CHAPTER 6 – THE RELOCATION OF CNR AND BT TO DURBAN

The PWC recommendation

538. While negotiations were being conducted for the supply of the 1064 locomotives, in February 2014, Transnet instructed Price Waterhouse Coopers ("PWC") to conduct a review of TE's operational readiness to deliver in respect of the assembly of the locomotives. In terms of the LSAs, TE and the OEMs were jointly responsible for setting up the assembly lines for the locomotives.

539. PWC assessed different TE sites to identify which ones could be used for the assembly of the 1064 locomotive order and submitted a report on 21 February 2014.[725] The original intention had been to use the Koedoespoort site in Gauteng, but the PWC assessment indicated that the site in Bayhead, Durban could also be used. The Koedoespoort facility had been used in the past to assemble the earlier procurements of Class 43E diesel locomotives for GE and the Class 20E electric locomotives for CSR. It, thus, had the advantage of the existing production lines and supply chain there and conveniently located engineering support. However, PWC felt that four large assembly lines located at the same location might divide focus and create supply bottlenecks. Accordingly, it recommended that two of the four assembly lines be set up at TE's Bayhead, Durban facility. Given that GE and CSR already had production lines at Koedoespoort, it made sense that they remain there to keep the benefit of shorter start-up periods. PWC accordingly recommended that the locomotives awarded to CNR and BT should be assembled in Durban.

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[725] Transnet-Ref-Bundle-08927

540. Discussions took place with CNR and BT about the location of the contractor facility in Durban during the PTN leading to the definition of "contractor facility" in the relevant LSAs being re-stated to mean "the facility at Koedoespoort, Gauteng or Bay-Head, Durban as notified in writing by the Contractor to the Company". Any costs associated with this decision were provided for in the 10% provision for contingencies in the ETC.

541. Mr Roberto Gonsalves and Mr Thobani Mnyandu gave insightful evidence into wrongdoing associated with the agreements and arrangements concluded by Transnet with CNR and BT in relation to the relocation.[726] Mr Gonsalves is a Chartered Accountant and the Managing Director of Mergence Corporate Solutions (Pty) Ltd (previously known as Cadiz Corporate Solutions (Pty) Ltd - "Cadiz"). Mr Mnyandu is an attorney and one of the directors at MNS Attorneys.

542. When Transnet issued tenders for the acquisition of the 1064 locomotives, Cadiz formed part of a consortium led by CNR, more precisely its South African counterpart, CRRC SA Rolling Stock (Pty) Ltd ("CRRC-SA"), formerly known as CNR Rolling Stock South Africa (Pty) Ltd ("CNRRSSA"). Mr Gonsalves is a non-executive director of this company. For the sake of convenience, the company will be referred to throughout as CNRRSSA.

543. The directors of CNRRSSA are: Mr Gang Wang (Mr Jeff Wang) (executive); Mr Tao Yu (Mr Tony Yu) (executive); Mr Feng Yu (non-executive); Mr Gang Zhao (non-executive); Mr Lulamile Lincoln Xate (minority non-executive director); Ms Rowlen Ethelbert Von Gericke (minority non-executive director); and Mr Roberto Gonsalves (minority non-executive director). The shareholding in CRRC-SA is

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[726] Mr Gonsalves: Transcript 23 May 2019, p 127-206; and Transcript 24 May 2019, p 1-41. Mr Mnyandu: Transcript 30 and 31 May 2019

structured as follows: China North Rail Corporation (CNR) - 66%, represented by the Chinese directors; Endinamix (Pty) Ltd - 30%, represented by Mr Xate; Global Railway Africa (Pty) Ltd - 2%, represented by Mr Von Gericke; and Cadiz - 2%, represented by Mr Gonsalves. Global Railway Africa (Pty) Ltd and Cadiz each held 10% in Endinamix.

544. The day-to-day operations and business of CNRRSSA were run by Mr Gang Wang (CEO) and Mr Tao Yu (CFO). The directors representing the minority shareholders, being those other than CNR, were all non-executive directors of CNRRSSA, and as such not involved in the operations and day to day business, except for attending board meetings.

545. CNRRSSA submitted its tender to Transnet for the 465 diesel locomotives (part of the 1064) in April 2013. After Transnet had decided to split the award of the 465 diesel locomotives on a 50/50 basis and to award the supply of 233 locomotives to BT and 232 locomotives to the CNRRSSA consortium, on 17 March 2014 CNRRSSA entered into a LSA with Transnet for the manufacturing of 232 diesel locomotives at the Durban facility. At the time of signing the LSA, CNRRSSA was aware that it would work in Durban,[727] but had based its costing in the bid on the assembly of the locomotives at Koedoespoort.

