

Judicial Commission of Inquiry into State Capture Report: Part 2

Vol. 1: Transnet



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

Chairperson: Justice RMM Zondo

Acting Chief Justice of the Republic of South Africa



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



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Of
Inquiry into allegations
Of
State Capture, Corruption and Fraud in the
Public Sector Including Organs of State

Report: Part II
Vol.1: Transnet

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Acting Chief Justice of the Republic of South Africa

TRANSNET

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LIST OF KEY ABBREVIATIONS AND TERMS

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

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

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

CHAPTER 1 – STATE CAPTURE AT TRANSNET

The terms of reference and legal framework

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

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

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

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

3. TOR 7 provides that the Commission shall, where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of certain persons. The standard of proof in making findings therefore must be guided by the objects of the Commission. A commission of inquiry is investigative by nature and does not apply (and is not bound by) the ordinary rules of evidence. It may rely on hearsay evidence, representations, or submissions without sworn evidence. While the Commission may make determinations of certain facts on the probabilities, a referral to prosecution or further investigation may be made on the basis of a *prima facie* case with reasonable prospects of corroboration by other evidence sufficient to meet the requisite standard of proof. There must be an objective reasonable basis for believing that a crime or misconduct may have been committed.³
4. The TORs arise from, and are to be construed, in the light of the report of the Public Protector. The report followed her preliminary investigation into allegations of improper conduct by the President, other state functionaries and the Gupta enterprise in the removal and appointment of ministers and directors of SOEs and the possibly corrupt award of state contracts. The Public Protector specifically identified for further investigation various contracts awarded by Transnet to three financial services companies with links to the Gupta enterprise: McKinsey Ltd, Regiments Capital (Pty) Ltd and Trillian Capital (Pty) Ltd.

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

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

5. The conduct of the role players in the capture of Transnet must be evaluated in terms of the constitutional requirement of an accountable public sector⁴ and the legal framework established to deal with corruption, fraud, money laundering and racketeering. Section 217(1) of the Constitution requires that, when an organ of state contracts for goods or services, it must do so in accordance with a tendering system that is fair, equitable, transparent, competitive and cost-effective. The Public Finance Management Act⁵ ("PFMA") was enacted to give effect to these broad principles laid down in the Constitution.
6. Transnet is defined as a major public entity in Schedule 2 of the PFMA and is thus subject to its provisions. Section 51(1)(a)(iii) of the PFMA obliges the accounting authority (the board)⁶ of a public entity to ensure that the public entity concerned has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. In terms of section 50 and section 51 of the PFMA the board of Transnet is enjoined to exercise the duty of utmost care to ensure reasonable protection of the assets of the public entity⁷ and to act with fidelity, honesty, integrity and in Transnet's best interests in managing its financial affairs.⁸ It is a criminal offence for the board or its members, and officials of Transnet to whom powers have been delegated by the board,⁹ wilfully or in a grossly negligent way to fail to comply with the duties and

⁴ Section 195 of the Constitution

⁵ Act 1 of 1999

⁶ Section 49 of the PFMA

⁷ Section 50(1)(a) of the PFMA

⁸ Section 50(1)(b) of the PFMA

⁹ Section 57(d) of the PFMA.

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

7. The obligations of the board of Transnet in terms of section 51(1)(a)(iii) of the PFMA to ensure that Transnet has and maintains an appropriate procurement and provisioning system, and to act with fidelity, honesty, integrity and in the best interests of the public entity in managing its financial affairs, are reflected in its Procurement Procedures Manual ("PPM"). Paragraph 5.1.2 of the PPM requires all Transnet employees to: i) act with integrity and professionalism at all times; ii) be honest; iii) protect Transnet's assets; iv) refrain from using a position of authority and/or facilities provided by Transnet to further their own interests or that of friends and relatives; v) desist from allowing personal interests to influence business decisions; and vi) maintain an attitude of zero tolerance toward any form of bribery, corruption and inducements.
8. Many instances of wrongdoing in procurements at Transnet between 2011 and 2018 possibly amounted to planned offences as part of a pattern of racketeering activity conducted by a racketeering enterprise (comprising a group of individuals and companies associated in fact) aligned with the Gupta family and its associated companies. In terms of the Prevention of Organised Crime Act¹¹ ("POCA"), a pattern of racketeering activity comprises two planned, ongoing, continuous or repeated offences contemplated in Schedule 1 of POCA including: i) offences under the Prevention and Combatting of Corrupt Activities Act¹² ("PRECCA") – corruption; ii) the common law offences of extortion, theft, fraud, forgery and uttering; iii) offences related to exchange control; iv) money laundering as enacted

¹⁰ Section 86(2) of the PFMA.

¹¹ Act 121 of 1998.

¹² Act 12 of 2004.

- in POCA; and v) any offence the punishment wherefore may be imprisonment exceeding one year without the option of a fine.
9. Racketeering consists not necessarily in the commission of a specific act of dishonest, corrupt or fraudulent conduct by an individual. The focus is on the relationship between the accused, the enterprise and the pattern of racketeering activities. Section 2(1) of POCA provides two categories of racketeering offences: participation offences and offences associated with receiving and using property derived from racketeering activities. The recurring elements in all of the offences under section 2(1) are the pattern of racketeering activity and the enterprise. A racketeering activity is an event. The relationship of the events to one another, or of an event to the enterprise, or of an event to a common objective of the enterprise, establishes a pattern.¹³ The participation offences are the acquiring of any interest in or control of any enterprise, participation in the conduct of the enterprise's affairs and the management of the operation or activities of an enterprise, through a pattern of racketeering activity.¹⁴ The receipt and use of property (very broadly defined) derived from racketeering activity on behalf of an enterprise or for the enterprise are also offences.¹⁵
10. In addition to the common law offence of fraud, two statutory offences listed in Schedule 1 of POCA are of particular relevance to the analysis of the scheme of capture at Transnet: corruption and offences relating to the proceeds of unlawful activities, including money laundering. Corruption is a statutory offence in terms of PRECCA. Anybody who accepts any gratification from anybody else, or gives any gratification to anybody else, in order to influence the receiver to conduct himself in

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

¹⁴ Section 2(1)(d)-(f) of POCA.

¹⁵ Section 2(1)(a)-(c) of POCA.

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

11. Section 1 of the Financial Intelligence Centre Act¹⁶ ("FICA") defines money laundering as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds. POCA creates a number of specific money laundering offences. Section 4 of POCA outlaws the crime of money laundering. It prohibits any person from entering into any agreement, engaging in any arrangement or transaction,¹⁷ or performing any other act,¹⁸ with anyone, in connection with property that is or forms part of the proceeds of unlawful activities (being any property or any service, advantage, benefit or reward which was derived, received or retained in connection with or as a result of any unlawful activity). The offence is committed if that person knows or ought reasonably to have known that the property constitutes the proceeds of unlawful activities ("the requisite knowledge"). In addition, the agreement, arrangement or other act must have or be likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of or interests in relation to it.¹⁹
12. Money laundering thus usually involves an agreement or arrangement regarding the proceeds of unlawful activities aimed at hiding their nature, source, location, disposition or movement. The offence is also committed if the conduct has the

¹⁶ Act 38 of 2001.

¹⁷ Section 4(a) of POCA.

¹⁸ Section 4(b) of POCA.

¹⁹ Section 4(a)-(b)(i) of POCA.

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

13. Section 5 of POCA creates the offence of assisting another to benefit from the proceeds of unlawful activities. It prohibits firstly any person (with the requisite knowledge) from entering into any arrangement with another person facilitating the retention or the control of the proceeds of unlawful activities obtained by that person.²² Additionally, it prohibits arrangements whereby the proceeds of unlawful activities are used to: i) make funds available to the other person; ii) acquire property; or iii) benefit him in any other way.²³ Section 6 of POCA prohibits any person (with the requisite knowledge) from acquiring, using or possessing property that is or forms part of the proceeds of unlawful activities of another person.
14. Although contraventions of the PFMA will not be constitutive elements of the crime of racketeering, not being listed under Schedule 1 of POCA, they will constitute unlawful activity and any advantage, benefit etc. in connection with that activity will be considered as the proceeds of an unlawful activity an element of money laundering and the assistance offences.

An overview of state capture at Transnet

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

²⁰ Section 4(a)-(b)(ii) (aa) of POCA.

²¹ Section 4(a)-(b)(ii) (bb) of POCA.

²² Section 5(a) of POCA.

²³ Section 5(b) of POCA.

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

16. In 2011 Transnet embarked on the so-called Market Demand Strategy ("MDS"). Mr Anoj Singh, the GCFO, and Mr Brian Molefe, the GCEO, played important roles in the development of the MDS.²⁴ The MDS is a counter-cyclical investment strategy involving investment of R300 billion in TFR, TNPA, TPT, TPL and TE ahead of demand on the premise that demand would peak within three years. The biggest portion of the proposed investment spend was allocated to an accelerated procurement of locomotives to enhance locomotive operational efficiency to enable delivery against the MDS, the growth of volumes from 208 million tonnes to 350 million tonnes and create business opportunities for TE.
17. State capture at Transnet involved a systematic scheme of securing illicit and corrupt influence or control over the decision-making. Corrupt actors sought to gain control over staff appointments and governance bodies to influence large procurements and capital expenditure by changing procurement mechanisms (such as the use of confinements rather than open tenders), the altering of bid criteria to favour corrupt suppliers, and the payment of inflated costs and advance payments. Corrupt procurement practices were sustained by bringing approval authority for high-value tenders ("HVTs") under centralised control and the weakening of the internal controls designed to prevent corruption. Collusion between individuals inside and outside of Transnet, as part of a co-ordinated effort to access and re-direct funds and benefits in substantial procurements, resulted in the strategic positioning of particular individuals in positions of responsibility. A small group of senior executives and directors were strategically positioned to

²⁴ Transcript 22 April 2021, p 156.

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

18. The results of this process were that Transnet became the primary site of State Capture in financial terms. Mr Paul Holden, a director of Shadow World Investigations, who submitted a report to the Commission regarding the "Gupta Enterprise and the Capture of Transnet", testified that Transnet contracts to the value of approximately R41.204 billion were irregularly awarded for the benefit of entities linked to the Gupta family or Mr Essa. This amount represents 72.21% of the total State payments in respect of contracts tainted by State Capture.²⁶
19. Three persons were identified as the primary architects and implementers of state capture at Transnet: Mr Brian Molefe, Mr Anoj Singh and Mr Siyabonga Gama. Mr Molefe was appointed as the GCEO of Transnet in February 2011. He was seconded as acting CEO of Eskom in April 2015 and became CEO of Eskom in October 2015. Mr Singh was GCFO of Transnet from 2011 until he too was seconded to Eskom as CFO in July 2015. Mr Gama was dismissed as CEO of

²⁵ Transcript 7 May 2019, p 39-40.

²⁶ FOF-20-006, para 2.

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

20. The former Minister of Public Enterprises, Mr Malusi Gigaba, was involved in the appointment of Mr Molefe and Mr Singh as directors of Transnet, and in the reinstatement of Mr Gama as the CEO of TFR. They in turn gave free reign to Mr Iqbal Sharma who in 2012 became the Chair of the influential Board Acquisitions and Disposals Committee ("BADC") of the Transnet board. These appointments were followed by the award of significant contracts that benefitted the Gupta enterprise.
21. During the relevant period Transnet procured 1259 locomotives in three separate procurement exercises (the 95, 100 and 1064 locomotive contracts) with a total contract value of more than R60 billion. Evidence heard by the Commission revealed serious procurement irregularities in respect of each of these procurement transactions. The irregularities usually favoured bidders associated with the Gupta enterprise. Investigations revealed: i) improper engagements with the successful bidders; ii) irregular changes to the evaluation criteria benefiting the preferred bidder; iii) a failure to levy delay penalties;²⁷ iv) the improper use of the mechanism of confinement (a process that does not involve opening the tender to the market in cases justified by urgency, standardisation or highly specialised goods); v) the questionable escalation of acquisition costs; vi) the request for proposals ("RFPs") not complying with legal requirements; vii) improper deviations when evaluating technical compliance; viii) non-compliance with the local production and content threshold and the award of tenders to bidders that did not meet the threshold; ix)

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

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

22. The evidence establishes that Mr Essa (using two shell companies – Regiments Asia (Pty) Ltd and Tequesta (Pty) Ltd) concluded several so-called Business Development Services Agreements ("BDSAs").²⁹ These were essentially kickback agreements with various companies based in Hong Kong associated with two of the successful bidders in the locomotive procurements, China South Rail Corporation Ltd ("CSR") and China North Rail Corporation Ltd ("CNR") both Chinese companies. These two companies merged in 2015 to become CRRC Corporation Ltd.³⁰
23. The evidence discloses that various subsidiaries of and companies associated with CSR and CNR, incorporated in South Africa and abroad, played some part in the various procurements of locomotives at Transnet. Thus, in relation to the procurement and delivery of electric locomotives, bids were made and transactions concluded variously by CSR, CSR Zhuzhou Electric Loco Co Ltd, CSR E-Loco Supply (Pty) Ltd ("CSR-SA") and CRRC E-Loco Supply (Pty) Ltd ("CRRC-E-Loco"). CNR acted similarly in relation to the procurement of 232 diesel locomotives that formed part of the procurement of the 1064 locomotives. Its relevant South African subsidiary was CNR Rolling Stock South Africa (Pty) Ltd ("CNRRSSA"), which later became CRRC SA Rolling Stock (Pty) Ltd ("CRRC-SA"). Other associated companies that were parties to the kickback agreements included: CNR (Hong Kong) Co Ltd, CSR (Hong Kong) Co Ltd, CRRC (Hong Kong) Ltd and CNR Dalian Locomotive and Rolling Stock Co Ltd. Unfortunately, in many instances the

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

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

³⁰ SEQ 12/2020 para 7

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

24. In terms of the BDSA or kickback agreements, Mr Essa secured commissions of 21% paid to the shell companies. Mr Essa's companies were to receive at least R7.342 billion from CSR and CNR for the provision of advisory services for Transnet's locomotive procurement when, as discussed later in this report, there is no evidence of any true valuable consideration in the form of services for these fees. Mr Essa's companies retained 15% of the payments with a significant portion of the remaining 85% being paid to the Gupta racketeering enterprise.³¹ During that time, Mr Sharma, the chairperson of the BADC of Transnet, had a matrix of business relationships with Mr Essa.
25. During July 2015 Transnet approved the relocation costs of two of the original equipment manufacturers ("OEMs"), Bombardier Transportation South Africa (Pty) Ltd ("BT" or "Bombardier") and CNR, amounting to R618.4 million and R647.2 million, respectively, for conducting their operations in Durban and not in Gauteng as originally envisaged in the RFPs. The variation orders to the locomotive supply agreements ("LSAs") were inflated and inadequately evaluated by Transnet and a fee of R67 million was paid in terms of a dubious BDSA between CNR and a

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

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

26. The appointment of financial advisors in relation to the 1064 locomotive procurement was a significant part of the racketeering at Transnet between 2011 and 2016. This involved the siphoning of funds from Transnet through the use of contracts for advisory services which sometimes provided little or no value for hugely inflated fee payments. The evidence of Mr Ian Sinton, the former General Counsel of Standard Bank,³² establishes that in October 2012 McKinsey agreed to appoint Regiments as its supplier development partner ("SDP") subject to Regiments agreeing to share with Mr Essa 30% (later increased to 50%) and Mr Kuben Moodley 5% of all income received from Transnet. Neither Mr Essa nor Mr Moodley rendered any service beyond introducing Regiments to McKinsey and Transnet. This was affordable because the consultancy rates that McKinsey agreed with Transnet were substantially more than Regiments would have accepted directly from Transnet.
27. More than R1 billion was laundered through various shell companies nominated by Mr Essa and Mr Moodley out of fees paid by Transnet to Regiments in accordance with this arrangement.³³ All of these shell companies operated as out and out money laundering vehicles without any legitimate business activities. Revenue received from Regiments by these shell companies was within days, laundered to lower level money laundering entities. None of the shell companies paid PAYE (employees' tax) to SARS.

³² Exh U10, IHSS-012 *et seq*

³³ Mr Holden calculates the total amount of State Capture related Transnet payments to Regiments at R1 023 161 529.89. This figure excludes an additional R248 729 210.00 in additional State Capture related payments to Regiments by the Transnet Second Defined Benefit Fund. See FOF-20-012, para 5

28. The laundering arrangements with Mr Essa and Mr Moodley on joint McKinsey/Regiments' contracts with Transnet were fraudulently presented by Regiments in joint McKinsey/Regiments bid submissions as Regiments' supply development arrangements. In 2021, as a result of an initiative of the Commission to confront McKinsey with certain evidence, McKinsey agreed to repay R650 million to Transnet.³⁴
29. Corruption also attended the hedging and risk mitigation of the funding arrangements for the locomotive procurement. In relation to a loan of USD1.5 billion advanced by the China Development Bank ("CDB"), Regiments was paid a success fee of R189 million of which R147 million was paid to Albatime, a company controlled by Mr Moodley. R122 million was then laundered to Sahara Computers (Pty) Ltd, a Gupta company. In relation to another funding arrangement, "the ZAR Club loan" for R12 billion, Trillian Capital Partners (Pty) Ltd (in which Mr Essa had an indirect 60% controlling interest, through Trillian Holdings (Pty) Ltd) was paid R93 million for arranging the loan, when no services had in fact been rendered. Four days later, R74 million of that amount was paid to Mr Moodley's company, Albatime. This amount would ultimately be laundered on to secure a R104.5 million loan from the Bank of Baroda that was used by Tegeta Exploration and Resources to pay part of the purchase price for the Optimum Coal Mine.³⁵
30. Most of the corruption and money laundering associated with the locomotive procurements and their financing happened while Mr Singh was the GCFO, Mr Molefe and Mr Gama served as the GCEO (at different times), and Mr Sharma was the chairperson of the BADC.

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

³⁵ Transcript 25 June 2021, p 38-39

31. There was also corruption in relation to key contracts for IT network and data services outsourced by Transnet. During 2013 Transnet issued a substantial tender for network services. After Neotel (Pty) Ltd had been identified as the preferred bidder, Mr Molefe reversed the award and awarded it to T-Systems (a company with Gupta links), the bidder that was ranked third in the scoring. Mr Molefe later revoked his decision and the tender was awarded finally to Neotel. Various irregularities attended the award of this tender - most significantly, substantial improper payments were made by Neotel to Homix (Pty) Ltd, a company linked to the Gupta enterprise.³⁶ In February 2017 there was a further attempt to favour T-Systems. Transnet awarded an IT data services tender to T-Systems as the second highest scoring bidder, rather than to the highest scoring bidder Gijima on the spurious basis that there were objective criteria justifying such an award. The matter was litigated and the decision was ultimately reversed and the award made to Gijima.³⁷ By the time that T-Systems was finally removed from its appointment, it had paid over R3 million to Zestilor, a company nominally owned by Ms Zeenat Osmany, the wife of Mr Essa, and R323 413 332.51 to Sechaba Computer Systems, a subsidiary of Zestilor.³⁸
32. There was also evidence of corruption in relation to Transnet's Manganese Expansion Project ("MEP"). Unqualified persons associated with the Gupta enterprise sought improperly to benefit from the project by seeking appointment as SDPs and inflation of the contract price to accommodate payments for services that added no value.

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

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

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

33. Two other transactions in relation to the procurement of cranes for Transnet are of interest. The contracts were concluded in the period 2011-2014 between Transnet and two companies, ZPMC and Liebherr. The conclusion and execution of these contracts was not subject to full investigation by the Commission. However, the Holden Money Flow Reports, analysed fully in a separate report of the Commission, indicates that these transactions were tainted by corruption and contributed to the illegal flow of funds to the Gupta enterprise.
34. ZPMC was awarded the Transnet cranes contract (designated iCLM HQ 0762 by Transnet) and received an aggregate amount of R877.81 million in payments from Transnet in connection with the contract.³⁹ Evidence shows that the contract was probably procured by corrupt payments to the Gupta family via JJ Trading FZE, an entity controlled by individuals from the Worlds Window Network, a major money laundering operation. JJ Trading acted as a conduit through which moneys were paid to the Gupta enterprise by ZPMC and CSR in relation to Transnet contracts.⁴⁰
35. ZPMC and JJ Trading FZE concluded an agreement dated 13 June 2011 in relation to the cranes contract which had recently been advertised through tender by Transnet, and for which ZPMC intended to submit a bid.⁴¹ JJ Trading's obligations under the contract included: i) the provision of information about the project to ZPMC; ii) the acquisition of the tender documents; iii) the provision of copies of the local laws and safety codes related to the project and information pertaining to local customs; iv) assistance to the personnel of ZPMC for the duration of the contract, including issuing invitation letters, communications with Transnet, hotel reservations, airport pick up and send-off; and v) the protection of

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

⁴⁰ FOF-06-220 to FOF-06-260

⁴¹ FOF-06-298, Annexure A

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

36. The second cranes contract was between Liebherr and Transnet. On 17 February 2014, Liebherr announced that it had received the contract to supply 22 cranes to TPT.⁴³ Transnet ultimately paid Liebherr an aggregate amount of R841.1 million in connection with this contract.⁴⁴
37. Liebherr made at least eight payments aggregating to USD3,232,430.88 to the Gupta enterprise company, Accurate Investments (based in Dubai), between 22 July 2013 and 26 May 2014.⁴⁵ These payments were then laundered further to various other companies in the Gupta enterprise. Liebherr has not provided any details of the services that Accurate Investments allegedly provided as "sales agent" to it in relation to the cranes contract.⁴⁶ The Gupta-leaks and the Dubai ledgers in particular show that Accurate Investments was beneficially owned and controlled by the Gupta enterprise,⁴⁷ and its function was to act primarily as a vehicle through which kickbacks could be laundered.

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

⁴³ FOF-06-203, fn 3

⁴⁴ FOF-09-151, Table 71

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

⁴⁶ FOF-06-1099, Annexure W

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

38. A review of the Dubai ledgers shows that in 2013-2014, the only incoming funds into Accurate Investments that were not sourced from other Gupta family companies were funds paid by Liebherr⁴⁸ and an unknown entity called VK Trading Hong Kong.⁴⁹ Accurate Investments incurred no notable expenses relating to rental or salaries at any time during the period in which it was receiving payments from Liebherr.⁵⁰ It is difficult to conceive of any legitimate payments that could have been made by Liebherr to a "sales agent" in respect of a cranes contract that ought to have been awarded by a fair, competitive and transparent process in accordance with the requirements of section 217 of the Constitution. If there was any legitimate reason for these payments to Accurate Investments as a "sales agent", Liebherr could have been expected to place evidence before the Commission but it declined to do so.

The restructuring of governance and the weakening of institutional controls

39. The capturing of Transnet involved the restructuring of governance and weakening of internal controls. In particular, the centralisation of approval authority at the level of the board and senior management in the hands of a few executives had the effect of shielding procurement processes from the scrutiny of a wider group of Transnet officials who could have detected and reported irregularities.
40. A rule of practice existed that key procurement documents, such as RFPs, confinements, condonations and variations to contracts had to be reviewed by Group Governance⁵¹ at Transnet to assess compliance with the regulatory

⁴⁸ FOF-06-218, para 131

⁴⁹ FOF-06-218, para 131

⁵⁰ FOF-05-113 to 117, Annexure A

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

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

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

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

⁵² Exh BB2.1(a), PSV-0005, para 16.2

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

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

⁵⁵ Exh BB2.1(a), PSV-0010, para 25

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

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

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

⁵⁷ Transcript 9 May 2019, p 73

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

44. Evaluation of tenders at Transnet normally followed the classic two phase methodology of the public sector. The bid evaluation process (steps 5-7 of the nine step cycle) commences with a preliminary stage 1 in which bids are assessed for administrative and substantive responsiveness. Bids are regarded as administratively responsive if all mandatory documents are received. Bids are regarded as substantively responsive if all pre-qualification criteria are met (e.g. technical or B-BBEE criteria). In designated sectors⁵⁹ bids that meet the test for responsiveness (both administrative and substantive) progress to the threshold stage in stage 1 for determination of whether the bid meets the threshold for local production and content ("LC"). The second threshold in stage 1 involves the award of a combination of points for supplier development ("SD") and the B-BBEE score card.⁶⁰ A bidder will need to meet a percentage (threshold) based on a combination of SD and B-BBEE before qualifying for assessment on functionality or quality - the technical requirements of the tender. The functionality stage involves a process of scoring bids against various functionality criteria, such as technical compliance,

⁵⁸ Transcript 9 May 2019, p 71 *et seq*; and see diagram at Annexure PV 2, Exh BB 2.1(a), PSV-0111

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

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

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

45. In stage 2 bids are assessed for price and preference. The elements of price and preference are used to compare bidders against each other. SD and B-BBEE are scored again in stage 2. In stage 1 SD and B-BBEE are disqualifiers, meaning that the bidder needed to meet a minimum threshold. In stage 2, the idea is to differentiate between bidders who give a superior SD offering and those who just meet the basics. Bidders are allocated points out of 100 for price and preference and the bid must be awarded to the bidder who scores the highest points overall. Where the value of the tender is expected to be between R30 000 and R50 million, 80 points are allocated to price and 20 to B-BBEE (preference). For tenders above R50 million, 90 points are allocated to price and 10 for preference. The points for price are determined by using a pre-determined formula, in which the lowest priced bid scores the maximum number of points (80 or 90 points as the case may be). The points for preference are allocated based on the bidders' B-BBEE scorecard. Bidders with B-BBEE recognition level 1 are allocated the maximum number of points (20 or 10 as the case might be) with fewer points allocated to bidders with lower B-BBEE levels, based on a pre-determined scale. In addition to the B-BBEE scorecard, points are awarded for Further Recognition Criteria ("FRC") to mitigate the fact that the scorecard might not be current. The points for price are then added to the points for preference to determine the bidder with the highest number of points. In terms of section 2(1)(f) of the Preferential Procurement Policy Framework Act⁶¹ ("PPPFA"), the tender must be awarded to the bidder with the highest number of points, unless "objective criteria" justify the award of the tender to a bidder other than the highest-scoring bidder.

⁶¹ Act 5 of 2000

46. There were several problems in procurement practice at Transnet during the period investigated by this Commission.⁶² In general these included: i) inadequate needs assessment; ii) poor or biased development and drafting of specifications; iii) under budgeting; iv) inappropriate deviations from the open bidding processes; v) short time for bidders to respond to tenders possibly intended to favour preferred bidders; vi) changing evaluation criteria during bid evaluation and adjudication; vii) inconsistent application of disqualification criteria; viii) improper overruling of the evaluation team; ix) manipulation of scores; x) the opportunistic use of risk factors as a reason to disqualify top-ranked bidders; xi) multiple repetitive awards to the same supplier; xii) awards not made by the official with the delegated authority; xiii) poor contract management; xiv) abuse of variation procedures; xv) failure to pursue contractual remedies for delay and breach; and xvi) inadequate validation of services rendered prior to payment.⁶³
47. Group Governance at Transnet was concerned about the changed delegation of authority framework, as it effectively granted authority to individuals to act as an acquisition council despite the complexity of the adjudication requiring a multi-disciplinary approach taking account of finance, legal, governance, compliance, tax and business etc. It is virtually impossible for any single person to possess all this expertise. The restructuring was accompanied by informal, but significant, shifts in governance culture and procurement practices that added to the centralisation of power in a small group of top executives and board members. Recommendations were routinely presented directly to the board for approval, rather than benefitting from internal review and scrutiny. The result was that high-value procurement decisions by the board were often uninformed or made on the basis of advice received from external advisors and consultants. The concentration of power in a

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

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

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

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

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

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

⁶⁵ Transcript 9 May 2019, p 119-127; and Exh BB2.1(a), PSV-0017, para 45.4

⁶⁶ Transcript 9 May 2019, p 82-83

⁶⁷ Para 15.1.1 of the PPM

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

50. The extent of permissible contract variation was also an issue. At Transnet a rule was introduced that allowed an acquisition council to approve a variation of up to 40% of the original contract value and variations above 40% to be approved by a higher level authority. This has been changed. Contract variations are now governed by National Treasury Instruction 3 of 2016/17 in terms of which Transnet can only approve a contract variation of 20% or R20 million for construction-related works or services and 15% or R15 million for non-construction works or services.
51. There were also instances where amendments were made to evaluation criteria subsequent to the receipt of bids. Paragraph 13 of the PPM provides that evaluation criteria must be unambiguous, rational and justifiable, quantifiable, predetermined and objective. The requirement that evaluation criteria are to be determined means that the evaluation criteria must be stated upfront in the RFP document and no evaluation criteria should be used in the evaluation process that were not stipulated in the RFP document.
52. Finally, the effectiveness of internal controls was also undermined by limiting access to information that would expose corruption. The upward flow of information was deliberately filtered so that limited information reached the board. The internal audit unit, which should ideally report directly to the audit committee of the board, had to "dilute" and "be selective" about what report reached the board and the audit committee. This practice of withholding the disclosure of audit information appears

⁶⁸ Transcript 9 May 2019, p 65-69

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

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

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

⁶⁹ Transcript 7 May 2019, p 34-35

⁷⁰ Exh BB10(a), MEM-001 *et seq*

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

⁷² Exh BB10(a), MEM-004, para 7

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

President Zuma's refusal to appoint a GCEO

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

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

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

⁷⁴ Transcript 7 May 2019, p 15 and p 41

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

57. State capture at Transnet began with the resignation of Ms Maria Ramos as GCEO of Transnet in 2009 and the election of Mr Jacob Zuma as President of the Republic. In May 2009, following the national elections, President Zuma appointed Ms Barbara Hogan as Minister of Public Enterprises. From Ms Hogan's earliest days in office President Zuma interfered and sought to thwart her appointment of a new GCEO of Transnet.⁷⁷
58. Ms Hogan submitted a statement to the Commission which she stated was intended "to illustrate from my personal experience as Minister of Public Enterprises (from 11 May 2009 to October 2010) the extent to which the former President of South Africa, President Zuma improperly and recklessly interfered in matters relating to the appointment of Board of Directors and Chief Executive Officers (CEOs) of State Owned Enterprises (SOEs)". She added that the actions

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

⁷⁶ Transcript 7 May 2019, p 50

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

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

59. After the resignation of Ms Ramos, Mr Chris Wells was appointed the acting GCEO. In early 2009, the Transnet board, following a selection process, recommended Mr Pravin Gordhan as its only candidate for the GCEO position. A week later, Mr Gordhan withdrew his candidature and ultimately was appointed the Minister of Finance after the General Elections of May 2009.
60. Mr Gama was a candidate for the position at the same time. Mr Gama had served as the CEO of TFR since 2005. In early 2008 there was an investigation into Mr Gama's conduct following allegations of corruption in relation inter alia to the procurement of security services from General Nyanda Security Advisory Services (Pty) Ltd ("GNS"), a company controlled by General Siphiwe Nyanda, then a Minister and member of President Zuma's Cabinet. An investigation established that there was a prima facie case of misconduct against Mr Gama. Ms Hogan accordingly formed the opinion that the serious nature of the allegations against Mr Gama precluded him from appointment as GCEO. The board also considered Mr Gama unsuitable for appointment as GCEO as, in addition to the allegations of corruption, an assessment revealed worrying concerns about his judgement and "important gaps, relative to the requirements for this position" and that Mr Gama required "greater cognitive development to handle the complexity of the position".
61. After a second process, the board recommended the appointment of Mr Sipho Maseko who was a highly capable and experienced black candidate with the requisite experience and admirable managerial capabilities. Mr Maseko set out his qualifications, skills and experience at the time he was interviewed for the position in an affidavit filed with the Commission. He holds the degrees of BA, LLB and has

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

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

62. Mr Gama was a candidate for the position during this process as well but was again found not to be suitable. False reports then appeared in the media that Mr Gama was being victimized by an anti-transformation white cabal that had instituted an inquiry (and later disciplinary proceedings) to prevent him from being appointed as the GCEO.⁷⁸
63. According to Ms Hogan, at a meeting in June 2009, President Zuma indicated that he was not prepared to accept the appointment of the board's candidate, Mr Maseko, and insisted that Mr Gama be appointed. When Ms Hogan resisted this on the basis that he was not the board's preferred candidate and was facing

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

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

64. On 28 July 2009, Ms Hogan sent President Zuma a decision memorandum detailing the selection process, the strong motivation for the appointment of Mr Maseko, the investigation into Mr Gama, and the corporate governance aspects of GCEO appointments. The report recommended the approval of the submission of a Cabinet memorandum recommending the appointment of Mr Maseko as Transnet's GCEO without delay.⁸⁰
65. The decision memorandum extensively set out the allegations which were being investigated against Mr Gama as well as what had been done or was being done to investigate the allegations. A reading of that memorandum leaves little doubt that the allegations against Mr Gama were of a very serious nature. Ms Hogan effectively told President Zuma in the memorandum that the charges against Mr Gama were not 'trumped up' or trivial but potentially significant and the board would be failing in its fiduciary duty if it did not complete the investigation in accordance with due process. She also pointed out that the board was confident that the substance and method of the recruitment and selection process were kept discrete from the investigations. Ms Hogan also told President Zuma that the board had not at any stage shortlisted Mr Gama as the second in-line preferred candidate to Mr Gordhan and that the board embarked on an extended search after the withdrawal of Mr Gordhan as it was not confident that the other candidates available, including Mr Gama, were suitable for the position.

⁷⁹ Exh L 1, p 10, para 34

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

66. Paragraph 2.4 of the memorandum indicates that the memorandum was prepared after certain questions and concerns had been raised. That is because in that paragraph Ms Hogan said to President Zuma that due to the delay in the appointment of the GCEO and media speculation, it had become critical for the shareholder to resolve the appointment of the CEO and to re-establish leadership stability at Transnet. The memorandum, she said, "serves to address questions and concerns raised with a view to agreement on the way forward in appointing a CEO for Transnet as soon as possible."
67. In the context of Ms Hogan's evidence about her discussion with President Zuma earlier in June 2009, the questions and concerns referred to in this excerpt had to be questions and concerns that were raised in the earlier or previous discussion between Ms Hogan and President Zuma.
68. In that memorandum all the candidates who were considered during the first recruitment process that produced Mr Gordhan as the board's recommended candidate were disclosed. They included Mr Gama who was an internal candidate. With regard to the candidates other than the candidate that the board recommended at that stage, namely, Mr Gordhan, the memorandum said:

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

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

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

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

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

71. The question that arises from this excerpt is: why would Ms Hogan say this if President Zuma had not said to her that he wanted Mr Gama appointed as GCEO of Transnet?
72. President Zuma denied Ms Hogan's version that his position was that his only choice for the position of GCEO of Transnet was Mr Gama and that, insofar as Mr Gama was still the subject of investigations and could be subjected to disciplinary process, there would be no appointment of the GCEO of Transnet until those processes had been completed. He said that his approach was to go along with the recommendation of the board and to see to it that processes had been followed.

73. Mr Zuma's version must be rejected as a complete fabrication. If he had no objection to appointing Mr Maseko who was recommended by both the board and his own Minister of Public Enterprises, why then was Mr Maseko not appointed? On Ms Hogan's version, the reason why Mr Maseko was not appointed is that Mr Zuma would not allow the matter to be taken to Cabinet because he said that his only choice was Mr Gama. Mr Zuma fled the Commission before he could be asked to explain this. Therefore, on his version there is no explanation for why Mr Maseko was not appointed.
74. In the last paragraph of the decision memorandum before her recommendation of the appointment of Mr Maseko, Ms Hogan stated:
- "In the event that Cabinet does not approve the appointment of any of the preferred candidates recommended by the Board, consideration should be given to commencing a new process of recruitment and selection conducted by the shareholder in order to immunize the process from any further controversy. However, in the interest of the company, this is not a preferred route to follow."
75. Mr Zuma acknowledged that he received the decision memorandum. Ms Hogan testified that she did not receive any response from President Zuma to her decision memorandum. So, again, if President Zuma's version that he had no objection to the appointment of Mr Maseko as GCEO is true, why did he not allow Ms Hogan to submit to Cabinet her Cabinet Memorandum recommending that Mr Maseko be appointed? Ms Hogan has an answer for this question too. It was because President Zuma was opposed to the appointment of Mr Maseko because he wanted Mr Gama for that position. On Mr Zuma's version, there is no explanation.
76. When President Zuma did not respond to this report and recommendation, Ms Hogan sent President Zuma an urgent letter on 25 August 2009 requesting

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

77. Ms Hogan testified that President Zuma in response to her letter gave her instructions to withdraw the memorandum and requested her to provide him with the names of three potential chairpersons for Transnet.⁸¹ She was told that the Cabinet Secretariat was instructed by President Zuma to withdraw the memorandum.⁸²
78. President Zuma's refusal to appoint Mr Maseko as GCEO of Transnet and his insistence on appointing Mr Gama to that position – even as Mr Gama was facing investigations into allegations of serious acts of misconduct – including allegations of misconduct relating to tenders - reflects the first steps taken by President Zuma towards the capture of Transnet by the Guptas with President Zuma's assistance.

