

PART 1: VOLUME I

CHAPTER 1 - SOUTH AFRICAN AIRWAYS AND ITS ASSOCIATED COMPANIES

TABLE OF CONTENTS

INTRODUCTION	6
GOVERNANCE	12
From Function to Dysfunction.....	12
The 2009 Board	12
The 2009 Executive.....	14
Change in shareholder	16
Treasury guarantee	17
Resignation of the Board.....	22
The Mumbai route and the relationship between the board and Minister Gigaba.....	23
After the resignation of the Carolus Board	26
The Board under Ms Myeni.....	31
Pembroke Capital	32
The privilege against self incrimination	37
The disclosure of Mr X's identity.....	40
The Board evaluation by Institute of Directors of South Africa NPC (IoDSA)	44
The letter of complaint and mass resignations of Board members.....	45
THE TRANSACTIONS	54
Airbus Swap and Emirates deal	54
General interference by the Board in operational matters.....	62
LSG Skychefs/Air Chefs.....	64
False whistleblower reports.....	79
General problems with procurement.....	82
30% BEE set aside	85
The origins	85

The Roadshows	86
Bidvest	88
The Swissport and Engen letters of award	92
Set aside for veterans	104
Ms Mpshe's removal	111
The appointment of Ms Nhantsi to the permanent position of CFO.....	114
Suspension of Ms Mpshe	115
Conclusion on disciplinary proceedings.....	119
BNP Capital raising	122
Procurement in financing.....	123
The first RFP	124
The second RFP	126
Funding from the FDC.....	130
Transaction advisor bid	136
The increase in the BNP scope to include sourcing funds	141
The cancellation fee	146
Conclusion of the term sheet with BNP	147
Whistleblowing	149
Ms Nhantsi's version	156
BNP Capital's evidence	178
Grissag.....	186
Connection between BNP and the Myenis	192
Mr Mngadi	194
Conclusion	195
Swissport	196
The ground handling agreement and Jamicron	200
GPUs	212
JM Aviation and AAR	222
First tender	223
Second tender.....	224
Third tender.....	227
Fourth tender.....	228
Fifth tender	228
Ms Sambo and AAR.....	233
Ms Memela's response	245
Ms Kwinana's version.....	260

The scheme to cover up the payments to Ms Kwinana and Ms Memela.....	274
Use of external service providers	305
The SAA Working Capital Tender Awarded to the McKinsey Regiments Consortium	306
External “legal” services	317
BEYOND SAA.....	320
State security resources.....	320
Illegal vetting of staff at SAA.....	321
Illegal use of SSA VIP protection detail	332
The new board – but retention of Ms Myeni.....	341
AUDITORS	346
Irregular award of audit	348
Conflict of interest	352
Inadequate audit procedures.....	357
Auditor’s role and duties	357
Inadequate internal controls and procedures.....	362
Inadequate external audit procedures	368
Air Chefs	379
Swissport ground handling	382
The New Age	391
Conclusion	392
SA EXPRESS	394
Introduction	394
The airports and SA Express.....	399
The contract.....	404
The first invoice	408
The money	411
A comparator?.....	411
The management company.....	412
Flow of Funds and the bribe	415
The allegations of corruption	418
The money laundering.....	421
The role of Neo Solutions	428

The cash in transit leg 433

CONCLUSION AND RECOMMENDATIONS 436

INTRODUCTION

1. This section of the report relates to the investigation that was conducted into South African Airways SOC Limited (SAA), its subsidiary, South African Airways Technical SOC Limited (SAAT) and South African Express (Pty) Ltd (*SA Express*).
2. Although the Public Protector's Report made some references to SAA, this was only in two contexts: the newspaper subscriptions with *The New Age*,¹ and the allegations of Ms Barbara Hogan about the pressure that had been applied to the then Chairperson of SAA, Ms Cheryl Carolus, concerning an SAA flight route referred to as "the Mumbai route".²
3. Notwithstanding the fact that SAA did not feature prominently in the Public Protector's State Capture Report, the Commission investigated it in some detail because the Terms of Reference of the Commission required the Commission to establish the extent to which state capture, corruption and fraud was prevalent in the public sector. In particular, the terms of reference required the Commission to investigate, make findings and report on whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity (paragraph 1.4 of the Terms of Reference). The Terms of Reference also required the Commission to determine whether any officials or functionaries within the various SOEs had benefitted personally from acts of corruption (paragraph 1.9 of the Terms of Reference).
4. These Terms of Reference therefore guided the investigation that was conducted into the affairs of SAA, SAAT and SA Express. The Commission also focussed its

¹ Public Protector State Capture Report, paras 4.25 and 5.7

² Public Protector State Capture Report, para 5.16

investigations on Ms Hogan's allegations, as they were recorded in the Public Protector's report, and sought to uncover more about the interactions surrounding the Mumbai route.

5. In order properly to understand SAA as an accountable institution within the public sector, the Commission's investigation focused on the Board of SAA as it is the accounting authority of SAA in terms of the Public Finance Management Act 1 of 1999 (*PFMA*). Ultimate responsibility for the regularity of SAA's expenditure lies with the Board and it is the Board which bears the obligation to procure goods and services in accordance with the requirements of the Constitution.
6. The investigation focused on the procurement undertaken by SAA and its associated companies because, as the work of the Commission developed, it became clear that acts of corruption and fraud within state owned enterprises usually occurred in areas of procurement of goods and services.
7. The investigation also considered the state of general governance at SAA over a period of just less than ten years in order to explore whether deficiencies in the governance of the entity could have contributed to the acts of corruption and fraud that took place within SAA. It also explored whether the usual watchdog institutions and functionaries, such as the independent non-executive members of the Board of SAA and the entity's auditors, performed their functions adequately.
8. The investigation revealed that there was a steady decline in the quality and effectiveness of the governance of SAA from 2012 onwards. This poor quality and ineffectiveness developed over the period that Ms Duduzile Myeni was the Chairperson of SAA and her co-Board member, Ms Yakhe Kwinana, was Chairperson of SAAT.

9. During both their tenures, acts of corruption and fraud took place at SAA and SAAT. Committed managers, who tried to stand up to the increasingly unreasonable and unlawful demands of these Board members, were slowly but surely removed from their positions.
10. The auditors appointed to SAA for the 2012 to 2016 financial years failed dismally to detect any of this fraud and corruption. The internal audit function within SAA was also hopelessly ineffective in identifying or limiting these criminal acts.
11. The Commission's investigations into SAA and SAAT show that fraud and corruption took hold in these entities not only because there was a wholesale failure of governance within the companies but also because, when companies are so depleted of those who are responsible and accountable, the conditions for state capture take hold.
12. State capture thrived in these entities because they were eventually being run, not in the interests of the people of South Africa for whom they were established, but in the interests of a select few who wielded power inside and outside of the entities.
13. The evidence reveals that Ms Myeni was appointed Chairperson of the Board of SAA in circumstances where she was an underperforming Board member. She proceeded, through a mixture of negligence, incompetence and deliberate corrupt intent, to dismantle governance procedures at SAA, create a climate of fear and intimidation and make a series of operational choices at SAA that saw it decline into a shambolic state.

14. From the time of her appointment as Chair, many people within SAA and officials in government, attempted to speak out against Ms Myeni and to stop her from wreaking havoc at the SOE. However, all attempts to criticize or remove her were met with resistance at the highest level. Two successive Ministers of Finance were, despite their efforts, unable to remove her from office. In 2016, Minister Gordhan was forced to replace the entire Board of SAA to “mitigate the harm” that its Chair had caused, and would likely continue to cause, to the entity.
15. Ms Myeni and those members of the SAA Board who were closely aligned with her, including Ms Kwinana, caused sustained damage to our national airline. They bullied officials within SAA who tried to resist their unlawful conduct. They created a climate so intolerable for many personnel that they left the airline or were forced out only to be replaced by more pliant employees.
16. This section of the report will first consider the Board of SAA under Ms Cheryl Carolus from 2009. When Ms Carolus and a number of her colleagues resigned *en masse* from SAA in September 2012, there were eleven non-executive members on the Board of SAA.
17. From October 2012 Ms Myeni was appointed as the Acting Chairperson of the Board and was later appointed as Chairperson of the Board of SAA. She would hold this position until 2017. Over those five years, the Board of SAA was slowly denuded of many of its members.
18. Matters came to a head in early 2014 when the majority of the Board members complained to the Minister of Public Enterprises, Mr Malusi Gigaba about Ms Myeni’s leadership of the Board. Despite the seriousness of their concerns, Ms Myeni was not called to account for her conduct by the Minister. Instead, the complaining members were required to do so. Minister Lynne Brown replaced Mr Gigaba after

the May general election in 2014. In October 2014, despite the serious allegations against Ms Myeni, the then Minister of Public Enterprises, Ms Lynne Brown, retained Ms Myeni and those who supported her, including Ms Kwinana, on the Board.

19. By the end of 2015 and into 2016, when many of the acts of fraud and corruption uncovered at SAA and SAAT took place, the Board had been whittled down to only four non-executive members.
20. The management style and approach of both Ms Myeni and Ms Kwinana enabled acts of fraud and corruption to engulf the entities. They became companies in which decision making was driven by the benefits that would accrue to those in charge as opposed to what was in the companies' best interests.
21. When this type of decision-making takes place in a few instances within an SOE, it may be possible to view them as isolated criminal acts. However, when this type of decision-making predominates and fraud and corruption become the order of the day, something else is at play. It was then that state capture had taken hold of the entity because it had now been transformed into an entity that benefitted the few rather than one that served the people.
22. This part of the report sets out in detail how the project of state capture took hold in SAA and its associated entities. It also reveals the considerable costs of state capture. Those costs do not just lie in the millions of Rands that are lost to the taxpayer. They also lie in the broken careers of people who tried to resist its stranglehold. The costs include the emotional trauma experienced when managers at SAA were subjected to unlawful and invasive state security vetting. The costs include the precarious livelihoods of those who subsequently faced joblessness

because these entities were driven into the ground. Finally, the costs lie in Cabinet decision-making that was motivated not by what was in the best interests of a state-owned entity but by the personal preferences of a President.

23. After dealing with SAA and SAAT, this chapter of the report then sets out the findings relating to an investigation conducted by the Commission into allegations that high - ranking officials in the North West provincial government had colluded with functionaries at SA Express to syphon millions of Rands out of the North West provincial government's coffers in order to benefit themselves, their families and the ruling party.

GOVERNANCE

From Function to Dysfunction

The 2009 Board

24. Ms Cheryl Ann Carolus was the Chair of the SAA Board from 28 September 2009 to September 2012.³
25. In her testimony before the Commission, Ms Carolus said that she served on the Board with other highly qualified people.⁴ There were 11 non-executive members of the Board at this time.⁵ Ms Carolus explained that the then shareholder representative, former Minister of Public Enterprises, Ms Barbara Hogan, ensured that the Board was familiar with its role in overseeing the corporate governance of SAA and that the members adhered to “the letter and the spirit of all the pieces of legislation and practices that governed the state owned companies and enterprises in general such as the PFMA⁶ . . . and . . . the newly adopted Companies Act”.⁷
26. Ms Carolus identified five key challenges that faced the SAA Board during her tenure:
- 26.1. Governance failures – there were prevalent and frequent violations of the PFMA, procurement and tender processes had not been followed and the

³ Transcript 29 November 2018, p 15

⁴ Transcript 29 November 2018, p16 – 18

⁵ Transcript 29 November 2018, p 106. See exhibit DD33, p 98 and p 100

⁶ Public Finance Management Act 1 of 1999 and Companies Act 71 of 2008

⁷ Transcript 29 November 2018, p 20

previous CEO had been suspended as a result. The Board had to lay criminal charges and institute civil actions to retrieve misappropriated money.⁸

26.2. There were very poor levels of capitalisation as a result of which SAA could not keep up with competitors.⁹ SAA had not kept up with the market in terms of the aircrafts it used and services it offered and had lost market share and many opportunities as a result.¹⁰

26.3. SAA faced a number of criminal and civil claims for price fixing and anti-competitive behaviour.¹¹

26.4. Management was fragmented and there were serious problems with how management had behaved; there was very poor staff morale as a result.¹²

26.5. SAA had a very weak balance sheet and was virtually bankrupt which drastically increased the cost of financing, making expansion even more difficult.¹³

27. In order to address these challenges, Ms Carolus explained that the first task was to appoint a competent CEO. At that time, the executives were mostly in acting positions and were not suitably qualified.¹⁴ The Board looked for a “world class person who had international experience and respect and somebody who understood the markets” and therefore hired an international headhunting firm to

⁸ Transcript 29 November 2018, p 20-21

⁹ Transcript 29 November 2018, p 21-22

¹⁰ Transcript 29 November 2018, p 22

¹¹ Transcript 29 November 2018, p 22

¹² Transcript 29 November 2018, p 22

¹³ Transcript 29 November 2018, p 23

¹⁴ Transcript 29 November 2018, p 25

conduct the search.¹⁵ At the end of a very vigorous search, the Board selected Ms Sizakele Mzimela who was a banker by training but had spent most of her professional life at SAA and was serving as the CEO of SAA Express.¹⁶

The 2009 Executive

28. Ms Sizakele Petunia Mzimela was the Group Chief Executive of SAA from 1 April 2010 until 9 October 2012.¹⁷ Ms Mzimela testified before the Commission and explained the hierarchy of SAA.¹⁸ The structure is that the Minister of the DPE is the shareholder representative of SAA. The Board of SAA reports to the shareholder.
29. Because Ms Mzimela acted as the Group CEO, there were various subsidiary and group companies of SAA for which she was also responsible. The CEOs of South African Travel Centre (SATC), Mango Airlines SOC Ltd (*"Mango"*), Air Chefs SOC Ltd (*"Air Chefs"*) and SAAT reported to her.
30. The Board of SAA then had various subcommittees. These included the Remuneration and Human Resources Committee (*Remco*); the Procurement and Tender Processes Committee; the Social and Ethics Governance and Monitoring Committee; the Finance, Risk and Investment Committee and the Audit Committee. However, eventually the Finance and Audit Committees became one Committee, the Audit and Risk Committee (*ARC*). The sub-committees would make recommendations and the Board would make the ultimate decision.

¹⁵ Transcript 29 November 2018, p 26

¹⁶ Transcript 29 November 2018, p 26-27

¹⁷ Transcript 26 June 2019, p 22

¹⁸ Exhibit DD14, p 5

31. Below the level of CEO are the General Managers in SAA.
32. Ms Mzimela testified that there were four key governance documents¹⁹ aside from the legislation that governed SAA. These were the Memorandum of Incorporation (*MOI*); the Significance and Materiality Framework;²⁰ the shareholders compact;²¹ and the corporate plan.²²
33. The *MOI* provides that the Board must have a minimum of three and a maximum of sixteen directors. It also provides that there has to be a minimum of two *ex officio* directors, the CEO and CFO, and that the majority of the Board must always be non- executive directors.²³ Accordingly, there would always have to be a minimum of three non-executive directors.
34. Ms Mzimela testified that under Minister Hogan, governance at SAA was very well managed and the Minister communicated with the Board through its Chair and the CEO of SAA communicated with the DG of the DPE. All communication would be formal and recorded in writing. There were monthly monitoring meetings. SAA governance enjoyed high levels of transparency and information passed through the correct channels.²⁴

¹⁹ Transcript 26 June 2019, p 41

²⁰ This specifies matters that have to be referred to the shareholder, the Minister of the DPE. It is contemplated under sections 54(2) and 55(2) of the PFMA

²¹ This is a documentation of the strategic intent for the organisation which performance targets that are monitored between the shareholder and the organisation. It is reviewed on an annual basis.

²² This is a three-year plan that sets out the implementation of the shareholder strategy – this would contain focus areas in terms of the company's routes, deliverables, changes in capital and fleet, revenue generation plans. See transcript 26 June 2019, p 47. This plan is required under section 52 of the PFMA

²³ Articles of Association, clause 21.1, exhibit DD14, p 63. The *MOI* was introduced later and can be found in exhibit DD2, p 143. The relevant clause is clause 13.1.1 that now provides for a minimum of five and a maximum of fifteen board members in total

²⁴ Transcript 26 June 2019, p 53-55

Change in shareholder

35. Ms Carolus testified that during her tenure, the executive was engaged in designing a turnaround strategy. In doing so, they collaborated extensively with the Department of Public Enterprises (*DPE*) which had an aviation unit. The result was a New Growth Strategy that was presented to the Board in October 2010.²⁵
36. One of the key strategies SAA was exploring in the strategy was a Mumbai route and expanding the “East-West Corridor”, bringing passengers from Mumbai and Beijing as these were key South African trading markets.²⁶ This strategy would include the capitalisation of SAA and the acquisition of a new fleet of aircraft.²⁷ The strategy was presented to Minister Hogan and her advisors and specialists in the DPE signed off on the strategy.²⁸
37. Immediately after the presentation and approval of the New Growth Strategy in October 2010, Minister Hogan was replaced with Minister Malusi Gigaba on 1 November 2010.²⁹
38. Ms Carolus testified that, soon thereafter, a tension developed between the Minister (i.e. Mr Gigaba) and the Board of SAA. She explained that the Minister would criticise and misrepresent the Board in public, which the Board felt undermined the market confidence that SAA was trying to build up with the public and financial institutions.

²⁵ Transcript 29 November 2018, p 28

²⁶ Transcript 29 November 2018, p 24

²⁷ Transcript 29 November 2018, p 28

²⁸ Transcript 29 November 2018, p 28-29

²⁹ Transcript 29 November 2018, p 29

Minister Gigaba would also criticize the board for being unpatriotic in public while commending their performance in person.³⁰

39. Ms Mzimela testified that, in contrast to corporate governance under Ms Hogan, under Minister Gigaba anyone in the Ministry would communicate directly with the CEO and there was not an enforced structure. This meant that issues “fell through the cracks”. There was a breakdown in the division of roles in the organisation and therefore a breakdown in good governance.³¹

Treasury guarantee

40. Ms Carolus testified that in 2012 SAA was making some progress in its financial position. In the two preceding decades the airline had been consistently suffering losses and requiring bailouts. However, in the two years preceding 2012 SAA had started to see some small profits. Nevertheless, because of its past performance and its weak balance sheet, financial institutions were reluctant to give SAA funding. As a result, SAA required a guarantee from its shareholder to give the funders comfort. This would also result in a reduction of interest rates charged by the banks because the risk would be improved.³²

41. In 2012 SAA made a presentation to Minister Gigaba about capitalisation requirements for SAA and the guarantee SAA needed in this regard. 2012 had seen an increase in SAA's expenditure by R2billion because of the hike in the oil price, and because it was still using a fuel inefficient fleet which exacerbated the problem.

³⁰ Transcript 29 November 2018, p 35-36

³¹ Transcript 26 June 2019, p 53-54

³² Transcript 29 November 2018, p 78-79

The guarantee was needed to facilitate borrowing for a new fleet. A fleet takes around four years for delivery from time of ordering but, because of the effects of the 2008 economic crisis, many airlines could not make good on existing orders. SAA was able to negotiate some very good deals on new available aircraft. It was therefore urgent that SAA obtain the requisite guarantees to exploit these opportunities.³³ The guarantee was also important for SAA to be able to ensure it was a viable going concern and was trading responsibly.³⁴

42. Ms Carolus testified that, despite the R2billion increase in expenditure, SAA, through careful financial and business planning, still managed to make a small net profit (albeit an operational loss).³⁵ She also pointed out that during her tenure on the Board, SAA received a clean audit where there were no allegations of any wrongdoing.³⁶
43. Without the guarantee, Ms Carolus explained, the audit would be qualified, because there was no certainty SAA was a going concern. However, the audit was otherwise complete and showed that governance was sound and all the right procedures had been followed. In addition, the PFMA required that the financial statements be presented to, among others, the DPE within five months of the end of the financial year (August 2012). SAA, therefore, could not wait for the guarantee and still comply with the PFMA requirements.³⁷
44. Ms Carolus testified that, when the Board began to reach the end of its term, its members started to become concerned about some of the Minister's statements that

³³ Transcript 29 November 2018, p 80-81

³⁴ Transcript 29 November 2018, p 82

³⁵ Transcript 29 November 2018, p 81-82

³⁶ Transcript 29 November 2018, p 82

³⁷ Section 55(1)(d) of the PFMA provides that the accounting authority for a public entity must submit within five months of the end of a financial year to the Treasury, to the Executive Authority and to the Auditor General

the SAA Board had no strategy or vision, were unpatriotic and that some officials were receiving inappropriate financial rewards. Ms Carolus said that this had no basis in fact. She said that SAA submitted its strategy and business plan each year with its annual financial statements, which then formed part of the corporate strategy that served as a compact with the shareholder on key deliverables.³⁸ Despite this, however, over time, the Minister made ever increasingly strident statements about the Board's alleged incompetence, deviousness and lack of patriotism.³⁹

45. Ms Carolus explained that, as a result of these negative statements by Minister Gigaba, the Board was determined to create a very detailed handover report, documenting its journey with relevant attachments, showing that it was in compliance with legal requirements and had acted with the consent of the shareholder.⁴⁰
46. In addition to the annual financial statement reporting requirements under the PFMA, SAA was also required, under the Companies Act, to submit the financials to the Annual General Meeting (AGM) within six months of the end of the financial year (September 2012). As waiting for the guarantee would make the annual financial statements late, the Board proposed that, in order to meet the deadline in the Companies Act, they would present the annual financial statements at the AGM without the guarantee and therefore with qualified audited statements.⁴¹
47. The Minister, however, advised the Board that he had postponed the AGM until 25 September 2012 in order to secure the guarantee letter from Treasury. Then, on the 25th of September, the Minister advised that the meeting was no longer taking place. There were just 5 days left before the deadline imposed under the Companies

³⁸ Transcript 29 November 2018, p 88

³⁹ Transcript 29 November 2018, p 90

⁴⁰ Transcript 29 November 2018, p 90. The report may be found in Exhibit R, p 92-139

⁴¹ Transcript 29 November 2018, p 83-84

Act. Ms Carolus explained that being a director of a company that was non-compliant with the Companies Act had serious consequences for the members of the Board, particularly where they were also directors of other major companies. She also explained that having a qualified audit would have serious consequences for SAA.⁴²

48. The Board, therefore, continued to follow up with the Minister about the AGM and the letter of guarantee. On 25 September 2012, Ms Carolus met with Minister Gigaba to ask about the letter of guarantee. He claimed that he had already sent the guarantee to Ms Carolus's staff and they had really "let her down". She asked him to ensure that the letter of guarantee reached her the next day.⁴³

49. At the meeting with the Minister, Ms Carolus advised him that because of the enormous risk to directors in being part of a Board that did not comply with the deadlines in the Companies Act, and because of the directors' general frustrations with Minister Gigaba's conduct, some directors had threatened to resign and she had already received one resignation letter. Ms Carolus testified that she told these directors that they had recovered SAA to the point where it had by then become a bankable proposition and they should not do it harm by resigning just a few days before their terms were due to expire.⁴⁴ Ms Carolus explained this to the Minister who undertook to get the letter to her the next day.⁴⁵

50. However, the next morning (i.e. 26 September 2012) in the Business Day Minister Gigaba, through the Speaker of Parliament, had released a statement, without any warning to the Board, stating that the AGM was to be postponed because

⁴² Transcript 29 November 2018, p 91

⁴³ Transcript 29 November 2018, p 92

⁴⁴ Transcript 29 November 2018, p 93

⁴⁵ Transcript 29 November 2018, p 93

SAA had not completed the preparation of its Annual Financial Statements,⁴⁶ which Ms Carolus said was false.⁴⁷

51. Ms Carolus said that, in fact, what had happened at Treasury was that a letter and memo had been dispatched for Minister Gordhan's attention seeking the R5billion guarantee for going concern purposes.⁴⁸ Minister Gordhan testified before the Commission that there is a process that needs to be followed when a guarantee is requested. A request will go to the Fiscal Liability Committee who convene to investigate and prepare a report on the request. The report is then sent to the DG and then to the Minister who has the authority to sign the guarantee.⁴⁹ Despite the fact that the SAA Board had met with Minister Gigaba and requested the guarantee at the beginning of the year,⁵⁰ the supporting memo that was sent to the Fiscal Liability Committee was dated 21 September 2012.⁵¹

52. Nevertheless, the Fiscal Liability Committee made a recommendation to support the request.⁵² On 26 September 2012, the DG, Mr Lungisa Fuzile, signed his confirmation that he approved the recommendation.⁵³ Minister Gordhan signed his approval the same day.⁵⁴ Accordingly, it was false that Minister Gigaba had already sent the letter of guarantee to SAA because at that point, 25 September 2012, it did

⁴⁶ The report stated "Mr Gigaba said the airline had been unable to finalise its annual report due to the need to address its 'immediate financial challenges' for its auditors to complete the financial statements"

⁴⁷ Transcript 29 November 2018, p 94. A copy of the article may be found in Exhibit R, p 140

⁴⁸ Exhibit N2, p 93

⁴⁹ Transcript 21 November 2018, p 41-42

⁵⁰ Transcript 29 November 2018, p 96-97

⁵¹ Exhibit N2, p 93-102

⁵² Exhibit N2, p 102

⁵³ Exhibit N2, p 103

⁵⁴ Exhibit N2, p 104-105

not yet exist.⁵⁵ In fact, it was only faxed from Mr Gordhan to the DPE in the early hours of the morning on 27 September 2012.⁵⁶

53. Although Mr Gigaba was sent a rule 3.3 notice in relation to the evidence of Ms Carolus, he did not respond to it at the time of her testimony. He explained in a later affidavit to the Commission that the notice had not been brought to his attention at the time that it was sent but he had identified it when he was provided with a bundle of documents from the Commission in advance of his scheduled attendance to give evidence. His response to the evidence of Ms Carolus is dealt with later in this section of the report.

Resignation of the Board

54. In the light of the Business Day report of 26 September 2012, on 27 September 2012, eight of the 12 directors resigned from the Board.⁵⁷ This was precipitated by Ms Carolus convening a meeting with the Board in which she explained that, in the light of Minister Gigaba's hostile and irresponsible conduct, she was going to resign as she could not trust the Minister to have fixed the situation by 30 September 2012.⁵⁸

55. The Board did not wish to make any statements that would destroy all the progress they had achieved for SAA in the financial markets during its tenure. Accordingly, the eight members issued a carefully drafted statement. They did not want to make

⁵⁵ Transcript 29 November 2018, p 100

⁵⁶ Exhibit N2, p 105

⁵⁷ Transcript 29 November 2018, p 106

⁵⁸ Transcript 29 November 2018, p 108

damning statements about the Minister as this would have catastrophic consequences for the airline.⁵⁹

56. According to Ms Carolus the 2009-2012 Board of SAA was highly qualified, fully capacitated and had a very productive working relationship with Minister Hogan. There was also a respectful and productive relationship of cooperation between the Board and the CEO, Ms Mzimela. The Board was able to turn around SAA and make it a sustainable enterprise; there was a clear vision and strategy for the future. However, the Board's relationship with Minister Gigaba began as tense and became openly hostile.⁶⁰

57. The Board was faced with costly delays caused by the inaction of the DPE and Minister Gigaba in failing to secure the treasury guarantee timeously. Minister Gigaba also publicly sabotaged and maligned the Board, which ultimately led to the mass resignation of eight members of the Board at the same time.

The Mumbai route and the relationship between the board and Minister Gigaba

58. Ms Carolus and Ms Mzimela both testified before the Commission about another feature of their interactions with Minister Gigaba and his special advisor, Mr Siyabonga Mahlangu. These interactions related to the issue of SAA's Mumbai route and the efforts made by SAA's competitor, Jet Airways, to get SAA to close down the route. According to Ms Carolus and Ms Mzimela, they were pressurized by Minister Gigaba and Mr Mahlangu to accommodate Jet Airway's requests despite the fact that it did not make commercial sense for SAA to close down the route.

