in practice for SAAT and resulted in AAR keeping components for repairs for inordinately long periods. Ms Memela was asked why this clause was not included and what steps she took to ensure SAAT's interests were protected in the contract. She replied that it was not her job to check the contract and this was purely Ms Mbeki's responsibility.¹¹⁰⁵ She confirmed that she did not even check the final contract before it was signed.¹¹⁰⁶ Ms Memela's assertion that it was not her responsibility to check the final contract but that of Ms Mbeki evidences Ms Memela's unacceptable failure to accept responsibility for her actions. Ms Mbeki was Ms Memela's junior and, therefore, Ms Memela should have checked the final contract. If she did not check it and her subordinate also failed to do so, Ms Memela must be held accountable.

634. Indeed, Ms Mbeki's evidence is that even she was not afforded the opportunity to check the contract before it was signed. She had scheduled a meeting on 7 July 2016 with the SAAT team members to go through the contract clause by clause as they usually did but she was informed that the agreement had already been signed.¹¹⁰⁷ Ms Memela testified that she knew nothing about the signing of the contract or who arranged for that to happen.¹¹⁰⁸ There is support for Ms Mbeki's testimony that the signing of the contract was rushed and was done without a proper review because there are numerous errors in the contract including in the numbering

¹¹⁰⁴ Exhibit DD25(b), p 472

¹¹⁰⁵ Transcript 11 February 2020, p 170

¹¹⁰⁶ Transcript 11 February 2020, p 172

¹¹⁰⁷ Exhibit DD22(b), p 475

¹¹⁰⁸ Transcript 11 February 2020, p 174

of the contract.¹¹⁰⁹ Mr Malola Phiri's affidavit to the Commission also confirms that the contract was rushed to be signed because Ms Kwinana was insistent that it be concluded.¹¹¹⁰

635. Mr Kenny's evidence about Ms Memela refusing to give him the full contract "to protect [him]", was put to Ms Memela. Ms Memela testified that she did not remember this.¹¹¹¹ Ms Memela was also asked about the implementation of clause 4.26 of the contract which required a deposit from SAAT in the form of a credit letter, but which was instead paid in cash. She was directed to correspondence where Mr Kleyn asked about the deposit that AAR was demanding and enquired whether the agreement provided instead for a bank letter as that was a standard SAA contract clause. Ms Memela responded to his enquiry by writing an email stating that they fought hard in the negotiations for a deposit clause with respect to cash to be excluded from the contract but, unfortunately, it was part of AAR's policy and SAAT could not refuse because the deposit being a bank letter had not been stipulated in the tender.¹¹¹²

636. However, Ms Memela was wrong. There was no requirement in the contract for a deposit to be paid in cash. She was therefore either deliberately misleading Mr Kleyn about the provisions of the contract or grossly negligent for not in fact checking what the contract said. Ms Memela claimed that this correspondence was only in respect of what happened at the negotiations and that she still needed to check what the contract stated. However, this is not a plausible explanation given what she said in the actual correspondence. In addition, she eventually admitted that she actually

¹¹⁰⁹ Transcript 11 February 2020, p 176

¹¹¹⁰ DD25(c) p 790

¹¹¹¹ Transcript 11 February 2020, p 178

¹¹¹² Exhibit DD22(b), p 649.1-649.2

could not recall ever having checked the contract and later claimed it was actually not her role to check it.¹¹¹³ Furthermore, the explanation in her email about what had transpired during the negotiation of the contract with AAR is inconsistent with her claim that she was not involved in the negotiation process and that this was done by Ms Mbeki alone. Ms Memela's answer was again evasive and did not make sense in the light of the written correspondence.

637. Her answer is also belied by later correspondence in which AAR again queried why it had not been paid in respect of deposit invoices it had issued. In response, Ms Memela again said that SAAT was obliged in terms of the contract to make payment in respect of a security deposit upfront and that this was part of the conditions precedent. She again referred to the negotiation process that resulted in SAAT agreeing to pay this deposit.¹¹¹⁴ Ms Memela's contemporaneous correspondence therefore confirms that she was heavily involved in the contractual negotiations. Despite this, and despite the clear terms of the contract that was actually concluded, Ms Memela failed dismally in protecting SAAT's interests when AAR starting demanding a cash payment to which it had no contractual entitlement. Instead of refusing the payment on the basis that the contract made no provision for it, Ms Memela actively supported that the payment be made. This is a further example of the ways in which she was able to influence events to the benefit of AAR and JM Aviation.

¹¹¹³ Transcript 11 February 2020, p 188-193

¹¹¹⁴ Exhibit DD25(b), p 650

638. Ms Memela's insistence to her colleagues that the contract required a cash deposit to be paid had a serious prejudicial effect on SAAT because SAAT was in a precarious cashflow position at the time.¹¹¹⁵

639. The deposit payment amounted to approximately R60million in cash. JM Aviation stood to benefit from this because it was entitled, under the joint venture, to receive 5% of that revenue.¹¹¹⁶ This is the same JM Aviation that paid Ms Memela R2.5million in May 2016.

640. The inescapable conclusion from all this evidence is that Ms Memela did favour AAR/JM Aviation during the tender relating to components in at least six ways. These are that:

640.1. she met with AAR in South Africa while the tender, in which AAR was a bidder, was still open;

640.2. she travelled to the US to meet with AAR while the tender, in which AAR was a bidder, was still open;

640.3. she entertained communications from JM Aviation about both the JV agreement it was entering into with AAR and the draft AAR/JM Aviation bid submission before the closing date for the submissions;

640.4. she shared confidential pricing information with AAR while the tender was open;

¹¹¹⁵ Transcript 12 February 2020, p 7-11

¹¹¹⁶ Transcript 12 February 2020, p 19

640.5. she put pressure on Ms Mbeki who was negotiating the contract to expedite its progress, when Ms Mbeki was attempting to secure more beneficial terms for SAA; and

640.6. she misled her colleagues in order to motivate for a cash deposit to be paid to AAR in the amount of approximately R60 million at a time when SAAT was severely cash strapped.

641. Had there been no payment that JM Aviation made to Ms Memela, it might have been possible to view her conduct as a manifestation of incompetence or gross negligence but JM Aviation's payment of R2.5 million to Ms Memela gives a different complexion to these facts. When the Head of Procurement of a state-owned company extends these types of favours to a supplier and receives R2.5 million from that same supplier, there is corruption at play.

642. When Ms Memela concluded her oral evidence, she requested an opportunity to make written re-examination submissions. She was afforded this opportunity and submitted these on 21 April 2021. Ms Memela's re-examination submissions do not advance her evidence before the Commission. They consist primarily of allegations against the evidence leader,¹¹¹⁷ complaints that the Commission's fact-finding endeavours have destroyed her relationships¹¹¹⁸ and criticisms about which witnesses the Commission chose to call.¹¹¹⁹

643. Ms Memela's submissions display a complete lack of candour and a singular failure to accept any responsibility for her actions. She complains that she was asked to

¹¹¹⁷ Ms Memela's re-examination submissions submitted on 21 April 2021, paras 3 and 4

¹¹¹⁸ Ms Memela's re-examination submissions submitted on 21 April 2021, para 1.4.3

¹¹¹⁹ Ms Memela's re-examination submissions submitted on 21 April 2021, para 1.4.7

account for her conduct at all. Her core contention is that other people should have been asked the questions posed to her.¹¹²⁰ However, this misses the point that it was Ms Memela who, through an admittedly fabricated sale agreement, ended up being paid R2.5 million by a SAAT supplier.

644. Ms Memela also included in her submissions that Mr Leon Robertse, who had provided an affidavit to the Commission regarding the pricing information that Ms Memela provided to Ms Sambo, left SAAT and bought a game farm. She criticised the Commission for not investigating this further, suggesting that it did not do so because he had supplied the Commission with the evidence that it wanted. However, this is not fair criticism because Ms Memela did not previously bring this allegation of an illicit game farm purchase, let alone any evidence to support it, to the Commission's attention.¹¹²¹ Self-evidently, the purchase of a property on retirement is not by itself suspicious or worthy of investigation. It was not Ms Memela's purchases or attempted purchase of property that warranted the Commission's interest, but the payment from a supplier of the state-owned entity that she worked for as head of procurement.

645. Ms Memela's re-examination submissions refer to numerous documents that were said to corroborate her version of events but then the documents were not attached to the submissions. Instead, the submissions indicated that they "can be provided to the Commission" if a request is made.¹¹²² The re-examination submissions were Ms Memela's opportunity to place any remaining clarificatory evidence before the Commission. It was up to her to include whatever supporting documents she deemed

¹¹²⁰ Ms Memela's re-examination submissions submitted on 21 April 2021, para 2.1.1

¹¹²¹ Ms Memela's re-examination submissions submitted on 21 April 2021, para 2.3

¹¹²² Ms Memela's re-examination submissions submitted on 21 April 2021, para 2.7

relevant to her re-examination. Her failure to do so attracts the inference that these documents did not, in fact, advance her case.

646. Ms Memela's submissions conclude on the basis of a "plea for leniency" from the Commission. She justifies this plea on the basis, amongst other things, that she was not afforded an opportunity to be re-examined or to cross-examine witnesses whom, she contends, lied about her.¹¹²³ However, this is not correct. Ms Memela agreed to provide written re-examination submissions in lieu of being questioned in re-examination and she decided not to pursue the cross-examination applications she had brought. She informed the Commission that she was content to rely on her re-examination submissions.

647. Ms Memela's pleas for leniency are not justified. In the light of the considerable evidence against Ms Memela which indicates that she received a kick-back payment from JM Aviation for advancing JM Aviation's and AAR's interests in their dealings with SAAT, the Commission will recommend that the NPA consider prosecuting Ms Memela for corruption.

Ms Kwinana's version

648. Ms Kwinana testified that she did not think it was inappropriate or irregular for a Board member, who would vote on a tender, to meet with a bidder whilst the tender was still open, if:

¹¹²³ Ms Memela's re-examination submissions submitted on 21 April 2021, para 7

648.1. that Board member was not aware that there was a bid going on and this person was a bidder; or

648.2. if the member was aware, it would depend on their level of involvement in the decision-making;¹¹²⁴ and,

648.3. even if such a board member was a key decision-maker, he or she should still be able to meet and talk about issues other than the tender.¹¹²⁵

649. Ms Kwinana went so far as to say that a decision-maker would only need to disclose a conflict of interest, or avoid talking to a bidder, if they personally felt that their judgment would be impaired because of their relationship.¹¹²⁶

650. At first, Ms Kwinana claimed that there was nothing wrong with the SAAT Board members' trip to the AAR Headquarters in the US because there were no tenders open at the time. However, when it was pointed out to her that the tender that had opened on 29 October 2014 was still open in May 2015 when the trip occurred, she accepted that it was open at the time.¹¹²⁷ She also accepted that AAR was one of the bidders.¹¹²⁸ She confirmed that the SAAT delegation was flown on private jets and driven in limousines and was taken to restaurants by AAR.¹¹²⁹

651. Ms Kwinana nevertheless testified that she did not regard this as irregular because the Board could only give its final approval if it went to Chicago to see AAR's facilities. She also claimed that she did not know that there was a tender open at that stage.

¹¹²⁴ Transcript day 296, 2 November 2020, p 144

¹¹²⁵ Transcript 2 November 2020, p 147 and p 154

¹¹²⁶ Transcript 2 November 2020, p 150

¹¹²⁷ Transcript 3 November 2020, p 91

¹¹²⁸ Transcript 3 November 2020, p 92

¹¹²⁹ Transcript 3 November 2020, p 90-91

But the minutes of Board meetings show that this was false because the Board had already voted to suspend the process so that they could explore a relationship with AAR.¹¹³⁰ However, later she admitted that she would have known when the contract was going out on tender and, therefore, she would have known that it was still open.¹¹³¹ She nonetheless tried to downplay the effect of this knowledge during her testimony by claiming that that there were so many tenders at SAAT that she would not have remembered this particular one. But this was a tender for over R1billion.¹¹³² It is therefore highly unlikely and implausible that Ms Kwinana did not know that the tender was still open when she visited the AAR headquarters in the US.

652. Ms Kwinana then denied that the restaurants, limousine rides and private jet flights were “benefits” that the Board ought not to have accepted from a bidder. Instead, she said that it was just part of their “due diligence”.¹¹³³ This explanation can be rejected on its face. There is no need to be transported around in limousines while one is conducting a “due diligence”. But even if Ms Kwinana were correct, and these sorts of lavish perks were just part and parcel of the work, the due diligence was still not conducted on any other bidders. It was performed on AAR precisely to investigate the possibility of an MOU with AAR¹¹³⁴ in respect of work that was the subject of an active tender. Indeed, the problem with this approach was highlighted by another feature of Ms Kwinana’s testimony. When she was asked about the information on which she based her decision when she voted as Chair of the Board of SAAT to award the five year components tender to AAR, she testified that she

¹¹³⁰ Transcript 3 November 2020, p 93

¹¹³¹ Transcript 3 November 2020, p 96

¹¹³² Transcript 3 November 2020, p 97

¹¹³³ Transcript 3 November 2020, p 98

¹¹³⁴ Transcript 3 November 2020, p 98

relied on what she had learnt about AAR's operations on this very trip.¹¹³⁵ This was information that no other bidder was able to provide and which no other bidder could dispute because it was not disclosed to them. The trip to the United States flew in the face of a fair, transparent and competitive procurement process.¹¹³⁶ Ultimately, the trip resulted in the Board retracting the open tender to pursue a private arrangement with AAR.¹¹³⁷

653. Ms Kwinana again claimed that, as long as in her opinion, the trip and benefits did not "impair [her] independence and thinking", then there was no problem. Of course, her casual reference to relying on information not actually in the tender documents that she gleaned from the trip, shows that she is not an appropriate judge of her own impartiality and that is why the procurement processes and SCM policies are in place at SAAT.

654. Ms Kwinana also claimed that such a trip would not influence an outcome because procurement processes are so rigorous that it would not matter.¹¹³⁸ However, the Board's decision thereafter to withdraw the tender, as well as the Board's decision to disregard the CFST, BAC and management recommendation that the tender be awarded to Air France, demonstrate that this is clearly false. There can be various safeguards in place but if the Board makes the ultimate decision, and it has allowed itself to be influenced in this way, the whole process is undermined.

655. It was put to Ms Kwinana that there are safeguards in place to ensure the independence of the non-executive Board members who ultimately vote on a tender.

¹¹³⁵ Transcript 7 November 2020, p 29-30. This was the fact that AAR was a components manufacturer and supplier itself and did not go through a middle man like Air France

¹¹³⁶ Transcript 3 November 2020, p 100

¹¹³⁷ Transcript 3 November 2020, p 105

¹¹³⁸ Transcript 3 November 2020, p 109-110

One of these safeguards is that it is management who should conduct any due diligence, and then make recommendations to the Board – the Board should not be enjoying a trip to the US and performing the due diligence itself. Ms Kwinana's response was that "this has been the practice" at SAAT.¹¹³⁹

656. It was evident from Ms Kwinana's testimony that nothing about her prior interactions with AAR were of any concern to her. When Mr Parsons resigned, he raised the concern that there was something untoward going on behind the scenes in the conclusion of the MOU between SAAT and AAR. He also said: "My other specific concern is the identification and selection of the BBBEE partners, if any, for the proposed joint venture, a process that needs to be highly transparent in a business that already has an uncompetitive cost base. The MOU received includes an implementation timetable that suggests this process may already be significantly advanced and there is no visibility of this to either the SAAT or SAA Boards or National Treasury."¹¹⁴⁰ Ms Kwinana's response to this was that, if Mr Parsons had concerns, he should have raised them at a Board meeting instead of just resigning and she said that she did not understand his concerns.¹¹⁴¹ This says a lot about Ms Kwinana.

657. The clauses in the RFP prohibiting any communication between anyone at SAAT and bidders in the tender, save for the Project Manager, were also put to Ms Kwinana. She was then taken to Ms Memela's emails with Ms Sokhulu of JM Aviation on the eve of the awarding of the tender to AAR/JM Aviation. Despite the clear and unequivocal wording of these clauses, Ms Kwinana continued to claim that there could still be communication between SAAT officials, including head of procurement,

¹¹³⁹ Transcript 3 November 2020, p 114

¹¹⁴⁰ Exhibit DD33, p 22.

¹¹⁴¹ Transcript 3 November 2020, p 124-125

depending on the “circumstances” and where it would be “impractical” to observe the proper procedure.¹¹⁴² This feature of Ms Kwinana’s testimony was particularly concerning because it revealed an approach to legal compliance directly at odds with the governing legislation. The bottom line of Ms Kwinana’s approach was that it was permissible not to follow the legal requirements of a tender if it was impractical to do so. I am satisfied, having listened to Ms Kwinana’s evidence, that many of the situations she would regard as impractical are situations which most people would find practical.

658. Finally, it was put to Ms Kwinana that clause 1.6.3 of the RFP made it clear that no exceptions or “circumstances” would justify a departure from the prohibition on communications. The clause said that “No discussions will be entered into surrounding elimination through non-compliance in clause 1.6.1”.¹¹⁴³ Eventually, she admitted that “on the face of it, I would be of the view that the bidder should be eliminated”.¹¹⁴⁴ She confirmed that AAR/JM Aviation should therefore have been eliminated from the five-year bid because of this communication but was not.¹¹⁴⁵

659. Ms Kwinana testified that she had a professional relationship with Mr Ndzeku. She met him during the SAA roadshows for supplier development in 2015.¹¹⁴⁶ She admitted having had many telephone calls with Mr Ndzeku where she gave him guidance about how BEE requirements at SAA were implemented.¹¹⁴⁷ She even admitted to having various telephonic discussions with him when the AAR/JM Aviation tender was open. However, she claimed that there was nothing

¹¹⁴² Transcript 3 November 2020, p 133-135

¹¹⁴³ Transcript 3 November 2020, p 137

¹¹⁴⁴ Transcript 3 November 2020, p 140

¹¹⁴⁵ Transcript 3 November 2020, p 147-148

¹¹⁴⁶ Transcript 2 November 2020, p 42

¹¹⁴⁷ Transcript 2 November 2020, p 44-45

inappropriate about this.¹¹⁴⁸ It was put to Ms Kwinana that she even spoke to Mr Ndzeku the day before the Board took its decision to award the components tender to AAR and JM Aviation, at 7:12pm.¹¹⁴⁹ Ms Kwinana claimed again that this was not irregular because they did not discuss the tender.¹¹⁵⁰ However, based on her own concessions about Ms Memela's emails disqualifying AAR and JM Aviation as a bidder, these telephone calls would also have resulted, on Ms Kwinana's version, in JM Aviation/AAR's elimination from the bid.