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

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

79. It would seem that from around the end of August 2009 to the end of June 2010 when Mr Gama was dismissed, Ms Hogan did not take any further steps towards the appointment of the GCEO of Transnet. Her version is that that was because President Zuma had told her that the filling of that position would have to wait for the outcome of Mr Gama's disciplinary process.
80. The preference for Mr Gama received support from two Cabinet ministers, Mr Jeff Radebe, and General Nyanda (who was the owner of the company implicated in the procurement irregularities that led ultimately to Mr Gama's dismissal), the ANC Secretary-General, Mr Gwede Mantashe and certain factions within the ANC. Mr Mantashe testified that he supported Mr Gama because it was appropriate to promote "black excellence" and Mr Gama had demonstrated his abilities during his career at Transnet. He preferred Mr Gama above the white candidate favoured by the board and was concerned about racism. He also held to the fiction that the board had initially favoured Mr Gama as second in line when it recommended the appointment of Mr Gordhan, when it had in fact not made such a decision and twice had considered Mr Gama to be unsuitable. Mr Mantashe's account is accordingly implausible and inconsistent with the facts. Mr Gama never competed against a white candidate. Mr Wells had put in an application for the position but withdrew it after a few days of making it. The only candidates preferred by the board with whom Mr Gama competed were Mr Gordhan and Mr Maseko. Mr Mantashe during his testimony to the Commission claimed not to know that, which is not credible given his obvious contemporaneous interest and his role in deployments by the governing party.⁸³

⁸³ Transcript 14 April 2021, p 198-211

81. Immediately before, and in the days following his suspension, Minister Radebe, Minister Nyanda, the ANC, the South African Communist Party, the South African Transport Workers Union ("SATAWU") and the ANC Youth League (under Mr Julius Malema at the time) all issued strong and harsh statements in support of Mr Gama, accusing Transnet of persecuting him. Mr Randall Howard, the General Secretary of SATAWU, and senior figure in COSATU, was a vocal supporter of Mr Gama.⁸⁴
82. In their evidence before the Commission both President Zuma and Ms Hogan confirmed that the deployment committee of the governing party, the ANC, identifies appropriate candidates for appointment as CEOs of State Owned Enterprises ("SOEs").⁸⁵ It is therefore reasonable to infer from the public support shown for Mr Gama by key members of the ANC that he also enjoyed the support of the deployment committee and this led ultimately to his appointment as GCEO in 2016.
83. Ms Hogan considered the support given to Mr Gama to have been part of "concerted attempts" to improperly influence the appointment process of the Transnet GCEO and a material breach of corporate governance.⁸⁶
84. When President Zuma gave evidence on 17 July 2019, he objected to the manner in which he was being questioned in relation to the report of 28 July 2009 put before him by Ms Hogan regarding Mr Gama. After a discussion in chambers, the proceedings were adjourned and President Zuma did not testify again before the Commission. The upshot of this is that while President Zuma did testify in relation to this issue he did not fully address the allegations by Ms Hogan that he was party

⁸⁴ Exh L 1, p 12, para 45

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

⁸⁶ Exh L 1, p 10, para 35

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

85. In relation to Mr Gama's candidacy, President Zuma said that following a process of discussion within Cabinet, there was a view that "this man [Mr Gama] we know him, he has been working here, he is capable, and then at the end I think there was kind of a stronger view that now let us take the decision that we should take him."⁸⁷
86. Regarding the recommendation of Mr Maseko, President Zuma claimed to remember the name, but not the background and details.⁸⁸ He admitted that Ms Hogan had briefed him in June 2009 about the need for Transnet to appoint a GCEO and new chairperson of the board, the board's choice of Mr Maseko and the investigation into the misconduct of Mr Gama.⁸⁹ He, however, denied that he told Ms Hogan that Mr Gama was his only choice for GCEO because this would have constituted a deviation from the proper process (the decision had to be taken collectively by Cabinet). He did not recall if he was told that it would be "messy" to appoint Mr Gama considering the charges he was facing and denied he said that no appointments whatsoever were to be made at Transnet until Mr Gama's disciplinary process was over.⁹⁰
87. President Zuma could neither admit nor deny that there was widespread vocal support for Mr Gama to be appointed as the next GCEO of Transnet. He maintained that from his perspective he had no preference for Mr Gama and was willing to abide the outcome of the final decision.⁹¹ He recalled that there were

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

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

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

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

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

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

88. President Zuma admitted that he had received and read the comprehensive report (dated 28 July 2009) sent to him by Ms Hogan.⁹⁵ He did not take issue with the report, which, *inter alia*, stressed the urgent need for the appointment of a GCEO.⁹⁶ He was not able to remember whether he responded to Ms Hogan or the recommendation in the report.⁹⁷ The process was that unless he raised an important issue with a Minister, a Cabinet memorandum would be placed before Cabinet for discussion.⁹⁸ It was the Cabinet Secretariat's responsibility to ensure that the memorandum went to Cabinet.⁹⁹
89. Having denied that he insisted that Mr Gama be appointed and delayed the appointment of a GCEO, President Zuma intimated that he had no difficulty with the memorandum proposing the appointment of Mr Maseko being placed before Cabinet. Because he walked out of the Commission and refused to return, President Zuma did not directly answer the allegation that after receiving Ms Hogan's letter of 25 August 2009 he instructed her to withdraw the matter of Mr Maseko's appointment from the Cabinet agenda.

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

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

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

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

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

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

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

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

90. The evidence of President Zuma that he did not insist at his meeting with Ms Hogan in June 2009 that Mr Gama be appointed and that he did not seek to prevent the appointment of Mr Maseko, stands to be rejected. President Zuma's position was "Mr Gama or nothing". Despite having received Ms Hogan's report on or about 28 July 2009 and acknowledging the urgent need for the appointment of a GCEO, he allowed the position to go unfilled for almost two years until his removal of Ms Hogan as Minister with effect from 1 November 2010.
91. The failure of President Zuma to respond to the contemporaneous correspondence, the practices of the ANC deployment committee, the vocal public support for Mr Gama by senior members of the ANC, the attacks on the members of the board, the fact that President Zuma allowed the position of GCEO to go unfilled for a period of 15 months and the subsequent removal of Ms Hogan as Minister of Public Enterprises on 31 October 2010, all support Ms Hogan's version that President Zuma insisted on the appointment of Mr Gama.
92. Hence, President Zuma's version is improbable as most evident from the fact that Mr Maseko was not appointed despite the desires and best efforts of the board and Ms Hogan. There is no other plausible explanation for the non-appointment of Mr Maseko. The evidence of President Zuma that he did not insist on Mr Gama and did not seek to prevent the appointment of Mr Maseko accordingly stands to be rejected as untruthful and false.

The dismissal of Mr Gama

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

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

94. Disciplinary proceedings were instituted against Mr Gama on three charges in late August 2009¹⁰¹ and he was suspended on full pay from 1 September 2009.¹⁰² On 10 September 2009, Mr Gama brought an urgent application in the High Court challenging the legality of his suspension and the decision to institute disciplinary proceedings against him.¹⁰³ Amongst Mr Gama's grounds for urgency was that Cabinet was about to consider the appointment of a new GCEO of Transnet and that the disciplinary action was timed to prejudice his prospects of filling the vacancy, for which he considered himself the front runner.¹⁰⁴ On 7 October 2009, the High Court dismissed Mr Gama's application with costs in favour of Transnet, Mr Wells (the acting GCEO), the Group Executive: Human Resources, Mr Pradeep Maharaj (who were represented by Bowman Gilfillan), and eight Transnet directors who opposed the application (who were represented by Eversheds).¹⁰⁵

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

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

¹⁰¹ Transnet-02-155, paras 83-84

¹⁰² Transnet-02-157, para 96

¹⁰³ Transnet-03-069, para 29

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

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

¹⁰⁶ Transnet-03-074, para 51

96. The first charge was that Mr Gama authorised the irregular conclusion of a contract by confinement (after cancelling an open bid process) for the provision of security services (at an ultimate cost of more than R95 million) by GNS (the company owned by General Nyanda, later a member of President Zuma's cabinet) in excess of his delegated authority (R10 million).¹⁰⁷ The chairperson found Mr Gama guilty on this charge in that he negligently authorised the conclusion of the contract and signed it without reading it and negligently failed to take appropriate steps to investigate the irregularities associated with the halting of an open tender process.
97. The second charge against Mr Gama concerned his failure to properly execute a contractual condition imposed by the board in a contract with Electro Motive Division ("EMD") for the provision of 50 "like new" refurbished locomotives requiring the reservation of all the local work on engineering, assembly and maintenance for Transnet Engineering ("TE"). The chairperson found that Mr Gama was negligent in failing to secure a contractual term which provided for TE to perform all the local work.¹⁰⁸ Mr Gama admitted that he failed to read the contract or to acquaint himself with its content and implications in order to ensure compliance with the board resolution.
98. The third charge upheld by the chairperson was that during the investigation into his conduct and in the various proceedings, Mr Gama had made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified, unreasonable, calculated to cause harm and had led to an irretrievable breakdown in the trust relationship between Mr Gama as the CEO of TFR and Transnet.

¹⁰⁷ Transnet-03-243

¹⁰⁸ Transnet-03-404, para 330

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

100. On 28 June 2010, the chairperson of the inquiry recommended Mr Gama's dismissal.¹¹⁰ He did so on the basis that the appropriate sanction in respect of each of the charges viewed in isolation was dismissal, and that viewed cumulatively, dismissal was surely appropriate. Mr Gama was dismissed on 29 June 2010.¹¹¹

The role of Mr Gigaba as Minister of Public Enterprises

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

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

¹¹⁰ Transnet-03-442-478

¹¹¹ Transnet-03-094, para 5(b)

¹¹² Exh L 1, p 14, paras 52-56

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

102. The following day, 1 November 2010, President Zuma appointed Mr Gigaba as Minister of Public Enterprises. Mr Gigaba remained the Minister of Public Enterprises until 25 May 2014, which period spanned the procurement and acquisition of the 100 and 1064 locomotives.
103. Mr Gigaba had a close relationship with the Gupta family (as did President Zuma and members of his family) which commenced in the early 2000s when he was the president of the ANC youth league. In affidavits filed with the Commission and in response to questions from the Fundudzi investigation, Mr Gigaba initially sought to downplay the relationship, but his testimony reveals that he had extensive, recurring contact with the Gupta family over a number of years.¹¹⁵
104. When asked in a written interrogatory sent to him by the Fundudzi investigation on 18 March 2019 if he had "any" relationship with the Guptas, and if so to describe its nature, Mr Gigaba answered "no".¹¹⁶ During his testimony to the Commission, he implausibly sought to explain away the falsehood on the basis that the question was ambiguous (which it plainly was not)¹¹⁷ and that he meant that he had no relationship beyond a social and cultural one. This interpretation is unsustainable in that the question posed by Fundudzi was general in nature (it asked if there was

¹¹³ Exh L 1, p 14-15, para 57

¹¹⁴ Exh L 1, p 24, para 108

¹¹⁵ Transcript 21 June 2021, p 58-71

¹¹⁶ Transcript 21 June 2021, p 59, line 5

¹¹⁷ Transcript 21 June 2021, p 62-66

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

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

¹¹⁸ Transnet-11-1084, para 139 et seq

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

106. Mr Gigaba in fact knew all the Gupta brothers and their mother,¹¹⁹ was especially a friend of Mr Ajay Gupta (who he would visit at Sahara Computers)¹²⁰ and made regular visits to the Gupta Saxonwold compound while he was Minister of Public Enterprises.¹²¹ His special advisor, Mr Siyabonga Mahlangu, was tasked with managing the Guptas and was a buffer between Mr Gigaba and Mr Ajay Gupta so as not to confuse the roles of friendship and business.¹²² He permitted Mr Mahlangu to travel with President Zuma's son, Mr Duduzane Zuma, to a Gupta wedding in India. The trip was paid for by Sahara Computers and Mr Mahlangu was paid his salary during his absence. Mr Gigaba attended the notorious Gupta wedding at Sun City¹²³ and the Guptas were invited to his wedding.¹²⁴

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

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

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

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

¹²² Transcript 18 June 2021, p 43

¹²³ Transcript 27 May 2021, p 276

¹²⁴ Transcript 31 May 2021, p 28

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

108. On 8 December 2010, Cabinet approved Mr Gigaba's recommendations for the board at Transnet (including the appointment of a new chairperson – Mr Mafika Mkwanzani). The new board included Mr Sharma. A few days after his appointment as chairperson of the board, Mr Mkwanzani was appointed as acting GCEO by Mr Gigaba to replace Mr Wells who resigned on the same day as President Zuma appointed Mr Gigaba as Minister.
109. Mr Gigaba was later party to an attempt to appoint Mr Sharma as chairperson of the board. Cabinet rejected that recommendation. A newspaper article of 9 June 2011 stated that the reason Cabinet "shot down" Mr Gigaba's recommendation for Mr Sharma's appointment was because he was inexperienced and therefore risked a negative reaction from the capital markets, and that there were "fears that he may be closely identified with the wealthy Gupta family". Mr Sharma, as mentioned, went on to be appointed as the Chair of the BADC, which played a central role in key procurement decisions that advanced the interests of the Gupta enterprise.

The appointment of Mr Brian Molefe as GCEO

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

¹²⁵ Transcript 8 March 2021, p 95-108

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

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

¹²⁶ Transcript 8 March 2021, p 104

¹²⁷ Transcript 8 March 2021, p 105

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

¹²⁹ Supplementary affidavit of Mr Mkwani, Transnet-04-021.423, para 5.14

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

¹³¹ Transcript 27 May 2021, p 228

¹³² Transcript 27 May 2021, p 232-245

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

112. The evidence confirms that Mr Molefe knew the Guptas well, particularly Mr Ajay Gupta who he spoke to on the phone often. His interaction with Mr Ajay Gupta started some years before his appointment as GCEO in 2011. He attended regular social functions and private meetings at the Gupta compound and would visit about once a month, on average. It is estimated that Mr Molefe may have gone to the Gupta compound as many as 50 times in the four years that he was GCEO at Transnet. The Guptas also visited his home.¹³³ During his tenure as GCEO, Mr Molefe supported substantial payments to the Gupta owned newspaper, the New Age, for advertising and marketing events, which others at Transnet regarded as being of questionable value.¹³⁴ Other evidence, discussed later, points to the fact that the Guptas influenced the decision to transfer Mr Molefe to Eskom, first on secondment as the acting CEO and later as CEO in 2015.
113. Mr Molefe went on to oversee the substantial procurements at Transnet from which the Gupta network illegally benefitted. Most of the transactions were approved by the BADC chaired by Mr Sharma, who was in a close business relationship with Mr Essa who had a 20-21% interest (via the dubious BDSAs) in the transactions. Ultimately, under Mr Molefe's watch, the Gupta enterprise received more than R3.5 billion in (proven) kickbacks in respect of the locomotives procured.
114. Despite the perpetrators of this massive racketeering, corruption and money laundering being his friends and associates operating in the Transnet space,

¹³³ Transcript 8 March 2021, p 143-184

¹³⁴ Transcript 10 March 2021, p 136-145

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

The reinstatement of Mr Gama

115. The process to reinstate Mr Gama appears to have begun (at around the same time as the process that led to the appointment of Mr Molefe) in a meeting between Mr Gigaba and Mr Mkwanazi either before 1 November 2010 or in early November 2010.¹³⁷ Prior to this, in July 2010, Mr Gama had referred an unfair dismissal dispute to the Transnet Bargaining Council¹³⁸ and later limited his claim to a contention that dismissal was an inappropriate sanction.¹³⁹ During the meeting with Mr Mkwanazi, Mr Gigaba requested that the incoming board should review the fairness of the dismissal of Mr Gama¹⁴⁰ because he thought the sanction of dismissal was unfair and too harsh for two reasons: firstly, because white employees had committed more serious acts of misconduct and had not been

¹³⁵ Transcript 8 March 2021, p 134-136

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

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

¹³⁸ Transnet-03-091-097

¹³⁹ Transnet-03-103, para 3

¹⁴⁰ Transnet-04-021.415, para 6

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

116. A new board was appointed with Mr Mkwani as the new chairperson on 13 December 2010. On 22 December 2010, the Public Protector notified Transnet that she was conducting an investigation into certain allegations that the Transnet board had unfairly conspired to prevent Mr Gama from successfully applying for the vacant post of GCEO.¹⁴³ Mr Mkwani enlisted the assistance of Mr Siyabulela Mapoma, GM: Group Legal Services, to deal with the Public Protector investigation.¹⁴⁴
117. According to Mr Mapoma, Mr Mkwani made it clear to him that he had been instructed to reinstate Mr Gama. Mr Mapoma assumed the instruction came from President Zuma. When Mr Mapoma later asked why Transnet was reinstating Mr Gama, Mr Mkwani "indicated initially that this was coming from the ministry...later on, he indicated that it was coming from higher up".¹⁴⁵ Mr Mkwani denied Mr Mapoma's version, stating that the shareholder instruction was to review the fairness of the dismissal, and that Mr Mapoma had made his own assumption about President Zuma's involvement.¹⁴⁶ Mr Gigaba testified that he had not given Mr Mkwani an instruction to reinstate Mr Gama,¹⁴⁷ did not discuss the issue with President Zuma and had received no instruction from him.¹⁴⁸

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

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

¹⁴³ Transnet-02-024

¹⁴⁴ Transnet-03-006-007, paras 12-13

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

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

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

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

118. Sometime before 13 January 2011, Transnet, on the advice of Mr Mahlangu, Mr Gigaba's special advisor, engaged Mr Sibusiso Gule of the law firm Deneys Reitz to assist it.¹⁴⁹ Mr Mahlangu testified that Mr Mwanazi had informed him (at this early stage) that Transnet intended to reinstate Mr Gama.¹⁵⁰ Asked why he had not contacted Mr Christopher Todd, the attorney from Bowman Gilfillan that had represented Transnet in the matter, Mr Mwanazi accepted that he did not really want to hear that Transnet was going to win the arbitration of the dismissal dispute.¹⁵¹
119. On 18 January 2011, after a discussion with Mr Mwanazi, Mr Mahlangu sent Mr Gigaba an email informing him that Transnet was nearing a settlement with Mr Gama and suggesting that he "socialise the President and his key aides (formal & informal) on the proposed settlement".¹⁵² Mr Mwanazi could not explain how Mr Mahlangu could have reported to Mr Gigaba that settlement was imminent as early as 18 January 2011 (unless the decision was pre-determined).¹⁵³ Mr Gigaba testified that he did not respond to the email as he saw it as a "run of the mill heads up" and had thus not "socialised" President Zuma.¹⁵⁴
120. On Friday, 21 January 2011, Mr Ndiphiwe Silinga (a Transnet legal advisor) advised Mr Todd that Mr Mwanazi¹⁵⁵ had instructed that the steps taken to recover from Mr Gama the costs awarded to Transnet in the High Court application should be halted and the arbitration set down for hearing during the week commencing 24 January 2011 should be postponed indefinitely, so as to allow the

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

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

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

¹⁵² Transnet-01-178

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

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

¹⁵⁵ Mr Mwanazi was both the chairperson of the board and the Acting GCEO at the time

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

121. On 22 January 2011 settlement negotiations were held between Transnet (represented by Deneys Reitz) and Mr Gama (represented by Langa Attorneys). Deneys Reitz's consultation note reflects Mr Mkwanazi as having stated during a caucus held before the negotiations commenced that he wanted to assist Mr Gama and bring him back into his office to assist him on strategic issues. If provided with an opinion setting out some unfairness, he would persuade the other board members to make a decision to bring Mr Gama back into the organisation.¹⁵⁷ Mr Mkwanazi in effect wanted some "friendly" legal advice from Deneys Reitz.¹⁵⁸ During his testimony he explained that he believed Mr Gama had been treated inconsistently, in that similar procurement irregularities had been condoned.¹⁵⁹ He was however forced to concede that the third charge (the unwarranted criticism charge) was not a condonable irregularity and was serious enough to deserve the sanction of dismissal on its own.¹⁶⁰
122. Mr Mapoma testified that, after a meeting between Mr Mkwanazi and Mr Gama at Inanda Estate, Mr Mkwanazi told him that they could not reach consensus on the terms of reinstatement, because Mr Gama wanted to be reinstated as the GCEO of Transnet – a position he had never held and for which the previous board

¹⁵⁶ Transnet-03-105-106

¹⁵⁷ Transnet-02-003, para 4

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

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

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

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

123. On 24 January 2011, Mr Todd wrote to Mr Silinga confirming that his instructions had been carried out and asked him to inform Mr Mwanazi that the legal team representing Transnet was satisfied that it was likely that the fairness of the sanction of dismissal would be upheld at arbitration.¹⁶⁴
124. The minutes of the board meeting on 25 January 2011 record that Mr Mwanazi referred to more than 30 cases of transgressions similar to those of Mr Gama mentioned in internal audit reports in 2008 and "a culture of condonation of exceeding delegated authority".¹⁶⁵ Mr Mwanazi accepted during his testimony before the Commission that the irregularities in the audit reports were not identical to those in Mr Gama's case¹⁶⁶ but only broadly comparable.¹⁶⁷ On 2 February 2011, Mr Todd prepared a report ("the Todd report") for Transnet on the disciplinary proceedings involving Mr Gama,¹⁶⁸ giving a full account of the matter, Mr Gama's weak prospects of success and senior counsel's opinion that the sanction of dismissal was likely to be upheld.¹⁶⁹ Mr Mwanazi accepted that, on his reading of the Todd report, it left no room for concluding that Transnet was actually

¹⁶¹ Transnet-03-008, para 19

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

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

¹⁶⁴ Transnet-03-107-108

¹⁶⁵ Transnet-01-534

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

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

¹⁶⁸ Transnet-03-065-090

¹⁶⁹ Transnet-03-089, para 65

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

125. On 3 February 2011, a meeting of the Nominations and Governance Committee, comprising Mr Mkwani, Ms T Mnyaka, Ms Doris Tshepe and Mr Sharma, was convened.¹⁷¹ The meeting first considered whether there should be a deviation from clause 4.8.4 of Transnet's recruitment and selection policy providing that the candidate for the still vacant GCEO position must not have been previously dismissed from Transnet for reasons related to incapacity or misconduct so as to permit Mr Gama to apply.¹⁷² Clause 2 of the policy permitted deviation where necessary in respect of executive appointments.¹⁷³ The CGNC resolved in favour of Mr Gama by deciding to allow him to apply for the position,¹⁷⁴ despite advice by senior counsel that by not challenging the findings of misconduct Mr Gama had conceded that he was guilty and thus it would be irrational for Transnet to interview him.¹⁷⁵ The Nominations and Governance Committee also discussed the settlement negotiations. The transcription of the meeting indicates that Mr Mapoma advised that Transnet had good prospects of success in the arbitration. When Ms Tshepe asked why in that case was Transnet settling, Mr Mkwani replied: "We don't know" and later rated the prospects as 50/50.¹⁷⁶ Mr Mkwani's answer that he did not know why Transnet was not pursuing the arbitration suggests that he

¹⁷⁰ Transcript 16 October 2020, p 187, lines 15-19

¹⁷¹ Transnet-01-827-832

¹⁷² Transnet-02-307

¹⁷³ Transnet-02-304

¹⁷⁴ Transnet-01-831

¹⁷⁵ Transnet-02-298, para 19

¹⁷⁶ Transnet-01-855, lines 695-708

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

126. Following a meeting with Mr Mwanazi on 4 February 2011,¹⁷⁸ Mr Mahlangu sent Mr Gigaba an email advising him of Mr Gama's application for the vacant GCEO position and the settlement negotiations with him.¹⁷⁹ Mr Mwanazi shared this information with Mr Mahlangu on account of the instruction that he had received from Mr Gigaba to review Mr Gama's dismissal.¹⁸⁰
127. On 10 February 2011, Mr Gama signed a draft of the settlement agreement, which provided for his reinstatement.¹⁸¹ This was before Deneys Reitz had provided any advice, and appears to indicate that friendly advice was sought subsequently which accorded with a decision that had already been taken.¹⁸² On 14 February 2011, Mr Mapoma sent Mr Gule of Deneys Reitz an email asking for a two pager for Mr Mwanazi for the board meeting of 16 February 2011 and attaching a draft to be settled by Mr Gule.¹⁸³ The attached two-page memorandum ("the Group Legal opinion") proposed a settlement of the dismissal dispute on generic grounds, without any suggestion that the dismissal was unfair or an assessment of prospects of success at arbitration.¹⁸⁴ Paragraph 7 of the memorandum included the following sentence at the request of Mr Mwanazi:¹⁸⁵

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

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

¹⁷⁹ Transnet-01-181-182

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

¹⁸¹ Transnet-02-006-011

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

¹⁸³ Transnet-02-012

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

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

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

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

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

¹⁸⁶ Transnet-02-015

¹⁸⁷ Transnet-02-17

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

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

¹⁹⁰ Transnet-01-034-035

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

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

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

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

¹⁹³ Transnet-03-158, para 9

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

¹⁹⁵ Transnet-03-160, para 13

¹⁹⁶ Transnet-03-160, para 13(a)

¹⁹⁷ Transnet-03-161, para 13(b)(i)

was entirely irrelevant.¹⁹⁸ Mr Mkwani concedes all of this during his evidence before the Commission.¹⁹⁹

131. In recognition of the weakness of the legal advice before it, the board requested Deneys Reitz to provide an augmented opinion, which it did on 22 February 2011.²⁰⁰ The augmented opinion supported settlement in generic terms without a proper analysis of the prospects of success, or any reference to the third charge, and ultimately concluded that the prospects were poor. This was contradicted in an earlier paragraph in the augmented opinion which pointed out that various legal opinions including its own "were of the view that Mr Gama's chances of successfully challenging his dismissal are not good."²⁰¹ When it was put to Mr Mkwani during his testimony that this demonstrated that the board had another agenda in reinstating Mr Gama (divorced from prospects of success at arbitration) he conceded that he could not fault the proposition.²⁰²

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

¹⁹⁸ Transnet-03-162, para 13(c)

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

²⁰⁰ Transnet-02-019-022

²⁰¹ Transnet-02-020

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

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

²⁰⁴ Transnet-03-012, para 27

content of the discussion for various reasons.²⁰⁵ Mr Gigaba testified that he was not aware of the discussion between Mr Mapoma and Mr Mahlangu, and President Zuma never gave him any instruction to reinstate Mr Gama.²⁰⁶ However, Mr Mapoma reported the matter to Mr Mkwanzazi²⁰⁷ who conceded that was possible.²⁰⁸ The probabilities as evidenced by subsequent events support Mr Mapoma's version.

133. On 23 February 2011 Transnet and Mr Gama concluded an agreement of settlement²⁰⁹ in terms of which Mr Gama would return to Transnet with effect from 23 February 2011 and resume duties as CEO of TFR on 1 April 2011. Any employment benefits that were due to him for the intervening period of 30 June 2010 to 23 February 2011 ("the intervening period") in terms of his employment contract were to be fully restored. Mr Gama was paid some R13 million under this clause. He was given a final written warning effective from 29 June 2010 to 29 December 2010 which he was deemed to have already served. Transnet agreed to "make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Mr Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council." Mr Gama's attorneys were paid in excess of R4 million in costs.

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

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

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

²⁰⁷ Transnet-03-012, para 28

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

²⁰⁹ Transnet-01-036-041

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

135. On 1 April 2011 Mr Gama resumed his duties as the CEO of TFR. He was unsuccessful in his attempt to be appointed GCEO. Around about this time, Mr Gigaba held a meeting with Mr Gama with a view to ensuring that he would support Mr Molefe as the new GCEO.²¹⁰
136. The evidence as a whole justifies a finding that the decision to reinstate Mr Gama was pre-determined and there was no sustainable legal advice in support of the decision to reinstate or any objective review of the fairness of Mr Gama's dismissal and the process followed did not set out to achieve this. While Mr Mwanazi led his fellow board members astray about the list (and the applicability of condonation), the fact remains that the decision to reinstate on the basis of inconsistency and the procurement condonation process was wholly indefensible. That the board did not properly consider the matter is incontrovertible.²¹¹
137. Not only was Mr Gama reinstated, but his reinstatement operated with full retrospective effect without any loss of remuneration and benefits (totalling some R13 million); three costs payments were made to him (totalling in excess of R4 million); and the six-month final written warning that was issued to him expired before he returned to work, had no deterrent effect and served no real purpose. Mr Mwanazi correctly conceded that it was a nonsensical final written warning.²¹²

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

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

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

The payment of Mr Gama's legal costs

138. The payments made to Mr Gama in respect of his legal costs were also indefensible. On 30 March 2011, Transnet paid Langa Attorneys R1 016 564.90.²¹³ This constituted 75% of the taxed costs incurred by Transnet (with Bowman Gilfillan and Eversheds) in the High Court litigation.²¹⁴ The amount was made up of R319 999.78 in respect of Bowman Gilfillan,²¹⁵ and R696 565.12 in respect of Eversheds.²¹⁶
139. According to Mr Mapoma, Mr Mkwani had instructed him to pay 75% of Transnet's taxed costs to Mr Gama on the basis that he had incurred liability for such costs.²¹⁷ Mr Mkwani denied this, but explained that the idea was to refund Mr Gama for costs that he had already paid in terms of the court order.²¹⁸ Mr Gama gave a similar version.²¹⁹ Because he was unhappy about making the payment, Mr Mapoma escalated the matter to Mr Singh, the GCFO, who (according to Mr Mapoma) approved the payments.²²⁰ In substantiation of this, Mr Mapoma referred to the handwritten annotations that he made on 28 March 2011 on each of the taxed bills submitted by Bowman Gilfillan and Eversheds recording "payment has

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

²¹⁴ Transnet-03-031, para 12.1

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

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

²¹⁷ Transnet-03-031, para 12.2

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

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

²²⁰ Transnet-03-031, para 12.2

been approved as per attached memo. (Discussed with Anoj)²²¹. The relevant memorandum was approved by Mr Molefe on 28 March 2011.²²²

140. According to Mr Mapoma, things became heated with Mr Langa in relation to the payment of Mr Gama's legal costs when Mr Mapoma refused to entertain the payment of a bill of more than R12 million, which he considered to be overreaching.²²³ Langa Attorneys then submitted a bill totalling R4 254 171.76.²²⁴ A Transnet appointed tax consultant taxed this down to R2 293 627.68,²²⁵ with 75% thereof equating to R1 720 220.76, which was the amount eventually paid as a second payment.²²⁶ This constituted 75% of the taxed costs incurred by Mr Gama in the High Court application, his disciplinary inquiry (14 days) and his referral to the Transnet Bargaining Council.²²⁷ The tax consultant's memorandum concluded that the costs had been substantially inflated and would likely be reduced even more in taxation.²²⁸
141. On 16 August 2011 the Director-General of the Department of Public Enterprises ("the DPE") sent a letter to Mr Molefe (the GCEO) advising that Langa Attorneys were complaining that Transnet was reneging on its undertaking to pay, without taxation, its bill of costs. The following day, Mr Mapoma addressed a memorandum

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

²²² Transnet-01-104-106

²²³ Transnet-03-010, paras 22-24

²²⁴ Transnet-02-175-209

²²⁵ Transnet-02-169-174

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

²²⁷ Transnet-03-031, para 12.1

²²⁸ Transnet-02-174

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

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

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

143. Langa Attorneys contended that Mr Gama was entitled to 75% of their bill of R4.2 million equating to R3.1 million, but that only R1.7 million had been paid (the second payment), thus leaving a balance owing of R1.4 million.²³³ Although it appears that Langa Attorneys subsequently submitted an invoice for R2.3 million, ultimately a new tax consultant arrived at a figure of R776 267.58 as being outstanding.²³⁴ Langa Attorneys accepted this offer, but claimed interest from the date of settlement²³⁵ (23 February 2011), which culminated in them submitting an invoice dated 8 April 2015 for R1 399 307.11.²³⁶ This amount was approved by Mr Singh (on the recommendation of Mr Silinga) on 15 April 2015.²³⁷ As the documentary record reflects, no regard was had to the fact that there had been a previous taxing of Langa Attorneys' bill, and that the amount paid of R1.7 million

²²⁹ Transnet-01-142-144

²³⁰ Transnet-01-147-148

²³¹ Transnet-03-854, para 2

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

²³³ Transnet-03-854-856

²³⁴ Transnet-03-857-861

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

²³⁶ Transnet-03-875-876

²³⁷ Transnet-03-877-879

was as a result thereof.²³⁸ On 16 April 2015, some four years after the second costs payment, Transnet paid Langa Attorneys another R1 399 307.11.²³⁹ This payment was made around the time Mr Gama commenced acting as the GCEO. He was appointed permanently a year later in April 2016.

144. The costs payments were indefensible and significantly enriched Mr Gama.
145. The first payment (of R1 016 564.90) involved paying Mr Gama 75% of the costs incurred by Transnet (with Bowman Gilfillan and Eversheds) in the High Court application that had been awarded in its (and its directors') favour. The only conceivable explanation for this that surfaced in evidence (given by Mr Mwanazi and Mr Gama) was that the payment was aimed at refunding Mr Gama for the costs that he had already paid to Transnet under the High Court order.²⁴⁰ However, this makes no sense for a number of reasons: firstly, the payment was not due under paragraph 3.5 of the settlement agreement (which provided for the payment of Mr Gama's High Court costs, not those incurred by Transnet that he was ordered to pay); secondly, the High Court application was divorced from the merits of the disciplinary charges that led to Mr Gama's dismissal; and thirdly, by the time that the payment was made, Mr Gama had not paid Bowman Gilfillan's taxed bill of costs²⁴¹ (the execution process having been stopped) – yet he was reimbursed an amount of R319 999.78 in respect of those. (Although Mr Gama claimed to have paid Transnet about R1 million in December 2009 in respect of the costs taxed by Eversheds,²⁴² he was unable to obtain banking records going that far back,²⁴³ and

²³⁸ Transnet-03-845, para 10

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

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

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

²⁴² Amounting to R928 753.49

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

146. During his evidence, Mr Mkwani concedes that Transnet should never have undertaken to pay any of Mr Gama's High Court costs (the second payment of R1 720 220.76) as his application had been dismissed by the High Court.²⁴⁷ Furthermore, although they may have been of a different view at the time, both Mr Mapoma²⁴⁸ and Mr Mkwani²⁴⁹ accepted that Mr Gama's disciplinary inquiry costs fell outside of the scope of paragraph 3.5 of the settlement agreement, which provides for the payment of the costs of Mr Gama's referral of the dismissal dispute to the Transnet Bargaining Council (which arose after his dismissal).

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

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

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

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

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

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

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

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

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

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

Political interference and impropriety in the reinstatement of Mr Gama

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

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

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

151. Moreover, Mr Mwanazi's approach from the outset is reflective of a pre-determined decision to reinstate Mr Gama. Mr Mwanazi was evidently biased in favour of Mr Gama from the outset and President Zuma had made no bones about his preference for Mr Gama to Ms Hogan. Mr Gigaba's testimony that he was issued with no instructions by President Zuma whatsoever is improbable in the light of Ms Hogan's evidence and the time frame. Mr Gama was reinstated shortly after Ms Hogan was removed by President Zuma as Minister of Public Enterprises and replaced by Mr Gigaba.
152. In addition, there is the evidence of Mr Mapoma that Mr Mwanazi told him that he had been instructed to reinstate Mr Gama. Although Mr Mwanazi denied this, the process that he followed in negotiating the settlement agreement and in getting it approved (in principle) by the board, supports Mr Mapoma's version. There is also the evidence that Mr Mahlangu put pressure on Mr Mapoma to wrap up the settlement, telling him in the process that President Zuma wanted it to be concluded quickly. Although Mr Mahlangu denied this, Mr Mapoma's version is more probable. Mr Mapoma was an outspoken critic of settlement with Mr Gama (as evident at the Nominations and Governance Committee meeting), which could well have paved the way for the telephonic discussion in question. Mr Mahlangu's conduct accords with the probabilities that President Zuma's support for Mr Gama continued after the appointment of Mr Gigaba.
153. Additionally, the nature of the interaction between Mr Mahlangu and Mr Gigaba as evidenced by their email communications reflects Mr Mahlangu keeping Mr Gigaba apprised of an issue (i.e. settlement with Mr Gama) that was clearly of importance to him and President Zuma. Although the issue fell outside of the realm of Mr Gigaba's ministerial oversight, President Zuma clearly favoured Mr Gama and in all

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

154. In the premises, Mr Gigaba probably did not simply request Mr Mwanazi (and the board) to review the fairness of Mr Gama's dismissal, but instead probably required Mr Gama to be reinstated.
155. In terms of section 3 of PRECCA, the crime of corruption is committed, *inter alia*, by the making of an offer of employment (a gratification in terms of section 1 of PRECCA) for the benefit of that person in order to act in a manner: i) amounting to the improper exercise of any power or function arising out of any legal obligation; ii) designed to achieve an unjustified result; or iii) amounts to any other unauthorised or improper inducement to do or not do anything. The conduct of Mr Gigaba, and Mr Mwanazi, when assessed against the role Mr Gama played in enriching the Gupta enterprise through various irregularities, gives rise to a reasonable suspicion that the crime of corruption may have been committed in the circumstances surrounding Mr Gama's reinstatement. Further evidence may be needed to establish that the offer and acceptance of employment was made in order for Mr Gama to act in a manner that amounted to an improper inducement to do anything (such as advantage the Gupta enterprise).
156. Considering the indefensible nature of the settlement agreement, and the concession of Mr Mwanazi that steps should be taken to recover the monies paid in terms of the unjustifiable settlement agreement, there are reasonable grounds to believe that the members of the board who voted in favour of settlement, the GCFO and the GCEO (as the accounting authority) may have failed to exercise

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

157. The evidence of the role played by Mr Gigaba, President Zuma and Mr Mkwanzani in the Gama saga, and the likely benefit of Mr Gama's reinstatement and subsequent promotion for the Gupta enterprise, may provide a reasonable basis to conclude that these individuals participated in the affairs of and were associated with the Gupta enterprise.
158. The findings regarding the improprieties associated with Mr Gama's reinstatement thus reveal possible attempts by Mr Gigaba and President Zuma to influence the directors of the board of Transnet through possible inducements and links to the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.1 and TOR 1.4, as well as corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The possible offences and identified wrongdoing should accordingly be referred in terms of TOR 7 for further investigation by law enforcement agencies.