⁵⁹ Transcript 29 November 2018, p 110-111

⁶⁰ Transcript 29 November 2018, p 107

59. Both Mr Gigaba and Mr Mahlangu responded to these allegations in their evidence before the Commission.
60. In his affidavit to the Commission, Mr Mahlangu stated that he was acting in the honest discharge of his duties in all his dealings with personnel at SAA and was not motivated by any outside interest.⁶¹
61. Mr Gigaba similarly denied having placed any pressure on SAA to close the Mumbai route. He also emphasised that the decision to close the route was finally taken after he had already left the Department of Public Enterprises. However, he did not dispute that he remained silent in the meetings that were arranged with him and at which the Jet Airways representatives reprimanded Ms Mzimela for the lack of action on SAA's part to cancel the route. He also did not deny that he and Ms Mzimela had to wait for a full two hours before the representative of Jet Airways arrived at their first scheduled meeting.⁶²
62. These two common cause facts indicate, on their own, that Mr Gigaba extended a level of preference to the Jet Airways representatives. It is quite something for a Cabinet Minister to be willing to be delayed for two hours for a third party representative to arrive at a meeting and then to say nothing when that representative behaves in a wholly inappropriate manner to the CEO of one of the state owned entities under the Minister's portfolio. It is therefore understandable that Ms Mzimela formed the view that, because Mr Gigaba had been willing to entertain Jet Airways' representatives in this way, he was communicating his support for the closure of the route.

⁶¹ Mr Mahlangu's affidavit dated 9 September 2020, para 270

⁶² Mr Gigaba's affidavit dated 17 June 2021, paras 12-15

63. In so far as Ms Carolus's general evidence regarding Mr Gigaba's attitude to the Board and his delays in communicating the Treasury guarantee to the Board are concerned, Mr Gigaba stated in his affidavit to the Commission that he did not remember questioning the Board's capabilities or patriotism and denied that there was any antagonism between him and the members of the Board prior to their resignation in September 2012.⁶³ However, this explanation does not match up with the unprecedented conduct of the majority of the board members. The majority of the board of SAA saw fit to resign, *en masse*, a matter of days before their terms at the airline would, in any event, have come to an end. That type of conduct is a statement. It evidences a break down in the relationship between the board and its shareholder. Mr Gigaba's denials are therefore not consistent with this extraordinary step taken by well-respected national and international business people.⁶⁴ As Ms Carlous explained in her evidence, they had professional reputations to uphold and served on many other high-profile boards. They could not accept any irregularities and unlawful conduct or even the appearance of impropriety. Compliance with the PFMA and the Companies Act was a top priority to the Board and they were fully aware of their obligations in this regard.

64. This era in SAA's governance was characterised by a keen understanding of corporate governance requirements, and high levels of integrity and competence amongst Board members.

⁶³ Mr Gigaba's affidavit dated 17 June 2021, paras 18-21

⁶⁴ Teddy Daka, Tukela Jantjies, Russel Loubser, Bonang Mohale, Jabulani Ndlovu, Lewis Rabbets, Zakele Sithole, Maggie Whitehouse and David Lewis (Abel Bouchon left the carrier mid-term for other reasons)

After the resignation of the Carolus Board

65. After the resignation of most of the members of the SAA Board in September 2012, Mr Vuyisile Kona was appointed as the Acting Chair of the Board on 28 September 2012.⁶⁵ Mr Kona was *also* appointed as Acting CEO of SAA on 12 October 2012.⁶⁶
66. At the same time, seven new non-executive Board members were appointed to the Board and three members from the old Board were retained: Ms Myeni, Ms Kwinana and Ms Lindi Nkosi-Thomas.⁶⁷
67. Because of concerns the Board had about Mr Kona acting in both positions, the Board requested the Minister to appoint another Acting-Chair. On 7 December 2012, Minister Gigaba appointed Ms Myeni as Acting Chair.⁶⁸
68. Ms Mzimela testified that she found it surprising that Ms Myeni was appointed as chair because she had a poor attendance record. She sometimes failed to turn up for meetings at all. If she did arrive, there were very few occasions where she stayed for the full duration. She always found a way to excuse herself early.⁶⁹ Her main excuse was “she now has to rush because number one has called her to a meeting”.⁷⁰ Notwithstanding this, Ms Myeni was appointed as Acting Chairperson of the SAA Board. When asked to explain this decision, Mr Gigaba distanced himself from the process and stated that the appointment of chairpersons and acting chairpersons was dealt with by the Department. The motivation for appointing a

⁶⁵ Transcript 4 February 2020, p 72. See also p 74

⁶⁶ Transcript 4 February 2020, p 75

⁶⁷ Exhibit DD33, p 101

⁶⁸ Exhibit DD 34.13, p 1212. See also transcript 4 February 2020, p 77

⁶⁹ Transcript 26 June 2019, p 203

⁷⁰ Transcript 26 June 2019, p 204

particular person were contained in Decision Memorandum which was then presented to the Minister. He was unable to obtain the memoranda that related to the appointment of Ms Myeni as acting chair and so could not give a full response. Nevertheless, he stated that he had “no reason at the time to be concerned about Ms Myeni’s competence, credentials or diligence in the performance of her fiduciary duties”.⁷¹

69. Mr Kona testified before the Commission that Minister Gigaba’s advisor, Mr Mahlangu, played a very direct role in the affairs at SAA. He acted as the link between Mr Kona and the Minister.⁷²

70. Mr Kona testified that, soon after his appointment, he began to prepare an urgent turnaround plan for SAA.⁷³ While he was busy with this task, Mr Mahlangu approached him and insisted that he attend a meeting at the Gupta’s house in Saxonwold. This meeting is set out in detail in the section of this report dealing with The New Age. The upshot of Mr Kona’s evidence was that, prior to this meeting, he had requested the supply chain management department of SAA to issue a tender for a consultant to assist with the turnaround plan and business plan to secure the future sustainability of the airline. The supply chain team had selected Lufthansa Consulting, which was the cheapest of the bidders.⁷⁴ At the Gupta meeting, he was offered large sums of money by Mr Tony Gupta, which he refused. After this occurred, Mr Gupta asked him about the contract for the turnaround strategy and Mr Kona informed him that Lufthansa Consulting had already been awarded the contract. According to Mr Kona, Mr Gupta became “livid” upon hearing this news.⁷⁵

⁷¹ Exhibit BB 24.1

⁷² Transcript 4 February 2020, p 82

⁷³ Transcript 4 February 2020, p 83

⁷⁴ Transcript 4 February 2020, p 89-91

⁷⁵ Transcript 4 February 2020, p 91-100

While Mr Mahlangu admitted that he was present at this meeting, he denied that Mr Kona was offered money by Mr Tony Gupta. Mr Mahlangu was not a good witness in many respects and in certain cases gave untruthful evidence. The probabilities favour Mr Kona's evidence. After all the evidence heard by the Commission and by other witnesses who had dealings with Mr Tony Gupta also testified that he offered them large assortments of bribes. In this regard reference can be made to Mr Jonas and Mr Dukwana.

71. Mr Kona testified that Mr Gupta even contacted the Director-General of Public Enterprises, Mr Tshediso Matona, to demand to know how this had happened. The DG promptly called Mr Kona to confront him about the award of the contract.⁷⁶ Mr Kona testified that a few days later, he received a letter from the DPE stating that it was investigating the award to Lufthansa. According to Mr Kona, the investigation revealed no irregularities and yet the DPE would not allow Mr Kona to start work with Lufthansa.⁷⁷

72. Mr Kona explained that, after this, the DPE and his fellow Board members became hostile towards him and it was clear that the DPE no longer wanted him to retain his position. The DPE had conversations with his colleagues and made his working life as difficult as possible.⁷⁸ Soon thereafter Minister Gigaba told Mr Kona that, because the Board was delaying implementing the turnaround strategy, the Board had to just do its own turnaround plan. Mr Kona testified that this was just a "hodge podge" compilation of documents for the sake of submitting something and he could not be part of it.⁷⁹

⁷⁶ Transcript 4 February 2020, p 101-102

⁷⁷ Transcript 4 February 2020, p 103

⁷⁸ Transcript 4 February 2020, p 103-104

⁷⁹ Transcript 4 February 2020, p 104-105

73. Thereafter, the Board produced legal opinions claiming that the Lufthansa contract was awarded because Mr Kona had an interest in the contract – which he denied. He therefore contacted Minister Gigaba to try and resolve the issue. Mr Kona said that the Minister stated that, when he returned to Johannesburg, they could have a meeting to discuss the matter but this never happened. Mr Kona was ultimately suspended for reasons he says were “spurious”. Mr Kona testified that the reason for his removal was his refusal to cooperate with the Guptas.⁸⁰
74. Mr Kona testified that he approached Ms Myeni, who was at that stage the Acting-Chair of the Board, about the meeting with the Guptas. He stated that Ms Myeni was more interested in what he ate and drank at the Saxonwold residence rather than being concerned about what had transpired. She did not seem to take the meeting very seriously.⁸¹ Mr Kona said that he assumed Ms Myeni made some calls thereafter⁸² because he then received messages from Mr Mahlangu.⁸³ These were sms messages that stated that Mr Kona was “compromising the mission”. Mr Kona understood this to mean that he was not supposed to tell other people about what had transpired.⁸⁴ He explained that he was given the impression that Ms Myeni had her own agenda for how to use the Guptas to align with her own plan and that by alerting her to their visit to Saxonwold, Mr Kona had let her know that Mr Mahlangu and others were also trying to use these “power brokers” to advance their plans.⁸⁵

⁸⁰ Transcript 4 February 2020, pp105-106

⁸¹ Transcript 4 February 2020, p 115-116

⁸² Transcript 4 February 2020, p 116

⁸³ Transcript 4 February 2020, p 117

⁸⁴ Transcript 4 February 2020, p 117. See the screenshots of these messages in Exhibit DD17, p 16-18. The message dated 17 November 2012 stated “why did you let her know that you knew where she was going you will compromise the mission”

⁸⁵ Transcript 4 February 2020, p 120

75. Mr Bongisizwe Mpondo, a former non-executive director of SAA, who was appointed on 27 September 2012, provided the Commission with an affidavit. He explained that in around December 2012, information came to the Board's attention about allegations of irregularities against Mr Kona. The "legal executive" drove the sourcing of legal opinions in this regard, which were negative towards Mr Kona.⁸⁶ In the light of these opinions, the Board, with the concurrence of the Minister, suspended Mr Kona from his position as Acting CEO on 11 February 2013,⁸⁷ and removed him as a Board member on 26 February 2013.⁸⁸ The Board and the Minister sought to appoint a new Acting CEO and selected Mr Nico Bezuidenhout, the CEO of Mango at the time.⁸⁹
76. Mr Siyabonga Mahlangu provided an affidavit dated 9 September 2020 to the Commission in which he dealt with Mr Kona's allegations concerning his role in the meeting at the Gupta residence and thereafter. Mr Mahlangu confirmed in his affidavit that the meeting at the Gupta residence took place and that he was there with Mr Kona. However, he denied most of the other details about what transpired at the meeting. In particular, he stated that he did not witness any discussion about large sums of cash nor did he see any such wads of cash. He also said that there was no discussion about the Lufthansa contract.⁹⁰
77. In relation to the sms that he sent Mr Kona, in which he said that he was "compromising the mission", Mr Mahlangu has a completely different explanation for

⁸⁶ Exhibit DD 34.13, p 1213 para 10

⁸⁷ Transcript 4 February 2020, p 73

⁸⁸ Transcript 4 February 2020, p 74 and p 76. Mr Kona's removal is recorded in a shareholder resolution dated 11 March 2013, annexure BM3 to the affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1245

⁸⁹ Exhibit DD 34.13, p 1214, para 11

⁹⁰ Mr Mahlangu's affidavit dated 9 September 2020 paras 226-239

this message. According to Mr Mahlangu, “the mission” to which he was referring related to Mr Kona’s ambitions to be appointed as CEO of SAA.⁹¹

78. On the probabilities, Mr Kona’s version about what transpired at the meeting he had with Mr Tony Gupta in the presence of Mr Mahlangu is the truth. He provided details in regard to the discussion as well as what followed after that discussion. What followed after that discussion includes that Mr Matona, the Director-General of Public Enterprises, telephoned him to ask him about the decision to award the tender to Lufthansa. His evidence was also to the effect that subsequently he received correspondence from the Department of Public Enterprises to the effect that they were investigating Mr Kona’s decision in this regard or were investigating allegations against him. Mr Mahlangu’s evidence in regard to various matters that he was questioned about before the Commission was untruthful in a number of respects.

The Board under Ms Myeni

79. This part of the report considers the allegations made by various parties against Ms Myeni as the Chair of the SAA Board, which ultimately resulted in the resignation of the majority of the Board members of SAA.
80. When Ms Myeni took office as Chair of the SAA Board on 7 December 2012, she signed an undertaking.⁹² It provided:

“I, Duduzile C Myeni, in my capacity as a non-executive member of the South African Airways Board, hereby accept the appointment as acting Chairperson of South African Airways Board. I undertake to observe and comply with the principles and provisions of all legislation relevant to South African Airways, the protocol on corporate governance under review and the provisions of the shareholder compact

⁹¹ Mr Mahlangu’s affidavit dated 9 September 2020 paras 244-248

⁹² Ms Myeni confirmed it was her signature - Transcript, 4 November 2020, p 62. The declaration is at Exhibit DD34(b), p 1240

between the Board of South African Airways and the Minister of Public Enterprises; to devote sufficient time for the execution of my responsibilities; to utilize my skills to the best of my ability; to initiate, develop and implement systems or mechanisms for the effective and efficient management of South African Airways; and to maintain and observe the highest standards of integrity and probity in the execution of my responsibilities."

81. As the discussion below illustrates, Ms Myeni did not live up to this undertaking.

Pembroke Capital

82. Mr Mpondo's affidavit to the Commission explained that, prior to the new Board appointments in 2012, SAA had concluded a deal to acquire 20 A320 narrow body aircraft from Airbus.⁹³ As Ms Carolus explained, this was part of the strategy to capitalize SAA to allow for more regional flights and shorter distance flights to Africa and Latin America because SAA only had planes available for short haul and very long haul flights and nothing in between.⁹⁴

83. Mr Mpondo's evidence was that the deal had been concluded but the financing had not been finalised. The Bank of China had been recommended but it had pulled out of the deal. He said that the Board ultimately resolved on 27 May 2013 to award the contract to finance 10 of the 20 aircraft to Pembroke Capital. The next ten would require another procurement process.⁹⁵ On 2 June 2013, there was another Board meeting at which the Chairperson of the Audit and Risk Committee, Ms Kwinana, started to raise concerns about the terms of the Pembroke transaction. However, the

⁹³ Para 12

⁹⁴ Transcript 29 November 2018, p 23-24

⁹⁵ Affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1214, para 12. The resolution of the Board for the financing of the 10 aircraft was dated 27 May 2013, item 9.9, and can be found at annexure BM4 of this affidavit, Exhibit DD34.3, p 1257. Ms Myeni is recorded as being at the meeting.

Board considered that the matter has already been resolved at its meeting of 27 May 2013 and decided not to revisit it.⁹⁶

84. After the resolution of 27 May 2013, an application was submitted to the Minister of Public Enterprises in terms of section 54 of the PFMA⁹⁷ for the approval of the financing that would be obtained from Pembroke for the leasing of the 10 aircraft.⁹⁸ However, on 20 June 2013, Ms Myeni wrote to the Minister and said that “we would like to update the Minister on the award of the sale and leaseback of aircraft to Pembroke Capital. While reference is made to ten (10) aircraft in the previous correspondence, *the Board has subsequently resolved* to transact on two (2) aircraft with Pembroke”⁹⁹ (emphasis added).
85. About three weeks later, on 11 July 2013, Ms Myeni wrote a third letter to the Minister in which she claimed that a third decision had been taken by the Board of SAA. This third decision was to revert to the original request for approval for the financing of ten aircraft.¹⁰⁰

⁹⁶ Affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1214, para 14

⁹⁷ S 54(2) of the PFMA provides:

“(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

- (a) establishment or participation in the establishment of a company;
- (b) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;
- (c) acquisition or disposal of a significant shareholding in a company;
- (d) acquisition or disposal of a significant asset;
- (e) commencement or cessation of a significant business activity; and
- (f) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.”

⁹⁸ Transcript 4 November 2020, p 105-106

⁹⁹ Exhibit DD34, p 1544

¹⁰⁰ Exhibit DD 34.13, p 1283

86. Mr Mpondo's affidavit explains that the Board was not aware that Ms Myeni had sent the second letter to the Minister. He said that the Company Secretary had circulated a memorandum to the members of the Board to "ratify" its decision to approve the funding of two aircraft instead of 10. Mr Mpondo said that this memorandum caused a "heated debate since the board had never taken such a decision." He stated: "It appears to me that DPE had requested the acting Chairperson to provide a Board resolution to confirm the decision, which she contended for in her letter of 20 June 2013. It appears, on the face of it, that Ms Myeni unilaterally attempted to change the board resolution of 27 May 2013 without the knowledge or approval of the board. This was highly irregular in my opinion."¹⁰¹
87. Mr Mpondo's affidavit further indicated that on 22 January 2014, the Board held a meeting – which Ms Myeni did not attend – at which members of the Board raised concerns about the fact that the aircraft had not yet been delivered when the Board had already voted on the decision in May 2013. This was costing SAA R2million per month in storage fees to Airbus for not taking delivery timeously.¹⁰² The Board noted that a large reason for the delay was the exchange between the Chairperson and the Minister regarding Ms Myeni's attempts to change the Board's decision.¹⁰³
88. There was a further Board meeting on 3 April 2014, which Ms Myeni yet again did not attend, at which the Board resolved that the Chair needed to account to the Board for the changes she had attempted to make to the resolution regarding the Pembroke transaction. Despite this resolution, Ms Myeni failed to account to the Board.¹⁰⁴

¹⁰¹ Exhibit DD 34.13, p 1215, para 16

¹⁰² Exhibit DD 34.13, p 1216, para 21

¹⁰³ Exhibit DD 34.13, pp 1216-1217, para 22

¹⁰⁴ Exhibit DD 34.13, p 1217, para 23

89. The Board members concluded that Ms Myeni appeared to be trying to secure her own funding for the acquisition of the 10 Airbus A320s, without involving the executive, resulting in the attempted change in the Board's funding resolution. Ms Myeni's conduct in the Pembroke transaction resulted in delays in the delivery of the aircraft that cost SAA approximately R800m in pre-delivery payments. This led to a further cash shortfall and SAA having to increase its borrowing limits, which negatively impacted SAA for a long time.¹⁰⁵
90. When Ms Myeni testified before the Commission, she was asked about this transaction and it was put to her that she had lied to the Minister when she claimed that the Board had taken a decision to change the original transaction for financing of 10 aircraft to one for financing only two aircraft.¹⁰⁶
91. Her misrepresentation to the Minister was clear because in 2017 Ms Myeni had deposed to an affidavit before the Companies and Intellectual Property Commission in which she claimed that the letter she had written to the Minister on 20 June 2013 was written on her "understanding of what the Board had resolved. [Ms Myeni] subsequently ascertained that [she] was mistaken and that the Board's decision had not changed, at which point [she] wrote a further letter to the Minister of Public Enterprises to clarify the situation, which clarification was accepted by the Minister".¹⁰⁷
92. But Ms Myeni had not confessed her mistake to the Minister back in 2013 when she wrote her third letter. On the contrary, her third letter claimed that there was yet a

¹⁰⁵ Exhibit DD 34.13, p 1335

¹⁰⁶ Transcript, 4 November 2020, p 100-115

¹⁰⁷ Exhibit DD34, p 1564, para 8

further decision taken by the Board in which it decided to revert to the financing for ten aircraft.

93. Therefore, Ms Myeni had falsely represented to the Minister of Public Enterprises that the Board of SAA had taken two decisions that it simply had not taken. Her representations to the Minister caused delays in the financing transaction which resulted in substantial financial losses to SAA – in the order of R800 million.
94. Fraud is the “unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another”.¹⁰⁸
95. It was put to Ms Myeni during her evidence that she had knowingly misrepresented to the Minister of Public Enterprises in 2013 that the Board of SAA had resolved to change the Pembroke transaction in circumstances where she knew that they had not done so and that the misrepresentation cost SAA in the order of R800 million.¹⁰⁹
96. As was the case with most of Ms Myeni’s testimony before the Commission, she refused to answer these questions citing her privilege against self-incrimination.¹¹⁰ She was later called back to the Commission to deal with some of the questions in respect of which she had invoked the privilege against self-incrimination. Between the time of her initial testimony and her recall to give evidence, the Constitutional Court handed down a judgment in which it made findings concerning the ambit of the privilege against self-incrimination when it is invoked by witnesses in a commission of inquiry.¹¹¹ This is addressed in more detail below.

¹⁰⁸ Heese obo Peters v Road Accident Fund 2012 (6) SA 496 (WCC) at para 65

¹⁰⁹ Transcript 6 November 2020, p 254

¹¹⁰ Transcript 4 November 2020, p 100-115

¹¹¹ Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma [2021] ZACC 2; 2021 (5) SA 1 (CC); 2021 (5) BCLR 542 (CC)

The privilege against self incrimination

97. Ms Myeni's invocation of the privilege was, at times, abused during her evidence. Whenever the privilege was being abused because the question put to her was innocuous and could not reasonably result in an answer that would incriminate her, the evidence leader noted for the record that its invocation in each of those instances was an abuse.¹¹²
98. Ms Myeni also abused the privilege in another way. There were some instances in which she would be asked one question, to which she would provide an often lengthy answer, and then when the evidence leader would ask a follow-up question that was more difficult for Ms Myeni to answer, she would invoke the privilege.¹¹³ On each occasion that this occurred, the evidence leader noted for the record that the privilege was being abused.
99. The Commission takes a dim view of a witness who conveniently invokes the privilege against self-incrimination. Ms Myeni's own testimony reflects the abuse of the privilege because she often described herself as "not comfortable" answering the questions; she said that they were showing her in a "bad light"; she said that she did not want to answer because there were pending civil proceedings against her or because the National Prosecuting Authority was investigating matters.¹¹⁴ None of those is a valid ground for invoking the privilege. This was explained at the outset of Ms Myeni's evidence¹¹⁵ and yet she continued to invoke the privilege when there was no legally justifiable basis for doing so.

¹¹² Transcript 5 November 2020, p 84-85

¹¹³ Transcript 6 November 2020, p 251

¹¹⁴ Transcript 6 November 2020, p 251

¹¹⁵ Transcript 4 November 2020, p 35-41

100. Where she did invoke the privilege in circumstances where it could legitimately be invoked, I explained to Ms Myeni that her failure to deal with these pertinent issues would mean that the evidence against her was uncontested and findings could then be made on the basis of the uncontested evidence against her.¹¹⁶
101. The Pembroke transaction is one such instance where the evidence against Ms Myeni is undisputed and overwhelming. Ms Myeni, the then Chairperson of the Board of SAA, on two successive occasions, lied to the Minister of Public Enterprises when she claimed that the Board had taken two decisions that it had not taken. Those misrepresentations caused financial losses to SAA.
102. After Ms Myeni testified, the Constitutional Court handed down judgment in the matter of *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) on 28 January 2021. The judgment dealt with the invocation of privilege against self-incrimination by witnesses who testified at the Commission.
103. In the light of this judgment, Ms Myeni was sent a copy of the submissions that the Legal Team intended to make that she had abused the privilege against self-incrimination. Ms Myeni was informed that the Legal Team would seek rulings from the Chairperson regarding the instances where she had abused the privilege. Ms Myeni was therefore summonsed to appear before the Commission again on 25 May 2021 to deal with this issue.
104. Ms Myeni failed to appear before the Commission on the date specified in the summons. Her non-attendance was in breach of the Commissions Act and so I made a ruling that a charge should be laid with the police by the Secretary of the

¹¹⁶ Transcript 6 November 2020, p 5

Commission concerning her failure to attend. Thereafter, arrangements were made with Ms Myeni to facilitate a virtual hearing so that she could be questioned. By that stage of the day, valuable time had been lost and so the evidence leader proposed that the questions in respect of which rulings had been sought should be answered on affidavit by Ms Myeni. Ms Myeni confirmed that she no longer had an objection to answering the questions and so would do so on affidavit.¹¹⁷ She indicated that she would need some time to do so because she wanted to deal with the questions “comprehensively”.¹¹⁸

105. The affidavit that was subsequently received from Ms Myeni was not comprehensive. It mainly consisted of one word answers and claims that Ms Myeni had no knowledge of certain matters. It was therefore of no utility to the Commission and indicated that Ms Myeni was merely continuing with her strategy of avoiding the Commission’s questions and had no intention to frankly and honestly assist the Commission’s work.
106. It is important to emphasise that the questions put to Ms Myeni on affidavit, were *only* in respect of the questions where the Legal Team took the view that she had abused her privilege against self incrimination – that is, where there was no discernible criminal offence associated with the possible answers to the question. Ms Myeni was not simply re-asked all of the questions put to her in her three days of evidence. Those questions remain unanswered because she invoked her privilege against self-incrimination. She did not have a change of heart in respect of those questions and never endeavoured to answer them. The evidence put to her in that questioning, remains uncontested.

¹¹⁷ Transcript 25 May 2021, p 158

¹¹⁸ Transcript 25 May 2021, p 159

107. Ms Myeni's conduct, when she was summonsed to return on 25 May 2021 to deal with the matters involving SAA where she had previously abused her privilege, is consistent with a witness who will go to great lengths to avoid being questioned. First, in defiance of the summons issued, Ms Myeni simply failed to appear before the Commission. Then, when I ruled that a criminal charge be laid for this non-attendance, Ms Myeni made herself available for questioning. However, until she was told that she could provide answers on affidavit to the questions in respect of which she had abused her privilege in refusing to testify, she maintained that the privilege had not been abused.
108. However, once she was presented with the option of responding to those questions on affidavit because there was no time remaining in the day for her to be questioned properly about the matters, she was suddenly willing to respond to the questions in an affidavit. The affidavit then proved to be vague and evasive.

The disclosure of Mr X's identity

109. Ms Myeni's conduct revealed a sustained disdain for the authority and processes of the Commission. During her first evidence session in November 2020, Ms Myeni disclosed the identity of a witness in respect of whom I had made a clear ruling that his identity should not be revealed because of concerns for his and his family's safety and security.
110. The witness was Mr X. Mr X gave evidence of a scheme in terms of which he received money from the bank account of Ms Myeni's son, Mr Thalente Myeni.

According to Mr X, he had no business dealings of any kind with Mr Thalete Myeni or his business, "Premier Attraction".¹¹⁹

111. Despite this, R 3.15 million was paid into Mr X's company's bank account in three tranches towards the end of 2015 and early 2016.¹²⁰ After receiving the money, Ms Myeni contacted Mr X and instructed him to pay the money out. Some of it was withdrawn in cash and then given to Ms Myeni or dropped off at her home.¹²¹ There were also two large amounts that were paid into a bank account for which Ms Myeni provided the banking details.¹²² Mr X testified that, at the time that he made the payments in accordance with Ms Myeni's instructions, he did not know who the holder of the bank account was. However, when he was initially questioned by the Commission's investigators, he was told that the payments were made to the Jacob Zuma Foundation.¹²³

112. The Commission traced the money that Mr X had received from Mr Thalete Myeni's business, to a R2 million payment from VNA Consulting.¹²⁴ VNA Consulting had been involved in a housing project in the Free State Province and had used some of the monies it received on that project to pay Mr Myeni's business, Premier Attraction. So, the money appears to have originated from the Free State government's coffers, been paid to VNA Consulting, then to Mr Myeni's business "Premier Attraction", then to Mr X's company's bank account, and then, on instruction by Ms Myeni, into the bank account for the Jacob Zuma Foundation.