546. During March 2014, Transnet requested CNRRSSA to provide a proposed costing of the impact of manufacturing/assembling the locomotives at the Bayhead facility in Durban instead of at Koedoespoort.[728] On 11 March 2014 CNRRSSA addressed a letter[729] to Mr Pita and Ms Mdletshe of Transnet indicating that the total additional cost would be R9 755 600. This was made up of approximately R4 million for extra

[727] Transcript 23 May 2019, p 139, line 10

[728] Transcript 23 May 2019, p 141, line 10

[729] Exh BB5, RG-181

costs on locomotives; R2.8 million for transport costs; R2.3 million for flights and accommodation; and R600 000 for new office set up.730 The letter stated that the costs related only "to the measurable financial implications" and added that there would be "a considerable amount of immeasurable financial losses that will be incurred due to relocating to Durban".731

547. There is no response to the letter from CNRRSSA dated 11 March 2014 on record. There is however an unsigned proposal under a CNRRSSA letter dated 1 February 2015 which estimated the increased cost to be more than R100 million.732 Annexed to this document is a schedule that includes figures against certain items and a total estimate of R318.7 million. Some of the cost items provided for are difficult to fathom, but they included the following: i) R65.4 million for increased logistics costs; ii) R29.4 million for set up facilities in Durban and travelling; iii) R48.6 million for increased cost of technical support on brand new process layout (compared with Koedoespoort); iv) R31.8 million for the difficulty and costs in training new employees; v) R47.4 million for increased cost for site service on site by supplier; and vi) R96 million for the increased financial cost to postpone the delivery due to the relocation. It is uncertain whether any discussion of this document took place within Transnet.

CNR's appointment of BEX as advisor in the relocation negotiations

548. A few months later, on 25 April 2015, CNRRSSA appointed Business Expansion Structured Products (Pty) Limited ("BEX") to act as an intermediary for the purpose

730 Transcript 30 May 2019, p 24 *et seq*. See also Exh BB8(c), TTM-009-010

731 Mr Wang, the CEO of CRRC-SA, in his statement filed with the Commission in October 2019, SEQ 12/2020, explained that the initial estimate of the relocation costs was done by Mr Von Gericke. He described it as "an arbitrary computation of random figures with no substantive basis whatsoever" – SEQ 12/2020, para 53

732 Transnet-Ref-Bundle-09014 – Mr Wang maintained that this was also an unsubstantiated estimate, as CNRRSSA was not in a position to provide an accurate calculation – SEQ 12/2020, para 110

of negotiating a contract with Transnet for the claim of the costs of relocating CNRRSSA's locomotive manufacturing/assembly to the Durban facility. BEX had not been involved in CNRRSSA's initial costing exercise that arrived at a total figure of R9.7 million for relocation costs.[733] BEX was appointed despite the reservations of the minority non-executive directors. They were concerned about inadequate consultation, the payment of an excessive fee to BEX, the failure of TFR to follow a tender process and there being no clear rationale for CNRRSSA being entitled to a relocation claim.[734]

549. The appointment of BEX commenced in March 2015 when a draft unsigned BDSA dated 8 March 2015 was distributed by email.[735] This BDSA referred to BEX Structured Products Limited (a different company to BEX) which was a company with some background in the rail sector. However, BEX, with whom the agreement was ultimately signed, turned out to be a shell or dormant company with one director, Mr Mark Shaw appointed on 15 April 2015, which had not traded and had no experience in the railway engineering business.

550. The BDSA dated 8 March 2015 bears significant resemblance to the BDSAs signed by CSR with Tequesta and Regiments Asia in Hong Kong (used to set up kickbacks from the CSR deals for the 95, 100 and 359 electric locomotive procurements) and was probably drafted by the same person. It uses the same cover page, fonts, layout and format throughout the document. Like the Tequesta agreement, and in almost identical language, the preamble to the BDSA stated that

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[733] Transcript 23 May 2019, p 149, line 1

[734] Transcript 23 May 2019, p 150, line10

[735] Exh BB5, RG-189 – In his statement Mr Wang stated that he had not solicited the services of BEX and described how Mr Shaw of BEX had simply presented himself at the offices of CNRRSSA in Sandton in March 2015 to offer his services generally and agreed to Mr Wang's proposal to assist with an estimation of the costs of relocation – SEQ 12/2020, para 112 *et seq*. As set out later, Mr Shaw was connected to the Gupta enterprise.

BEX was a "professional services advisory business" with long subsisting relationships in South Africa with "a familiarity with regulatory, social, cultural and political framework whereby it is capable to closely co-ordinate with the designated authorities". The "Project" is defined in clause 1 of the BDSA as "the change in scope whereby Transnet Engineering (TE) requires the Company to change the location of the local manufacture programme from TE Spartan Pretoria facility to their Durban facility".