The appointment of Mr Gama as GCEO

159. On 17 April 2015, Mr Molefe was seconded to Eskom as Acting CEO.
160. At a meeting of the Transnet board on 20 April 2015, Mr Gama was appointed as Acting GCEO purportedly "due to his vast knowledge of the Company". Mr Gama had worked at Transnet since 1994 and had been CEO of both TPA and TFR. He

²⁵² Section 50(1)(a) of the PFMA

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

161. On 30 September 2015 Mr Molefe resigned from the Transnet board and was appointed Eskom CEO with effect from 1 October 2015. Mr Gama continued to act as GCEO of Transnet.
162. At a meeting of the Transnet board²⁵³ on 18 February 2016, the chairperson of the board, who, by then, was Ms Linda Mabaso, informed the board that she had received a letter on 7 January 2016 from Ms Lynne Brown, the Minister of Public Enterprises, requesting that the GCEO appointment be finalised within 30 days. She then indicated that, in the circumstances, an internal appointee would be ideal and proposed Mr Gama as the most qualified individual. The board approved the appointment.
163. In a letter dated 24 February 2016, Ms Mabaso recommended to Ms Brown that Mr Gama be appointed on a permanent basis without any formal recruitment processes as the matter was urgent because Mr Gama's delegation of authority would expire on 31 March 2016. She said that the board did not feel it necessary to advertise the post internally or externally based on the urgency and Mr Gama's performance. Ms Mabaso's letter made no reference to the fact that Mr Gama had been dismissed for financial misconduct, non-compliance with the directions of the board, and unwarranted criticism of the board and senior executives; nor to the fact that Mr Gama had on two other occasions been found unsuitable for appointment

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

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

164. Mr Gama did not see out his full term of office. In September 2018, after the appointment of a new Transnet board, Mr Gama was dismissed as GCEO and removed from the board of Transnet because of serious violations of his financial procurement and fiduciary responsibilities and the board having lost trust and confidence in his ability to lead Transnet.
165. In an affidavit dated 28 October 2021 submitted to the Commission, Ms Mabaso said that the board was not aware of the disciplinary findings, the terms and conditions of the indefensible settlement agreement, the nature of the serious misconduct to which Mr Gama admitted, and his prior unsuccessful attempts to be appointed as GCEO. She stated that, because Mr Gama "was within the structures of Transnet", there was no need for the board to interrogate his history as "it would have been unfair to conduct a post-mortem on him on issues that were settled between the parties."²⁵⁴
166. This blithe unconcern reflects poorly on the judgement of Ms Mabaso and the Transnet board and appreciation of their responsibilities as directors of the board of an SOE. It was incumbent on Ms Mabaso and the board to review Mr Gama's history and to evaluate his conduct against other possible candidates. The justification for not advertising the position internally and externally so as to allow a fair, transparent and competitive process is unconvincing. The denial of Ms Mabaso that she and the board were subject to any political influence in deviating from the normal process of appointment in taking these extraordinary steps to appoint Mr Gama is accordingly open to doubt.

²⁵⁴ Transnet-07-250.575-576.

Mr Gama's links to the Gupta enterprise

167. Mr Gama's links to the Gupta enterprise are most evident from his association with Mr Essa. These are discussed more fully in the analyses of the specific transactions. It suffices now, by way of overview, to note that Mr Gama claimed he met Mr Essa only on four occasions: during a meeting at TFR's offices with McKinsey and Regiments in early 2015;²⁵⁵ in Mr Singh's office at the Carlton Centre in July 2015;²⁵⁶ at the Gupta compound in November 2015;²⁵⁷ and at the Oberoi Hotel in Dubai in January 2016.²⁵⁸ In addition, he said that they met in passing at a restaurant.²⁵⁹
168. At the second meeting in July 2015 Mr Essa requested a meeting with Mr Gama who told him to get his contact details from Mr Singh.²⁶⁰ Mr Essa followed up and phoned him in October / November 2015 and invited him to a meeting at what turned out to be the Gupta compound in Saxonwold where Mr Essa introduced him to Mr Rajesh (Tony) Gupta who indicated that there was scope for the development of a working relationship between Transnet and his businesses in the future. Mr Gama said that he considered the discussion meaningless and indicated to Mr Essa that he was disappointed about having been duped into a meeting at the Gupta compound.²⁶¹ Mr Gama said he did not visit the Gupta compound again, and had no further interactions with the Guptas. His driver testified otherwise.

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

²⁵⁶ Transnet-07-048, para 31.3

²⁵⁷ Transnet-07-048, para 31.4

²⁵⁸ Transnet-07-052, para 32.6

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

²⁶⁰ Transnet-07-048, para 31.3

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

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

170. Mr Gama also had links with Mr Vikas Sagar of McKinsey who was implicated in the corrupt activities of Mr Essa, Regiments and Trillian at Transnet and Eskom.²⁶⁴ There is evidence that Mr Sagar assisted Mr Gama with an MBA project in December 2015 - January 2016.²⁶⁵ An investigation by McKinsey revealed that Mr Gama was enrolled in the Trium global executive MBA program. Mr Sagar allegedly coordinated research support for Mr Gama, supplemented course work using company resources and contractors to outline and help draft two chapters which Mr Gama submitted as his contribution to the Capstone project. The support commissioned by Mr Sagar caused McKinsey to incur costs of R100 000 for which

²⁶² Transnet-07-250.72

²⁶³ Transcript 30 April 2021, p 114-115

²⁶⁴ Transnet-05-493, para 1

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

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

171. As discussed, Mr Gama enjoyed political support from Mr Gigaba and President Zuma. Ms Nomachule Gigaba (nee Mngoma), Mr Gigaba's wife, testified that Mr Gigaba may have used his influence with Mr Gama to get his sister, Ms Gugulethu Gigaba, a job at Transnet.²⁶⁷ Mr Gigaba and Mr Gama denied this. Ms Gugulethu Gigaba commenced employment with TFR in February 2017.²⁶⁸ some months after Mr Gigaba emailed Mr Mlamuli Buthelezi (the then Group Chief Operating Officer of Transnet reporting to Mr Gama) her curriculum vitae on 25 June 2016 with the message, "herewith the matter I told you about".²⁶⁹

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

²⁶⁶ Transnet-07-250, para 2(d)

²⁶⁷ Transnet-07-250.128, para 31.3

²⁶⁸ Transnet-07-250.112-114

²⁶⁹ Transnet-07-250.104-105

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

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

Mr Singh's links to the Gupta enterprise

173. On 1 July 2012 Mr Singh was appointed as Transnet GCFO, having acted in the position since 2009. Mr Sharma was appointed as Chair of the BADC one month later. These appointments in 2012 coincided with the launch of the MDS, the R300 billion capital expenditure program, which was the centrepiece of procurement corruption at Transnet in subsequent years and over which Mr Singh exercised financial control.
174. Mr Singh also knew the Guptas fairly well. He was at pains to minimise the extent of the relationship. His denials must be assessed in the light of his poor credibility as evidenced by his many falsehoods and dissembling exposed throughout his testimony before the Commission. He lied in his affidavit (which he was directed to produce) about the frequency and reasons for his visits to Saxonwold. By his own admission, Mr Singh visited the Saxonwold compound at least 12 times in four years "for religious or cultural functions only". He was invited to the notorious Gupta wedding at Sun City. Mr Singh also visited the offices of Sahara Computers. Mr Singh's then girlfriend, Ms Selina Naik, was originally employed at Transnet but later secured employment with the Guptas at Sahara Computers. She resigned from Transnet in December 2014, commenced employment at Sahara Computers in January 2015 and worked there until 2017. Her boss was Mr Ashu Chawla (the CEO) and she worked directly with the Gupta brothers.
175. Mr Singh denied the evidence of his driver that he took him to Saxonwold more than ten times or that he took him to Knox Vaults (a safety deposit box facility) from the Gupta compound six or seven times, but admitted that he took him to Sahara Computers on a number of occasions to fetch his girlfriend.

176. Mr Singh sought to underplay his relationship with Mr Essa. He testified that they only met twice informally at Mr Essa's request at Melrose Arch. This is contradicted by testimony of Mr Gama. He testified that in July 2015, he saw Mr Singh and Mr Essa together in a boardroom by Mr Singh's office at Transnet where Mr Essa asked him (Mr Gama) for his contact details. Moreover, Mr Singh's former secretary, Ms Nobahle Takane, stated in an affidavit that in late 2012 Mr Essa visited Transnet's head offices in Carlton Centre when Mr Singh was the acting GCFO to pick up a document which she described as a memorandum to the BADC that made mention of Hatch Goba, a company involved in the MEP.²⁷² Mr Singh also denied the testimony of Mr Henk Bester, the global director and managing director for the rail division of Hatch Goba (corroborated by Mr Craig Sumption of Hatch Goba) that he attended a meeting together with Mr Essa at Melrose Arch regarding the appointment of SDPs on the MEP.²⁷³
177. Mr Singh used the same travel agent as Mr Essa, stayed in the same hotel in Dubai as Mr Essa, and was, on occasion, present in Dubai (sometimes at the Oberoi Hotel) at the same time as Mr Essa. Certain of Mr Singh's hotel reservations and invoices were forwarded by Mr Chawla of Sahara Computers to Mr Essa. Ms Sameera Sooliman of Travel Excellence testified that Mr Essa and Sahara Computers used Travel Excellence and that Mr Singh's flights were

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

²⁷³ Transnet-04-045, paras 57-58

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

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

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

²⁷⁵ Transnet-05-1949-54

²⁷⁶ Transnet-05-1955-62

²⁷⁷ Transnet-05-770-74

²⁷⁸ Transnet-05-775-82

²⁷⁹ Transnet-05-1963

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

179. On 11 to 15 June 2015 Mr Singh once again travelled to Dubai and stayed at the Oberoi Hotel. Mr Ajay Gupta, Mr Rajesh Gupta and Mr Essa were present in Dubai at the same time. Mr Chawla forwarded Mr Singh's confirmation of reservation to Mr Essa.²⁸⁰ On 11 June 2015 – at the same time as this particular Dubai trip – Mr Singh approved payment, which was made on the same day, of a wholly unjustifiable R189 million success fee to Regiments for its role in securing funding in relation to the procurement of 1064 locomotives.²⁸¹ R122 million of this amount was later laundered to Sahara Computers.²⁸²
180. Mr Singh's various trips to Dubai thus give the lie to his denials about his relationship with Mr Essa. Mr Singh disputed the authenticity of all the Gupta leaks documents and contended that someone must have fabricated the invoices and emails and that they are not genuine. Viewed from the perspective of the evidence overall, his contention is inherently improbable. He had no invoices or supporting documentation (such as credit card statements) of his own that confirmed that he paid for his own flights and hotel accommodation.
181. In just over three years, Mr Singh accumulated R19 million in a current bank account as a result of spending virtually none of his remuneration, indicating that he had other sources of money besides his salary. The fact that this account was not an interest bearing account obviated his declaring additional income from it in his tax returns. Mr Singh maintained that he funded his living expenses from savings held in other bank accounts.

²⁸⁰ Transnet-05-1785-87; 05-1972-79

²⁸¹ Transnet-07-250.399

²⁸² Transcript 30 April 2021, p 11

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

Other key appointments

183. On 23 May 2011 Mr Gigaba was requested to approve a reshuffle of the Transnet board proposed in a DPE memorandum which had been prepared following consultation with his advisor, Mr Mahlangu. The memorandum proposed the replacement of Mr Mafika Mkwanzani with Mr Sharma as the chairperson of the board, on the ground that Mr Mkwanzani had become "intimately involved in the management of the company" and the Department of Public Enterprises was of the view that "there should be a clear division of responsibilities at the head of the company, ensuring a balance of power and authority". The memorandum also recommended the removal of Mr Don Mkhwanazi (who had seriously criticised the process that led to the recruitment, selection and appointment of Mr Molefe as GCEO) and Ms Mnyaka (whose name was subsequently struck out) as non-executive directors only six months after their appointment in December 2010.
184. On 7 July 2011 Ms Yasmin Forbes and Mr Nishi Choubey (a former employee of Sahara Computers) were appointed as non-executive directors. As discussed earlier, Mr Sharma was not appointed to the position of chairperson of the board possibly because of concerns about his close ties with the Guptas and Mr Essa.²⁸⁴
185. On 26 May 2014, after the general election of 2014, Ms Brown was appointed Minister of Public Enterprises. A board reshuffle took place in December 2014. A

²⁸³ Transcript 17 June 2021, p 33-36

²⁸⁴ Transcript 27 May 2021, p 217-227

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

186. Mr Seleke had been proposed by Mr Tony Gupta to Mr Mxolise Dukwana in 2011 (or there about) as the head of his department to replace the incumbent who Mr Tony Gupta wanted Mr Dukwana to dismiss.
187. Mr Shane served as a board member of Transnet from December 2014 to June 2017 and as the chairperson of the Transnet Second Defined Benefit Fund ("TSDBF") over the same period. He succeeded Mr Sharma as chairperson of the Transnet BADC. Like Mr Sharma, Mr Shane had close links with Mr Essa. He was a director of Integrated Capital Management, which was involved in the creation of the Trillian Group under Mr Essa and Mr Eric Wood in late 2015 / early 2016.²⁸⁵ A CIPC company search undertaken in May 2021 reflects that Mr Shane and Mr Essa are both active directors of Antares Capital, with their dates of appointment being 28 October 2014 and 5 June 2016, respectively.²⁸⁶
188. Mr Shane presided over or was linked to three transactions (or sets of transactions) pointing to the possibility of his association or participation in the Gupta enterprise. First, he was a director of Transnet when CNRRSSA entered into a BDSA with BEX (a company linked to the Gupta enterprise) in relation to the relocation of CNR's assembly line to Durban, which resulted in BEX being paid a kick-back of R76 million on 25 September 2015.²⁸⁷ Mr Holden's evidence establishes that R9 million of this was ultimately paid to Integrated Capital Management of which Mr Shane was a director, in November 2015.²⁸⁸ Secondly, in his capacity as the

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

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

²⁸⁷ FOF-09-159, para 204

²⁸⁸ FOF-09-404-405, paras 717-720

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

189. The personnel changes and board appointments during Ms Brown's tenure as Minister saw the departure of individuals in senior management who resisted the alleged corruption and weakening of governance structures at Transnet. This included the resignation of Ms Mathane Makgatho as Head of Group Treasury in November 2014. Ms Makgatho had objected to a number of transactions that were not in the best interests of Transnet, especially the use of Regiments as advisors. She found herself increasingly side-lined from processes that were in her direct remit as Group Treasurer.
190. After prolonged conflict with senior management, particularly Mr Singh, Ms Makgatho began to feel unsafe, suspecting that she was under surveillance and that her car had been tampered with. The impact of this working environment on her health prompted her to resign. A number of Transnet Treasury members who

²⁸⁹ Exhibit BB11, MMAM-214-234

²⁹⁰ FOF-09-091-092, paras 98-102

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

The role of Mr Essa

191. The evidence before the Commission thus reveals that the individuals appointed to key positions at Transnet had a relationship or contact with the Gupta enterprise and Mr Essa in particular.
192. Mr Essa's role and influence appears from the evidence in relation to all the significant transactions analysed later in this report, which indicates that he was influential from October 2011 when Mr Gigaba appointed him as a director of Broadband Infraco ("BBI") (an SOE in the IT sector). This SOE had some part in the questionable decision of Mr Molefe on 20 November 2013 to reverse the award of the IT network services contract to Neotel and the appointment of T-Systems together with BBI in its place.²⁹¹
193. Mr Essa worked closely with two consulting firms, Regiments and Trillian, both of which, with his help, were awarded strategic consulting contracts with Transnet. These contracts put them in a position to wield considerable influence over the financial, strategic and procurement decisions of Transnet. Mr Essa probably played some part in facilitating the illicit Regiments fee arrangements and in concluding the array of BDSAs in relation to the acquisition of locomotives. He interacted extensively with Mr Singh and was apparently instrumental in setting up a meeting for Mr Niven Pillay (of Regiments) with Mr Singh on 3 December 2012, just before Regiments emerged as McKinsey's new SDP.²⁹² Likewise, Mr Essa, on

²⁹¹ Exhibit BB6(a), SC-88-94

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

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

194. Throughout this time, Mr Essa maintained a close relationship with Mr Sharma who was appointed to the Transnet board on 9 December 2010 by Mr Gigaba and was chairperson of the BADC from August 2012 to November 2014. Mr Essa had significant mutual business interests with Mr Sharma during this period. Mr Essa was a director of VR Laser Services (Pty) Ltd and a director and a shareholder in Elgasolve (Pty) Ltd. On 28 February 2013 Mr Sharma declared a 50% shareholding in Elgasolve which owns 74.9% of the shares in VR Laser, an active Transnet vendor at the time when Mr Sharma was on the board. VR Laser had business dealings with Transnet to the value of approximately R200 000 per year since 2006. In 2014, Elgasolve held 80% shares in National Agricultural Development Project (Pty) Ltd ("NADP"). Both Mr Sharma and Mr Essa have been directors of NADP since November 2013 (and were still active directors as at 13 April 2021).²⁹³
195. As outlined earlier, Mr Essa had significant contact with Mr Singh and Mr Gama in the period under investigation. Mr Essa's relationship with Mr Molefe was more limited, but possibly more consequential. As discussed earlier, Mr Essa's close business associate, Mr Sharma nominated Mr Molefe for the position of GCEO. Mr Sharma sat on the selection panel that interviewed Mr Molefe but belatedly recused himself. It is unlikely that the person who became the GCEO of Transnet

²⁹³ Exh BB30

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

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

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

²⁹⁵ Transcript 20 October 2020, p 100, line 20

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

²⁹⁷ Exhibit BB3(b), MSM-531-543

²⁹⁸ Transnet-05-405.89-90

197. Mr Essa also cultivated a relationship with Mr Pita who, as the acting GCFO of Transnet, authorised the corrupt payment of R93 million to Trillian on 2 December 2015;²⁹⁹ the day on which Mr Pita also secured two additional large safety deposit boxes at the facility known as Knox Vaults, where other Gupta associates, including Mr Singh and Mr Moodley, also had boxes. Mr Pita was permanently appointed as GCFO on 1 February 2016. He met with Mr Essa at the Gupta compound around this time to discuss the cession of a substantial Regiments contract to Trillian.³⁰⁰ In or about April 2016, Mr Pita made a presentation on investment projects at the Gupta compound, with Mr Essa and Mr Rajesh (Tony) Gupta being in attendance.³⁰¹ In or about October 2016³⁰² Mr Pita was summoned to a meeting by Mr Essa at the Gupta compound to discuss the failure to pay Trillian.³⁰³ Mr Pita confirmed that he met Mr Essa on unspecified dates at the Gupta compound, at Mr Essa's offices in Melrose Arch and at the Parreirinha restaurant in Turffontein.³⁰⁴

The cash bribes

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

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

²⁹⁹ Transnet-07-1068A

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

³⁰¹ Transnet-07-1046-47, paras 6.20 - 6.26

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

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

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

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

200. Mr Molefe was incriminated by Witness 1 who has worked in close protection since 1989. Prior to giving testimony to the Commission, Witness 1 was subjected to sinister threats of death and extreme violence in messages sent to his phone. He was also followed by vehicles acting suspiciously.
201. Witness 1 performed close protection and driving services for Mr Molefe from February 2011 until August 2014. He testified that he transported Mr Molefe to various meetings with Mr Ajay Gupta and others at different places over a period of time. He provided entries from logbooks that confirmed 15 meetings between July 2011 and September 2012. He said that these meetings were not recorded in Mr Molefe's diary. Witness 1 also testified to seeing Mr Molefe with Mr Ajay Gupta at Bloemfontein airport during the ANC National Conference at Bloemfontein in 2012, and Mr Gigaba at the Gupta compound in Saxonwold on an occasion when he took Mr Molefe there.
202. According to Witness 1, Mr Molefe would take a light brown backpack with him to the meetings at the Gupta compound. Mr Molefe confirmed that he owned such a backpack and pointed it out to the Commission during his testimony. Witness 1 testified that he observed Mr Molefe on some occasions come out of meetings with the Guptas carrying a sports bag containing something and was instructed on one occasion to take the sports bag to Mr Ajay Gupta at Sahara Computers in Midrand.
203. Witness 1 also testified that one day while attending a meeting in the main boardroom of Transnet, Mr Molefe instructed him to fetch his cell phone from his brown backpack in his office. He said that when he did so, he discovered that the backpack was half full with bundles of R200 notes. He called Mr Molefe's personal

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

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

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

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

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

³⁰⁶ Transcript 10 March 2021, p 200

³⁰⁷ Transcript 10 March 2021, p 217-218

³⁰⁸ Transcript 10 March 2021, p 226, line 20

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

207. On this basis it is possible to conclude, with reference to TOR 1.5, that there are reasonable grounds to believe that Mr Molefe may have committed the crime of corruption by accepting a gratification to act in violation of his duties or in order to influence the price under various contracts or the procurement of tenders favouring the Gupta enterprise. There are also reasonable grounds to believe that Mr Molefe was associated with or participated in the affairs of the Gupta enterprise.
208. Witness 3 incriminated Mr Molefe, Mr Singh, Mr Pita and Mr Gigaba.
209. Witness 3 worked first for Mr Gigaba in 2005 and 2006 when Mr Gigaba was Deputy Minister of Home Affairs. He then worked in the private sector. Mr Gigaba's office then head hunted him in 2013 and he was employed by Transnet and seconded to Mr Gigaba for the period of July - December 2013 while Mr Gigaba was Minister of Public Enterprises. He was assigned to Mr Singh in July 2014 until Mr Singh was seconded to Eskom in 2015. Thereafter he worked for Mr Pita.
210. Witness 3 testified that he accompanied Mr Gigaba on six or seven visits to the Gupta compound in Saxonwold. These visits were not recorded in Mr Gigaba's diary or the vehicle logbook. The cross examination of Witness 3 by counsel for Mr Gigaba revealed a contradiction in Witness 3's version about whether the logbooks

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

211. During the visits to the Gupta compound, Witness 3 said that he saw Mr Molefe, Mr Matshela Koko (the CEO of Eskom), Dr Ben Ngubane (the chair of Eskom), Ms Mabaso (the chair of Transnet) and President Zuma. He stated that he did not know Mr Koko and Ms Mabaso when he saw them in 2013 but realised who they were later.³¹⁰
212. Witness 3 also testified to the fact that Mr Gigaba was in the practice of carrying large amounts of cash, and paid for expensive clothing and restaurant bills in cash. He said that one day he opened the boot of the vehicle for Mr Gigaba and witnessed Mr Gigaba take money from a travel bag full of bundles of R200 notes. He suspected this money came from the Guptas. Mr Gigaba denied this.
213. As with Mr Molefe, this evidence (taken with the full range of evidence implicating Mr Gigaba addressed elsewhere in this report) provides reasonable grounds to believe that Mr Gigaba might have been involved in corruption and participated in and was associated with the Gupta enterprise and for a finding in that regard to be made in terms of TOR 1.4 and TOR 1.5, justifying a referral for further investigation in terms of TOR 7.

³⁰⁹ Transcript 8 March 2021, p 23 *et seq*

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

214. Witness 3 testified that after he was assigned to Mr Singh, he transported Mr Singh to the Gupta compound in Saxonwold more than ten times. He said that Mr Singh would appear from the residence carrying a full sports bag. He suspected the bag was full of cash because Mr Singh gave him cash from it.
215. Witness 3 testified that on six or seven different occasions, Witness 3 drove Mr Singh from meetings with the Guptas at Saxonwold to Knox Vaults, a facility in Killarney, Johannesburg providing safety deposit boxes, where Mr Singh would alight from the car with the full sports bag and return with it empty.
216. It is common cause that Mr Singh leased safety deposit boxes at Knox Vaults. Mr Moodley, the director of Albatime, the company that received 5% of the Regiments payments made to the Gupta racketeering enterprise, and Mr Pita, Singh's successor as GCFO at Transnet, both kept safety deposit boxes there too.³¹¹
217. Mr Singh denied that Witness 3 had ever driven him to Knox Vaults. He also initially maintained that he had only four boxes, one for himself and one each for his wife and two small children. His evidence was shown to be demonstrably false on a number of counts, which impacts on his overall credibility. His various falsehoods should be seen as admissions against interest tendered to the Commission while conscious of the incriminating nature of the truth.
218. Firstly, Mr Singh lied about the number and purpose of the boxes.³¹² After his initial explanation in his evidence before the Commission that he had only four boxes for a few family valuables and some cash (which he said implausibly was earned through gambling and moonlighting), Mr Singh was confronted with the Knox Vault

³¹¹ Transcript 1 June 2021, p 206-208

³¹² Transcript 22 April 2021, p 14 -30

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

219. Secondly, in elaboration of his denial that Witness 3 ever took him to Knox Vaults, Mr Singh testified that he used to drive there himself during working hours in the week in his own car rather than his official car. This version is inconsistent with the undisputed evidence that Mr Singh left his own vehicle at Transnet during the week when he used his official car and driver and drove his own car home only on weekends. The lie is given to Mr Singh's denial that Witness 3 drove him to Knox Vaults most cogently by the fact that Witness 3 was the original source of the information about the safety boxes to the Commission. Mr Singh initially stated that Witness 3 probably became aware of Knox Vaults when told about it by investigators at the Commission. He essentially accused the investigators and Witness 3 of engaging in a fraudulent scheme to incriminate him by fabricating testimony to the effect that Witness 3 had driven Mr Singh to Knox Vaults when he had not done so. The relevant investigator filed an affidavit confirming that before interviewing Witness 3 the investigation team was unaware of Knox Vaults. Witness 3 was the source of the information about Mr Singh's safety deposit boxes.
220. Mr Singh conceded that he had a cordial relationship with Witness 3 and could offer no explanation for why Witness 3 would engage in perjury and a damning act of deception to incriminate him. In the premises, on the probabilities Mr Singh did

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

221. Witness 3 testified also about an incident at the Three Rivers Lodge in Vereeniging in July 2014. He said that he drove Mr Singh there to attend a conference. He said that while sitting in the car park he observed two Chinese men walk into the lodge with two suitcases, one maroon the other black. At about 15h00, he received a message from Mr Singh asking him to come inside. There, he said, he encountered Mr Singh, Mr Molefe and the two Chinese men he had seen in the car park. He testified that Mr Singh asked him to take the maroon suitcase to the car. Witness 3 then went back to the vehicle and put the "very heavy" maroon suitcase in the boot. While sitting in the vehicle waiting for Mr Singh, Witness 3 saw Mr Molefe's driver emerge from the lodge with the black suitcase which he put into the boot of Mr Molefe's car.
222. A few days later, Witness 3 found the maroon suitcase (no longer so heavy) in the boot of the car parked in the basement at Transnet. He opened it and saw it contained rolls of R200 notes. He messaged Mr Singh who came to the basement to collect it.
223. Both Mr Singh and Mr Molefe denied that they were given money by the Chinese men at Three Rivers Lodge and accused Witness 3 of perjury and fabrication. They could venture no explanation for why Witness 3 would engage in such deception to falsely incriminate them.³¹³ Given Mr Singh's proven dishonesty, Witness 3's version is likely more credible and a finding may be made on the probabilities that Mr Singh and Mr Molefe were given cash by the two Chinese men seen by Witness 3.

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

224. This evidence, viewed with the conspectus of evidence incriminating Mr Singh in relation to his conduct at Transnet and Eskom during the period of state capture, together with his marked tendency to mislead, be evasive and to give false testimony (commented upon throughout this report), provides clear and convincing grounds for a finding in terms of TOR 1.5 that Mr Singh committed the crime of corruption by accepting a gratification to act in violation of his duties or in order to influence the price under various contracts or the procurement of tenders favouring the Gupta enterprise and participated in the affairs of the enterprise. These findings justify a referral for further investigation as contemplated in TOR 7.
225. After Mr Singh's secondment to Eskom in 2015, Witness 3 was assigned to Mr Pita (previously the GCSCO) who became the acting GCFO when Mr Singh left and was later promoted to GCFO in February 2016. He testified that he drove Mr Pita to the Gupta compound twice; once in the week immediately preceding Mr Pita's appointment as GCFO (possibly in late January 2016). Mr Pita denied the intimation that the visit had anything to do with his subsequent appointment and maintained that it took place after his appointment on 1 February 2016.³¹⁴ This visit, according to Mr Pita, concerned the cession of a contract from Regiments to Trillian, a company controlled by Mr Essa. Mr Pita testified that he did not know at the time that the residence he visited was the Gupta compound.
226. According to Witness 3, Mr Pita was upset when he left the Gupta compound on the second time he drove him there. Witness 3 said that Mr Pita cursed and made a comment about a R600 million payment. Mr Pita confirmed that he was upset

³¹⁴ Transcript 1 June 2021, p 139

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

227. Witness 3 did not see Mr Pita emerge from the Gupta residence with any bags on either visit. However, he testified that he did transport Mr Pita to Knox Vaults six times and witnessed him remove a sports bag from the boot and go into the building. He said he also drove Mr Pita 15 times to the Parreirinha restaurant in Turffontein for meetings with Mr Essa, usually on Friday afternoons where lunch was had and much alcohol consumed.
228. Mr Pita acknowledged that he visited the Gupta compound at the invitation of Mr Essa on three other occasions on which he drove there himself in his own vehicle (at least one of which was prior to the second time Witness 3 drove him there) and that he had met Mr Essa on various occasions at the Gupta compound and elsewhere. During this time (April-September 2016) Mr Essa's company, Trillian, was rendering services to Transnet under different contracts. There were disputes regarding the division of work and payments between Regiments and Trillian.³¹⁶ According to Mr Pita, at one meeting, Mr Tony Gupta became abusive, reminding Mr Pita of his political influence and threatened him with consequences if he did not facilitate certain payments to Trillian.³¹⁷ When allegations of corruption were made against the Guptas in the media during 2016-2017, Mr Pita attended other meetings with Mr Essa and Mr Tony Gupta at the compound, which he described as tense and difficult, and at which a recommendation to terminate Transnet's relationship with Trillian led to heated exchanges and attempts to intimidate Mr Pita.

³¹⁵ Transcript 1 June 2021, p 170

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

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

229. During his testimony, Mr Pita was at pains to put distance between himself, Mr Essa and the Guptas. He sought to portray that he was a victim of abuse whenever he attempted to question their claims for payment. The evidence nonetheless confirms that Mr Pita had ongoing engagements with them at several meetings at the Gupta compound, at Mr Essa's offices and at restaurants in Johannesburg. Mr Pita admitted that he often visited the Parreirinha restaurant in Turffontein and that Witness 3 could have taken him there 15 times. He denied meeting Mr Essa there more than once, saying that Mr Essa as an observant Muslim would usually go to mosque on Friday afternoons. Thus, he contended that Witness 3's evidence that he sat in the restaurant and observed Mr Pita there with Mr Essa frequently was a fabrication.³¹⁸
230. Mr Pita admitted that he and his mother had safety deposit boxes at Knox Vaults, a fact unearthed not by his admission but by the investigators of the Commission in June 2019 when they seized a box leased by him.³¹⁹ He acquired seven large boxes over six months between June 2015 and December 2015 (precisely at the time he took over Mr Singh's functions at Transnet as acting GCFO) incrementally increasing the quantity as he required more space. He paid approximately R30 000 per annum for the lease of the boxes and paid cash for four of them.³²⁰ He cancelled the boxes in 2017 and kept only the one which was discovered by the investigators.
231. Mr Pita admitted that Witness 3 drove him to Knox Vaults, where he deposited items from a bag he carried into the premises. He testified that the boxes were for storing financial records of a restaurant in Killarney Mall (opposite Knox Vaults) co-

³¹⁸ Transcript 1 June 2021, p 183-186

³¹⁹ Transcript 1 June 2021, p 171

³²⁰ Transcript 1 June 2021, p 196

owned by his mother and his cousin. This explanation is doubtful in view of the fact that his mother sold the restaurant in October 2014 and Mr Pita leased the first box in June 2015. Mr Pita explained that the ongoing negotiations around the sale of the restaurant necessitated the boxes.³²¹ That explanation is also implausible when weighed against the fact that he commenced leasing the boxes at Knox Vaults in very close proximity to assuming Mr Singh's position at Transnet after Mr Singh had followed Mr Molefe to Eskom. Allied to this, Mr Pita was forced to contend (implausibly) that it was a mere coincidence that back-to-back GCFOs at Transnet held multiple boxes at Knox Vaults. He said that he was unaware that Mr Singh made use of the same facility³²² (located in close proximity to the Gupta compound which they both visited on numerous occasions).

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

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

³²¹ Transcript 1 June 2021, p 210-217

³²² Transcript 1 June 2021, p 207-222.

³²³ Transcript 1 June 2021, p 176.

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

234. Mr Gama was incriminated by Witness 2 who worked as his driver and close protection officer from May 2012 to December 2017 while he was CEO of TFR and GCEO of Transnet. Witness 2 testified that he took Mr Gama to the Gupta compound four times. These visits were not recorded in Mr Gama's diary. No logbooks were kept because Mr Gama used his private vehicles. Mr Gama denied visiting the Gupta compound four times, claiming that he only did so once.³²⁴
235. Witness 2 testified that on one occasion when he had driven Mr Gama to the Gupta compound and while he was waiting there for Mr Gama he spoke to Mr Jiyane, the Chief Procurement Officer at TFR, who said to him that he (Witness 2) was being exposed to the "shady stuff" they did there.³²⁵ Witness 2 said that on another visit he saw Mr Molefe there.
236. Witness 2 testified that in November 2016, during one of the visits to the Gupta compound, Mr Gama came out of the residence and told him that he should expect someone to bring him a suitcase and instructed him to place it in the boot. A short

³²⁴ Transcript 26 April 2021, p 68

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

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

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

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

³²⁶ Transcript 26 April 2021, p 72-75

³²⁷ Transcript 26 April 2021, p 75-95

in Pretoria earlier in the day, but Mr Gama claimed that he left Pretoria earlier than the records showed Witness 2 had left. He denied that he was at Melrose Arch or in Bryanston. The difficulty with accepting that version is that the Google Maps information shows that Witness 2 was at Melrose Arch on 13 June 2017 from 20h27 to 21h36 and was parked at the home of Mr Gama's girlfriend between 22h37 and 01h57, confirming the version of Witness 2.³²⁸ Mr Gama could offer no convincing account for Witness 2 being parked at the home of his girlfriend at such a late hour. Mr Gama sought to argue that the Google Maps information was unreliable because it seemed to reflect that Witness 2 took more than three hours to drive to Pretoria on the morning in question. However, Mr Gama did not apply for leave to cross-examine Witness 2 on this issue. In any event, whatever the explanation for that apparent anomaly, the Google Maps information unequivocally places Witness 2 at the correct address of Mr Gama's girlfriend that evening.

239. Mr Gama's version does not include an explanation for why Witness 2 would have visited Mr Gama's girlfriend's home that evening without Mr Gama. His version must be rejected as untrue and that of Witness 2 accepted as true. Mr Gama's demonstrably false version should be construed as an admission against interest tendered in the knowledge of the incriminating implications of the truth.
240. The second instance involving the collection of cash from Mr Essa by Witness 2 allegedly occurred a month later on 13 July 2017 when Mr Gama instructed him to drive him to the Melrose Apartments. On arrival, Mr Gama went inside to meet with Mr Essa. Later, Mr Gama, walking with Mr Essa, returned with a plastic bag which he put in the boot and instructed Witness 2 to drive to the residence of a person he knew in Sandhurst. Witness 2 testified that while waiting there he decided to check

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

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

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

242. Mr Gama's version is questionable for a few reasons. Firstly, the minutes of the TNPA meeting make no reference to Mr Gama after his initial presentation, which ended immediately before the lunch adjournment at 12:30.³³⁰ The minutes of the meeting reflect that Mr Gama made no contribution to the discussion after that suggesting that he could have left the meeting earlier than he said.³³¹ Secondly, the spreadsheet relied on by Mr Gama to show that he had an appointment with the chairperson of the board, does not confirm that he attended it and he did not produce any evidence from the chairperson or any other person confirming that the meeting took place.³³² Thirdly, in any event, it is improbable that the meeting at the Carlton Centre could have started at 16:00 if Mr Gama ended his meeting in Parktown at 15:47, as he said. Fourthly, it stands to be accepted that Witness 2 was on duty on the day in question – this in the light of the fact that he dropped Mr

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

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

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

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

Gama off at the address of his girlfriend at 19:31 - 19:36.³³³ It follows from this that just as much as Mr Gama contended that he could not have been in two places at once, the same applied to Witness 2 – he could not simultaneously have been at Melrose Arch (between 15:51 and 17:04, as per the Google Maps information) and on route with Mr Gama between Parktown and the Carlton Centre (between 15:47 and 16:00).