¹¹⁹ Transcript 18 February 2020, p 59-61

¹²⁰ Transcript 18 February 2020, p 52-54

¹²¹ Transcript 18 February 2020, p 63-84

¹²² Transcript 18 February 2020, p84-86

¹²³ Transcript 18 February 2020, p 85-86

¹²⁴ Transcript 17 February 2020, p 22

113. Mr Thalente Myeni was questioned at the Commission about his involvement in this arrangement. He claimed that the dealings with VNA Consulting and with Mr X were all legitimate business dealings,¹²⁵ despite Mr X's complete denial that there was any business relationship at all between him and Mr Thalente Myeni.
114. Mr Myeni's claims that these were all legitimate business dealings cannot be accepted as correct. He was extremely vague in his testimony about the work with VNA Consulting. He did not know how many people worked on the "project".¹²⁶ He could not recall the names of the people at VNA Consulting with whom they had worked.¹²⁷ He said that there was no method by which they would account for the work done and he was unable to provide any details of the precise work that would earn his company R2 million.¹²⁸ He could not recall the period over which the work was to be completed.¹²⁹ Despite being summonsed by the Commission to produce the document that would evidence this business relationship, Mr Myeni could not produce a single document.¹³⁰
115. The Commission has seen a number of instances of this type of alleged "business dealings" during the course of its hearings. Witnesses would come before the Commission and claim that there were genuine business relationships between various parties but then could not ever produce a contemporaneous document to corroborate their version. The absence of contemporaneous documents is a compelling indicator that no genuine business relationship existed. This is because, in the ordinary course, genuine business relationship produce records – records of

¹²⁵ Transcript 17 February 2020, p 25

¹²⁶ Transcript 17 February 2020, p 25

¹²⁷ Transcript 17 February 2020, p 26

¹²⁸ Transcript 17 February 2020, p 28-29

¹²⁹ Transcript 17 February 2020, p 29

¹³⁰ Transcript 17 February 2020, p 32-p 34 and p 42

emails between the parties, records of work done, progress records on performance, and records of interactions and conversations. The absence of records, together with an inadequate explanation for their non-existence, means that the relationships were probably not genuine ones.

116. Mr Myeni's version must also be assessed against that of Mr X. Mr X was a candid and frank witness. He made it clear at the end of his testimony that he did not want to be testifying before the Commission but that he realised he had no choice but to tell the full story when all the documents and records of the bank transactions were presented to him by the Commission's investigators.¹³¹ He also gave evidence at the Commission in difficult circumstances and notwithstanding the threat that this posed to his own and his family's well-being.

117. Mr X's story is also one that the Commission heard often. It is the story of someone who got caught up, as a result of circumstance and long term relationships, in what appears to be a criminal scheme. Although he was a reluctant witness, he came before the Commission to explain his conduct in a forthright manner. He did not try to excuse it, or obfuscate. He explained what had happened in clear and simple terms. This was in stark contrast to Mr Myeni's evasive approach when being questioned.

118. The evidence that was presented at the Commission indicates that the dealings between VNA Consulting, Premier Attraction (Mr Thalete Myeni's business), Mr X's business, Ms Duduzile Myeni, and the Jacob Zuma Foundation were not arms-length business dealings. The flow of funds from the Free State to these various individuals and entities need to be investigated further in order to establish whether there was

¹³¹ Transcript 18 February 2020, p 104

a corrupt relationship between any of these parties in terms of which state funds were redirected to benefit private parties, including the Jacob Zuma Foundation.

119. Mr X did a service to this country in being willing to give a frank and candid account of his involvement in these transactions. He did not deserve to have his identity revealed by Ms Myeni. When Ms Myeni did so during her testimony before the Commission, I directed that a criminal complaint should be lodged with the Police.. I understand that a criminal complaint has been lodged with the Police but, at the time of finalising this report, I am unaware of any arrest having been made.

The Board evaluation by Institute of Directors of South Africa NPC (IoDSA)

120. It is now necessary to return to the situation at SAA in 2014 because, as the report has highlighted above, during the early part of 2014 there was a material breakdown at board level at SAA. A number of the directors had expressed grave misgivings about Ms Myeni's leadership of the Board.

121. In the light of this situation, the Institute of Directors of South Africa NPC (IoDSA)¹³² was tasked with undertaking an evaluation of the SAA Board. According to Mr Mpondo, Ms Myeni insisted that members of the Board be interviewed for the evaluation instead of simply completing the evaluation electronically as most had done. The rest of the Board was unhappy with this because it would delay the preparation of the AGM pack required for the AGM on 29 January 2014.¹³³

¹³² The IoDSA is a non-profit company and a professional body for directors that is recognised by the South African Qualifications Authority. It promotes corporate governance in South Africa, serving as a convener and secretariat to the King Commission on Corporate Governance and has ownership of the King Codes/Reports

¹³³ Exhibit DD 34.13, p 1217, para 24

122. The pack was delayed unduly because the report was not forthcoming. It was eventually presented as a hardcopy at the AGM by a member of the Social, Ethics, Governance and Nominations Committee. The Board requested that the Chair account for why she held back the report.¹³⁴ Mr Mpondo stated that the report would have reflected all the governance and leadership issues facing SAA at the time.¹³⁵

The letter of complaint and mass resignations of Board members

123. Mr Mpondo's affidavit stated that at a meeting of the SAA Board on 22 January 2014 the Board dealt with the leadership of the Board in general and resolved that there were challenges in the leadership of Ms Myeni.¹³⁶

124. On 28 January 2014 six Board members resolved to write a letter to Ms Myeni and copied Minister Gigaba regarding concerns with her leadership.¹³⁷ The letter¹³⁸ was signed by all of the Board members except Ms Kwinana, Ms Nkosi-Thomas and Dr Naithani. The letter dealt with the following issues:

124.1. The Chair undermined the narrow body fleet financing process. This is the Pembroke transaction referred to above.

124.2. The procurement process for the wide body fleet was irregular – Ms Myeni as the Chair of the Board appeared not to have been aware that a Request for Proposals (*RFP*) had been issued by the management of SAA in this regard, despite the requirement in the MOI of SAA that Ministerial approval must be

¹³⁴ Exhibit DD 34.13, p 1218, para 2

¹³⁵ Exhibit DD 34.13, p 1218, para 26

¹³⁶ Exhibit DD 34.13, p 1218, para 27

¹³⁷ Exhibit DD 34.13, p 1218, para 28

¹³⁸ Exhibit DD 34.13, pp 153-162

sought by the Chair, on behalf of the Board, before any processes for procurement of a major asset.

- 124.3. Losses occasioned by the Chair's procrastination. First, Ms Myeni's conduct in the Pembroke transaction caused delays which cost SAA R800m. Second, Ms Myeni refused the Board's request to convene meetings to finalise the wide-body acquisition process, resulting in SAA losing the scheduled slots for the delivery of these aircraft, which meant SAA did not have these fuel-efficient aircraft for the 2016/2017 year leading to financial losses.
- 124.4. The Chair initiated forensic investigations into three fellow board members, without following the process set out in the SAA Internal Audit Charter. The Board stated: "We refuse to be managed by fear and victimization in this Board." It continued: "The conduct of the Chairperson in overtly acting against resolutions or seeking to change resolutions is becoming pervasive. It happened with the A320 financing transaction. It continues to happen with whistleblowing and investigations."
- 124.5. The Chairperson sowed confusion in Board Committees and interfered in their operations, to the extent that the Chair claimed to be a member of all Board Committees. This compromised the Chair's impartiality. This included using the Audit and Risk Committee to investigate Board members without proper processes in place; entering into a performance contract with the CEO, assisted by the HR & Remco Chairperson without the members of that committee or the Board seeing the contract, in contravention of the MOI; and trying to usurp the powers of the Procurement and Tender Processes Committee (*PTPC*) in the wide body procurement process.

124.6. The Chair was responsible for various inefficiencies. These included the poor administration of the Board, which resulted in many urgent agenda items not being attended to and causing the company financial loss; lack of planning for the 2014 AGM which resulted in the Chair seeking a waiver of the AGM notice period and never explaining to the Board why this was necessary; the Chair's non-attendance at key meetings or failure to provide reports for the Board to consider in advance of meetings.

124.7. The Chair disregarded Board resolutions.

125. The letter concluded:

"This letter demonstrates repeat transgressions of corporate governance, undermining due process by the Board and a lack of diligence and care on the part of the Chairperson on extremely important matters.

All the examples employed above are illustrative of a leadership style that potentially will expose all serving Board members to liability. We specifically highlight the risks associated with non-compliance with section 76 'Standards of Directors Conduct' & 77 'Liability of Directors and Prescribed Officers' of the Companies Act, 2008.

In the exercise of our fiduciary obligations we recognize the need to uphold the highest standards of governance. These issues are seriously impacting on our performance individually and collectively. It is our sole intention to continue to put our shoulders behind the proverbial wheel with the aim of turning the organisation around. Increasingly it appears to us that our best efforts will be in vain given the realities we are operating under."

126. The signatories to the letter first attempted to have a meeting with Ms Myeni to deal with these challenges and requested the Company Secretary to schedule a special session. The Chair rejected the request and so the members had to resort to the

letter.¹³⁹ The Chair responded to the letter by refusing to meet to discuss the issues.¹⁴⁰

127. Ms Nkosi-Thomas resigned from the Board in or around March 2014.¹⁴¹

128. On 3 April 2014 the Board requested that the Company Secretary prepare an assessment of the Board's effectiveness.¹⁴² The Company Secretary presented this report at a meeting on 29 May 2014.¹⁴³

129. The report concluded that:

129.1. the Board was not a coherent team;

129.2. the Chair failed to fulfil the mandate set out in the Board Charter of maintaining a dialogue with, and guiding, the CEO – the two did not meet;

129.3. the Chair attempted on two occasions to place a moratorium on board meetings;

129.4. the Board raised serious issues of leadership that remained unresolved;

129.5. one of the Board members transmitted a memorandum from the Chairperson to the Auditor General to investigate before the Board could deliberate and investigate the issues raised. This was calculated to undermine internal processes;

¹³⁹ Exhibit DD 34.13, p 1219, para 28

¹⁴⁰ Exhibit DD34.13, p 1343

¹⁴¹ Transcript 5 November 2020, p 82

¹⁴² Exhibit DD34.13, p 1346

¹⁴³ Exhibit DD34.13, p 1360

129.6. The Chairperson sent a letter directly to the Minister about the financial position of SAA without first consulting the Board.

130. The Board adopted the Company Secretary's report and resolved that a letter be written to the DPE to request a session between the Minister and the Board.¹⁴⁴ The Board took advice that it could initiate a process, in consultation with the Minister, to invoke the provisions of section 71(3)(b) of the Companies Act to remove Ms Myeni as a director.¹⁴⁵ Minister Gigaba convened a meeting to mediate between all the parties but the Chair did not arrive.¹⁴⁶ Thereafter, Mr Gigaba was replaced by Ms Lynne Brown, as Minister of Public Enterprises.

131. In June 2014 the new Public Enterprises Minister, Ms Lynne Brown, convened a meeting with the Board. The Chair arrived during the course of the meeting. The Board members raised all the issues they had advanced in their letter.¹⁴⁷ Following on the meeting, the Minister requested, and was presented with, a report on SAA's leadership issues prepared by officials in the DPE.¹⁴⁸ This briefing report, dated 30 July 2014, concluded that the Board was completely dysfunctional and referred to Ms Myeni's decision to suspend all Board activities until the Minister intervened, which had aggravated the problems faced by the Board and SAA.

132. On 14 October 2014 the Board members received a notice convening a special general meeting of the company.¹⁴⁹ The notice stated that the meeting was convened to consider removing the seven Board members that signed the letter to the Minister

¹⁴⁴ Exhibit DD34.13, p 138

¹⁴⁵ Exhibit DD34.13, p 1222, para 37

¹⁴⁶ Exhibit DD34.13, p 1222-3, para 38

¹⁴⁷ Exhibit DD34.13, p 1223, para 39

¹⁴⁸ Exhibit DD34.13, p 1393

¹⁴⁹ Exhibit DD34.13, p 141

about Ms Myeni, as well as the removal of Dr Naithani. Mr Mpondo stated that he was surprised at this because there was no indication that the Minister was not happy with the Board's performance.¹⁵⁰ Given the content of the notice it appeared that there was already a predetermined outcome and as the Board members did not consider that they had done anything wrong, there was nothing to present to the Minister. Mr Mpondo accordingly decided to resign from the Board.¹⁵¹ Ms Myeni was not, however, asked to account to the Minister.

133. Ms Myeni was asked during her testimony about the Board's resignation and the contents of the letter they sent to the Minister complaining about her. She was also asked why it was that in the circumstances, the Minister would only ask the other Board members to account for why they should not be removed and never questioned Ms Myeni. Ms Myeni invoked her privilege against self-incrimination in respect of these questions.¹⁵²

134. The affidavit of Mr Mpondo was also put to Ms Myeni.¹⁵³ Mr Mpondo was one of the directors who resigned. He set out the considerable steps that the Board had taken to report Ms Myeni's deficiencies to the Minister and Ms Myeni's failure to show up at the meeting scheduled with Minister Gigaba and the DG to try and work out the issues. The affidavit set out the report that was sent to Minister Brown about Ms Myeni including the factions in SAA, the DPE's assessment that the Board was completely dysfunctional, and Ms Myeni's decision to suspend all Board activities.

¹⁵⁰ Exhibit DD34.13, p 1224, para 43

¹⁵¹ Exhibit DD34.13, p 1224, para 44

¹⁵² Transcript 4 November 2020, p 4- 28

¹⁵³ Exhibit DD34(b).13, p 1222

135. Again, Ms Myeni invoked her privilege against self-incrimination in response to being asked for her account of these events.¹⁵⁴ Ms Myeni's failure to give any contrary version on these events means that Mr Mpondo's affidavit is uncontested. There is no reason why the Commission should not accept Mr Mpondo's version, not only because it has not been denied by Ms Myeni but also because it is supported by two independent sources of corroboration. Both the SAA Company Secretary's report and the report prepared by the DPE confirmed that by 2014 there was a completely dysfunctional Board at SAA. They also recorded serious concerns about the manner in which Ms Myeni was discharging her functions as Chair of the Board.
136. Despite all these concerns, in October 2014 Minister Brown retained Ms Myeni on the Board, together with Ms Kwinana and Dr Naithani. They were joined on the Board by two new appointments – Mr Anthony Dixon and Dr John Tambi.¹⁵⁵
137. Ms Brown provided an affidavit to the Commission dealing with the issue of the retention of Ms Myeni on the Board of SAA notwithstanding the complaints that had been received from the majority of the board members.
138. Although Ms Brown emphasised that she was concerned with issues of corporate governance when she took over the Public Enterprises portfolio in May 2014, she stated that "the issue of Ms Myeni as an individual Board Chairperson was not a priority".¹⁵⁶ Ms Brown further emphasised that the DPE's briefing report only reached her in September 2014 which was one month before the October AGM at which the directors would be changed.¹⁵⁷

¹⁵⁴ Transcript 5 November 2020, p 49-55

¹⁵⁵ Exhibit DD33, p 102

¹⁵⁶ Affidavit of Ms Brown dated 23 January 2020 para 75

¹⁵⁷ Affidavit of Ms Brown dated 23 January 2020 para 76

139. Ms Brown further explained that she had not been informed “about each fibre of Ms Myeni’s conduct or the conduct of the other Board members for that matter”. She therefore stated that she “could not take action against Ms Myeni or any other Board member in the abstract”.¹⁵⁸ Later in her affidavit, however, she acknowledged that “there was a flurry of allegations and counter allegations making it difficult to make an objective grounded determination as to exactly who [had] failed to fulfil his/her duties”.¹⁵⁹

140. Ms Brown then referred to the fact that she gave the Board three months to resolve their differences and received advice from the Department that she would need to make a decision whether to remove some or all of the Board members.¹⁶⁰

141. However, on the critical issue, which was why only the complaining Board members had been called on to explain why they should not be removed, Ms Brown said that she could not remember whether Ms Kwinana or Ms Myeni had also been given letters to explain their conduct. The records that the Commission obtained from the Department do not include any such letters being sent to Ms Myeni or Ms Kwinana. As a result, it is probable that they were not sent such letters. This, again, raises the key question: why would the Minister only call on the complaining Board members to explain why they should not be removed?

142. Ms Brown’s answer to this key issue was unsatisfactory. In the end, she concluded her affidavit by saying that, when those Board members who had been called on to explain their conduct resigned, the only two remaining members – Ms Myeni and Ms Kwinana – were retained to ensure continuity.¹⁶¹ However, that begs the question:

¹⁵⁸ Affidavit of Ms Brown dated 23 January 2020 para 86

¹⁵⁹ Affidavit of Ms Brown dated 23 January 2020 para 93

¹⁶⁰ Affidavit of Ms Brown dated 23 January 2020 paras 97-101

¹⁶¹ Affidavit of Ms Brown dated 23 January 2020 para 104

continuity for what purpose? The account by the majority of the Board was that Ms Myeni had chaired a hopelessly dysfunctional board and had acted improperly and in breach of her duties. That is not the type of continuity that a Minister should be looking for in an SOE. Continuity could also have been maintained by acting on the complaints of the majority of the Board, which may have encouraged them to stay on. The Minister's explanation for failing to deal with or meaningfully investigate serious, fundamental concerns about the organisation's leadership is inexcusable.

143. In his affidavit submitted to the Commission, Minister Gordhan stated that by January 2015, the SAA Board "had shrunk in size and been eroded in terms of its skills and expertise leaving only Ms Myeni, Ms Kwinana and Dr Tambi on the SAA Board. The Board was thus under-capacitated."¹⁶² Mr Dixon was also on the Board at that time but resigned in November 2015.¹⁶³ This was as good as SAA having no board at all. That this situation was allowed to happen in regard to an SOE was, to say the least, scandalous, particularly when Minister Gigaba and Minister Lynn Brown had been told about these challenges at SAA.

144. The events that unfolded under this under-capacitated Board were devastating for SAA. Some of the particular transactions, which demonstrate the governance problems at SAA under this Board, are explored below.

¹⁶² Minister Gordhan's affidavit, dated 20 August 2020, para 19

¹⁶³ *Organisation Undoing Tax Abuse and Others v Myeni* [2010] ZAGPPHC 169 at para 72. See also transcript 1 July 2019, p 9

THE TRANSACTIONS

Airbus Swap and Emirates deal

145. The Airbus swap transaction and the Emirates deal have been the subject matter of OUTA's High Court application to declare Ms Myeni a delinquent director under the Companies Act. OUTA was successful in the High Court.¹⁶⁴

146. The High Court's judgment makes numerous findings against Ms Myeni in justifying its order to have her declared delinquent. The judgment makes findings that Ms Myeni failed to attend meetings, that she displayed negligence in her dealings as Board Chairperson, that she often had opaque motives for obstructing patently advantageous measures for SAA, that she was in a powerful position in South Africa and was a close confidant of President Zuma and that she appeared to have a desire (at face value) to promote transformation and local development to the negation of all other principles of process and good governance, and the welfare and continued survival of SAA.

147. In respect of the transaction with Emirates, the High Court found as follows:

147.1. SAA had a code sharing relationship with Emirates that was one of the most profitable areas of SAA's business and generated profits of over R170million per year. The agreement involved SAA purchasing Emirates flights at a reduced rate and selling them to customers at a profit. Conducting international flights with the heavy Airbus 340-600 aircraft was inefficient and made it hard to run these routes profitably and Emirates had been granted a substantial number of frequencies to South Africa by the Department of Transport as part

¹⁶⁴ Organisation Undoing Tax Abuse and Others v Myeni [2020] ZAGPPHC 169

of a bilateral agreement. The result was that SAA could not be profitable on its international routes and needed an enhanced code sharing arrangement between SAA and a middle eastern airline. Therefore in 2013 increasing networks through code sharing¹⁶⁵ was a key priority for SAA.

- 147.2. At first, SAA had a deal with Etihad but it was causing SAA major losses. In January 2015, Emirates approached SAA with a proposal for enhanced code-sharing which proposal was forwarded to National Treasury. SAA had two bargaining chips going into negotiations – its code-sharing relationship with Etihad and the possibility of helping Emirates in litigation against the DoT.¹⁶⁶ The deal was very beneficial to SAA. The Board was made aware of the proposal as soon as it was received. SAA also had a Fleet plan prepared for it by an external consultancy that recommended this arrangement with Emirates. The SAA Management prepared a Memorandum of Understanding (MOU) and circulated it to the Board. Ms Myeni got involved in the operational aspect of the deal and insisted on attending meetings with Emirate, which was highly unusual. This included Ms Myeni travelling to Dubai. Management hoped to conclude the MOU at the meeting. Ms Myeni then cancelled the meeting at the last minute for unexplained reasons which was treated as highly disrespectful by Emirates and Dubai officials.

¹⁶⁵ Code sharing is a marketing arrangement in which an airline places its designator code on a flight operated by another airline, and sells tickets for that flight. Airlines frequently form code-share arrangements to strengthen or expand their market presence and competitive ability

¹⁶⁶ This litigation related to the legality of the agreement that underpinned a contractual arrangement Emirates had with the DoT. DoT tried to stop the agreement during 2013. Emirates approached the Court and obtained an interdict to keep it in place, but DoT was threatening to appeal. Although Emirates sought SAA's support over the fourth frequency, Mr Bezuidenhout, Mr Bose, Ms Mpshe and Mr Meyer were all clear in the Myeni delinquency trial that SAA had no legal power to determine existing route rights or to determine the course of DoT's litigation with Emirates, but could merely approach DoT to consider the prudence of the litigation, in the light of the prospective code sharing agreement with Emirates

- 147.3. There was a second opportunity for a meeting in Cape Town and Ms Myeni was personally invited by the CEO of Emirates to attend. Despite being reminded to attend, Ms Myeni just failed to show up. The other non-executive Board members also did not show up. The meeting took place between the executives of SAA and Emirates and they concluded a draft non-binding MOU.
- 147.4. Mr Nick Linnell, an independent legal adviser whose involvement with the SAA Board and relationship with Ms Myeni is detailed later in the report, presented to the Board queries about the MOU that were contrary to the legal opinion that SAA's legal advisory panel had obtained. The Board and Ms Myeni in particular caused delays in the finalisation of the MOU and even set up a committee to assess this non-binding MOU. The committee fully supported the MOU. Ms Myeni still delayed the conclusion – she asked to meet with the review committee, but failed to attend. The rest of the Board members all indicated that they had no objection. Ms Myeni was the only hold out. She cancelled further plans to conclude the MOU. The conclusion of the MOU was scheduled to take place at a formal ceremony to which international media had been invited. Ms Myeni then called the executive to say the President had instructed them not to sign the MOU. The ceremony was called off leading to national embarrassment, ruining the deal with Emirates and hampering relations with Etihad (because SAA had made it known that it was building a relationship with Emirates, instead of Etihad, but then failed to do so) as well as other partners because SAA was now seen as entirely irrational.
- 147.5. At the meeting that Ms Myeni called after this had happened on 3 July 2015, she confiscated everyone's devices. During the meeting, she issued action points that made no sense. Ms Myeni prevented the circulation of a round robin resolution to approve the MOU. Thereafter, Ms Myeni continued to be an

obstacle to the conclusion of the MOU – citing undisclosed concerns. Eventually, every member of the SAA team responsible for engaging with Emirates was removed or resigned. The Court found that her reasons for frustrating and sabotaging the deal remain unclear to this day.

147.6. The High Court concluded that Ms Myeni's actions "led to irreparable harm for SAA and the country. What motivated these reckless and detrimental actions to SAA and country, we still do not know. Ms Myeni acted recklessly and broke her fiduciary duty in sabotaging this deal and the people of South Africa and SAA's employees are paying the price for her actions."¹⁶⁷ There can be no doubt, that what happened at SAA during Ms Myeni's tenure as the chairperson of the Board of SAA contributed significantly to SAA being placed under business rescue a few years later – in 2020.

148. The High Court also found the following with respect to the Airbus swap deal:

148.1. Ms Myeni tried to put a stop to a transaction between Airbus and SAA, in terms of which SAA sought to cancel a legacy contract for the purchase of 10 Airbus A320-200s and to replace this with a new deal for SAA to lease five airbuses directly from Airbus. This would have allowed SAA to escape onerous pre-delivery payments and inflated prices under the old contract. The matter was extremely urgent as SAA was liable to pay R1billion to Airbus in 2015, which money it did not have. Default would risk triggering its other loan obligations with the effect that billions of rand would fall due immediately, with a knock-on effect on government debts.

¹⁶⁷ Organisation Undoing Tax Abuse and Others v Myeni [2010] ZAGPPHC 169 para 132

- 148.2. Executives had spent months negotiating the deal with Airbus. It was very beneficial to SAA and crucial for it because it allowed the replacement of the old fleet which was inefficient with more fuel efficient and lighter aircraft in line with SAA's network and fleet plan. Treasury had approved the deal and all that was missing was the SAA Board's resolution to ratify the documents. This deal was a key condition to getting any further guarantees from government.
- 148.3. Ms Myeni simply failed to meet the deadline and did not ratify the deal. The Board then began questioning the deal, after having previously approved of the transaction. Rather than just ratifying the agreements, Ms Myeni, Ms Kwinana and Dr Tambi started engaging directly with Airbus representatives to attempt to renegotiate the deal, which was highly irregular. The Board continued thereafter to delay finalising the deal, which delay would have catastrophic consequences for SAA. Ms Myeni even went so far as to send a letter herself directly (without consulting anyone) to the President of Airbus to try and agree on new terms. She tried to unilaterally introduce the engagement of "an African Aircraft Leasing Company".
- 148.4. Ms Myeni could offer no plausible explanation for her delay or her actions. Again, she cited unspecified concerns with it. Ms Myeni then took it upon herself to appoint a transaction advisor, without any processes in place, which was manifestly unlawful. The proposal from the selected advisor demonstrated a complete lack of understanding of the transaction and aptitude to advise on the matter. All the while National Treasury was in correspondence with Ms Myeni, warning her of the danger in which she was putting SAA. Thereafter, all senior executives who opposed Ms Myeni's plan to change the transaction were removed. She sent out a completely inaccurate section 54 application to the Minister of Finance (Mr Nene) in regard to her amended version of the plan with

Airbus. The Minister declined Ms Myeni's request and instructed her to approve the Swap Transaction without delay.

148.5. On 9 December 2015, Minister Nene was fired by President Zuma and was replaced by Mr D Van Rooyen. Mr D Van Rooyen was replaced four days later by Mr Pravin Gordhan. When Minister Gordhan finally came into office, he allowed Ms Myeni one final opportunity to make out her case. Ms Myeni failed to attend the meeting with Minister Gordhan to do so. She instead sent another section 54 application that was rejected. During this period, Ms Kwinana resigned from the Board. Eventually Treasury intervened to save the swap.

148.6. The High Court found that "faced with all these risks, Ms Myeni's attitude seemed to be one of supine indifference" and her explanations were "generally incomprehensible". "As Chairperson of the Board she did not show any concern for the catastrophic consequences of her actions not only for SAA but the country."¹⁶⁸

149. Former Minister Nene testified before the Commission¹⁶⁹ about a meeting to which he was summoned by former President Zuma which was also attended by Ms Myeni in November 2015. Mr Nene was called to that meeting after he had shared concerns about Ms Myeni's leadership at SAA with his ANC colleagues in an ANC meeting. Minister Nene testified that during the meeting he complained about Ms Myeni and said to former President Zuma that Ms Myeni was obstructive and the Board acted recklessly under her leadership. He recommended that she be removed from office. He emphasised that, because of Ms Myeni's conduct in the airbus swap

¹⁶⁸ Organisation Undoing Tax Abuse and Others v Myeni [2010] ZAGPPHC 169 at para 230

¹⁶⁹ Transcript 3 October 2018

transaction, there was a serious threat that the airline would default on its obligations and this would have a ripple effect across the economy as a whole.

150. Also during his evidence, Mr Nene said that he considered his subsequent removal as Minister of Finance a month later as having been linked to the views he expressed about Ms Myeni in the meeting he had with Mr Zuma and Ms Myeni.