551. Clause 2 of the BDSA recorded that CNRRSSA had approached BEX to assess and formulate the strategy and planning to quantify and benchmark the costs associated with the relocation and BEX had agreed to undertake the work at its sole risk and at no cost to CNRRSSA if the agreed benchmark costs were not realised from TFR. Clauses 2.4 and 2.5 provided that after extensive research and negotiations with CNRRSSA and TFR, BEX and CNRRSSA had agreed that the benchmark costs for the Project would be fixed at R280 million excluding VAT and that BEX would be entitled to an agency commission equivalent to the difference between the price excluding VAT awarded to CNRRSSA by TFR and the price benchmark of R280 million excluding VAT as detailed in clause 7 which included an example that if the price awarded was R650 million, then BEX will be entitled to an agency commission of R370 million. In the BDSA eventually concluded on 25 April 2015, the benchmark price was increased from R280 million to R580 million.[736]

552. At a board meeting of 10 April 2015, the minority non-executive directors objected strongly to the agreement with BEX and requested that their dissent be expressly

[736] FOF-06-189

noted and minuted. Notwithstanding the objections of the minority non-executive directors, CNRRSSA proceeded to sign the agreement with BEX.

553. It is not clear from the BDSA how BEX benchmarked the cost of CNRRSSA locating its business activities in Durban at R280 million. On 21 April 2015, Mr Gonsalves received a document,[737] partly written in Chinese, reflecting the estimated cost increase amounting to approximately R287 million, made up of: i) R45.1 million for increased logistics costs; ii) R27.3 million for set up facilities in Durban and travelling; iii) R60.75 million for increased cost of technical support on brand new process layout (compared with Koedoespoort); iv) R31.8 million for difficulty and increased costs of training new employees; v) R47,4 million for increased cost for site service on site by supplier; vi) R48 million for increased financial cost to postpone the delivery due to the relocation; and vii) R26.3 million for inflation.

554. The BEX proposal and costs were subsequently presented by CNRRSSA to Transnet which culminated in CNRRSSA concluding an agreement with Transnet in terms of which Transnet agreed to bear the cost of relocation in an amount of R719 090 548, less a 10% discount, amounting to R647 181 494.

The variation order for the costs of relocation of CNR and BT

555. On 19 May 2015, Ms Mdletshe (Senior Manager: Strategic Sourcing Locomotives at TFR) compiled a memorandum[738] to Mr Gama motivating for a variation order to finalise the relocation of the programme for the construction by CNR of 233 Class 45D locomotives to a maximum value of R669 784 286. This amount approximated

[737] Annexure RG 11, Exh BB5, RG-233

[738] Transnet-Ref-Bundle-09111; and Transnet-07-250.401

the figure proposed by CNRRSSA and later included in the BEX agreement.[739] The proposal was recommended by Mr Ravir Nair (the acting CEO of TFR), Mr Singh (GCFO) and Mr Silinga (Group Executive: Legal and Compliance). The memorandum indicated that a negotiation team made up of Mr Singh (GCFO), Mr Jiyane (then CEO: TE), Mr Pita (then Group Head SCM), Mr Silinga (Group Executive: Legal and Compliance) and Ms Mdletshe would negotiate an agreement dealing with the costs of relocation. The memorandum recorded that on 24 January 2014 the board had resolved that the GCEO be given authority to sign, approve and conclude all necessary documents to give effect to the resolution approving the acquisition of the 1064 locomotives and thus the GCEO had the authority to approve variation orders in relation to the costs of the move to Durban.

556. In an earlier draft of the memorandum, Mr Gama approved the proposal but added in manuscript that he needed clarity on three matters: i) did the proposal apply to both BT and CNR; ii) whether the amount of R635 million was still under negotiation; and iii) how the proposal related to the delegation by the board. Mr Gama added his signature to the document on the basis that the limit of his delegated authority was not exceeded and he was informed of the final negotiation outcomes. He did not date his signature on this document.[740] The signatures of Ms Mdletshe, Mr Silinga and Mr Singh were added on 19 May 2015. Mr Gama signed the final version of the memorandum[741] on 9 June 2015, so it may be assumed that he made his handwritten annotations sometime after 19 May 2015 but before 9 June 2015.

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[739] See Transnet-Ref-Bundle-09111 and the comments of Mr Mnyandu, Transcript 30 May 2019, p 48, suggesting that this coincidence is suspicious.

[740] Transcript 12 May 2021, p 227-231; Transnet-Ref-Bundle-09115; and Transnet-07-250.405

[741] Transnet-Ref-Bunde-09114; and Transnet-07-250.404

557. The memorandum sought approval for a variation order to a maximum value of R669 784 286. It explained that as a result of the relocation, there would be a number of cost drivers, namely: labour costs; material costs; operational and logistical costs; technical support; physical transportation of materials and resources; incremental warehousing costs; and financing and risk costs due to time constraints and delays. When Mr Gama ultimately approved it the capped figure for the variation order was changed to R635 851 786, which was possibly derived from another proposal by CNRRSSA.[742]

The negotiations in relation to the relocation of CNR and BT

558. The relocation negotiations began on 19 June 2015. The negotiation team held two separate meetings with CNRRSSA and BT at OR Tambo International Airport in Johannesburg. The attendance register of the meeting with CNRRSSA reflects that it was attended also by Mr Shaw of BEX.[743] Mr Singh, despite leading the negotiation team at the OR Tambo meeting with Mr Shaw in attendance, presumably representing BEX, stated during his testimony that he had no sense of BEX ever having played any role in the negotiations and the finalisation of the relocation deal. He said he did not know who BEX was and did not know anybody from BEX.[744] His testimony is not credible in the light of Mr Shaw's attendance of the negotiations.