660. It was put to Ms Kwinana that she was present at the meeting at which the component services contract with AAR/JM Aviation was signed. Mr Malola Phiri's affidavit to the Commission sets out in detail that Ms Kwinana and Ms Memela were present at the meeting where the contract was signed. According to Mr Phiri, Ms Memela indicated at the meeting that the agreement was on its way with a courier. Ms Kwinana's driver was requested to collect the parcel while everyone waited in the boardroom. When the contract was delivered, it was already signed by AAR. Ms Kwinana insisted that Mr Phiri sign it on behalf of SAAT. He asked Ms Memela and Ms Kwinana to check the document and, on their approval, he signed it. Mr Malola Phiri added that Ms Kwinana wanted the contract signed as a matter of urgency. Mr Phiri said that Ms Kwinana's behaviour at the meeting was "over the top, bordering on being aggressive".¹¹⁵¹

661. As Ms Memela had done in her testimony, Ms Kwinana also denied being present when the contract was signed. Ms Kwinana claimed that the contract had already been signed when she convened a meeting with SAAT's management and that she

¹¹⁴⁸ Transcript 3 November 2020, p 150

¹¹⁴⁹ Transcript 3 November 2020, p 154

¹¹⁵⁰ Transcript 3 November 2020, p 154

¹¹⁵¹ Exhibit DD25(c), p 790-791

wanted to obtain the signed version urgently because National Treasury wanted it.¹¹⁵²

662. There are no independent facts in relation to the meeting at which the component services agreement was signed to indicate which of the two versions is true. Ms Kwinana played a key-decision making role in deciding to award the tender to the joint venture of AAR and JM Aviation. This decision was both unjustified and unfair. It therefore does not matter whether she also pushed for the contract to be signed. The contract should, in fact, never have been awarded to AAR/JM.

663. On 9 May 2016 the Board of SAAT decided to award the component services contract to AAR/JM, and not to follow the management's recommendation that it should be awarded to Air France. The Board's reasons for its decision were given as:

663.1. Air France's unwillingness to align itself with supplier development;¹¹⁵³

663.2. The benefits given for selecting Air France were not compelling;¹¹⁵⁴

663.3. Concerns about AAR/JM Aviation low balling could be mitigated through contract.¹¹⁵⁵

664. When Ms Kwinana was asked what the Board meant when it said that Air France did not align itself with "supplier development", she first stated that she would need to "google" the term. Thereafter, she went on to explain that it meant that Air France

¹¹⁵² Transcript 3 November 2020, p 163

¹¹⁵³ Transcript 7 November 2020, p 10-11

¹¹⁵⁴ Transcript 7 November 2020, p 11

¹¹⁵⁵ Transcript 7 November 2020, p 11

did not comply with BEE. Ms Kwinana said that Air France “was not even supposed to be there” because that was part of the critical criteria.¹¹⁵⁶

665. However, SAAT’s CEO’s recommendation¹¹⁵⁷ included an observation that none of the tenderers was BEE compliant and that, for that reason, they had all been ranked the same with regard to BEE.¹¹⁵⁸ This recommendation had served before the Board when the Board made its decision. When this was pointed out to Ms Kwinana during her testimony, she then had to shift ground and started to rely on other reasons.¹¹⁵⁹ She said that she had meant something else by supplier development – namely, that Air France did not indicate it could develop other local suppliers.¹¹⁶⁰ When it was put to Ms Kwinana that all of the bidders had committed to supplier development, and none of them had submitted a full proposal yet,¹¹⁶¹ she said “There were many things that we talked about that resulted in us rejecting Air France.”¹¹⁶² This was an evasive answer and one that Ms Kwinana was driven to give because none of her other prior answers withstood scrutiny.

666. Ms Kwinana then testified about the second reason given by the Board for rejecting Air France and this related to cost savings.¹¹⁶³ However, management had raised a concern that it appeared that AAR was deliberately “low balling” with its projected costs and it would inflate those costs over time and then claim various things were not included in the tender.¹¹⁶⁴ Management set out their concerns as follows in the

¹¹⁵⁶ Transcript 7 November 2020, p 12

¹¹⁵⁷ Exhibit DD22(f), p 2274-2280

¹¹⁵⁸ Exhibit DD22(f), p 2280

¹¹⁵⁹ Transcript 7 November 2020, p 16

¹¹⁶⁰ Transcript 7 November 2020, p 23

¹¹⁶¹ Transcript 7 November 2020, p 23-24

¹¹⁶² Transcript 7 November 2020, p 24-25

¹¹⁶³ Transcript 7 November 2020, p 28

¹¹⁶⁴ Transcript 7 November 2020, p 33

recommendation to the Board: “Sudden drastic cuts to the tender prices with a reduction of more than USD40million raised the fear of low balling to get the contract and doubts on sustainability”.¹¹⁶⁵ In the end, the price difference between Air France and AAR was fairly close, but in order to get there, AAR had to drop its prices in a dramatic fashion that raised concern.¹¹⁶⁶ Ms Kwinana testified that, despite this serious concern being raised by management, the Board did not take any steps to check whether the contract eventually concluded in fact protected SAAT against this low-balling concern.¹¹⁶⁷

667. As indicated above, time has shown that the low-balling concern was real because, when Mr Human testified before the Commission in February 2020, he stated that the costing of the contract at that time, was sitting at R1.8 billion. This was well over the price of R1.25 billion that AARM had put up in its bid.

668. Ms Kwinana was also questioned about Ms Sambo’s allegations that she has disclosed to her that she wanted to “get her hands” on some of the contracts before she left SAA and SAAT. Ms Kwinana denied Ms Sambo’s testimony on these aspects.¹¹⁶⁸ In fact, she claimed Ms Sambo was a “pathological liar”.¹¹⁶⁹ Ms Kwinana denied that she asked to be introduced to Ms Jackson.¹¹⁷⁰ She testified that a reasonable person would doubt that if Ms Kwinana wished to ask these things, she would have said it in the presence of Dr Tambi or even Ms Sambo herself.¹¹⁷¹ Ms Kwinana stated that Ms Sambo approached SAAT and complained about her

¹¹⁶⁵ Transcript 7 November 2020, p 34

¹¹⁶⁶ Transcript 7 November 2020, p 35-36

¹¹⁶⁷ Transcript 7 November 2020, p 37 and p 42

¹¹⁶⁸ Transcript 3 November 2020, p 80-81

¹¹⁶⁹ Transcript 3 November 2020, p 81-82

¹¹⁷⁰ Transcript 3 November 2020, p 82

¹¹⁷¹ Transcript 3 November 2020, p83

relationship with AAR and that is why Ms Kwinana called a meeting with Dr Tambi, to see if there was anything SAAT could do.¹¹⁷² Ms Kwinana said that she had called Ms Sambo an “ihashi” during the meeting, because Ms Sambo explained how she had been running around trying to introduce AAR to various officials in South Africa since 2011.¹¹⁷³

669. Ms Kwinana testified:

“Ms Memela tried to assist her but because she is such a spoilt brat, maybe she is used to getting things her way but now, if you don't even put your tender how was she expected to win the tender. So, basically, that's the reason why, basically, I did not even put an effort to answer her affidavit because it is clear that she is a blatant liar”.¹¹⁷⁴

670. It was put to Ms Kwinana that Ms Memela's whatsapp communications with Ms Sambo provide independent contemporaneous support for Ms Sambo's version.¹¹⁷⁵ In 2017, Ms Memela had sent a whatsapp message to Ms Sambo in which she had said the following: “And in 2015 you came to me as a friend and asked for information for the short tender which you wanted to give to you partner, but looks like you ended up not giving it to them, since you wanted money upfront, they tendered anyway with your company name . . . You guys (yourself, Koekie Mdluli and Chair) were negotiating with Cheryl where there was an agreement of what amount was going to

¹¹⁷² Transcript 3 November 2020, p 83

¹¹⁷³ Transcript 3 November 2020, p 85

¹¹⁷⁴ Transcript 3 November 2020, p 84

¹¹⁷⁵ Exhibit DD18, p 539-540

be paid out to you guys if there was success. Unfortunately, Cheryl changed her mind, claiming it was illegal in her country to pay out bribes. . .”¹¹⁷⁶

671. Ms Kwinana testified that this was “nonsense”.¹¹⁷⁷

672. While it may be that Ms Sambo’s version is not correct in all its respects, no explanation was proffered by Ms Kwinana for why Ms Memela, her trusted head of procurement, would have made up a story in an unguarded moment in 2017 to implicate Ms Kwinana in soliciting a bribe if it were not true.

673. In the end, however, the Commission’s investigations revealed that many millions of Rands were, in fact, paid to Ms Kwinana from JM Aviation’s bank account. This was after Ms Kwinana:

673.1. had been wined and dined by AAR in Chicago;

673.2. had been speaking to Mr Ndzeku regularly on the phone while decisions on tenders affecting AAR and JM Aviation were being made;

673.3. made an unjustified and unfair decision to reject management’s recommendation that Air France should be awarded the tender for component services and instead gave the contract to AAR/JM.

674. In the circumstances the evidence is overwhelming that Ms Kwinana engaged in corrupt activities in order to benefit the joint venture of AAR/JM.

675. Both Ms Kwinana and Ms Memela denied that their conduct constituted corruption. They offered, in support of these denials, elaborate explanations about why the

¹¹⁷⁶ Transcript 3 November 2020, p 88

¹¹⁷⁷ Transcript 3 November 2020, p 89

money they received from JM Aviation was not intended for their own benefit. Ms Memela's version involved Mr Ndzeke buying land in the Eastern Cape from her mother which her mother then donated to Ms Memela for the purchase of her house in Bedfordview. Ms Kwinana's version involved Mr Ndzeke investing millions of Rands in forex trading that Ms Kwinana's business, Zanospark (Pty) Ltd, just happened to be engaged in while JM Aviation was a candidate supplier to SAAT.

676. Both of these versions were, however, shown to be false because of small errors that the perpetrators had made when they were trying to cover their tracks. This is dealt with in the next section. It is important to note, for present purposes, that Ms Memela and Ms Kwinana were not working alone when they perpetrated their deceitful scheme. They were aided by the attorney, who represented them throughout their dealings with the Commission – Ms Mbanjwa.

677. When the evidence of their fraud was first revealed during the testimony of Mr Ndzeke, the Commission wrote to Ms Mbanjwa and invited her to provide an affidavit to the Commission setting out her version of the fraud in which she had been implicated during Mr Ndzeke's evidence. Ms Mbanjwa declined to provide any affidavit. She said that she was satisfied that she was not implicated in any wrongdoing in the evidence of Mr Ndzeke.

678. This stance was staggering given what had been disclosed in Mr Ndzeke's evidence. On Mr Ndzeke's own evidence, Ms Mbanjwa had drafted a sale agreement for the land he said he had purchased from Ms Memela's mother, which he eventually conceded had been a fraud. As an officer of the court, Ms Mbanjwa would no doubt be aware of the seriousness of an allegation of fraud made against her. Despite this, she has given no version to the Commission and so Mr Ndzeke's acceptance that the sale agreement was a fraud and was only signed in 2019 is uncontested.

The scheme to cover up the payments to Ms Kwinana and Ms Memela

Ms Memela and the sale of her mother's land

679. JM Aviation paid an amount of R2.5million towards the purchase of a house for Ms Memela in 2016.¹¹⁷⁸ Ms Memela testified that it was not JM Aviation that had paid the R2.5 million but, rather, Mr Ndzeke himself, although the funds may have come through JM Aviation.¹¹⁷⁹ She explained the payment from Mr Ndzeke on the basis that her mother had sold him a plot of land in the Eastern Cape at Mpindweni, next to Umzimvubu, that she (i.e. Ms Memela's mother) had inherited from her parents.¹¹⁸⁰ Ms Memela stated that she put Mr Ndzeke in touch with her mother because he was looking for property in the Eastern Cape for one of his projects.¹¹⁸¹ She testified that the contract of sale of the property was concluded between 2015 and 2016 and the purchase price was R2.5million.¹¹⁸² Later she claimed that she was sure that the agreement was concluded in November 2015 – long before the tender had been awarded to AAR/JM Aviation. This was despite the fact that the payment was only made in May 2016.¹¹⁸³

680. Ms Memela testified that her desire to purchase property had begun in 2015 when she had been interested in a property in the Eastern Cape in Cove Ridge, for business purposes, for the total cost of R2.8million. She said that her mother had

¹¹⁷⁸ Transcript 7 February 2020, p 72

¹¹⁷⁹ Transcript 7 February 2020, p 73

¹¹⁸⁰ Transcript 7 February 2020, p 75

¹¹⁸¹ Transcript 7 February 2020, p 75

¹¹⁸² Transcript 7 February 2020, p 78

¹¹⁸³ Transcript 7 February 2020, p 207

told her that she would assist with the deposit for the property by selling some of her property in the Eastern Cape.¹¹⁸⁴ Ms Memela said that in or around February 2016, she and her mother agreed that the money should be used to purchase a property in Bedfordview.¹¹⁸⁵ Ms Memela testified that the Bedfordview property was purchased for R3.8million. She stated, that once she had found the Bedfordview property, she cancelled the Cove Ridge purchase.¹¹⁸⁶

681. The Cove Ridge purchase agreement¹¹⁸⁷ was concluded on 21 April 2015 between an entity called Slipknot Investment and Ms Memela. It is a three-page document that does not provide when the purchase price had to be paid; whether the transaction was subject to bond approval; whether a deposit had to be paid or indeed many other critical details. Ms Kwinana, the Chair of SAAT, represented Slip Knot in this transaction.¹¹⁸⁸ Ms Memela testified that it was Mbanjwa Attorneys who handled the transfer of the property.¹¹⁸⁹ Ms Memela stated that Ms Kwinana provided her with “sisterly advice” in terms of investment and that she had provided her with this property as an investment opportunity.¹¹⁹⁰

682. Ms Memela testified that Mr Ndzeke paid the purchase price for her mother’s property directly to Ms Mbanjwa who was going to pay it to the transferring attorneys

¹¹⁸⁴ Transcript 7 February 2020, p 98-99

¹¹⁸⁵ Transcript 7 February 2020, p 101

¹¹⁸⁶ Transcript 7 February 2020, p 3

¹¹⁸⁷ Exhibit DD25(b), p 370-374

¹¹⁸⁸ Transcript 7 February 2020, p 113

¹¹⁸⁹ Transcript 7 February 2020, p 116

¹¹⁹⁰ Transcript 7 February 2020, p 119

for the Bedfordview property.¹¹⁹¹ Ms Memela testified that this payment from her mother was not a loan but rather a donation.¹¹⁹²

683. Ms Memela testified that, when she decided to purchase the Bedfordview property instead, she cancelled the Cove Ridge agreement. However, there was no cancellation clause entitling the purchaser to cancel the agreement.¹¹⁹³ Once this was pointed out to Ms Memela, she testified that she had secured Ms Kwinana's agreement to cancel.¹¹⁹⁴ The cancellation letter,¹¹⁹⁵ dated 7 May 2016, stated that Ms Memela intended to cancel the contract and "the deposit of which will be used in the sale of the aforementioned house in Bedfordview. The monies that were paid to L Mbanjwa Incorporated in respect of this transaction should now be paid over to the seller's attorneys ..."

684. Ms Memela testified that she had already committed to the Bedfordview property and made an offer to purchase back in February 2016.¹¹⁹⁶ It was put to her that this meant that in February 2016, she was on the line for R3.8 million on the Bedfordview property and, at the same time, was liable to pay Slipknot, Ms Kwinana's company, R 2.8 million for the Cove Ridge Property. Ms Memela conceded that she did not, at that stage, have R 6.6 million available to her for both property acquisitions.¹¹⁹⁷ Nonetheless, she only cancelled the Cove Ridge agreement many months later on 7 May 2016. It was put to her that this did not make sense. Ms Memela was evasive in response and could not answer the question. She eventually suggested that

¹¹⁹¹ Transcript 7 February 2020, p 122

¹¹⁹² Transcript 7 February 2020, p 123

¹¹⁹³ Transcript 7 February 2020, p 135

¹¹⁹⁴ Transcript 7 February 2020, p 136

¹¹⁹⁵ Exhibit DD25(a), p 397

¹¹⁹⁶ Transcript 7 February 2020, p 188

¹¹⁹⁷ Transcript 7 February 2020, p 143

maybe she and Ms Kwinana agreed verbally to cancel the agreement and then only cancelled formally three months later.¹¹⁹⁸

685. The other suspicious aspect of the cancellation date was that it was two days after the deposit was received from JM Aviation into Ms Mbanjwa's account.¹¹⁹⁹ The payment is actually reflected in the bank statements as "consulting Kwinana". Ms Memela could not give an answer for why a payment that Mr Ndzeke had made, which had nothing to do with Ms Kwinana, would have had the payment reference "consulting Kwinana".

686. It was put to Ms Memela that, in Ms Sambo's affidavit to the Commission, she stated that Ms Memela had told her she had put in an offer on a house in Bedfordview but it was declined as her salary was insufficient and Ms Memela informed Ms Sambo that Ms Kwinana and Mr Zwane told her that they would make a plan for her.¹²⁰⁰ Ms Memela's response was so convoluted that it is not clear what her ultimate response was but it appeared to imply that she denied the statement.¹²⁰¹

687. Ms Memela confirmed that, when JM Aviation made this payment of R2.5million on 5 May 2016, she was the Head of Procurement at SAAT.¹²⁰² Furthermore, as at this date, the components tender that AAR/JM Aviation was ultimately awarded, was still open. The Board decided to award the tender to JM/AAR on 9 May 2016.¹²⁰³ The BAC meeting only took place on 6 May 2016, the day after this payment had been

¹¹⁹⁸ Transcript 7 February 2020, p 144-146

¹¹⁹⁹ See the bank account records of Mbanjwa Attorneys in exhibit DD25, p 395 that shows JM Aviation paid the money on 5 May 2016

¹²⁰⁰ Transcript 7 February 2020, p 155

¹²⁰¹ Transcript 7 February 2020, p 157-160

¹²⁰² Transcript 7 February 2020, p 161

¹²⁰³ Transcript 7 February 2020, p 162

made.¹²⁰⁴ In addition, on the date on which this payment was made, JM Aviation and SAAT, represented by Ms Memela, were still negotiating the price of the purchase of the GPUs.¹²⁰⁵

688. Ms Memela claimed that there was no conflict of interest in having received this payment from JM Aviation and she stated that she was not sitting on the evaluation team and so there was no conflict.¹²⁰⁶ When asked whether she was familiar with the conflict of interest policy of SAAT and when she would be required to declare a conflict, she admitted that she was not familiar with it.¹²⁰⁷ The policy¹²⁰⁸ provides at clause 7.1¹²⁰⁹ that SAA employees must not seek to use their positions to gain direct or indirect benefits for themselves or their family members.

689. It was put to Ms Memela that the fact that she had used her position and her meeting with Mr Ndzeku to find a purchaser for her mother's property, that ended up benefiting her, was in conflict with clause 7.1. Her answer was again evasive and hard to understand. She began questioning whether the policy had indeed been adopted by SAAT.¹²¹⁰

690. Ms Memela was then asked whether she had not breached clause 7.3.1 of the same policy which provided that SAA employees shall refuse gifts, hospitality or other benefits that could influence their judgement or performance of obligations. Ms Memela testified that she was not the decision maker in either the sale of the GPUs

¹²⁰⁴ Transcript 7 February 2020, p 162

¹²⁰⁵ Transcript 7 February 2020, p 162-163

¹²⁰⁶ Transcript 7 February 2020, p 164-165

¹²⁰⁷ Transcript 7 February 2020, pp 166-167.