151. During her evidence, Ms Myeni was asked how, after this had happened, she had managed to persuade the former President to keep her on as a member of the SAA Board and, indeed, to remain as its Chairperson. She was also asked whether her retention on the Board had anything to do with Minister Nene's removal as Finance Minister. Ms Myeni refused to answer these questions and instead invoked her privilege against self-incrimination.¹⁷⁰ When Ms Myeni responded to these questions after she had agreed to do so on affidavit, she said that she may have attended a meeting with former President Zuma at which Minister Nene was present. However, beyond that, she stated as follows: "I dispute all of Minister Nene's evidence".¹⁷¹

152. It was also put to Ms Myeni that Minister Gordhan had testified before the Commission¹⁷² that Ms Myeni's efforts to reverse Minister Nene's decision on the airbus swap transaction would likely have triggered debt defaults by SAA and that Minister Gordhan had decided not to reverse Minister Nene's decision, despite Ms Myeni's application for him to do so. After he had refused to reverse Mr Nene's decision, Minister Gordhan received a call from President Zuma asking him to reconsider the decision. Ms Myeni was asked whether she had asked President

¹⁷⁰ Transcript 6 November 2020, p 103-110

¹⁷¹ Ms Myeni's affidavit dated 6 June 2021 para 29

¹⁷² On 20 November 2018

Zuma to do so. She refused to answer the questions and invoked her privilege against self-incrimination.¹⁷³

153. It was also put to Ms Myeni that the evidence of two successive finance Ministers was that her approach to SAA was reckless. Once again, Ms Myeni refused to answer the questions and invoked her privilege against self-incrimination.¹⁷⁴

154. The evidence of former Minister Nene and Minister Gordhan on their interactions with both Ms Myeni and former President Zuma therefore stand uncontested before the Commission, save for a bald and self-serving denial in Ms Myeni's affidavit about Mr Nene's account of the meeting with Mr Zuma. There is no reason why the Ministers' evidence should not be accepted. It is to the effect that by 2015 the SAA Board was being chaired by a person who had little concern or appreciation for the serious negative effect that the airbus swap transaction would have had on SAA's financial position and that of the country.

¹⁷³ Transcript 6 November 2020, p 125-126

¹⁷⁴ Transcript 6 November 2020, p 127

General interference by the Board in operational matters

155. Ms Mathulwane Emily Mpshe was appointed as Acting CEO in July 2015,¹⁷⁵ replacing Mr Nico Bezuidenhout, and remained in that position until November 2015,¹⁷⁶ when she was replaced by Mr Musa Zwane.¹⁷⁷
156. Ms Mpshe testified that she was notified in an urgent meeting during July 2015 that Mr Bezuidenhout was going back to Mango Airlines and that Ms Myeni had instructed that Ms Mpshe be appointed as Acting CEO.¹⁷⁸
157. Ms Mpshe testified that there were numerous instances of Board members interfering with operational matters that ought to have been the exclusive purview of management at SAA. In particular, with reference to the appointment or discipline of employees – non-executive directors, and in particular the Chair, Ms Myeni, would be heavily involved in, and, issue instructions on, these issues.¹⁷⁹ Ms Mpshe explained that this was inappropriate. The Board, and the shareholder in consultation, should select the CEO but thereafter, the CEO is responsible for selecting other executive members and those employees would select other employees to populate the organisation.¹⁸⁰
158. Ms Mpshe testified that these instructions on the appointment of specific individuals was contrary to the employment procedures, policies or prescripts in place at SAA.

¹⁷⁵ Transcript 1 July 2019, p 5

¹⁷⁶ Transcript 1 July 2019, p 6

¹⁷⁷ Transcript 1 July 2019, p 8

¹⁷⁸ Transcript 1 July 2019, p 6

¹⁷⁹ Transcript 1 July 2019, p 11

¹⁸⁰ Transcript 1 July 2019, p 11-12

She said it was also inappropriate at the time because SAA was in the process of retrenching large numbers of employees. She explained that she raised this as a problem on two occasions with the Remunerations Committee of the Board.¹⁸¹ However, they did not act to address these concerns.

159. The Board's inappropriate involvement in the affairs of management did not stop with the appointment of personnel. The Board also took decisions that were contrary to the advice of management. When these decisions were probed during the course of the Commission's hearings, it became clear that they were unjustified. In some instances, the decisions were so lacking in rationality that the only explanation for the Board's conduct appears to have been some ulterior purpose. These examples are dealt with in greater detail below.

¹⁸¹ Transcript day 124, 1 July 2019, p 13.

LSG Skychefs/Air Chefs

160. Ms Mpshe testified that in 2015 an SAA subsidiary Air Chefs was servicing SAA lounges.¹⁸² However, customers were complaining at the airport lounges about the service and food served.¹⁸³ The SAA lounges had stopped being competitive and so Investec started a partnership with SAA to revamp the lounge. Part of the revamp involved a tender for a catering company.¹⁸⁴
161. The contract went out to tender and Air Chefs was among the bidders invited to bid for the contract.¹⁸⁵ The contract was for an amount of R85million spread out over three years.¹⁸⁶
162. Ms Mpshe testified that LSG Skychefs South Africa (Pty) Ltd (*LSG Skychefs*) was a subsidiary of Lufthansa Airlines, a German company. It was a South African registered company and based in South Africa. It was employing South Africans.¹⁸⁷ It had acquired the necessary BEE credentials.¹⁸⁸
163. LSG Skychefs and Air Chefs both tendered for the catering contract.
164. Dr M Dahwa was the Head of Procurement at SAA in 2015. He testified before the Commission that there was a full formal procurement process and evaluations had been done in respect of airport lounge catering.¹⁸⁹

¹⁸² Transcript 1 July 2019, p 56

¹⁸³ Transcript 1 July 2019, p 54

¹⁸⁴ Transcript 1 July 2019, p 55-56

¹⁸⁵ Transcript 1 July 2019, p 56

¹⁸⁶ Transcript 1 July 2019, p 56

¹⁸⁷ Transcript 1 July 2019, p 53

¹⁸⁸ Transcript 1 July 2019, p 53

¹⁸⁹ Transcript, 28 June 2019, p 236

165. Given that the contract award was for R85 million, it fell within Ms Mpshe's delegation of authority as Acting CEO to approve the award. After the full procurement process had been completed and LSG SkyChefs had been selected, Ms Mpshe prepared a submission to the Board of SAA to notify it that there would be a new service provider after the renovated lounges had been opened.¹⁹⁰

166. The submission was dated 20 August 2015. It informed the Board of the following:¹⁹¹

166.1. the deterioration of quality in the service and product provided by Air Chefs at OR Tambo International Airport and the complaints SAA had received about this which had resulted in reputational and commercial harm to SAA and prompted customers to move to competitor lounges;

166.2. the management of SAA had several interactions with Air Chefs about the deteriorating quality and, despite these efforts, there had been no improvement in the service and the quality of the food;

166.3. SAA, therefore, had had no other option but to go out on a confined tender¹⁹² to find a suitable catering service;

166.4. the level and standard of service required was also part of the contractual obligation that SAA had to Investec as part of their partnership in upgrading the lounges;

¹⁹⁰ Transcript 1 July 2019, p 57

¹⁹¹ Exhibit DD15(a), p 91-93

¹⁹² This is where a tender is not advertised generally to the public for any interested party to bid for it. Instead, the tender committee would identify a limited group of suitable candidates and invited only these parties to bid for the contract

166.5. SAA had received three responses to the bid. These were from (1) LSG Skychefs; (2) Air Chefs; and (3) Dnata-Newrest;

166.6. a full, proper and lawful procurement process had been conducted;

166.7. Air Chefs had been unable to meet even the minimum qualification criteria for the tender and had therefore been excluded;

166.8. of the remaining two tenderers, LSG Skychefs had the lowest price;

166.9. there would be a revenue loss to Air Chefs of R18million per annum and a negligible negative net profit impact of R1.8million per annum; and

166.10. due consideration had been given to the implications of taking business away from Air Chefs as against retaining customers in a highly competitive market and it had been noted that this was only carving out a small portion of services rendered by Air Chefs in relation to the total SAA account.

167. Ms Mpshe testified that in the negotiations between SAA and LSG Skychefs the parties had agreed that the business of servicing the lounges was going to be transferred as a going concern as contemplated in section 197 of the Labour Relations Act 66 of 1995.¹⁹³ As a result, LSG Skychefs would take over the

¹⁹³ S 197(2) provides:

"If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) - (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer; (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee; (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer"

employees of Air Chefs. The process had in fact already begun – employees were being transferred and trained in preparation for the opening of the lounge. There would accordingly not be any loss of employment at Air Chefs despite the fact that it had not been awarded the tender.¹⁹⁴

168. On 21 August 2015 Dr Dahwa sent a letter of award to LSG Skychefs confirming that it had been awarded the catering contract.¹⁹⁵ On 1 September 2015 Ms Mpshe, Ms Myeni and Dr Dahwa went to attend a meeting of the relevant Portfolio Committee of Parliament. The issue of SAA awarding the tender to a “German company” was discussed for a long time in Parliament.¹⁹⁶ In fact, according to Ms Mpshe, this was something Ms Myeni herself raised: Ms Mpshe said Ms Myeni told Parliament that as a non-executive director she had been surprised to learn that SAA had been awarding contracts to German companies. This was what drew Parliament’s attention to the issue.¹⁹⁷

169. Dr Dahwa testified that Ms Myeni was asked by the Portfolio Committee why SAA had awarded a catering tender to a German company – and whether SAA meant that there were no South African women who could cook.¹⁹⁸ Ms Myeni had responded by claiming that she did not know about the decision and did not agree with it.

170. Ms Mpshe testified that, when the SAA delegation left the Portfolio Committee, Ms Myeni was irate and said to her that by taking away business from a local

¹⁹⁴ Transcript 1 July 2019, p 60-61

¹⁹⁵ Transcript 1 July 2019, p 5. See also transcript 123, 28 June 2019, p 235

¹⁹⁶ Transcript 1 July 2019, p 58

¹⁹⁷ Transcript 1 July 2019, p 58

¹⁹⁸ Transcript 28 June 2019, p 236

company and giving it to a “foreign” company, “you mean Black people can’t cook”.¹⁹⁹

She began berating Ms Mpshe in front of her colleagues waiting outside of Parliament.²⁰⁰ Ms Mpshe responded by saying that they should discuss this elsewhere because Ms Mpshe’s correspondence to Ms Myeni had already explained and addressed Ms Myeni’s concerns.²⁰¹

171. On 2 September 2015 Ms Myeni sent Ms Mpshe an email instructing her not to award the tender to LSG Skychefs. Ms Mpshe responded that the award had already been awarded to LSG Skychefs and that her submission to the Board had simply been a notification. She also clarified that LSG Skychefs were the legitimate successful bidders. Ms Myeni asked her about Air Chefs and why they were excluded. Ms Mpshe checked with Dr Dahwa and was advised that Air Chefs had been excluded because they had not submitted the full documentation required to be eligible for the tender. She told Ms Myeni accordingly.²⁰²

172. On 3 September 2015 Ms Kwinana sent an email to Ms Mpshe stating that the award had to be cancelled; that she was “disturbed by this decision which is killing SAA subsidiary”; she also stated that “this looks like treason and I request this to be investigated by the SIU”.²⁰³

173. Thereafter, Ms Myeni sent Ms Mpshe an email stating that she had to cancel the LSG Skychefs award.²⁰⁴ She stated that she had a responsibility to support a

¹⁹⁹ Transcript 1 July 2019, p 59

²⁰⁰ Transcript 1 July 2019, p 60

²⁰¹ Transcript 1 July 2019, p 59

²⁰² Transcript 1 July 2019, p 61

²⁰³ Exhibit DD15(a), p 116

²⁰⁴ Transcript 1 July 2019, p 61

subsidiary of the airline.²⁰⁵ Ms Myeni stated that furthermore, Ms Myeni was the chairperson of the Board of Airchefs at the time.²⁰⁶ Ms Mpshe testified that she believed this was a conflict of interest.²⁰⁷ In the email Ms Myeni asked for a comprehensive review of the tender process.²⁰⁸

174. In response Ms Mpshe gathered all the information from Dr Dahwa about the procurement process.²⁰⁹ She also asked the legal department at SAA to provide an opinion as to the legal risks of cancelling the contract. The legal department expressed the view that LSG SkycheFs had been appointed pursuant to a lawful procurement process. They concluded that the cancellation or suspension of the award could result in possible legal action and financial exposure against SAA.²¹⁰ The opinion was provided to the Board.²¹¹

175. Ms Mpshe prepared a comprehensive response and circulated it to all the members of the Board on 8 September 2015.²¹² In this response, she clarified that:

175.1. there were not going to be any job losses and this was also a condition of the tender itself;

175.2. LSG SkycheFs was a South African entity which locally sourced and produced products procured by SAA;

²⁰⁵ Transcript 1 July 2019, p 63. This email is at exhibit DD15(a), p 111

²⁰⁶ Transcript 1 July 2019, p 64

²⁰⁷ Transcript 1 July 2019, p 65

²⁰⁸ Exhibit DD15(a), p 111.

²⁰⁹ Transcript 1 July 2019, p 68

²¹⁰ Exhibit DD15(a), p 127-135

²¹¹ Transcript 1 July 2019, p 84

²¹² Exhibit DD15(a), p 114-117. This includes an earlier email response from Ms Mpshe of 3 September 2015, addressing more of the Chair's questions

- 175.3. the lounge services only represented 4.265% of AirChef's total annual revenue and, that, therefore, the revenue loss would be negligible;
- 175.4. a letter of award had already been issued to LSG on 21 August 2015. LSG Skychefs had already commenced with implementing operational requirements;
- 175.5. the tender had been awarded pursuant to a recommendation by the Bid Adjudication Committee (*BAC*) after due process had been followed in accordance with Ms Mpshe's delegated authority;
- 175.6. any cancellation of the award would result in litigation and financial exposure against SAA;
- 175.7. Air Chefs had failed to meet the initial minimum threshold for evaluation in the tender and had lawfully been precluded from proceeding to further stages of the evaluation.
176. Ms Mpshe then had a meeting with the rest of the Board on 28 and 29 September 2015 about whether to cancel the LSG tender award.²¹³ Despite the warning from the legal department and the extensive explanations by Ms Mpshe of the fair tender process that had been followed, the Board simply decided to pass a resolution to cancel the award on the basis that it had a duty to its subsidiary, Air Chefs.²¹⁴ The resolution stated that the award to LSG Skychefs had to be "retracted" and the contract awarded to Air Chefs "without going through a bidding process".²¹⁵ The LSG

²¹³ Transcript 1 July 2019, p 85

²¹⁴ Transcript 1 July 2019, p 87-88

²¹⁵ Exhibit DD15(a), p 138

Skychef's contract was, thereafter, cancelled.²¹⁶ Subsequently, LSG SkyChefs sued SAA over this decision.²¹⁷ Customers continued to note the substandard food in the lounges.²¹⁸ The Board never concerned itself with even attempting to improve Air Chef's services.²¹⁹

177. Dr Dahwa explained that he signed the cancellation letter to LSG SkyChefs because the Board had resolved that this should be done.²²⁰ He accepted, however, that this was "not the right thing" to do. He signed the letter, nonetheless, because of the sensitive political optics of the situation – i.e. that this had been the subject of tense and embarrassing public questioning in Parliament and that Ms Myeni was insistent that this embarrassment be addressed in this way.²²¹ He did so on 6 October 2015.²²² Dr Dahwa stated that part of the reason why he signed the letter was that he did not want to continue to be seen to be insubordinate or unwilling to implement the will of the Board.²²³

178. At this same meeting on 28 and 29 September 2015, Ms Myeni in her anger at Ms Mpshe's decision, proposed that the Board pass a resolution reducing her delegation of authority by half – as well as the authority of all the executives.²²⁴ The

²¹⁶ Transcript 1 July 2019, p 89

²¹⁷ Transcript 1 July 2019, p 94

²¹⁸ Transcript 1 July 2019, p 94-95

²¹⁹ Transcript 1 July 2019, p 96

²²⁰ Transcript 28 June 2019, p 238 and p 240

²²¹ Transcript 28 June 2019, p 246

²²² Transcript 28 June 2019, p 247. This was four days after his long ordeal with Ms Myeni and Ms Kwinana over the letters of award to Swissport and Engen, which is dealt with later.

²²³ Transcript 28 June 2019, p 248

²²⁴ Transcript 1 July 2019, p 93

result of this was that the Board would then have to be more involved in the day to day operations of the airline.²²⁵

179. Ms Mpshe testified that the executives were very concerned about the level of the Board's involvement in the operations of SAA but they did not issue any resolution to this effect or refuse Ms Myeni's proposal. She testified that the morale of the executives was very low because these instructions were contrary to lawful process and what the airline should have been doing in terms of implementing the company's strategic objective.²²⁶ Ms Mpshe stated that, while non-executives were not supposed to be at SAA very frequently outside of meeting times, Ms Myeni and Ms Kwinana were frequently at SAA.²²⁷ She stated that the executives had to spend time fighting back against unlawful instructions instead of implementing the approved strategy at the airline to deal with SAA's already precarious position.²²⁸

180. When Ms Kwinana testified before the Commission, she was asked for her account of the decision to withdraw the LSG SkyChefs tender in order to give it to Air Chefs. She said that it was one of the best decisions she ever made at SAA. In support of her view, she said:²²⁹

180.1. leaving the tender with LSG SkyChefs would have resulted in retrenchments and job losses at Air Chefs; she said that it would have resulted in the loss of 1500 jobs;

180.2. Local suppliers would have also lost their jobs to a foreign company;

²²⁵ Transcript 1 July 2019, p 93

²²⁶ Transcript 1 July 2019, p 90

²²⁷ Transcript 1 July 2019, p 102

²²⁸ Transcript 1 July 2019, p 91

²²⁹ Transcript 2 November 2020, p 170

- 180.3. Air Chefs is a 100% subsidiary of SAA and it should be developed and given a chance to improve;
- 180.4. as a subsidiary Air Chefs did most of its work for SAA and it was going to lose most of that work and most of its revenue; and
- 180.5. whoever had made the decision to award the tender to LSG Skychef was clearly trying to sabotage SAA.
181. It was put to Ms Kwinana that all of the reasons she advanced had been dealt with comprehensively by Ms Mpshe in her submission to the Board. It was put to her that the Board had therefore either ignored these factors because they were determined to cancel the bid, or they simply did not read Ms Mpshe's submissions. In response, Ms Kwinana took the position in her testimony that the simple fact that Air Chefs was a subsidiary of SAA meant that it had to be chosen as a supplier all the time, regardless of the cost to SAA or the harm to SAA's reputation. She kept comparing Air Chefs to a child that she said had to be guided and nurtured,²³⁰ instead of a corporate entity that SAA engaged with as an efficient business entity.
182. When Ms Mpshe's responses to all of these issues were put to Ms Kwinana, she claimed, without any basis, to "not trust" Ms Mpshe's submission, even suggesting it never reached the Board. Ms Kwinana began making wild, unsubstantiated allegations against Ms Mpshe, including that she joined forces with LSG Skychefs to sue SAA to set aside the tender.²³¹ She was continuously evasive, particularly when it was put to her that SAA routinely used South African subsidiaries of foreign

²³⁰ Transcript 2 November 2020, p 175, 185 and 189

²³¹ Transcript 2 November 2020, p 255-256

companies as service providers, and this therefore could not have been a valid basis for withdrawing the tender or contract.²³²

183. Ms Kwinana was also questioned about whether the decision to retract an existing tender and replace it with an award to another entity on instruction from the Board was a reportable irregularity. A reportable irregularity is a concept defined under section 45 of the Auditing Professions Act 26 of 2005.²³³ It refers an unlawful act or omission that has been committed by someone in a management position which has caused or is likely to cause material financial loss to the entity or which is fraudulent or which involves a material breach of a fiduciary duty.

184. Ms Kwinana testified that it was not a reportable irregularity to retract an existing tender that followed correct procedure, and simply award it to another bidder without following any process. She claimed that it would have been a reportable irregularity if the award had *remained* with Air Chefs because the tender was supposed to go to the shareholder in terms of section 54 of the PFMA²³⁴ because it was a discontinuation of a big portion of the SAA Group.²³⁵

185. Ms Kwinana's insistence that the Board's decision to retract the tender award from LSG SkyChefs and give it to Air Chefs was not a reportable irregularity was in stark contrast to the evidence of Mr Mothibe, the PWC auditor who was responsible for auditing SAA in the 2016 financial year. When Mr Mothibe testified before the

²³² Transcript 2 November 2020, p 223-224

²³³ An unlawful act or omission committed by somebody in a senior management position which (1) has caused, or it likely to cause, material financial loss to the entity, or (2) which is fraudulent or amounts to theft, or (3) which present a material breach of a fiduciary duty

²³⁴ See the fn above setting out this section. In essence, the section provides that before a public entity concludes any major stipulated transactions, the accounting authority for the public entity (the Board) must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction

²³⁵ Transcript 2 November 2020, p 171

Commission, he accepted that, had the true facts concerning the Board's decision on this matter been brought to his attention, he would have reported it to the Independent Regulatory Board for Auditors (*IRBA*) as a reportable irregularity.²³⁶

186. Furthermore, Ms Kwinana's reference to section 54 of the PFMA is also entirely incorrect as a matter of law. First, even if this tender did require the approval of the shareholder or National Treasury under section 54 of the PFMA, it was finally and officially awarded to a bidder. It was a final administrative act. South African law says that an administrator cannot simply withdraw a final administrative decision because there was an irregularity in the process. It must apply to court through the appropriate channels for the decision to be set aside. The decision is binding until a court sets it aside.²³⁷

187. In any event, section 54 did not apply in this case. Section 54(2)(e) of the PFMA provides that, before a public entity may conclude a transaction that amounts to commencement or cessation of a significant business activity, the Board must promptly and in writing inform the relevant treasury of the transaction and submit particulars to the executive authority for approval of the transaction. However, the servicing of the SAA lounge was not a "significant business activity". According to Ms Mpshe's submission to the Board, it amounted to around 4% of Air Chef's business and R18million in revenue per year (R1.8million in profit).

188. "Significant" is not defined in the PFMA. Treasury Regulation 28.3.1 provides that the Board may develop a framework of acceptance levels of significance with the Minister. This framework is known as the Significance and Materiality Framework. The transaction thresholds are set out in annexure B thereof. For cessation of a

²³⁶ Transcript 16 July 2020, p 201

²³⁷ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (4) SA 418 (CC)

business activity, the annexure requires notification if there is a cessation of business activity which results in retrenchment of any number of employees; or a cessation of business activity where costs exceed R100million. Neither of these applied to this transaction.

189. In any event, this was not the reason given *at the time* for why the Board set aside the award. Rather, it was Ms Kwinana's after-the-fact justification presented under questioning before the Commission which had no legal or factual basis.
190. Ms Kwinana's conduct made no commercial sense and it put SAA at risk both reputationally and legally. During her evidence, Ms Kwinana repeatedly claimed that her conduct was lawful because the letter of award had not yet been sent out when the Board took its decision to retract the award.²³⁸ When it was put to her that this was false and she would have known that because the legal opinion presented to the Board made it clear, she would still not accept it.
191. Ms Kwinana was a very poor witness. She continually refused to make the most basic of concessions, even when the evidence presented to show that she was wrong, was overwhelming. In the end, this severely undermined her credibility as a witness. She showed herself to be willing to be dishonest under oath simply to avoid having to account for her unlawful and irresponsible conduct.
192. The evidence regarding the Board's conduct in the unlawful and unjustified cancellation of the LSG Skycheffs tender was also put to Ms Myeni when she testified. She again refused to answer the questions and invoked her privilege against self incrimination. Despite invoking the privilege, she did say that outsourcing from Air Cheffs to LSG Skycheffs would be like "killing a child that was established by

²³⁸ Transcript 2 November 2020, p 230-243

SAA as a subsidiary”.²³⁹ This explanation was remarkably similar to Ms Kwinana’s attempted justification. For the same reasons set out above in respect of Ms Kwinana’s purported justification, Ms Myeni’s explanation is also rejected.

193. Ms Myeni also testified that she was entitled to ignore the advice of the SAA legal department.²⁴⁰ That sort of attitude to the advice provided by SAA’s own qualified internal lawyers is deeply concerning. It evidences a level of disregard for the expertise of others that calls into question Ms Myeni’s fitness to hold any position on the board of an SOE.

194. Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract. They acted in gross disregard of their fiduciary duties to SAA when they took this decision.

195. Section 162 of the Companies Act empowers the shareholder of a company, amongst others, to bring an application to declare a director of a company delinquent. The shareholder of SAA is the executive authority as defined under the PFMA. At the time when these decisions were taken, that was the Minister of Finance, Minister Gordhan.

196. Section 162 is the section of the Companies Act in terms of which OUTA brought its application before the High Court for an order declaring Ms Myeni a delinquent director. No such application was, however, instituted against Ms Kwinana. There is a limitation in section 162(2)(a) of the Companies Act on these types of applications. They must be brought within 24 months of the person having been a director of the company.

²³⁹ Transcript 6 November 2020, p 239-224

²⁴⁰ Transcript 6 November 2020, p 246-248

197. Therefore, under the current statutory regime, it is not possible for the executive authority of SAA any longer to bring such an application to court. Given that it often takes a number of years for the facts of delinquency, especially in SOEs to be uncovered, the Commission recommends the amendment of the Companies Act so as to permit applications of this type to be brought even after two years, on good cause shown. This will mean that in cases such as the present, where the true extent of the Board members' breaches of duty are only uncovered a number of years later, steps can still be taken by the executive authority of an SOE to ensure that they are declared delinquent and thereby prevented from serving on the boards of companies in the future.

False whistleblower reports

198. Ms Mpshe testified that Deloitte provided a whistleblower service to SAA. The results would be reported on a platform to which Ms Kwinana, as head of the Audit and Risk Committee (ARC), had access.²⁴¹
199. In 2016 Ms Mpshe received a call from a member of OUTA, Mr Wayne Duvenage, explaining that Ms Kwinana had approached OUTA after she had resigned from the SAA Board and told them that she would accompany Ms Myeni to internet cafes to go and formulate whistleblower reports and use these to victimize staff members at SAA – to suspend or dismiss those that they wanted removed.²⁴² Ms Mpshe said she was shocked to hear this because these reports had been used to initiate disciplinary proceedings against, among others, Mr Sylvain Bosch and Mr Bezuidenhout.²⁴³ According to Ms Mpshe, Mr Duvenage explained to her that Ms Kwinana had said that she had decided to tell OUTA everything so that she could avoid being targeted in their litigation against Ms Myeni to have her declared a delinquent director, which would have been fatal for her career as a chartered accountant with her own firm.²⁴⁴
200. During her evidence before the Commission Ms Kwinana was asked to confirm that Ms Myeni prepared false whistleblower reports. It was put to her that during her interview with OUTA, she had told them that Ms Myeni had indeed prepared false whistleblower reports in order to discipline staff that she had a problem with. When Ms Kwinana disputed that she had said this to OUTA, she was shown a transcript of her meeting with OUTA on 30 August 2016.²⁴⁵ However, Ms Kwinana still persisted

²⁴¹ Transcript 1 July 2019, p 97-99

²⁴² Transcript 1 July 2019, p 141

²⁴³ Transcript 1 July 2019, p 142-143

²⁴⁴ Transcript 1 July 2019, p 144

²⁴⁵ Exhibit 33.26

that she had never said this and claimed that it was a “language issue” – which is patently absurd as the transcript is very clear. She then claimed that the transcript had to be wrong because it referred to having been “edited” on the first page.²⁴⁶ The Commission subsequently provided the audio recording of the interview to Ms Kwinana and invited her to indicate to the Commission whether she disputed the transcript which the Commission had obtained. She was warned that, if there was no alternative transcript forthcoming from her, she would be taken to have accepted the correctness of the Commission’s transcript. Despite the invitation to do so, Ms Kwinana failed to provide the Commission with an alternative transcript of the interview. The Commission’s transcript is therefore uncontested and reveals that just over a week after Ms Kwinana had left SAA, she confessed to OUTA that she knew that Ms Myeni used to prepare false whistleblower reports in order to remove executives and employees that she wanted out of SAA.