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[742] The final memo authorising the negotiations may not be part of the record – see Transcript 30 May 2019, p 49-58 and Transnet-Ref-Bundle -09115

[743] Exh BB8(c), TTM-98

[744] Transcript 17 June 2021, p 162 – In the re-examination affidavit, Mr Singh maintained that his role was "limited to supporting a memorandum to the acting GCE for approval of the relocation amounts in respect of CNR" – Transnet 05-2406, para 181. This is not correct given his role in the negotiations.

559. There are no minutes of the meeting of 19 June 2015, but it appears from the transcripts[745] that the OEMs were requested to clarify assumptions and contingencies built into the proposals. They were further requested to make a price reduction and a revised offer in the range of 10% to 20% and to deal with the specifics such as milestone payments, scheduling delays and the like. Transnet indicated that it would seek approval on 30 June 2015.[746] There was some superficial interrogation of the figures, but the Transnet negotiation team was comfortable with a ballpark figure of R600 million and was apparently to some extent just going through the motions.

560. A document prepared by CNRRSSA titled "Analysis of Cost Increases for Locomotive Delivery and Locomotive Factory Relocation" ("the Analysis") gives insight into CNRRSSA's final position.[747] The Analysis was signed by Mr Wang as CEO of CNRRSSA and provided a space for Mr Singh's signature but which was not signed by him.[748] Mr Singh claimed he did not have the delegated authority to sign it.[749]The Analysis provides a breakdown of the cost increases as follows: labour costs R54.3 million; material costs R223.9 million; logistical costs R6.4 million; technical support R70 million; transportation R94.2 million; delta to warehouse costs R75.6 million; and other costs R194.5 million. The total cost is stated to be R719 090 548 less a 10% discount giving an amount of R647 181 494. The document goes on to offer some justification for each line item.

561. The Analysis justified the increase of labour costs by R54.3 million on the basis that each build team of 25 had to be increased with 23 additional staff members

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[745] Exh BB8(c), TTM-97 *et seq*

[746] See Exh BB8(c), TTM-022; and Transcript 30 May 2019, p 77 *et seq*

[747] Annexure RG 12, Exh BB5, RG-238; and Transcript 23 May 2019, p 164, line 18

[748] Annexure RG 12, Exh BB5, RG-249

[749] Transcript 17 June 2021, p 154

from CNRRSSA being: six mentors, six quality assurance and inspection specialists, eight customer service team agents and three senior managers because of the lack of skills and experience in Durban. The additional material cost was justified as R203 million for inflationary costs caused by the five-month delay and R21 million for added warehousing of imported raw materials. The logistics costs of R6.4 million were said to be administrative costs necessary to re-work the logistics as the roll-out needed to be altered, for additional travel costs and higher inventory requirements. The R70 million for technical support was for specialised technical and engineering teams in addition to that budgeted for Pretoria due to the lack of expertise in maintenance and post-production available in Durban and an increased cost of on-site service by suppliers. The R94.2 million for transportation was for the physical transportation of assembly parts of locomotives, short-term insurance on the value of transported goods and transport protection. The R75.7 million warehousing cost arose as a result of the substantially higher cost of "prime industrial factories" in Durban, fencing, security, office furniture, office construction, shelving and storage, additional forklifts, stacking trucks, delivery vehicles and additional staff. The other costs of R194 million were essentially financing costs.

562. On 20 June 2015 the day after the meeting at OR Tambo International Airport, Mr Pita (who attended the meeting) wrote an email to the other members of the negotiating team and Mr Laher[750] in which he set out detailed comments and questions for CNR. It is clear that Mr Pita (then the Group Chief Supply Chain Officer – "GCSCO") had serious reservations about the cost increase.[751] His comments reveal that the costs were very significantly inflated and in some respects were irrational and wholly unjustifiable. Mr Laher agreed with that

[750] Transnet-Ref-Bundle-09117; and Transnet-07-250.406

[751] Transcript 12 May 2021, p 231-232

assessment.[752] In an email[753] addressed to the negotiating team the next day, 21 June 2015, Mr Laher confirmed that much of the pricing made no sense. There is no evidence that any member of the negotiation team was ever informed of or queried the rise in cost from the R9.8 million (initially quoted by CNRRSSA in its letter of 11 March 2014 addressed to Ms Mdletshe and Mr Pita)[754] to the R670 million proposal just over one year later.