¹²⁰⁸ Exhibit DD25(a), p 436

¹²⁰⁹ Exhibit DD25(a), p442

¹²¹⁰ Transcript 7 February 2020, p 169-172.

to JM Aviation nor the award of the tender to AAR/JM Aviation. She said that these were Board decisions.¹²¹¹

691. After Ms Memela had testified, Mr Ndzeke testified about the contract with Ms Memela's mother, Ms Hlohlela. Mr Ndzeke stated that he had met Ms Memela in around mid 2015 at one of the supplier development workshops.¹²¹² He testified that during that introduction, Ms Memela had told him about her mother's land in the Eastern Cape and he was interested in buying it.¹²¹³ He explained that, at that time, he was involved in commercial cannabis farming in Lesotho and Swaziland and he wanted to use Ms Hlohlela's property for that type of business.¹²¹⁴

692. As evidence of Mr Ndzeke's involvement in the growing of cannabis, he provided the Commission with an investment document from a company called Medigrow that is involved in commercial cannabis farming. He testified that this was the company that he was dealing with at the time.¹²¹⁵ He also stated that he had shown Ms Hlohlela this document in 2015 when discussing the sale of the land.¹²¹⁶

693. Mr Ndzeke testified that he met with Ms Hlohlela about the purchase of the land in Mpindweni in the Eastern Cape, in a village called Mbizana.¹²¹⁷ He said that the meeting was somewhere between mid-2015 and the signing of the sale agreement in November 2015.¹²¹⁸ Mr Ndzeke testified that at the meeting, Ms Hlohlela called

¹²¹¹ Transcript 7 February 2020, p 172-173

¹²¹² Transcript 26 August 2020, p 82

¹²¹³ Transcript 26 August 2020, p 83-84

¹²¹⁴ Transcript 26 August 2020, p 87

¹²¹⁵ Transcript 26 August 2020, p 88

¹²¹⁶ Transcript 26 August 2020, p 240

¹²¹⁷ Transcript 26 August 2020, p 90

¹²¹⁸ Transcript 26 August 2020, p 92-9

the tribal chief to join them and introduced Mr Ndzeku to the chief.¹²¹⁹ When asked whether Mr Ndzeku was referring to Chief Sigcau, Mr Ndzeku said he thought so.¹²²⁰ He stated that Chief Sigcau was the “inkosi”¹²²¹ of the area¹²²² and that Chief Sigcau was introduced to him at this meeting.¹²²³ He also testified that Chief Sigcau told him that any acquisition of land had to go through him as the chief of the area.¹²²⁴ Mr Ndzeku claimed that his uncle also joined him at this meeting. He stated that at the time of his testimony before the Commission, his uncle was sick in hospital and was, therefore, not available to testify.¹²²⁵ He stated that the Chief brought two or three other people with him to the meeting.¹²²⁶

694. Mr Ndzeku testified that he was taken to the land, which was opposite the Umzimvubu River, on the Ntabankulu side of the River, and he was happy with it.¹²²⁷ Mr Ndzeku testified that Ms Hlohlela then instructed him to go and speak to Ms Mbanjwa about getting paperwork to confirm the sale of the land.¹²²⁸ Mr Ndzeku relied on an affidavit that was allegedly deposed to by Ms Hlohlela stating that Mr Ndzeku purchased her family land in Mpindweni that had been passed down to her by the Cholani family. Mr Ndzeku provided the Commission with this affidavit.¹²²⁹ He

¹²¹⁹ Transcript 26 August 2020, p 94

¹²²⁰ Transcript 26 August 2020, p 95-96

¹²²¹ “Inkosi”, otherwise appearing as “Nkosi”, is the isiZulu and isiXhosa word for a Chief – a traditional leader

¹²²² Transcript 26 August 2020, p 96

¹²²³ Transcript 26 August 2020, p 259-260

¹²²⁴ Transcript 26 August 2020, p 264

¹²²⁵ Transcript 26 August 2020, p 97

¹²²⁶ Transcript 26 August 2020, p 101

¹²²⁷ Transcript 26 August 2020, p 102

¹²²⁸ Transcript 26 August 2020, p 270-271

¹²²⁹ Exhibit DD26, p 24

testified that in 2015/2016¹²³⁰ the affidavit had been given to him by Ms Memela in front of Ms Mbanjwa, and he was told that it would be proof of ownership of land.¹²³¹

695. Mr Ndzeke testified that Ms Mbanjwa prepared the sale of land agreement.¹²³² He said that he and Ms Hlohlela signed the sale agreement in respect of her property in November 2015.¹²³³ He said that, when he made the payment for the land to Ms Mbanjwa, he was asked to use Ms Kwinana's name as a reference.¹²³⁴ He claimed that he did not know that Ms Memela was going to use the money to purchase property.¹²³⁵ Mr Ndzeke's claim that he did not know that Ms Memela was going to purchase property with the money is false, because this fact is actually recorded in the sale agreement between him and Ms Hlohlela.¹²³⁶

696. After Mr Ndzeke had given this version of the events surrounding the property purchase, the evidence leader began to probe some of its main features. First, when it was put to Mr Ndzeke that he could not have given Ms Memela or Ms Hlohlela the Medigrow document in 2015 because that document was only created in November 2018,¹²³⁷ he realised that he had been caught out and conceded that he did not give them the document in 2015.¹²³⁸ Mr Ndzeke had, therefore, lied about this document in his earlier testimony.

¹²³⁰ Transcript 26 August 2020, p 303

¹²³¹ Transcript 26 August 2020, p 297-298

¹²³² Transcript 26 August 2020, p 270-271

¹²³³ Transcript 26 August 2020, p 237

¹²³⁴ Transcript 26 August 2020, p 107

¹²³⁵ Transcript 26 August 2020, p 252

¹²³⁶ Exhibit DD26, p 14-23

¹²³⁷ Transcript 26 August 2020, p 240

¹²³⁸ Transcript 26 August 2020, p 242

697. It was also put to Mr Ndzeke that the Commission had received an affidavit from Medigrow's CEO¹²³⁹ who confirmed that the document could only have been given to Mr Ndzeke during a presentation to potential investors in November 2018. Therefore, he could not have been looking to purchase the land for this purpose in 2015. Mr Ndzeke then said he did not remember when he got the document from Medigrow.¹²⁴⁰ He then conceded that he had no interactions with Medigrow at all in 2015 and in fact had no plans with the company at all. However, he still persisted in his version that he had plans to grow cannabis in Swaziland at the time.¹²⁴¹ This explanation must be rejected because, when Mr Ndzeke was served with a summons requiring him to provide any documents evidencing what he had planned to do with the property when he purchased it in 2015, he had provided the Medigrow document.¹²⁴² On Mr Ndzeke's own version, therefore, it was Medigrow that he was interested in when he bought the property in 2015. However, when the date discrepancy was pointed out to Mr Ndzeke, he tried to escape the obvious conclusion that he had no such plans in 2015 with a vague reference to other cannabis growing that he planned to undertake.

698. It was also put to Mr Ndzeke that he could not have met with Chief Sigcau because the Chief had, himself, provided the Commission with an affidavit¹²⁴³ explaining that he had never met Mr Ndzeke, that Ms Hlohlela had no authority to sell the land she claimed to have inherited from the Cholanis in Mpindweni and that no such land was ever sold to Mr Ndzeke according to the traditional authorities responsible for the land. The affidavit also explained the process that would be followed if there was a change in the use of traditional land. Chief Sigcau said that process required the

¹²³⁹ Exhibit DD26, p 278-282

¹²⁴⁰ Transcript 26 August 2020, p 246

¹²⁴¹ Transcript 26 August 2020, p 247

¹²⁴² Transcript 26 August 2020, p 248

¹²⁴³ Exhibit DD26, p 283-291

involvement of the traditional authorities and various procedures had to be followed – none of which had been followed in respect of the Mpindweni land. He also observed that no such use rights had ever been sold in respect of land within his area of jurisdiction for anywhere close to the value of R2.5million, but rather for hundreds of rands.¹²⁴⁴

699. Mr Ndzeke's response to this was to claim that he was told by one of the Chief's associates that, once the Commission's investigators had started asking the Chief and others questions about the land transaction, the Chief had said that he did not want to be involved in the Commission's activities. Mr Ndzeke said that that was why the Chief was denying the meeting.¹²⁴⁵ However, the detailed affidavit provided by the Chief is not the sort of affidavit produced by someone who does not want to be involved in the Commission's work. This explanation by Mr Ndzeke therefore made no sense. In addition, it was put to Mr Ndzeke that his story of meeting with the Chief was highly implausible because he claimed that the Chief came to Ms Hlohlela's house whereas it would have been required of them to go to visit the Chief at his house and not the other way.¹²⁴⁶ Mr Ndzeke said in response that he understood this – and did not attempt to provide any further defence of the story.¹²⁴⁷ He eventually conceded: "So I am a little bit confused exactly what happened that day. Maybe I am wrong or maybe it was not the Chief, I do not know what to say."¹²⁴⁸

700. It was further put to Mr Ndzeke that the affidavit he provided to the Commission, which purported to evidence Ms Hlohlela's rights over the land and her transfer of

¹²⁴⁴ Transcript 26 August 2020, p 287

¹²⁴⁵ Transcript 26 August 2020, p 288-289

¹²⁴⁶ Transcript 26 August 2020, p 290-291

¹²⁴⁷ Transcript 26 August 2020, p 291

¹²⁴⁸ Transcript 26 August 2020, p 294-295

those rights to Mr Ndzeke, could not have been provided to him in 2015/2016 because it was on an affidavit template used by the Mount Frere Police Station from 2019. The Mount Frere Police Station provided the Commission with affidavits by some of its officers explaining that it would be impossible to have had that template in 2015 or 2016.¹²⁴⁹ They also explained that the policeman who was allegedly the Commissioner of oaths of the affidavit, could not have deposed to it on that date because he was out on patrol, according to his incident book.¹²⁵⁰ The Commission investigators met with the police officer who allegedly commissioned the affidavit and sought to obtain an affidavit from him. While at first he cooperated, he eventually stopped cooperating with the Commission. The South African Police has commenced an investigation into his conduct in this regard.

701. It was further put to Mr Ndzeke that the affidavit and the contract of sale could not have been signed by Ms Hlohlela because the Commission had received a report from a handwriting expert who had compared various documents that Ms Hlohlela had signed when she was still alive – from many years back until up to a year before the affidavit was allegedly signed – and had concluded that the affidavit was signed by the same person who signed the sale of land agreement, purporting to be Ms Hlohlela, but that neither of these signatures matched the other verified signatures of Ms Hlohlela. The expert concluded that the signatures on the affidavit and the sale agreement had been forged.¹²⁵¹

702. Finally, it was put to Mr Ndzeke that the sale agreement could not possibly have existed in 2015 because it made provision for certain disputes under it to be referred to the President of the Legal Practice Council and yet the Legal Practice Council did

¹²⁴⁹ Exhibit DD26, p 304-335

¹²⁵⁰ Exhibit DD26, p 304-335

¹²⁵¹ Exhibit DD26, p 292-303. Transcript 2020, p 312

not exist in 2015. It was only established in 2018. The sale agreement was, therefore, likely to have been based on an agreement template designed after 2018 and not 2015.

703. Faced with all this evidence, Mr Ndzeke eventually conceded that the affidavit was a forgery.¹²⁵² He also admitted that he did not sign the purchase agreement in 2015, but rather in 2019.¹²⁵³ He confirmed that it was prepared by Ms Mbanjwa¹²⁵⁴ and that it was a fraud.¹²⁵⁵

704. It was put to Mr Ndzeke that there was no agreement about land in 2015 or 2016. JM Aviation paid Ms Memela as head of procurement at SAAT an amount of R2.5million out of the R28.5million that was paid by Swissport to JM Aviation, in exchange for her helping JM Aviation in the GPU sale and in the AAR/JM Aviation bid.¹²⁵⁶ By this time, Mr Ndzeke had no answer.

705. After Mr Ndzeke had testified, Ms Memela gave evidence again. She was questioned about what had been revealed in the evidence of Mr Ndzeke regarding the veracity and authenticity of the sale agreement which, on Ms Memela's version, had been the reason for the payment of R2.5 million to her.

706. Despite all the concessions made by Mr Ndzeke about the sale agreement being a fraud, Ms Memela denied this and said that the agreement was valid. She said that Chief Sigcau's evidence that he had never authorized the sale of the land to Mr Ndzeke should be rejected because the land that was being referred to was not land

¹²⁵² Transcript 26 August 2020, p 331-332

¹²⁵³ Transcript 26 August 2020, p 336

¹²⁵⁴ Transcript 26 August 2020, p 339

¹²⁵⁵ Transcript 26 August 2020, p 340

¹²⁵⁶ Transcript 26 August 2020, p 343-344

owned by her mother's family, the Cholanis.¹²⁵⁷ However, that cannot be correct, because in the alleged affidavit from Ms Hlohlela, the land is described as being from the Cholanis. In fact, Ms Memela¹²⁵⁸ failed to give a proper responses to this. Instead, her response was convoluted. It mostly involved accusing the Commission's evidence leader of not understanding how land was treated in rural areas, criticising the investigators of the Commission, and criticising the way that the evidence leader questioned Mr Ndzeke..¹²⁵⁹ All these criticisms must be viewed against the fact that Mr Ndzeke positively identified the land as being next to the Umzimvubu River on the Ntabankulu side of the River – which accords with the description of the land by Chief Sigcau as being the Cholani family land.¹²⁶⁰

707. Ms Memela then claimed that Chief Sigcau's affidavit was problematic because the Paramount Chief would not have been involved in the administration of the land himself and his permission would not have been required. She claimed, contrary to Chief Sigcau's evidence, that one did not in fact need permission from anyone, be it headman or any traditional authority, to transfer land.¹²⁶¹ She also challenged whether Chief Sigcau had spoken to the correct officials in the area that serve under him.¹²⁶²

708. Ms Memela did not offer any contrary evidence by anyone in the area or any traditional leader.¹²⁶³ Land under the jurisdiction of an inkosi or a chief does not get transferred from the ownership of one person to that of another as is done in the case of land or property that is the subject of a title deed. That is because land under

¹²⁵⁷ Transcript 1 October 2020, p 166-167

¹²⁵⁸ Transcript 1 October 2020, p 169

¹²⁵⁹ Transcript 1 October 2020, p 170-172

¹²⁶⁰ Transcript 26 August 2020, p 103-105

¹²⁶¹ Transcript 1 October 2020, p 173-174

¹²⁶² Transcript 1 October 2020, p 176

¹²⁶³ Transcript 1 October 2020, p 180

a chief or inkosi is not owned by any individual. It is communal land administered by the local chief on behalf of his community. It is the right of use that may be passed from one family to another where the Chief approves the arrangement. There can be no doubt Chief Sigcau's version is to be preferred to that of Ms Memela.

709. Ms Memela also maintained that the affidavit allegedly deposed to by her mother was authentic. She claimed that the handwriting expert's opinion to the contrary should be rejected because she had only considered handwriting samples from 20 years before her mother's alleged affidavit.¹²⁶⁴ But this was not true. The handwriting expert had considered sample signatures *spanning* 20 years, not samples that were 20 years' older than the affidavit. Further, despite being given an opportunity to do so, Ms Memela did not engage another handwriting expert to refute the Commission's expert. When the sample signatures from just a year before the alleged affidavit was signed were shown to Ms Memela, she accepted that her criticism was unjustified but then she changed tack. She explained that, because of the standard disclaimer¹²⁶⁵ attached to the expert report, which said that the expert had worked from copies and not originals, the report should not be believed.¹²⁶⁶

710. The disclaimer in fact explained that there were certain comparisons that could not be made on a copy, such as considering differences in pen pressure. However, beyond that, comparisons based on copies could be undertaken. Having considered the copies, the expert concluded that the dissimilarities or similarities in individual characteristics were "profound". It was therefore her professional opinion that the signatures she examined that were known to be Ms Hlohlela's were not made by the same writer as the signatures found in either the purported affidavit or the alleged

¹²⁶⁴ Transcript 1 October 2020, p 167

¹²⁶⁵ Exhibit DD26, p 295

¹²⁶⁶ Transcript 1 October 2020, p 189 and p 194

sale agreement. The handwriting expert said that the sale agreement and affidavit were signed by the same hand but that was different to Ms Hlohlela's signature on official comparison documents.¹²⁶⁷ Ms Memela stated that she disputed this conclusion but offered no evidence to the contrary or indeed any plausible criticism of the expert report.¹²⁶⁸ She finally deflected the issue by saying that "we will request that we also take this through our expert". She never did so. Indeed, she had already had the report for two weeks before the hearing and had made no attempt to secure an expert in that time.¹²⁶⁹ It is fair to assume that the reason why Ms Memela did not call any handwriting expert to support her version is either that she knew that the conclusion reached by the Commission's handwriting expert was correct and, therefore, did not bother to consult another expert or she consulted another expert, who told her that the conclusion reached by the Commission's expert was correct.

711. Ms Memela disputed Mr Ndzeke's admission that the sale agreement was actually signed only in 2019. She testified that, as there would be no title deed, Mr Ndzeke had insisted upon a sale agreement and the affidavit.¹²⁷⁰ She testified that she had, therefore, given him the affidavit some time in 2015 or 2016 and the sale agreement followed suit.¹²⁷¹

711.1. When it was put to Ms Memela that the template of the affidavit was dated 2019, she said that that was "an error".¹²⁷² However, as the evidence from the Mount Frere police station demonstrated, it is literally impossible for a document deposited to in 2015 to be completed on a 2019 template because that template

¹²⁶⁷ Exhibit DD26, p 298

¹²⁶⁸ Transcript 1 October 2020, p 198

¹²⁶⁹ Transcript 1 October 2020, p 201

¹²⁷⁰ Transcript 1 October 2020, p 206

¹²⁷¹ Transcript 1 October 2020, p 207

¹²⁷² Transcript 1 October 2020, p 213

would not have been in existence yet at that time. Quite clearly, Ms Memela was sticking to the version that had been fabricated.

711.2. When Ms Memela's attention was drawn to the fact that the sale agreement that Mr Ndzeke admitted was actually signed in 2019 had a dispute resolution clause that appointed the President of the Legal Practice Council to select an arbitrator and yet, in 2015, the Legal Practice Council did not exist as it was only established in 2018, she could not offer any sensible answer. She must have realised that she and Mr Ndzeke had been caught out.