201. That Ms Kwinana said this at her interview with OUTA in August 2016 is beyond doubt. Whether she was lying when she did so, is less clear. It was put to Ms Kwinana during her evidence that one possibility was that she was lying about Ms Myeni when she accused her of preparing the false whistleblower reports in order to deflect attention from her own conduct ²⁴⁷ or, alternatively that what she said about Ms Myeni at the time was true but, for some unknown reason, Ms Kwinana was now willing to lie under oath about that fact before the Commission. It is not possible, definitely, to resolve this question. But at least the following should be noted:

- 201.1. Ms Nhantsi, who was the interim CFO after Mr Wolf Meyer had resigned from SAA, testified before the Commission that Ms Kwinana had also told her, while

²⁴⁶ Transcript, 7 November 2020, p 223-234

²⁴⁷ Transcript 7 November 2020, p 231

she was still at SAA, that Ms Myeni would prepare false whistleblower reports.²⁴⁸

201.2. In addition, when the issue of false whistleblower reports was put to Ms Myeni in her evidence, she first used the opportunity to claim that the Commission is a refuge for tainted employees and that it just listens to false gossip. She stated that Ms Kwinana and Ms Nhantsi are friends and business partners.²⁴⁹ However, ultimately, she invoked the privilege against self incrimination when asked directly whether she had falsified the reports.²⁵⁰

202. In the light of this evidence and Ms Myeni's failure to contradict it despite giving some evidence on the topic, it is probable that Ms Myeni did prepare the false whistleblower reports while she was Chairperson of the Board of SAA. This type of conduct is also consistent with other evidence that the Commission has received about how Ms Myeni treated managers and employees whom she wanted to remove from SAA. This is dealt with in more detail below.

²⁴⁸ Exhibit DD2 page 22

²⁴⁹ Transcript 6 November 2020, p 192-193

²⁵⁰ Transcript 6 November 2020, p 193

General problems with procurement

203. Dr Dahwa was the Chief Procurement Officer at SAA from August 2014 until his suspension on 3 December 2015. Dr Dahwa testified that there were significant problems with the procurement process when he arrived at SAA. SAA did not keep proper records of tender documents and contracts. They were kept loose in various drawers. One of the main audit findings around that time was that documents would simply go missing and were not available for inspection.²⁵¹ Records of tender documents and records of when tender submissions were received were “in a shambles”.²⁵² Therefore, one of Dr Dahwa’s primary goals was to implement changes to these record-keeping systems.²⁵³
204. Dr Dahwa also stated that, when tenders were awarded, SAA would simply send out a tender award by letter without any terms and conditions or securing a signed contract.²⁵⁴ SAA would try and negotiate contract terms only after awarding contracts, at which point, suppliers had no incentive to agree to terms and negotiations would go on for up to two years without contracts being secured. This was another issue that Dr Dahwa identified as needing “urgent attention”.²⁵⁵
205. On 13 March 2015 Dr Dahwa presented various changes in corporate procurement governance that he believed needed to be implemented at SAA.²⁵⁶ This presentation

²⁵¹ Transcript 28 June 2019, p 119

²⁵² Transcript 28 June 2019, p 120

²⁵³ Transcript 28 June 2019, p 120

²⁵⁴ Transcript 28 June 2019, p 120

²⁵⁵ Transcript 28 June 2019, p 121

²⁵⁶ Exhibit DD16, p 181

noted that, ideally, there should be two primary committees responsible for procurement.

206. The first was the cross-functional or sourcing team that, at that stage, was mandated with the whole procurement process from origin of tender specification right up to the award.²⁵⁷ Dr Dahwa testified that the way things had been operating at that stage did not separate out various duties nor preserve an independent body for procurement. The system therefore lacked appropriate checks and balances.²⁵⁸ He also noted that the committee did not have sufficient competencies and capacities to execute their duties properly.²⁵⁹

207. The second was the bid adjudication committee (BAC). This committee would review what the first committee had done.²⁶⁰

208. In order to separate out responsibilities in the cross functional team, Dr Dahwa proposed creating a three-stage bid process. First, there would be a bid specification committee who would put together the bid and then draft terms and conditions of the tender; the second independent committee would be the bid evaluation committee who would write recommendations to the bid adjudication committee in line with the procurement processes in the supply chain management policy; and the third stage would be the BAC, who would award the tender.²⁶¹

209. Dr Dahwa testified that, although he found SAA's procurement processes in disarray, he took steps to improve them. However, as set out below, he said that these

²⁵⁷ Transcript 28 June 2019, p 123

²⁵⁸ Transcript 28 June 2019, p 121

²⁵⁹ Transcript 28 June 2019, p 123

²⁶⁰ Transcript 28 June 2019, p 123

²⁶¹ Transcript 28 June 2019, p 124

processes he introduced were undermined entirely by the interference of the Board's non-executive members.

30% BEE set aside

The origins

211. In 2015, SAA adopted what was referred to as “a 30% set aside policy” in terms of which SAA would set aside 30% of its procurement spend for BEE enterprises. The Board claimed that the policy was based on statements made by former President Zuma during his State of the Nation Address of 2015.²⁶² However, the former President’s actual statement was that: “Government will set aside 30 percent of appropriate categories of state procurement for purchasing from small to medium enterprises, cooperatives as well as township and rural enterprises.”²⁶³

212. This is a very different proposition. It is far more conservative and reasonable. It certainly does not bind SoEs to set aside 30% of all their procurement spend for BEE enterprises.

213. In his evidence before the Commission, Dr Dahwa testified that the SAA Board was determined to pursue an “aggressive transformation” policy. He explained that he was happy with the goal of the policy but not the way that SAA attempted to implement it.²⁶⁴

214. Dr Dahwa explained that he experienced tremendous pressure from the Board to implement the 30% set aside policy. He told the Board that the policy could not be implemented without proper PFMA amendments or treasury guidelines. However, he said that he was, nevertheless, simply instructed by the Board to impose the policy without any proper procurement processes being followed. He said that the

²⁶² Transcript 28 June 2019, p 128-129

²⁶³ Exhibit DD16, p 8

²⁶⁴ Transcript 28 June 2019, p 147-148

Board would insist on this condition being imposed after the procurement process had already been undertaken and the condition was nowhere in the bid document. He said that this was irregular and unlawful.²⁶⁵

The Roadshows

215. Ms Mpshe testified before the Commission that, as part of the Board's decision to implement the 30% set aside policy, Ms Myeni would call meetings with potential service providers about the 30% set aside opportunity.²⁶⁶ Ms Myeni and Ms Kwinana would decide whom to invite to these meetings. This culminated in supplier development roadshows.²⁶⁷

216. Dr Dahwa testified that these were information-sharing roadshows where SAA representatives would travel to different provinces sharing information with potential BEE suppliers to SAA about how to do business with SAA. They were called "supply engagement summits". They shared information about when key contracts were expiring so that the participants could prepare for the bidding process. It was simply information sharing and was non-committal.²⁶⁸

217. Dr Dahwa testified that, at the inaugural supply engagement summit, Ms Myeni announced publicly to the attendees that Dr Dahwa was the Acting CPO and, in order for him to secure a permanent position, he needed to take instructions from her about transformation initiatives and make sure that he implemented them in

²⁶⁵ Transcript 28 June 2019, p 135-136

²⁶⁶ Transcript 1 July 2019, p 161

²⁶⁷ Transcript 1 July 2019, p 162

²⁶⁸ Transcript 28 June 2019, pp145-146

accordance with her request.²⁶⁹ Dr Dahwa testified that at a further summit, Ms Myeni made further similar comments that Dr Dahwa regarded as problematic.²⁷⁰

218. Dr Dawha testified that, although these summits had begun as commitment-free information sessions, over time, the spirit changed and it became clear to him that Ms Myeni and Ms Kwinana wanted to begin making concrete undertakings about contracts to the attendees.²⁷¹ In fact, Ms Kwinana actually supplied Dr Dawha with a list of companies she wanted invited to the summit that was hosted in Durban. SAA ultimately invited over 60 companies to that summit.²⁷²

219. It was at one of these roadshows that Ms Nontsasa Memela, the Head of Procurement at SAAT, testified that she met Mr Vuyisile Ndzeke of JM Aviation (South Africa) (Pty) Ltd (*JM Aviation*). As set out in greater detail below, JM Aviation and Mr Ndzeke were involved in a number of questionable dealings with many decision-makers within SAA and SAAT.

220. After one of these roadshows in Durban, Ms Kwinana instructed Dr Dahwa to simply award 15% of the Swissport Services and the Engen contracts to all the companies that attended the roadshow. Dr Dawha explained to her that this was not possible because it was illegal and it was also not clear how it would be possible to award a contract to 60 different entities. Ms Kwinana told Dr Dahwa to establish a holding company that constituted all 60 companies and award it to that company. Dr Dahwa explained that as Chief Procurement Officer he could not do such a thing because it was a fundamental breach of his duties. She responded that she would then do it

²⁶⁹ Transcript 28 June 2019, p 165-166

²⁷⁰ Transcript 28 June 2019, p 166

²⁷¹ Transcript 28 June 2019, p 167

²⁷² Transcript 28 June 2019, p 147

herself.²⁷³ As appears later, Ms Kwinana did so and formed the company “Quintessential” in order to implement the set aside policy, that involved her own personal enrichment.

Bidvest

221. Ms Mpshe testified that, in addition to Ms Myeni and Ms Kwinana’s attempts to implement the 30% set aside policy in new tenders, they were also attempting to impose the policy on existing service providers that already had a contract with SAA.²⁷⁴

222. Dr Dahwa testified that Ms Kwinana requested a list from him of all contracts that were due to expire, that she was going to use for “transformation purposes”.²⁷⁵ Dr Dahwa provided the list which included Swissport (to the value of R1.2billion) and Bidvest.²⁷⁶

223. Ms Mpshe testified that Mr Meyer approached her and said he was very embarrassed because he came back from a meeting with Ms Kwinana and a company in the aviation space called Bid Air,²⁷⁷ at which Ms Kwinana had told them about the 30% set aside policy and instructed Bid Air to put aside 30% of its share of the tender for a BEE partner. Bid Air was already a level 1 BEE accredited firm so they were confused at this news and unclear how this was supposed to be practically

²⁷³ Transcript 28 June 2019, p 148

²⁷⁴ Transcript 1 July 2019, p 173-174, line

²⁷⁵ Transcript 28 June 2019, p 130,. The email request may be found at exhibit DD16, p 214. It pertained to Swissport and Bidvest’s contracts in particular and asked for the details of security companies, insurance companies, toilet paper suppliers and so on

²⁷⁶ Exhibit DD16, p 9

²⁷⁷ Transcript 1 July 2019, p 172

implemented. They wrote a letter thereafter to SAA asking about these issues and requesting SAA to advise as to the firm with which they are supposed to partner. Ms Mpshe testified that Mr Meyer showed her the letter but took it with him when he left. The letter, dated 23 June 2015, worried Ms Mpshe because, legally, they were not supposed to be imposing this policy and this was documentary evidence that representatives of SAA had attempted to do so.²⁷⁸

224. The letter stated that Bid Air was already 63.42% Black owned and 24.85% Black women owned. It also asked whether this requirement would be a prerequisite for the upcoming tender. The letter pointed out that there were material difficulties in implementing this because they were a licensed entity and the new BEE partner would not be. They said that, in addition, the licence requirements provided that companies awarded contracts for the first time must use new equipment. They said that this meant that they would not be able to transfer equipment to this SAA-nominated partner, which would result in additional capital expenditure of R20million.²⁷⁹

225. Ms Mpshe explained that someone must have notified other parties about this because then Dr Anton Alberts, a member of Parliament, sent a letter to the B-BEEE Commission about the matter.²⁸⁰ The Acting B-BBEE Commissioner of the Department of Trade and Industry (*DTI*), Ms Zodwa Ntuli, advised Ms Mpshe, at a subsequent meeting, that SAA had to immediately stop what it was doing with regard

²⁷⁸ Transcript 1 July 2019, p 171-172. The letter from Bid Air may be found in exhibit DD15(b), p 349, dated 23 June 2015

²⁷⁹ Exhibit DD15(b), p 349

²⁸⁰ Transcript 1 July 2019, p 178

to the 30% set aside policy because it was illegal.²⁸¹ Ms Mpshe communicated this discussion to the Board.²⁸²

226. On 13 September 2015 Ms Ntuli sent a letter to Ms Myeni.²⁸³ In the letter, Ms Ntuli stated that the DTI had had a meeting with Ms Mpshe on 8 September 2015 at which Ms Mpshe had informed the DTI that SAA was demanding that Bidvest give 30% of its contract away to an SAA-nominated company. The letter stated in no uncertain terms that the initiative was not in line with the B-BBEE Act and Codes of Good Practice. The letter asked SAA to send written confirmation by 18 September 2015 that it would not proceed to implement the 30% set aside initiative until it had applied for and received authorisation to do so as an official deviation from the terms of the B-BBEE Act.

227. Ms Mpshe testified that Ms Myeni's response to Ms Ntuli's letter was to tell Ms Mpshe, at the next meeting after receiving the letter, that "I do not want to hear anything from that woman" because she (i.e. Ms Myeni) dealt with the Deputy Minister instead.²⁸⁴ She asked Ms Kwinana to respond to the letter. Ms Kwinana prepared a response for Ms Mpshe to send but Ms Mpshe refused because she felt that the tone of the response was inappropriate. The letter effectively said that it was not for Ms Ntuli to tell SAA what to do and that transformation was a national agenda and there was nothing illegal about it.²⁸⁵ Ms Mpshe changed the letter to say that, as an SOE, SAA would obey the laws of the land.²⁸⁶

²⁸¹ Transcript 1 July 2019, p 185

²⁸² Transcript 1 July 2019, p 186

²⁸³ Exhibit DD16, p 234.1-243.3

²⁸⁴ Transcript 1 July 2019, p 187

²⁸⁵ Transcript 1 July 2019, pp 193-194

²⁸⁶ Transcript 1 July 2019, p 196

228. On 28 September 2015 Mr Kenneth Brown, the Chief Procurement Officer of National Treasury sent a letter to Ms Mpshe about the fact that the SAA Board resolved to set aside 30% of key procurement transactions for Black-owned businesses. He also told SAA that, while decisions taken by the Board to encourage transformation in procurement were commendable, the Board should *not* operate outside the procurement legal framework. He further recorded that the resolution to set aside 30% of contracts was not supported by any procurement legal framework and “must be stopped with immediate effect”. The letter requested Ms Mpshe to “advise the Board not to take procurement decisions that would bring the name of SAA and National Treasury into disrepute.”²⁸⁷
229. The DTI and Treasury were correct. The current Broad-Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000 provide for specific measures for BEE in procurement (a 90/10 split in bid evaluation, for example). If a particular industry or body seeks to deviate from that, it must get special dispensation from the Minister. They cannot simply design their own BBBEE policy. This has now been confirmed by the courts.²⁸⁸
230. Ms Mpshe responded to the letter from Treasury.²⁸⁹ She stated that while there was a proposed 30% set aside policy to expedite BEE growth, SAA was an SOE and would seek to ensure compliance with applicable laws and regulations.

²⁸⁷ Exhibit DD16, p 234

²⁸⁸ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] 2 All SA 1 (SCA) and *Swissport South Africa (Pty) Ltd v Airports Company South Africa SOC Limited and Others* [2020] ZAGPJHC 70 at para 21

²⁸⁹ Exhibit DD15(b), p 370

231. Ms Kwinana also responded to Treasury on behalf of the Board.²⁹⁰ The letter asked for full details about precisely how the Board operated outside of procurement frameworks and how exactly the Board's procurement decisions brought SAA and National Treasury into disrepute.²⁹¹ This letter was curious given the clear terms of Mr Brown's letter to which this was a response.

The Swissport and Engen letters of award

232. Swissport was the ground handling service provider for SAA. The evolution of the award and contract with Swissport is discussed in much greater detail below. For present purposes, it is sufficient to record that Swissport had been a long-standing provider of ground handling service to SAA and had been formally awarded the tender to provide such services, and was indeed performing the services. However, due to delays in SAA, the formal contract was never signed.

233. Engen was also a long-standing service provider to SAA. It had been awarded a jet-fuel tender by SAA and the conclusion of the contract was still outstanding in 2015.

234. As set out below, Ms Kwinana saw the outstanding contracts as an opportunity to get Swissport and Engen to agree to the 30% set aside policy.

235. Dr Dahwa testified that on 2 October 2015 at 10am he received an SMS from Ms Kwinana requiring him to go to the SAA Airways Park boardroom on the 6th floor.

²⁹⁰ Exhibit DD15(b), p 390

²⁹¹ Exhibit DD15(b), p 394

He complied. He said that Ms Kwinana asked him how far he had gone in the implementation of the 30% set aside policy.²⁹² In particular, she asked him whether the 30% set aside policy had been included in the Swissport and Engen contracts. Dr Dahwa explained to her that this would be unlawful and that he could not go ahead with that decision.²⁹³

236. Dr Dahwa testified that Ms Myeni entered the boardroom while he was in discussion with Ms Kwinana and asked Ms Kwinana how far Dr Dahwa had gone in implementing the 30% set aside strategy. Ms Kwinana told Ms Myeni that Dr Dahwa was making excuses as to why he could not implement the strategy. Ms Myeni then told Dr Dahwa that she was advertising his job. She refused to let him talk unless he did what she asked. Ms Myeni then instructed him to go back to his office and prepare the award letters. Ms Kwinana provided him with some rough drafts of what the letters of award should say.²⁹⁴ The award letters contemplated awarding a percentage²⁹⁵ of the Swissport contract to an entity called “Jamicron (Pty) Ltd” and a percentage of the Engen jet fuel contract to “Quintessential” – the holding company formed by Ms Kwinana to represent the 60 companies which had attended the Durban summit.²⁹⁶

237. Dr Dahwa went back to his office and tried to draft the award letters in accordance with the instructions. He found himself unable to comply with this instruction which he regarded as unlawful. He returned to the boardroom and told Ms Myeni and Ms Kwinana that his conscience would not let him sign the letters. Ms Myeni was about

²⁹² Transcript 28 June 2019, p 167

²⁹³ Transcript 28 June 2019, p 170

²⁹⁴ Transcript 28 June 2019, p 171

²⁹⁵ Ms Kwinana was debating what percentage would be tolerable with Dr Dahwa, suggesting 15 or 10% if he refused to grant anything higher - Transcript 28 June 2019, p 196

²⁹⁶ Transcript 28 June 2019, p 196

to sign the letter but appeared to change her mind.²⁹⁷ She instructed Dr Dahwa to go back to his office and change the name of the signatory to Ms Mpshe.²⁹⁸

238. Dr Dahwa went to speak to Ms Mpshe and told her what was happening, namely, that Ms Myeni and Ms Kwinana were trying to compel him to issue or sign the letters of award which would be unlawful. She told him that, if he knew that this was wrong, he should not do what they were instructing him to do because it was unlawful and it would come back to haunt him one day. Dr Dahwa testified that he then left and went back to his office to pretend he was doing something but in truth he was “being held at ransom” as Ms Myeni and Ms Kwinana were waiting for him in the boardroom. Dr Dahwa then appended Ms Mpshe’s name to the bottom of the letter and took it to her to sign. She refused to do so.²⁹⁹

239. Dr Dahwa went to tell Ms Myeni that Ms Mpshe had refused to sign the letter. Ms Myeni then insisted that they all go to Ms Mpshe’s office. Ms Mpshe told Ms Kwinana and Ms Myeni that she was not going to sign the letters. She also told Dr Dahwa, again in front of Ms Myeni and Ms Kwinana, not to sign the letter if his conscience would not allow him to do that and it was unlawful.³⁰⁰

240. Ms Myeni told Ms Mpshe and Dr Dahwa that she was surprised that, as Black executives, they were not in support of the idea. Eventually, Ms Mpshe excused herself and the rest were left in her office. Before she left, she told Dr Dahwa that he would be alone in Court should he sign and this matter come back and that, if he knew that it would be wrong to sign, then he should not do it. She said to Dr Dahwa

²⁹⁷ Transcript 28 June 2019, p 177

²⁹⁸ Transcript 28 June 2019, pp 176-177

²⁹⁹ Transcript 28 June 2019, p 178

³⁰⁰ Transcript 28 June 2019, p 178

that, if he signed, with all of his qualifications, experience and credentials, he would have to answer for it one day.³⁰¹

241. Dr Dahwa testified that he asked Ms Kwinana how he was going to be able to justify appointing a pre-selected entity without having gone out on open tender to procure the most effective service provider for SAA.³⁰² Ms Kwinana did not respond well to this and conveyed to Dr Dahwa that he was just anti-transformation and began to threaten him that if he continued to disobey them, he and Ms Mpshe were going to “suffer” and would face disciplinary consequences.³⁰³

242. Dr Dahwa testified that Ms Kwinana and Ms Myeni continued to insist that he sign the letters but he refused. They then asked him to undertake that he would sign it by the next week. He explained that he felt the two of them were playing psychological games with him – one minute praising him and then chastising him.³⁰⁴

243. The whole ordeal with Ms Kwinana and Ms Myeni lasted from 10h00 to around 18h00 on a Friday.³⁰⁵ Dr Dahwa testified that, after everyone had left and it was just the three of them in Ms Mpshe’s office, Ms Myeni said to him that the EFF would be coming to SAA on the Monday because they were concerned about transformation issues at SAA and they wanted to get rid of people like him.³⁰⁶ He said that she went so far as to tell him that the EFF wanted to get rid of all Zimbabweans from SAA.³⁰⁷

³⁰¹ Transcript 28 June 2019, p 179-180

³⁰² Transcript 28 June 2019, p 182

³⁰³ Transcript 28 June 2019, p 182-184

³⁰⁴ Transcript 28 June 2019, p 180

³⁰⁵ Transcript 28 June 2019, p 172

³⁰⁶ Transcript 28 June 2019, pp183-184

³⁰⁷ Exhibit DD16, p 12, para 34

He said Ms Kwinana and Ms Myeni often made comments about him being a Zimbabwean.³⁰⁸

244. Dr Dahwa testified that, after Ms Kwinana had told him that he and Ms Mpshe were “going to suffer” and would undergo disciplinary proceedings if they did not obey her, he then became emotional and asked them whether he could leave because it was around 6 or 7pm.³⁰⁹ Dr Dahwa said he eventually, under duress, undertook to sign the letters by the next week but he had no intention of doing so and only said that he would in order to be allowed to leave the meeting.³¹⁰ He confirmed that he never wrote or signed the letters.³¹¹

245. In her testimony before the Commission Ms Mpshe confirmed Dr Dahwa’s version of events as to what took place on 2 October 2015. She stated that he was visibly shaken and emotional. He presented two letters of award to her and said he could not sign them. Ms Mpshe confirmed the content of the letters to Swissport and Engen about setting aside 30% of their expenditure for companies nominated by Ms Kwinana. She advised Dr Dahwa that he had her support and she would not sign the letters. Ms Mpshe testified that Dr Dahwa was almost in tears and told her that he had never been so humiliated in his life. He had been told by Ms Myeni and Ms Kwinana that he was a Zimbabwean citizen and was holding a position he would never hold in his own country and was standing in the way of transformation.³¹²

246. Ms Mpshe testified that, when she and Dr Dahwa were together with Ms Myeni and Ms Kwinana and they tried to put their perspectives across, they were simply told

³⁰⁸ Exhibit DD16, p 12, para 35

³⁰⁹ Transcript 28 June 2019, p 184

³¹⁰ Transcript 28 June 2019, p 190-191

³¹¹ Transcript 28 June 2019, p 248

³¹² Transcript 1 July 2019, p 202-208

that there was a board resolution supporting these awards and they had to implement them. Ms Mpshe explained that this was often what these two non-executive directors said, but that, when one asked for the resolutions, it transpired that they did not already exist. Instead, the resolutions would be taken after the fact to justify what Ms Myeni and Ms Kwinana had said.³¹³

247. The following Monday morning, Dr Dahwa wrote an email to his line manager, Mr Meyer explaining what Ms Myeni had said to him about the EFF and its march on that day. He told Mr Meyer that, as a result of what he had been told about the EFF and its picket at SAA on that day, he felt scared to come to work.³¹⁴

248. Shortly after this had taken place, on 9 October 2015, Ms Kwinana wrote a letter of complaint about Dr Dahwa to Ms Myeni.³¹⁵ The letter made various complaints including that Dr Dahwa had refused to sign the award letters because his conscience would not allow him and that he insinuated that the Board required him to do unprofessional, unethical, illegal and criminal activities. Ms Kwinana complained that she was being forced to “micromanage executives in respect of the non-implementation of our Board Resolutions in general.”³¹⁶ She concluded the letter as follows:

“From the foregoing it is clear that there is no commitment on the part of Dr Dahwa to the resolutions of the Durban Road Show. No positive outcome has eventuated since we went on the roadshow judging by numerous inquiries from would-be service providers that have gone unanswered. The situation as it presents itself amply demonstrates that Dr Dahwa is hell bent on sabotaging and derailing the transformation agenda of the present government in general and that of SAA in

³¹³ Transcript 1 July 2019, p 216

³¹⁴ Transcript 1 July 2019, p 217-218

³¹⁵ Exhibit DD16, p 240

³¹⁶ Exhibit DD16, p 241

particular. While the SAA Board is doing all in its power to translate the Government's intent of economic empowerment into concrete reality to extricate the African majority from the quagmire of poverty. Dr Dahwa is equally doing his best to keep the same people in economic bondage. He is part of a sinister, retrogressive agenda which is aimed at reversing the transformational agenda of the present government. His behaviour smacks of insubordination and conspiracy against the SAA Board. This purulent attitude may be located in the fact that he does not share the agony of the people of South Africa who have emerged from centuries of economic deprivation and whose freedom was born of struggle. It is actually ironic that he is essentially biting the hand that feeds him. This leaves me with no other option except to recommend that the strongest possible action be taken against him.”³¹⁷

249. Dr Dahwa testified in detail as to why the other allegations in the letter were unfounded and false.³¹⁸

250. Dr Dahwa also testified that he was from the same African background and was also a product of the struggle. He also testified that he was a South African permanent resident and took his responsibility to the government and the people of South Africa very seriously. He explained that he had implemented many pro-transformation measures but just refused to break the law. Dr Dahwa testified that Ms Kwinana had written the letter out of bitterness because he had refused to do what she and Ms Myeni wanted him to do.³¹⁹

251. Thereafter, the following correspondence was exchanged:

³¹⁷ Exhibit DD16, p 241-242

³¹⁸ Transcript 28 June 2019, p 200-202

³¹⁹ Exhibit DD16, p 208

- 251.1. On 29 October 2015, Ms Kwinana sent an email to Dr Dahwa asking him to confirm that “BEE will be able to participate” in the Swissport Ground Handling tender, “with effect from Monday, 2 November 2015”.³²⁰
- 251.2. On 30 October 2015 Dr Dahwa responded to Ms Kwinana’s letter and said that he was in the process of preparing a detailed report about the high risk of this award being challenged because the terms and conditions SAA was seeking to impose on Swissport were not included in the procurement process.³²¹
- 251.3. On 2 November 2015 Ms Kwinana wrote back to Dr Dahwa in the following terms: “I did not ask for the risks, I asked for the implementation of board resolutions. Please let me know if you will not implement the resolutions of the Board.”³²²
- 251.4. On 3 November 2015 Mr Meyer wrote to Ms Kwinana, copying (among others) Ms Myeni, Ms Mpshe, Ms Ruth Kibuuka (the company secretary) and Dr Dahwa.³²³ As CPO, Dr Dahwa reported to Mr Meyer as the CFO. Mr Meyer told Ms Kwinana that the CPO had a fiduciary duty to ensure that SAA procurement policies were compliant with its own SME policies as well as the Public Procurement laws and regulations. He also pointed out that a 15% set aside to the company “Quintessential Business Consulting Limited, registration number 2014/012470/07 represented by Mr Peter Tshisevhe” was not actually

³²⁰ Exhibit DD16, p 230

³²¹ Exhibit DD16, p 229

³²² Exhibit DD16, p 228-229

³²³ Exhibit DD16, p 225-227

included in the Board resolution.³²⁴ This company was the holding company Ms Kwinana had established to represent the 60 companies that had attended the Durban summit.³²⁵ The letter also stated that the selection of Jamicron (Pty) Ltd to work with Swissport as the BEE partner for the 30% set aside is not in line with the Board resolution and did not follow a due and proper procurement process.³²⁶ Mr Meyer suggested that the Board take note of the detailed memo on the risks associated with this decision that Dr Dahwa's team was preparing.³²⁷ He stated that the Board had a fiduciary responsibility to uphold and promote good corporate governance; it could not become operationally involved and give instructions that exposed the airline to non-compliance with its own policies and the law. He pointed out that SAA had received direct guidance from the Minister and the DoT (this should have read "DTI") that the 30% set aside policy should not be implemented. He concluded thus: "We all agree that transformation in South Africa is important, but this goal does not justify that proper governance and SCM policies should not be followed".³²⁸

251.5. On 6 November 2015 Ms Kwinana responded to Mr Meyer's letter and addressed her responses to Ms Myeni, who had been copied into Mr Meyer's letter, as follows:³²⁹

"The allocation of 15% to BEE was a Board decision which has not been implemented, the Board allocated the 15% to all BEE companies in the SAA data base who've been knocking on SAA doors. The number of these companies is +/-

³²⁴ Exhibit DD16, p 226, paras 1-3

³²⁵ Transcript 28 June 2019, p 153

³²⁶ Exhibit DD16, p 226, para 4

³²⁷ Exhibit DD16, p 227

³²⁸ Exhibit DD16, p 227-228

³²⁹ Exhibit DD16, p 224-227. Ms Kwinana was responding to an email of Wolf Meyer's dated 3 November 2015. Her email is in the form of red comments on Mr Meyer's email. Mr Meyer's original text is in black.