563. On 23 June 2015 Ms Mdletshe circulated a revised proposal from CNRRSSA to the members of the negotiating team and Mr Laher.[755] She noted that the meetings scheduled for that day were postponed and that BT's proposal was still outstanding and that it would revert later that day with a revised proposal. The costs in the revised CNRRSSA proposal remained essentially the same with some adjustment to the material and financing costs. The total claimed was R669 784 286. CNRRSSA however proposed a discount of 10% and thus the total revised cost was stated to be R602 805 858. CNRRSSA proposed an upfront payment of 50% amounting to R301 402 929 and 24 monthly payments of approximately R12.6 million per month.[756]

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[752] Transnet-Ref-Bundle-09120; and Transcript 21 October 2020, p 46 *et seq*.

[753] Transcript 12 May 2021, p 233; Transnet-Ref-Bundle-09120; and Transnet-07-250.408

[754] Annexure RG 3, Exh BB5, RG-182 – see the discussion of this issue at Transcript 31 May 2019, p 20-24

[755] Annexure YL 21, Exh BB4(f)1, YIL-255

[756] Mr Wang in his statement justified the cost of more than R603 million in general terms on the grounds that the Durban facility was inadequate, the poor condition of the flooring and constant problems with the equipment necessary for installation. The facility was empty and without shelving. He set out in some detail the difficulties CNRRSSA had in working effectively with TE, but failed entirely to provide an estimate or calculation of any actual additional costs incurred as a result of the relocation, and for which Transnet was contractually liable, despite such probably being possible to calculate some four years after the relocation. He, however, without any meaningful substantiation, maintained that the actual cost would exceed the amount of R603 million and undertook to provide a report of an expert engaged by CNRRSSA who had made an initial estimate that the amount was in fact insufficient. It seems that no such expert report has been filed with the Commission to date – SEQ 12/2020, paras 80-101, 106 and 152-153.

564. Mr Laher responded to Ms Mdletshe's email later on 25 June 2015 in an email[757] addressed to all the members of the negotiating team informing them that the proposal had not changed and his concerns still applied. He added that the payment terms offer needed to be considered in the light of Transnet's cash flow situation and suggested that advice be sought from Transnet treasury. There is no evidence of any communication among the negotiation team members or any correspondence with other officials or entities within Transnet in which the relevant figures were discussed, analysed or interrogated.[758] When Ms Mdletshe was asked by the MNS investigation team why Mr Laher's concerns had not been addressed she allegedly replied that he was not a member of the negotiation team.[759]

565. When Mr Singh was asked whether he as a member of the negotiation team was satisfied that Mr Laher's concerns had been resolved, he answered that he was comfortable that Ms Mdletshe would have attended to them prior to sending him the memorandum. He said he was also reasonably comfortable with the R1.2 billion ultimately agreed as the cost of relocation as he believed the amounts "were relatively in the ballpark and therefore…the values – the memorandum could be supported".[760]

566. There is little evidence on record dealing with BT's proposal regarding relocation costs.761 BT confirmed its willingness to relocate in a letter dated 6 June 2014

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[757] Transnet-07-250.410

[758] Transcript 30 May 2019, p 99-103

[759] Transcript 30 May 2019, p 102, lines 17-20

[760] Transcript 17 June 2021, p 151-163; and Transcript 17 June 2021, p 160, line 20

[761] On 25 February 2021, BT was granted leave to withdraw their rule 3.3.6 / 3.4 application (which had been granted) to lead oral evidence and cross-examine witnesses. In its affidavits BT originally sought to present evidence on: the tender process and conclusion of the LSA; the contractual advance payments; local content; the move to Durban; the MNS report; and the 95 locomotives tender. The affidavits deal with the relocation costs in detail. However, on 18 June 2021, the attorneys of BT sent a letter to the Commission submitting that if the affidavits of BT do form part of the record, they should simply be ignored.

addressed to TFR but indicated that it would need to review the infrastructure of the Durban facility and to determine the consequences for its supply and logistics chain as well as their project team. It proposed a process of analysis, assessment and negotiation in respect of cost, the extension of delivery times and changes to supplier development ("SD").[762] On 10 April 2015, BT sent Transnet a variation notice which seems to be the final version of a notice first submitted on 26 September 2014.[763] The document stipulated a fixed price for moving to TE's Durban facility at R634 315 000. Strangely, unlike CNRRSSA, BT provided no detailed pricing of the additional cost. It merely set out in general terms the pricing assumptions of the proposal without any accompanying figures. It stated that the change of location of the assembly facility had significant impact on most suppliers that would need to deliver to the Durban facility instead of Koedoespoort, including additional costs for the transportation of supplies as well as expert support at the facility. Moreover, the extension of production time of the project had a cost implication for all parties that have to maintain resources in place for additional months, including BT's suppliers and contractors.