711.3. Ms Memela maintained that she did not help Mr Ndzeke get any tender.¹²⁷³ However, it was amply demonstrated, throughout Ms Memela's evidence that she played an important role in the whole procurement process. The highlights of her role include the following:

711.3.1. she communicated with JM Aviation about its bid submission and its JV agreement with AAR while the tender process was still open and bids had not yet been submitted;

711.3.2. she attended a CFST meeting while the tenders were being evaluated;

711.3.3. after the tender had been awarded to AAR/JM and the contract was under threat of being cancelled by Ms Myeni, Ms Memela supported it;

711.3.4. she negotiated the terms of the contract that were prejudicial to SAAT;

¹²⁷³ Transcript 1 October 2020, p 168

711.3.5. she misled the treasury of SAA into paying a R60 million cash deposit to AAR in circumstances where the contract did not require it and this had severely prejudicial consequences for SAAT's cash flow; and

711.3.6. she agreed to sell twelve GPUs to JM Aviation at a price far that was far lower than the market value, at a significant cost to SAAT.

712. In short, there were multiple ways in which Ms Mememla influenced the tender decision and unduly assisted JM Aviation/AAR to secure the components tender and a low price for the sale of the GPUs. In the face of this, her continued insistence that, as head of procurement, she did nothing for JM Aviation, is most regrettable. Quite clearly, she engaged in acts of corruption in order to assist AAR/JM Aviation.

713. Apart from the very strange features of the Cove Ridge sale agreement referred to earlier there were certain other features that make it quite plain that the agreement was just a fabrication to explain the payment of money into Ms Mbanjwa's account that was then used for Ms Memela's house. This is because:

713.1. the agreement was purportedly concluded in April 2015,¹²⁷⁴ but while this agreement was still in existence and the full R2,8million obligation owing on it, Ms Memela also concluded a binding sale agreement to pay R3.8million for the Bedfordview house in February 2016, and allegedly kept both in operation until May 2016.

713.2. the agreement had been signed only by Ms Memela and her husband did not sign the agreement, in circumstances where Ms Memela was married in community of property, with her husband which was in breach of section 15 of

¹²⁷⁴ Exhibit DD25(a), p 370. The signature and date are at p 373

the Matrimonial Property Act 88 of 1984.¹²⁷⁵ Section 15 provides that any transaction under the Alienation of Land Act must be signed by both spouses to be valid. In response, Ms Memela claimed that she had signed various other property purchase agreements without her husband. She offered to provide those offers to purchase or sale agreements to the Commission. When the Commission followed up with her after her evidence to request such documents, none was produced.¹²⁷⁶ Quite clearly, Ms Memela was continuing with her dishonest version.

713.3. Ms Memela had attempted to purchase a house two months before this for R1.4million. Her application for a mortgage bond for the purchase was declined by the bank.¹²⁷⁷ Despite this, two months later, she committed herself to paying R2.8 million for a property from Slipknot Investments. Ms Memela claimed that this was because she knew her mother was selling her property in the Eastern Cape.¹²⁷⁸ However, that does not make sense because the alleged sale agreement with Mr Ndzeke was only ostensibly signed in November 2015, some seven months later. Furthermore, the Slipknot sale agreement did not contain any condition that it was subject to her first securing the “sale” of her mother’s property.

713.4. Ms Memela did not sign a client form under the Financial Intelligence Centre Act 38 of 2001 (*FICA*) for Ms Mbanjwa when the Slipknot sale agreement was concluded.¹²⁷⁹ Instead, such a form was only completed a full year later in

¹²⁷⁵ Section 15(2) provides that a spouse married in community of property may not without the written consent of the other spouse (g) as a purchaser enter into a contract as defined in the Alienation of Land Act 68 of 1981, and to which the provisions of that Act apply

¹²⁷⁶ Transcript 1 October 2020, p 241 and p 271

¹²⁷⁷ Transcript 1 October 2020, p 233-234

¹²⁷⁸ Transcript 1 October 2020, p 235-236

¹²⁷⁹ Transcript 1 October 2020, p 247

2016.¹²⁸⁰ However, in terms of section 21 of FICA, client information forms are required to be provided and signed when the transaction occurs or when the business relationship begins.¹²⁸¹ The date of the client take on sheet (6 May 2016) that was ultimately signed is suspicious because it was only signed the day *after* JM Aviation had paid R2.5million to Ms Mbanjwa (5 May 2016) which money was ultimately used by Ms Memela to purchase her property in Bedfordview. This tends to indicate that the first time Ms Memela became a client of Ms Mbanjwa's was when JM Aviation had made the payment of R2.5 million into Ms Mbanjwa's account.

714. The final suspicious feature of the Slipknot agreement was eventually put to Ms Kwinana during her evidence. When Ms Kwinana appeared before the Commission, she was asked about the *domicilium* address that she had provided for Slipknot Investments under the agreement.¹²⁸² The address given was 92 President Park, Midrand. However, in 2015, Ms Kwinana had not been working out of that address for a number of years already. The agreement was signed in April 2015, and the new owner of the President Park property, Mr Mark Bates, provided the Commission with an affidavit that explained that his company had been in that property since 2013.¹²⁸³

715. It was put to Ms Kwinana that this mistaken address is precisely the kind of mistake that is made when agreements are created many years after the alleged event and

¹²⁸⁰ Exhibit DD25(c), p 1129 and p 1135

¹²⁸¹ Section 21(1) of the FICA Act requires that when an accountable institution engages with a prospective client to enter into a single transaction or to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship establish and verify the identity of the client

¹²⁸² Exhibit DD25(a), p 374

¹²⁸³ Exhibit DD33, p 201

are made to look like they were concluded earlier.¹²⁸⁴ Her response was that she had continued to write the wrong address on various documents for many years after leaving her premises. This explanation makes no sense and Ms Kwinana should be ashamed to have given these answers.¹²⁸⁵

716. In the end, the evidence presented to the Commission shows clearly that Ms Memela received payment of R2.5million from JM Aviation to facilitate the JM Aviation/AAR components tender and the sale of the GPUs. It also shows that Ms Memela, Ms Kwinana and Ms Mbanjwa conspired to try to hide their corrupt activities by fabricating agreements after the commission of their corrupt activities.

717. This type of conduct calls for prosecution. In addition, both Ms Memela and Ms Mbanjwa are officers of the Court. Ms Memela is an advocate and Ms Mbanjwa, an attorney. Despite this, they have participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. The Legal Practice Council should investigate their conduct further to determine whether they deserve to remain on the roll of advocates in the case of Ms Memela and, of attorneys, in the case of Ms Mbanjwa.

Ms Kwinana's Zanospark investment company

718. As set out above in the report, JM Aviation bought the GPUs from SAAT for approximately R3million and then immediately sold them to Swissport for R9million, thus making a profit of R6million in a day. This same calculation was put to Ms Kwinana and she was invited to accept that, as a result of SAAT's sale of the GPUs to JM Aviation, JM Aviation made R6million.

¹²⁸⁴ Transcript 7 November 2020, p 163-165 and p 239-239

¹²⁸⁵ Transcript 7 November 2020, p 167-168

719. Ms Kwinana would not accept this. She resisted the conclusion that JM Aviation made an immediate profit of R6 million. She denied this on the basis that, when you buy a motor car for R200,000 and it depreciates in value, then, when you sell it, you can only get R150,000 for it. When it was pointed out to her that that may be so for motor cars but, in this case, there was no depreciation (the sale taking place the very next day and in respect of already used equipment), she still would not concede that JM Aviation made R6 million on the sale.

720. After her evidence, Ms Kwinana's lawyer, Ms Mbanjwa provided "submissions" to the Commission in lieu of re-examining Ms Kwinana. In those submissions, Ms Mbanjwa makes the point that, in the affidavit that Mr Aires (of JM Aviation) provided to the Commission, he claimed that seven of the GPUs were taken in for repairs. She then asserted that "the cost of repairs would clearly be an add-on on the selling price that JM Aviation would charge Swissport".¹²⁸⁶ Ms Mbanjwa also criticized the evidence leader for allegedly ignoring this evidence and claimed that the evidence leader had thereby "misled the public".¹²⁸⁷

721. However, a proper consideration of Mr Aires's affidavit reveals that it does not provide support for this submission. In support of the conclusion that Mr Aires' affidavit did not support Ms Mbanjwa's submission, the following can be said:

721.1. First, although Mr Aires contends in paragraph 27 of his affidavit to the Commission that seven of the GPUs were sent for repairs "at JM Aviation's cost", he provides no documents that support this claim and the claim is

¹²⁸⁶ Submissions for Ms Kwinana dated 1 December 2020 at page 16, para (a)

¹²⁸⁷ Submissions for Ms Kwinana dated 1 December 2020 at page 5, para 2.3(a)

inconsistent with his contemporaneous emails with Swissport at the time and his emails in 2017 to Ms Memela.

721.2. Mr Kohl's affidavit makes it clear that on Thursday, 14 July 2016, Mr Aires sent an email to Swissport in which he confirmed that he had inspected the GPUs and ten of them were ready for collection.¹²⁸⁸ This was followed with an email on 28 July 2016 in which Mr Aires informed Swissport that the remaining three GPUs were ready for collection.¹²⁸⁹ By 28 July 2016, therefore, all twelve GPUs had been collected from SAAT. In an email on 2 August 2016, Mr Aires confirmed to Swissport that all the GPUs had been delivered to Swissport.¹²⁹⁰ In his contemporaneous correspondence, Mr Aires makes no reference to the need for these GPUs to be repaired at JM Aviation's cost after they had been collected from SAAT.

721.3. Furthermore, in 2017, Mr Aires provided an email to Ms Memela in which he set out the chronology related to the GPUs. This email is an annexure to one of the Open Waters reports that Ms Kwinana kept emphasising during her testimony and which she said ought to have been considered by the Commission.¹²⁹¹

721.4. Until receipt of Ms Kwinana's submissions on 1 December 2020, it had not been necessary to refer to these emails but because the issue was pertinently raised in her submissions, it is necessary to refer to them.

¹²⁸⁸ Exhibit DD25, p 361

¹²⁸⁹ Exhibit DD25, p 362

¹²⁹⁰ Exhibit DD25, p 364

¹²⁹¹ Transcript 2 November 2020, p 10-11

- 721.5. Annexure 65 to the Open Water report on the SAAT GPU transaction dated 19 June 2018 is an email dated 21 September 2017 that Mr Aires sent to Ms Memela. In that email, Mr Aires refers to the seven GPUs that needed to be repaired but records that they were repaired *by SAAT* prior to June 2016. The sale of the GPUs to JM Aviation only took place during June 2016 and so these repairs were not done by JM Aviation but by SAAT.
- 721.6. It appears that Mr Aires was, therefore, not being truthful in his affidavit. Unfortunately, Mr Aires is located in the United States of America and therefore was not available to be questioned at the Commission. Had he given evidence, this aspect would certainly have been probed further.
- 721.7. It is therefore not correct that the sale price of the GPUs was to be discounted by the repair work that JM Aviation had to do on seven GPUs. That repair work was done by SAAT before they were sold to JM Aviation. In July 2016, JM Aviation inspected the GPUs and confirmed that they were ready for collection by Swissport. By 2 August 2016, all the GPUs had been delivered to Swissport.
- 721.8. Second, Mr Aires's entire affidavit suffers from a fatal flaw. In it, Mr Aires tried to justify both the price at which JM Aviation bought the GPUs from SAAT and the price at which it sold them, a day later, to Swissport as reflecting fair market value. However, the problem with that is that despite being sold only a day apart, the sale prices were R 6 million apart. This means that Mr Aires has to justify a sale price of R3 million as being market-related on day 1 but then simultaneously justify a sale price of R9 million as being market-related on day 2. Without some explanation for a change in the market over a day, of which there is none in Mr Aires affidavit, that type of reasoning is simply untenable.

His was an attempt to defend the indefensible or to explain that which is inexplicable.

722. Of the approximately R9 million that JM Aviation received from Swissport for the GPUs, R4.3million was paid to Ms Kwinana. This was done through paying an entity called Zanospark (Pty) Ltd that Ms Kwinana controlled.¹²⁹²
723. The relevant bank statements illustrate that on 24 June 2016, Swissport paid JM Aviation R9 849 600 from the proceeds of the sale of the GPUs; on 29 June 2016, R2.5million was paid out of the account to Ms Hendricks, who is Mr Ndzeke's wife; Ms Hendricks then paid the money to Zanospark, as well as a later payment of R600 000.
724. Zanospark was only created in February 2016 and had an opening balance of R502 at the time.¹²⁹³ Thereafter, once Ms Kwinana had left SAA, further amounts were paid to her directly from JM Aviation. Through-out this period, there was no other activity in the Zanospark bank account. This money was then paid out to Ms Kwinana's personal account.¹²⁹⁴ Ms Kwinana ultimately received a total of R4.3million from JM Aviation over the period from July 2016 to September 2016.
725. Mr Ndzeke claimed that the money that had been paid from JM Aviation to Ms Kwinana's company, Zanospark, was actually his money that JM Aviation owed him, and he wanted to invest it with Zanospark as a forex investment company.¹²⁹⁵ He also stated that, although the payments were also reflected as being paid by Ms

¹²⁹² Transcript 26 August 2020, p 344-345

¹²⁹³ Exhibit DD26, p 49. See also pp 392-403

¹²⁹⁴ Exhibit DD26, p 397

¹²⁹⁵ Transcript 26 August 2020, p 346-351 and p 370

Hendricks, his wife, she was investing his money on his behalf.¹²⁹⁶ He claimed to have received updates on his investment, in the form of annual statements, which he would receive from Zanospark on email.¹²⁹⁷ However, after Mr Ndzeke was served with a summons requiring him to produce any documents he had in this regard, he stated in an affidavit that there were no such statements.¹²⁹⁸ During his evidence, however, he claimed that the documents did, in fact, exist and said that he could produce them.¹²⁹⁹ However, after the Commission had followed up with him on a number of occasions after his evidence, Mr Ndzeke failed to produce any documents. Obviously, that was because he never had any such documents and he had been dishonest in telling the Commission that they existed.

726. It should also be noted that Mr Ndzeke was also asked to report to the Commission about JM Aviation's accounting to SARS for the payment it had received from Swissport. The Swissport payment of R28.5 million had included an amount of R3.5 million for VAT, for which JM Aviation was accountable to SARS.¹³⁰⁰ Mr Ndzeke has also failed to report to the Commission on this matter. SARS should investigate this issue further and take such steps as it may deem appropriate in terms of the law.

727. It was also put to Mr Ndzeke that if Zanospark was trading in forex, then it would have needed to be licenced either by the SARB or as a financial services provider under the Financial Advisory and Intermediary Services Act 37 of 2002 (*FAIS*), but that both those institutions had advised the Commission that Zanospark had no such licences.¹³⁰¹

¹²⁹⁶ Transcript 26 August 2020, p 366

¹²⁹⁷ Transcript 26 August 2020, p 354

¹²⁹⁸ Exhibit DD26, p 0.144, para 3.3

¹²⁹⁹ Transcript 26 August 2020, p 381

¹³⁰⁰ Transcript 26 August 2020, p 380 to 382

¹³⁰¹ Exhibit DD 26, p 336-391. Transcript 26 August 2020, p 360-361

728. Mr Ndzeke's version that the JM Aviation payments to Zanospark were actually his money was inconsistent with his own evidence given earlier in the day. Earlier in the day, Mr Ndzeke had testified that he did not receive large sums of money through JM Aviation and had received payments of a maximum of R100 000 for successful deals that JM Aviation had done. Later, however, he changed his story and claimed to have been paid millions of rands that JM Aviation had owed him that he then used to invest with Ms Kwinana's entity.

729. Ms Kwinana confirmed that she established Zanospark in February 2016 with her daughter, Ms Lumka Goniwe.¹³⁰²

730. She explained that the payments she received first from Ms Hendricks (prior to Ms Kwinana leaving SAA) and, thereafter, from JM Aviation, were investments that she was placing for Mr Ndzeke and Ms Hendricks, and that they were two of around eight investment clients that Zanospark had.¹³⁰³

731. It was clear from Ms Kwinana's evidence that she engaged in extensive forex trading on online platforms, placed investments in various vehicles and also traded in cryptocurrency. This was not surprising as she is a chartered accountant and should have financial experience and investment acumen.¹³⁰⁴

732. However, if she was legitimately trading on behalf of third parties as her clients, then she would (and Zanospark would), according to an affidavit from the Financial Sector Conduct Authority provided to the Commission, be required to have a licence as a financial services provider.¹³⁰⁵ This is because in terms of FAIS, a financial service

¹³⁰² Transcript 3 November 2020, p 181

¹³⁰³ Transcript 3 November 2020, p 183 and 187

¹³⁰⁴ Transcript 3 November 2020, p 184- 187, p 192, p 211, p 215-216, p 224, and p 240-241

¹³⁰⁵ Exhibit DD33.21, p 323-384

provider is defined as anyone who, as a regular feature of the business of such person, furnishes advice; or renders an intermediary service or both. Advice is defined as any recommendation or guidance of a financial nature by means of any medium to a client in respect of the purchase of a financial product or an investment in any financial product, or on the conclusion of any other transaction aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product. An intermediary service is defined as any act performed by a person on behalf of a client the result of which is that the client enters into any transaction in respect of a financial product or with a view to buying, selling, administering or managing a financial product purchased by a client or in which the client had invested. A financial product includes securities and instruments such as shares, debentures, money market instruments, a participatory interest in a collective investment scheme, a foreign currency denominated investment instrument, including a foreign currency deposit, and any other product similar in nature declared to be a financial product by the Minister.

733. Ms Kwinana persistently denied in her evidence that she needed a licence to do forex trading¹³⁰⁶ and in the submissions made by her legal representative to the Commission on her behalf, this point is raised again.¹³⁰⁷

734. Of course, if Ms Kwinana were conducting the forex trading for herself, then she would need no licence because FAIS only regulates financial *services* that are provided *to clients*. The fact that Ms Kwinana, a chartered accountant who operated an accounting firm for many years, would not get a licence from the FSCA, if she were legitimately investing on behalf of third parties, seems highly unlikely. The

¹³⁰⁶ Transcript 3 November 2020, p 188

¹³⁰⁷ Submissions for Ms Kwinana dated 1 December 2020, page 20 para 6.3.5

absence of a licence therefore tends to indicate that Ms Kwinana was not conducting forex trading activities for others, but for herself.

735. The manner in which Ms Kwinana dealt with the funds in her account and the Zanospark account also indicates that she treated the money as her own and not as the investment monies of clients. For example:

735.1. the Zanospark bank account had no activity in it until the payments from JM Aviation.¹³⁰⁸

735.2. the money was always transferred into her personal account and disappeared from there. This is not the conduct of a financial advisor who should be keeping her clients' funds separate from her own.¹³⁰⁹

735.3. Zanospark was unable to provide the Commission with any records of the investments. By way of a summons, it was required to produce any and all documents evidencing the investments and trading done on behalf of Ms Hendricks and Mr Ndzeke but was unable to do so. It could produce no client ledger where the clients' investments and their progress was noted. It could produce no investment statements provided to clients, nor a single email to demonstrate the existence of a client-relationship. Despite this, Ms Kwinana claimed that she had sent out annual statements in January of each year¹³¹⁰ and concluded FICA documents¹³¹¹ but just could not give them to the Commission.