243. In short, Witness 2's Google Maps information again serves to corroborate his version that Mr Gama again collected cash from Mr Essa at Melrose Arch. The lie is given to Mr Gama's denial by the improbability of Witness 2 driving to Melrose Arch (where Mr Essa lived) and Sandhurst,³³⁴ and then to the home of Mr Gama's girlfriend without Mr Gama.
244. Witness 2 referred to two instances (one in September 2015 and the other in April 2017) where he said he discovered stacks of R200 notes in the boot of the vehicle, in both instances amounting to about R100 000. Mr Gama denied that he would leave that amount of money in the boot of his car.
245. Witness 2 also testified to Mr Gama picking up a box which he assumed contained cash from Mr Jiyane at Beaulieu College in Midrand in 2016 and witnessing Mr Gama hand over a packet of cash (R200 notes) to Mr Jiyane on the N17 Highway in 2017.³³⁵ Mr Gama recalled meeting Mr Jiyane at Beaulieu College to give him a

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

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

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

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

246. Witness 2's evidence against Mr Gama must be approached with some caution given the personal friction between them. Mr Gama alleged that Witness 2 had been set up to incriminate him and had been induced with an offer of reinstatement by Transnet, having been dismissed at Mr Gama's instigation for allegedly sprinkling *muti* at the home of Mr Gama's girlfriend.³³⁸
247. Witness 2's evidence is supported by the Google Map travel history and the implausibility of some of Mr Gama's denials. Moreover, Mr Gama did not apply for leave to cross examine Witness 2. He attempted to explain this on the basis that cross examination would have been hampered by the absence of his electronic diary. The Commission (via Transnet) had provided Mr Gama with electronic data making up his diary, but was unable to recreate the diary in a viewable form. Using the data provided, Mr Gama was able to present his version of his whereabouts on 13 June 2017 and 13 July 2017. He then called for the discovery of documentation supporting his case which was provided to him. He could have cross examined Witness 2 based on these documents. In any event, there was no need for him to have his diary to cross examine Witness 2 about whether he was bribed (through reinstatement) to fabricate his version, and whether he was motivated by a grudge to falsely implicate Mr Gama.
248. The allegations of Witness 2 should also be assessed in the light of Mr Gama's alleged participation in the Gupta racketeering enterprise. Mr Gama was centrally involved in the award of contracts to Regiments and Trillian and the making of

³³⁶ Transcript 26 April 2021, p 133

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

³³⁸ Transcript 26 April 2021, p 118-131 and p 140-147

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

249. For the reasons outlined, the evidence relating to the cash bribes gives rise to strong and convincing reasonable grounds that Mr Molefe, Mr Gigaba, Mr Singh, Mr Gama and Mr Jiyane³³⁹ corruptly received property from and participated in the conduct of the affairs of the Gupta enterprise. There is also a reasonable suspicion that Mr Pita may have done so. Appropriate referrals for further investigation in terms of TOR 7 are justifiable.

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

CHAPTER 2 - THE GNS/ABALOZI CONTRACT

The confinement and terms of the contract

250. The discussion of Mr Gama's reinstatement and promotion is not complete without examination of the fate of the GNS contract and the litigation related to it. The contract had its origin in a confinement memorandum which served before the TFR Acquisition Council in late 2007.³⁴⁰ The contract was for security services in relation to cable theft and the prevention of criminal activities against TFR. The tender for the services originally followed an open tender process, which was stopped and substituted with a confinement to GNS on the basis that there was an increase in cable theft as the festive season approached. GNS was recommended on the basis of its "expertise, proven track record and national footprint in providing specialised security solutions". The cross functional sourcing team noted that GNS had a highly technical skilled workforce able to secure the rail network.
251. The contract³⁴¹ signed in early June 2008 made provision for four kinds of services related to security: i) project management; ii) investigations; iii) monitoring and evaluation of personnel posted to safeguard the railway line, infrastructure and freight; and iv) information gathering and analysis.³⁴² GNS was obliged to provide personnel to be based at strategic locations in order to effectively monitor and provide surveillance on security related matters and occurrences. Annexure A to the contract consisted of an "Employee Project Name List" which was intended to include the identity details of all the employees engaged by GNS consisting of: i) a director and co-ordinator for project management; ii) a manager and eight investigators for investigations; iii) a manager and eight researchers for monitoring

³⁴⁰ Transnet-03-509

³⁴¹ Transnet-03-111

³⁴² Transnet-03-137

and evaluation; and iv) a manager, eight handlers and 20 (confidential) sources for information gathering and analysis.³⁴³ Annexure C to the contract set out the project cost (R18 933 120 at the time of signing) which reflects that the entire cost was made up entirely of personnel costs of the identified posts.³⁴⁴

252. Soon after the appointment of GNS a significant extension to the contract was approved on 31 July 2008. The extension of services arose from the discovery of thefts out of containers at the Kaserne Yard. This extension was for depot protection and for the escort and protection of train drivers.³⁴⁵ As a result of this extension of the scope of services, and from that month onwards, GNS rendered a second invoice each month in the amount of R1 781 683.20, and continued to do so each month until the contract was terminated in January 2010. This was followed by a second extension of services on 12 May 2009 which increased the number of personnel for "train crew personnel escort duties" at an additional cost of R976 752.³⁴⁶ Following the second extension of the scope of services, Transnet was issued with three invoices by GNS each month, in the following amounts: i) R1 798 646.40 for the services initially procured; ii) R1 781 683.20 for the additional services procured under the first extension; and iii) R976 752 for the additional services procured under the second extension. The total amount that Transnet paid to GNS for security services over a period of some two years and two months was R95.5 million.

³⁴³ Transnet-03-137-138

³⁴⁴ Transnet-03-141

³⁴⁵ Transnet-03-624

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

Misrepresentations and improprieties in the award of the contract

253. The award of the contract to GNS was attended by significant misrepresentations and irregularities. Most significantly, GNS in fact employed no staff at all, and so could not have deployed its own staff as the resources for which it invoiced Transnet monthly.
254. A disciplinary inquiry that led to the dismissal of Mr Senamela and Mr Khanye (two Transnet employees involved in the procurement) in March 2010 found *inter alia* that GNS had no employees, was not registered for PAYE and wrongfully used subcontractors to perform the work it had undertaken to perform. It concluded also that the open tender process was wrongfully cancelled, the confinement was improper, the price paid to GNS was excessive and the profile provided by GNS in its bid was fraudulent and plagiarised its purported expertise from the profile material of foreign service providers, as evident from its claim to have experience in investigating jury tampering in South Africa where juries are not used.³⁴⁷
255. Towards the end of 2009 or early 2010, Transnet decided to terminate the contract. In negotiations regarding the termination of the contract, GNS was afforded an opportunity to explain its operating model and to disclose the number and identity of the persons it had deployed to Transnet and for whom it had invoiced Transnet monthly for some two years. Representatives of GNS initially refused to provide the information but later explained that GNS did not employ the resources itself and had sub-contracted with third parties to procure staff. This was a breach of the agreement with Transnet.³⁴⁸ GNS effectively outsourced the tender as it had no track record in the security service industry. Transnet requested more details of the

³⁴⁷ Transnet-03-170 *et seq.*

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

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

The litigation

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

³⁴⁹ Transnet-05-405.98

³⁵⁰ Transnet-03-830 *et seq*

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

257. After Mr Gama's reinstatement as CEO of TFR in early 2011, there appears to have been a concerted effort to withdraw the litigation.³⁵²
258. On 13 April 2012, management informed the Risk Committee that there was new information impacting on the case.³⁵³ Some months later, on 27 September 2012, Mr Silinga, Transnet's General Manager, Legal Services received an updated schedule of security reports allegedly provided by GNS/Abalozi stating that "all the months billed are now supported by a report of some form".³⁵⁴ Mr Silinga then instructed Bowman Gilfillan to seek counsel's opinion on the possible impact of this development on the prospects of success in the litigation.³⁵⁵ On 5 December 2012 Adv F Barrie SC provided an opinion which noted that though it seemed that GNS/Abalozi (via its sub-contractors) had rendered some services (mostly unrelated to the original rationale for employing GNS/Abalozi – to deal with cable theft) the value of the services was probably minuscule in relation to the overall remuneration paid to GNS/Abalozi. He advised Transnet to proceed with a claim for *restitutio in integrum*³⁵⁶ and for GNS/Abalozi to be put to the proof of any value provided in a counterclaim for enrichment.³⁵⁷

³⁵¹ Transcript 13 January 2021, p 91-94

³⁵² Transcript 13 January 2021, p 88

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

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

³⁵⁵ Transcript 13 January 2021, p 90

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

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

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

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

³⁵⁸ Transnet-03-678

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

³⁶⁰ Transnet-03-686

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

261. Mr Todd (the attorney handling the litigation on behalf of Transnet) doubted that full value had been given and, accepting the fraudulent and illegal genesis of the contract, favoured continuing the litigation.³⁶² TFR seemed more aligned with the interests of GNS/Abalozi than those of Transnet.
262. In a meeting on 18 March 2013, the GCEO, Mr Molefe, informed Mr Todd that the litigation was sensitive and that he had been receiving calls from a person he did not identify (whom Mr Todd assumed was General Nyanda) asking why Transnet was persisting with the litigation against GNS/Abalozi.³⁶³ At this point Mr Todd, like Adv Barrie SC, realised that pursuing the litigation would be difficult in the absence of any witness willing to advance the interests of Transnet.³⁶⁴

The withdrawal of the litigation

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

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

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

³⁶³ Transcript 13 January 2021, p 106

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

³⁶⁵ Transnet-03-700

blacklisting had not followed due process³⁶⁶ and GNS/Abalozi had been "wrongly accused by Transnet" as the required services had been rendered. He relied on Mr Mtetwa's memorandum of 14 January 2013 showing a decline in cable theft supposedly as a result of GNS/Abalozi's performance.³⁶⁷ Mr Molefe's justification for rescinding the blacklisting is not sustainable. Mr Khanye and Mr Senamela were dismissed on the basis of evidence of collusion and the contract was (in the words of Mr Gama) a "scam and a fraud" that misrepresented the capacity of GNS/Abalozi. Mr Molefe's contention that GNS/Abalozi was wrongly accused is false. There are accordingly reasonable grounds to believe that Mr Molefe breached his obligation to exercise the duty of utmost care to ensure reasonable protection of the assets of the public entity³⁶⁸ and to act with fidelity, honesty, integrity and in the best interests of Transnet in managing its financial affairs.³⁶⁹

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

"Specialised security contract different to traditional guarding contract -

- Performance/outcomes focused, is based on a targeted reduction in theft incidents; length of cable stolen, arrests and convictions.
- Number and type of resources required are not prescribed to the service provider as with guarding contracts."

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

³⁶⁶ Practice Note Number SCM 5 of 2006

³⁶⁷ Transnet-05-405.98-100

³⁶⁸ Section 50(1)(a) of the PFMA

³⁶⁹ Section 50(1)(b) of the PFMA

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

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

³⁷⁰ Transcript 13 January 2021, p 115-116.

³⁷¹ Transcript 13 January 2021, p 112-114.

³⁷² Transcript 13 January 2021, p 118.

³⁷³ SEQ 11/2011.

267. Despite the assurances of TFR management, the Risk Committee at its meeting of 7 November 2013 resolved that the matter should be referred to the Arbitration Foundation of Southern Africa for resolution, preceded by mediation. This was an unusual approach that was not pursued. Instead, on 18 December 2013, a memorandum of instruction was given to Mr Charles Nupen of the law firm Harris Nupen Ralebatsi ("HNR") to conduct an independent investigation to determine whether Transnet received value for money from the security services rendered by GNS/Abalozi to TFR in terms of the contract.
268. HNR delivered its report on 30 April 2014. It pursued three lines of investigation: i) the degree of contractual compliance by GNS/Abalozi; ii) a comparison of GNS/Abalozi costs with those of CPI/ARM; and iii) the impact of services rendered by GNS/Abalozi. Its brief did not extend to consideration of the lawfulness or validity of the GNS/Abalozi contract, the issues of misrepresentation, collusion, non-compliance with the procurement policies, or corruption.
269. HNR concluded that GNS/Abalozi had not rendered value for money when assessed against contractual compliance. However, this was not the fault solely of GNS/Abalozi as TFR security had to "bear some responsibility for its failure to manage the contract effectively." It was unable to proffer an opinion in relation to cost comparison due to the differences in the geographical scope of the services rendered, the levels of investment in the services provided for in the contracts and the differences in the management of the contracts.
270. In relation to impact and effectiveness, HNR concluded differently on the disaggregated services. The contract provided for three distinct services: i) intelligence and investigations undertaken to provide a comprehensive service but primarily directed at curbing national cable theft; ii) security guarding and

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

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

³⁷⁴ Transnet-03-753-754

³⁷⁵ Transnet-03-760

³⁷⁶ Transnet-03-762 *et seq*

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

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

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

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

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

³⁷⁷ Transnet-03-761

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

³⁷⁹ Transnet-03-783

³⁸⁰ Transcript 13 January 2021, p 131

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

275. There were simply no grounds for Transnet to have agreed to pay legal costs of persons who were not parties to the litigation. Given the absence of merits in GNS/Abalozi's case, the misrepresentations it had made to Transnet and the fact that GNS/Abalozi had not proved that it had deployed people as required by the contract, there was no basis for Transnet to agree to pay any costs to GNS/Abalozi, not to speak of punitive costs on the attorney and own client scale. Mr Molefe justified paying the legal costs incurred by the directors and co-founders of GNS on an attorney and own client scale as being the legal costs of persons and entities who had been unfairly blacklisted by Transnet.³⁸³ But they were not party to the litigation under case number 10/43494 and there was no litigation in regard to the blacklisting. In any event, that explanation does not justify punitive costs. It is simply nonsensical and in all probability Mr Molefe knew that.
276. The undertaking by Transnet to pay "all the legal costs incurred by Abalozi, its directors and the co-founders and directors of GNS on an attorney and own client scale" appears to have led GNS/Abalozi to believe that it was entitled to much more than the costs incurred in the litigation. This is evident from certain letters addressed to Transnet by GNS/Abalozi after the settlement agreement was concluded.

³⁸¹ Transnet-03-789

³⁸² Transcript 13 January 2021, p 136

³⁸³ Transnet-05-405.101, para 11

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

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

³⁸⁴ Transnet-03-791

³⁸⁵ Transnet-03-807

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

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

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

³⁸⁶ Transcript 13 January 2021, p 142

³⁸⁷ Transnet-03-801

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

281. Mr Molefe was of the view that the settlement agreement of 4 August 2014 excluded the following; i) loss of revenue from Transnet of R250 million; ii) loss of revenue from SSA of R387 million; iii) loss of revenue from G Fleet of R82 million; and iv) pain and suffering arising from defamation of R700 million. He obviously assumed that Transnet bore liability for these additional claims in the amount of R1.4 billion, despite the fact that some of the claims were spurious and had either been compromised by the settlement or had prescribed. The evidence indicates that part of the inflated claim of R1.4 billion included amounts claimed in the counterclaim under case 10/43494 that had been compromised exclusively by the agreed payment of costs in the deed of settlement.³⁸⁸
282. Moreover, Mr Molefe opted to settle the claims for additional amounts before summons had been issued in respect of them and without properly investigating whether the claims were valid or inflated as they appear to have been.³⁸⁹ He was not suspicious of the fact that GNS/Abalozi within weeks of making the claims was prepared to settle an alleged entitlement to R1.4 billion (including a wholly unrealistic defamation claim of R700 million) for R20 million. He was adamant that the claims were not inflated and that he was entitled to rely on internal legal advice (which he could not substantiate) without applying his independent judgment to the merits of these dubious claims, some of which had been settled and others were

³⁸⁸ Transcript 29 April 2021, p 228

³⁸⁹ Transcript 29 April 2021, p 229

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

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

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

³⁹⁰ Transcript 29 April 2021, p 230-237

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

³⁹² Transnet-05-405.102

³⁹³ Section 50(1)(a) of the PFMA

³⁹⁴ Section 50(1)(b) of the PFMA

³⁹⁵ Section 51(1)(b)(ii) of the PFMA

³⁹⁶ Section 51(1)(b)(iii) of the PFMA

³⁹⁷ Transnet-03-812

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

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

CHAPTER 3 – THE PROCUREMENT OF THE 95 LOCOMOTIVES

The procurement decision

285. The first locomotive transaction of significance was the procurement of 95 locomotives by Transnet from CSR Zhuzhou Electric Locomotive Company Ltd ("CSR") which commenced in 2011. The irregularities which attended this procurement (other than the kickbacks paid) were less serious but provide insight into the evolving relationship between Transnet and CSR, indicating that CSR was improperly favoured as a supplier in various procurements as part of the corruption and pattern of racketeering activity involving the Gupta enterprise.
286. Shortly after the appointment of Mr Molefe as GCEO of Transnet and the reinstatement of Mr Gama as CEO of TFR, on 20 April 2011, the board of Transnet approved the Locomotive Fleet Modernization Plan, subject to the BADC confirming affordability. Mr Gama submitted a memorandum dealing with affordability to the meeting of the BADC held on 3 August 2011. Originally, the TFR locomotive acquisition plan was accommodated in the latter years of the five-year capital programme. However, at its meeting of 3 August 2011 the BADC accepted that due to "action plans to create the much-needed liquidity", TFR could fund the acquisition of 138 locomotives (43 diesel and 95 electric) sooner. An efficient and reliable locomotive fleet was imperative to deliver the volumes indicated in the corporate plan and the then existing fleet was unable to support current volumes. The proposed acquisition of the 138 locomotives over the following two financial years was thus "the first tranche" of the larger rollout of the locomotive fleet plan.³⁹⁹ The BADC accordingly recommended the acquisition of the 138 locomotives.

³⁹⁹ Transnet-Ref-Bundle-08344 et seq

287. The business case⁴⁰⁰ submitted to the Transnet Capital Investment Committee ("CAPIC") sought authority to proceed with the acquisition at an estimated total cost ("ETC") of R3.649 billion. The ETC for the 95 electric locomotives was R2.659 billion of the total ETC. At its meeting of 31 August 2011, the board approved the acquisition at a cost of approximately R3.6 billion, and authorised Transnet to proceed with the acquisition of the 43 diesel locomotives by confinement and 45 electric locomotives in 2012/13 and 50 in 2013/14 by an open bid process.⁴⁰¹
288. On 5 October 2011 the then chairperson of the board, Mr Mkwani, notified the Minister of Finance of "the significant capital expenditure" involved in the acquisition of the 95 locomotives. On 24 October 2011, Mr Mkwani wrote to Mr Gigaba, the Minister of Public Enterprises, requesting approval for the procurement of the 95 locomotives in terms of section 54(2)(d) of the PFMA.⁴⁰² The letter explained that there was insufficient traction power to meet the volume demand as the ageing fleets limited Transnet's ability to support current volumes and thus an efficient and reliable locomotive fleet was imperative to deliver the volumes as indicated in the corporate plan. Mr Mkwani made two other important points. Firstly, Transnet had adopted a procurement strategy aimed at achieving localisation benefits and the weighting criteria focused on the promotion of black economic empowerment through applying weighting for the B-BBEE scorecard rating and allocating additional points for further recognition criteria focusing on black ownership, management control, employment equity, enterprise development and preferential procurement. Transnet aimed to transform "its supplier base by engaging in targeted supplier development initiatives to support localization and

⁴⁰⁰ Transnet-Ref-Bundle-08344 et seq

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

⁴⁰² Transnet-Ref-Bundle-08365

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

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

Inappropriate communications with CSR during the bid

290. Transnet issued the RFP for the acquisition of the 95 electric locomotives on 6 December 2011 and advertised it in the *Business Day* newspaper.⁴⁰⁴ The closing date for collection of the tender documents was 30 January 2012. The notice stated that the RFP documents could be obtained at the Reception Tender Advice Centre in Parktown, Johannesburg and that a R20 000 non-refundable tender charge was payable. The notice stated that preference would be given to B-BBEE companies in terms of Transnet’s B-BBEE policy. Section 2 of the RFP required all respondents to attend a compulsory briefing session (scheduled for 31 January 2012) and that those without a valid RFP document in their possession would not be allowed to attend.⁴⁰⁵ The closing date for the submission of the bids was originally 28 February 2012. On 26 January 2012, Mr Gama approved the extension of the closing date to 17 April 2012.⁴⁰⁶

⁴⁰³ Transnet-Ref-Bundle-08367

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

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

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

291. Section 5 of the RFP noted that Transnet, as a state-owned company, was obliged to transform its supplier base by engaging in targeted SD initiatives to support localisation and industrialisation, while providing meaningful opportunities for black South Africans. Section 5.5 of the RFP set out the socio-economic obligations for foreign bidders. Foreign bidders would assume obligations under the competitive supplier development programme developed by the DPE, to develop local downstream suppliers, leverage local maintenance and manufacturing initiatives, and develop skills and technology transfers.
292. Section 6 of the RFP addressed the B-BBEE requirements under the B-BBEE Act which aims to promote the inclusion of previously disadvantaged South Africans in the economy. The B-BBEE scorecard is derived from the B-BBEE codes that assess a firm's compliance with the B-BBEE Act. Any private company seeking to secure tenders with public entities is usually expected to comply with the targets. The maximum points that can be scored is 118 points with points allocated for: i) ownership (25 points); ii) management (15 points); iii) skills development (20 points); iv) enterprise and supplier development (40 points); and v) socio-economic development (5 points). The RFP recommended bidders to be accredited⁴⁰⁷ by a verification agency accredited by the South African National Accreditation System ("SANAS") or a registered auditor approved by the Independent Regulatory Board of Auditors ("IRBA"), in accordance with the approval granted by the Department of Trade and Industry.
293. Any verification certificate had to reflect the weighted points attained by the entity for each element of the B-BBEE scorecard as well as the overall B-BBEE rating.

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

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

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

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

295. The tender notice informed potential bidders that enquiries regarding the tender had to be directed to Ms Lindiwe Mdletshe of Transnet. On 14 December 2011 Mr She Yongjun of CSR⁴¹⁰ addressed an email to Ms Mdletshe expressing interest in

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

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

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

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

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

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

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

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

⁴¹¹ Transnet-Ref-Bundle-08433

⁴¹² Transnet-Ref-Bundle-08435

⁴¹³ Exh BB(3)(a), MSM-203

⁴¹⁴ Transcript 9 March 2021, p 188

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

299. Ms Mdletshe's assistance to CSR is open to criticism. It is not desirable for a Transnet employee to collect tender documentation on behalf of a bidder. The tender notice did not provide for tender documents to be emailed to potential bidders. CSR may well have faced challenges collecting the RFP, as it did not have an office or a representative in South Africa.⁴¹⁷ But it could and should have used a courier service. This minor transgression was not consequential, but viewed in the context of other events, they point to the possible favouring of CSR.
300. On 19 January 2012, before the compulsory clarification meeting scheduled for 31 January 2012, Mr Wang Pan addressed a letter to Mr Molefe in which he thanked him for the opportunity to take part in the tender, outlined CSR's credentials and capabilities, and expressed an intention "to bid and cooperate with Transnet with our quality and competitive products". The letter went on to explain that CSR intended to participate in the briefing session of 31 January 2012 and that a CSR delegation intended to visit South Africa from 30 January to 3 February 2012. Mr Wang Pan then asked Mr Molefe to "give us chance and support us to arrange": i) a meeting with him to discuss cooperation; ii) a meeting with Transnet's technical group to discuss and optimize the technical specifications; iii) a site visit to a locomotive depot or engineering factory to study existing electric locomotives and investigate the operational conditions; and iv) a visit and discussion with some

⁴¹⁵ Exh BB(3)(a), MSM-203

⁴¹⁶ Transnet-Ref-Bundle-08438

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

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

301. Mr Molefe replied the same day thanking Mr Wang Pan for the letter and his interest shown in the tender. He did not object to CSR's attempt to gain preferential access prior to the closing of the bids, and informed Mr Wang Pan that he had forwarded his request to Mr Gama (at TFR) who would "process and respond to your request."⁴¹⁹
302. The Fundudzi investigation attached significance to these events in its report. It discovered that Mr Wang Pan (for reasons unknown and not established by its investigation) simultaneously forwarded his email of 19 January 2012 to Mr Molefe to Mr Rupesh Bansal, a known Gupta associate in India, who forwarded it to Mr Suchi Bansal at Worlds Window in India and to Oakbay Investments, both companies associated with the Gupta enterprise, indicating possible involvement and influence by individuals linked to the Guptas at this early stage.⁴²⁰
303. There is no evidence that the meetings proposed by Mr Wang Pan ever in fact took place.⁴²¹ Mr Molefe said that he did nothing beyond referring the letter to Mr Gama and thus intimated that he did not attend any meeting with CSR prior to the closure of the bid.⁴²² There is a possibility that others at Transnet may have communicated with the officials of CSR and discussed the tender prior to the closure of the bid.
304. No executive of Transnet is allowed to engage with a bidder during a tender period, prior to the closing date. It was inappropriate for Mr Pita to alert CSR to the bid

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

⁴¹⁹ Exh BB(3)(a), MSM-205

⁴²⁰ Fundudzi Loco Report, paras 5.5.13.13 -16

⁴²¹ Transcript 28 May 2019, p 73, line 21

⁴²² Transcript 9 May 2021, p 192

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

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

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

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

The changing of the evaluation criteria to favour CSR

306. Nine bidders, including CSR, submitted their tenders timeously on 17 April 2012 and complied with the submission requirements. The tender opening process was regular and in line with paragraph 3.3.3 of the PPM (2009).
307. Section 4 of the proposal form of the RFP required respondents "to forward a valid copy of their company's tax clearance certificate with their proposal".⁴²⁵ A tax clearance certificate was thus one of the returnable documents, as was a B-BBEE accreditation certificate. The RFP provided that a failure to furnish all returnable documents could lead to disqualification. On the closing date, CSR was not registered as a company in South Africa and thus could not and did not submit: i) valid South African VAT and company registration certificates; ii) a B-BBEE accreditation certificate; and iii) a valid South African tax clearance certificate. Its bid was accordingly non-responsive and should have been disqualified.
308. On 22 May 2012 Mr Molefe delegated the power to Mr Gama to appoint the Cross Functional Evaluation Team ("CFET"). The CFET's B-BBEE evaluation report reflected that B-BBEE evaluations were conducted on nine bidders as part of the stage 1 evaluations. The RFP required a bidder to attain an overall minimum threshold of 60% in stage 1 to proceed to stage 2. The stage 1 criteria had three components: i) B-BBEE scorecard (10%); ii) FRC (10%); and iii) SD specifics (80%). Only three of the nine bidders scored above the required minimum threshold, namely: Bombardier (70%), Siemens (63%) and SSMM Consortium (62%). CSR was awarded zero for the B-BBEE scorecard resulting in it receiving an overall score of 56% (below the overall minimum threshold of 60%) meaning

⁴²⁵ Transent-Ref-Bundle-08418

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

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

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

⁴²⁶ Exh BB(3)(a), MSM-268

⁴²⁷ Exh BB(3)(a), MSM-269, para 6

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

310. Mr Molefe accepted and approved the recommendation to change the criteria on 8 June 2012.⁴²⁹ The consequent amendment of the RFP to exclude B-BBEE and FRC in stage 1 of the evaluation process and to include these criteria in stage 3 was ratified by the BADC on 21 August 2012 and noted by the Transnet board on 29 August 2012.⁴³⁰ After the removal of the B-BBEE requirement, CSR's score changed from 56% to 69% above the minimum threshold of 60%; and thus it proceeded to stage 2 of the evaluation process. CSR was the only foreign company to benefit from this change.⁴³¹

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

⁴²⁸ Exh BB(3)(a), MSM-269, para 7

⁴²⁹ Exh BB(3)(a), MSM-269

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

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

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

⁴³³ See para 13 of the PPM (2012)

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

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

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

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

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

⁴³⁵ Fundudzi Loco Report, para 5.5.18.9

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

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

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

The award of the contract to CSR

316. Only Siemens, Bombardier and CSR met the technical requirements in stage 2 and proceeded to stage 3. A memorandum dated 8 August 2012 records the results of the stage 3 evaluation process.⁴³⁷ CSR scored the highest score and became the preferred bidder with a score of 76.4%. The weighted targets in stage 3 were: B-BBEE scorecard (20%); SD scorecard (20%); and price (60%). CSR scored 16% on B-BBEE scorecard, 13.8% on SD scorecard and 46.6% on price, giving the total of 76.4%. Siemens scored 54.16% and Bombardier 59.7%. CSR's zero score for B-BBEE in May 2012 thus changed to 80% (16% of the weighted 20%) in July 2012. The competitive scores on B-BBEE and SD were marginally different, but CSR far outscored the other bidders on price, was awarded the tender and signed a Locomotive Supply Agreement ("LSA") with Transnet in late 2012.
317. The RFP required bidders to submit a price including hedging and a price excluding hedging. Only Bombardier did this. Siemens and CSR failed to submit their pricing schedule as required by the RFP. CSR's recommended price for the tender was R2.7 billion (excluding VAT) including hedging and escalation costs. Ms Helen Walsh, the Acting General Manager: Governance, Risk and Compliance at Transnet, and a qualified chartered accountant, testified that between December 2012 and May 2017, R2 686 790 000 was paid to CSR under the LSA for the 95 locomotives. An additional amount of R376 150 600 was paid for VAT, giving a total of R3 062 940 600. Additional payments of R369 928 965 (R328 582 544 plus R45 449 856 VAT) were paid between December 2013 and December 2018.⁴³⁸ The total cost of R3 062 940 600 plus R369 928 965, being R3 432 869 565 was approximately R700 million more than the amount authorised by the Minister as the

⁴³⁷ Fundudzi Loco Report, para 5.5.18.4

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

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

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

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

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

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

⁴³⁹ Transnet-Ref-Bundle, p 8367

⁴⁴⁰ Fundudzi Loco Report, paras 5.5.18.1 - 5

⁴⁴¹ MNS 95 Report, para 2.5

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

321. The report submitted to the Commission by Mr Holden of Shadow World Investigations⁴⁴³ shows that CSR (Hong Kong) and Century General Trading FZE ("CGT") concluded an exclusive agency or consultancy agreement pertaining to "the 95 Project" on 14 April 2012. A 2015 accounting spreadsheet of payments due from CSR to various parties confirms that CGT was due to receive 20% of the total value of the 95 Project, equal to R523.32 million, as a kickback.⁴⁴⁴ An email dated 22 August 2015, discovered in the Gupta-leaks, attached a payment schedule including a calculation of the moneys CSR had agreed to pay to CGT, amongst others.⁴⁴⁵ The calculations show that CGT was to be paid 20% of the contract value of the 95 locomotive contract, which equalled R523.32 million.⁴⁴⁶ On 10 February 2015, CSR and Regiments Asia (Pty) Ltd, a company controlled by Mr Essa, concluded a Business Development Services Agreement ("BDSA") in relation to "the 95 Locomotive Project" indicating that Regiments Asia effectively displaced CGT under the consultancy agreement of 2012.⁴⁴⁷ Thus, Regiments Asia was due

⁴⁴² Section 2(1)(e) of the POCA

⁴⁴³ FOF-06-163

⁴⁴⁴ FOF-06-180, paras 11-12

⁴⁴⁵ FOF-06-193, paras 54-60

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

⁴⁴⁷ FOF-06-427 - Preamble

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

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

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

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

⁴⁴⁸ FOF-06-186, paras 29-31

⁴⁴⁹ FOF-06-196, para 60

⁴⁵⁰ Transcript 28 May 2021, p 151-154

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

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

325. Insofar as the award to CSR was invalid, it constituted conduct in contravention of a law and thus *prima facie* was "unlawful activity" as contemplated in section 1 of POCA. The award of the tender also constitutes "property" as defined in section 1 of POCA. To the extent that Mr Gama and Mr Molefe ought reasonably to have known that CSR had obtained the proceeds of unlawful activity through the illegal award of the tender and engaged in the transaction whereby control of the proceeds by CSR was facilitated, there may be reasonable grounds to believe that Mr Molefe and Mr Gama contravened section 5 of POCA. Likewise, there are reasonable grounds to believe that Mr Molefe and Mr Gama may have contravened section 50(1)(a) read with section 57 of the PFMA in failing to act with fidelity and integrity in the best interests of Transnet.
326. The conduct associated with the conclusion of the BDSA provides reasonable grounds to believe that the offences of corruption, money laundering and racketeering may have been committed by Mr Essa and his associates in the Gupta enterprise and the persons who concluded the BDSA on behalf of CSR.
327. These findings are to the effect that there are reasonable grounds to believe that these employees and board members of Transnet violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.4 and involved corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The likely offences and identified

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

CHAPTER 4 – THE PROCUREMENT OF THE 100 LOCOMOTIVES

The decision to favour CSR above Mitsui

328. In April 2012 the board of Transnet approved the procurement of the acquisition of 1064 locomotives to give effect to the Market Demand Strategy ("the MDS"). Delays in the procurement impacted on the MDS targets and thus it was decided to urgently procure 100 additional locomotives for use on the coal export line (which runs from the Ermelo coalfields to Richards Bay). The acceleration of the acquisition would release older locomotives from the coal line for use for General Freight Business ("GFB").⁴⁵² There was also a need to standardise the electric locomotive fleet on the coal line with dual voltage locomotives. The DC (direct current) voltage network stops at Ermelo and the AC (alternating current) voltage network then goes from Ermelo to Richards Bay. This meant that locomotives had to be changed at Ermelo thus causing operational inefficiency.⁴⁵³
329. Therefore, on 15 October 2013, Mr Francis Callard, a senior engineer at TFR, submitted a business case memorandum for an accelerated procurement of 100 class 19E dual voltage electric locomotives for the coal export line by confinement (on grounds of urgency, standardisation and highly specialised and largely identical goods) to Mitsui African Rail Solutions ("Mitsui") at a cost of R3.871 billion (excluding borrowing costs).⁴⁵⁴ Class 19E locomotives are 311 kilo-newton tractive

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

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

⁴⁵⁴ Annexure FC1, Exh BB4(a), FQC-069

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

330. Mitsui had contracted with Transnet in 2009 and had already supplied 110 class 19E electric locomotives for use on the coal export line, which, according to Mr Callard, were operating optimally. The Mitsui designs were finalised so delivery lead times would be kept to a minimum and set up costs reduced. The restarting of the Mitsui production lines would be quick and there would be maintenance standardisation. Specialised tender specifications take time to prepare and a new supplier would necessitate a new design, design review and type testing which could take up to 15 months before production commenced. Moreover, Transnet crew (drivers and assistants) had already been trained to operate the Mitsui locomotives.⁴⁵⁶ Furthermore, a confinement to a Japanese company would bring forex savings on the 40% foreign component as at the time the JPY/ZAR rate was favourable.⁴⁵⁷
331. The proposal for the confinement to Mitsui was scheduled for discussion at a meeting of the BADC on 21 October 2013. However, the matter was removed from the agenda on grounds of sensitivity arising from a media controversy about previous confinements to Mitsui.⁴⁵⁸

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

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

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

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

332. Between October 2013 and January 2014, Mr Callard worked on the business case and submitted an updated final version (Annexure FC5A) dated 20 January 2014.⁴⁵⁹ On 22 January 2014 Mr Callard received an email from Ms Mdletshe attaching a revised memorandum dated 21 January 2014 (Annexure FC7A) requesting him to make certain changes.⁴⁶⁰ The revised memorandum included significant changes about which he had not been consulted,⁴⁶¹ which resulted in unsuitable locomotives being specified and procured.⁴⁶² These were: i) it was proposed to confine the award to CSR instead of Mitsui; ii) references to "class 19E locomotives or equivalent" had been removed; iii) the discussion of the fact that the class 20E locomotives procured from CSR (in the tender for the 95 locomotives) were not suited for heavy haul on the coal export line was deleted;⁴⁶³ iv) it falsely stated that the locomotives would be "largely identical with those already supplied" when CSR had not supplied any locomotives;⁴⁶⁴ and v) it deleted all reference to the fact that Mitsui had already produced 110 locomotives for the coal export line and the discussion of the advantages that entailed.
333. The analysis in the memorandum of the advantages of standardisation in a confinement to Mitsui was replaced with a discussion about CSR having been adjudicated a preferred bidder in the procurement of the 95 and 1064 locomotives which maximised supplier development and quality, and that another tender process would not be efficient given the urgency. Supplier development had not been a key focus area in the previous Mitsui contracts and Mitsui did not fare well in the most recent tenders and continuation with it by confinement "would pose

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

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

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

⁴⁶² Transcript 17 May 2019, p 69, line 20

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

⁴⁶⁴ Transcript 17 May 2019, p 77-80

unnecessary risk to the organisation.⁴⁶⁵ None of this rationale addressed the key point of standardisation of the coal line fleet (dual voltage locomotives) and interoperability. The CSR locomotive in the 95 procurement was a class 20 locomotive, which is less powerful. The benefits of standardisation offered by a confinement to Mitsui were for all intents and purposes negated.⁴⁶⁶ Furthermore, the estimated price of R34.34 million per locomotive in the original version⁴⁶⁷ was qualified by the addition of "which will be used as a guide as is dependent on forex fluctuation",⁴⁶⁸ adding an uncertainty and variable to the price, in that it allowed for a fluctuation in the price of the imported content of the locomotive.⁴⁶⁹

334. Mr Callard was of the view that the amendments to his memorandum were intended to mislead the board that the confinement to CSR was in order when in fact the requirements for confinement were not met and the locomotives to be procured from CSR were not suited for use on the coal export line.
335. Mr Gama, then the CEO of TFR and the end-user of the procurement, testified that, contrary to the requirements of the Procurement Procedures Manual ("the PPM"), he was not initially informed of the amendment of the memorandum or the replacement of Mitsui by CSR, nor asked to give input on the revised business case or to motivate the change on behalf of TFR.⁴⁷⁰ He said that he learnt of the change for the first time shortly before the BADC meeting of 24 January 2014, "was not party to the unilateral amendment" and did not sign the altered memorandum

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

⁴⁶⁶ Transcript 17 May 2019, p 67, line 15

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

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

⁴⁶⁹ Transcript 17 May 2019, p 97, line 20

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

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

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

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

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

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

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

interoperable. He also noted that while CSR could make additional locomotives in China quickly to mitigate against MDS volume loss, this would be counter to Transnet's localisation strategy.⁴⁷⁴ The import of Mr Gama's email is that he had grasped the implications of the concerns raised by Mr Callard and was conveying them to Mr Singh in anticipation of the upcoming BADC and board meetings scheduled for the next day. Mr Gama testified that he agreed with Mr Callard and did not support the confinement to CSR. That, he said, was why he ultimately did not sign the memorandum presented to the BADC and the board.⁴⁷⁵ The next morning, 24 January 2014, at 07:02, Mr Singh replied to Mr Gama in an email⁴⁷⁶ suggesting that they discuss it later that day. Prior to that, at 07:00, Mr Singh had forwarded Mr Gama's email to Mr Molefe in an email stating: "FYI".⁴⁷⁷

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

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

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

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

⁴⁷⁷ Transcript 17 May 2019, p 125

⁴⁷⁸ Transcript 28 May 2021, p 183, line 5

⁴⁷⁹ Transcript 28 May 2021, p 177

⁴⁸⁰ Transcript 11 May 2021, p 338

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

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

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

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

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

The flawed rationale for the confinement

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

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

⁴⁸⁴ Transcript 17 May 2019, p 146-154

⁴⁸⁵ Transcript 28 May 2019, p 144-146

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

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

⁴⁸⁸ Transcript 28 May 2021, p 202

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

342. Mr Gama testified that Mr Molefe later informed him that Mr Sharma, in particular, was strongly opposed to a confinement to Mitsui, and the BADC supported him.⁴⁸⁹ The minutes⁴⁹⁰ make no reference to any of the matters raised by Mr Callard. Mr Molefe confirmed in his evidence that despite the concerns being known to him, Mr Singh and Mr Jiyane, they were not raised or discussed.⁴⁹¹ As mentioned, Mr Gama raised no objection.