567. On 22 June 2015 Mr Laher addressed an email to the negotiation team concerning BT's proposal, suggesting that clarity and a detailed costing of each element making up the additional cost should be obtained from BT. At a minimum, he said, information was required in relation to additional costs of hedging, escalation, bonding costs, transport (number of trips, size of containers per trip and distances),

[762] Transnet-Ref-Bundle-08835

[763] Annexure YL 18, Exhibit BB4(f)1, YIL-213. This was an updated version of a document prepared by BT on 26 September 2014 – see Transnet-Ref-Bundle-08837; and Transcript 30 May 2019, p 71-72

warehousing (per square metre), insurance and new production layout. It was also necessary to ascertain any savings on transport costs for materials imported.[764]

568. On 10 July 2015 Mr Pita addressed an email[765] to Ms Mdletshe and copied the other members of the negotiation team, in which he mentioned that he had received feedback from BT that it would send a letter on the following Monday providing clarity on their offer. He requested Ms Mdletshe to update all the documentation and to compile a memorandum to be addressed to the acting GCEO (Mr Gama) for approval of the CNRRSSA and BT proposals.

569. There is no evidence that BT ever supplied this information or of any detailed analysis of BT's costing performed by the negotiation team or any official at Transnet. Mr Pita concluded that if the team was happy with the proposals the sign off could be done quickly. He also asked Ms Mdletshe to ensure that sign off by TIA (internal audit) was included in the memo. Mr Laher was not copied in this email. Nor did Mr Pita explain whether his and Mr Laher's concerns had been adequately addressed.

570. On 14 July 2015 Mr Pita wrote an email to Mr Silinga asking him to "review the legal clauses and caveats raised in both proposals, especially the BT offer" as these might have a "significant impact". Mr Silinga responded to this email on 17 July 2015 stating that the agreed price of R618 457 125 and various other clauses were acceptable but noting that timelines needed to be agreed.[766]

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[764] Transnet-07-250.408

[765] Transnet-Ref-Bundle-09126; and Transnet-07-250.412

[766] Transnet-Ref-Bundle-09442

The payments made in respect of the relocation of CNR and BT

571. Two memoranda[767] were prepared by Ms Mdletshe requesting the acting GCEO to note the final outcome of the negotiation for relocation to Durban and to approve the variation orders for the agreed total amounts. The memoranda were recommended by Mr Nair (Acting CEO: TFR), Mr Singh (GCFO), Mr Pita (GCPO), Mr Silinga (GEL&C), and Mr Jiyane (CEO: TE) on 22 July 2015, and approved and signed by Mr Gama (acting GCEO) on 23 July 2015.[768] Transnet agreed to pay BT R618 457 125 and CNR R647 181 494 for the relocation costs; being a total of R1.261 billion. The variation orders resulted in the total contract price of the 232 diesel locomotives awarded to CNR increasing from R9 947 116 464 to R10 594 297 958; and the price of the 240 electric locomotives awarded to BT increasing from R13 049 206 320 to R13 667 663 320.[769]

572. It would seem that Mr Gama approved the memoranda on 23 July 2015 despite the queries he had raised with Ms Mdletshe in May 2015 not having been answered.[770] Mr Nair confirmed in an interview with the MNS investigation team[771] that the memoranda had been recommended and signed on 22 July 2015 by himself, Mr Singh, Mr Silinga, Mr Jiyane and Mr Pita in the presence of each other at a breakaway meeting held at Kloofzicht in Muldersdrift. The transcription of the interview reflects that he recommended the variation order without properly satisfying himself about the justifiability of the R1.2 billion cost increase.

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[767] Transnet-Ref-Bundle-09130 *et seq*; Transnet-07-250.415; and Transnet-07-250.419

[768] Transnet-07-250.418; and Transnet-07-250.421

[769] Transnet-Ref-Bundle-09454-09455

[770] Transnet-Ref-Bundle-09181-09182

[771] Transnet-Ref-Bundle-09203-09206

573. Unusually, in a letter dated 23 July 2015 addressed to CNRRSSA, Mr Gama agreed that 50% of the variation order amount (R323.59 million) would be paid to CNRRSSA in advance and thereafter in 24 monthly instalments of R13.48 million without requiring it to submit invoices for specific expenditures incurred.

574. The full budgeted amount of R1.2 billion for relocation costs was not paid to the OEMs. CNRRSSA was paid only one payment in the amount of R368.89 million (being the initial 50% payment of R323.59 million plus VAT) on 19 August 2015.[772] The bank records of BEX reflect that R76 585 630.43 (R67.2 million plus VAT) was paid by CNRRSSA to BEX on 25 September 2015 shortly after CNRRSSA received the payment of R368.89 million.[773] BT, on the other hand, received 13 different payments in respect of relocation costs between 12 August 2015 and 13 July 2018. These payments totalled R248.71 million (inclusive of VAT).[774] As there is no variation order in relation to BT on record, it is not clear whether the payments were in accordance with the terms of the applicable variation order. Thus, a combined total of R617.60 million (inclusive of VAT) was paid in relocation costs to CNR and BT and not R1.2 billion as initially agreed. There is no explanation on record for why CNRRSSA did not receive the 24 monthly instalments or why BT was paid less than half of the agreed costs of relocation.