60 in the Sharks Board Supplier engagement forum, the forum that you were supposed to be at, it was agreed that SAA or Engen for that matter cannot sign an agreement with 30 companies and that they will be included as one company for ease of contracting. In subsequent meeting with [Dr Dahwa] it was agreed the one company represents all +/- companies or all 60 companies sign, it is not an issue. What must happen is that the 15% must be implemented. In fact Chairperson non-implementation of Board resolutions amounts to insubordination.”

251.6. The letter continued that management is responsible for implementing the Board’s decision. In addition, Ms Kwinana stated “I appreciate the guidance that you received from the Shareholder and DOT [this should have read “DTI”] in respect of the 30% set aside. I would, however, have loved that your Board’s guidance on the implementation of 30% would also have been included and counted here.”

251.7. On 9 November 2015 Mr Meyer responded to this email.³³⁰ He explained that the implementation of Board resolutions should be guided by the company’s supply chain management policies and that other potential BEE companies could be prejudiced by this decision. He pointed out that Ms Kwinana’s position was contrary to section 217 of the Constitution and section 51(1)(a) of the PFMA; the summits were just information sharing sessions and not formal due procurement processes to award a contract; SAA did not have the power to form and appoint a holding company to represent 60 companies that expressed an interest in supplying jet fuel; and the resolution of the Board made no mention of Quintessential or Jamicron.

252. As will be set out in more detail under the Swissport section below, Mr Lester Peter, who replaced Dr Dahwa as Chief Procurement Officer after he was put through a grossly unfair disciplinary process, did take steps to comply with Ms Kwinana’s

³³⁰ Exhibit DD16, p 223-24

demands and sent out a draft contract to Swissport imposing the 30% set aside policy.

253. In her evidence before the Commission, Ms Kwinana testified that SAA tried to implement the 30% set aside policy but had received communication from the DTI and National Treasury saying that they could not do so.³³¹ Ms Kwinana even conceded that the set aside policy was not in line with the SCM Policy in place at SAA.³³²

254. Ms Kwinana then went on to claim that after receiving the correspondence from the DTI and National Treasury (28 September 2015), she no longer attempted to implement the 30% set aside policy.³³³ She claimed that the evidence by Dr Dahwa and Ms Mpshe about the events on 2 October 2015, were false.³³⁴ She claimed that she did not attend any such meeting; that she did not threaten Dr Dahwa thereafter; and that Dr Dahwa had not communicated to her that his conscience would not allow him to sign the letters she was demanding. When her version was tested, she maintained that could not have been any meeting because there were no minutes taken. However, that is palpably absurd because, as pointed out, if there was an unlawful and unethical meeting taking place, it is unlikely that anyone would keep a record of it in minutes.³³⁵

255. It was put to Ms Kwinana that the letter she wrote later to Ms Myeni on 12 October 2015,³³⁶ where she viciously condemned Dr Dahwa, actually confirmed Dr Dahwa's

³³¹ Transcript 2 November 2020, p 107

³³² Transcript 3 November 2020, p 16

³³³ Transcript 3 November 2020, p 18

³³⁴ Transcript 3 November 2020, p 64-65 and p 70

³³⁵ Transcript 3 November 2020, p 30

³³⁶ Exhibit DD16, p 239-240

version of events because she complained that he had failed to sign award letters - award letters that Ms Kwinana testified she knew nothing about.³³⁷ The letter also repeated what Dr Dahwa said; namely that he had refused to write letters of award because “his conscience would not allow him”. Ms Kwinana had initially denied in her evidence that she had ever been told this by Dr Dahwa.³³⁸ When the letter was shown to her, Ms Kwinana just said she forgot that she had written the letter.³³⁹

256. Ms Kwinana was also shown the contemporaneous letter that Dr Dahwa had written to Mr Meyer where he said that he was not coming to work as he feared for his life after the threats from Ms Myeni and Ms Kwinana about the EFF. All this notwithstanding, she still denied that any of it took place.³⁴⁰

257. During her evidence before the Commission, Ms Myeni was also asked about these events. She refused to answer and invoked the privilege against self incrimination.³⁴¹

258. Ms Kwinana’s evidence on the interaction with Dr Dahwa was dishonest. She was given numerous opportunities to come clean and accept what the contemporaneous documents revealed about the events of the 2nd of October 2015. However, rather than accepting responsibility for her role in the ordeal, she doggedly persisted in lying under oath. Her evidence is rejected as patently false and I find that Ms Mpshe and Dr Dahwa’s account of what transpired on 2 October 2015 is true. On that day, two senior executives at SAA were tormented by Ms Myeni and Ms Kwinana for refusing to take action that both National Treasury and the DTI had told SAA was unlawful.

³³⁷ Transcript 3 November 2020, p 39

³³⁸ Transcript 3 November 2020, p 39-40

³³⁹ Transcript 3 November 2020, p 40

³⁴⁰ Transcript 3 November 2020, p 47-48

³⁴¹ Transcript 6 November 2020, p 223-238

259. As set out in greater detail below, Dr Dahwa was ultimately removed from his position as Chief Procurement Officer in December 2015. Once Dr Dahwa was removed from his position and Ms Mpshe was moved out of her role as Acting-CEO, the 30% set aside policy forged ahead and Swissport was eventually awarded the ground handling contract for five years from 1 April 2016, in circumstances that were irregular and unlawful. In addition, there was a strange BEE provision included in this contract that ended up benefitting JM Aviation to the tune of R6 million. Shortly after that R 6million came into JM Aviation's bank account, it was used to benefit Ms Kwinana personally in the amount of R4.3 million. This is dealt with in more detail below.

Set aside for veterans

260. Ms Mpshe testified that Ms Myeni approached her and instructed her to do a presentation for MK veterans³⁴² Ms Mpshe consulted Dr Dahwa and the head of transformation, Mr Thapelo Lehasa, and created an outline of what would be presented, including the framework for procurement at SAA; all of the upstream and downstream opportunities for services there were at SAA; the requirements to be a service provider at SAA; and how SAA could assist them in getting on the service provider list so that they would be informed of tender opportunities.³⁴³

³⁴² Transcript 1 July 2019, p 165

³⁴³ Transcript 1 July 2019, p 166-167

261. The meeting was attended by the Deputy Minister of Military Veterans and Defence, Mr Kebby Maphatsoe, together with Mr Des van Rooyen and some other representatives of the MK Veterans organisation.³⁴⁴
262. After the presentation, Ms Myeni stood up and said that “these people” had “died for us to get our freedom and all you want to do is tell them about policies and procedures. They are not interested in policies and procedures”. They want to know what the budget is of the jet fuel per annum. Ms Mpshe responded that she did not believe it was appropriate to discuss budgets with potential service providers. Ms Myeni proceeded to talk about how these veterans had “died” and suffered and that perhaps they should set aside 30% of all vacancies at SAA for the children of MK veterans. Ms Mpshe said she made no further comments about Ms Myeni’s pronouncements, but at the end of the meeting, Ms Mpshe stated that she would make arrangements for Mr Lehasa and Dr Dahwa to meet with Mr van Rooyen to assist them in helping them register on the database of suppliers.³⁴⁵
263. On 2 December 2015 Dr Dahwa was told by the head of transformation, Mr Lehasa, that he wanted to see him urgently together with Mr Des van Rooyen, who Mr Lehasa told him was the Treasurer-General for the Military Veterans Associations.³⁴⁶ Dr Dahwa initially refused to attend as he had been given no notice of this meeting but was informed that there had been emails about it and eventually he attended.³⁴⁷
264. At the meeting Mr van Rooyen advised that he was not happy because Dr Dahwa was not responding to his emails, to which Dr Dahwa responded that he had not

³⁴⁴ Transcript 1 July 2019, p 168

³⁴⁵ Transcript 1 July 2019, p 169

³⁴⁶ In fact, Mr van Rooyen was the Treasurer General of the MKVA as his card indicates – Exhibit DD16, p 264

³⁴⁷ Transcript 28 June 2019, p 212

received the emails. Mr van Rooyen then explained that the MKVA wanted to do business with SAA and particularly with respect to two contracts, security provision and the Amadeus contract extension,³⁴⁸ that required a BEE partner. Dr Dahwa testified that he was not aware of any open tenders for security (one had recently been awarded) and the Amadeus contract extension potential for a BEE partner was in early discussion phases and had certainly not yet gone out to tender. Mr van Rooyen insisted that these two tenders be awarded to two particular companies, related to MKVA.³⁴⁹

265. Dr Dahwa testified that he was surprised that Mr van Rooyen had this information, as well as some detailed content about the amount of money SAA intended to dedicate to this development endeavour.³⁵⁰ Dr Dahwa said that he tried to find out who had told them this or who had indicated that they might be BEE partners, but Mr Van Rooyen refused to give up their source.³⁵¹ This concerned Dr Dahwa. He was also concerned that MKVA was not making a request, but was giving an instruction that these contracts be awarded to these companies.³⁵² Dr Dahwa testified that the meeting ended with him refusing to help the MKVA representatives.³⁵³

266. Mr van Rooyen received a rule 3.3 notice ahead of Dr Dahwa's evidence. He did not make any application in terms of rule 3.4 of the Commission's Rules. Dr Dahwa's evidence on this aspect is therefore uncontested.

³⁴⁸ The Amadeus contract was the online booking system used by SAA - Transcript 28 June 2019, p 219

³⁴⁹ Transcript 28 June 2019, p 213

³⁵⁰ Transcript 28 June 2019, p 226

³⁵¹ Transcript 28 June 2019, p 225

³⁵² Transcript 28 June 2019, p 227-228

³⁵³ Transcript 28 June 2019, p 229

Dr Dahwa's removal

267. The day after the meeting with Mr van Rooyen, on 3 December 2015, Dr Dahwa was instructed to report to the boardroom at SAA.³⁵⁴ On his way to the boardroom, he saw Mr Musa Zwane speaking to Ms Myeni – Mr Zwane had by now replaced Ms Mpshe as Acting-CEO of SAA.
268. On his way to the boardroom Dr Dahwa was intercepted by Ms Phumeza Nhantsi who introduced herself as the new Acting CFO and she moved him into another venue. She stated that she had been instructed to place Dr Dahwa on special leave because there were matters concerning him that were being investigated. Dr Dahwa was provided with a letter setting out the basis for his suspension that had been prepared by an external lawyer from BMK Attorneys, Mr Mbuleli Kolisi.³⁵⁵ The letter was to the effect that Dr Dahwa was suspended with immediate effect. After reading the letter, Dr Dahwa went to his office, packed up his things and left the workplace.³⁵⁶
269. On 9 December 2015 Dr Dahwa went to consult a lawyer about his suspension. This is the day on which Minister Nhlanhla Nene was fired by President Zuma. He saw on television, the announcement that Mr Des van Rooyen had been appointed as Finance Minister. This made Dr Dahwa suddenly realise that the person to whom he had said “No” in the previous meeting was far more powerful than he thought and he started to become worried for his safety. He made plans to immediately leave for Zimbabwe with his family.³⁵⁷

³⁵⁴ Transcript 28 June 2019, p 255

³⁵⁵ Transcript 28 June 2019, p 256

³⁵⁶ Transcript 28 June 2019, p 257

³⁵⁷ Transcript 28 June 2019, p 263

270. After this, Dr Dahwa received disciplinary charges and then a disciplinary process followed.³⁵⁸ The process was an expensive external hearing, chaired by a Mr Khotso Ramolefe.³⁵⁹ Mr Kolisi from BMK Attorneys acted for SAA.³⁶⁰
271. The disciplinary proceedings began on 16 March 2016. Dr Dahwa attended the first day but then handed in a sick note for the second day. BMK Attorneys, acting for SAA, insisted that the proceedings should continue even in the absence of Dr Dahwa.
272. After Dr Dahwa had testified in the Commission, I requested that an affidavit be obtained from SAA setting out what had happened during the course of Dr Dahwa's disciplinary process. In accordance with that request, the head of Employee Relations at SAA, Mr Lourens Erasmus, provided an affidavit to the Commission detailing the circumstances of Dr Dahwa's disciplinary process. In his affidavit, Mr Erasmus explained that, after Dr Dahwa had provided a sick note to the chair of the disciplinary hearing, he was very concerned that the proceedings would be continuing without Dr Dahwa present. Mr Erasmus immediately raised concerns because he said that, unless the authenticity of the medical certificate was challenged, it would be unfair to proceed with the inquiry in his absence.³⁶¹
273. Mr Erasmus took up the issue with Ms Nhantsi who was coordinating the proceedings against Dr Dahwa but she said they would continue nonetheless.³⁶²

³⁵⁸ Transcript 28 June 2019, p 265-266

³⁵⁹ There was some uncertainty at the time that Dr Dahwa testified about who had chaired his disciplinary proceeding but it was subsequently clarified that it had been Mr Ramolefe and not Cassim SC, as originally thought – see Affidavit of Erasmus, DD34 p 1729

³⁶⁰ Transcript 28 June 2019, p 267-268

³⁶¹ Exhibit DD34 p 1728 para 42

³⁶² Exhibit DD34 p 1729 para 43

274. Mr Erasmus remained concerned that any finding against Dr Dahwa after a hearing conducted in his absence would be liable to be challenged. This would be because he had not been given an opportunity to test the evidence against him and to put his side of the case. Mr Erasmus was concerned about the proceedings continuing and so he engaged Ms Khanyisile Khanyile, an Employee Relations Specialist, to assist and give her opinion on the appropriateness of the disciplinary proceedings proceeding in Dr Dahwa's absence. She was unequivocal in her views.³⁶³ She said that the entire process would be procedurally and substantively unfair if it continued. She also said that if it continued, SAA could face many claims for unfair dismissal, unfair labour practices, and civil claims.

275. Despite this, the disciplinary hearing proceeded. The chairperson found against Dr Dahwa.

276. The ruling³⁶⁴ explains that Dr Dahwa was "charged" with various counts of dishonesty and dereliction of duty. These were to the effect that he had implied at the roadshows that the jet fuel contract had more BEE opportunities than there were in reality and that it was *this* representation that caused the Board members present to then offer these opportunities to the attendants at the show; that he had lied about sending out the 30% set-aside letter to Engen, when he hadn't; and that he refused to carry out the "lawful" and "reasonable" instruction to implement the 30% set aside policy.

277. Dr Dahwa's testimony dealt in detail with why these allegations were baseless; his lawyers also addressed this aspect in detail.³⁶⁵ The upshot of the charges was that he was insubordinate for failing to follow Ms Myeni and Ms Kwinana's irregular and

³⁶³ Exhibit DD34 p 1732 para 49

³⁶⁴ Exhibit LE12, p 1796

³⁶⁵ Exhibit DD16, p 313-325

unlawful instructions. As set out above, the circumstances of his removal strongly lend themselves to the conclusion that these charges were trumped up in order to remove him from office. This is further supported by the treatment of Ms Mpshe (discussed later) when she was also forcibly removed. Dr Dahwa had ample reason not to carry out these instructions and it was Ms Myeni and Ms Kwinana who made promises at the roadshows when they were not in a position to do so.

278. In the light of Ms Khanyile's advice, Mr Erasmus implored Ms Nhantsi not to provide the ruling to Dr Dahwa because of all the irregularities in the process.³⁶⁶ She did so nonetheless and he was dismissed.³⁶⁷

279. Mr Erasmus also provided the ruling to Ms Khanyile, who expressed serious concerns about its correctness.³⁶⁸

280. Dr Dahwa then tried conciliation, but SAA kept failing to arrive for the conciliation meetings and so he then moved to arbitration. However, at a point, it was just becoming too draining to keep fighting and so he settled with SAA on the basis that he would be paid six months remuneration just to walk away.³⁶⁹

281. Dr Dahwa explained that after this, he did not receive any formal job offers for three and a half years and ultimately his house in Pretoria, which he had purchased when he took the job at SAA, was repossessed by the bank.³⁷⁰

³⁶⁶ Exhibit DD34 p 1744 para 54

³⁶⁷ Exhibit DD34 p 1744 para 54

³⁶⁸ Exhibit DD34 p 1744 para 55

³⁶⁹ Transcript 28 June 2019, p 273- 274

³⁷⁰ Transcript 28 June 2019, p 275

Ms Mpshe's removal as Acting Group CEO of SAA

282. On 13 October 2015 there was an Exco meeting with the Board. At the meeting, Ms Myeni stated that the meeting had been convened because the Board was concerned with Ms Mpshe's performance as Acting CEO. This was because she was alleged to have refused to follow and implement Board instructions and was second-guessing the Board.³⁷¹

283. Ms Mpshe testified that at this meeting, Mr Zwane, who was the CEO of SAAT at the time, had said that he could not understand why a CEO would resist taking instructions from the Board. He emphasised that, as CEO of SAAT, he worked very well with Ms Kwinana as Chairperson of the Board of SAAT and always implemented her decisions.³⁷²

284. Mr Zwane's willingness to implement decisions of the SAAT Board is a matter that is addressed later herein.

285. Ms Mpshe testified that other executive members at the meeting said that they did not have any problem with her leadership and were indeed complimentary of her leadership style. They had also stated that the company was beginning to stabilise under her leadership. Ms Mpshe then insisted that she should have a right of reply. She stated that she would take instructions from the Board that were lawful and

³⁷¹ Transcript 1 July 2019, p 228

³⁷² Transcript 1 July 2019, p 229

would comply with approved policies and procedures within the governance framework of SAA.³⁷³

286. After this meeting, on 27 October 2015, the Chair summoned Ms Mpshe to a meeting alone with her in Durban at the Beverly Hills Hotel. The Chair began by showering Ms Mpshe with praise.³⁷⁴ She asked Ms Mpshe why she had not applied for the permanent CEO position and now the deadline had passed. She told Ms Mpshe to just send Ms Myeni her CV anyway even though the deadline had passed. Ms Mpshe refused.³⁷⁵

287. After this, Ms Myeni stated that the unions were dissatisfied with how Ms Mpshe was handling the retrenchment process at SAA, which had almost reached the final stage by that point. Ms Mpshe testified that she was surprised to hear this because some of the unions had complimented her on how the process had been handled.³⁷⁶

288. On 13 November 2015 the company secretary contacted Ms Mpshe and told her that Ms Myeni had scheduled a meeting with trade unions in the afternoon. Ms Mpshe queried this because there was a structured forum where these discussions were meant to take place at which all relevant stakeholders would be present.³⁷⁷ Nevertheless, Ms Mpshe attended the meeting. Ms Myeni and Ms Kwinana were present, along with one trade union.³⁷⁸ When the meeting opened, Ms Mpshe voiced her concern at the inappropriateness of the meeting in the light of the structures that were in place for discussions with labour. Ms Myeni told her that this was Ms Myeni's

³⁷³ Transcript 1 July 2019, p 230

³⁷⁴ Transcript 1 July 2019, p 234

³⁷⁵ Transcript 1 July 2019, p 235

³⁷⁶ Transcript 1 July 2019, p 237

³⁷⁷ Transcript 1 July 2019, p 240

³⁷⁸ Transcript 1 July 2019, p 241

meeting, so she “must shut up and listen and toe the line”. Ms Mpshe then kept quiet.³⁷⁹ The meeting was about highly operational issues concerning staff rosters.³⁸⁰

289. Ms Mpshe testified that she believed the true purpose of the meeting was to try and create some justification for terminating her employment as Acting CEO and to carry on the termination narrative of the meeting in Durban that the unions had complained about her. Ms Mpshe testified that there was really no reason for a meeting about purely operational matters that involved Ms Mpshe or any Board members.³⁸¹

290. Later that day, namely, 13 November 2015 Ms Myeni called Ms Mpshe and told her there would be a Board meeting later that evening that she was obliged to attend.³⁸² At the meeting, only Ms Kwinana and Dr Tambi were in attendance. Ms Myeni was not there.³⁸³ Ms Kwinana opened the meeting by saying that the Chair had instructed them to relieve Ms Mpshe of her position because they wanted to give other executives a chance at the position, which Ms Mpshe responded was “fair enough”. Ms Mpshe asked when the decision was effective and Ms Kwinana told her it was effective immediately. Ms Mpshe explained that it was a legal requirement to have a CEO at all times. They responded that Mr Zwane would take over her position.³⁸⁴ Ms Mpshe then simply left before Ms Myeni arrived. Mr Zwane acted as the CEO of SAA until there was a permanent appointment on 1 November 2017.³⁸⁵

³⁷⁹ Transcript 1 July 2019, p 242

³⁸⁰ Transcript 1 July 2019, p 242

³⁸¹ Transcript 1 July 2019, p 244

³⁸² Transcript 1 July 2019, p 245-246

³⁸³ Transcript 1 July 2019, p 248

³⁸⁴ Transcript 1 July 2019, p 249

³⁸⁵ Transcript 1 July 2019, p 252

The appointment of Ms Nhantsi to the permanent position of CFO

291. Ms Mpshe testified that after she had been removed as Acting CEO, she went back to her position as General Manager: Human Resources. In this capacity, she was tasked with the appointment of the new SAA CFO.
292. Ms Phumeza Nhantsi had been seconded as interim CFO towards the end of November 2015. Ms Nhantsi testified that in 2015 she was employed at SNG – an accounting firm. She was a chartered accountant. She did joint audit work with Ms Kwinana's firm, Kwinana & Associates. Ms Nhantsi testified that towards the end of 2015, Ms Kwinana approached her and asked if she wanted to be seconded to SAA.³⁸⁶ Ms Nhantsi said she was interested. On 27 November 2015, Ms Nhantsi became the interim CFO but was still paid by SNG because she was on secondment. There was no process followed prior to this appointment and Ms Mpshe testified that she regarded it as irregular.
293. While Ms Nhantsi was in the position of interim CFO, a process was undertaken to find a permanent CFO. Ms Mpshe explained that, although Ms Nhantsi had been part of the pool of potential candidates for the permanent CFO position, she had not made the short list.³⁸⁷
294. However, after the short list had been completed, Mr Zwane, the then acting-CEO, told the team responsible for the process that Ms Myeni had issued an instruction that Ms Nhantsi was to be placed on the shortlist. Ms Mpshe testified that this was done.³⁸⁸

³⁸⁶ Transcript 18 June 2019, p 29

³⁸⁷ Transcript 1 July 2019, p 252-253

³⁸⁸ Transcript 1 July 2019, p 254

295. In the end, Ms Nhantsi was appointed to the position of permanent CFO in May 2017.³⁸⁹ The role that was to be played by Ms Nhantsi later was to reveal why Ms Myeni wanted her to be CFO. It was to get to that position somebody who was to be beholden to her and who would make sure that she implemented her unlawful decisions. This is also what happened when Mr Gigaba selected Mr Brian Molefe as Group CEO of Transnet even though he had not obtained the highest points in the interview and he overlooked a candidate who had scored higher points than Mr Brian Molefe. Mr Gigaba did so either because he had been instructed to do so or because, even if he had not been instructed to do so, he knew that Mr Molefe was the candidate that the Guptas wanted to be appointed to that position. As I say elsewhere in the report, one friend of the Guptas appointed another friend of the Guptas to a strategically important position.

Suspension of Ms Mpshe as General Manager: HR

296. In the middle of December 2015 Ms Mpshe was back in her position as General Manager: HR and she went on a month's leave. When she returned to work on 19 January 2016, she was told to attend a presentation by the SSA regarding security vetting. Thereafter, she was handed an envelope from Ms Kibuuka that had a long list of allegations of misconduct against her. The document containing the allegations of misconduct was signed by Mr Zwane.³⁹⁰ Ms Kibuuka advised Ms Mpshe that the letter came from Mr Lester Peter who also told Ms Kibuuka to advise Ms Mpshe that

³⁸⁹ Transcript 1 July 2019, p 256

³⁹⁰ Transcript 1 July 2019, p 258

she had to go on leave.³⁹¹ Mr Peter was the SAA contract manager responsible for procurement at the time.³⁹²

297. The allegations contained in the letter ranged from conduct in 2012. This included failure to discipline Mr Wolf Meyer when instructed to do so (this was when Ms Mpshe had asked for a legal opinion and investigation report before taking action, which was not provided); failure to cooperate with the State Security vetting operations (this was when Ms Mpshe refused to fire or move an innocent member of the treasury department who Ms Myeni had targeted and accused of failing her vetting because she had dual citizenship); allegedly adjusting Dr Dahwa's salary without following due process; and allegedly signing a contract with Airbus without the correct delegation of authority.³⁹³

298. Later that day, Ms Mpshe received a phone call from a journalist in connection with her suspension. He informed her that a reliable source at SAA had told him that she was going to be suspended. Ms Mpshe told him she did not know what he was talking about, asked him to please not call her again, and put the phone down.³⁹⁴

299. Ms Mpshe, having noted that the letter of charges and allegations against her was signed by Mr Zwane, asked to have a meeting with him to discuss the letter. Mr Zwane was only able to meet with Ms Mpshe in early February 2016. She asked Mr Zwane what the allegations were about because, as far as she was concerned, she had led an exemplary career in SAA and had never been found to have committed any misconduct.³⁹⁵ Ms Mpshe testified that some of the allegations she was facing

³⁹¹ Transcript 1 July 2019, p 259

³⁹² Transcript 1 July 2019, p 259

³⁹³ Transcript 1 July 2019, p 264-266

³⁹⁴ Transcript 1 July 2019, p 260

³⁹⁵ Transcript 1 July 2019, p 263

dated back to 2012. In her view, it simply did not make sense for these allegations to be levelled against her for the first time in 2016.³⁹⁶ According to Ms Mpshe, Mr Zwane would not look her in the eye and responded that it was the Board and he was just carrying out the Board's instruction.³⁹⁷

300. Ms Mpshe's attorneys wrote a response to Mr Zwane's letter of charges.³⁹⁸ The response dealt with each individual charge and allegation and explained why Ms Mpshe's actions in each case were justified. She also explained that she believed the suspension was for ulterior reasons and the charges had no real basis. She contended that the ulterior motive was that she was being punished for refusing to sign off the 30% BEE set aside letters that Ms Kwinana and Ms Myeni wished her to sign.³⁹⁹

301. Then she heard nothing further from SAA's attorneys, ENS, until mid-April 2016, when another set of attorneys, BMK Attorneys, took over the matter. Ms Mpshe's attorney advised her that the attorneys at ENS were surprised to learn someone else was taking over the matter and that it was even proceeding at all because, based on the response from Ms Mpshe, they had taken the view that there was no basis for a disciplinary process.⁴⁰⁰

302. On 5 May 2016, Mr Zwane summoned Ms Mpshe to a meeting with Ms Kwinana.⁴⁰¹ At the meeting, he handed her a letter which suspended her with immediate effect. Ms Mpshe told Mr Zwane that she would not acknowledge receipt of the letter as the matter was being dealt with by her attorney. Ms Kwinana stated: "Do you always

³⁹⁶ Transcript 1 July 2019, p 264

³⁹⁷ Transcript 1 July 2019, p 264

³⁹⁸ Transcript 1 July 2019, p 268

³⁹⁹ Exhibit DD 15, pp 415-470

⁴⁰⁰ Transcript, 1 July 2019, p 269

⁴⁰¹ Transcript 1 July 2019, p 270

have to be so difficult?”. Ms Mpshe responded, “I’m not sure how much experience you’ve had with attorneys. Once you have handed your matter to your attorney, you are not going to be having dealings with other people on the same matter. It is on principle. It is not being difficult.” Ms Mpshe therefore did not take the letter and left the room.⁴⁰²

303. SAA made no effort to respond to Ms Mpshe’s attorney’s letter setting out her response to the charges until around 6 August 2016.⁴⁰³ On this date, completely new charges were levelled against Ms Mpshe, with only two of the allegations remaining the same.⁴⁰⁴ The disciplinary process was stalled and did not progress, with SAA’s attorney, BMK Attorneys, stating they did not have instructions.