¹³⁰⁸ Exhibit DD26, p 104-111

¹³⁰⁹ Exhibit DD26, p 104-111 and transcript 3 November 2020, p 227 and p 229

¹³¹⁰ Transcript, p 3 November 2020, p 198

¹³¹¹ Transcript 3 November 2020, p 235-236

735.4. Ms Kwinana's attempts to justify why she could not produce the documents was not credible. She claimed that Zanospark has a strict confidentiality policy that prevented her from ever emailing her clients. According to her, she would print the statements out and then deliver them by hand to her clients in January of a year, wherever they happened to be – at the office, at the airport.¹³¹² This was flatly contradicted by Mr Ndzeku who testified that he had received the statements via email. In the end, both Mr Ndzeku and Ms Kwinana were simply giving dishonest versions of what the position was.

735.5. Ms Kwinana also claimed that her server had been seized in February 2020¹³¹³ with the result that she had none of the electronic copies of the annual statements.¹³¹⁴ However, if this were a legitimate business, then it strains belief that she would not have retrieved these records from the host or at least keep back-ups somewhere.

735.6. In any event, the company that confiscated the server, Onero, told the Commission that the server was, in fact, confiscated in April 2019¹³¹⁵ – which means that the last statements from December 2019¹³¹⁶/January 2020¹³¹⁷, which Ms Kwinana claimed she had prepared for her clients, would still have been in her possession. Yet, she had failed to produce these in response to the summons. When I pressed her on this during her evidence, she then changed her story and said that she did not provide them because there were so many documents referred to in the summons and she did not have all of them. That

¹³¹² Transcript 3 November 2020, p 205

¹³¹³ Transcript 3 November 2020, p 199

¹³¹⁴ Transcript 3 November 2020, p 198

¹³¹⁵ Transcript 7 November 2020, p 55. Ms Kwinana did not dispute this date

¹³¹⁶ Transcript 3 November 2020, p 199

¹³¹⁷ Transcript 3 November 2020, p 205

explanation, as I pointed out, just did not bear scrutiny – you don't fail to produce documents in response to a summons because you only have some of the number that are summonsed; you produce those you have.¹³¹⁸

736. All these factors point clearly to the conclusion that Ms Kwinana was not investing Mr Ndzeke's money for him. The money she received from JM Aviation and Ms Hendricks was meant *for her*.

737. Indeed, the evidence showed that Ms Kwinana invested the R4.3 million in a property that she purchased through a family trust. On Mr Ndzeke's own version, he was investing in forex trading in order to hedge against the falling Rand.¹³¹⁹ It was therefore put to Ms Kwinana that, if she was in fact investing Mr Ndzeke's money, she would not have been permitted to buy property located in South Africa with the money because this would provide no "hedge against the Rand".¹³²⁰ She had no adequate answer to this proposition.

738. The evidence overwhelmingly pointed to the fact that the money Ms Kwinana received from Ms Hendricks and JM Aviation was hers to do with as she pleased. She received this money after:

738.1. she, as a member of the Board of SAA, had approved that SAA enter into a contract with Swissport for ground handling services in terms of which JM Aviation managed to buy GPUs from SAAT and made a R6 million profit in a day;

¹³¹⁸ Transcript 7 November 2020, p 99

¹³¹⁹ Transcript 26 August 2020, p 347 - 351

¹³²⁰ Transcript 3 November 2020, p 251-253

738.2. she, as the chair of the Board of SAAT, had taken part in a decision to award unjustifiably and unfairly the components tender to the joint venture of JM Aviation and AAR.

739. As the report highlighted above, Ms Kwinana presented the Commission with re-examination submissions at the conclusion of her oral evidence. She filed the submissions on 1 December 2020.

740. Ms Kwinana complained in her submissions that the Commission had adopted an “inquisitorial” approach to her evidence and contended that she had suffered prejudice as a result.¹³²¹ Ms Kwinana also said that the questioning by the evidence leader had been “random, haphazard and incoherent”.¹³²²

741. However, as the detailed account of Ms Kwinana’s testimony above shows, Ms Kwinana was provided with a fair opportunity to respond to the questions put to her. She gave evidence for three days at the Commission and any consideration of the transcript of the evidence will show that her questioning was structured in a logical and coherent manner.

742. Ms Kwinana emphasised repeatedly in her submissions that the pertinent decisions on which she was called to account were taken by the Boards of SAA or SAAT.¹³²³ This explanation appears to have been provided to shift, or at least dilute, the blame attributable to Ms Kwinana. However, the efforts do not avail her because as a member of those Boards, she was still accountable for her own conduct. With regard

¹³²¹ Ms Kwinana’s re-examination submissions dated 1 December 2020, paras 1.2.2.5 and 8.1 to 8.2

¹³²² Ms Kwinana’s re-examination submissions dated 1 December 2020, para 1.2.2.8

¹³²³ See, for example, Ms Kwinana’s re-examination submissions dated 1 December 2020, para 2.1.1 a) and 2.2 b)

to SAAT, she was the Chairperson of SAAT'S Board and, therefore, that Board's leader.

743. The bulk of the submissions are directed to a reformulation of the evidence that Ms Kwinana already gave under oath.¹³²⁴ That is not the purpose of re-examination. Under the Commission's Rules, re-examination is permitted in order to clarify the evidence of a witness, not to repeat or reformulate it.

744. The efforts made by Ms Kwinana in the re-examination submissions to justify her receipt of payments and the various breaches of her fiduciary and other legal obligations do not assist her. Ms Kwinana has failed to give any plausible explanation for why as the Chairperson of SAAT and a Board member of SAA it was lawful and appropriate for her to have received payments from an entity, and persons affiliated with it, that was a supplier to SAAT. The payments were, therefore, probably corrupt payments because they were made in exchange for decisions, in which Ms Kwinana was involved, that benefitted the entity that made the payments. The Commission will recommend that the NPA considers prosecuting Ms Kwinana for the offence of corruption.

Use of external service providers

745. One of the themes that has emerged in the evidence presented to the Commission is the use of external service providers when there were already ably qualified and skilled staff working within the various SOEs. This use of duplicate external service

¹³²⁴ See, for example, Ms Kwinana's re-examination submissions dated 1 December 2020, paras 3.1 to 3.6

providers was often a means by which corruption was allowed to flourish within the SOEs. Attention was therefore given to this issue in the investigation into SAA.

746. The SAA Working Capital Tender Awarded to the McKinsey Regiments Consortium

Background

747. Mr Phetolo Ramosebudi was the South African Airways (SAA) Treasurer from January 2012 to February 2015 when he left SAA to become the Transnet Treasurer. Prior to joining SAA, Mr Ramosebudi had been the Treasurer at Airports Company South Africa (ACSA) from 2007 to 2011.¹³²⁵

748. While Mr Ramosebudi was Treasurer of ACSA, he developed a corrupt relationship with Regiments Capital. This is based on the following transactions:

748.1. between 2010 and 2013 Mr Ramosebudi issued invoices in the names of entities controlled by him or his brother to Regiments Capital in amounts that aggregated to R9 132 490,39.¹³²⁶

748.2. the invoices were emailed to Niven Pillay or Eric Wood, both of whom were partners of Regiments Capital at the time.¹³²⁷

¹³²⁵ Transcript 26 November 2020, p 20

¹³²⁶ Transcript 26 November 2020, p 94-138

¹³²⁷ Transcript 26 November 2020, p 94-138. Ramosebudi Bundle FOF-04-085- 092 and FOF-04-712 -726

748.3. Regiments Capital did not pay all of these invoices, but did pay to Mr Ramosebudi or the entities linked to him, an aggregate amount of R5 173 013.66 over the same period.¹³²⁸

748.4. Mr Ramosebudi was unable to provide any explanation for these invoices and payments and repeatedly raised his right against self-incrimination when questioned in relation to them.¹³²⁹

749. It seems clear that these payments to Mr Ramosebudi were a corrupt quid pro quo for Mr Ramosebudi's role in allowing Regiments Capital to extract more than R50 million in gratuitous payments that were funded by ACSA.

750. In 2008 Regiments Capital were engaged by ACSA to advise it on a number of funding structures.¹³³⁰ Although Regiments had been appointed on terms that provided for a specific fee,¹³³¹ with the collusion of Mr Ramosebudi, Regiments Capital arranged to extract more than an additional R50 million at the expense of ACSA. The additional Regiments Capital "fees" were the following:

750.1. R13 165 348 (R11 548 000 plus VAT) which was invoiced by Regiments Capital to Nedbank in relation to a R2 billion interest swap between Nedbank Capital and ACSA and then recovered by Nedbank from ACSA over the life of the interest swap transaction.¹³³²

¹³²⁸ Transcript 26 November 2020, p 94 and p 98-107

¹³²⁹ Transcript 26 November 2020, p 94-138

¹³³⁰ Transcript 26 November 2020, p 30

¹³³¹ Transcript 26 November 2020, p 29. Ramosebudi Bundle FOF-04-020

¹³³² Transcript 26 November 2020, p 37-41. Ramosebudi Bundle FOF-04-023

750.2. R10 784 561.88 (R9 460 142 plus VAT) which was invoiced by Regiments Capital to Nedbank in relation to a R1.5 billion interest swap between Nedbank Capital and ACSA and then recovered by Nedbank from ACSA over the life of the interest swap transaction.¹³³³ This transaction was entered into by ACSA on the recommendation of Regiments Capital to avoid the interest rate exposure on a loan from the Development Bank of South Africa that Regiments Capital had apparently been paid by ACSA for arranging in the first place.¹³³⁴

750.3. Additional amounts aggregating to R 11 420 477.82 (R10 017 963 plus VAT) invoiced by Regiments Capital annually to Nedbank from March 2011 to March 2019 in respect of the same R1.5 billion interest swap between Nedbank Capital and ACSA, which amounts were recovered by Nedbank from ACSA over the life of the interest swap transaction.¹³³⁵

750.4. R22 260 782.28 (R19 527 002 plus VAT) which was invoiced by Regiments Capital to Standard Bank in relation to a R1.75 billion interest swap between Standard Bank and ACSA and then recovered by Standard Bank from ACSA over the life of the interest swap transaction.¹³³⁶

751. Mr Ramosebudi provided comfort to Standard Bank that ACSA was willing to enter into these arrangements in terms of which Standard Bank¹³³⁷ would pay Regiments Capital “fees” which would then be repaid by ACSA over the life of the transactions.¹³³⁸ There is no evidence to suggest that anyone at ACSA other than

¹³³³ Transcript 26 November 2020, p 37 -41. Ramosebudi Bundle FOF-04-062

¹³³⁴ Transcript 26 November 2020, p 59-60

¹³³⁵ Transcript, 26 November 2020, p 146 -147. Ramosebudi Bundle FOF-04-111

¹³³⁶ Transcript 26 November 2020, p 65-78. Ramosebudi Bundle FOF-04-084

¹³³⁷ It appears that Nedbank were happy to rely on the say so of Eric Wood of Regiments Capital and did not seek confirmation from anyone at ACSA

¹³³⁸ Transcript 26 November 2020, p 65-69. Ramosebudi Bundle FOF-04-082

Mr Ramosebudi was aware of these arrangements. On his own version, Mr Ramosebudi was not authorised to enter into arrangements like these for the payment of additional “fees” to Regiments Capital.¹³³⁹

752. Before leaving this background topic, it is necessary to note a disturbing feature of Nedbank’s involvement in these transactions.

752.1. The Nedbank dealers who engaged with Regiments Capital in relation to the ACSA transactions were Mario Visenza and Moss Brickman.

752.2. Mr Visenza and Mr Brickman appear to have had an arrangement with Eric Wood of Regiments Capital in terms of which the Regiments Capital “fee” which was to be repaid by ACSA over the life of the transaction would be matched by an equivalent amount to be paid to Nedbank by ACSA. This arrangement was reflected in Mr Visenza’s repeated statement to Mr Wood in emails relating to Nedbank ACSA Regiments transactions. Mr Visenza’s statement was:

“We leave it to you to include a margin for us to share on the usual 50/50 agreement”.¹³⁴⁰

752.3. Nedbank’s arrangement with Regiments Capital was, accordingly, one in terms of which Regiments Capital, which was ACSA’s agent, was incentivised to act contrary to its principal’s interests by increasing the margin payable by ACSA to Nedbank and, thus, increasing its 50% share of this margin.

752.4. There is no evidence that Nedbank ever sought proof from ACSA that ACSA had authorised the arrangement in terms of which Nedbank, as ACSA’s

¹³³⁹ Transcript 26 November 2020, p 69-70

¹³⁴⁰ See for example Ramosebudi Bundle FOF-04-021 email from Mario Visenza to Eric Wood, 1 October 2009 (copied to Moss Brickman and Elize Britz of Nedbank) and Ramosebudi Bundle FOF-04-032 email from Mario Visenza to Eric Wood, 16 February 2010 (copied to Moss Brickman of Nedbank)

counterparty, would pay the “fees” of ACSA’s agent, Regiments Capital, up front and recover these “fees” from ACSA over the life of the transaction with ACSA. Still less is there evidence that Nedbank informed ACSA that Regiments Capital, as ACSA’s agent, was being incentivised to increase the margin payable by ACSA to Nedbank.

752.5. On its face, the arrangement between Mr Visnenza and Mr Brickman on the one hand, and Mr Wood, on the other, would appear to contravene section 6(b)(ii) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. That provision reads:

“6 Offences in respect of corrupt activities relating to agents

Any-

...

(b) person who, directly or indirectly-

...

(ii) gives or agrees or offers to give any gratification to an agent, whether for the benefit of that agent or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner-

(aa) that amounts to the-

(aaa) illegal, dishonest, unauthorised, incomplete, or biased;

...

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(bb) that amounts to-

(aaa) the abuse of a position of authority;

(bbb) a breach of trust; or

- (ccc) the violation of a legal duty or a set of rules;
- (cc) designed to achieve an unjustified result; or
- (dd) that amounts to any other unauthorised or improper inducement to do or not to do anything,
- is guilty of the offence of corrupt activities relating to agents.”

752.6. The Commission had intended to canvass these issues with Nedbank in evidence at the hearings, but the time for hearings ran out before this could take place. So Nedbank’s version in relation to these transactions has not been heard. This is a matter which requires further investigation by the appropriate authorities and recommendations in this regard are made in the concluding section of this Chapter, together with recommendations in relation to the roles of Regiments Capital and Messrs Ramosebudi, Wood and Pillay in these transactions.

The Corrupt Manipulation of the SAA Working Capital Tender

753. SAA Bid No RFP 085/13 was an invitation issued on 19 November 2013 for proposals “for the appointment of a consultant to assist the South African Airways Group with the unlocking of working capital.”¹³⁴¹ The framing of this bid and its adjudication were corruptly manipulated by Mr Ramosebudi and Regiments Capital so as to ensure that the tender was awarded to the McKinsey Regiments consortium.

754. It is important to note that there is no evidence that McKinsey was aware of the corruption linked to its joint bid with Regiments Capital. After the corruption had been

¹³⁴¹ Ramosebudi Bundle FOF-04-133 - 201

pointed out to McKinsey by the Commission, McKinsey repaid to SAA the full amount that it had received from SAA pursuant to its appointment flowing from the joint bid with Regiments Capital.¹³⁴² The amount paid by McKinsey to SAA was R12 484 710. That payment was made by McKinsey pursuant to an approach by the Commission's Investigation Team and Legal Team where they shared with McKinsey the evidence uncovered by the Commission showing wrongdoing in relation to SAA Bid No RFP 085/13.

755. The corrupt rigging of the Working Capital tender started more than a month before the bid invitation was issued.

755.1. On 14 October 2013, Mr Ramosebudi sent Mr Wood at Regiments Capital an email of a draft of the scope of work to be included in the Working Capital tender.¹³⁴³

755.2. On 24 October 2013 Mr Ramosebudi emailed Mr Wood a draft of the evaluation criteria to be included in the Working Capital tender. His covering email invited Mr Wood to "review and comment".¹³⁴⁴

755.3. On 28 October 2013 Mr Wood emailed Mr Ramosebudi a revised draft of the evaluation criteria. The revised draft of the evaluation criteria had been sent to Mr Wood earlier that day by Mr Indheran Pillay of Regiments Capital. The revised draft had been copied to Mr Tewedros Gebreselasie of Regiments Capital. It, therefore, appears that Mr Indheran Pillay and Mr Gebreselasie were

¹³⁴² Transcript26 May 2021, p 63-65

¹³⁴³ Ramosebudi Bundle FOF-04-115 – 118 email from Phetolo Ramosebudi to Eric Wood 14 October 2013

¹³⁴⁴ Ramosebudi Bundle FOF-04-119 – 122 email from Phetolo Ramosebudi to Eric Wood 24 October 2013

also aware of Regiments Capital's revision of the evaluation criteria for the SAA Working Capital tender.¹³⁴⁵

755.4. The changes made by Regiments Capital to the draft evaluation criteria were material. Most of these changes were incorporated in the final bid invitation document that was issued on 19 November 2013.¹³⁴⁶

755.5. On 29 October 2013 Mr Ramosebudi emailed Mr Wood an invoice in the amount of R375 606 issued to Regiments Capital in the name of Mr Ramosebudi's entity, Rams Capital CC.¹³⁴⁷ On 7 November 2013 Regiments Capital paid the invoiced amount of R375 606 to Riskmaths Solutions (Pty) Ltd, another of Mr Ramosebudi's entities. The payment was made from the Regiments Capital Standard Bank business current account into the FNB business account of Riskmaths Solutions (Pty) Ltd.¹³⁴⁸

756. Twelve days after Regiments Capital had paid its bribe to Mr Ramosebudi, the SAA Working Capital Bid Invitation document was issued on 19 November 2013 with a closing date of 4 December.¹³⁴⁹ So, while all other bidders were given only 15 days between receiving notice of the bid and submitting their bid, Regiments Capital had an additional month to consider the scope of work section of the bid and had reformulated the evaluation criteria of the bid three weeks before the bid invitation was issued.

¹³⁴⁵ Ramosebudi Bundle FOF-04-123 – 126 email from Eric Wood to Phetolo Ramosebudi 28 October 2013

¹³⁴⁶ See Ramosebudi Bundle FOF-04-127 – 129. Compare Ramosebudi Bundle FOF-04-153 - 154

¹³⁴⁷ Ramosebudi Bundle FOF-04-130 - 131 email from Phetolo Ramosebudi to Eric Wood 29 October 2013

¹³⁴⁸ Ramosebudi Bundle FOF-04-654 (Regiments Capital Standard Bank account statement, 30 November 2013 and FOF-04-691 – 692 (Riskmaths Solutions FNB account statement, 9 November 2013)

¹³⁴⁹ Ramosebudi Bundle FOF-04-133 – 201 at 137.