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

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

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

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

⁴⁹¹ Transcript 9 March 2021, p 211, line 17

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

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

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

345. The rationale justifying the decision not to confine the procurement to Mitsui but to favour CSR therefore does not stand up to scrutiny. Management misled the BADC and the board on 24 January 2014 with spurious motivations and false or misleading statements. The conduct was a breach of fiduciary duties on the part of Mr Molefe, Mr Singh, Mr Gama and Mr Jiyane and a contravention of sections 50 and 51 of the PFMA. Their conduct was part of an evident pattern to favour CSR by means of an unjustifiable confinement of the procurement of the 100 locomotives to it.

346. However, Mr Molefe may have had legitimate concerns about the performance of the Mitsui locomotives. Mr Frikkie Harris, Program Manager (Capital Programs) wrote to Mitsui on 19 February 2013 (some months before the procurement of the 100 locomotives) notifying it of certain defects in some of the components of the Mitsui locomotives.⁴⁹⁷ Mr Molefe testified that the "failings" had been brought to his attention prior to his decision to change the confinement to CSR.⁴⁹⁸ No evidence was presented on the precise nature of the defects and whether they provided good cause not to procure further from Mitsui. Additional correspondence

⁴⁹⁴ Transnet-07-250.169, para 77.1; and Annexure FC 15, Exh BB4(a), FQC-269

⁴⁹⁵ Transnet-Ref-Bundle-08663

⁴⁹⁶ See Table A in the MNS 100 Report, Transnet-Ref-Bundle-08581

⁴⁹⁷ Transnet-05-114.9

⁴⁹⁸ Transcript 10 March 2021, p 8, line 10-20

submitted by Mr Molefe reveals that during 2014-2015 the traction motor nose bracket bolts of the Mitsui Class 19E locomotives failed during in-service operations and rendered the locomotives unsafe and at risk of derailment.⁴⁹⁹ Other correspondence in late 2015 indicates that various failures had led to "sub-optimal performance" of the locomotive fleet on the coal line with the result that the plan to cascade some of the locomotives from the coal line to general freight business ("GFB") could not be fully implemented.⁵⁰⁰ These defects arose after the tender of the 100 locomotives had been awarded to CSR and Mr Molefe would not have been aware of them at the time of the award.

347. It thus seems that the decision not to procure further locomotives from Mitsui, although motivated by suspect intentions, may have been a good idea.⁵⁰¹ However, that does not avoid the other criticisms of confining the procurement to CSR. If Mitsui was an unsuitable OEM, then the standardisation rationale and benefits of confinement did not apply. If no good grounds for confinement existed, Transnet should have resorted to an open tender. Instead, key individuals resorted to a confinement with the aim of inappropriately favouring CSR, most likely with the intention to favour the Gupta enterprise.

348. In a letter dated 25 February 2014 addressed by Mr Molefe to Mr Wang Pan of CSR, Mr Molefe reiterated the need for expeditious delivery as a priority commencing latest September 2014 with completion by March 2015. He also noted

⁴⁹⁹ Transnet-05-114.6

⁵⁰⁰ Transnet-05-114.4

⁵⁰¹ Mr Singh testified to other difficulties in the relationship with Mitsui. There were delays in commissioning and contractual disputes about late delivery which impacted on volumes – Transcript 28 May 2021, p 205-211

that supplier development was a non-negotiable suspensive condition and had to meet or exceed 70% as measured in the SD value summary.⁵⁰²

349. The Locomotive Supply Agreement ("the LSA") for the 100 locomotives was concluded with CSR on 17 March 2014, the same day as the contracts for the 1064 locomotives. The price per locomotive was R43.8 million. The payment terms stipulated that 30% of the total contract price was payable at the effective date (signature) of the contract, an additional 30% at the date of the design review finalisation and 37% on the date of issue of an acceptance certificate - leaving 3% as retentions for the post delivery period. That meant 60% of the price would be paid before the delivery of any locomotive.
350. The CSR proposal and the contract did not comply with the urgent delivery schedule required by the RFP, which stated that expeditious delivery for acceptance testing was a priority commencing latest September 2014 with completion by March 2015. The initial confinement rationale of October 2013 justified confinement on the basis that the 100 locomotives needed to be delivered within 12 months, i.e. during 2014. CSR initially undertook to deliver 40 locomotives manufactured in China between February 2015 and June 2015 and to deliver the balance of 60 manufactured in South Africa between June and September 2015. In terms of the LSA, the parties agreed to deliver the locomotives between June 2015 and November 2015.⁵⁰³ This delivery schedule did not give effect to the urgent needs of the coal line and the entire rationale of the urgent confinement two years earlier in 2013.⁵⁰⁴

⁵⁰² Transnet-Ref-Bundle-08663

⁵⁰³ Fundudzi Loco Report, paras 5.8.20 - 5.8.28

⁵⁰⁴ Exh BB4(a), FOC-016, paras 68-73

351. In June 2014, it became apparent that the procurement of the 95 locomotives from CSR had been delayed and this had a knock-on negative effect on the delivery of the 100 class 21E's by CSR. The rationale of the confinement of the 100 locomotives to CSR to protect the MDS volumes by the accelerated acquisition of the 100 locomotives was thus thwarted. Mr Gama accordingly addressed a memorandum⁵⁰⁵ to Mr Molefe recommending that approval be granted to negotiate delivery with CSR on the premise of 100% imported content for the 100 class 21E locomotives, in other words that the locomotives be fully assembled in China. This proposal does not appear to have been approved.
352. It is not clear when exactly the class 21E locomotives were in fact delivered, but it can be accepted that the delays negated the entire raison d'etre of the project. The confinement to CSR was flawed in concept and execution. The motivation to use CSR based on its supposed production capacity in China at a time when it had yet to deliver a working locomotive to Transnet did not meet the rationale for and the requirements of procurement by confinement. CSR offered various excuses for the delay.⁵⁰⁶ The essential point, though, is that the delays undermined the rationale for the confinement.
353. CSR also did not comply with the 70% (mandatory and non-negotiable) SD requirement.⁵⁰⁷ Regulation 9(1) of the PPPFA Regulations of 2011 makes it mandatory for organs of state, including Transnet, when issuing RFPs for designated sectors to make it a condition for bidders to comply with minimum local production and content requirements for designated sectors. National Treasury Instruction Note of 16 July 2012 prescribed the minimum local production content

⁵⁰⁵ Annexure FC 20, Exh BB4(a), FQC-300

⁵⁰⁶ SEQ 43/2019, para 109 *et seq*

⁵⁰⁷ MNS 100 Report, Transnet-Ref-Bundle-08576, para 1.4.4.

for the procurement of electric locomotives as 60%. Contrary to these provisions, the RFP for the 100 electric locomotives did not state that CSR was required to comply with the 60% local production and content threshold.

354. The local content information sheet submitted by CSR⁵⁰⁸ indicates that the local content percentage was 15%. The total imported content of the 100 locomotives was valued at R3.723 billion, while the localised content was valued at R657 million, giving a total value of R4.370 billion of which only R657 million represented localised value. Although 60 of the locomotives were manufactured in South Africa, it appears from the local content information sheet that most of the components of the locomotives (car body, bogie, coupling equipment, suspension, AC traction motors, electric systems, facilities and the design) were imported and assembled here. The failure to meet the localisation production and content was an irregularity, confirming again that CSR was inappropriately favoured and accommodated.⁵⁰⁹

The excessive and unsecured advance payments

355. The upfront payment of 60% of the purchase price in respect of the 100 locomotives was unusual and not in line with past practice. This resulted in R1.32 billion being paid to CSR by Transnet before a single locomotive was delivered, suggesting again that CSR was unduly favoured and that Mr Molefe and the other officials involved in concluding this contract acted in breach of their fiduciary duties and in contravention of section 50 and 51 of the PFMA.⁵¹⁰ The norm in paying deposits was in the region of 10% with the balance being paid on delivery

⁵⁰⁸ Transnet-Ref-Bundle-08666

⁵⁰⁹ CSR without much in the way of substantiation maintained that it complied with the SD requirement – SEQ 43/2019, para 117

⁵¹⁰ Transcript 17 May 2019, p 185 *et seq*; and Exh BB4(a), FOC-014, paras 60-63

of the locomotives. By comparison, the upfront payment to Mitsui for the earlier procurement of 110 19E locomotives was 7.8% and the advance payment to CSR for the 95 locomotives was 10%.⁵¹¹

356. Moreover, CSR did not furnish requisite security in respect of the advance payments. Clause 1.2.2 (b) of schedule 1 to the LSA concluded between Transnet and CSR on 17 March 2014 provided that no milestone payment would be due without an advance payment guarantee ("APG") as a form of security against the default of CSR of its obligations under the contract. Correspondence in October 2014⁵¹² confirms that Mr Jiyane authorised advance payments to CSR without an APG. Transnet paid two advance payments of 30% of the contract price in two instalments of R1 505 billion in March 2014 and September - October 2014.⁵¹³ These payments (or at least one of them) were made without APGs being in place. Further investigation is required to determine if any official of Transnet acted in contravention of sections 50(1)(a) and 50(1)(b) of the PFMA and committed an offence in terms of section 86(2) of the PFMA by wilfully or in a grossly negligent way failing to comply with these provisions.

The increase in the price of the 100 locomotives

357. On 24 January 2014 the board approved the procurement of the 100 locomotives from CSR at an ETC of R3.871 billion. On 17 March 2014 Transnet signed the LSA with CSR for the supply of the 100 locomotives at a price of R4.840 billion (R48.4 million per locomotive) - an increase of R969 million. When asked during his testimony whether it would not have been more appropriate to have sought the approval of the board for the approximately R1 billion (R969 million) increase

⁵¹¹ Exh BB4(a), FOC-014, para 61; and Transcript 17 May 2019, p 188, line 15 et seq

⁵¹² Transnet-Ref-Bundle-08686

⁵¹³ Exh BB13(a), HJW-0006, paras 22-23; and Annexures HJW 4, HJW 4(a) and HJW 4(b)

before signing the LSA, Mr Singh argued that the board on 24 January 2014 had delegated the power to Mr Molefe as GCEO to negotiate and conclude the procurement.⁵¹⁴ The prudence of such an approach in a transaction of this magnitude is questionable. It minimised the board's oversight function in relation to major expenditure (later shown to be tainted by substantial corruption). The board was presented with a fait accompli in respect of which it had little option but to ratify.⁵¹⁵

358. The negotiations around price were conducted during February-March 2014 at the offices of the law firm Webber Wentzel. The negotiations were co-chaired by Mr Singh and Mr Jiyane who reported to the Locomotive Supply Committee. Mr Yusuf Laher was part of the financial support team.⁵¹⁶ The memorandum that served before the board on 24 January 2014, priced the 100 locomotives in JPY rather than USD.⁵¹⁷ This was anomalous in that CSR was a Chinese company and usually priced in USD. The final cash flow was priced in USD.⁵¹⁸ The JPY pricing was probably the result of the original proposal involving Mitsui, a Japanese company.

359. During the price negotiations Mr Singh requested Mr Laher to prepare a "reasonability calculation" of what the expected price would be for the 20E locomotives. The calculation⁵¹⁹ commences with a base price of R28 860 000 per locomotive. This price represented a 50/50 local and foreign content = ZAR14 430 000 plus USD 1 950 000 x 7.4 (ZAR/USD exchange rate). The

⁵¹⁴ Transcript 28 May 2021, p 231-232

⁵¹⁵ Transcript 28 May 2021, p 232-233

⁵¹⁶ Exh BB4(f).2, YL-Resp-004-009, paras 19-42; and Transcript 21 October 2020, p 65 *et seq*

⁵¹⁷ The base price per locomotive was stated to be R34.34 million (2013-14) being JPY385 million at ZAR/JPY 0.09823

⁵¹⁸ Annexure FC17, Exh BB4(a), FQC-276-277

⁵¹⁹ Annexure YL 24, Exh BB4(f).2, YL-Resp-045

applicable exchange rate (7.4) was that applied by CSR.⁵²⁰ Mr Laher added an additional R4 416 750 to the base price as a backward looking forex adjustment. It is not clear what exchange rate he used for that purpose. He then added various amounts for escalations, hedging costs, set up costs, variations (to change the 20E locomotive to a 21E locomotive) and options. He arrived at a price of R41 million per locomotive including options (but not contingencies). CSR pushed for a price of R48 million per locomotive. Mr Laher thought that CSR incorrectly used a high exchange rate⁵²¹ - ZAR/USD rate of 10.9 (and not 7.4) - which increased the USD portion of the base price from R14 430 000 to R21 255 000. Mr Laher's calculation (at 7.4) increased the USD portion of the base price from R14 430 000 to R18 846 750 (R14 430 000 plus R4 416 750). The rate used by CSR added R2.4 million per locomotive (R241 million to the total base price). According to Mr Laher, Mr Singh was not concerned about this and told him it was the overall price and the final result of the negotiation that was important.

360. Mr Singh then involved Mr Laher in the preparation of a memorandum for Mr Molefe to present to the board in May 2014 explaining the increase in the price. He was told to prepare a (walk forward) calculation from the business case price (R3.87 billion) to the final contracted pricing (R4.840 billion). Mr Singh instructed Mr Laher to take the price per locomotive in the business case of R34 million per locomotive and to add and subtract any elements that impacted that price in order to end up at the final contract price of R48.4 million per locomotive.

361. The assumptions used in the business case involved a ZAR/JPY rate of 0.09823 and the base price in the business case was based upon the price obtained from

⁵²⁰ It is not clear why that rate was used. It seems to be the prevailing rate at the date of the bid for the 95 class 20E electric locomotives.

⁵²¹ Annexure YL 24, Exh BB4(f).2, YL-Resp-045

Mitsui in May 2013. The price was then escalated for the JPY movement from the date of the submission of the business case to the board (24 January 2014) to the date of contracting (17 March 2014) in order to show the impact of the change in the ZAR/JPY rate in the business case price. Mr Laher performed the calculation accordingly. As for escalations, Mr Singh directed Mr Laher to escalate the price (for inflation) not from the date of the business case submission to the board (24 January 2014) but from May 2013 because the base price was supposedly based on information at that date. He thus provided for backward looking escalations for the period May 2013 to March 2014 – 10 months instead of two months (January 2014 - March 2014).

362. Mr Singh then provided the guidance for the additional adjustments to price which are reflected in the memorandum submitted by Mr Molefe to the board dated 23 May 2014 explaining the price increase.⁵²² The memorandum (including the price of R48.4 million per locomotive) was recommended and signed by Mr Molefe, Mr Singh and Mr Gama. On the evidence heard by the Commission, these three officials all had connections with the Gupta enterprise and received substantial cash from it.
363. The purpose of Mr Molefe's memorandum of 23 May 2014 was to request the board to approve the increase from R3.871 billion to R4.840 billion. He justified the increase of R969 million as attributable to: i) an update of the business case for economic impacts (backward looking forex adjustments and escalations) of R495 million; ii) scope change, being additional costs for the variations for higher locomotive specifications to modify the class 20E locomotives to class 21E, in the amount of R347 million; iii) risk mitigation (forward looking forex, escalations and

⁵²² Annexure YL 25, Exh BB4(f).2, YL-Resp-047

contingencies) in the amount of R373 million; less iv) a negotiated discount of R247 million. He maintained that the final price was comparable to the Mitsui proposal except for the additional R347 million needed to convert the class 20E locomotives to class 21E. This cost would not have been incurred had Transnet procured the class 19E locomotives from Mitsui. However, Transnet had negotiated a discount of R247 million,⁵²³ which mitigated the cost of the modifications. There was still an additional net cost of R100 million incurred for the adaptation.⁵²⁴

364. Paragraph 22 of Mr Molefe's memorandum of 23 May 2014 included Table 1 setting out the figures explaining the increase in cost per locomotive.⁵²⁵ It is best represented as follows:

Base price per locomotive (excl hedging and escalations)	R34.34 million
Item A: impact of exchange rate to contract date (backward looking)	R3.69 million
Item B: impact of inflation to contract date (backward looking)	R1.26 million
Item C: additional cost for modification of the locomotives	R3.47 million
Item D: cost for fix escalations (forward looking)	R2.63 million
Item E: foreign exchange hedging (forward looking)	R1.08 million

⁵²³ Annexure YL 25, Exh BB4(f).2, YL-Resp-049, para 22(g)

⁵²⁴ Annexure YL 25, Exh BB4(f).2, YL-Resp-055, para 48

⁵²⁵ See Table A in the MNS 100 Report, Transnet-Ref-Bundle-8581

Item F: discount negotiated	- R2.47 million
Final contracted price per locomotive	R44 million
Item G: 10% contingencies (capital spares, variations and options)	R4.4 million
Proposed ETC per locomotive	R48,4 million
Proposed ETC for 100 locomotives	R4,840 billion
Business case	R3,870 billion
Increase:	R969.28 million

365. Mr Molefe explained that the submission prepared in January 2014 for the board was based on economic forecasts obtained in May 2013.⁵²⁶ There is no explanation for why the original figures had not been updated to January 2014 when the board approved the total price of R3.871 billion. If there were good reasons for relying on historical figures from May 2013 they ought to have been disclosed. There was some degree of disclosure in the memorandum of 21 January 2014 where it was cryptically stated: "The 100 electric locomotives are summarised below and are based on previous experience with the class 19E contract".⁵²⁷ The figures used there were those proposed by Mitsui in May 2013.

366. In the memorandum of 23 May 2014 Mr Molefe addressed each item of price increase in Table 1 and provided elucidation of the reasons for the adjustment. Mr Alistair Chabi, the actuary employed by MNS, analysed those reasons, interrogated

⁵²⁶ Annexure YL 25, Exh BB4(f).2, YL-Resp-050, para 23

⁵²⁷ Annexure YL 23, Exh BB4(f).2, YL-Resp-039

the figures and concluded that an increase in the amount of R969.28 million was unjustifiable as some of the cost items were either incorrect or inflated.⁵²⁸

367. During his evidence, Mr Molefe, without much in the way of substantiation, dismissed Mr Chabi's conclusions as "rubbish". He essentially maintained that risk specialists would differ in making valuations as estimation was an art not a science.⁵²⁹ Whatever the merit of that observation, Mr Chabi's analysis certainly reveals that some of the assumptions deployed by Mr Molefe unnecessarily inflated the price. Moreover, it is important to emphasise that despite being directed on 12 November 2020 in terms of Regulation 10(6) of the Regulations of the Commission to deal with Mr Chabi's opinion that the increase in ETC was unjustified, Mr Molefe did not deal with the issue in his affidavit filed with the Commission or in his testimony.⁵³⁰
368. Mr Chabi firstly maintained that the base price of R34.34 million per locomotive in Table 1 of Mr Molefe's memorandum was incorrect. In its proposal addressed to Mr Molefe on 28 February 2014, CSR reflected its base price as R28.86 million per locomotive.⁵³¹ The proposal letter included a table setting out the walk forward from R28.86 million to R49 158 426 taking account of the forex, escalation and modification adjustments to the base price. Thus, the base price per locomotive used by CSR (and Mr Laher) was R28.86 million. Mr Chabi accordingly accepted R28.86 million as the correct starting point and adjusted it (the April 2012 base price) for inflation and foreign currency movements from April 2012 to May 2013,

⁵²⁸ Transcript 4 December 2019, p 83-102; and MNS 100 Report, Transnet-Ref-Bundle-8580 et seq

⁵²⁹ Transcript 9 March 2021, p 225-227

⁵³⁰ Transcript 9 March 2021, p 229-230 - Mr Molefe deals with the procurement of the 100 locomotives in paras 40-50 of his affidavit at Transnet-05-035 without addressing Mr Chabi's adverse findings against him.

⁵³¹ Transnet-Ref-Bundle-8706

and arrived at a revised base price of R30.95 million.⁵³² This calculation reduced the price per locomotive by R3.39 million and the price for the entire 100 procurement by R339 million.⁵³³

369. Mr Singh contended in his testimony⁵³⁴ that Mr Chabi's calculation was fundamentally flawed mainly because he used the "incorrect base price" of R28.86 million per locomotive, which was the CSR 95 locomotive price. This, he said, was untenable for commercial, technical and logical reasons because the 100 locomotives procured were 26 tons per axle and thus distinct from the 95 Class 20E already procured which are 22 tons per axle. The correct base price per locomotive, he argued, was that provided for in Table 1 of Mr Molefe's memorandum of 23 May 2014, namely R34.34 million per locomotive which was the amount quoted by Mitsui in its proposal of 13 May 2013.⁵³⁵ Mr Singh's contention is not sustainable for a few reasons.⁵³⁶ First, and perhaps most importantly, and as just mentioned, CSR in its proposal submitted to Mr Molefe in February 2014 based its walk forward price on a base price of R28.86 million per locomotive.⁵³⁷ Table 1 made an allowance for a modification cost of R3.47 million per locomotive or R347 million for the entire 100 locomotives. To start off with the price quoted by Mitsui for locomotives that required no modification and then to make allowance for an additional R3.47 million per locomotive for modification is double dipping. Mr Singh, as a chartered accountant, would know this.

⁵³² MNS 100 Report, Transnet-Ref-Bundle-8583, para 2.3.3.1

⁵³³ The figure of R30.95 million per locomotive is made up of R28.86 million – the April 2012 base price, plus FX adjustment of R1.2 million plus inflation (April 2012 – May 2013) of R0.89 million.

⁵³⁴ Transcript 31 May 2021, p 136; and Transnet-05-1467, paras 161-169

⁵³⁵ Transcript 31 May 2021, p 136; and Transnet-05-1468, para 165

⁵³⁶ See Transnet-05-1790, paras 12-19

⁵³⁷ Transnet-Ref-Bundle-08706

370. The inflation of the base price, as said, added R339 million to the overall price, which again possibly advanced the money laundering agenda in that it might have provided excess funds to finance the kickbacks to the Gupta enterprise.
371. Mr Molefe justified Item A in Table 1, the backward looking forex adjustment of R3.69 million per locomotive, on the ground that the ZAR had depreciated by 10.74% against the Japanese Yen ("the JPY"). While he accepted that allowance had to be made for foreign exchange movements between May 2013 and March 2014, Mr Chabi maintained that Mr Molefe's figure was incorrect. Exchange rates obtained from the SARB website show a 3.51% (and not 10.74%) depreciation of the ZAR against the JPY from 0.1015 to 0.1051 per JPY. Secondly, the requirement of the NT Instruction Note that there be 60% local content / 40% foreign content (CSR's bid irregularly provided a 15/85 split), taken with the correct ZAR/JPY rate, meant that R0.43 million per locomotive was the correct adjustment. Mr Molefe's Item A figure of R3.69 million thus overstated the cost by R3.26 million per locomotive and the ETC by R326 million. The figure, of course, would be different if the local/foreign content of 15/85, as was in fact the case, was taken into account. However, the figure of 15/85 local/foreign content contractually concluded was irregular in terms of the NT Instruction Note.
372. Mr Singh challenged Mr Chabi's methods and use of the JPY in his forex calculations in relation to Item A. He contended that the exchange rate used by Mr Chabi to adjust the base price was flawed in that he used the JPY to adjust the CSR price that was based in USD when there was no logical or commercial reason to do so.⁵³⁸ Mr Singh's complaint about the use of the JPY was disingenuous considering that in the memorandum of 23 May 2014 he attributed the change in

⁵³⁸ Transnet-05-1468, paras 166-169

the expected price of the locomotives to the depreciation of the ZAR against the JPY. Mr Chabi did not choose the JPY as the basis of his calculations. Mr Singh did. Mr Singh also failed to offer clarity about which was the appropriate currency to use. In relation to Item A of Table 1, Mr Singh and Mr Molefe stated:

"Foreign exchange rates: The rand has depreciated by 10.74% against the Japanese Yen. This has impacted the expected price of the locomotive as per the business case and ultimately the Estimated Total Cost (ETC) as approved by the Board by approximately 10.74%. Consequently, the additional 10.7% per A in Table 1 above is reasonable."⁵³⁹

373. Mr Chabi was concerned about the reference to the ZAR/JPY impact in the memorandum because CSR had referred to the ZAR/USD impact. For that reason he looked at two scenarios: ZAR/JPY and ZAR/USD. Using the ZAR/USD rate the total price would have been R4.478 billion, still R362 million less than the final price submitted to the board.⁵⁴⁰

374. Mr Chabi was of the opinion that the backward looking impact of inflation (Item B of Table 1) was understated by Mr Molefe. The base line price (as adjusted) of R30.95 million per locomotive made no provision for inflation between May 2013 and March 2014. Mr Molefe recorded that local producer price index in South Africa increased on average by 6.4% for the period thus affecting the locally sourced scope of the project. Foreign equivalent indices increased on average by about 1.3% to 2.5%. Having regard to increases to the cost of labour and steel, Mr Molefe provided for a net 3.7% increase of the backward looking ten-month period. Mr Chabi relied on the producer price index provided by Statistics South Africa of 7.42% and the OECD rate for Japan of 1.01% and applied a local/foreign ratio of

⁵³⁹ Paragraph 24(a) of the memorandum of 23 May 2015

⁵⁴⁰ Exh BB8(b).2, AOC-100-020, para 5.34; and Transnet-05-1791, para 25; see also Transnet 05-2418, para 220

60/40 to reach a weighted average of 4.86% ((60% of 7.42%) = 4.5% + (40% of 1,01%) = 0.4%). A weighted average of 4.86% backward looking inflation computed at a cost of R1.5 million per locomotive rather than R1.26 million as provided by Mr Molefe under Item B, thus increased the adjusted base price by an additional R240 000 per locomotive.

375. Mr Chabi did not take issue with the computation of the modification cost for upgrading the locomotives from class 20E to class 21E (Item C) and accepted the figure of R3.47 million per locomotive (adding R347 million to the total ETC) in Table 1.
376. Mr Chabi believed that Item D (forward looking escalation/inflation impact) in Table 1 was overstated by R0.71 million per locomotive. In the memorandum Mr Molefe justified the increase of R2.63 million per locomotive as follows. Cash flow certainty is of paramount importance to Transnet for the purposes of long term planning and the managing of its key financial metrics such as gearing and the cash interest cover. Credit agencies and bondholders support Transnet fixing its escalation exposure and conservative risk appetites. After considering various inflationary trends, Mr Molefe accepted that a CPI of 6% (which excluded a premium for risk) escalated for 18 months resulted in a 9% increase which justified a 7.7% adjustment for item D. He believed that the high level of local content (60%) made local indices more applicable for the cost escalations going forward. In reaching this conclusion, Mr Molefe relied on the methodology and techniques proposed by Regiments.⁵⁴¹
377. There are three factors that impact on Mr Molefe's calculation of item D that contribute to it being an overstatement. Firstly, an escalation rate of 6% should not

⁵⁴¹ Annexure YL 25, Exh BB4(f).2, YL-Resp-050, paras 51-65

be applied to the foreign component which was subject to Japanese economic conditions since it was quoted in JPY. Secondly, the local content was not 60% but was in fact irregularly quoted at 15%. Thirdly, the cost should not have been escalated over 18 months, but should have taken account of the staggered delivery schedule. The memorandum of 23 May 2014 noted that the first locomotives would be delivered in January 2015 and the last in September 2015.⁵⁴² Mr Chabi assumed it was more reasonable to project a uniform distribution in the delivery of the locomotives of 13 locomotives per month for six months and nine locomotives in September 2015. Thus, the March 2014 price (before forward escalations and forex) per locomotive needed to be escalated only to the date of delivery. Mr Chabi then applied a weighted average rate for PPI (6% to local content of 60% and 2% to 40% foreign content) being 4.4% and arrived at a total forward escalation cost of R1.92 million per locomotive which is R0.71 million less than R2.63 million provided in Item D of Table 1 (R71 million less in the ETC). Given that the local/foreign content may have been 15/85, the lesser amount calculated by Mr Chabi may also have been an overstatement.

378. Mr Molefe's treatment of the forward forex risk (Item E) was inconsistent in that it was based on the ZAR/USD rather than the ZAR/JPY rate. As the ZAR/JPY had appreciated in the relevant period, it is questionable whether the adjustment is justified. However, Mr Chabi (given the lack of clarity on the exchange rate definition and the levels assumed) was prepared to accept that the cost of R1.08 million per locomotive (R108 million added to the ETC) was justifiable on a ZAR/USD basis.

⁵⁴² Annexure YL 25, Exh BB4(f).2, YL-Resp-050, para 17

379. If one allows for the adjustments proposed by Mr Chabi to the base price, the backward looking forex and escalations and the forward looking escalations, and assume that the discount of R2.47 million per locomotive (Item F) represented 5% of the total cost of a locomotive, it is justifiable to allow for a proportionately lower amount of R2.09 million as a discount; being R380 000 less per locomotive (R38 million in ETC). Likewise, the 10% provision for contingencies would reduce from R4.4 million per locomotive to R3.73 million, being R670 000 less.
380. Mr Chabi accordingly concluded that the ETC per locomotive (including contingencies) was in fact R41 million per locomotive (base price R30.95 million; backward looking forex R430 000; backward escalations R1.5 million; modifications R3.47 million; forward escalations R1.92 million; less a discount of R2.09 million, plus contingencies of R3.73 million). Consequently, the figures put before the board unjustifiably increased the price by R7.4 million per locomotive or by approximately R740 million. Further investigation is required to determine if any board member and/or official of Transnet contravened section 50 and 51 of the PFMA and acted wilfully or grossly negligently in this regard so as to have committed an offence in terms of section 86(2) of the PFMA.

Payments to the Gupta enterprise Cand transgressions related to the procurement of the 100 locomotives

381. CSR paid a kickback of R925 million on this contract. The payment schedule attached to the email dated 22 August 2015 (discovered in the Gupta-leaks) shows that JJT was to be paid 21% of the total contract value for the 100 locomotives, being R925 million. In August 2016 CRRC signed an addendum varying the terms of the BDSA of 2 January 2015 between CSR and Regiments Asia (who had replaced JJT) in relation to the 100 electric locomotives. The payment schedule

confirmed that as at August 2015 USD107 203 912 had been paid to JJT, part of which related to the 100 locomotives kickback.⁵⁴³ JJT was not to retain the full amount of the R925 million but only 15%, while at least part of the remaining 85% was to be paid to companies controlled by the Gupta enterprise.⁵⁴⁴

382. The conduct of Mr Singh, Mr Molefe and Mr Jiyane in favouring CSR above Mitsui and undermining the rationale of the original confinement gives rise to reasonable grounds to believe that they may not have acted in the best interests of Transnet, acted prejudicially in relation to its financial interests and thus contravened sections 76(1) and (3) of the Companies Act and sections 50 and 51 of the PFMA. Mr Gama's supine acquiescence in the ultimate decision is equally questionable. The failure to alert the board about Mr Callard's concerns amounted to non-disclosure of material information and a failure to act with integrity in the financial affairs of Transnet. Submitting a misleading memorandum on the escalation of the price was also a breach of these provisions. The submission of the memorandum to the board recommending confinement also breached the PPM.
383. The obvious favouring of CSR and the evidence regarding the kickbacks point towards corrupt activity relating to procuring a tender in violation of section 12 of PRECCA. The conduct associated with the conclusion of the BDSA provides reasonable grounds to believe that the offences of corruption as contemplated in Chapter 2 of PRECCA, and racketeering and offences related to the proceeds of unlawful activities may have been committed by Mr Essa, his associates in the Gupta enterprise and the persons who concluded the BDSA on behalf of CSR.

⁵⁴³ FOF-06-193, paras 54-60

⁵⁴⁴ FOF-06-196, para 60

384. These findings are to the effect that there are reasonable grounds to believe that board members (Mr Molefe, Mr Singh and others), employees (particularly Mr Gama and Mr Jiyane) of Transnet and others violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.4 and involved corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.
385. In the light, in particular, of his relationship with Mr Essa, the conduct of Mr Sharma (the Chair of the BADC) in relation to the acquisition of the 100 locomotives warrants further investigation.

CHAPTER 5 – THE PROCUREMENT OF THE 1064 LOCOMOTIVES

Background to the acquisition

386. The business case for the procurement of the 1064 locomotives was developed at TFR during 2011-2012 by a team coordinated by Mr Callard. The acquisition was part of the Market Demand Strategy ("the MDS") plan to grow volumes from 208 million tonnes to 350 million tonnes per annum and GFB in particular from 82.6 million tonnes to 170 million tonnes by 2019. Extending the life of the aging locomotives in the existing fleet was no longer economically cost effective or technologically practical. The business case recommended a programmatic procurement of new locomotives which would create benefits for TE through localisation, technology transfers, development of manufacturing skills and the creation of jobs. The acquisition cost of the 1064 locomotives was stated in the business case to be R38.6 billion. Two thirds of the cost would be financed using cash generated by operations and about R13 billion needed to be raised externally. Delivery of the locomotives was scheduled to take place over seven years.

387. RFPs were issued on 23 July 2012. Transnet then appointed McKinsey in March 2013 (and later other transaction advisors, Regiments and Trillian) to evaluate the business case and assist in the acquisition. The board only approved the business case on 25 April 2013; about nine months after the RFPs had been issued.⁵⁴⁵ The Minister of Public Enterprises granted approval for the acquisition on 3 August 2013.⁵⁴⁶

⁵⁴⁵ Transcript 26 April 2021, p 169-183; and Annexure YL 1, Exh BB4(f).1, YIL-023

⁵⁴⁶ Annexure FC 82, Exh BB4(b), FQC-638

388. Between May 2012 and April 2013 the business case was dealt with by Mr Singh (GCFO) and Mr Mohammed Mahomedy (GM: Capital Assurance and Integration). Mr Callard and Mr Pillay together with others from TFR assisted McKinsey with technical input. Mr Singh performed the key oversight role and Mr Gama as CEO of TFR provided human resources from TFR.
389. The procurement process was initiated by the issuing of RFPs and was followed by the receipt of bids, the tender evaluation stage, the best and final offer ("the BAFO") stage, the post tender negotiations ("the PTN") and ultimately the conclusion of the Locomotive Supply Agreements ("the LSAs"). The evaluation process and BAFO stage endured from May 2013 to January 2014. On 24 January 2014, the BADC and the board split the procurement into four contracts and appointed four OEMs as preferred bidders. The post tender negotiations took place in February 2014 and the LSAs were concluded on 17 March 2014.
390. Mr Jiyane of TFR was the overseer of the procurement process. Six or seven different committees worked on the procurement; each of them had a chairperson. The committees included the commercial stream, the financial stream, the technical stream and the supplier development stream. There were also different cross-functional evaluation teams for finance, commercial and technical. The chairpersons of those committees constituted the tender evaluation team. Each of those then reported to Mr Jiyane. Alongside that was the HVT evaluation team, an independent team of experts with audit and compliance skills, which considered deviations and recommendations. Mr Gama co-chaired the PTN team with Mr Singh, who took the lead role in the negotiations. There was also the Locomotive Steering Committee ("LSC") which was chaired by the GCEO, Mr Molefe. Mr Gama, Mr Singh and Mr Jiyane were also members. There was a sub-committee of the LSC consisting of Mr Molefe, Mr Singh and Mr Gama.