304. Ms Mpshe was on suspension for 22 months.⁴⁰⁵ The suspension was with pay. Finally, in around August or September 2017, Ms Mpshe was asked to prepare representations to the Board as to why her suspension should be lifted.⁴⁰⁶ At this stage, a new Board was in place, but Ms Myeni remained the Chair.⁴⁰⁷

305. After Ms Mpshe had provided the representations on 15 September 2017,⁴⁰⁸ she had to wait until February 2018 to hear anything further from the Board. The new CEO, Mr Jarana, proposed to Ms Mpshe a mutual separation. Ms Mpshe asked for the terms of this proposal but they were not forthcoming.⁴⁰⁹ A few weeks later, there was a letter that misrecorded what had occurred at the meeting between Ms Mpshe

⁴⁰² Transcript 1 July 2019, p 271

⁴⁰³ Transcript 1 July 2019, p 272

⁴⁰⁴ Transcript 1 July 2019, p 276

⁴⁰⁵ Transcript 1 July 2019, p 290

⁴⁰⁶ Exhibit DD15(b), p 432

⁴⁰⁷ Transcript, 1 July 2019, p 292

⁴⁰⁸ Exhibit DD15, p 43

⁴⁰⁹ Transcript 1 July 2019, p 295

and Mr Jarana. Ms Mpshe was advised by her attorneys that they could continue to fight the action and they would likely win, but that SAA had deep pockets and she had already incurred almost R500 000 in legal fees by that point.⁴¹⁰ Ms Mpshe ultimately agreed to a mutual separation on the basis of which she received a settlement of 12 months' salary.⁴¹¹

306. Ms Mpshe told the Commission that she and her family had endured “immeasurable hardship” because of SAA’s conduct. Her reputation was permanently damaged and the whole saga had had extremely serious consequences for her career.⁴¹² She said that her children had been humiliated by the accusations that their mother had been suspended for misconduct.⁴¹³ She said that it was embarrassing for her in the community and it was embarrassing for her husband that she was put through this ordeal.⁴¹⁴

Conclusion on disciplinary proceedings

307. The facts set out above tell a sorry tale of gross manipulation of disciplinary processes to remove a competent and committed Chief Procurement Officer and the Head of Human Resources at SAA. Both Dr Dahwa and Ms Mpshe were subjected to abuse from Ms Myeni and Ms Kwinana when they tried to resist their attempts unlawfully to redirect 30% of SAA’s procurement spend to pre-selected BEE entities.

⁴¹⁰ Transcript 1 July 2019, p 296

⁴¹¹ Transcript 1 July 2019, p 298

⁴¹² Transcript 1 July 2019, p 301

⁴¹³ Transcript 1 July 2019, p 302

⁴¹⁴ Transcript 1 July 2019, p 303-304

They were also both subjected to trumped up charges and had to endure drawn out and unfair disciplinary processes, which they eventually could no longer fund.

308. Taxpayers' money was wasted on these expensive disciplinary processes that utilised external lawyers, that ultimately required SAA to pay out Dr Dahwa and Ms Mpshe, and that necessitated the employment (and payment) of other people to fulfil these roles while Dr Dahwa and Ms Mpshe were on paid suspension for months and even years, on end. This again shows a complete disregard by Ms Myeni and Ms Kwinana for the money of the South African public that had been entrusted to the airline.

309. Elsewhere in this report there will be a discussion on what should be done about possible compensation to those individuals who have suffered or who suffer financially and otherwise as a result of their resistance to state capture and corruption. For example, they may have incurred legal costs to defend themselves against suspension and dismissal or they may have been dismissed and had no funds to fight unlawful or unfair dismissals which were used to get them out of the way so that malleable individuals would be appointed to their positions or where the suspensions or dismissals are used to penalise them for their refusal to co-operate with corrupt agendas.

310. Just how much the removal of Ms Mpshe and Dr Dahwa cost SAA will be dealt with below. Once Dr Dahwa and Ms Mpshe were out of the way, the project of state capture truly took hold in SAA and paved the way for a number of acts of gross corruption and fraud at the national carrier and its subsidiary, SAAT.

BNP Capital raising

312. Ms Cynthia Agnes Soraya Stimpel served for 10 years as the Head of Financial Risk Management at SAA and then became the Acting Group Treasurer.⁴¹⁵ She testified that the SAA Board of Directors under Ms Cheryl Carolus was focused towards a strategic direction and the team worked together to achieve SAA's vision. At the time, the staff morale was quite high and it appeared that SAA was slowly starting to improve.⁴¹⁶ In contrast, after Ms Carolus had left the airline, Ms Stimpel noted that there was increased interference by the Board in operational matters like specific SAA contracts. Ms Stimpel testified that this was a deviation from the appropriate governance and oversight role that the Board was supposed to play.⁴¹⁷

313. Ms Stimpel testified that in February 2015, SAA was in a seriously precarious financial situation. It had a treasury guarantee of up to R15billion but had borrowed about R11billion. She said that it was always short term debt with the result that, when the loans came to maturity, they had to be rolled over which was not a simple process.⁴¹⁸ This also resulted in very high interest rates.⁴¹⁹ Around this time, Ms Stimpel was appointed as Acting Group Treasurer.⁴²⁰ During this period, SAA was instructed to stop reporting to the DPE and instead report to National Treasury.⁴²¹

⁴¹⁵ Transcript 13 June 2019, p 24

⁴¹⁶ Transcript 13 June 2019, p 24

⁴¹⁷ Transcript 13 June 2019, p 25

⁴¹⁸ Transcript 13 June 2019, p 25

⁴¹⁹ Transcript 13 June 2019, p 26

⁴²⁰ Transcript 13 June 2019, p 26. Ms Stimpel explained why she was qualified to take on this role in transcript 13 June 2019, p 28

⁴²¹ Transcript 13 June 2019, p 18-19

314. National Treasury required SAA to draw up a borrowing plan for the next three to five years indicating how SAA intended to manage its funds.⁴²² Ms Stimpel's team, in collaboration with Mr Wolf Meyer, who was the CFO at this time, and National Treasury, prepared this plan and submitted it to Exco and the Audit and Risk Committee (ARC). The Board approved the plan in April 2015.⁴²³
315. The plan was based on the analysis that, if SAA converted all its short-term debts to long-term ones, over a ten-year tenure, and took full advantage of the R15billion guarantee, this could be secured at a fixed rate and would save SAA approximately R400million.⁴²⁴

Procurement in financing

316. Ms Stimpel testified that, in making funding decisions at SAA, they followed a slightly different process to ordinary procurement. They used the Financial Risk Management Policy. This required an RFP but only to the five major banks directly.⁴²⁵ This was because the banks were reliable and there had been a proven historical funding relationship.⁴²⁶ The process was conducted through the Financial Risk Committee and not through those responsible for the SCM Policy. It then went to Exco, then ARC, and then the Board as opposed to the SCM Policy that required the process to go through the Cross Functional Sourcing Team, the BAC and only then

⁴²² Transcript 13 June 2019, p 29

⁴²³ Transcript 13 June 2019, p 30

⁴²⁴ Transcript 13 June 2019, p 31

⁴²⁵ Transcript 13 June 2019, p 31

⁴²⁶ Transcript 13 June 2019, p 32

to the ARC and the Board.⁴²⁷ However, Ms Stimpel explained that they did attempt to get the most competitive rates they could get from the banks and made a full analysis of each bank's offer before taking a decision.⁴²⁸

The first RFP

317. Ms Stimpel testified that, after the Board had approved the borrowing plan on 22 April 2015, SAA began to implement it and went out to the market with an RFP for R15billion for debt consolidation. However, despite having approved this plan, the Board then queried the issue of the RFP and its content, and asked for a paper to be prepared on debt consolidation.⁴²⁹

318. Thereafter, Ms Kwinana sent an email stating that the process had to be cancelled and that a tender process should be followed.⁴³⁰ The email queried the limited pool of funders as this would not allow new entrants to the market.

319. Ms Stimpel explained that, when dealing with such an enormous sum, they did not deviate from the institutions that were in a position to fund such large amounts. She said that smaller institutions simply did not have the capacity to do so.⁴³¹ Ms Stimpel responded to the email and pointed out that the RFP had been sent out on the instruction of the Board's Chairperson.⁴³² She tried to dissuade the Board from cancelling the process because of the reputational risk to the company and the harm

⁴²⁷ Transcript 13 June 2019, p 32.

⁴²⁸ Transcript 13 June 2019, p 33.

⁴²⁹ Transcript 13 June 2019, p 34

⁴³⁰ Exhibit DD1, p 170

⁴³¹ Transcript 13 June 2019, p 35

⁴³² Exhibit DD1, p 178

it would cause if they later put out another RFP.⁴³³ She also pointed out that the large banks had proven themselves to be reliable in treating SAA's sensitive financial information confidentially.⁴³⁴ Finally, in addressing Ms Kwinana's concern about new entrants, Ms Stimpel explained that, despite the formal limited-scope RFP, they had received many unsolicited calls from new entrants many of whom explicitly said they could not manage R15billion. Ms Stimpel told Ms Kwinana that the ones who could were asked to prepare a term sheet in response to the RFP and they had asked what a term sheet was. In other words, they were clearly not capacitated to fulfil this role.⁴³⁵ Ms Stimpel also expressed concerns about how exactly these unsolicited bidders knew about the funding opportunity in circumstances where no RFP had gone out. She and Mr Meyer suspected they got the information from the Board because the executive team in SAA treasury had been involved since 2007 in borrowing activities and knew not to disclose anything about it.⁴³⁶

320. The Board ultimately decided to cancel the RFP. Accordingly, the Treasury prepared a smaller RFP which was just for the amount of maturing debt that was rolling over at that time, which was R7billion. When it got to the Board, however, the Board changed it back to a full R15billion debt consolidation RFP.⁴³⁷ Not only did the Board require Ms Stimpel to then prepare a new RFP for this full amount, but it wished the RFP to be sent out to all the unsolicited bidders that had visited SAA previously in relation to the debt and the Board wanted to approve and even add to the list of funders to whom the RFP would be sent. Ms Stimpel explained that this was the first time she had heard of an RFP first being approved from the Board and not going

⁴³³ Transcript 13 June 2019, p 36

⁴³⁴ Exhibit DD1, p 178

⁴³⁵ Transcript 13 June 2019, p 37

⁴³⁶ Transcript 13 June 2019, p 38

⁴³⁷ Transcript 13 June 2019, p 39

through the normal financial procurement channels. She testified that this was unusual, even in SCM processes.⁴³⁸

The second RFP

321. On 10 September 2015, the new RFP went to the Board for approval with a list of counterparties to whom it would be sent.⁴³⁹ The RFP was approved and sent out. The closing date for responses was 2 October 2015. This would allow time to compile a spreadsheet out of the respective bidders' term sheets so that SAA could compare who was offering the best terms and interest.⁴⁴⁰

322. In around October 2015, (before his resignation in November 2015), Mr Meyer called Ms Stimpel and other treasury managers into his office and explained to them that a potential bidder had called a meeting with him. He had assumed the meeting would be to discuss how to put together the term sheet or something about the lending terms. However, when he got there, and met with the bidder, a Mr Jayendra Naidoo from First Self Financial Services, someone at the meeting called him aside, and told Mr Meyer that he must ensure SAA gave his client the deal because "number 1" (President Jacob Zuma) wanted this deal to happen.⁴⁴¹ Mr Meyer responded that the decision making was done in a team and based on a full analysis and so he could not assist in this request.⁴⁴² Mr Meyer also explained to Ms Stimpel that he was suspicious when he got to the meeting and decided to record it from a recording

⁴³⁸ Transcript 13 June 2019, p 43

⁴³⁹ Exhibit DD1, p 207. The list of parties is at Annexure B, p 212

⁴⁴⁰ Transcript 13 June 2019, p 46

⁴⁴¹ Transcript 13 June 2019, p 47. See also p 48. See also exhibit DD13, p 6, para 33

⁴⁴² Transcript 13 June 2019, p 48

device in a pen.⁴⁴³ Ms Stimpel congratulated him for putting him straight and for recording the interaction. She then left as she had a lot of work to do.⁴⁴⁴

323. Ms Stimpel explained that in November 2015 Mr Meyer was called into a Board meeting. When he arrived, he was searched and the security confiscated his recording pen and his laptop.⁴⁴⁵ Ms Stimpel explained that these types of precautions were highly unusual.⁴⁴⁶ However, she noted that a few months later, in February 2016, Ms Myeni called a meeting with National Treasury and at this meeting there was again someone waiting at the door who asked everyone to hand over their cell phones and laptops.⁴⁴⁷

324. Ms Stimpel testified that she found it highly unusual and very suspicious that Ms Myeni would even have known about the recording pen and thought to confiscate it from Mr Meyer. She also began to feel that something was really not right at SAA when the Board started taking these extraordinary measures. The secrecy and fear of being recorded at a meeting was very suspicious.⁴⁴⁸ In addition, Ms Stimpel confirmed that the security men that confiscated items were not internal SAA security personnel.⁴⁴⁹

325. Mr Meyer told his treasury personnel that, because of negative reporting about him in the press, which he said was defamatory, regarding the management of certain SAA funds in Africa, he had been advised by his attorney to simply resign and find

⁴⁴³ Transcript 13 June 2019, p 48

⁴⁴⁴ Transcript 13 June 2019, p 48

⁴⁴⁵ Transcript 13 June 2019, p 49

⁴⁴⁶ Transcript 13 June 2019, p 49-50

⁴⁴⁷ Transcript 13 June 2019, p 50,

⁴⁴⁸ Transcript 13 June 2019, p 50

⁴⁴⁹ Transcript 13 June 2019, p 51.

alternative employment. He did so ⁴⁵⁰ and was then replaced by Ms Phumeza Nhantsi on 27 November 2015 as interim CFO.⁴⁵¹

326. SAA received various responses to the funding RFP.⁴⁵² The top offer came from SeaCrest Investments. They had the best interest rate and offered the full amount required.⁴⁵³ There was an alternative offer from three major banks, which were together only willing to fund R4.3billion.⁴⁵⁴ The Treasury team was preparing a recommendation for the appointment of SeaCrest but during their analysis they became worried that there was not enough information available on SeaCrest. They asked SAA's legal department to do a full due diligence on the company.⁴⁵⁵ Accordingly, in the recommendation from Treasury to the Financial Risk Committee, Ms Stimpel recorded that, although SeaCrest was the preferred bidder, a full due diligence still needed to be conducted before any decision could be taken.⁴⁵⁶

327. Ms Stimpel's recommendation also provided for an alternative position. As there still had to be due diligence performed, they could put in place a contingency plan that, if Seacrest was not recommended, then SAA should take the combination from all the banks of R4.3billion.⁴⁵⁷

328. The due diligence was conducted because there was little known about SeaCrest and its term sheet revealed that it was not going to be the direct funder. It was using

⁴⁵⁰ Transcript 13 June 2019, p 52

⁴⁵¹ Transcript 13 June 2019, p 52

⁴⁵² These can be found summarized in an analysis sheet in exhibit DD1, p 256

⁴⁵³ Transcript 13 June 2019, p 55

⁴⁵⁴ Transcript 13 June 2019, p 57

⁴⁵⁵ Transcript 13 June 2019, p 57

⁴⁵⁶ Exhibit DD1, p 234

⁴⁵⁷ Exhibit DD1, p 235

two other funders, Mars Capital and the other – main funder – was Grissag.⁴⁵⁸ The due diligence report reflected that SeaCrest and its investors were reluctant to provide the required information and documentation until a successful bidder was announced. This information was critical in order to make an informed decision. SAA was concerned about the origin and availability of the funds.⁴⁵⁹ However, the ultimate recommendation was that the due diligence could be finalised after the award of the tender during the contracting process and one of the conditions precedent of the agreement was going to be a due diligence.⁴⁶⁰ The review committee drafted an agreement which proposed that a successful due diligence and the provision of various documents and safeguards – from regulators and insurance companies - would be a condition for the contract coming into being.⁴⁶¹

329. These documents were then sent to Exco. The recommendation recorded that the Treasury team were not comfortable with the results of the due diligence at that time. While the Treasury team recommended SeaCrest as the first choice, this was subject to a more thorough due diligence being a condition precedent in the contract.⁴⁶² However, Ms Stimpel still raised with Exco that SAA could consider simply jettisoning SeaCrest altogether. This was because Ms Stimpel was still concerned that since 2007, SAA's practice had been to go through the big banks which were reliable and had the requisite capacity. SAA also had a close working relationship with them. The due diligence for SeaCrest had raised red flags and SAA still did not know who

⁴⁵⁸ Transcript day 112, 13 June 2019, p 60

⁴⁵⁹ Exhibit DD1, p 274

⁴⁶⁰ Exhibit DD1, p 275

⁴⁶¹ Exhibit DD1, p 258. The conditions precedent are on p 263

⁴⁶² Transcript 13 June 2019, p 66

Grissag was and how it would be sourcing its funds. So, Ms Stimpel's view was that, if she had to make the decision alone, she would have excluded SeaCrest.⁴⁶³

330. This same recommendation was then placed before the SAA Board.⁴⁶⁴ Ms Stimpel did not attend the Board meeting, at Ms Nhantsi's direction, even though she normally did attend meetings about funding or hedging together with the CFO.⁴⁶⁵ Ms Stimpel testified that what she expected was that the Board would either choose one of the recommended options, or they would reject both and ask that a fresh RFP be put out but that is not what occurred.⁴⁶⁶ When Ms Stimpel went to fetch the Board resolution from the company secretary's offices in order to implement the Board's decision, there was no resolution there. However, the Board meeting had been on 3 December 2015 and this was 7 December 2015.⁴⁶⁷

Funding from the FDC

331. When Ms Stimpel finally received the Board resolution, she found it perplexing. The Board had rejected both recommendations and resolved to get funding from a third option that had not appeared in the recommendation – an entity known as the Free State Development Corporation (FDC). The resolution gave authority to the Acting CEO and interim CFO to sign any contracts to make sure that the loan happened. The Acting CEO was Mr Zwane who had replaced Ms Mpshe. The Acting CFO was Ms Nhantsi who had replaced Mr Wolf Meyer. The resolution was based on a letter

⁴⁶³ Transcript 13 June 2019, p 67

⁴⁶⁴ Exhibit DD1, p 244

⁴⁶⁵ Transcript 13 June 2019, p 80

⁴⁶⁶ Transcript 13 June 2019, p 69

⁴⁶⁷ Transcript 13 June 2019, p 69

that had been sent to the Board by a “Shepard Moyo” from the FDC. Ms Stimpel was concerned because that letter had not even gone through the formal RFP process, nor had it been analysed.⁴⁶⁸ The letter stated only the following:

“Free State Development Corporation is a schedule 3D company in terms of PFMA. The Corporation offers financial and non-financial support in terms of FDC Act. Subsequent to our discussion regarding funding that we provide, we are in the process of exploring a joint venture between FDC and foreign investor through its newly formed subsidiary in the Free State.

The investor has indicated that there is appetite for government owned entities such as SAA who require funding. This is a first of its kind within FDC but we would like to explore this opportunity and provide such funding to yourselves. This is subject to investor agreements reached and also PFMA approvals sought. I will keep you informed if this materialises and we will negotiate terms at that point in time. The funder has indicated that it is low cost funding but this matter is under discussion. I envisage this to be between 3% to 6%. Please note that as we discussed, this letter is not a commitment but one of the solutions we may explore in future together.”⁴⁶⁹

332. While Ms Stimpel did not disagree with the Board’s rejection of the SeaCrest recommendation, she did disagree with the rejection of the second. Even though it was correct that the amount was not the full amount required to consolidate the debt, it would have alleviated some of SAA’s immediate pressures and allowed SAA to go out on RFP again for the remainder of the debt. She testified that, if she had been at the meeting, she would have pointed this out.⁴⁷⁰ In fact, in the Board minutes there is no reflection of any discussion around this point.⁴⁷¹ However, the very concerning aspect was that the resolution was for the approval of the FDC loan, from a foreign bidder that did not go through any process, on the basis of a brief letter that did not

⁴⁶⁸ Transcript 13 June 2019

⁴⁶⁹ Exhibit DD1, p 287

⁴⁷⁰ Transcript 13 June 2019, p 81

⁴⁷¹ Transcript 13 June 2019, p 81

even set out the terms of the loan.⁴⁷² The resolution empowered Ms Nhantsi to take all steps to conclude an agreement on a R14billion loan. That is the same Ms Nhantsi who did not make it to the shortlist for the position of CFO and only got in because Ms Dudu Myeni issued an instruction that she be included in the shortlist.

333. The letter from the FDC⁴⁷³ stated that the transaction was subject to approvals under the PFMA and that terms would be negotiated at a later point in time. It stated that the interest rate may be between 3 and 6% but this was not a commitment. The letter made no mention of the amount it was willing to advance. It also made no mention of the tenure of the loan.

334. Ms Stimpel testified that she asked for this letter at the time and the Board told her that she did not need to see it.⁴⁷⁴ Ms Stimpel was shown the letter by the Commission's investigator. She testified that this letter could never have been sufficient for the Board to reject the recommendations of the entire process the Treasury had gone through and to simply choose another bidder on these vague terms. There was no information on the FDC's mandate; this was an exploratory letter and not a firm commitment so it was not even clear what the terms were. The Board clearly wanted to work with the FDC without going through the approved governance processes.⁴⁷⁵

335. The mandate of the FDC is in fact governed very clearly by the terms of the statute that created it. That is the Free State Development Corporate Act 6 of 1995.⁴⁷⁶ Section 4 defines the capacity and powers of the FDC and confines the power to the

⁴⁷² The resolution is at exhibit DD1, p 289. See transcript 13 June 2019, p 82.

⁴⁷³ Exhibit DD1, p 287

⁴⁷⁴ Transcript 13 June 2019, p 78

⁴⁷⁵ Transcript 13 June 2019, p 72-73

⁴⁷⁶ See the legislation in exhibit DD1(c), p 904. Section 3 and 4 is at p 905-906

FDC's objects, set out in section 3. The objects provide for the FDC to develop enterprises *within the Free State province*. It includes assisting Free State SMMEs and economic empowerment projects within the province.

336. Ms Stimpel was similarly concerned about some of the reasons given by the Board in the resolution. The resolution stated that borrowing from another SOE carried less risk and that they would give SAA better treatment in the event of default.⁴⁷⁷ Ms Stimpel testified that, if she had been at the meeting, she would have explained that this could not be correct. She said that, in fact, the risk was worse because the two parties' risks are in one bundle – the government/public bundle. This would be concentrating all the risk within the Government.⁴⁷⁸ She said that it was also incorrect that FDC would have treated SAA any differently in the event of default. Ms Stimpel explained that the knock-on effects of default would be crippling to the FDC, with terrible consequences for the overall funding of national and provincial government.⁴⁷⁹

337. Ms Stimpel testified that the Board's seemingly inexplicable decision, based on a letter that did not make any of the undertakings reflected in the resolution, could be understood if one had regard to the composition of the Board in late 2015. It was only Ms Myeni, Ms Kwinana, Dr Tambi and then executives, Ms Nhantsi and Mr Zwane. Ms Nhantsi and Mr Zwane were never going to oppose anything that Ms Myeni wanted. As already set out above, it was under this diminished Board, with its new executives, that fraud and corruption progressed unabated at SAA and SAAT.

⁴⁷⁷ Exhibit DD1, p 289, para c

⁴⁷⁸ Transcript 13 June 2019, p 83

⁴⁷⁹ Transcript 13 June 2019, p 83-84

338. During the week of 7 December 2015 Ms Stimpel received instructions from Ms Nhantsi to “ratify” the decision to appoint the FDC (which, in the light of the context in which it was said, meant to execute or implement the decision). She refused as she was being asked to do so without even seeing the Board resolution at that stage.⁴⁸⁰ Ms Stimpel then later received the resolution and recorded her reservations in an email dated 9 December 2015.⁴⁸¹ The email noted that the process was irregular and that, if the FDC was to be considered, the RFP had to go out again with the FDC included as a bidder.
339. As a result, Ms Stimpel made a recommendation to the Financial Risk Committee that they send the RFP to the FDC as they would with any bidder. Once the FDC had responded to the RFP, the Committee would be able to do a full comparison of the different options and decide – regardless of what the Board had decided.⁴⁸²
340. A member of Ms Stimpel’s team did send an RFP out on 24 December 2015 to the FDC but they were concerned that even this was outside of proper processes because the period for the submission of responses to the RFP had expired on 2 October 2015.⁴⁸³
341. Ms Stimpel also testified that the Board’s conduct had prejudiced SAA because a number of loans were coming to maturity in December 2015 and needed to be rolled over and there would be new debt. SAA needed urgent cash to meet these obligations. It would need bridging finance to do so, given that neither the consolidation, nor the alternative partial loans from the banks had happened. SAA

⁴⁸⁰ Transcript 13 June 2019, p 89

⁴⁸¹ Exhibit DD1, p 291

⁴⁸² Transcript 13 June 2019, p 84-85

⁴⁸³ Transcript 13 June 2019, p 90

used the remaining R3billion to which it had access under the National Treasury guarantee to meet those obligations and secured bridging finance for the period December to March 2016.⁴⁸⁴

342. The legal department, which was part of the cross-function sourcing team for financing, raised a concern about the FDC and whether a due diligence had been conducted. The legal department's representative sent this query in a letter to Ms Nhantsi who confirmed that it would be done.⁴⁸⁵ This was an inversion of the process – usually a due diligence should be done *before* the Board decides to award the contract – not after.⁴⁸⁶ Furthermore, there was no provision in the resolution for any conditions precedent, as would have been the protection with SeaCrest, to provide for a due diligence process to be conducted.⁴⁸⁷

343. Ms Nhantsi's response to the request for a due diligence was also curious because she then instructed Treasury to send out the RFP to the IDC and PIC as well.⁴⁸⁸ The IDC and PIC had been part of the entities to which SAA had sent the RFP previously, which had not responded because their mandate did not include funding SOEs. For that reason, they were not considered in later years. Treasury therefore did not act on this request. It also did not appear in the Board resolution.⁴⁸⁹

344. The FDC responded to the RFP with a term sheet.⁴⁹⁰ The startling thing about the term sheet was that it proposed a joint venture between the FDC and Grissag –

⁴⁸⁴ Transcript 13 June 2019, p 92-93

⁴⁸⁵ Transcript 13 June 2019, p 94

⁴⁸⁶ Transcript 13 June 2019, p 94

⁴⁸⁷ Transcript 13 June 2019, p 95

⁴⁸⁸ Exhibit DD1, 303

⁴⁸⁹ Transcript 13 June 2019, p 96

⁴⁹⁰ The term sheet may be found in exhibit DD1, p 316

which was the main funder in the SeaCrest offer. The Board had rejected the SeaCrest offer because there had been insufficient due diligence and not enough information about the funder.⁴⁹¹

345. When Treasury met and performed the analysis of the response to the RFP on 6 January 2016, they invited representatives from National Treasury to be observers. The interest rate (of 4%) seemed very beneficial but the same issue of Grissag not being subject to due diligence was worrying. When National Treasury weighed in, they explained that the FDC did not have the mandate to conclude the transaction. FDC could only fund development projects in the Free State.⁴⁹² It is quite clear that the Board simply did not do a basic “homework” about the FDC before they made their resolution in favour of FDC.