757. Regiments Capital submitted a bid in partnership with McKinsey.¹³⁵⁰ As pointed out above, there is no evidence that McKinsey was aware of the corrupt dealings between Regiments Capital and Mr Ramosebudi linked to this bid.

758. The Regiments Capital McKinsey bid was structured so that the remuneration payable to the consortium was not fixed but would be 8% of the benchmarked savings achieved for SAA. This created a potential problem in that the Bid Adjudication Committee considering the tender only had authority to award tenders less than R100 million and the 8% of savings might exceed R100 million. Mr Ramosebudi flagged this issue in an email to the Bid Adjudication Committee on 24 January 2013. He suggested that McKinsey be approached to place a R100 million cap on their fees. Later, on 24 January 2013 he forwarded to Mr Wood his confidential email to the Bid Adjudication Committee. In that way he alerted Mr Wood to the fact that, unless the Regiments Capital McKinsey bid price was capped at R100 million, the tender award would have to be approved by the SAA Board and Mr Ramosebudi would lose his control over the process.¹³⁵¹

759. On 24 January 2013 Mr Ramosebudi also forwarded to Mr Wood confidential exchanges between the Bid Adjudication Committee and the Regiments McKinsey consortium's two remaining competitors, Boston Consulting¹³⁵² and the IQ Group.

¹³⁵³ These exchanges included details of the pricing structure of the Boston

¹³⁵⁰ Ramosebudi Bundle FOF-04-202 - 227

¹³⁵¹ Ramosebudi Bundle FOF-04-228 email from Mr Ramosebudi to Mr Wood, 24 January 2014 forwarding email from Mr Ramosebudi to Reinette Slabbert and others, 24 January 2014

¹³⁵² Ramosebudi Bundle FOF-04-235 – 247 email from Mr Ramosebudi to Mr Wood, 24 January 2014 forwarding exchanges between the Bid Adjudication Committee and Boston Consulting

¹³⁵³ Ramosebudi Bundle FOF-04-248– 251 email from Mr Ramosebudi to Mr Wood, 24 January 2014 forwarding exchanges between the Bid Adjudication Committee and IQ Group

Consulting and IQ Group bids. So, the Regiments Capital McKinsey bidders would have knowledge of this information when they were approached to cap their price.

760. On 28 January 2013 Mr Ramosebudi forwarded to Mr Wood an internal Bid Adjudication Committee email reporting that McKinsey had still not confirmed that they would cap their fees below R100 million.¹³⁵⁴

761. Later, on 28 January 2013 McKinsey emailed Reinette Slabbert of the Bid Adjudication Committee to confirm a cap on their fees of R80.5 million for a saving of R1.2 billion.¹³⁵⁵

762. Upon receipt of this communication from McKinsey, Ms Slabbert emailed the Bid Adjudication Committee later on 28 January 2013 recommending that the Committee establish from Boston Consulting and the IQ Group what their fees would be for a saving of R1.2 billion.¹³⁵⁶ Mr Ramosebudi immediately intervened to quash Ms Slabbert's proposal. He wrote an email to the Bid Adjudication Committee stating:

"I am seriously very unhappy the way this tender is run, Reinette seems to be biased and we can't BAFO after BAFO because someone didn't price the way Reinette expected."¹³⁵⁷

¹³⁵⁴ Ramosebudi Bundle FOF-04-252 - 254 email from Mr Ramosebudi to Mr Wood, 28 January 2014 forwarding an exchange between the Bid Adjudication Committee and McKinsey

¹³⁵⁵ Ramosebudi Bundle FOF-04-255 email from Christina Planert to Reinette Slabbert, 28 January 2014

¹³⁵⁶ Ramosebudi Bundle FOF-04-255 email from Reinette Slabbert to Bid Adjudication Committee, 28 January 2014

¹³⁵⁷ Ramosebudi Bundle FOF-04-260 email from Phetolo Ramosebudi to Bid Adjudication Committee, 29 January 2014

In the face of Mr Ramosebudi's accusation, Ms Slabbert backed down,¹³⁵⁸ and the tender was awarded to the Regiments McKinsey consortium.¹³⁵⁹

The Payments

763. SAA ultimately paid McKinsey an amount of R12 484 710 in March 2015 in respect of the Working Capital Tender.¹³⁶⁰

764. The amount of R12 484 710 included Regiments Capital share of the consortium fees. On 31 March 2015, Regiments Capital invoiced McKinsey in the amount of R6 241 500 for its share of the fees (just under 50% of R12 484 710). Regiments Capital, in turn, paid R2 496 600 (40% of the amount it had invoiced McKinsey) to Homix, and R312 075 (5% of the amount it had invoiced McKinsey) to Albatime, who had introduced Regiments Capital to Salim Essa.¹³⁶¹

765. Mr Ramosebudi invoked his right against self-incrimination and declined to answer a question whether he knew that Regiments Capital had paid to a shell company designated by Salim Essa or Ashok Narayan any amounts it received on the SAA Working Capital contract.¹³⁶²

¹³⁵⁸ Ramosebudi Bundle FOF-04-260 email from Reinette Slabbert to Bid Adjudication Committee, 29 January 2014

¹³⁵⁹ Ramosebudi Bundle FOF-04-275 email from Christina Planert to Reinette Slabbert and others, 6 February 2014

¹³⁶⁰ McKinsey Bundle FOF-08-475

¹³⁶¹ Ramosebudi Bundle FOF-04-596 Extract from Regiments Capital spreadsheet "Advisory Invoices Tracking"

¹³⁶² Transcript 26 May 2021, p 63-65

766. As pointed out above, McKinsey has now repaid to SAA the full amount of the R12 484 710 it received from SAA on the Working Capital contract, including the R6 241 500 it paid to Regiments Capital on the contract.

External “legal” services

767. Ms Kwinana testified that the staff of SAA were of a very high calibre; were well-qualified and competent. With particular reference to their legal personnel, she said that they were very highly qualified and the Board would rely on them regularly.¹³⁶³

768. Ms Kwinana testified that she knew Mr Nick Linnell¹³⁶⁴ and that he used to attend Board meetings and committee meetings at SAA. Although she never asked why an outsider was present at such meetings,¹³⁶⁵ she said that she did not know why he was at those meetings. She testified that she assumed that Ms Myeni would know as she had invited him.¹³⁶⁶ Ms Kwinana testified that sometimes, Mr Linnell would offer a legal opinion on a matter or he would even make presentations.¹³⁶⁷ If the Board needed a quick legal opinion or some legal research, they would ask Mr Linnell to provide the legal opinion or to conduct the required research¹³⁶⁸

¹³⁶³ Transcript 2 November 2020, p 94

¹³⁶⁴ Transcript 2 November 2020, p 117

¹³⁶⁵ Transcript 2 November 2020, p 118

¹³⁶⁶ Transcript 2 November 2020, p 122

¹³⁶⁷ Transcript 2 November 2020, p 122

¹³⁶⁸ Transcript 2 November 2020, p 124

769. When asked why, when SAA had such well qualified lawyers, they needed an outsider to be there to give legal advice, Ms Kwinana could not give a meaningful answer.¹³⁶⁹ However, she confirmed that Mr Linnell did not actually attend those meetings in his capacity as a lawyer.¹³⁷⁰ However, the evidence shows that Mr Linnell was heavily involved in legal matters involving Ms Myeni as the Chair of the Board of SAA. He briefed Werksmans on her behalf¹³⁷¹ when she sought an opinion about the CEO, Mr Kalawe, and about the conduct of the Board.

770. Mr Linnell was paid by SAA for this work¹³⁷² in circumstances where Ms Kwinana indicated she did not understand his purpose and that SAA had its own highly qualified in-house legal team. Mr Linnell was engaged in circumstances where no proper procurement processes were followed as they should have been under the PFMA.¹³⁷³

771. Given that SAA already had briefed attorneys, had in-house legal counsel, and that Mr Linnell was not actually a practising attorney in South Africa, Ms Myeni was asked what role Mr Linnell was playing and why he billed SAA for his services. She was also asked why his invoices¹³⁷⁴ (amounting to just under R2million) were paid by SAA in circumstances where it appears no procurement processes had been followed. Ms Myeni was also asked why Mr Linnell was permitted to attend confidential board meetings when he was not fulfilling the role of an attorney (who would have then been subject to legal privilege) and whether she accepted that

¹³⁶⁹ Transcript 2 November 2020, p 124

¹³⁷⁰ Transcript 2 November 2020, p 127

¹³⁷¹ DD34 p 1979 para 7.3, p 1980 para 10

¹³⁷² Exhibit DD34.27, p 1585-1692.

¹³⁷³ Transcript 2 November 2020, p 134

¹³⁷⁴ Exhibit DD34(b), p 1590-1589. Many of these invoices were addressed to Ms Kwinana – despite her testimony that she did not know what Mr Linnell did at SAA

spending just under R2million in these circumstances would amount to irregular and wasteful expenditure in breach of the PFMA.

772. Ms Myeni refused to answer these questions and invoked her privilege against self incrimination.¹³⁷⁵ When she responded on affidavit to the question of Mr Linnell's attendance at Board meetings, Ms Myeni confirmed that he had attended the meetings on occasion when he was invited by the Board to do so. Had Ms Myeni in fact given this answer during her testimony, the answer would have been followed up with a series of further questions about why his attendance was required when there was a fully functional staff compliment at SAA; who, precisely, had called for him to attend; what value he had added to those Board meetings; and whether having an outsider at the meetings was not in conflict with the confidentiality that Ms Myeni was often keen to emphasise for the work of SAA's Board. Evidently, Ms Myeni elected only to answer the Commission's questions on affidavit, to avoid these obvious follow-up questions, and to only give answers that did not expose any wrongdoing. Despite repeatedly stating that she wished to be helpful to the Commission, her conduct revealed something else. Ms Myeni's entire approach to the Commission was consistent with a witness eager not to be exposed to probing questioning. Her answers on affidavit were brusque and provided no legitimate reason for involving Mr Linnell in confidential board work, other than to advance her own personal interests.

773. Ms Myeni was also afforded an opportunity after her oral evidence to respond to the evidence of Werksmans about the work they did for Ms Myeni in April 2014 and in terms of which they were briefed by Mr Linnell before he was even appointed at SAA in any capacity. Ms Myeni provided an affidavit to the Commission in which she

¹³⁷⁵ Transcript 6 November 2020, p 170-192

declined to deal with Werksmans' evidence on the basis that she could incriminate herself.

774. The evidence presented to the Commission shows that Ms Myeni used Mr Nick Linnell as a personal lawyer, at public expense and without regular procurement processes, to guide her in furthering her own personal interests. She also sought to use public funds to get legal advice on advancing her own personal interests with the SAA Board, instead of advancing the airline's interests.

775. The evidence presented in the Eskom workstream also reveals the role that Mr Linnell played, through Ms Myeni's invitation, in the efforts to remove three executives at Eskom in March 2015. Four executives were suspended, three of whom never returned to Eskom.

BEYOND SAA

State security resources

776. The evidence presented at the Commission showed that the project of state capture was often facilitated through the use of state resources to advance the personal interests of officials. The Commission therefore investigated instances where state resources were used to further the project of state capture, corruption and fraud at SOEs.

777. In the case of SAA, there were two instances of irregular and unlawful employment of state security resources.

777.1. The first instance involved vetting the management of SAA for security clearance. The manner in which the vetting was conducted and its scope indicates that the vetting was employed for an ulterior purpose of intimidating

and harassing members of staff. SAA lost staff as a result of the vetting and Ms Myeni attempted to use the results of the vetting to have one member of the finance team removed from her position.

The second instance involved the security detail that was provided to Ms Myeni.

Illegal vetting of staff at SAA

778. Ms Nokunqoba Gloria Dlamini was employed by the State Security Agency (SSA) and based in the Pretoria Head Office as an analyst and evaluator. This means that she interpreted and analysed reports from information obtained from vetting field work.¹³⁷⁶ Ms Dlamini testified before the Commission that she was assigned the role of a project manager when SAA was vetting its executives.¹³⁷⁷

779. Ms Mpshe testified that she received a call from the SSA to the effect that they needed a report about SAA's decision to close the route through Dakar, Senegal – a decision made by Mr Bosc because it was not commercially viable. Ms Mpshe consulted one of the legal advisors in SAA and the two of them decided that Ms Mpshe could not simply divulge all of this information because it involved confidential information about particular employees of SAA, in circumstances where the request did not come from the normal protocol – i.e. from one government department to another. They communicated this to the SSA official. Thereafter, they received a letter from the Director-General of the SSA, Mr Dlodlo, who instructed them to reply to the request.¹³⁷⁸ Then a further letter arrived from the Minister of State Security,

¹³⁷⁶ Transcript 19 February 2020, p 11

¹³⁷⁷ Transcript 19 February 2020, p 12

¹³⁷⁸ Transcript 1 July 2019, p 147

Minister Mahlobo and then one from the National Treasury indicating that staff would be vetted by the SSA.¹³⁷⁹

780. Ms Dlamini testified that the vetting of executives and support staff at SAA had its origins in a letter sent by the Minister of State Security, Mr David Mahlobo, to the Minister of Finance, Mr Nhlanhla Nene, on 13 October 2015.¹³⁸⁰ The letter stated, inter alia: “It has come to the attention of the State Security Agency that there is an urgent need for vetting and re-vetting of state owned enterprises given sensitive information received on an ongoing basis.”¹³⁸¹ The letter went on to state: “As per section 1 of the National Strategic Intelligence Act 39 of 1994 as amended by Act 67 of 2002 states that the National Intelligence Agency has the mandate to vet all other National, Provincial and Local Government Departments, Parastatals and their service providers.” The letter ultimately stated that the Chairperson of SAA would be required to provide a list of all executive management support staff.¹³⁸²

781. Minister Mahlobo purported to be quoting from section 1 of the National Strategic Intelligence Act (NSIA). That section is a definitions section and contains no such provision. In fact, there is no such provision anywhere in the NSIA. It is not clear how Minister Mahlobo relied upon and quoted a non-existent section to justify the plan to vet SAA employees. Section 2A(1) gives the SSA the mandate to vet employees of organs of state (which includes state owned entities) but it provides as follows:

“The relevant members of the National Intelligence Structures may conduct a vetting investigation in the prescribed manner to determine the security competence of a person if such a person (a) is employed by or is an applicant to an organ of state; or (b) is rendering a service or has given notice of intention to render a service to an

¹³⁷⁹ Transcript 1 July 2019, p 148

¹³⁸⁰ Exhibit DD24, pp 17-18

¹³⁸¹ Exhibit DD24, p 18, para 2

¹³⁸² Exhibit DD24, p 18, para 6

organ of state, which service may (i) give him or her access to classified information and intelligence in the possession of the organ of state; or (ii) give him or her access to areas designated national key points in terms of the National Key Points Act, 1980. “

782. Ms Dlamini testified that her superior, General Dlodlo, explained to her that SSA would be vetting SAA because it was an SOE and vetting SOEs was part of SSA's mandate.¹³⁸³ Ms Dlamini confirmed that, in her view, just being an employee of an SOE meant that one had to be vetted.¹³⁸⁴ She also confirmed that at no point in the vetting exercise did the team assess whether the employees they vetted (executive managers and support staff) had access to classified information.¹³⁸⁵

783. On 26 November 2015, Minister Nene responded to Minister Mahlobo's letter.¹³⁸⁶ In his letter, Minister Nene repeated the purported (but wrong) quote from the National Strategic Intelligence Act. The letter also described two letters from Ms Myeni setting out all executive management and support staff who were to be vetted. The one letter from Ms Myeni was dated 2 November 2015 and the other, 5 November 2015.

784. The letter from Ms Myeni dated 2 November 2015¹³⁸⁷ had 13 names of executives of SAA that were to be vetted. The one dated 5 November 2015¹³⁸⁸ had a further list of around 118 people consisting of executive managers and support staff. Ms Dlamini testified that, in her view, the Board members of SAA should also have been

¹³⁸³ Transcript 19 February 2020, p 28

¹³⁸⁴ Transcript 19 February 2020, p 30

¹³⁸⁵ Transcript 19 February 2020, p 46

¹³⁸⁶ Exhibit DD24, p 19

¹³⁸⁷ Exhibit DD24, p 20.

¹³⁸⁸ Exhibit DD24, p 21-22

vetted as people who performed services for an organ of state if they were privy to classified information.¹³⁸⁹

785. This is also provided for in clause 1.5 of Chapter 5 of the Minimum Information Security Standard (*MISS*) document. That clause provides that political appointees, directors, generals, ambassadors will not be vetted unless the President so requests or the relevant contract so provides, but that from the lowest level up to Deputy DG, all staff members and any other individuals who should have access to classified information must be subject to security vetting.¹³⁹⁰

786. In summary:

786.1. Section 2A (1) of the NSIA (that is the National Strategic Intelligence Act) provides that SSA may vet, in the prescribed manner to determine the security competence of a person, or employees of organs of state, and *may* vet in this manner service providers to organs of state *if* they have access to classified information.

786.2. The MISS provides that all staff members or any other individuals who have access to classified information must be vetted.

786.3. Directors of the Board of SAA will be service providers and thus, in order for SAA to be empowered to vet them, they must have access to classified information and if they have access to that information, the MISS makes it mandatory to vet them.

¹³⁸⁹ Transcript 19 February 2020, p 42- 43

¹³⁹⁰ Aviation legislation bundle p 465

787. Given that the vetting was not conducted in respect of Board members, Ms Dlamini admitted that the vetting would not have been compliant with the provisions of MISS if those Board members had had access to classified information.¹³⁹¹
788. Further, it is important to note that there is a qualification in section 2A of the NSIA. The vetting must be conducted “in the prescribed manner to determine the security competence of a person”. The definition of security competence is: “a person’s ability to act in such a manner that he or she does not cause classified information or material to fall into unauthorised hands thereby harming or endangering the security or interests of the State.” This is measured against three things: the person’s susceptibility to extortion and blackmail; amenability to bribes, susceptibility to being compromised due to the person’s behaviour; and the person’s loyalty to the state.
789. SSA’s mandate to vet employees of organs of state is limited to these employees who would have access to classified information. Ms Dlamini, nevertheless, insisted that the meaning of the provision was that any employees of organs of state may be vetted, without any recourse to whether they would even be exposed to classified information.¹³⁹²
790. Ms Olitzki, who, as seen above, was in the finance department at SAA, provided an affidavit to the Commission in which she confirmed that in the eight years that she had served as the Head of Department for Financial Accounting at SAA, she had never once seen a document that could be deemed classified or top secret.¹³⁹³

¹³⁹¹ Transcript 19 February 2020, p 48

¹³⁹² Transcript 19 February 2020, p 147-148

¹³⁹³ Exhibit DD24, p 68 and p 72

791. In Ms Dlamini's project plan, she stated as an objective of the vetting that it was to ensure that "all classified and sensitive documents within SSA are assessed by personnel with valid security clearances."¹³⁹⁴ When it was put to Ms Dlamini that this goal could not be achieved if there was never an assessment of whether the vetted employees actually had access to any classified or sensitive documents, she answered that their only role was to identify the risk posed by executives.¹³⁹⁵ Of course, this makes no sense in a context in which risk is a function of access to classified documents.