391. During 2012 Transnet issued two RFPs for the locomotives: one for 599 electric locomotives⁵⁴⁷ and one for 465 diesel locomotives.⁵⁴⁸ The closing dates changed over time and were ultimately extended to 30 April 2013. Both RFPs were issued in two separate parts to enable Transnet to seek an exemption from certain requirements of National Treasury. On 16 July 2012 National Treasury issued an Instruction Note which provided that only bids that achieved the minimum stipulated threshold for local production and content were to be evaluated further. Paragraph 3 of the Instruction Note set the minimum threshold percentage for local content and production for diesel locomotives at 55% and electrical locomotives at 60%. Further evaluation had to be done in accordance with the 90/10 price/B-BBEE preference point system. Transnet wanted to use a different preferential point system in the 1064 locomotive procurement and accordingly decided to split the RFPs into separate documents (Part 1 and Part 2) to afford it an opportunity to obtain an exemption from the Minister of Finance.
392. Part 1 of the RFPs was issued on 23 July 2012. Part 1 dealt with general, technical and administrative information. Part 2 was issued in December 2012 without an exemption having been obtained from the Minister of Finance. Part 2 dealt with the evaluation criteria, evaluation methodology, weightings, etc. It provided for a six-stage evaluation process and a points preference system (in stage 6) with criteria of price/supplier development/B-BBEE on a 60/20/20 basis. Transnet's preferred criteria in stage 6 of the evaluation process would have advanced affirmative action (perhaps at the expense of cost efficiency/price). However, whatever the motivation, neither the Minister nor the board members and officials of Transnet had the legal authority to deviate from the provisions of the Instruction Note and Regulations 5 and 6 of the PPPFA Regulations. Their conduct gave rise to a

⁵⁴⁷ Transnet-Ref-Bundle-04535

⁵⁴⁸ Transnet-Ref-Bundle-04594

possible ground of review by an unsuccessful bidder and possibly amounted to a breach of fiduciary duty and contravention of section 51 of the PFMA requiring an appropriate and fair procurement and provisioning system and compliance with systems of internal control and preventing any irregular expenditure.⁵⁴⁹ Further, investigation is required to determine whether any official or board member contravened section 86(2) of the PFMA by wilfully or in a grossly negligent way failing to comply with these requirements.

The misrepresentation of the ETC to the Transnet board

393. The business case for the procurement was approved by the board on 25 April 2013, some months after the original closing dates for the receipt of the tenders. The board approved the procurement at an ETC of R38.6 billion "excluding the potential effects from forex hedging, forex escalation and other price escalations". The exclusion of the potential effects of forex hedging and escalations from the ETC gave rise to a controversy about whether there was a misrepresentation to the board with the aim of inflating the cost of the acquisition at a later stage after the board had approved an ETC of R38.6 billion. The ultimate cost of the procurement was R54.5 billion.
394. The original version of the business case (dated 7 March 2012) approved by the TFRIC on 9 March 2012 and CAPIC on 21 May 2012 proposed an ETC of R38.146 billion.⁵⁵⁰ Not much else happened in relation to the development of the business case until March 2013 when McKinsey was appointed the transaction advisor. A version of the business case dated 25 April 2013⁵⁵¹ was submitted to the board (as

⁵⁴⁹ Transcript 28 May 2019, p 180; and MNS Report Vol 1 (dealing with the procurement of the 1064 locomotives), Transnet-06-275 *et seq* ("MNS 1064 Report") at paras 2.1.16-2.1.18

⁵⁵⁰ See Annexure FC 36, Exh BB4(a), FOC-349; and Annexure FC 38, Exh BB4(a), FOC-354

⁵⁵¹ Annexure FC 54, Exh BB4(b), FOC-401 *et seq*

an annexure to a memorandum authored by Mr Singh and Mr Molefe dated 18 April 2013).⁵⁵² It stated the ETC to be R38.6 billion (excluding the potential effects from forex hedging, forex escalation and other price escalations)*.⁵⁵³ The board at its meeting of 25 April 2013⁵⁵⁴ thus approved the business case similarly at an ETC of R38.6 billion "excluding the potential effects from forex hedging, forex escalation and other price escalations".

395. Mr Callard and others testified that the ETC figure of R38.6 billion presented to the board meeting of 25 April 2013 had in fact included provision for escalations, forex and hedging. He maintained that the ETC as originally calculated was intended only to exclude "borrowing costs" (interest on borrowed capital) and this was possibly changed at a meeting of the LSC on 18 April 2013 before the business case served before the board or even afterwards.

396. Correspondence and other documentation prepared while McKinsey was finalising its input on the financial model for the business case, confirm that the ETC originally made provision for and included escalations and forex.⁵⁵⁵ The locomotive prices were based on projected US inflation and converted back to ZAR based on the forward rate obtained from the Transnet treasury.⁵⁵⁶ In addition, a copy of the business case dated 29 April 2013 (after the board had passed its resolution) differed from the version dated 25 April 2013 and only excluded borrowing costs from the ETC of R38.6 billion. The meta-data for the file containing the final version⁵⁵⁷ revealed that it was modified on the computer of Mr Yusuf Mahomed on

⁵⁵² Transnet-07-250.236

⁵⁵³ Annexure FC 54, Exh BB4(b), FQC-405

⁵⁵⁴ Annexure YL 1, Exh BB4(f).1, YIL-023

⁵⁵⁵ Annexure FC 42, Exh BB4(a) FOC-363

⁵⁵⁶ See Exh BB4(a), FQC-024, para 103.1

⁵⁵⁷ Annexures FC52 and FC53, Exh BB4(a), FOC-396-400

30 April 2013 at 10h31.⁵⁵⁸ Mr Mahomed admitted that he amended the business case on 30 April 2013 by deleting the words "borrowing costs" and inserting the words "the potential effects from forex hedging, forex escalation and other price escalations". He explained that the change was on the instruction of Mr Singh to bring the document into line with the resolutions passed by the board and the other committees during April 2013.⁵⁵⁹ This raises the suspicion that the board resolution may also have been changed.

397. A table in the Fundudzi Loco Report⁵⁶⁰ (based on calculations done by Mr Callard and others in 2018) reflects that the ETC comprised a basic price of R31.887 billion with provisions for forex (R1.706 billion), escalations for inflation (R2.775 billion) and contingencies (R2.232 billion) making a total of R38.6 billion, of which R4.481 was for forex and escalations.⁵⁶¹

398. In order to comprehend the dispute about the ETC it is necessary to understand certain key concepts of the financial model used in arriving at the ETC.⁵⁶² The most lucid evidence about the projected viability of the project and the composition of the ETC is found in the statement of Mr Chabi, an expert actuary appointed as part of the MNS investigation.⁵⁶³ The ETC is an important measure used in the appraisal of the viability of any large capital project. It is the sum of the direct/immediate costs

⁵⁵⁸ Annexure FC53, Exh BB4(a), FQC-400

⁵⁵⁹ Exh BB4(g), YM-08, para 5.1. In the re-examination affidavit, Mr Singh maintained that as a result of a miscommunication the exclusion was incorrectly formulated – he said it should have read: "excluding the potential effect from forex hedging, forex escalation, other price escalations, **post approval**" - Transnet 05-2398, para 155. This would have left the ETC open-ended; but more importantly would not have altered the misrepresentation to the board that the ETC did not include provision for hedging etc. when (as appears in the ensuing analysis) it in fact did so to the tune of R5 billion.

⁵⁶⁰ Fundudzi Loco Report, para 5.9.12.22

⁵⁶¹ Fundudzi Loco Report, para 5.9.12.22; see also Transcript 17 June 2021, p 29

⁵⁶² Exh BB8(b).1, AOC-1064-001 *et seq*

⁵⁶³ Exh BB8(b).1, AOC-1064-001 *et seq*

associated with the purchase of the locomotives over the delivery period (in this case seven years). The components of the ETC normally include: i) the base price of the locomotives; ii) a localisation premium; iii) currency hedging costs; iv) escalations; and v) a provision for contingencies. These costs therefore would normally include provision for inflation (escalations) and forex costs. The ETC speaks purely to costs and does not consider revenue and profits. It is the key constitutive element of the total cost of ownership ("TCO").⁵⁶⁴

399. The ETC is not the appropriate measure to use in deciding whether to invest in a project. The projected profitability of a project is better measured by the Net Present Value ("the NPV") - the present value of the expected revenue net of the present value of the expected costs. The NPV represents the profit one expects to realise from the project in current money terms allowing for the risks associated with the project. These risks are allowed for in the hurdle rate – a discounting factor. The application of the hurdle rate arrives at the minimum return that shareholders would want from a project in order to consider investing in the project. Whereas the ETC on the 1064 locomotive project was determined over seven years (the predicted delivery schedule), the NPV was computed over a 36-year period (the foreseeable life of the project).
400. The contentious issue concerning the ETC and whether it included forex and escalations relates to the initial capital outlay or acquisition costs (which is the first element of the TCO in order of magnitude). The base price of the locomotives included in the ETC is what an operational locomotive would have cost Transnet in April 2013. The localisation premium used an assumption for local content of 50%.

⁵⁶⁴ The TCO comprises six distinct elements: i) the ETC being the initial capital outlay/acquisition costs – the costs associated with the purchase of the locomotives; ii) personnel costs; iii) fuel costs; iv) maintenance costs; v) emission costs; and vi) insurance costs. In the 1064 procurement, the ETC made up 47% of the TCO and 20% of all costs (the TCO plus wagon costs etc.).

The ZAR price for the local component in 2014 was computed by taking the USD price of the locomotives at a percentage of 50% at the forward ZAR/USD rate in 2014 and adding a localisation premium of 2% to that figure. The figure was adjusted for 2015 onward by the predicted South African inflation rate for three years. The foreign component was done similarly except for the years going forward the USA inflation rate was assumed to be 2.2% for 2015 and 2.3% for each year thereafter. The business case relied on an assumed South African PPI averaging 5.7%. The PPI over the preceding five-year period was 3.6%. The assumption for inflation in the business case was thus higher than the historical rate. The business case used a rate of 2.3% for foreign components purchased abroad which was conservative and reasonable.

401. The business case applied hedging by applying forward rates, locking in the exchange rate for the purchase and sale of currency at a future date, thus removing the need to take a view on what forex rates would be going forward. Thus the business case provided protection against having to pay more than budgeted for the goods sourced from abroad because of depreciation in the ZAR.
402. A hurdle rate of 18.56% was applied. It was based on research of over 160 companies for Greenfields projects (completely new projects incorporating higher than normal business risks). This was conservative and acceptable, with the result that the NPV was R2.7 billion. The project was thus profitable, but thinly so, in that it was 2.5% of a total revenue of R109 billion. The risk of the project turning unprofitable was material in the event of certain assumptions not materialising, if revenue was delayed or reduced (for example, if locomotives were not delivered timeously, or the predicted MDS volumes did not materialise) or costs increased by more than expected.

403. Mr Chabi calculated that the base price of the 465 diesel locomotives was R11.147 billion and that of the electric locomotives was R19.329 billion, meaning that of the R38.6 billion of the ETC, the total base price was R30.476 billion. He arrived at these figures by using the cost per diesel locomotive of USD2.6 million and USD3.5 million per electric locomotive provided in the business case, which he multiplied by the then applicable spot rate of 9.1285, and added a localisation premium of 2% to the 50% local component.
404. Applying the applicable local PPI rate and the USA CPI rate of 2.3%, Mr Chabi arrived at a figure of R1.821 billion for inflation on the local components and R713 million on the foreign components. The computation of the escalation costs was based on a straightforward application of the assumed local and foreign rates over the seven-year delivery period.
405. To calculate hedging costs, Mr Chabi applied hedging to the foreign component of the locomotive price and arrived at a figure of R3.358 billion by applying the Transnet treasury curve hedged rates to the foreign component of the total locomotive price as adjusted by the USA CPI.
406. The base price plus the escalation and hedging costs gave a total price of R36.368 billion. Contingencies of R2.232 billion brought the ETC to R38.6 billion.
407. Mr Chabi's calculations thus leave no doubt that the ETC of R38.6 billion included escalations and forex hedging in the total amount of R5.892 billion (R1.821 billion + R713 million + R3.358 billion). He concluded that the variables and assumptions used to model the business case were reasonable; and the ETC of R38.6 billion in the business case was an acceptable estimate for the total costs of acquiring the locomotives, including escalations and foreign currency exchange rate hedging costs.

408. Mr Chabi's figures differ from those in the Fundudzi Loco Report which, as mentioned, reflects that the ETC comprised a basic price of R31.887 billion with provisions for forex (R1.706 billion), escalations for inflation (R2.775 billion) and contingencies (R2.232 billion) making a total of R38.6 billion, of which R4.481 billion was for forex and escalations. Both figures confirm though that provision was made in the ETC for forex and escalations in a total amount of between R4.481 billion and R5.892 billion.
409. The statement in the business case approved by the board thus quite evidently misrepresented the assumptions about the purchase price and the financial model that was agreed as part of the business case development. The supposed exclusion of forex and escalations from the ETC possibly allowed for the manipulation of the price later and left the actual price undetermined. The board, faced with an ETC not correctly reflecting the total cost, should have returned the business case to its authors with a request that it be revised to give an accurate ETC so that it could budget correctly for the cash flow of Transnet over the years of the project and not leave it open-ended.⁵⁶⁵
410. If it is accepted that the original business case ETC of R38.6 billion included some escalations, forex and hedging costs – in the amount of R4.481 billion or R5.892 billion – the presentation to the board that the ETC excluding such costs entirely was a misrepresentation and caused the board to take a decision without the benefit of a proper estimate before it. When Mr Molefe, Mr Singh and Mr Gama testified, they did not contest that the ETC made some provision for forex and escalations and thus it may be assumed that they accepted such provision was in the amount of R4.481 billion or R5.892 billion. However, their presentation to the

⁵⁶⁵ Transcript 20 May 2019, p 90, lines 4-10

board communicated unequivocally that the ETC excluded all forex and inflation escalations. Had that been true, the ETC should have been stated to be R32.708 billion (R38.6 billion less R5.892 billion) and not R38.6 billion.

411. In their evidence before the Commission, Mr Molefe, Mr Gama and Mr Singh admitted that the business case did not provide a calculation of the escalation, forex and hedging costs and accepted there was an assumption that they were included in the ETC.⁵⁶⁶ Mr Molefe asserted that the entire issue about whether escalations, forex and hedging were included in the ETC figure of R38.6 billion was much ado about nothing as the figure was an estimate or minimum to be escalated later.⁵⁶⁷ This missed the point; firstly, of whether in truth the ETC in the business case included some forex, hedging and escalation costs, and, secondly, if there was a misrepresentation of the ETC to the board. When it was put to Mr Molefe that he had misrepresented the ETC to the board by saying it excluded hedging and escalation when it in fact included them, he conceded that he had.⁵⁶⁸ He did not take issue with either the evidence of Mr Laher (regarding an exercise undertaken in 2018 which concluded that escalations, forex and hedging had been included in the ETC)⁵⁶⁹ or with the evidence of Mr David Fine from McKinsey's that the intention had been to include the escalations, forex and hedging costs in the original ETC.⁵⁷⁰
412. Mr Gama argued that the stated contract value actually included escalations albeit at estimated and assumed values which ultimately proved to be inaccurate and understated. He maintained that the statement that the ETC excluded the potential

⁵⁶⁶ Transcript 10 March 2021, p 29, line 10; and Transcript 12 May 2021, p 179-201.

⁵⁶⁷ Transcript 10 March 2021, p 17-24.

⁵⁶⁸ Transcript 10 March 2021, p 38, lines 10-20.

⁵⁶⁹ Transcript 10 March 2021, p 40, line 15.

⁵⁷⁰ Transcript 10 March 2021, p 41, line 15.

effects from forex hedging, forex escalation and other escalations was not incorrect. Provision had been made for these costs in the ETC of R38.6 billion but that provision potentially could be insufficient going forward.⁵⁷¹ Mr Singh reasoned likewise. He admitted that the business case made provision for forex and escalations and confirmed that he had instructed Mr Yusuf Mahomed to make the change but Mr Mahomed had incorrectly formulated the sentence.⁵⁷² He said that the proper formulation should have been that the business case included these costs but excluded the effects of these variables post approval of the business case – meaning that the board needed to approve the R38.6 billion ETC on the basis that in the nature of things it was likely to change as the procurement process unfolded in the evaluation, adjudication and post tender negotiation phases.⁵⁷³

413. Mr Singh and Mr Gama did not identify precisely what forex and escalation costs were not included in the ETC. Mr Chabi's calculations related to the entire seven-year delivery period.⁵⁷⁴ Accepting that there was a provision of R5.892 billion for forex and escalations in the ETC of R38.6 billion, it is not clear what that provision did not cover. In the memorandum⁵⁷⁵ submitted to the board on 28 May 2014, Mr Molefe justified the increase from R38.5 billion to R54.5 billion on the grounds that the ETC of R38.6 billion excluded *inter alia* the cost of changes in economic conditions (forex and inflation) between approval of the business case (April 2013) and the award of the contract (17 March 2014), the cost of hedging for foreign exchange movements, and the cost for future inflationary escalations. That would seem to cover the whole range of backward and forward forex and inflation

⁵⁷¹ Transcript 12 May 2021, p 183

⁵⁷² Transcript 31 May 2021, p 161, line 9, p 163, line 9, and p 177

⁵⁷³ Transcript 31 May 2021, p 166, line 10

⁵⁷⁴ Exh BB8(b).1, AOC-1064-036, para 9.48.2 and 9.48.3

⁵⁷⁵ Annexure FC 85, Exh BB4(a), FQC-713

escalations from the date the ETC was approved. Mr Chabi's calculations accounted entirely for backward and forward looking forex and escalation costs.⁵⁷⁶

414. At its meeting on 28 May 2014, the board accepted the recommendation to increase the ETC from R38.6 billion to R54.5 billion and took note that the main reasons for the increase in ETC was "due to the exclusion" of the identified costs from it.⁵⁷⁷ That statement is false. The resolution did not mention or take account of the fact that the ETC had made provision for forex and escalations in the amount of R5.892 billion. Nor did it state that the provision for these costs in the ETC had proved insufficient and was understated.

415. On 31 March 2014, two weeks after the signature of the LSAs, Ms N Huma from the Department of Public Enterprises addressed an email to Mr Singh noting that the department had approved an ETC of R 38.6 billion as per the section 54 PFMA application, querying why there was such a huge difference between the approved ETC and the actual transaction value and asking if Transnet would make a submission to explain the difference to the Minister. Mr Singh responded to the email on the same day explaining that the approval was for R38.6 billion but excluded the impacts of foreign exchange and escalations, stating falsely that these were normally not included in the ETC as they are subject to the economic conditions at the time of contracting and are not available and they are a mere function of the economic inputs at the time of contracting. He undertook to provide a full report on the transaction once the board had approved it.⁵⁷⁸ This email again misrepresented the true situation by omitting to mention that the ETC of R38.6 billion had in fact included R5.892 billion for forex and escalations and

⁵⁷⁶ Exh BB8(b).1, AOC-1064-032, para 9.34; and Exh BB8(b).1, AOC-1064-035, paras 9.46 and 9.47

⁵⁷⁷ Annexure AC 5, Exh BB8(b).1, AOC-1064-182

⁵⁷⁸ Transnet-05-2337; and Transcript 17 June 2021, p 30-32

possibly constituted fraud. Mr Singh did not submit a report seeking the approval from the Minister for the increase in price.

416. The evidence as a whole therefore establishes that there was a misrepresentation to the board and the Minister of Public Enterprises concerning the elements making up the ETC. Consequently, the board was not apprised of the true ETC before going to market. The false assumption that the ETC excluded all escalation, forex and hedging costs, when it in fact made provision to the tune of R5.892 billion, probably influenced the negotiation of the final price. This must be so because instead of working from a base line ETC of R38.6 billion including some of these costs (or more accurately an ETC of R32.708 excluding them), Transnet (including the board and negotiation team) proceeded on the assumption that all such costs (established later to be R14.9 billion) could legitimately be added to the final price.⁵⁷⁹ The approval by the board on 28 May 2014 for an increase of the price (including the provision of R14.9 billion for forex and escalations) was granted on the mistaken premise that no provision for those costs had been included in the ETC when in fact there was provision for R5.892 billion.

417. This false accounting may have facilitated the ability of CSR and CNR to pay the 21% kickbacks to the Gupta enterprise on the 1064 locomotive contracts. This conduct if shown to have been intentional gives rise to reasonable grounds to believe that there was a fraud on Transnet in that it amounted to a misrepresentation that was prejudicial (or potentially prejudicial) to Transnet and

⁵⁷⁹ In their memorandum to the BADC, dated 23 May 2014, recommending approval of the increase of the ETC from R38.6 billion to R54.5 billion (Annexure FC 85, Exh BB4(b), FQC-715, para 14) Mr Molefe, Mr Singh and Mr Gama justified the R14.8 billion increase for escalations, forex and hedging costs on the basis that the costs had been expressly excluded from the ETC of R38.6 billion approved by the board in April 2013. In para 108 of the memorandum of 23 May 2014, the BADC was asked to "take note" that the main reason for the increase of the ETC to R54.5 billion was that those costs had been excluded, despite the fact that Mr Molefe knew that to be false.

that there may have been a contravention of the duty in section 50(1)(b) of the PFMA to act with fidelity, honesty and integrity and in the best interest of Transnet in managing its financial affairs.

The improper favouring of CSR and CNR in the evaluation of the bids

418. At the closing of the bids, on 30 April 2013, seven bidders submitted bids for the procurement of the 599 electric locomotives and four bidders submitted bids for the 465 diesel locomotives. The evaluation process endured until 15 January 2014. Two bidders for the electric locomotives went through to the BAFO stage of the procurement process - Bombardier Transportation SA (Pty) Ltd ("BT" or "Bombardier") and CSR E-Loco Rail Consortium Supply. All four bidders for the diesel locomotives went through to the BAFO stage, namely: CNR Consortium; CSR Loliwe Consortium ("CSR Loliwe"); EMD Africa (Pty) Ltd ("EMD") and GE South Africa Technologies (Pty) Ltd ("GE"). After the BAFO stage, the CNR consortium and GE were recommended to proceed to the PTN in respect of the diesel locomotives, and both Bombardier and the CSR consortium went through in respect of the electric locomotives. (Ultimately, the CNR contracting party was CNR Rolling Stock South Africa (Pty) Ltd ("CNRRSSA")⁵⁸⁰ and the CSR contracting party, CSR E-Loco Supply (Pty) Ltd ("CSR-SA").⁵⁸¹
419. Much evidence before the Commission suggests that CSR and CNR were unduly favoured at various stages of the procurement process. In March-May 2013, prior to the submission and evaluation of the bids, Transnet engaged in direct negotiations with CSR and the China Development Bank ("the CDB") with a view to concluding a tripartite cooperation agreement. The original draft of the agreement

⁵⁸⁰ CNRRSSA later became CRRC SA Rolling Stock (Pty) Ltd ("CRRC-SA").

⁵⁸¹ CSR-SA later became CRRC E-Loco Supply (Pty) Ltd ("CRRC-E-Loco").

explicitly provided for cooperation on the procurement and refurbishment of electrical and diesel locomotives.⁵⁸² The cooperation agreement ultimately signed⁵⁸³ was between the CDB and Transnet. Perhaps more conscious of the difficulty posed by a prior agreement favouring a bidder, the agreement provided merely for Transnet and the CDB to identify opportunities for CDB to participate in funding the development and upgrade of infrastructure in line with Transnet's MDS.⁵⁸⁴

420. After the evaluation process, the BADC, chaired by Mr Sharma, on 24 January 2014, recommended to the board that Bombardier, CSR, CNR and General Electric Ltd ("GE") be appointed as the OEMs to manufacture the 1064 locomotives and that the award of the locomotives be split as follows: Bombardier 240 electric locomotives; CSR 359 electric locomotives; CNR 232 diesel locomotives; and GE 233 diesels locomotives. The board accepted the recommendation of the BADC at its meeting of 24 January 2014 at an ETC of R33.4 billion (excluding hedging, escalations and the costs associated with using Transnet Engineering as a subcontractor – "TE scope").⁵⁸⁵ The matter of TE scope is discussed below.

421. Mr Laher was responsible for the preparation of the financial evaluation criteria which consisted of a points scoring matrix for the evaluation of: i) price; ii) TCO; iii) delivery schedule; iv) payment terms; v) RFP and contractual compliance; and vi) financial stability. Mr Laher identified four risks that ultimately impacted on the price evaluation: i) batch pricing; ii) the decision to normalise the price by excluding the cost of using TE as the main subcontractor; iii) the delivery schedules; and iv) inconsistencies in the application of the TCO model.

⁵⁸² Annexure MM 13, Exh BB10(a), MEM-112

⁵⁸³ Annexure MM 17, Exh BB10(a), MEM-135

⁵⁸⁴ Exh BB10(a), MEM-023-MEM-026, paras 91-101; and Transcript 6 June 2019, p 146-173

⁵⁸⁵ Annexures YL 12 and YL 13, Exh BB4(f).1, YIL-113 et seq

422. In early January 2014, Transnet addressed letters to Bombardier and CSR for the electric locomotives and all four bidders (CNR, CSR Loliwe, EMD and GE) for the diesel locomotives requesting them to provide a best and final offer ("BAFO").⁵⁸⁶ All the bidders submitted BAFO's on 10 January 2014.
423. Accounting for TE as a subcontractor led to a flawed evaluation process on the issue of price.⁵⁸⁷ The business case expressed the aspiration for the procurement to create business opportunities for TE. Part 2 of the RFPs issued in December 2012 provided that the participation of TE in the locomotive procurement process "will be prescribed" and that further details would follow after the issuance of Part 2 of the RFP. No details however appear to have followed the issuance of Part 2 of the RFP.
424. On 10 December 2013, the Cross Functional Evaluation Team – Finance ("the CFET-Finance") issued two reports detailing its findings from the stage 6 evaluation for the 599 electric locomotive and the 465 diesel locomotive tenders respectively.⁵⁸⁸ Both reports dealt with the use of TE and proceeded on the assumption that the RFP dictated that the participation of TE in the procurement process would be prescribed. As the CFET-Finance was not given access to the supplier development ("SD") files, it initially assumed that all the bidders had provided pricing based on the utilisation of TE as the main sub-contractor. However, the SD files indicated that bidders 3 and 7 on the electric locomotives procurement did not specify the use of TE as the main sub-contractor and bidder 1 did not specify the use of TE in the procurement of the diesel locomotives. Supply chain services ("SCS") explained that bidders were likely to make different

⁵⁸⁶ Annexure FC 95, Exh BB4(b), FQC-775

⁵⁸⁷ Exh BB4(a), FQC-040-FQC-050, paras 161-194; and Transcript 20 May 2019, p 130 - Transcript 23 May 2019, p 25

⁵⁸⁸ Annexure FC 83 and Annexure FC 84, Exh BB4(b), FQC-641 *et seq* and FQC 681 *et seq*

assumptions on the use of TE as a main sub-contractor including the percentage that would be sub-contracted. These assumptions were not specified in the RFPs and could differ significantly between bidders. Accordingly, SCS (in conjunction with the CEO of TFR, the GCEO and GCFO) decided that clarity should be obtained to establish what proportion of the bidder's price related to the use of TE.

425. On 2 December 2013, Mr Jiyane addressed letters to bidders 1, 2 and 5 for the electric locomotives and bidders 2 and 4 for the diesel locomotives (bidder 3 for the diesel locomotive tender had already provided pricing with and without the use of TE) requesting clarity.⁵⁸⁹ The letter in relevant part stated:

"Transnet has realised that the statement about TE contained in the RFP has led to different interpretations by tenderers regarding the scope of work for TE.

In an effort to fully consider every possible factor, Transnet requires the following clarification:

1. What would be the Rand impact on your price per locomotive if you did not use TE as a local subcontractor, but used an alternative local private sector subcontractor?
2. What would your price per locomotive be if you did not use TE as a local subcontractor but used an alternative local private sector subcontractor?"

426. The aim of the CFET-Finance and SCS in seeking this information was to apply a pricing methodology by evaluating all the bidders excluding the use of TE as a main sub-contractor "in order to normalise the base on which to evaluate price."

427. After receiving responses, the CFET-Finance determined in relation to the electric locomotives that: i) Bombardier's price per locomotive would decrease by approximately R1.9 million; ii) CSR's price per locomotive would decrease by

⁵⁸⁹ Exh BB4(e), FQC-sup2-03

R3.48 million; and iii) bidder 5 indicated that there would be no impact on its bid price per locomotive. The ultimate implication of this adjustment was the reduction of Bombardier's total price per locomotive from R34.73 million to R32.83 million and the reduction of CSR's price from R38.2 million to R34.7 million.⁵⁹⁰ This resulted in Bombardier moving from second best price per locomotive to best price. CSR moved from fourth best price to third within a close margin to the first and second, whereas before the adjustment, its price was much less competitive than the other three bidders. When it initially made allowance for the TE adjustment, CSR maintained that there would be a reduction of R3.48 million per locomotive but a subsequent submission indicated it to be R5.49 million, the difference of R2.01 million per locomotive was later explained to be a discount. The CFET-Finance proceeded on the basis of excluding this potential discount and reduced the price by R3.48 million per locomotive. As will be explained later, this discount was inappropriately factored back in at the BAFO stage. The contract for the electric locomotives was ultimately awarded to Bombardier and CSR. The ranking of the bids for the diesel locomotives in respect of price did not change as a result of the TE adjustment.⁵⁹¹

428. Evaluating the bidders on the basis of not using TE as a sub-contractor was not on its own unfair.⁵⁹² Doing the evaluation on that basis meant that all bidders (including those who had not provided for TE as a subcontractor) would be treated equally. If the intention had been that all bidders had to quote on the assumption that TE would be used as the main sub-contractor, and that had been misunderstood by some bidders, one could fairly rectify the misunderstanding by evaluating the bids

⁵⁹⁰ Annexure FC 83, Exh BB4(b), FQC-679 read with Exh BB4(c), FQC-sup-23

⁵⁹¹ Annexure FC 84, Exh BB4(b), FQC-712

⁵⁹² Transcript 20 May 2019, p 168 *et seq*

on the basis that TE would not be used as the main sub-contractor.⁵⁹³ Moreover, it allowed the CFET-Finance to assess the impact of pricing for TE as a premium Transnet was prepared to pay for ensuring TE was used as the main sub-contractor with the attendant localisation benefits.

429. Mr Callard, however, emphasised that the RFP did not allow for the methodology and suggested that the reductions in price were arbitrary and not verifiable.⁵⁹⁴ More importantly, the TE adjustment changed the rankings of the bidders in the procurement of the electric locomotives. In the case of the diesel locomotives, the application of the two methodologies inclusive of TE and exclusive of TE was inconsequential as it had the same outcome in respect of the ranking of the bidders on the basis of price. Bombardier moved from second to first, and CSR from fourth to third. Given that the award was split between Bombardier and CSR, it probably made no difference to the appointment of Bombardier. The change of CSR's price significantly altered its competitive position. Without the TE adjustment, it would have been difficult to justify CSR proceeding to the BAFO stage. As will be seen presently, in the BAFO stage CSR increased its price to add back the TE deduction.
430. As mentioned, on 4 January 2014, Transnet requested the bidders to submit their BAFO with a closing date of 10 January 2014. On 15 January 2014, the CFET-Finance prepared a memorandum setting out the results of the BAFO from Bombardier and CSR for the 599 electric locomotives.⁵⁹⁵ In paragraph 5 of the memorandum there is a table outlining the BAFO prices per locomotive. It includes the previous evaluated prices of Bombardier and CSR as specified in the CFET-

⁵⁹³ Transcript 20 May 2019, p 174-175

⁵⁹⁴ Transcript 20 May 2019, p 172, line 8 – p 173, line 2

⁵⁹⁵ Annexure FC 65, Exh BB4(b), FQC-578

Finance report of 10 December 2013. These prices are reflected as the prices after deducting the impact of not using TE as the main sub-contractor. Thus, Bombardier's price before the TE adjustment was R34.73 million. This price was not used in the BAFO memorandum. Rather the adjusted price was used – namely R32.83 million. Likewise, CSR's price of R38.19 million was not used – rather R34.71 million was used as the evaluated price.⁵⁹⁶

431. Although Bombardier and CSR were evaluated on the price per locomotive without using TE as the sub-contractor, Transnet in the end paid the amount using TE. The quoted price per locomotive for Bombardier including TE was R34.73 million. The difference between its quoted price and BAFO price per locomotive was R1.91 million (R34.73 million minus R32.83 million). Bombardier was awarded 240 locomotives. Hence, according to Mr Callard, its total price was understated by R458 million. Likewise, the difference between CSR's quoted price and the TE adjusted price was R3.48 million per locomotive (R38.19 million minus R34.71 million). It was awarded 359 locomotives. Its total price was thus understated by R1.25 billion. In the result, the total BAFO price for the electric locomotives to be supplied by Bombardier and CSR was understated by approximately R1.71 billion. This amount later was added back to the final price and is included in the calculation that led to the increase of the ETC from R38.6 billion to R54.5 billion.⁵⁹⁷ The true prices were accordingly significantly understated for these bidders.

432. The BAFO prices for Bombardier and CSR were further adjusted downwards. The BAFO memorandum records the BAFO evaluated price per locomotive of Bombardier to be R32.38 million, being R455 661 less than the TE adjusted

⁵⁹⁶ See Exh BB4(d), FQC-sup2; and Annexure FC 65, Exh BB4(b), FQC-582

⁵⁹⁷ See Table 2 of Mr Molefe's memorandum of 23 May 2014 to the board - Annexure FC 85, Exh BB4(b), FQC-718; and the MSM 1064 Report, para 4.1.3

evaluation price of R32.83 million. The BAFO reconciliation recorded that the difference was made up of a forex change due to import content and rate changes.⁵⁹⁸ The BAFO evaluated price of CSR in the memorandum was R32.46 million, being R2.25 million less than the TE adjusted evaluation price of R34.71 million. The BAFO reconciliation records that the difference was made up of a forex change (R243 893) and the discount on the price of R2.01 million, which the CFET-Finance had refused to take into account when doing the TE adjustment.⁵⁹⁹

433. The BAFO price of the successful bidders for the electric locomotives was thus fundamentally misstated because at a later stage the TE impact was added back to the BAFO price.⁶⁰⁰ The stated BAFO price in the reconciliations⁶⁰¹ was not the price actually paid per locomotive. The essential point being that with the TE adjustment excluded from the BAFO price, the BAFO price could not be used to determine the true cost. The price that should have been used was the pre-adjusted for TE price. Both Bombardier and CSR were going to use TE as the main sub-contractor. The price per locomotive before TE adjustment was Bombardier R34.73 million and CSR R38.19 million. The BAFO should have been done using these prices. As a consequence, the BAFO prices did not include the premium that would be paid for using TE. Adding back the TE component significantly increased the base price of the locomotive. Besides the unfair favouring of CSR, the amount added back to the CSR and Bombardier price for using TE was part of the R15.9 billion escalation of the price of the procurement. The price excluding TE was a price that was not going to be finally contracted upon. The adjustment resulted in the contract being

⁵⁹⁸ Annexure FC 65A, Exh BB4(b), FQC-582

⁵⁹⁹ Annexure FC 65A, Exh BB4(b), FQC-581; and Transcript 20 May 2019, p 216 -219

⁶⁰⁰ Transcript 20 May 2019, p 207, lines 5-7

⁶⁰¹ Annexures FC 65 and FC 65A, Exh BB4(b), FQC-581-582

awarded to the wrong bidder who did not meet the criteria – CSR.⁶⁰² The decision to do that probably constituted a contravention of section 50 and 51 of the PFMA and possibly fraud, and further advanced the interests of the Gupta enterprise.

434. The BAFO price used in the evaluation of CNR's bid in the diesel locomotive procurement was also problematic.⁶⁰³ As mentioned, on 4 January 2014, Transnet wrote to CNR⁶⁰⁴ seeking its BAFO using specific guidelines. CNR responded to the request for information on 10 January 2014 and claimed amongst other things to have reduced their base price in the Total Cost of Ownership ("TCO") model from R39.735 million per locomotive to R27.36 million. It noted that this price related "to the cost of manufacture and does not include training costs, logistics, royalties, technical support, service charges, finance costs, and contingencies etc."⁶⁰⁵ The use of "etc." left the price open-ended.

435. The exclusions from the base price in CNR's letter of 10 January 2014 (excluding training costs etc.) did not constitute "a comparative BAFO price".⁶⁰⁶ The deductions in respect of some of the specifications were costed in the original bid and ought not to have been excluded in the BAFO,⁶⁰⁷ and were "open-ended".⁶⁰⁸ The adjustment of the base price involved a reduction of R12.38 million per locomotive amounting in total to a reduction of approximately R5.8 billion (465 x R12.38 million).⁶⁰⁹ CNR's BAFO price was accordingly misleading as evident from the fact that the deductions exceeded its total Annexure E costs of R5.5 billion.