346. On 6 January 2016, Ms Stimpel set up a meeting with Ms Nhantsi and relayed this information to her that the FDC had no mandate outside of the Free State. Ms Nhantsi advised them to leave the matter with her and she would speak to Mr Moyo at the FDC about it. Ms Nhantsi failed to come back to Ms Stimpel for a long time. It was only on 20 April 2016 that she told Ms Stimpel that the FDC was off the table for this reason.⁴⁹³

Transaction advisor bid

347. At the end of the meeting between Ms Nhantsi and Ms Stimpel on 6 January 2016, Ms Nhantsi advised Ms Stimpel that she had received Board approval for a

⁴⁹¹ Transcript 13 June 2019, p 97

⁴⁹² Transcript 13 June 2019, p 100

⁴⁹³ Transcript 13 June 2019, p 101

transaction advisor about the debt consolidation transaction. The transaction advisor would consider SAA's debt portfolio and how to restructure the balance sheet and related matters. Ms Stimpel responded that this was precisely what Treasury had done through the financing department and had made recommendations which had been approved. This was an internal function.⁴⁹⁴

348. Ms Nhantsi claimed that there was a need for this advisor because:

- (1) Treasury did not have sufficient skills since Ms Stimpel had only been in her position for 8 months; Ms Stimpel said that this was unfounded as she had been performing a similar role in the Treasury department for 10 years;
- (2) The large amount was only in the Board's authority and the Board needed external assurance from an independent source about the transaction; Ms Stimpel said that it was unjustified and irresponsible, to spend unwarranted sums on another party reproducing work already performed internally, particularly in the light of SAA's financial situation; and
- (3) Ms Nhantsi was new and did not have sufficient institutional knowledge; Ms Stimpel testified that she could have relied on her team that worked with the National Treasury and the legal department for this institutional knowledge.⁴⁹⁵

349. Ms Nhantsi prepared recommendations to be submitted to the Board about why a transaction advisor was necessary.⁴⁹⁶ Ms Stimpel went through each of the motivations and testified that each of these were things that were being considered or had already been considered internally.⁴⁹⁷

⁴⁹⁴ Transcript 13 June 2019, p 102

⁴⁹⁵ Transcript, 13 June 2019, p 103-104

⁴⁹⁶ Exhibit DD1, p 330

⁴⁹⁷ Transcript 13 June 2019, p 107-111

350. Nonetheless, the Board approved the recommendation for the appointment of a transaction advisor “to advise regarding the R15billion debt consolidation restructuring exercise”.⁴⁹⁸ Thereafter, an RFP was issued. The BAC prepared a document with the proposed evaluation criteria for it.⁴⁹⁹ When Ms Stimpel read the document, she realised that the advisor was actually going to be tasked with sourcing the R15billion funding – something her team had been tasked with doing and in respect of which the RFP process was still open. While Ms Stimpel had not seen the Board resolution, she did understand that it did not extend to actually sourcing the funding. She immediately tried to get hold of Ms Nhantsi but she was not able to reach her.⁵⁰⁰

351. Ms Stimpel also testified that it made no sense to get a middle person to broker this funding process in circumstances where SAA had historically managed to obtain funding straight from the banks, that they knew would be reliable. Ms Stimpel shared this view with Ms Nhantsi at various meetings.⁵⁰¹ Appointing a middle person would significantly drive up costs for SAA.⁵⁰² Ms Stimpel eventually wrote an email to Ms Nhantsi detailing all her concerns.⁵⁰³ Ms Nhantsi told her that she already had Board approval and would send it to Ms Stimpel. However, what she sent her was Ms Nhantsi’s recommendation for a transaction advisor, which did not make mention

⁴⁹⁸ Exhibit DD1, p 333

⁴⁹⁹ Exhibit DD1, p 348

⁵⁰⁰ Transcript 13 June 2019, p 113

⁵⁰¹ Transcript 13 June 2019, p 115

⁵⁰² Transcript 13 June 2019, p 116

⁵⁰³ Exhibit DD1, p 356

of a broker to source the funding.⁵⁰⁴ Ms Stimpel therefore made changes to the BAC evaluation document so that it excluded the sourcing of funds.⁵⁰⁵

352. The RFP that ultimately went out followed Ms Stimpel's revisions – it only related to transaction advisory services and did not include the sourcing of funds.⁵⁰⁶ Seven entities responded: Deloitte & Touche, Regiments Capital, Basis Point Capital, Singer Holdings, Nasela Capital, Nedbank Limited, and BNP Capital.⁵⁰⁷

353. The RFP required⁵⁰⁸ bidders to submit their BBBEE certificates and, if they were joint ventures, they required a consolidated certificate and had to submit the percentage income split in the joint venture agreement as well as the split in workload.⁵⁰⁹ It also required a financial services provider licence from the Financial Services Board;⁵¹⁰ and the signed joint venture agreement.⁵¹¹ The BNP Capital bid⁵¹² provided that the consortium or joint venture bidding was "InLine Trading 10 (Pty) Ltd". In other words, BNP was bidding together with InLine Trading 10 (Pty) Ltd.

354. Ms Stimpel testified that neither she nor Michael Kleyn, who was the Manager of International Cash Management in the Group Treasury at SAA,⁵¹³ were invited to be involved in the evaluation of the bid submissions which would ordinarily have been

⁵⁰⁴ Transcript 13 June 2019, p 116-117

⁵⁰⁵ Transcript day 112, 13 June 2019, p 117

⁵⁰⁶ Exhibit DD1, p 359

⁵⁰⁷ Transcript 13 June 2019, p 118

⁵⁰⁸ See Exhibit DD1, p 384-393

⁵⁰⁹ Transcript 13 June 2019, p 119

⁵¹⁰ Transcript 13 June 2019, p 120

⁵¹¹ Transcript 13 June 2019, p 121

⁵¹² Exhibit DD1, p 393

⁵¹³ See exhibit DD1, p 311

part of their work. The point of the Cross Functional Sourcing Team was to get expertise from different departments.⁵¹⁴

355. The Bid Evaluation Committee (BEC)⁵¹⁵ recommended to the Bid Adjudication Committee (BAC), who then selected BNP Capital to provide the transaction advisory services⁵¹⁶ despite there being no budget for the expenditure. The budget was to come from Ms Nhantsi's funds as CFO.⁵¹⁷

356. There were, however, a number of shortcomings in the BNP bid.

356.1. First, there was no information in the bid about its joint venture partner, InLine Trading;⁵¹⁸

356.2. Second, there was no consolidated BEE certificate;⁵¹⁹

356.3. Third, the price submission stated that because of the complexity of the project, the fee would be R1 plus a fee to SAA on the successful adoption for implementation of advice. This amount could not have been correct.⁵²⁰

357. On 20 April 2016 the Cross Functional Sourcing Team called a meeting with Ms Nhantsi to get some feedback about what was happening with the funding RFP, because the RFP was still open and they had not given any feedback to applicants. In this meeting, Ms Nhantsi told the team that FDC was "off the table" and that BNP

⁵¹⁴ Transcript June 2019, p 123

⁵¹⁵ Made up of Khomotso Chadi (Compliance and Corporate Governance Expert); Silas Matsudza (Commodity Manager); Thami Ntisane (Chief Dealer); and Themba Sikhosana (Legal Advisor) – see exhibit DD1, p 431

⁵¹⁶ Exhibit DD1, p 424

⁵¹⁷ Exhibit DD1, p 435

⁵¹⁸ Transcript 13 June 2019, p 132

⁵¹⁹ Transcript 13 June 2019, p 132

⁵²⁰ Transcript 13 June 2019, p 132-133

would now be sourcing the funding. The team challenged this decision. In particular, Ms Lindsay Olitzki, who was the Head of Department: Financial Accounting, in the treasury at SAA,⁵²¹ stated that the scope of the procurement transaction could not be changed in that manner. Other members, including Ms Stimpel, stated that the sourcing of funds needed to go out to tender again with a new RFP for a transaction advisor who would source funding.⁵²² Despite warning Ms Nhantsi at the meeting of this need, she did not appear to take any further action, and the Board passed the resolution extending the scope of the BNP transaction advisor contract to source the R15billion, as set out below.⁵²³

The increase in the BNP scope to include sourcing funds

358. The next day, on 21 April 2016, the Board decided to increase BNP's scope to include sourcing of funds.⁵²⁴ There was no process behind it. Instead of management driving the process and the initiative coming from SAA business and then motivated up to the Board for final approval, all that served before the Board was a letter from Ms Nhantsi recommending that BNP's scope be extended.⁵²⁵

359. A few weeks later, on 6 May 2016, Ms Stimpel was called into Ms Nhantsi's office. Ms Nhantsi told her that, since Ms Stimpel was constantly challenging what she did, Ms Nhantsi thought that she would just show Ms Stimpel the document she wanted Ms Stimpel to sign and discuss the matter with her. Ms Nhantsi told Ms Stimpel that the Board had already approved the award to BNP of an increased scope to source funding; that she had already spoken to BNP and they were prepared to source that

⁵²¹ Exhibit DD 24, p 68

⁵²² Transcript 13 June 2019, p 134-135

⁵²³ Exhibit DD1, p 15, para 81

⁵²⁴ Transcript 13 June 2019, pp 136-137

⁵²⁵ Transcript 13 June 2019, p 137

funding; and they had given Ms Nhantsi the price. She gave Ms Stimpel a document that indicated that BNP would charge SAA 3% of R15billion as the fee for sourcing the funds. Ms Stimpel refused to sign it. She said that her job was to reduce expenses for SAA by R300million by year end and the only way to do that was to reduce interest rates on borrowing. This would wipe out the entire saving on one transaction. Ms Nhantsi agreed to go back to BNP and renegotiate.⁵²⁶

360. Ms Stimpel then went on leave. Mr Kleyn acted in her position. She instructed him not to sign anything in her absence. She also asked him to get comparative pricing from the banks for sourcing funding on the R15billion.⁵²⁷

361. On 11 May 2016 the SAA Global Supply Management Unit made a request to the BAC to support confining the award of the contract for sourcing funds to just BNP Capital.⁵²⁸ It should be noted that this whole process of confinement was happening *after* the Board had already approved the extension of BNP's scope to source funding for SAA. This was another inversion of the process. Proper procurement does not permit Boards of SOEs to make decisions and then try to justify them *ex post facto* by running a process *thereafter*.

362. On 13 May 2016 the BAC did make such a recommendation.⁵²⁹ This recommendation claimed that the sourcing was urgent and the Board had not been able to source funds from its own efforts and so needed the transaction advisor to do so. Ms Stimpel testified that the matter was not that urgent – the same problems had been facing SAA for a long time and they had been managed. Any urgency that

⁵²⁶ Transcript 13 June 2019, p 139

⁵²⁷ Transcript 13 June 2019, p 140

⁵²⁸ Exhibit DD1, p 445

⁵²⁹ Exhibit DD1, p 453

there was, had been caused by the Board's inaction and delaying since February 2015 when SAA sent out the original RFP, which the Board had cancelled. Ms Stimpel testified that in terms of SAA's own procurement policy, lack of proper planning on SAA's part could never be regarded as a ground for urgency.⁵³⁰

363. The motivation from the BAC explained that a normal success fee in the industry is 2-3% and SAA had managed to secure a fee of 1.5%. That amounted to a total of R256million, with VAT.⁵³¹ Ms Stimpel testified that even the 1.5% was far higher than industry norms charged by banks, which would normally use basis points (less than 1%) for arranging funding. Although banks could increase interest charges on the funding, they would not charge such a large fee.⁵³²

364. While Ms Stimpel was away and despite her instruction to Mr Kleyn before she left, Mr Kleyn signed the BAC recommendation to appoint BNP Capital to source funding.⁵³³ He sent her a whatsapp message saying that he had done so because he was under pressure to sign the document. Ms Stimpel testified that she was very upset. She stopped during her pilgrimage in France to send an urgent whistleblower message to National Treasury. Her message said that she had received a notification that a BAC document was signed to pay a client without her knowing anything about the client and that SAA would have to pay the client R225million (excluding VAT). She said that Mr Kleyn had signed the document because he was put under pressure to do so by the interim CFO.⁵³⁴

⁵³⁰ Transcript 13 June 2019, pp 143-145. The policy is at exhibit DD1(c), p 890

⁵³¹ Exhibit DD1, p 446

⁵³² Transcript 13 June 2019, p 147

⁵³³ Exhibit DD1, p 447

⁵³⁴ Transcript 13 June 2019, p 149. The message itself may be found at exhibit DD1, p 443.

365. Two days later, on 13 May 2016, the BAC approved the decision to confine sourcing funds to BNP.⁵³⁵ The BAC checklist that accompanied the approval contained a number of requirements that had to be confirmed as having been met. However, some of the key requirements on this checklist simply had “not applicable” entered next to them.⁵³⁶
366. On 18 May 2016 Ms Stimpel returned from leave. She asked Mr Kleyn for his version of events. Mr Kleyn told her that he was called to the head of procurement’s office. That was Mr Lester Peter at the time. He had replaced Dr Dahwa. Mr Kleyn said that Mr Peter literally “jumped up and down” and told him “you don’t take responsibility here, you just sign”. Mr Kleyn had then just signed the recommendation.⁵³⁷ Mr Lester Peter’s conduct in this regard reveals beyond any doubt that Ms Myeni had made sure that Dr Dahwa was replaced as Chief Procurement Officer by someone who was going to do as Ms Myeni pleased. Mr Peter did just that.
367. Ms Stimpel’s next step in trying to manage the situation was to obtain comparative prices for the sourcing of funds. She did not want the word to get out in the industry that this was happening at SAA. As a result, she sent emails to some of her colleagues at the banks and posed a “hypothetical” request for pricing. She sent the request to three banks: Standard Bank, ABSA and Rand Merchant Bank.⁵³⁸ ABSA wrote back the same day to say their fees were lower than 10 basis points (that is 0.1%) and there could be further participation fees for the lenders and arrangers that usually ranged between 0.25 to 0.4% but “A deal can always be made”.⁵³⁹ Ms

⁵³⁵ Exhibit DD1, p 453

⁵³⁶ Transcript 13 June 2019, pp 153-155

⁵³⁷ Transcript 13 June 2019, p 155

⁵³⁸ Transcript 13 June 2019, p 156. The email may be found at exhibit DD1, p 460

⁵³⁹ Transcript 13 June 2019, p 157

Stimpel also received a quote from RMB for a couple of different structuring options, including one for 0.5% and another, where the amounts were raised from different sources with rates varying from 0.2 to 0.3% but also required further engagement.⁵⁴⁰

368. Ms Stimpel wrote to Ms Nhantsi on 20 May 2016.⁵⁴¹ Ms Stimpel testified that the email was designed to stop the approval process from progressing any further up the approval chain (Exco, TIPCO, ARC and the Board) because she could show that there were much lower quotes in the market. She provided Ms Nhantsi with a table of comparative prices that allowed a savings of R85million. The email also warned about reputational risks to SAA because they had been seeking these funds from the banks since 2015 and now SAA was simply going with a transactional advisor that she could find nothing about online. She suggested that they do a full comparison break down and open the bidding to these other parties.

369. Ms Stimpel testified that Ms Nhantsi elected not to draw these concerns to the attention of the Board and instead secured the Board's approval – which was done by round robin resolution on 24 May 2016.⁵⁴²

370. At the time Ms Stimpel did not know that the Board had taken this decision and so she continued to try to communicate with Ms Nhantsi via whatsapp and email, setting out her concerns. Ms Nhantsi responded eventually to say that they needed to have a meeting to make Ms Stimpel understand that, at the end of the day, the Board and executives make the decision, not her, and SAA had a crisis and needed money.⁵⁴³

⁵⁴⁰ Transcript 13 June 2019. The response is at exhibit DD1, p 466

⁵⁴¹ Exhibit DD1, p 462

⁵⁴² Transcript 13 June 2019, p 162. The resolution may be found at exhibit DD1, p 480

⁵⁴³ Transcript 13 June 2019, p 166. The sms communication may be found in exhibit DD1, pp 471-473

371. On 25 May 2016 SAA issued a letter of award to BNP Capital to source the funding.⁵⁴⁴ It was subject to various conditions and stated that these were the essential terms of the parties' agreement and would prevail should there later be any inconsistencies. It provided that any services rendered by BNP prior to signing the agreement would be governed by SAA's general conditions of contract. This award was accepted in a letter from BNP on the same day (25 May 2016).⁵⁴⁵

The cancellation fee

372. In its 25 May 2016 letter BNP stated that it had already been engaged in work to source funding. As a result, BNP told SAA that, if SAA were unilaterally to cancel the award, BNP would claim a cancellation fee of 50% of the total fee to which they were entitled.⁵⁴⁶ This cancellation fee would therefore be 50% of the R2,68 million, which was the fee they claimed as transaction advisor, and then 50% of the R225 million fee on the sourcing of funds. The total cancellation fee would therefore have been approximately R114million, excluding VAT.⁵⁴⁷

373. Ms Stimpel testified that cancellation fees in this type of agreement are not customary. At the time SAA was in serious financial difficulty and so every employee had been tasked with cost-saving. This type of fee could not be accommodated in such a precarious financial environment. She also testified that sending a letter

⁵⁴⁴ Exhibit DD1, p 490

⁵⁴⁵ Exhibit DD1, p 491

⁵⁴⁶ Exhibit DD1, p 494

⁵⁴⁷ Transcript 14 June 2019, p 8

demanding a cancellation fee for work already done on the very same day that the award was granted seemed very odd.⁵⁴⁸

Conclusion of the term sheet with BNP

374. On 3 June 2016 Ms Stimpel attended a meeting between National Treasury and SAA funders. Various representatives from SAA were present including Ms Olitzki and Ms Nhantsi. This was one of the regular meetings SAA had with Treasury as its guarantor, to present its financial results, its progress with its turnaround strategy and financial operations, and an overview of the business.⁵⁴⁹ These presentations would also be done for each individual funder bank separately so as to avoid any disclosure of confidential information. BNP Capital did not attend this meeting despite having purportedly accepted its mandate on 25 May 2016.⁵⁵⁰

375. On 8 June 2016 BNP Capital sent a letter to SAA referring to a meeting of 3 June 2016 between National Treasury, SAA and SAA's funders and recorded the key points of those meeting.⁵⁵¹ Ms Stimpel testified that she was surprised that BNP had this information as it was confidential and should not have been conveyed to them by any members of the team.⁵⁵² The letter from BNP went on to set out in great detail the costs that Grissag, who BNP had selected as the preferred source of funds, had already incurred in sourcing the funding in order to justify the cancellation fee that BNP claimed in its 25 May 2016 letter.⁵⁵³ The letter concluded by stating that BNP

⁵⁴⁸ Transcript 14 June 2019, p 10

⁵⁴⁹ Transcript 14 June 2019, p 16-17

⁵⁵⁰ Transcript 14 June 2019, p 18

⁵⁵¹ Transcript 14 June 2019, p 18. The letter may be found at exhibit DD1, p 526

⁵⁵² Transcript 14 June 2019, p 19

⁵⁵³ Exhibit DD1, p 527

urgently requested SAA to sign off the term sheet indicating its preferred choice.⁵⁵⁴

This was a reference to the term sheet that Grissag had provided. The request stated that the response from SAA must not include a caveat that the approval of the term sheet was “non-binding”.⁵⁵⁵

376. This request was apparently granted by SAA because on 6 June 2020 Ms Nhantsi signed a term sheet with Grissag.⁵⁵⁶ The term sheet was missing a section usually included in these term sheets which provides that the term sheet is non-binding. This had evidently been removed.⁵⁵⁷

377. Ms Stimpel explained that she was very concerned to see that Ms Nhantsi had bound SAA to this term sheet in circumstances where none of this had gone through the proper channels. There was a departure from historical lending from the big banks, there was no proper RFP process, there was a transaction advisor brought in when this was not necessary, the advisor’s scope was simply increased without process or assessment of risk and cost, and the advisor’s fee was enormous and negated any savings associated with debt consolidation.⁵⁵⁸

378. Ms Stimpel was very concerned about the particular terms to which SAA was now bound under the term sheet. Not only did Grissag get a 3.5% fee, but it also got 1% payable to it on each draw down that SAA made on the funding. This meant that every time SAA made a drawdown, Grissag would get 1% of the amount utilized by SAA. The final cost would therefore be unclear and onerous. It did not appear to

⁵⁵⁴ Exhibit DD1, p 528

⁵⁵⁵ Transcript 14 June 2019, p 20

⁵⁵⁶ Exhibit DD1, p 530-534

⁵⁵⁷ Transcript 14 June 2019, p 21

⁵⁵⁸ Transcript 14 June 2019, p 26

have been thought through. No risk assessments or financial impact assessments were done as would normally have been done at the BAC level.⁵⁵⁹

Whistleblowing

379. As a result of these serious concerns, Ms Stimpel approached her fellow treasury managers about speaking out about this but they were too afraid of losing their jobs. Ms Stimpel consulted her family about the risk to her job and decided to blow the whistle about the transaction.⁵⁶⁰ She drafted a whistleblowing letter and asked a member of the executive, Mr Joshua du Plessis, what route she should take. He advised her not to do anything internally because it would simply go to the Board and she would be immediately suspended. He also told her about a previous example, where Mr Bosc, the head of operations at the time, had reported certain irregularities in the Airbus deal through the normal internal whistleblowing process and was immediately suspended from SAA⁵⁶¹.

380. Ms Stimpel reported her whistleblowing to National Treasury and then to the Organisation Undoing Tax Abuse (OUTA). On 1 July 2016⁵⁶² she met with OUTA. They asked her whether she could retrieve some of the procurement documents around BNP Capital. On 4 July 2016 Ms Stimpel attempted to get the documents from Mr Silas Matsaudza who was in the procurement department. She could not find him after a number of attempts. She then went to his office. When she was there, she found the BNP documents on the floor. She took them and went to scan

⁵⁵⁹ Transcript 14 June 2019, p 23-24

⁵⁶⁰ Transcript 14 June 2019, p 26

⁵⁶¹ Transcript 14 June 2019, p 28

⁵⁶² Transcript 14 June 2019, p 34

them to herself. When she sought to return them to Mr Matsaudza's office, she found the office locked. The next day, 5 July 2016, she handed them back to him and explained that she had taken them the previous day. He was very angry and said he was going to report her to Ms Nhantsi and Mr Peter.⁵⁶³ His level of anger surprised Ms Stimpel. She told Mr Matsaudza that she had to meet with National Treasury but would return after the meeting to discuss the matter.

381. While on her way to the meeting, Ms Nhantsi called Ms Stimpel on the phone and told her not to attend the meeting as she had been told by Mr Matsaudza what had happened.⁵⁶⁴ Ms Nhantsi said that she did not want Ms Stimpel giving the documents to National Treasury. Ms Stimpel testified that it should not have been a problem to share this information with National Treasury as they were often included in the funding process since National Treasury was the provider of SAA's guarantee.⁵⁶⁵ Ms Stimpel testified that there was no legitimate reason to want to exclude National Treasury. Ms Nhantsi also told Ms Stimpel that, if this were to be leaked to the media, she would hold her responsible.⁵⁶⁶ Ms Stimpel did not proceed to go to the meeting with National Treasury because, as set out below, she was then suspended.

382. Ms Nhantsi testified that she denied that the reason why she instructed Ms Stimpel not to meet with National Treasury was that she did not want her to give National Treasury the BNP bid documents. She stated that the reason she wanted Ms Stimpel not to proceed to the meeting with National Treasury was that she wanted Ms Stimpel to come back and explain her conduct with the confidential documents.⁵⁶⁷

⁵⁶³ Transcript 14 June 2019, p 36-37

⁵⁶⁴ Transcript 14 June 2019, p 43

⁵⁶⁵ Transcript 14 June 2019, p 44

⁵⁶⁶ Transcript 14 June 2019, p 46

⁵⁶⁷ Transcript 19 June 2019, p 40

However, this explanation was inconsistent with Ms Stimpel's testimony that Ms Nhantsi had refused to let her tell her side of the story after the incident. When this was put to Ms Nhantsi, she did not deny it but simply said she could not remember saying that.⁵⁶⁸

383. Late in the afternoon on the same day , Ms Nhantsi called Ms Stimpel to her office and gave her a letter to the effect that she had been suspended for taking confidential tender documents without permission from the procurement section.⁵⁶⁹ After receiving her letter of suspension, Ms Stimpel received a call from a journalist at the Sunday Times about it, but she refused to comment.⁵⁷⁰

384. On 6 July 2016 Ms Stimpel met with OUTA's attorneys, Webber Wentzel and relayed the story. On 7 July 2016, Webber Wentzel sent a letter of demand to SAA to stop the BNP transaction.⁵⁷¹ SAA did not respond to the letter by the stipulated deadline. Ms Stimpel worked with Webber Wentzel to prepare an application for a court interdict.⁵⁷²

385. Unbeknown to Ms Stimpel, on 4 July 2016, Ms Nhantsi prepared a submission to the Board, which Mr Zwane approved as Acting Group CEO, recommending that a cancellation fee be approved for BNP in the event that SAA cancelled its mandate. By this stage, the cancellation fee had been reduced from 50% of the total fee, to

⁵⁶⁸ Transcript 19 June 2019, p 40-41

⁵⁶⁹ Transcript 14 June 2019, pp 49-50. The letter may be found at exhibit DD1, p 570

⁵⁷⁰ Transcript 14 June 2019, p 53

⁵⁷¹ Transcript 14 June 2019, p 54. The letter may be found in exhibit DD1, p 548

⁵⁷² Transcript 14 June 2019, p 55

just under R50million and was sought to be justified on the basis of the amount of work that BNP claimed it had already done to source funding.⁵⁷³

386. Ms Nhantsi's recommendation was supported by Ms Myeni only. On 7 July 2016, the Deputy Company Secretary, Madu Nyoni, wrote to the Board asking for a round robin approval of the cancellation fee.⁵⁷⁴ Ms Stimpel noted that it had become a habit of the Board to pass a number of important resolutions by round robin.⁵⁷⁵ Ms Myeni responded the same day saying, "Does this need Board approval? If so I approve it."⁵⁷⁶ There was no approval from the other Board members.

387. On 8 July 2016 Mr Mahlangu from BNP sent a letter to SAA regarding the licence that had been issued to BNP by the, then, Financial Services Board (*FSB*). The letter stated that BNP had received a letter from the FSB on 12 May 2016 indicating its intention to temporarily suspend BNP's licence for three months because, under section 10 of the Financial Advisory and Intermediary Services Act 37 of 2002, the "key individual" of the organisation had failed to complete the first level regulatory examinations.⁵⁷⁷ An FSB licence was part of the critical criteria for being appointed as a transaction advisor. Despite having been advised of this issue as early as May 2016, notably even before BNP was appointed to source funds, BNP had not disclosed this problem to SAA. Instead, it had waited until July to do so.⁵⁷⁸

⁵⁷³ Exhibit DD1, p 555-556

⁵⁷⁴ Exhibit DD1, p 559

⁵⁷⁵ Transcript 14 June 2019, p 41

⁵⁷⁶ Exhibit DD1, p 559

⁵⁷⁷ Exhibit DD1, p 573

⁵⁷⁸ Transcript 14 June 2019, p 57

388. The FSB (now the Financial Sector Conduct Authority (*FSCA*)) provided the Commission with an affidavit to the effect that the letter of 12 May 2016 was not a letter of an *intention* to suspend but was an actual suspension letter.⁵⁷⁹
389. On 21 July 2016 Webber Wentzel launched urgent interdict proceedings to stop the BNP transaction. SAA held a press conference and indicated that it had stopped the transaction and terminated the appointment of BNP.⁵⁸⁰ This was before the urgent application could be heard and the order granted.
390. On 27 July 2016 Ms Stimpel received a notification of disciplinary charges against her.⁵⁸¹ The charges included removing company documents; “insolence”; breaching contract of employment including confidentiality undertakings; and breaching SAA’s anonymous reporting policy.
391. Ms Stimpel testified that the tender documents were not confidential in the sense that she would not be authorised to see them. She was part of Treasury and responsible for sourcing funds – it was part of her main responsibility at SAA. As to the charge of “insolence”, this may have related to a whatsapp she sent a colleague stating “the Board continues with its unethical behaviour”. Ms Stimpel denied ever having breached her employment contract. The last charge was an accusation that she did not go through the SAA internal whistleblowing process. Ms Stimpel testified that she was never obliged to use that route. It was available *if* employees wanted to use it.⁵⁸²

⁵⁷⁹ Exhibit DD1, p 578

⁵⁸⁰ Transcript 14 June 2019, p 59. The press statement may be found in exhibit DD1, p 833

⁵⁸¹ Exhibit DD1, p 837

⁵⁸² Transcript 14 June 2019, pp 64-68