792. The project plan also stated one of its objectives as being "executive management support and buy-in".¹³⁹⁶ However, it was put to Ms Dlamini that she did not receive this support because she had to fly to Cape Town to meet with Ms Myeni about this issue and that seven members of executive management resigned because of the vetting process and that many others were unhappy given the level of personal information they had to provide to the SSA.¹³⁹⁷ Ms Dlamini responded that this did not indicate a lack of buy-in and support because she never received indication from the Acting CEO of SAA that there was a lack of support and those management employees who resigned could have resigned for any reason.¹³⁹⁸ She also stated that she had regular feedback meetings and so she would be in a position to know if there was a lack of support.¹³⁹⁹ However, she later admitted that she had only met with the members of the Board (who was not being vetted) and the Acting CEO, Mr

¹³⁹⁴ Exhibit DD24, p 34, para 1.3

¹³⁹⁵ Transcript 19 February 2020, p 51

¹³⁹⁶ Exhibit DD24, p 35, item 1.5

¹³⁹⁷ Transcript 19 February 2020, p 60-61

¹³⁹⁸ Transcript 19 February 2020, p 61

¹³⁹⁹ Transcript 19 February 2020, p 62

Musa Zwane. She therefore failed to meet with the actual people who were subjected to the vetting process and so could not have obtained feedback from them.¹⁴⁰⁰

793. Ms Mpshe testified that many employees were suspicious and unhappy about the vetting process. Many were not willing to cooperate as vetting was not a condition of their employment and it had never been asked of them before.¹⁴⁰¹ Ms Mpshe herself refused to comply because she was very suspicious of the reasons for the vetting, and noted that the questions were very personal and intrusive. Her husband viewed the process and questions as abusive and they decided that she would not comply. She shared this position openly with Mr Zwane who was, at that stage, the Acting CEO.¹⁴⁰²

794. A curious feature of Ms Dlamini's reporting of the project plan for the vetting process is that she first met with the Chairperson, Ms Myeni, alone on 13 January 2016, and later met with the Board the next day to present the plan in Midrand. Ms Dlamini claimed that the purpose of this first meeting was just to "observe protocol" – but she had to fly to Durban to do so and then fly back for the meeting with the Board in Midrand the next day.¹⁴⁰³ She explained that the purpose of the meeting was to get access to the resources she needed to conduct the vetting like parking access but she then admitted that it was, in fact, the Board and not Ms Myeni that could help her with obtaining that access. She therefore could not give a good reason why she had to meet with Ms Myeni alone before meeting with the Board, to run the project plan past her.¹⁴⁰⁴

¹⁴⁰⁰ Transcript 19 February 2020, p 62

¹⁴⁰¹ Transcript 1 July 2019, p 149

¹⁴⁰² Transcript 1 July 2019, p 149

¹⁴⁰³ Transcript 19 February 2020, p 63-64

¹⁴⁰⁴ Transcript 19 February 2020, p 68-69

795. Ms Dlamini testified that the vetting process had four stages. First, participants had to fill in administrative forms; second, there was fieldwork where vetting officers conducted interviews with references and any additional ones that could be necessary; third, the participant would have to undergo a polygraph test; and, finally, analysis where the data was consolidated and interpreted to reach final conclusions.¹⁴⁰⁵
796. Ms Olitzki's affidavit confirmed the extensive and invasive nature of the vetting process.¹⁴⁰⁶ The questions asked in the administrative phase included health, psychiatric treatment, education, substance abuse, romantic relationships and cohabitation arrangements; the forms required the employee to identify referees who had known the employee for 5 to 20 years; details about any travel out of the country and those of the person's spouse; bank statements; loans; income and expenditure and sources of income.¹⁴⁰⁷
797. During the interview phase, participants were asked wide-ranging questions, some of which were very personal and private and some of which appeared to be completely irrelevant to their work.¹⁴⁰⁸ The participants also knew that the interview would be followed with a polygraph test and so they are not in a position to withhold

¹⁴⁰⁵ Transcript 19 February 2020, p 70-71

¹⁴⁰⁶ Exhibit DD24, p 68

¹⁴⁰⁷ Exhibit DD24, p 70

¹⁴⁰⁸ Exhibit DD24, p 43-49. These included questions about family background; whether children in the house were treated fairly when they were growing up; whether family had substance abuse issues and what they were; psychological treatment that family members had received; they had to describe their spouse's personality; whether if they could live their life over again they would marry their spouse; the nature of the relationship with their parents; what influence their relationships with their parents and parents in law had on their marriage; whether they believed in having more than one partner at a time; how your children would cope with the death of your spouse; how they deal with stress and pressure; whether they go out to bars and clubs or attend parties; what they talk about there; whether they hang out with men or women; what they see as luxuries; whether they make impulsive shopping decisions; if they borrow money; if they gamble; if they belong to a church; what principles they lived by; their political affiliations; whether it is wrong to regularly change beliefs; whether they are happy with the current government; the role of the participant in any political organisation; questions about personality and moods; whether they are susceptible to manipulation or bribery; whether they confide in their friends; whether they could be blackmailed.

information.¹⁴⁰⁹ Ms Dlamini confirmed that all the questions are of an extremely personal and invasive nature.¹⁴¹⁰

798. Ms Dlamini testified that the polygraph machine is only used when vetting is being conducted at a Top-Secret level or when there is a specific need to verify the reliability of the information gathered. Ms Dlamini stated that they were vetting the management of SAA on a Top-Secret level.¹⁴¹¹ However, she admitted that while it was “standard practice” for senior management to be vetted at this level, she did not know that any of them would ever actually be in receipt of Top-Secret Information.¹⁴¹² These managers were also not advised that they were entitled to refuse the polygraph test, which Ms Dlamini stated they should have been told.¹⁴¹³

799. Ms Dlamini stated that during the analysis stage, the evaluator would make recommendations on whether clearance ought to be granted or declined.¹⁴¹⁴ She acknowledged that the vetting regulations provided that an applicant had to be notified in writing of the outcome of the vetting. She stated that she complied with this regulation by giving the outcomes to the Acting CEO, Mr Zwane, but not the individuals concerned.¹⁴¹⁵ She testified that she told Mr Zwane verbally to give the outcomes to the individuals concerned and that he undertook to do so.¹⁴¹⁶ Ms Dlamini

¹⁴⁰⁹ Transcript 19 February 2020, p 78

¹⁴¹⁰ Transcript 19 February 2020, p 80

¹⁴¹¹ Transcript 19 February 2020, p 81

¹⁴¹² Transcript 19 February 2020, p 81- 82

¹⁴¹³ Transcript 19 February 2020, p 88-89

¹⁴¹⁴ Transcript 19 February 2020, p 90

¹⁴¹⁵ Transcript 19 February 2020, p 90-91

¹⁴¹⁶ Transcript 19 February 2020, p 92

stated that she was surprised to learn that at least two SAA managers were not told their outcomes.¹⁴¹⁷

800. Ms Dlamini prepared a report on the outcome of the vetting process.¹⁴¹⁸ She concluded that the project was successful; that 70% of executive management and support staff had been vetted and 85% of cases received clearance; and “no strikes or serious disturbances reported since the project started.”¹⁴¹⁹ Despite this statement, Ms Dlamini still persisted in her claim that she knew nothing about any unhappiness or resistance to the vetting process.¹⁴²⁰

801. The report also claimed that “SAA reported an improvement on their revenue (about two billion turnover) as a result of the vetting project”.¹⁴²¹ She testified that she had obtained that information from the Acting CEO, Mr Zwane.¹⁴²² However she admitted that he never told her the increase was “as a result” of the vetting process. When asked what possible causal relationship there could have been between vetting and revenue, she could not answer the question.¹⁴²³

802. Ms Dlamini could also not explain in what way the vetting project had been “successful” as indicated in her report.¹⁴²⁴ After being given the opportunity to explain these so-called “successes” many times, she finally suggested that it may have contributed to a reduction in corruption but could not provide any concrete reason

¹⁴¹⁷ Transcript 19 February 2020, p 92

¹⁴¹⁸ Exhibit DD24, p 50

¹⁴¹⁹ Exhibit DD24, p 60-61

¹⁴²⁰ Transcript 19 February 2020, p 120

¹⁴²¹ Exhibit DD24, p 60

¹⁴²² Exhibit DD24, p 122

¹⁴²³ Transcript 19 February 2020, p 123

¹⁴²⁴ Transcript 19 February 2020, p 125-129

for why that would be or how that occurred, and also confirmed that they could not even terminate the employment of people who failed to obtain clearance.¹⁴²⁵

803. The evidence presented to the Commission demonstrates that:

803.1. 118 employees at SAA were subjected to an invasive, intrusive, and extremely personal vetting process;

803.2. The relevant legislation provides that these employees may only be vetted to determine the likelihood of them sharing classified information;

803.3. The objective of the vetting process was also to ensure that employees did not disclose classified information;

803.4. It was never determined whether any of these employees were ever in receipt of classified information during the course of their employment, and some evidence suggests that these employees in fact were never exposed to that type of information;

803.5. The vetting exercise was viewed by some of the management of SAA as irregular. There was general unhappiness about it and it resulted in the resignation of 7 executives. It had no measurable or appreciable success or positive outcome for SAA.

804. It is, therefore, reasonable and fair to conclude that the vetting was pointless, harmful and unlawful. Importantly, the two Ministers involved in the process and the project manager in the SSA were wrong about the mandate of the SAA for these types of operations. These findings are of importance to the future operations of the SAA

¹⁴²⁵ Transcript 19 February 2020, p 139-141

because they evidence a worrying and misguided internal understanding of the legal framework within which vetting is required to be conducted.

Illegal use of SSA VIP protection detail

805. In addition to using the state security resources to vet and remove non-compliant staff members at SAA, Ms Myeni used state security resources for her personal protection detail and to intimidate other Board members. The use of the detail was irregular and unlawful, a waste of state resources, and furthered the object of state capture by creating a climate of fear and lack of transparency.
806. The Commission heard extensive evidence about the irregular redeployment of state security resources for the benefit of former President Zuma. This process of redeploying state resources from their proper and legitimate scope was at the expense of the public they were required to serve. When state resources are diverted in this manner, there is less personnel available to discharge the proper mandate of institutions. There is also the risk that those resources will be used for unlawful and ulterior purposes such as intimidating detractors and creating a cloud of secrecy and lack of transparency over these officials' dealings.
807. Mr Y, who was employed within the State Security Agency (SSA), submitted an affidavit to the Commission without his identity being revealed. This was pursuant to an order I had made as Chairperson of the Commission allowing that his identity should not be disclosed.¹⁴²⁶

¹⁴²⁶ Transcript 19 February 2020, p 113-114

808. Mr Y testified about the Special Operations Unit within the SSA. This unit dealt with strategic projects that were very sensitive and involved using undercover operatives from the SSA.¹⁴²⁷ Mr Y stated that this unit was used where the links between the SSA or government would need to remain hidden and to allow for plausible deniability of the state's involvement. This could be counter-terrorism or transnational organized crime – matters that required the covert gathering of intelligence. That was, at least, the function of the unit before 2012.¹⁴²⁸
809. Mr Y explained that after 2012, undercover operatives were redeployed to act as protection detail for former President Zuma. These members would act as a parallel protection to the Presidential Protection Unit. This meant they were exposed as members of the SSA and therefore could no longer perform covert undercover operations.¹⁴²⁹
810. To carry out this parallel protection mandate, Mr Thulani Dlomo was appointed as General Manager of the new Special Operations Unit, and all the members of the covert structure were advised that they were no longer going to be working on identified focus areas like transnational organized crime or counter-terrorism, but instead would be doing risk assessment and security directly related to President Zuma. This redeployment took place despite the fact that some of these operatives had been trained and resources had been invested in them to be placed in very long term undercover positions.¹⁴³⁰ The Unit was shifted from operating under the Deputy DG responsible for domestic operations, to the DG responsible for counter

¹⁴²⁷ Transcript 19 February 2020, p 172

¹⁴²⁸ Transcript 19 February 2020, p 173

¹⁴²⁹ Transcript 19 February 2020, p 175

¹⁴³⁰ Transcript 19 February 2020, p 175-176

intelligence operations.¹⁴³¹ The unit had an estimated 30 permanent members and a further 70-170¹⁴³² members who were agents acting for the Unit but working in other law enforcement agencies.¹⁴³³

811. Mr Y testified that he described the unit as a “parallel” structure because most of their functions were already performed by other units in the SSA or other stakeholder departments, but they were dedicated to performing this function specifically for the former President.¹⁴³⁴ For example, protection of VIPs (Ministers, members of Parliament) would normally be performed by the SAPS but there was now a dedicated unit in the SSA that would also specifically protect the President.¹⁴³⁵

812. Mr Y testified that while some in the unit were existing operatives, most were new recruits – and most of them were recruited from KwaZulu-Natal. Mr Y did not know the reason for this but said that he could “make certain assumptions and deductions given the support base of the people involved”.¹⁴³⁶

813. These new recruits were given training normally reserved for full SSA members. This included training in foreign countries in counter intelligence and VIP protection and the gathering of intelligence.¹⁴³⁷

¹⁴³¹ Transcript 19 February 2020, p 176

¹⁴³² Mr Y's affidavit says 200 in total while in oral testimony he said 100.

¹⁴³³ Transcript 19 February 2020, p 176

¹⁴³⁴ Transcript 19 February 2020, p 177

¹⁴³⁵ Transcript 19 February 2020, p 179

¹⁴³⁶ Transcript 19 February 2020, p 181

¹⁴³⁷ Transcript 19 February 2020, p 181

814. Mr Y testified that, in the course of interviewing agents of this Unit, it appeared the Special Operations Unit was conducting unlawful operations. This investigation was still ongoing when Mr Y testified in February 2020.¹⁴³⁸
815. Mr Y explained that the group of approximately 200 agents and members were allocated to specific people who were supporters of President Zuma and who “may have been facing certain difficulties” – and who would not be eligible for protection from SAPS. One of those people was Ms Myeni – though Mr Y confirmed that the SSA could not find any formal paperwork containing a request for protection from within SSA. Mr Y discovered that Ms Myeni had enjoyed these security benefits as a result of the work of the High-Level Review Panel investigation into SSA matters.¹⁴³⁹
816. The High-Level Review Panel was established by President Cyril Ramaphosa in June 2018 to enable the reconstruction of a Professional National Intelligence Capability for South Africa that would respect and uphold the Constitution and the law. It was chaired by Dr Sydney Mufamadi.¹⁴⁴⁰ The Report generated by this panel explained that the Special Operations Unit had a legitimate function prior to 2012 working on particularly serious or sensitive operations of national importance but thereafter the report stated that there was “naked politicization of intelligence”.¹⁴⁴¹
817. The Report concluded that Mr Thulani Dlomo had been deployed by President Zuma via the Minister of State Security, to head up the Special Operations Chief

¹⁴³⁸ Transcript 19 February 2020, p 186

¹⁴³⁹ Transcript 19 February 2020, p 182. The High-Level Review Panel Report on the State Security Agency, dated December 2018, may be found in Exhibit DD23(c), p 168-273

¹⁴⁴⁰ Exhibit DD23(c), p 173

¹⁴⁴¹ Exhibit DD23(c), p 236

Directorate and effect the politicization of the Unit and the SSA in general.¹⁴⁴² It found that the Unit was “a law unto itself and directly served the political interest of the Executive. It also undertook intelligence operations which were clearly unconstitutional and illegal.” This included deploying undercover operatives for VIP protection of various persons not entitled to this protection, including Ms Myeni.¹⁴⁴³

818. In fact, the Report found that the Special Operation Unit had become a parallel intelligence structure serving a faction of the ruling party and in particular the personal, political interests of the sitting President.¹⁴⁴⁴ The Report concluded that this was in direct breach of the Constitution, relevant legislation and good government intelligence functioning.¹⁴⁴⁵ Mr Y agreed with and confirmed all of these findings.¹⁴⁴⁶

819. Mr Y testified that the normal process an official would follow if they believed their life was under threat, would be to put a request through the security advisor in the SSA allocated to a particular SOE or government department, which request would be channelled to the SAPS.¹⁴⁴⁷ Mr Y confirmed that no such process was followed with respect to Ms Myeni.¹⁴⁴⁸

820. Even though Ms Myeni did not lawfully qualify for protective VIP services, she nevertheless received such services from the SSA.

¹⁴⁴² Exhibit DD23(c), p 237, together with transcript 19 February 2020, p 186

¹⁴⁴³ Exhibit DD23(c), p 237

¹⁴⁴⁴ Exhibit DD23(c), p 238

¹⁴⁴⁵ Exhibit DD23(c), p 238

¹⁴⁴⁶ Transcript 19 February 2020, p 187-188

¹⁴⁴⁷ Transcript 19 February 2020, p 188

¹⁴⁴⁸ Transcript 19 February 2020, p 189

821. Mr Lingaraj Gary Moonsamy, the Head of Department: Group Security Services at SAA, provided an affidavit to the Commission that set out the nature of the security services the SSA provided to Ms Myeni.¹⁴⁴⁹ Mr Moonsamy stated that he provided Ms Myeni with the services of a close protection officer, together with three other members of the SAA security services for a period of four months. Thereafter, Ms Myeni obtained a new security detail. Mr Moonsamy did not know who had appointed them or where they came from. Mr Moonsamy explained that in doing so Ms Myeni breached SAA policy by not making prior arrangements before arriving at SAA with her own security detail. Her security personnel refused to sign in when they arrived at SAA. This was also a violation of the SAA policy.¹⁴⁵⁰

822. Mr Y testified that, if these security personnel had been legitimately deployed by SSA, they would have had no problem signing in. He said that they are supposed to follow existing security policies and procedures.¹⁴⁵¹

823. Mr Moonsamy provided the Commission with CCTV footage¹⁴⁵² of some of the personnel accompanying Ms Myeni to SAA and Mr Y positively identified one of them as Zama Ntolo, a member of the Special Operations Unit of the SSA.¹⁴⁵³

824. Mr Moonsamy also included in his affidavit an incident report regarding the former CFO of SAA, Mr Wolf Meyer. The report provided that Ms Myeni had instructed security personnel accompanying her to SAA to confiscate a recording device (concealed in a pen) from him.¹⁴⁵⁴ In addition, Mr Moonsamy stated that his

¹⁴⁴⁹ Exhibit DD23(b), p 15-167

¹⁴⁵⁰ Exhibit DD23(b), p 16-18

¹⁴⁵¹ Transcript 20 February 2020, p 7

¹⁴⁵² Exhibit DD23(b), p 160

¹⁴⁵³ Transcript 20 February 2020, p 8.