⁶⁰² Transcript 21 October 2020, p 21

⁶⁰³ Exh BB4(a), FQC-048-049, paras 181-190

⁶⁰⁴ Annexure FC 95, Exh BB4(b), FQC-775

⁶⁰⁵ Annexure FC 98, Exh BB4(b), FQC-785

⁶⁰⁶ Exh BB4(a), FQC-049, para 187.2; and Transcript 20 May 2019, p 238, lines 13-15

⁶⁰⁷ Transcript 20 May 2019, p 245, lines 1-10

⁶⁰⁸ Transcript 20 May 2019, p 239, line 20

⁶⁰⁹ Transcript 23 May 2019, p 6, line 15 *et seq*

Annexure E costs include manpower costs, factory overheads and administration overheads (many of which CNR purported to exclude from its BAFO).⁶¹⁰

436. CNR's BAFO price was thus inaccurate, unrealistic and misleading. The memorandum,⁶¹¹ dated 15 January 2014, sent by the CFET-Finance to the LSC regarding the results of the BAFO responses for the 465 diesel locomotives indicated that the original base price used for evaluation of the CNR bid before BAFO was R44.23 million per locomotive and the BAFO price used for evaluation was R30.45 million. The difference of R13.78 million was stated in the memorandum to be made up of a discount of R12.38 million and R1.4 million being a forex charge due to import content and rate changes.⁶¹² This evidence confirms that the BAFO price carried forward for the purpose of evaluating CNR's bid included the inappropriate qualifications and exclusions from the BAFO price presented by CNR in its letter of 10 January 2014.⁶¹³

437. Thus, taking account of the TE adjustment favouring CSR and the inappropriate reduction of CNR's BAFO, the prices of CSR (for the electric locomotives) and CNR (for the diesel locomotives) at the end of the BAFO process were not the real cost of the locomotives. CSR clearly benefited from the TE adjustment changing its ranking on price in relation to the procurement of the electric locomotives, and CNR was favoured not by the TE adjustment, but rather by the inappropriate reduction of its BAFO price by R12.38 million per locomotive. CNR's unrealistic BAFO price in all likelihood led to its bid being inappropriately favoured. The evidence before the Commission in relation to the identity of the officials and employees of Transnet

⁶¹⁰ This is revealed in correspondence between Transnet and CNR – see Annexure FC 101, Exh BB4(b), FQC-791, and Annexure FC 102, Exh BB4(b), FQC-795

⁶¹¹ Annexure FC 66, Exh BB4(b), FQC-584

⁶¹² See Annexure FC 66, Exh BB4(b), FQC-587, read with Annexure FC 66A, FQC-589

⁶¹³ Transcript 23 May 2019, p 8, line 9 – p 10, line 7

who were responsible for these irregularities is not clear and thus requires further investigation.

The 1064 post tender negotiations: batch pricing, excessive advance payments and local content

438. On 17 January 2014 the GCEO, Mr Molefe, addressed two memoranda to the board of Transnet setting out results of the evaluation of the two tenders and proposing the splitting of the two procurements between the two OEMs in each tender.⁶¹⁴ In relation to the 599 electric locomotives, Bombardier received a total score of 65.96 and CSR 61.33. The memoranda explained that besides these two bidders scoring the highest points, their proposals offered local content and SD commitments of a higher order and a delivery schedule close to Transnet requirements. They also scored highest on technical evaluations. It was noted that CSR offered a discount of R2.25 million per locomotive, including a revised foreign content, thus offering the best price. The memorandum then proposed the split of the award (60% of the procurement to CSR and 40% to Bombardier) to reduce delivery risk and enhance ability to meet MDS volume targets.
439. CSR was favoured on the basis of its track record in relation to the 95 locomotives; while Bombardier had not done work for Transnet in the recent past. The memorandum concerning the 465 diesel locomotives made a like recommendation that there be a split of the award between CNR and GE on a 50-50 basis. On 24 January 2014 the board approved the recommendation and split the awards along the lines suggested,⁶¹⁵ "subject (to) a further endorsement by the BADC post the

⁶¹⁴ Annexures YL 10 and YL 11, Exh BB4(f).1, YIL-87-112

⁶¹⁵ Annexures YL 12 and YL 13, Exh BB4(f).1, YIL-113-116

"negotiation process" and delegated authority to the GCEO to sign, approve and conclude all necessary documents to give effect to the resolutions.⁶¹⁶

440. Paragraph 19.1.1 of the PPM (2012) provided that post tender negotiations ("PTN") should be used as an effective tool to drive down costs or extract further value for Transnet after the evaluation has been completed and the preferred bidder has been identified and approved. After the board's approval on 24 January 2014, Transnet and the successful bidders commenced the PTN process for the conclusion of the contracts.
441. The post tender negotiations took place during February-March 2014 and endured for about six weeks and were led by Mr Singh and Mr Wood of Regiments. Both Mr Singh and Regiments were associates of the Gupta enterprise and thus unlikely to act in the best interests of Transnet. Regiments essentially assumed the role that normally was reserved to Transnet's treasury. The Group Treasurer of Transnet, Ms Makgatho, was side lined and excluded from the process,⁶¹⁷ probably because she was too rigorous in her oversight.⁶¹⁸
442. Supply chain management produced a negotiation mandate which required the PTN process to address 12 identified negotiation points.⁶¹⁹ The document ("the negotiations mandate") set out terms of reference for each of the negotiation points as well as the most desirable outcome, the target agreement and the least acceptable agreement on each negotiation point.⁶²⁰ The negotiation points

⁶¹⁶ Annexures YL12 and YL13, Exh BB4(f).1, YIL-114-116

⁶¹⁷ Transcript 6 June 2019, p 52-53

⁶¹⁸ Transcript 6 June 2019, p 39-67 and p 79-83; Mr Molefe authorised Mr Gama and Mr Singh to lead the process – Transnet-05-2388

⁶¹⁹ Transnet-Ref-Bundle-05144 *et seq*

⁶²⁰ For example, under base price – foreign exchange impacts, the most desirable option was stated to be a "rand-based contract with fixed price including hedging costs (supplier manager's hedging costs)."

included: i) base price – foreign exchange impacts; ii) base price impact of TE; iii) payment schedules; and iv) break-pricing and batch-pricing.

443. The price of the procurement rose significantly during the post tender negotiations (supposedly intended to reduce costs) in the period from the short-listing of the bidders to the conclusion of the LSAs on 17 March 2014. The initial assessments of the total price by Regiments to TFR of the 1064 project were R39.94 billion. Over the course of Regiments interactions with TFR during January 2014 to 17 March 2014, the ETC increased by R15.9 billion. A significant factor contributing to this increase was the change in escalation formulas used and the source of the indices used in the escalation formula.

444. The issue of batch-pricing arose during the post tender negotiations as a consequence of the board's decision to split the awards between two bidders in both tenders.⁶²¹ Paragraph 12 of the RFP (under the heading "Disclaimers") granted Transnet the right to split the award between bidders.⁶²² It reads:

"Respondents are hereby advised that Transnet is not committed to any course of action as a result of its issuance of this RFP and/its receipt of a proposal in response to it. In particular, please note that Transnet reserves the right to split the award of the contract between more than one supplier..."

445. The provision made for batch-pricing by the Transnet negotiation team during the PTN led to an increase of R2.7 billion in the ultimate price. Committing Transnet to batch-pricing was contrary to the provisions of the RFP, compromised the fairness of the procurement process and constituted an irregularity. Mr Singh, Mr Gama and Mr Laher justified the additional cost of R2.7 billion on the grounds that the

⁶²¹ See generally - Transcript 28 May 2019, p 205 et seq; Transcript 29 May 2019, p 49 et seq; and MNS 1064 Report, para 2.4

⁶²² Transnet-Ref-Bundle-04547-04548

reduction in the quantities of the locomotives awarded to each bidder necessitated the bidders to increase their prices.

446. Paragraph 3.1 of Part 2 of the RFP (under the heading: "Scope of Requirements")⁶²³ provided for a seven-year delivery schedule and stated:

"Transnet requires flexibility in exercising options for the acquisition of the locomotives. These options may include suspending or postponing the delivery of the locomotives until a later day or changing quantities. Transnet however does not expect to pay a price premium should it exercise any of these options".⁶²⁴

447. Although this paragraph does not speak of "batch-pricing", it aimed at ensuring that if the batch of locomotives was reduced there would be no increase in the price of the locomotive. The next paragraph of the RFP spoke of "break-pricing" which must be distinguished from what was referred to as batch-pricing. It read:

"Transnet reserves the right to terminate the locomotive acquisition programme or any part thereof at any stage during the seven-year period should circumstances so dictate. Therefore, Transnet is not obliged to acquire the full amount of 599 locomotives. Bidders are therefore required to provide "break-pricing" for each of the stages indicated below, should Transnet decide to terminate the acquisition process at any of these stages."

448. These provisions make it plain that Transnet would not pay a premium for splitting an award or changing quantities but only for break-pricing. The RFP permitted break-pricing adjustments but not batch-pricing adjustments. Price adjustments were permissible if Transnet terminated the acquisition programme at some point during the delivery schedule, but could not adjust prices if a different quantity of locomotives was awarded to a bidder prior to the contract being concluded.⁶²⁵ The

⁶²³ Transnet-Ref-Bundle-04552

⁶²⁴ Emphasis added.

⁶²⁵ Transcript 28 May 2019, p 208, lines 20-25

assertion by Mr Singh during his testimony that Transnet never contemplated paying a zero cost for batch-pricing is simply wrong and inconsistent with these provisions.⁶²⁶ The board's approval of the splitting of the award did not amount to authorisation to commit Transnet to batch-pricing, especially when it was specifically brought to its attention that the RFP in effect prohibited Transnet from paying a price premium for changing the locomotive quantities procured from any one bidder.

449. The CFET-Finance reports of 10 December 2013 conflated break-pricing and batch-pricing noting that break point pricing had been provided by all bidders and the price per locomotive would vary depending on the batch size of the order placed.⁶²⁷ The reports then set out a table accounting for break-pricing. The table provided for the delivery of an escalating number of locomotives over five identified periods. There is no analysis of the implications for the price of each locomotive if there was a splitting of the batches.⁶²⁸ By contrast, the negotiations mandate understood the difference. It set "the most desirable outcome" and "the target agreement" for batch-pricing as: "remove batch pricing".⁶²⁹ Thus, the strategy of the negotiation team ought to have been to enforce the unequivocal right of Transnet to incur no additional liability or price increase for batch-pricing on account of the decision of the board to split the awards among the four bidders. Despite that, on the basis of the financial calculations and inputs from Regiments, as well as

⁶²⁶ Transcript 17 June 2021 p 68-72; Transnet-05-1453, para 100; and Transnet-05-1827, paras 63-68

⁶²⁷ Annexure FC 84, Exh BB4(b), FQC-661

⁶²⁸ Annexure FC 85, Exh BB4(b), FQC-701. The CFET report dealing with the 465 diesel locomotives includes a similar paragraph and admonition.

⁶²⁹ Transnet-Ref-Bundle-05148

"pushback" from the suppliers, the negotiations team ultimately agreed to batch-pricing.⁶³⁰

450. In an email dated 14 August 2018, Mr Laher justified agreeing to batch-pricing as being consistent with the board decision of 24 January 2014 and claimed the Locomotive Steering Committee ("the LSC") agreed that it would not make sense for there not to be a price increase when the batch size is reduced, especially where the reduction is substantial. He argued that "basic financial principles allow for recovery of fixed costs over the size of the batch, thus mathematically by reducing the batch size there are fewer units with which to recover fixed costs".⁶³¹ Mr Laher notably misstated what the board had decided. The board did not decide to provide for batch-pricing. It merely split the awards between different suppliers. Mr Laher clearly appreciated the risks of batch-pricing and the fact that it was unacceptable for Transnet. He nonetheless believed it was correct to have agreed to unnecessary batch pricing of R2.7 billion. His point that the reduction justified an increase in price is questionable when one considers the size and value of this particular procurement.

451. Mr Laher changed his tune about his understanding of batch-pricing in his evidence to the Commission. He testified that he told Mr Singh and Mr Jiyane that the original bid price per unit needed to be retained by bidders even though batch sizes were reduced because an adjustment could lead to their prices being higher than other unsuccessful bidders who could have given lower prices for a smaller batch.⁶³² The point so made is a compelling argument for why batch-pricing was inappropriate. During the post tender negotiations, Mr Singh and Mr Jiyane

⁶³⁰ Transcript 29 May 2019, p 36, line 21

⁶³¹ Transnet-Ref-Bundle-04318

⁶³² Exh BB4(f).1, YIL-014, para 51

disagreed with this proposition on the basis that "all bidders were requested to provide break-point pricing, and were not evaluated on smaller batch-pricing". This conflated batch-pricing with break-pricing.

452. A PTN feedback meeting on 7 February 2014 discussed the issue of batch pricing. The transcript of the meeting reveals that the issue came up in the context of a discussion the negotiation team had conducted with the bidders about escalations and break-pricing and that Mr Laher was fully aware that firstly batch-pricing had not been provided for in the RFPs and secondly the mandate of the negotiating team was to avoid any undue liability for batch-pricing.⁶³³ However, both Mr Singh and Mr Jiyane clearly considered introducing batch-pricing at this late stage (to favour CSR, the bidder pressing the matter) as justifiable. Mr Laher then intimated that the correct thing to do was to go back to all the bidders and to seek a proposal for batch-pricing. Mr Singh said it was too late. In his testimony, Mr Singh denied that Mr Laher had raised these concerns at the meeting. When confronted with the transcript showing that the matter was raised and that he had replied that it was too late to go back to the bidders, Mr Singh dissembled and repeated his untenable position that Transnet had to pay something.⁶³⁴
453. The meeting of 7 February 2014 then agreed that batch-pricing could justifiably be allowed to increase the price of the procurement by R2.7 billion (regardless of Transnet's contractual rights and the impact on the evaluation of price in stage 6 of the evaluation), through the simple expedient of including it under "escalations". Because Mr Singh was GCFO and Mr Jiyane was the CPO, Mr Laher said that he felt he was obliged to go along with their preferred approach.⁶³⁵ Mr Molefe,

⁶³³ Annexure FC-S4-03, Exh BB4(h), FQC-018

⁶³⁴ Transcript 17 June 2021, p 73-82

⁶³⁵ Transcript 21 October 2020, p 36, line 10; and Transcript 21 October 2020, p 42, lines 9-15

although not a member of the negotiation team, was a member of the Locomotive Steering Committee ("the LSC") to which the negotiation team and Mr Singh reported. He conceded during his evidence that batch-pricing ought not to have been included in the price and that he bore some responsibility but denied he acted deliberately to the prejudice of Transnet.⁶³⁶

454. An accelerated delivery schedule was used to justify the cost of R2.7 billion for batch-pricing. In his memorandum of 23 May 2014 to the board, Mr Molefe argued that the R2.7 billion was offset by a shorter delivery period resulting in lower escalation and forex costs.⁶³⁷ The business case and the RFP provided for the delivery of the locomotives over a period of seven years. In February 2014, Mr Singh requested TFR to respond to a proposal to reduce the delivery schedule from seven years to three / four years in the hope that accelerating the locomotives would save forex costs in the future.⁶³⁸

455. The key risk in accelerating the rate of delivery over a shorter period was that it required additional cash flow to effect payment for the locomotives at a time when there were constraints on the budget. Moving money to procuring the locomotives would take capital away from the capital projects which were required to support the acquisition of the locomotives. There was also considerable doubt about the preparedness of TE to handle the accelerated delivery. Moreover, the MDS volumes might not materialise as anticipated.⁶³⁹ Accelerated delivery posed an overall risk as it required very tight simultaneous coordination of markets, customer capacity, material supply, and developing infrastructure capacity and wagons.

⁶³⁶ Transcript 10 March 2021, p 73-83

⁶³⁷ Annexure FC 86, Exh BB4(b), FQC-726, para 70

⁶³⁸ Transcript 20 May 2019, p 104, lines 8-15

⁶³⁹ Annexure FC 54, Exh BB4(b), FQC-450, para 7.3

456. The LSAs concluded on 17 March 2014 included the accelerated delivery schedule.
457. The worst-case volume shortfall identified in the business case did in fact materialise. This occurred without the benefit of a flexible procurement and contracting strategy caused by the decision to accelerate the delivery schedule. As it turned out, the delivery of the locomotives was delayed. By December 2018, only 497 of the 1064 locomotives had been delivered.
458. The imprudence of accelerated delivery became apparent later. In about November 2015, Mr Pita (then GCFO) requested the Group Capital Integration and Assurance team to assist with potentially extending the 1064 locomotive delivery schedule by another two years, because of Transnet's precarious liquidity position. Transnet had paid excessive upfront payments and had not received much in the way of locomotives and this was impacting on liquidity. The proposal meant going back to the six-year delivery schedule that was originally envisioned in the business case. Regiments reviewed the cost implications of the proposed extension and considered a variety of options. These included the creation of a special purpose vehicle which would consider the sale of "excess" locomotives and a possible leaseback. Regiments submitted estimate calculations on 26 January 2016 of R13 billion (on top of the total cost of R54.5 billion) as the possible deferral cost for a period of two years.
459. The Group Capital Integration and Assurance team opposed the Regiments proposal as Transnet did not need to incur further costs because at that stage all the OEMs were experiencing production challenges or had not commenced production at the time, meaning they could not meet the accelerated delivery

schedule in any event.⁶⁴⁰ There was no need to incur this additional cost given that some of the OEM's had not even commenced production in South Africa. Moreover, the deferral of locomotives delivery would have triggered deferral penalties. The proposal, which would have advanced the interests of Regiments and the Gupta enterprise, was not implemented.

460. Mr Mahomedy testified that it came to his attention during the post tender negotiations that the negotiation team was negotiating a higher than normal advance payment to the bidders. Transnet had a historical practice of paying a deposit of 10%.⁶⁴¹ Advance payments are made to cover costs that the OEM will incur before the first locomotive is delivered. The norm is to pay 10%-15%. An amount in excess of this would invariably impact the cash interest cover - the financial ratio that is of particular interest to financial institutions and credit rating agencies. Payment of too large an advance payment could affect Transnet's credit rating and its ability to borrow at favourable rates. The advance payments paid in relation to the 599 electric locomotives (especially to CSR) were beyond the norm.
461. Despite Mr Mahomedy's concern, the PTN team agreed to pay CSR a deposit of 10% on the date of signing and a further 20% within six months – on design review in September 2014. This meant that Transnet was obliged to pay CSR R5.4 billion upfront before any locomotive was manufactured or delivered. Bombardier similarly received 9% upfront, 9% on design review, and a further 9% after six months. Advance payments of less than 2% were also not unusual. CSR had in fact initially proposed that amount in its bid.⁶⁴² Thus, CSR's advance payment increased dramatically during the post tender negotiations. Bombardier had originally put

⁶⁴⁰ Exh BB3(a), MSM-023, para 5.7

⁶⁴¹ Transcript 15 May 2019, p 81 *et seq*; and Exh BB3(a), MSM-011, paras 5.3.5-5.3.8

⁶⁴² Transcript 29 May 2019, p122; and Exh BB4(a), FQC-035, para 145

forward an advance payment of 25%. Its advance payment increased by 2% to 27%, being three payments of 9%. Likewise, CNR in the procurement of the 465 diesel locomotives increased its deposit from 1.08% to 15% (10% upfront and 5% on design review). No adequate explanation was ever tendered for these excessive payments.⁶⁴³

462. The consequence of the negotiations team (led by the Gupta associates Mr Singh and Mr Wood) agreeing to excessive advance payments on all the locomotive procurements was that on contract initiation on 17 March 2014, Transnet had to pay upfront advance payments of R7.37 billion before 1 April 2014 and had to increase its borrowings in the order of R6 billion in 2014-2015.⁶⁴⁴ The agreement to pay these excessive amounts raises questions about whether the final negotiations were conducted in Transnet's interests and whether those responsible acted corruptly.⁶⁴⁵

463. In addition, the RFPs stipulated that "local content" was a prequalification for the acquisition with a threshold of 60% for the electric locomotives and 55% for the diesel locomotives. It is questionable whether Bombardier and CSR should have been awarded the electric locomotive tender, and CNR the diesel locomotive tender, on account of their non-compliance with local production and content requirements. Mr Molefe in his memorandum to the board justifying the price increase failed properly to take account of the reduced local content and lower foreign inflation assumptions leading to the forward escalation costs being overstated and adding R3.2 billion to the cost of the transaction.

⁶⁴³ Transcript 15 May 2019, p 83

⁶⁴⁴ Transcript 20 May 2019, p 127 *et seq*; and Annexure FC 64, Exh BB4(b), FQC-537

⁶⁴⁵ See also the evidence of Ms Makgatho, the Group Treasurer, Exh BB10(a), MEM-015, paras 52-54; Transcript 6 June 2019, p 84-97

464. The computation of local content is regulated by paragraph 4.3 of the NT Instruction Note in accordance with the following formula: $LC=[1-X/Y] \times 100$ where X is the value of imported content in ZAR and Y is the bid price in ZAR excluding VAT.⁶⁴⁶ Paragraph 4.2(1) of the NT Instruction Note provides that prices used in the determination of X must be converted to ZAR at the exchange rate published by the SA Reserve Bank at 12h00 on the date of the advertisement of the bid. Using this formula MNS established that the local content of the Bombardier bid (53.8%) and CSR bid (54.5%) in the procurement of the electric locomotives fell below the prescribed 60% threshold. Similarly, the bid of CNR (45.2%) in the procurement of the diesel locomotives fell below the 55% threshold.⁶⁴⁷

465. During the post tender negotiations, the negotiation team used a favourable exchange rate that reflected changes resulting from the deterioration in the ZAR during the period between the advertisement of the bid and the conclusion of the post tender negotiations. This revision did not alter the overall result. The local content of the three bidders in fact decreased further as follows: Bombardier (45.6%); CSR (49.6%); and CNR (37.6%).⁶⁴⁸

466. Hence, at the close of the post tender negotiations, the bidders ought to have been disqualified or at least advised that they no longer met the prescribed minimum threshold and requested to adjust their figures.⁶⁴⁹ Notwithstanding this non-

⁶⁴⁶ MNS 1064 Report, para 2.3.3

⁶⁴⁷ MNS 1064 Report, para 2.3.3

⁶⁴⁸ MNS relied on certain spreadsheets used by the negotiations team - see Annexures FC 78 – FC 80, Exh BB4(b), FQC-624-632. The total imported value - relative to the locomotive price BAFO were: Bombardier – R15 804 152/R29 049 486 = 45.6%; CSR – R14 566 499/R28 890 000 = 49.6%; and CNR R17 557 873/R28 124 169 = 37.6%. See slide 52, Exh BB8(a), MNS-TS-53; and Transcript 28 May 2019, p 204 *et seq*

⁶⁴⁹ Transcript 28 May 2019, p 205, lines 5-10

compliance, CNR, Bombardier and CSR were awarded the contracts.⁶⁵⁰ This too was most likely in breach of the PFMA and advanced the corrupt scheme of the Gupta enterprise.

The increase in the price of the 1064 locomotives

467. The LSAs were concluded on 17 March 2014; CSR was commissioned to supply 359 class 22E electric locomotives at R18.1 billion; Bombardier to supply 240 23E electric locomotives at R13 billion; GE 233 44D diesel locomotives at R8.4 billion; and CNR 232 diesel locomotives at R9.9 billion. The total cost was R49.5 billion with a contingency of R4.9 billion making a total price of approximately R54.4 billion.
468. More than two months later, Mr Molefe submitted a memorandum to the BADC meeting of 26 May 2014,⁶⁵¹ and later to the board meeting of 28 May 2014 explaining the increase and seeking approval for it. The increase of R15.9 billion was attributed to four contributing adjustments: i) updated economic factors amounting to R5.4 billion; ii) risk mitigation – forex and escalation of R9.5 billion; iii) TE scope of R2.6 billion; and iv) contingencies of R4.9 billion. These four factors added R22.4 billion to the ETC. However, the PTN had yielded savings in respect of lower capital acquisition costs (less the batch-pricing adjustment) amounting to R6.5 billion, resulting in a total upward adjustment of R15.9 billion.⁶⁵² The board accepted the recommendation and took note that the main reason for the increase

⁶⁵⁰ See also the supplementary affidavit of Mr Sedumedi at Transnet-05-1977, paras 4.13-4.18 dealing with Mr Singh's untenable contention that it was sufficient for the LSAs to include contractual remedies for non-compliance with local content.

⁶⁵¹ Annexure FC 85, Exh BB4(b), FOC-715

⁶⁵² Para 14 of Annexure FC 85, Exh BB4(b), FOC-715

in ETC was the exclusion of the specified costs from the 24 January 2014 submission.⁶⁵³

469. Before approving the increase of R15.9 billion, neither the board nor the GCEO sought approval from the Minister of Public Enterprises for the increase. Paragraph 17 of the memorandum of 23 May 2014 noted that the acquisition had been approved by the Minister of Public Enterprises on 3 August 2013 and added that "although the approval from the Minister was not subject to a final cost of R38.6 billion, for good governance and for information purposes a letter will be sent to the Department of Public Enterprises advising of the final ETC".⁶⁵⁴
470. Section 54(2)(d) of the PFMA provides in relevant part that before a public entity (Transnet) concludes a transaction for the acquisition of a significant asset, the board must promptly and in writing inform the National Treasury of the transaction and submit relevant particulars of the transaction to the Minister of Public Enterprises (the relevant executive authority) for "approval of the transaction". Section 54(2) of the PFMA is aimed *inter alia* at ensuring Ministerial approval for transactions for the acquisition of significant assets.
471. The PFMA does not define what is meant by a significant asset. However, Treasury Regulation 28.3 provides that the Minister and the accounting authority must agree on the methodology for determining what is significant. The Shareholder Compact contained the Significance and Materiality Framework ("SMF") which provided that the Transnet board was exempt from the provisions of

⁶⁵³ Annexure AC 5, Exh BB8(b).1, AOC-1064-182 – Mr Singh argued in the re-examination affidavit (Transnet-05-2394, paras 138-140) that it was open to the BADC and the board to give an instruction not to make the award. This seems unlikely considering that Mr Molefe had signed the LSAs two months earlier on 17 March 2014.

⁶⁵⁴ Para 17 of Annexure FC 85, Exh BB4(b), FQC715-16

section 54(2)(d) of the PFMA if the acquisition did not exceed 2% of the 30 September 2013 audited asset base (which equated to R4.4 billion). The SMF also provided that the board was required to provide the Department of Public Enterprises with a detailed notification of all acquisitions of assets valued above R2 billion.⁶⁵⁵ Transnet agreed in clause 8 of the Shareholder Compact that an asset in excess of R3.9 billion would be significant.⁶⁵⁶ Paragraph 5.1.3 of Transnet's delegation of authority framework provided that increases in the ETC of projects already approved by the Shareholder Minister had to be reported to the Shareholder Minister if the increase was in excess of 15%.

472. It is common cause that the Minister approved the acquisition at an ETC of R38.6 billion on 3 August 2013 but was never requested to approve the increase of R15.9 million, nor was the increase reported to the Minister as proposed in paragraph 17 of the memorandum of 23 May 2014. Mr Molefe, in the memorandum, in effect advised the board that there was no need for ministerial approval.⁶⁵⁷ Mr Molefe admitted during his testimony that he had not reported the increase to the Minister,⁶⁵⁸ even though he understood that he was obliged to report the increase and had undertaken to the board that he would do so.⁶⁵⁹ He declined initially to comment on whether his conduct amounted to a contravention

⁶⁵⁵ Transnet-05-1913, para 3

⁶⁵⁶ Clause 8 of the Shareholder Compact refers to the framework for significance and materiality in Annexure E. In the table in Annexure E under the heading: "Exemption from section 54 of the PFMA" it is provided that an acquisition which does not exceed 2% of the 31 December 2012 audited asset-based value (which equates to R3.9 billion) is exempted.

⁶⁵⁷ Annexure FC 85, Exh BB4(b), FQC-715, paras 16 and 17

⁶⁵⁸ Transcript 10 March 2021, p 74-76

⁶⁵⁹ Transcript 10 March 2021, p 89, line 11

of the PFMA,⁶⁶⁰ but later said it was a matter for the legal and compliance department.⁶⁶¹

473. Mr Singh, the author of paragraph 17 of the memorandum of 23 May 2014, dealt with this question in an affidavit filed with the Commission on 10 March 2021.⁶⁶² He said that he stood by the contents of paragraph 17 of the memorandum as it was based on the delegation of authority framework and the significance and materiality framework applicable at the time. Paragraph 5.1.3 of the delegation of authority framework merely provided that increases in the ETC of projects already approved by the Shareholder Minister had to be reported to the Shareholder Minister if the increase is in excess of 15%. Since the procurement of the 1064 locomotives was approved by the then Minister of Public Enterprises, Mr Gigaba, on 3 August 2013, Mr Singh argued, Transnet only needed to report the increase in the ETC to the Minister and did not need approval for contracting at an agreed higher price.⁶⁶³
474. Mr Singh's argument is disingenuous, and if accepted would defeat the purpose of the materiality framework.⁶⁶⁴ The object of paragraph 5.1.3 of the delegation of authority framework was to allow some leeway up to 15% of the approved price, but, for good reason, implicitly required approval where there had been a material change. The purpose was to provide the Minister of Public Enterprises with oversight authority in relation to projects that materially exceeded the original approved price estimates. The requirement of reporting to the Minister was aimed at obtaining approval for a substantial increase in the price of an existing project, in recognition of the fact that the supposition upon which the original approval had

⁶⁶⁰ Transcript 10 March 2021, p 76

⁶⁶¹ Transcript 10 March 2021, p 77 and 80-83

⁶⁶² Transnet-05-1431

⁶⁶³ Transcript 17 June 2021, p 146-151; Transnet -05-1436, para 21

⁶⁶⁴ See the supplementary affidavit of Mr Sedumedi, Transnet-05-1913, paras 3-4

been granted no longer held true: the price of the procurement in this case increased by an additional 41%.

475. If Mr Singh's argument were accepted it would lead to the absurdity or anomaly that Transnet, for example, could obtain approval for a R10 million transaction, then unilaterally enter into a contract for R20 billion for which it had no Ministerial approval and could regularise the ultimate transaction by the simple expedient of reporting it to the Minister who would be without power to veto the transaction and prevent its conclusion. That could never have been the intention.
476. The fact of the matter in this case is that despite Mr Singh undertaking on 31 March 2014 to provide a full report to the Minister⁶⁶⁵ the increase of R15.9 billion was neither reported to nor approved by the Minister with the result that the legality of the LSAs is open to question on this ground. The Commission is aware that there is litigation between Transnet and the OEMs in relation to this procurement.
477. As will be discussed more fully later in this report, Regiments took over the role of financial adviser on the 1064 procurement in February 2014, shortly before the LSAs were signed at the increased price of R54.5 billion. The memorandum of 23 May 2014 indicated that escalations had been verified by Transnet using publicly available data and by Regiments "using their intellectual property methodology techniques."⁶⁶⁶ The altered business case and price increase was considered only by the BADC and the board without the benefit of the specialist expertise of other internal structures and only subsequent to the award of contracts.⁶⁶⁷ Given the extensive increase, the business case ought to have been re-visited using the

⁶⁶⁵ Transnet-05-2337; and Transcript 17 June 2021, p 30-32

⁶⁶⁶ Annexure FC 85, Exh BB4(b), FQC-725, para 59

⁶⁶⁷ Transcript 15 May 2019, p 54

changed assumptions and tested for viability and profitability before the LSAs were concluded.⁶⁶⁸

478. Table 2 of the memorandum of 23 May 2014⁶⁶⁹ sets out the line items making up the ultimate price of R54.5 billion. It commences with an aggregate amount of the BAFO price in respect of the entire 1064 acquisition and adds amounts for backward looking escalations and forex adjustments, batch-pricing adjustments, accounting for TE, forward looking escalations, hedging costs, and contingencies. Mr Chabi concluded that the increase from R38.6 billion to R54.5 billion reflected in Table 2 was not entirely justifiable.
479. Mr Mahomedy took issue particularly with the forex and escalation amounts reflected in Table 2, amounting to R14.9 billion (R2.3 billion escalation up to signature date; R3 billion forex adjustment to spot rate; R6.7 billion escalations to end of contract; and R2.7 billion hedging costs). He believed these were markedly high because: i) the entire contract was not subject to foreign exchange hedging and fluctuation (considering that 55% of the diesel locomotives and 60% of the electric locomotives was localised); ii) large upfront deposits were paid at the outset; iii) the business case had made provision for costs and price escalations; and iv) given that fixed price contracts had been signed in March 2014, an amount of R4.95 billion for contingencies was excessive – the business case provided for R2.232 billion. Taking account of localisation and the advance payments, Mr Mahomedy calculated that at most, only R12 billion of the R54.5 billion would have been subject to foreign exchange movements. Yet R5.7 billion of the R15.9 billion price increase provided for foreign exchange. It seems implausible that R5.7 billion was required to provide for foreign exchange fluctuations on an amount of R12

⁶⁶⁸ Transcript 15 May 2019, p 62 *et seq*

⁶⁶⁹ Annexure FC 85, Exh BB4(b), FQC-718 - The table is more legible in MNS 1064 Report, para 4.1.3

billion. Furthermore, the escalations appear not to have taken account of the shortened delivery schedule. All of these considerations, Mr Mahomedy submitted, required the business case to have been re-visited and re-designed using the updated changed assumptions and then tested for viability and profitability before the LSAs were concluded.⁶⁷⁰

480. The business case provided for a positive Net Present Value ("NPV") of R2.7 billion based on the original ETC using a hurdle rate of 18.56%. Moving from R38.6 billion to R54.5 billion produced an NPV negative. The procurement project in the business case was profitable, but thinly so, in that it was only 2.5% of a revenue of R109 billion. A delay in the delivery of the locomotives, the MDS volumes not materialising, or increases in costs (all possibly impacting cash flow and thus the financing of the deal) meant there was a material risk that the project would become unprofitable.⁶⁷¹ Mr Molefe in the memorandum of 23 May 2014 however informed the board that the NPV of the business case remained positive at R11.68 billion (a significant increase on the R2.7 billion projected in the business case) using a changed hurdle rate of 15.2% but would have become a negative R1.67 billion at the original hurdle rate of 18.56%.⁶⁷²
481. Mr Singh changed the hurdle rate at Transnet from 18.56% to 16.24% (effective from 31 March 2014) on 20 May 2014, days before the memorandum justifying the increase was submitted to the board.⁶⁷³ Yet the memorandum applied a hurdle rate of 15.2%. He could not convincingly account for where he had obtained the hurdle rate of 15.2% used by him to achieve the positive NPV of R11.68 billion, beyond saying it had been under discussion before the rate of 16.24% was settled on. He

⁶⁷⁰ Transcript 15 May 2019, p 62 et seq

⁶⁷¹ Exh BB8(b).1, AOC-1064-022, para 8

⁶⁷² Annexure FC 85, Exh BB4(b), FQC-715, para 7

⁶⁷³ Transcript 31 May 2021, p 210

could not say whether the use of the rate of 16.24% would have resulted in a negative or positive NPV and accepted that the exercise to determine that would take some weeks.⁶⁷⁴ The use of the hurdle rate of 15.2% and the statement that the NPV result was positive at R11.86 billion was a significant misrepresentation and (in view of the proximity in time of the change to the hurdle rate effected by Mr Singh to his compiling the memorandum) was most likely deliberately designed to mislead the board. Mr Singh used a hurdle rate of 15.2% a few days after he had signed the policy document changing the rate from 18.56% to 16.24% most likely to ensure a positive NPV when the ETC hurdle rate of 18.56% produced a negative NPV.

482. The memorandum of 23 May 2014 depicted the reasons for the increase in ETC in Table 2 as follows:⁶⁷⁵

ITEM	RANDS
BAFO per board submission excluding hedging and escalation:	R29 355 532 740
A. Escalation up to signature date (close of tender to	R2 362 018 104

⁶⁷⁴ Transcript 31 May 2021, p 190-217. Mr Singh later maintained that the NPV would have been positive regardless of the hurdle rate used because of unproven potential operational efficiencies that could be achieved from optimisation of flows based on new technology, for example, running dual-electric locomotives across routes that previously required multiple change overs from AC to DC, and if there was a 5% increase in operational efficiency -Transcript 17 June 2021, p 43-52; Annexure FC 54, Exh BB4(a), FQC-423 and FQC-452. In the re-examination affidavit, Mr Singh described the use of the incorrect hurdle rate as "a mere oversight" – Transnet 05-2405, para 175; he also sought to attribute the blame for it to Mr Laher - Transnet 05-2402, para 168 *et seq.* Given the late filing of the re-examination affidavit, neither Mr Laher nor the investigative team have had an opportunity to deal with this allegation. Mr Laher's name does not appear on the memorandum of 23 May 2014 submitted to the board, which was recommended by Mr Singh on 22 May 2014 (and drafted on his instruction and under his supervision and guidance).