575. In October 2018 MNS attorneys appointed Loliwe Rail Solutions ("Loliwe") to conduct an assessment of the approved relocation costs to determine whether there was a rational basis for the increased costs. In its report,[775] Loliwe noted that the relocation negotiation team was not provided with any back up information pertaining to the alleged costs and thus could not have undertaken a proper due-

[772] Transcript 10 July 2019, p 59 *et seq*

[773] FOF-06-189, para 41

[774] Annexure HJW 15, Exh BB13, HJW-0081

[775] Transnet-Ref-Bundle-09447 *et seq*

diligence. Normally, a claim for variation would provide details and specific information pertaining to the breakdown of the items claimed and how each was affected by the unforeseen event. In the case of the variation orders of CNR and BT, only line items were provided and amounts provided. No detail as to how the OEMs incurred additional costs through their suppliers and sub-contractors was provided. Without sufficient and accurate backup information to support the claims, Loliwe could not accept any of the payments as valid. It concluded that the variation orders were inflated intentionally and inadequately evaluated by Transnet. It was also of the view that Transnet was not liable for any additional costs for "relocation" because the LSAs provided for the assembly of the locomotives to take place either in Pretoria or elsewhere in South Africa.

576. The lack of due diligence preceding these variations resulting in an increase of R1.2 billion to the price payable to BT and CNR is confirmed by the limited role played by Transnet Internal Audit ("TIA"). In his email of 10 July 2015, Mr Pita instructed Ms Mdletshe to obtain TIA approval. She failed to do so in contravention of the Procurement Procedures Manual ("the PPM"). In a report dated 7 June 2017,[776] the auditors reported that TIA had attended the meeting with the negotiation team, CNR and BT on 19 June 2015 at OR Tambo International Airport. A follow up meeting was scheduled, but, despite being copied in various emails, TIA was not invited to any subsequent meetings where negotiations on relocation costs took place with the bidders in attendance, as required by the HVT methodology in the PPM. TIA was not provided with the memoranda of 23 July 2015 or informed of the outcome of the negotiations. Based on its limited involvement in the process, TIA was therefore not in a position to produce a formal report to indicate the adequacy and effectiveness of the processes undertaken in

[776] Transnet-Ref-Bundle-09148

the relocation negotiations. Contrary to the requirements of the PPM, no internal audit report was ever produced[777]

The challenge of the minority directors of CNRRSSA to the BEX payment

577. Mr Gonsalves testified that the minority non-executive directors had misgivings about why CNRRSSA, having negotiated a complex LSA, and despite having access to considerable rail rolling stock experience within its shareholder base, felt it necessary to appoint an intermediary such as BEX, which was a newly formed company with no trading history and little or no background in the assembly, manufacture, maintenance or operation of locomotives, or any other experience in the rail industry, to negotiate a variation order with Transnet and furthermore to do so on such significantly generous terms to BEX.[778] The appointment of BEX was concluded by CNRRSSA without the requisite authority as in terms of clause 4.1.3.27 of the Memorandum of Incorporation it required the support of 70% of the shareholders which was not attained.[779]

578. On 16 August 2016, Ms Von Gericke (Global), Mr Whiting (Global), Mr Xate (Endinamix) and Mr Gonsalves (Cadiz) met with Mr Gama, Mr Pita and Mr Silinga to discuss the issues. At that stage they had not had sight of the variation order signed by Mr Gama on 23 July 2015. Mr Gama testified that he was surprised at the meeting to hear of the excessive fee paid to BEX and denied being aware of the concerns of Mr Pita and Mr Laher about the deliberate inflation of the price of the relocation.[780] On 13 September 2016 Mr Xate and Mr Gonsalves met with Mr Silinga to hand over copies of the relevant documents. On 8 December 2016 Mr

[777] Transcript 31 May 2019, p 47-53

[778] Transcript 23 May 2019, p 157-174

[779] Annexure RG 15, Exh BB5, RG-263

[780] Transcript 12 May 2021, p 237-238

Silinga informed the minority non-executive CNRRSSA directors that Transnet had appointed Werksmans to investigate the BEX matter. On 14 December 2016 the minority non-executive directors met with Werksmans and shared all the relevant information.

579. On 2 March 2017 Mr Silinga wrote to the minority non-executive directors intimating that he believed the differences between the shareholders of CNRRSSA may have been resolved and asked whether they were "still pursuing or withdrawing the complaint."[781] The minority non-executive directors requested Transnet to continue with the Werksmans investigation as their concerns about BEX had not been resolved.[782]

580. On 12 June 2017 Mr Fred von Eckardstein, an auditor at KPMG, reported a reportable irregularity to the Independent Regulatory Board of Auditors ("IRBA") to the effect that the relocation proposal of CNRRSSA significantly misrepresented the cost of relocation and the BDSA with BEX appeared to lack sound commercial substance and purpose.[783] On 28 September 2017 Mr Gonsalves spoke with Mr Charles Yu of Hogan Lovells who informed him that Hogan Lovells no longer wished to act for CNRRSSA on the reportable irregularity as one of the BEX directors apparently had a relationship with the Gupta enterprise.[784] On 27 October 2017 KPMG resigned as CNRRSSA's auditor. Following a meeting with Werksmans, the minority non-executive directors decided to report the BEX issue