¹⁴⁵⁴ Exhibit DD23(b), p 19, para 15. See the incident report is at p 161

predecessor, Mr Jona de Waal was advised by former CEO Nico Bezuidenhout and Mr Meyer, that Ms Myeni's security personnel from SSA would confiscate laptops and phones from people before they went into meetings, on Ms Myeni's instruction.¹⁴⁵⁵ This is confirmed in an incident report compiled by an SSA member explaining that, before the meeting started, they had to gather up all electronic equipment.¹⁴⁵⁶ Mr Y testified that it was not in the mandate of SSA members to confiscate electronic equipment.¹⁴⁵⁷

825. Mr Eric Zamokwakhe Mtolo of the Special Operations Unit of the SSA provided the Commission with an affidavit confirming that he did accompany Ms Myeni to SAA on one occasion, as was captured in the CCTV footage that Mr Moonsamy gave the Commission.¹⁴⁵⁸

826. Mr Mtolo stated that he was summoned by Mr Dlomo, together with another member of the SSA by the name of "Gerald" (he did not know his last name) and upon entering the meeting venue, found that Ms Myeni was also there. Mr Mtolo stated that he had encountered Ms Myeni previously because he was asked to assist her in tracing a cell phone number of a person she claimed was harassing her.¹⁴⁵⁹

827. Mr Dlomo instructed Mr Mtolo to speed up the investigation into Ms Myeni's harassment claim and also asked him to accompany Ms Myeni to SAA's offices at Airways Park and to wait outside a meeting room where Ms Myeni would be attending a meeting.¹⁴⁶⁰ Mr Mtolo and "Gerald" did as instructed and waited for Ms Myeni outside a meeting room. A few minutes into the meeting, Ms Myeni walked

¹⁴⁵⁵ Exhibit DD23(b), p 19, para 15

¹⁴⁵⁶ Exhibit DD23(b), p 160-161

¹⁴⁵⁷ Transcript 20 February 2020, p 9. See also, p 13

¹⁴⁵⁸ Exhibit DD34.14, p 1426-1432

¹⁴⁵⁹ Exhibit DD34.14, p 1427, paras 6-8

¹⁴⁶⁰ Exhibit DD34.14, p 1428, paras 10-11

out with a recording device pen, which she placed together with a number of cell phones that were on the desk. Ms Myeni told Mr Mtolo that she had taken the pen from someone in the meeting and Mr Mtolo assumed the phones were similarly from members attending the meeting. Mr Mtolo was concerned that he was supposed to look after the devices which was not his job and told “Gerald” that he should brief Mr Dlomo about what had happened. Mr Mtolo also briefed Mr Dlomo in person about the incident. At the end of the meeting, Ms Myeni attempted to give Mr Mtolo the recording pen but he refused to take it. After Mr Mtolo had briefed Mr Dlomo about what had happened, Mr Dlomo never involved Mr Mtolo again in any of Ms Myeni’s matters.¹⁴⁶¹

828. There is accordingly overwhelming and corroborated evidence that Ms Myeni was unlawfully benefitting from SSA resources and enjoyed the protection of undercover operatives, trained overseas in counterintelligence strategies and intelligence gathering. This reveals how powerful Ms Myeni was and how close she was to President Zuma. The extent of Ms Myeni’s proximity to former President Zuma is also reflected in her dealings with Bosasa and in relation to Eskom.

829. However, in so far as SAA is concerned, it appears that Ms Myeni operated as the Chair of SAA with a level of suspicion about the management of SAA that is not normal behaviour for a Chairperson of the Board of a public entity. Ms Myeni operated SAA under a cloud of fear, intimidation, secrecy and paranoia, when a public entity should be operated transparently and with accountability to the South African people who fund its operations.

830. During her evidence before the Commission, Ms Myeni was asked about the security services she used, whether it was a lawful deployment of SSA resources and

¹⁴⁶¹ Exhibit DD34.14, pp 1429, para 15 – 1430, para 20

whether she ordered the confiscation of Board members' electronic devices with the assistance of SSA officers. She refused to answer these questions and invoked the privilege against self incrimination.¹⁴⁶²

831. She was also asked about the vetting process at SAA, the lawfulness of the process, why it was necessary in circumstances where employees were not exposed to classified information and why the Board members were excluded from the process if they, more than anyone, would be likely to be exposed to confidential or sensitive information. It was put to Ms Myeni that Board members were likely excluded because of the highly personal and invasive nature of the questions. She was also asked about Ms Nhantsi's evidence regarding Ms Olitzki and the use of vetting results to remove employees Ms Myeni wanted removed. Ms Myeni, once again, refused to answer these questions and invoked the privilege against self incrimination.¹⁴⁶³

832. Ms Myeni's refusal to be accountable for her actions is regrettable. She clearly received favours from the SSA to which she was not lawfully entitled. She employed those resources during her time as a Chairperson of the Board of SAA for ulterior purposes.

¹⁴⁶² Transcript 6 November 2020, p 81-83

¹⁴⁶³ Transcript 6 November 2020, p 83-102

The new board – but retention of Ms Myeni

833. Ms Kwinana resigned from the Board on 23 August 2016. She said that her reason for resigning was that Minister Gordhan had an issue with funding and wanted new Board members.¹⁴⁶⁴ The reasons stated in her letter of resignation¹⁴⁶⁵ were that National Treasury was not issuing the guarantee to SAA which resulted in a failure to finalise the audited financial statements, and the Minister wanted to appoint a new Board so that the guarantee could be issued.¹⁴⁶⁶ Ms Kwinana also testified that she could sense that the Minister wanted the whole Board to resign because he did not have a good relationship with the Chair, Ms Myeni, and the Board.¹⁴⁶⁷ Despite this, however, Ms Myeni was retained on the new Board.

834. According to minutes of a Cabinet meeting on 24 August 2016, Mr Gordhan motivated for the appointment of Ms Myeni as a non-executive director and Chairperson of SAA for a further two years.

835. Minister Gordhan was asked to provide an affidavit to the Commission explaining why he made this recommendation. He explained that the decision was driven primarily by former President Zuma and his insistence that Ms Myeni be retained as the Chair of SAA.¹⁴⁶⁸ He said that, as a member of the executive, he was constrained by the explicit wishes of President Zuma and sought to mitigate the harm that would be caused by her retention with the appointment of other directors to the Board whom he considered to be people who were fit, independent, qualified, and with integrity “who would be able to constrain the adverse impact of Ms Myeni’s leadership going

¹⁴⁶⁴ Transcript 2 November 2020, p 136

¹⁴⁶⁵ Exhibit DD33.10, p 84

¹⁴⁶⁶ Transcript 2 November 2020, p 137

¹⁴⁶⁷ Transcript day 296, 2 November 2020, p 140

¹⁴⁶⁸ Affidavit of Minister Gordhan, dated 28 August 2020, para 5

forward". He stated: "It was clear to me that the then Head of State would not permit her removal, so I worked to surround her with competent and qualified Directors".¹⁴⁶⁹

836. Minister Gordhan also asked that the Commission call upon the President to explain "why there was unyielding insistence that Ms Myeni be retained as the SAA Chair for three terms, despite what is known about various decisions she took that harmed the airline's interests. Examples include the notorious Airbus transaction and her direct interference in the management of SAA to scuttle a very lucrative transaction with Emirates Airlines."¹⁴⁷⁰ The Commission was not able to question Mr Zuma about this because, as explained more fully elsewhere, he walked out of the Commission hearing on 19 November 2021 in contravention of a summons and, thereafter, refused to appear before the Commission. Mr Zuma fled the Commission completely without any valid reason. He did so in order to avoid having to answer questions in the Commission about matters such as this. He did not want to account to the nation. He knew he was not going to have answers to many of the questions that were bound to be put to him.

837. Minister Gordhan explained that, as further mitigation to the harm Ms Myeni could do on the Board, he proposed to Cabinet that there be an annual review of Ms Myeni's performance.¹⁴⁷¹

838. Mr Gordhan's affidavit has one unexplained feature. He claims that the reason he recommended Ms Myeni for two years was that the President insisted it was not up for discussion that Ms Myeni be replaced and that, as an executive member, he was bound by that decision. However, Ms Myeni was not, in the end, retained for two

¹⁴⁶⁹ Para 8

¹⁴⁷⁰ Para 9

¹⁴⁷¹ Affidavit of Minister Gordhan, dated 28 August 2020, para 22.

years, as recommended by Minister Gordhan. Cabinet in fact voted for her to remain at SAA for only one year¹⁴⁷² – less than that proposed by Minister Gordhan. It therefore appears that Minister Gordhan was prepared to recommend that Ms Myeni remain as the Chairperson of the SAA Board for one more additional year than the majority of the members of Cabinet.

839. Minister Gordhan stated that on 12 December 2014 the DPE relinquished the role of oversight of SAA and National Treasury took over that role. At that time National Treasury was led by then Finance Minister, Mr Nhlanhla Nene.¹⁴⁷³

840. Ms Myeni's initial three-year term on the Board would have expired before October 2015. However, she remained on the Board without any reappointment process until Cabinet made the decision to retain her for a further year. Minister Gordhan was asked to explain how this could have occurred. Minister Gordhan's explanation did not, however, make much sense. He stated that because the President wanted Ms Myeni retained, no further appointments could occur without his consent on this basis. However, this does not explain why she was not formally reappointed to this position when her term ended.

841. This is particularly problematic because under SAA's memorandum of incorporation a director may only serve three terms on the Board. Clause 13.4.1 of the MOI provides that "A non-executive Director shall hold office for a term of three (3) years and shall not hold office for more than three (3) consecutive terms".¹⁴⁷⁴

842. If Ms Myeni, had, indeed been properly appointed for a year in 2015 until 2016, that would have been her third term in office and Cabinet could not have reappointed her

¹⁴⁷² Affidavit of Minister Gordhan, dated 28 August 2020, para 23

¹⁴⁷³ Para 14

¹⁴⁷⁴ Exhibit DD2, p 14

in 2016. According to his affidavit, Minister Gordhan took the view that because the MOI allows for three terms of a maximum period of three years each, as long as the total period for which Mr Myeni served on the Board of SAA was less than nine years, this was compliant with the MOI.¹⁴⁷⁵ This does not, however, appear to be the correct interpretation of the term limit. A term has a maximum of three years but if the term was not three years long, the MOI did not qualify the term limit. It remained three consecutive terms.

843. As we set out above, Ms Myeni was able to remain as Chairperson of the Board of SAA despite:

843.1. the majority of the SAA Board in early 2014 raising serious concerns about her leadership;

843.2. one former Finance Minister's (Minister Nene's) concerns about her lack of appreciation of the impact that the airbus swap transaction would have on the finances of SAA; and

843.3. another former Finance Minister's (Minister Gordhan's) concerns that she should not be retained on the Board after 2016.

844. Both former Minister Nene and Minister Gordhan attribute Ms Myeni's retention on the Board to the personal preference of former President Zuma. This preference appears to have been more important to the former President than the proper governance or management of SAA.

845. By 2016, there appears to have been a consensus at Treasury that Ms Myeni was a liability to the organisation and had already caused it severe harm and financial loss.

¹⁴⁷⁵ Affidavit of Minister Gordhan, dated 28 August 2020, para 30

Notwithstanding these concerns, the former President insisted that Ms Myeni be retained in her position at any cost, and with complete disregard for the welfare of SAA. His Cabinet followed suit and voted to retain her beyond 2016.

AUDITORS

847. The Commission heard evidence from two primary witnesses on the activities of the auditors of SAA over the period set out above in which Ms Myeni was the Chair of the Board and Ms Kwinana was the Chair of the Audit and Risk Committee (ARC). ARC was the Board committee primarily responsible for the audit of SAA.
848. The Commission also received an affidavit from Mr Simon Mantell, a chartered accountant, in which he detailed the engagements he had had with SAA when his company, Mantelli's, bid for a dry snack tender in 2013. Mr Mantell's affidavit raised serious concerns about the auditing work that had been done at SAA by both its internal and external auditors. This issue merited further investigation by the Commission in order to establish whether the role that auditors played at SAA contributed in any way to what unfolded at the airline. However, the Commission could not investigate it further due to time and other constraints.
849. The first witness was Mr Polani Sokombela, a business executive at the Auditor-General's office. Mr Sokombela testified that for 2016/17 financial year, the AG took over the audit from a private audit firm, PricewaterhouseCoopers (*PWC*), after it had held the mandate to audit SAA for five years, together with its joint-audit partner, Nkonki Inc (*Nkonki*). Mr Sokombela was able to explain the level and standard of audit required for, in particular, a public entity like an SOE. He testified that the state in which the AG found SAA's records and accounting practices was dismal. He also testified to some of the very serious shortcomings in PWC and Nkonki's joint audits, which may have enabled state capture, corruption and irregularities to remain undetected at SAA for many years.

850. The second witness was Mr Pule Joseph Mothibe, the audit partner at PWC responsible for the SAA audit for the 2013/2014 to 2015/2016 financial years.¹⁴⁷⁶ His evidence clearly demonstrated that PWC's primary interest was in the financial aspect of the audit and ascertaining whether SAA was a going concern – as one would expect would be the focus for a private audit client. However, it was evident that PWC was either not equipped to assess, or was just not particularly concerned about, the peculiar requirements and obligations attendant on a public entity and ensuring that irregularities that contravened the PFMA and other procurement legislation were carefully investigated and reported on.

851. This section of the report focusses on three main problematic aspects of the PWC joint audits with Nkonki over that five-year period:

851.1. first, that the audit appointment itself was irregular from the second year onwards;

851.2. second, that Ms Kwinana's possible conflict of interest with PWC was not discovered;

851.3. third, that PWC failed to devise audit procedures that were appropriate to detect corruption or irregular tenders in some major transactions including the Air Chefs tender and the Swissport Ground Handling transaction.

¹⁴⁷⁶ Transcript 16 July 2020, p 28

Irregular award of audit

852. Mr Sokombela testified that under the Public Audit Act 25 of 2004, if the Auditor General elects not to audit a public entity like SAA, the Board and the shareholder of SAA would be responsible for appointing a private auditor in accordance with ordinary supply chain management policies for procurement of services. However, the concurrence of the AG is required to finalise the appointment.¹⁴⁷⁷ The concurrence will depend on the firm's capacity to do the work and whether the firm is sufficiently independent (i.e. whether there are any conflicts of interest), guided by the Code of Ethics of Professional Accountants issued by the International Ethics Standard Board for Accountants.¹⁴⁷⁸ Mr Sokombela also testified that, regardless of the length of the tender award, the audit firm's appointment must still be subject to the AG's concurrence each year and, under section 90 of the Companies Act, the entity's audit committee must satisfy itself each year that the auditors remain independent and that they are performing in terms of the required quality standards.¹⁴⁷⁹ If they do not meet these standards each year, their appointment should be terminated.¹⁴⁸⁰

853. Mr Sokombela explained that in 2011/2012, SAA consulted the AG with regard to the appointment of PWC and Nkonki as joint auditors for the 2011/2012 financial year. The AG provided its concurrence. The request for concurrence was for a one-year appointment, but in fact PWC and Nkonki remained on as joint auditors for a

¹⁴⁷⁷ Transcript 20 February 2020, p 51-52. See section 25 of the Public Audit Act

¹⁴⁷⁸ Transcript 20 February 2020, p 60-61

¹⁴⁷⁹ Section 90(1) of the Companies Act 71 of 2008 provides: "Upon its incorporation, and each year at its annual general meeting, a public company or state-owned company must appoint an auditor." Section 90(2)(c) provides: "To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in section 34(2), a person or firm must be acceptable to the company's audit committee as being independent of the company..."

¹⁴⁸⁰ Transcript 20 February 2020, p 64-65

period of five years, until the AG took over the audit in the 2016/2017 audit year.¹⁴⁸¹ Despite the irregularity of the subsequent four years, SAA did consult the AG and sought a concurrence each year thereafter until 2015/2016.¹⁴⁸² The AG nevertheless still granted its concurrence. Mr Sokombela explained that this was because, at the time, the AG's processes for granting concurrence were not particularly well-developed and the AG did not look into the regularity of the process of appointment when it granted concurrence – as it does now. So even though the appointment of PWC and Nkonki was only for a year, and the subsequent years were therefore irregular, the AG did not detect this irregularity and so still granted its concurrence.¹⁴⁸³

854. Mr Mothibe confirmed in his evidence that the award letter¹⁴⁸⁴ that PWC and Nkonki had received in respect of the SAA audit was only for the 2011/2012 financial year. However, his impression at the time was that they had been awarded the tender for five years. Though it must be noted that he only joined the team for the 2013/2014 financial year.¹⁴⁸⁵

855. Not only was the award for just one year but also, the request for proposals to which PWC responded was only for the 2011/2012 financial year.¹⁴⁸⁶ Nevertheless, Mr Mothibe insisted that it would be economically unviable for a firm to audit SAA for one year only, given the size and complexity of the audit.¹⁴⁸⁷ This may very well be correct because it will take time for a new audit firm to come to grips with the business

¹⁴⁸¹ Transcript 20 February 2020, p 68-69

¹⁴⁸² Transcript 20 February 2020, p 70-71

¹⁴⁸³ Transcript 20 February 2020, p 72

¹⁴⁸⁴ Exhibit DD19(c), p 115

¹⁴⁸⁵ Transcript 16 July 2020, p 70

¹⁴⁸⁶ Exhibit DD19(c), p 59 – the particular year is at p 77 under “scope of work”

¹⁴⁸⁷ Transcript 16 July 2020, p 7

of a new client. Indeed, that was Ms Kwinana's evidence as well¹⁴⁸⁸ and the sentiment was echoed by Mr Sokombela.

856. Ms Kwinana was shown the report and recommendations from the ARC where the committee recommended the tender only go out for one year.¹⁴⁸⁹ Despite serving on that committee, she testified that this was a "very big mistake".¹⁴⁹⁰ She actually claimed that ARC never made that recommendation. However, her evidence on this cannot be correct in the face of the documents presented to her which recorded this as the decision. These included the ARC minutes themselves and the recommendation report from ARC to the Board.¹⁴⁹¹

857. Whatever the merits of a decision to appoint auditors for only one year may be, the fact of the matter is that PWC responded to an RFP for a one-year audit. It did not decline to do so because it was not financially viable. This was put to Mr Mothibe and he responded that the firm would have understood the tender to be for five years.¹⁴⁹² However, Mr Mothibe could not adequately explain how PWC could have thought that from a clearly defined scope of work in the RFP.¹⁴⁹³ He went so far as to say "the procurement process is run by South African Airways and not by PWC. . . so I am not too sure I can speculate in that regard."¹⁴⁹⁴ But this displays a concerning attitude from the very team that was supposed to detect irregularities in the procurement processes at SAA.

¹⁴⁸⁸ Transcript 7 November 2020, p 169-171

¹⁴⁸⁹ Exhibit DD19(a), p 54

¹⁴⁹⁰ Transcript 7 November 2020, p 174

¹⁴⁹¹ Transcript 7 November 2020, p 181-182

¹⁴⁹² Transcript 16 July 2020, p 76

¹⁴⁹³ Transcript 16 July 2020, p 76-77

¹⁴⁹⁴ Transcript 16 July 2020, p 78