⁶⁷⁵ Annexure FC 85, Exh BB4(b), FQC-718

March 2014):

B. Add back original TE scope for BAFO purposes:	R1 706 643 360
C. Forex adjustment to spot rate:	R3 030 660 144
D. Batch price adjustment for batch size:	<u>R2 754 402 335</u>
BAFO updated for economic and other factors	R39 209 256 683
B. Additional TE scope:	<u>R883 172 732</u>
New price including TE's scope	R40 092 429 615
E. Cost to fix escalation to end of contract:	R6 725 784 499
F. Cost to hedging:	<u>R2 729 046 496</u>
ETC including hedging and escalations	R49 547 224 410
G. Contingencies:	<u>R4 954 775 590</u>
ETC including hedging, escalation, options etc.	R54 502 000 900

483. The BAFO cost of R29.356 billion represents the total cost of the 599 electric locomotives and the 465 diesels. The base price in the ETC was R30.476 billion.⁶⁷⁶ The difference may be attributable to the BAFO and PTN stages. The aggregate figure used in the price evaluation as reflected in the memoranda of 15 January 2014 submitted to the LSC by the CFET-Finance differs from that in the memorandum of 23 May 2014. The BAFO prices per locomotive used in the memoranda of 15 January 2014 led Mr Chabi to a total BAFO price of R29 532 819 948 which is about R177 million more than the price stipulated in Table 2 of Mr

⁶⁷⁶ Exh BB8(b).1, MNS-AC-23

Molefe's memorandum of 23 May 2014 (R29 355 532 740). If Mr Chabi's calculations are correct, the BAFO was understated by Mr Molefe in the amount of R177 million. Mr Chabi received no documents substantiating the BAFO price of R29.356 billion used by Mr Molefe, but worked on the assumption that such figure was the correct value.⁶⁷⁷

484. Mr Chabi reached the overall conclusion that the increase to the BAFO figure made up of the additional Items A-G in Table 2 was unjustifiably high.
485. Items A and C in Table 2 provide for an adjustment of price to take account of escalations and a forex adjustment for the period between the close of the tender and the signature of the LSAs (April 2013 to March 2014). In total they amount to R5 392,678 248 (R2 362 018104 plus R3 030 660 144). These are "the backward-looking economic factors" that impacted the price. Mr Molefe argued that the estimates and assumptions on which the business case was based had changed substantially since the board approved the ETC in April 2013.
486. With regard to Item A, Mr Molefe explained that labour cost increases (Transnet had concluded a two-year wage settlement at 8.5%), a 12.9% increase in the price of steel, a local producer price index of over 7.5%, higher foreign inflation and anticipated inflation of 6.1% would result in a locomotive price increase of 8% which was reflected in the amount of R2 362 018 104 in Item A in Table 2.
487. Mr Chabi took issue with the computation of the backward-looking escalation figure of R2.362 billion.⁶⁷⁸ He agreed that there was deterioration in economic factors beyond the levels allowed for in the business case. The cost arising from this

⁶⁷⁷ Transcript 29 May 2019, p 226 *et seq*; and Exh BB8(b).1, AOC-1064-041, para 10.2

⁶⁷⁸ Exh BB8(b).1, AOC-1064-036, para 9.54.3

deterioration as per Items A and C of the memorandum was R5.4 billion. He computed this cost to be R4.4 billion. Mr Chabi accepted that the foreign currency cost of approximately R3.1 billion (Item C) was reasonable, but considered the escalation in Item A to be overstated. The key inputs in determining backward escalation costs were the local content declarations by the OEM's and the relevant price inflation indices. Because this was backward-looking, the inputs were observable and required no assumptions. The memorandum estimated R2.362 billion on the back of assumed local content of 60%. Contrary to the submissions in the memorandum, all the OEM's, except GE, failed to meet the local content requirements.⁶⁷⁹ He estimated the escalations by using the following parameters: i) actual declared foreign-local content; ii) the Treasury curve hedge rates; iii) local inflation in line with South African PPI rates (backward-looking at 7.74% per annum); iv) foreign inflation in line with US CPI i.e. 2% per annum; and v) expected accelerated delivery schedules. Based on these, the estimated inflation should have been R1.42 billion instead of R2.362 billion. The memorandum does not show the calculation for the R2.362 billion, but it does appear to consider additional inflation for cost components. The additional inflationary costs of components are accounted for in the PPI and foreign inflation. Adding them back amounted to double counting.⁶⁸⁰ Mr Chabi simplified the point by intimating that the 8% escalation posited by Mr Molefe in his memorandum did not properly account for the different rates of inflation for the local and foreign components.⁶⁸¹ Foreign inflation was 2% or less, while South African inflation was 7.8%. A weighted average of 8% was not justifiable.⁶⁸²

⁶⁷⁹ Exh BB8(b).1, AOC-1064-043, paras 10.6-10.7

⁶⁸⁰ MNS 1064 Report, paras 4.1.4 - 4.1.8

⁶⁸¹ Transcript 4 December 2019, p 48-52

⁶⁸² See MNS 1064 Report, para 4.1.3

488. Item C was a provision for the depreciation of the ZAR, which had impacted the expected price of the locomotives as per the business case and ultimately the ETC. Mr Chabi's computation was R3.17 billion which was more than the R3.031 billion provided in Table 2. He thus accepted that Item C was a reasonable adjustment.
489. Item B of Table 2 comprises two amounts in respect of TE. R1.707 billion and R883 million. Together they amount to a premium of R2.59 billion for the use of TE as a sub-contractor. The amount of R1.707 billion is the amount which was deducted from the BAFO price of the electric locomotives during stage 6 of the evaluation. Mr Molefe's adding it back at this stage confirms that CSR and Bombardier were not in fact evaluated on the actual price of their locomotives. This unfairly favoured CSR. However, from an accounting perspective, the adding back of this amount to the price was appropriate because it reflected the actual price – including the additional cost of using TE as a sub-contractor. The memorandum did not provide a clear explanation for the additional amount of R883 million under Item B for TE scope beyond suggesting it was a risk premium into their pricing for the risks associated with TE carrying out the additional new scope of work for the first time. Mr Chabi was unable to get more information and was unable to refute it. He therefore assumed that the R2.5 billion TE adjustment was reasonable.⁶⁸³
490. Item D of Table 2 provided for an adjustment of approximately R2.7 billion for the reduction of the batch size. Mr Molefe justified the additional cost on the basis of an overall saving on future escalations and hedging costs as a result of a shorter

⁶⁸³ Transcript 4 December 2019, p 53

delivery period in the amount of R4.08 billion (which given the delays was probably not realised).⁶⁸⁴

491. The batch price adjustment cost (batch-pricing) in Item D was probably a break-point pricing cost (break-pricing). Break-pricing only applies when there is a premature termination of the procurement order and thus applies only once a contract was in place. The idea behind break-pricing is that with a premature break the bidders need to be compensated for having committed financial resources in anticipation of fulfilling the entire order. However, when the board split the bids into batches, no contract had been signed with the OEM's and therefore no fixed costs for setting up the production lines needed to be recouped by them. The pricing schedules provided by the bidders in respect of break-pricing were probably used to obtain the figure of R2.7 billion. Using the break-point pricing schedules provided by the bidders, a figure of R2.7 billion was obtained assuming OEMs were contracted and orders were terminated at the point where the batches were supplied by the OEMs. The figure is wholly unjustifiable. Paragraph 3.1 of Part 2 of the RFP specifically provided that Transnet would not be expected to pay a price premium should it exercise the option to change the quantities of locomotives procured from any bidder. Mr Chabi accordingly concluded correctly that the amount of R2.7 billion was unjustified and no basis existed for the adjustment.
492. Item E of Table 2 provided for an adjustment to a forward escalation of input costs in the amount of R6 725,748,499. This cost is the expected escalation from 17

⁶⁸⁴ Annexure FC 85, Exh BB4(b), FQC-726, paras 66-71 - Mr Singh re-visited the question of batch pricing in his belatedly filed re-examination affidavit – Transnet 05-2411, paras 205-208. His analysis indicates that he misunderstands the principal contention that he played a significant part during the PTN in incurring an additional liability of R2.7 billion that Transnet was not contractually obliged to incur. He accused Mr Chabi of being "obsessive in the way that he interprets the concept of break pricing as this is the only way to justify a zero value for the batch pricing adjustment". The inclusion in the price of a R2.7 billion adjustment that was not due entirely supports Mr Chabi's finding that the price was unjustifiably inflated by this amount.

March 2014 (the contract signing date) over the contract term (originally seven years but reduced to three to four years by the accelerated delivery schedule). The cost should be an estimation of the difference between the BAFO price as at 17 March 2014 (the contract date) and the expected prices at the times of delivery for each locomotive, allowing for declared local/foreign contents, and future South African PPI at 6% per annum and USA CPI at 2% per annum.⁶⁸⁵ However, the cost estimation in the memorandum of 23 May 2014 used different assumptions resulting in an unjustifiable increase in this cost.

493. In the memorandum, Mr Molefe justified the R6.7 billion increase on the ground that financial prudence warranted fixing the escalation exposure on conservative grounds.⁶⁸⁶ He argued that given the size, magnitude and risk tolerance of Transnet due to the execution of the Market Demand Strategy, cash flow certainty was of paramount importance when planning for the long term. This would ensure that Transnet was able to manage its gearing, cash interest cover and the like. Fixing escalation for input costs, especially the volatile cost of labour and steel, would gain certainty of cash flows and satisfy the conservative risk appetite of bond holders and credit rating agencies. The contractors had also built a risk premium into their pricing for forward looking inflation to cater for the unpredictable nature of the labour environment within South Africa and the risk associated with TE carrying out the additional new scope of work.

494. Although the South African Reserve Bank ("SARB") forecast CPI at 6.2%, 5.9% and 5.5% for the years 2014, 2015 and 2016 respectively, there was concern about upward inflationary pressure. The "high level" of local content, which Mr Molefe set at 60%, justified in his view the use of local indices in assessing the cost of

⁶⁸⁵ MNS 1064 Report, para 4.1.12(b)

⁶⁸⁶ Annexure FC 85, Exh BB4(b), FQC-724, paras 45-59

escalations going forward. It should be immediately noted that Mr Molefe misstated the local content figure. The local content of three bidders (Bombardier, CSR and CNR) was in fact below 50%. Nonetheless Mr Molefe believed a net escalation of 16.8% provided in Item E was justified (CPI of 6% escalated for 35 months on a compound basis, excluding a provision for risk results in a 18.54% increase). These escalations were verified by Regiments "using their intellectual property methodology and techniques". The escalation of R6.7 billion amounted to the application of a weighted average of 7.35% to the entire transaction.

495. Mr Chabi was of the opinion that the calculation in Item E was unjustifiable for two essential reasons: first, the incorrect local content figures; and, second, the use of local indices in relation to foreign inflation assumptions.⁶⁸⁷ He performed his analysis by constructing an inflation index for each OEM to reflect each OEM's local and foreign content (Bombardier 45/55; CSR 50/50; and CNR 38/62). In modelling cash flows he allowed for a 90% upfront payment on delivery and 10% after a retention period of four months (presumably accounting for the advance payments made within the six months of signature). He assumed local and foreign inflation at 6% and 2% respectively over the accelerated delivery period.⁶⁸⁸ He started with an "escalated" price of a locomotive as at March 2014 (the date of the LSA), being the updated BAFO price at that date, taking account of inflation between April 2013 and March 2014, the forex adjustment, the add back of the TE adjustment, and the batch price adjustment. The escalation cost was then the difference between the escalated March 2014 price per locomotive and the escalated price of the locomotives at various points over the accelerated delivery period.

⁶⁸⁷ Transcript 4 December 2019, p 59-67; and Exh BB8(b).1, AOC-1064-046, paras 10.20-10.23

⁶⁸⁸ These figures were conservative because South African and US inflation were probably lower

496. The first key difference in assumptions in relation to Item E was Mr Chabi's use of an inflation rate which took account of the local/foreign content ratio. Mr Molefe erred in applying the local indices to the entire transaction – 7.35% per year.⁶⁸⁹ The second mistaken assumption in Mr Molefe's calculation was his escalation for 60 months, resulting in an 18.54% increase. This incorrectly assumed that all the locomotives were purchased in the 35th month, whereas the delivery was scheduled to take place intermittently over the three-year period. Thirdly, the calculation that the 16.8% adjustment (R6.7 billion) to the price was justified by a forward-looking inflation assumption of 6% per year (18.54% over 35 months) was incorrect. To achieve an escalation cost of R6.7 billion, the assumed inflation rate would be 7.35%.⁶⁹⁰

497. The crux of Mr Chabi's testimony is that the application of proper assumptions regarding local/foreign content, a lower weighted inflation rate (taking account of the different local and foreign rates), the intermittent delivery of locomotives and the accelerated delivery schedule, results in an Item E adjustment of R3.472 billion and not R6.726 billion. Item E in Table 2 of the memorandum accordingly overestimated this adjustment by approximately R3.3 billion.

498. Mr Singh challenged the conclusion by Mr Chabi that the provision for forward escalations was overstated by R3.2 billion on various grounds⁶⁹¹ and provided an expert opinion by Mr Erich Krohnert in support of his arguments.⁶⁹² Mr Chabi

⁶⁸⁹ Transcript 4 December 2019, p 61-64

⁶⁹⁰ Transcript 4 December 2019, p 66, line 10 et seq

⁶⁹¹ Transnet-05-1492, paras 268-274; and Transcript 17 June 2021, p 82-105

⁶⁹² Transnet-05-1982 – Mr Krohnert does not appear to have qualified himself as an expert, despite Mr Singh's counsel undertaking to do so – Transcript 17 June 2021, p 112 – See also Mr Singh's re-examination affidavit (Transnet 05-2415, paras 209-215) where he belatedly elaborates on some of his contentions regarding escalations and the inclusion of a risk premium which he failed to raise during his testimony to which Mr Chabi and the investigative team of the Commission have been denied an opportunity to respond.

rebutted the submissions of Mr Singh and Mr Krohnert in two supplementary affidavits.⁶⁹³

499. Mr Singh argued firstly that Mr Chabi erred in using the payment profile of 90% on delivery and 10% after a four-month retention period used in the business case in March 2013 as opposed to the contractually committed provisions available in March 2014 which better reflected reality. Mr Singh did not set out the relevant contractual provisions. Mr Chabi countered that the profile suggested by Mr Singh was not sufficient because it did not account for the timing of each milestone over the payment profile. The assumption used by Mr Chabi is widely accepted and in fact was used by Mr Krohnert, who explained that like Mr Chabi he estimated the cost of escalation to the end of the contract by modelling the future cash flows using the delivery schedule provided in the memorandum to the board justifying the increase and provided for 90% of the purchase price to be paid on delivery and the remainder to be paid four months later. He noted that he had not been provided with the actual contracts to determine the correct delivery or payment schedules. Accordingly, Mr Chabi's assumption on the payment profile seems appropriate.
500. Mr Singh further maintained that Mr Chabi made an error in using actual local content percentages as opposed to the contractually committed local content percentages. The contention is not sustainable as it would not accord with the actual reality since the contractual requirements were not in fact met.
501. Mr Singh accused Mr Chabi of being simplistic for relying on the local (6%) and foreign (2%) CPI numbers. In the opinion of Mr Krohnert, Mr Chabi should have utilized industry specific inflation indicators for each different country to assess the appropriate impact of this factor on costs - industry specific variables would include

⁶⁹³ Transnet-05-1828, paras 69-77; Transnet-05-2004, paras 6.8-6.9

items such as steel, labour, copper etc. The OEMs were more likely to have priced using industry specific inflation for their own manufacturing costs.

502. Using data from the Bureau of Labour Statistics of the US Department of Labour, Mr Krohnert believed that an industry specific inflationary indicator of 4.2% for the USA was more appropriate than using a general inflation assumption which might not give sufficient weight to industry specific factors. An industry-specific index constructed for the local component could be estimated at 7.7% on the assumption that the labour component was equal to Transnet's 8.5% p.a. wage agreement and that the steel and fuel components would equal that of the foreign components. He felt this was optimistic given that South African electricity increases had averaged significantly higher than this prior to February 2014. Using these values would result in a composite future inflationary expectation of 6.2% p.a. as opposed to the 4.4% assumed using the general inflation assumptions. Mr Krohnert pointed out that there was nothing untoward in a provider seeking to immunise its own inflationary exposure when negotiating this transaction.
503. Mr Chabi responded to this by arguing that the information detailing the relevant factors along with the respective weightings for each OEM was not available to him or Mr Krohnert, as appears from the assumptions Mr Krohnert used. Mr Krohnert's approach seems problematic firstly because the memorandum justifying the price increases did not provide for a full basket of factors (or components) to consider when determining a composite inflation rate. It provided a few examples, with the implication that a financial modeller would need to assume the remaining factors and weighting for them. The model proposed by Mr Krohnert is complex (and not brief as per the actuarial principle of parsimony) and makes assumptions that are subjective and would not have generalised well across the four OEM's. Assumptions with regard to over 40 parameters would have been required resulting

in the model becoming volatile and unreliable. It was in Transnet's best interest rather for it to have relied on broad escalation indices (which it in fact did) when agreeing to price.

504. Mr Singh alleged that Mr Chabi also ignored the fact that a premium would be charged by the OEMs to assume the risk of future price escalations. According to Mr Krohnert a risk premium for taking on the risk of the unknown is legitimate. The need for a premium was mentioned in the memorandum but the quantum was not quantified. There are no market observable factors to determine the premium to be paid to assume future price escalations risk. A price premium of 1.35% for assuming such risk, according to Mr Singh, could reasonably be added by the OEMs to a rate of 6% (weighted average for both local and foreign components), thus arriving at the rate of 7.35% used in the memorandum. Mr Chabi disagreed.
505. Over the five-year period prior to March 2014, the rolling one-year local PPI averaged at 4.1%, well below the inflation rate of 6% assumed by Mr Chabi. An all-inclusive escalation rate (escalation rate + risk premium) of more than 6% was not warranted and should not have been agreed to by the Transnet team in the negotiations. The approach adopted by Mr Krohnert would not have been in the interest of Transnet because it would have ignored the upside risk of local inflation falling below 6% and allowed for an additional 1.35% as a risk premium without substantiating the amount. Mr Chabi's assumption of 6%, being the upper band of the SARB target, in effect allowed for a risk premium of about 2%.
506. In short, the application of a rate of 7.35% on both local and foreign content unjustifiably increased the price and provided a significant margin that would have assisted CSR and CNR to pay the agreed kickbacks to the Gupta enterprise.

507. Item F of Table 2 provided an additional hedging cost of R2 729 046 496. Mr Chabi agreed that this cost was justifiable and reasonable.⁶⁹⁴
508. Item G of Table 2 added R4 954 775 590 for contingencies. Mr Chabi estimated that Item G was unduly inflated by R2.1 billion.⁶⁹⁵ Mr Molefe justified the R4.955 billion on the basis that the ETC of R49.5 billion did not include the cost of:
- i) capital spares beyond the warranty period; ii) variation orders and options (such as electronically controlled pneumatic braking and wire distributed power etc.); and
 - iii) provision for manufacturing operations to be carried out by TE in Durban.
- These, he maintained, justified an additional 10% contingency adjustment.
509. According to Mr Chabi, it is standard practice in projects of this kind to set aside a contingency reserve to provide for unforeseen risks and costs in the amount of 5% to 10% of the capital cost.⁶⁹⁶ Contingency costs of R2.232 billion made up 7.4% of the capital cost in the business case. Mr Chabi accepted that contingencies for variations and options were standard.⁶⁹⁷ He took issue with the provision for capital spares because contingencies are not ordinarily meant to cover long term capital spares. Such components are usually under warranty and hence their costs would not be included.⁶⁹⁸ Mr Chabi took the view that a contingency of between 7-8% was more typical of past practice within Transnet and a contingency of R2.809 billion was more appropriate. He broke the figure down into four items: i) capital

⁶⁹⁴ Exh BB8(b).1, AOC-1064-049

⁶⁹⁵ Mr Singh's attempt to discredit Mr Chabi's findings on the provision for contingencies is not convincing – Transcript 17 June 2021, p 105-117

⁶⁹⁶ Exh BB8(b).1, AOC-1064-039, para 9.54.9

⁶⁹⁷ Transcript 4 December 2019, p 72, line 12 *et seq*

⁶⁹⁸ MNS 1064 Report, para 4.1.14; Mr Singh contended belatedly in the re-examination affidavit (Transnet 05-2409, paras 196-200) that Mr Chabi was not qualified as a locomotive expert and thus did not possess the skill to challenge this variable and had failed to appreciate that the price for spare parts and tools was not finalised. The late filing of the re-examination affidavit resulted in Mr Chabi and the investigative team of the Commission being denied an opportunity to deal with this allegation.

spares – R545 344 406; ii) options – R1.07 billion; iii) relocation to Durban – R9.5 million; and iv) unallocated R1.18 billion.⁶⁹⁹

510. During his testimony, Mr Chabi did not deal with the additional amount included in the 10% contingency provision for the establishment of a production line in Durban. In the memorandum Mr Molefe explained that Transnet had decided that it would be more strategic to have two OEMs manufacture locomotives in Durban because TE could not accommodate four OEMs in Gauteng. Bidders had based their contracted price on manufacturing operations being carried out in Gauteng and thus there would be additional costs that had not been quantified. This cost was included in the additional 10% for contingencies.⁷⁰⁰ Mr Chabi put this cost at R9.5 million⁷⁰¹ on the basis of a quotation supplied by CNR on 11 March 2014 (a week before the LSAs were signed). As discussed later, the cost increased dramatically to R1.2 billion subsequent to the contracts being concluded and was a significant component of the Gupta scheme.

511. In the final analysis, Mr Chabi concluded that the deterioration and economic conditions (inflation and foreign currency) warranted an increase in the ETC in the business case from R38.6 billion to R45.379 billion made up of: i) BAFO price = R29.356 billion; ii) TE scope = R2.590 billion; iii) backward escalations = R1.392 billion; iv) backward forex = R3.031 billion; v) forward escalations = R3.472 billion; vi) forward forex = R2.7 billion; and vii) contingencies = R2.809 billion. This represented an increase of 18% (R6.8 billion) on the original ETC rather than the 41% increase proposed by Mr Molefe in the amount of R15.9 billion.

⁶⁹⁹ Transnet-05-2008, para 8

⁷⁰⁰ Annexure FC 85, Exh BB4(b), FQC-726, paras 73-75

⁷⁰¹ Transnet-05-2008, para 8.

512. In short, according to Mr Chabi, the adjustment approved by the board in May 2014 in the amount of R15.9 billion included amounts totalling R9.124 billion in unjustifiable expenditure. This overstated expenditure was due to changes in escalation formulas and the source of the indices used by Regiments. This increase, at Transnet's expense, benefitted CSR and CNR, which in turn had kickback agreements with entities controlled by Mr Essa.

The Teesta agreements in relation to the 1064 locomotives

513. The Shadow World Investigation report⁷⁰² reveals that CSR agreed to pay kickbacks of 21% of the value of the 359 electric locomotives (awarded to it as part of the 1064 locomotive procurement) to two Gupta linked companies, JJT and Teesta Group Ltd, ("Teesta"), equalling approximately R3.806 billion.⁷⁰³ As with the kickbacks on the other contracts with CSR, approximately 85% of that was probably paid to the Gupta enterprise.⁷⁰⁴

514. On 18 May 2015 Mr Essa, acting on behalf of one of his companies, Teesta, incorporated under the laws of Hong Kong, concluded a contract in Shenzhen, China, with CSR (Hong Kong) Co Ltd.⁷⁰⁵ The contract is described on its cover page as a "Business Development Services Agreement" ("the BDSA"). The preamble of the BDSA records that Teesta had acquired a familiarity with regulatory framework in South Africa and could identify opportunities to participate in various government projects. CSR (Hong Kong) was described as a global company specialising in the manufacture of electric locomotives with focus on emerging markets and had approached Teesta to provide advisory services in

⁷⁰² FOF-06-163

⁷⁰³ JJT was to receive R706 770 480 and Teesta R3 098 916 720

⁷⁰⁴ FOF-06-194, paras 58-60

⁷⁰⁵ FOF-06-358; and Transnet-Ref-Bundle-05149

respect of "the Project" for and assistance to achieve their BEE obligations. The Project referred to "Project 359" which was defined in clause 1.1 of the BDSA to refer to "any portion of the tender for the supply of 359 Electric Locomotives [22E]" to Transnet. At the time the BDSA was concluded (May 2015) the LSA for the 359 electric locomotives had already been concluded between CSR and Transnet (17 March 2014).

515. Clause 3.3 is a noteworthy provision. It reads:

"The company has advised Tequesta that a previous agreement had been signed between CSR, Zhuzhou Electric Locomotive Co Ltd and JJ Trading FZE (hereinafter referred to as the "JJT"). However, the company advises Tequesta that in the event that JJT disputes or contests the cancellation or non-payment in a court of law and if the court decrees that the agreement with JJT is valid...then the financial compensation to JJT (which will not exceed the retention amount, that is 15% of the ...amount payable to Tequesta under this agreement) will be deducted from the amount retained from Tequesta as per clause 6.1.6 and the balance (if there is) will then be paid to Tequesta within 30 days".

516. Clause 6.1.1 of the BDSA set out the remuneration and payment terms:

"For the project related advisory services provided by Tequesta, as detailed in Annexure A, Tequesta shall be entitled to an advisory fee of 21%... of the contract value of Project 359 awarded to the company, based on 2%... of the contract value as the success fee and 19%...of pro-rata to the milestone-based payments received by the company from the client. The company has already paid 3.9% of the contract value (R706 770 480) to JJT up to the agreement date (18 May 2015). The total payable amount to Tequesta under this agreement is 17.1% of the contract value (R3 098 916 720)".

517. The total payable under the BDSA was R3.806 billion consisting of the prior payment to JJT of R706.77 million and the remaining payment of R3.099 billion to

Tequesta.⁷⁰⁶ In short, the BDSA undertook to pay Tequesta and JJT R3.86 billion for "advisory services" in Annexure A to the agreement to advise the company on the regulatory framework in South Africa and assist with various opportunities to participate in government projects.

518. Annexure A included a revealing clause in relation to the agreed services to be provided by Tequesta. It reads:

"It is hereby noted and agreed between the parties that the above services are provided as pre-project service and will conclude on the company's signing the contract for the project with the client. The company will not require any proof of delivery of the above services since it is understood that the project would not have materialised without the active efforts of Tequesta to provide the services listed above."

519. The import of this clause is twofold. First, it confirms that the services for which Tequesta was to be paid were allegedly rendered by it to CSR (Hong Kong) prior to the signing of the LSA on 17 March 2014, some 14 months before the BDSA was signed. Second, Tequesta was not required to provide proof of any of the services allegedly rendered by it because in fact the remuneration was primarily for the role Tequesta had played in materialising the project. The provisions of the BDSA are thus ambiguous in a key respect. On the one hand the BDSA is cast in language identifying services to be performed in the future, but on the other it clearly intimates that the services had already been rendered and there was no need to establish that the services had in fact been delivered.

520. There are three other important observations that can be made about the BDSA: i) it confirms the exact number of locomotives that were awarded to CSR 14 months prior to its signature; ii) the services rendered pre-date the award of the tender; and

⁷⁰⁶ The remuneration figure in the MNS 1064 Report is incorrect - MNS 1064 Report, para 3.1.19

iii) Tequesta was responsible for CSR being awarded the contract. CSR actually bid for the full 599 electric locomotives; yet the Project was defined as the 359 locomotives which were awarded to it. If there were genuine pre-award services, these would have related to the bid for 599.

521. There is no evidence of any services provided by either Tequesta or JJT. Mr Tshiamo Sedumedi of MNS reviewed videos of the PTN to see if Tequesta had assisted "the company in negotiating with the client on pricing levels in relation to the project". He observed that it was CSR personnel and not representatives of Tequesta who concluded these negotiations. There was no evidence that Mr Essa was involved in the negotiations either.⁷⁰⁷ It is also not apparent what, if anything, Tequesta had done to assist CSR to secure the bid. From these facts it is quite clear that this transaction was corrupt.
522. Mr Sedumedi was not able to cast any light upon the identity and location of JJT and why it received R706 million before being substituted by Tequesta. He ventured that prior to Tequesta being appointed (long after the event) as the service provider under the BDSA, and the arrangement for the deduction of the R706 million from the overall fee, JJT was the service provider of these supposed services and there was a prior relationship between CSR (Hong Kong) and JJT. This was confirmed by Mr Holden during his testimony before the Commission.
523. In August 2016 CRRC signed an addendum to existing agreements with Tequesta varying the terms of the BDSA of 18 May 2015. The primary aim of the addendum was to modify the terms under which Tequesta was to be paid, and, in particular, waived CRRC's right to withhold portions of the payments due to Tequesta. It appears that CRRC had retained 15% of all payments due to Tequesta as surety.

⁷⁰⁷ Transcript 29 May 2019, p 79, line 1

The addendum stipulated that this would no longer be the case and that the withheld amounts to date (equal to USD15,144,610 million) would be paid to Tequesta. This was contingent on Transnet awarding CRRC contracts to provide maintenance services. If this was not met, CRRC would be entitled to recoup the 15% outlay against future payments that were due to be made to Tequesta. The withheld amounts would be released within 90 days of the final payment being made by Transnet to CRRC. The effect of the addendum was to expedite a large payment to the Gupta enterprise through Tequesta.⁷⁰⁸

524. CNR also paid kickbacks to the Gupta enterprise for the award of the 232 diesel locomotive contract. On 20 May 2014 CNR and Tequesta entered into an exclusive agency agreement.⁷⁰⁹ This agreement replaced and superseded an earlier agreement of 8 July 2013 between CNR and CGT related to the same matters. The later agreement is a simple cut-and-paste operation in which CGT was replaced by Tequesta. Paragraph 1.1 of the agreement defines the project upon which the agreement was based as "the supply of 232 Diesel Locomotives for the General Freight Business issued by Transnet Freight Rail in South Africa", while the product was defined as the "Diesel Locomotives as awarded by Transnet Freight Rail for General Freight Business after being successful in tender." In return for a series of services, including using its "best endeavours to promote and increase the sale of the Company's Product in the territory", CGT/Tequesta would be entitled to a success fee payment equal to 2% of the total value of the contract entered into between Transnet and CNR. The success fee was to be paid immediately upon CNR and Transnet formalising the agreement. CGT/Tequesta was also entitled to a further 19% sales commission, which was to be paid upon receipt by CNR of

⁷⁰⁸ FOF-06-195

⁷⁰⁹ FOF-06-304

certain milestone payments from Transnet. The total kickback paid in this instance was R2.088 billion.⁷¹⁰

The maintenance services agreement with CSR

525. The LSA concluded between CSR and Transnet envisaged the parties concluding a maintenance agreement for the locomotives supplied. On 28 July 2016 the board approved the conclusion of a 12-year maintenance services agreement with CSR for an amount of R6.18 billion. The memorandum supporting the award was not presented to the relevant governance structures for review prior to it serving before the board. It was presented directly to the board and subsequently sent to the Minister of Public Enterprises for approval.⁷¹¹ The minutes of the board meeting record the attendance *inter alia* of Ms Mabaso, Mr Gama, Mr Nagdee and Mr Shane.⁷¹²
526. Management informed the board at the meeting of 28 July 2016 that the agreement was needed as part of Transnet's drive to improve operational performance and support of the 1064 locomotive project. It was aimed at: i) improved maintenance output and operating performance; ii) reduced and optimised cost; iii) an enhanced role for TE; and iv) enhanced local content. The negotiation team had been engaged in seven months of negotiations with CSR and managed to secure "substantial reductions in the cost of fully OEM managed maintenance through extensive negotiations with CSR".⁷¹³ The board recommended that the Minister should approve the business case and award the maintenance services (the 12-year contract) to CSR in terms of the LSA for the 1064 locomotives. The board

⁷¹⁰ Transcript 7 December 2020, p 177 *et seq*

⁷¹¹ Transcript 15 May 2019, p 12

⁷¹² Annexure MSM 1, Exh BB3(a), MSM-040

⁷¹³ Annexure MSM 1, Exh BB3(a), MSM-043, para 3.2.4

further approved the delegation of authority to the GCEO (Mr Gama) to conclude the contract.⁷¹⁴

527. On 12 August 2016 Transnet issued CSR with a Letter of Award for the maintenance services of the locomotives.⁷¹⁵ Clause 2.4 of the Letter of Award provided that Transnet would pay CSR "Start Up Costs" totalling R618 160 764 (excluding VAT) within 14 days of receipt of a valid and effective "On Demand Guarantee" issued by a financial institution.⁷¹⁶ Pursuant to this clause Transnet paid CSR an advance payment of R704 703 250 (including VAT) in October 2016.
528. Transnet terminated the Letter of Award in October 2017 (amidst allegations of corruption)⁷¹⁷ on the ground of non-performance. Despite the fact that Transnet had not received any goods or services in terms of this contract, no steps were taken to claim back the advance payment until September 2018 when Transnet notified the Bank of China of its claim under the bond on the grounds that CSR had failed to execute its obligations.⁷¹⁸ Mr Gama maintained that the Letter of Award was only terminated in September 2018 and intimated that Mr Mahomedy was responsible for the delay in terminating the agreement.⁷¹⁹
529. In December 2018, more than two years after payment had been made, CSR refunded Transnet R618 160 746. CSR failed to repay the VAT amounting to R86 542 504 as well as the interest due to Transnet in the amount of R136 473 803. On 11 February 2019, Transnet demanded payment of the VAT

⁷¹⁴ Annexure MSM 1, Exh BB3(a), MSM-044

⁷¹⁵ Annexure MSM 15, Exh BB3(a), MSM-281

⁷¹⁶ Annexure MSM15, Exh BB3(a), MSM-286, para 2.4

⁷¹⁷ Transcript 15 May 2018, p 97; and Exh BB3(a), MSM-340

⁷¹⁸ Annexures MSM16 and MSM17, Exh BB3(b), MSM-345 *et seq*

⁷¹⁹ Transnet-07-250.143, para 33

and interest in the total amount of R223 016 308.⁷²⁰ The amount remained outstanding in May 2019 and it is not clear whether this amount has subsequently been paid to Transnet.⁷²¹

530. There was also a BDSA in relation to the maintenance agreement which may account for CSR's reticence in making full repayment. About ten months prior to the board approving the maintenance agreement, on 10 June 2015, CSR entered into a BDSA with Regiments Asia Ltd.⁷²² The BDSA was signed by Mr Essa on behalf of Regiments Asia and by Mr Zhou Qinhe for CSR. Clause 1 of the BDSA defined the "project" as "the long term (expected 12 years) financial budget for the Railways Spares & Maintenance by Transnet SOC Limited, South Africa." In terms of clause 3 of the BDSA, Regiments Asia was to provide advisory and consulting services in respect of the project and to aid business development and assist CSR in achieving its B-BBEE objectives in South Africa. There is nothing in the BDSA which specifically addressed the outputs of maintenance or operational performance of the locomotives. The BDSA, like the other kickback agreements, was essentially a pro forma contract.
531. In terms of clause 6 of the BDSA, Regiments Asia was to be paid 21% of the contract price as awarded to CSR by Transnet.⁷²³ Had the contract run its course, the kickback would have been in the region of R1.3 billion. The fee was payable incrementally but would become payable after the signing of the contract between CSR and Transnet and the receipt of the advance payment by the CSR. In terms of this BDSA, CSR became liable to pay Regiments Asia R129 813 760 in October

⁷²⁰ Annexure MSM 18, Exh BB3(b), MSM-351

⁷²¹ Transcript 15 May 2018, p 102

⁷²² FOF-06-388

⁷²³ FOF-06-398

2016. On 29 October 2016, CRRC paid R9 406 181 into the Habib Bank UAE account of Tequesta, apparently in respect of this kickback payment obligation.⁷²⁴

The transgressions in relation to the 1064 locomotives

532. The procurement of the 1064 locomotives was attended by a wide range of wrongdoing that reflected a pattern aimed at favouring CSR and CNR with the objective of facilitating the kickbacks to the Gupta racketeering enterprise.
533. The wrongdoing comprised, *inter alia*: i) the misrepresentation to the board of the components of the ETC; ii) the non-compliance with the preferential points system; iii) the unfair favouring of CSR through the TE adjustment; iv) the factoring of the R2.01 million TE discount back into the price of CSR's locomotives; v) the understating of CNR's BAFO price; vi) the marginalising of Transnet's treasury; vii) the inflation of the price through the inappropriate use of batch-pricing; viii) the manipulation of the delivery schedule; ix) the payment of excessive advance payments; x) non-compliance with the local content requirements; xi) the failure to obtain the approval of the Minister for the increase; xii) the misrepresentation to the board of the NPV by using the wrong hurdle rate; xiii) the inflation of the provision for escalations, forex, batch-pricing and contingencies in the price; xiv) the dubious maintenance services agreement and the failure to recoup the excessive advance payment timeously and the VAT on it; and xv) the BDSA kickbacks.
534. As specifically discussed in the preceding paragraphs, all of this wrongdoing gives rise to reasonable grounds to believe that there may have been contraventions of various provisions of sections 50 and 51 of the PFMA on the part of the role players (Mr Molefe, Mr Singh, Mr Gama and other members of the board) in

⁷²⁴ FOF-06-980 and Annexure II, FOF-06-885.6

relation to the transactions in which they were involved. At various times they failed to exercise the duty of utmost care to ensure reasonable protection of the assets of Transnet. Individually they did not act with fidelity, honesty, integrity and in the best interests of Transnet in managing its financial affairs and did not comply with its operational policies and applicable legislation.

535. Taken with the evidence against Mr Molefe, Mr Singh and Mr Gama concerning their receipt of cash gratifications from the Gupta enterprise and the payment of kickbacks to Mr Essa's companies and the Gupta enterprise by CSR and CNR, there are reasonable grounds to believe that Mr Molefe, Mr Singh, Mr Gama and Mr Essa, as well as others, received corrupt gratifications. There are also reasonable grounds to believe that they have participated in the conduct of the affairs of the Gupta enterprise and may have committed various offences under section 2 of POCA and those relating to money laundering and the proceeds of unlawful activities in terms of sections 4-6 of POCA. The conduct associated with the conclusion of the BDSA in particular provides reasonable grounds to believe that the offences of corruption, racketeering and those relating to the proceeds of unlawful activities as contemplated in Chapter 2 of PRECCA and Chapters 2 and 3 of POCA may have been committed by Mr Essa and his associates in the Gupta enterprise and the persons who concluded the BDSA on behalf of CSR.
536. These findings are to the effect that there are reasonable grounds to believe that the relevant employees and board members of Transnet violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise as contemplated in TOR 1.4 and involved corruption of the kind contemplated in TOR 1.5 and TOR 1.9. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

537. In the light of his relationship with Mr Essa, the conduct of Mr Sharma (the Chair of the BADC) in relation to the acquisition of the locomotives warrants further investigation.