[781] Annexure RG 18, Exh BB5, RG-277

[782] Annexure RG 19, Exh BB5, RG-279

[783] Annexure RG 20, Exh BB5, RG 289-290

[784] Transcript 24 May 2019, p 9-11

to the Hawks – the Directorate for Priority Crimes Investigation. Nothing has come of that report.[785]

581. On 27 September 2018, Mr Stephen Nthite, a director of Endinamix, wrote to the board of CNRRSSA on behalf of the Endinamix board informing it that Endinamix regarded the payment of R67.18 million to BEX as a bribe to induce the award of this tender and demanded that CNRRSSA report this matter in terms of the PRECCA.[786]

582. On 8 October 2018, after meeting with the minority directors, the new auditors, J Theron & Pietersen Inc, retracted the 2015, 2016 and 2018 annual financial statements of CNRRSSA. The draft audited annual financial statements distributed in March 2019 in respect of the year ended 31 December 2018 drew attention to the reportable irregularity of 12 June 2017 and record that the matter remained unresolved.[787]

Payments to the Gupta enterprise and transgressions related to the relocation

583. The contract between BEX and CNRRSSA was signed by Mr Shaw. Investigative journalists at AmaBhungane have confirmed that BEX forwarded an email confirming the new total of R647 million for the relocation to Mr Essa, merely stating "FYI". The bank records of BEX reflect that approximately R76.59 million (R67.2 million plus VAT) was paid by CNRRSSA to BEX on 25 September 2015.[788] This was shortly after CNRRSSA received the initial payment of R368.89 million from Transnet on 19 August 2015. Mr Shaw was the signatory of the Standard

[785] Transcript 24 May 2019, p 15

[786] Annexure RG 26, Exh BB5, RG-332

[787] Annexure RG 29, Exh BB5, RG-339

[788] Transnet FOF-06-189, para 41

Bank account into which the fee was paid by CNRRSSA. After receiving the payment Mr Shaw laundered the money immediately in four instalments to other shell companies.[789] As pointed out above, R9 million of the R76.59 million was ultimately paid to Integrated Capital Management of which Transnet director, Mr Shane, was a director, in November 2015.[790] Another R33.73 million was laundered through to the Gupta family company, Confident Concepts.[791]

584. The Enablers Report submitted to the Commission in February 2020 by Open Secrets and Shadow World Investigations affirms that Mr Taufique Hasware, a general trader with no relevant experience, was a director of BEX and of three other companies – Homix, Forsure Consultants and Hastauf – all of which were front companies for Mr Essa and the Gupta enterprise.[792] These companies were primarily purposed with facilitating kickbacks from Transnet contracts.[793]

585. The evidence indicates that the variation orders may have permitted the incurring of unnecessary expenditure prejudicial to Transnet, with the issue requiring further investigation. The evidence suggests *prima facie* that Mr Gama may have authorised the expenditure of R1.2 billion without satisfying himself that a cost/benefit analysis had been conducted when it evidently had not been.[794] There are accordingly reasonable grounds to believe that his conduct may have been in violation of sections 50 and 51 of the PFMA. Further investigation is required to decide if Mr Nair and the members of the negotiation team breached their fiduciary

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[789] "The Enablers" by Open Secrets (February 2020) p 61

[790] Exh VV10-SCFOFA-403-404, paras 717-720

[791] Exh VV10-SCFOFA-399-403, paras 707-712 and Table 234

[792] "The Enablers" by Open Secrets (February 2020) p 57-58

[793] The report relies on a media report on the Internet: "Gupta link in R647m Train Deal" – AmaBhungane 2018 https://amabhungane.org/stories/gupta-lonk-in-r647m-train-deal

[794] Transcript 12 May 2021, p 225-246

duties, the provisions of the PFMA and/or the PPM when negotiating and approving the variation orders.[795]

586. Moreover, the members of the negotiation team were all remiss in not resolving the issues raised by Mr Pita and Mr Laher in late June 2015. Paragraph 15.3 of the PPM requires high-value tenders ("HVT") to be conducted in a manner that enables supply chain management and the negotiation team to detect any shortcomings at key gateways in the process, make appropriate corrections, determine if governance processes have been followed and raise concerns which then must be addressed. In terms of paragraph 5.1.2 of the PPM all Transnet employees are required to protect Transnet's assets, act with integrity and professionalism, and to maintain an attitude of zero tolerance toward any form of bribery, corruption and inducements. Paragraph 12.6 of the PPM (2015) provides that where a contract amendment increases the value or period of a contract, supplier development must be re-negotiated based on the cumulative value and/or period of the contract.

587. The impropriety of the variations arising from the relocation, and their part in the Gupta money laundering and racketeering enterprise, is disclosed in the evidence relating to the payment made to BEX. The PFMA contraventions result in the payment to BEX being the proceeds of unlawful activities and thus there are reasonable grounds to believe that the directors of BEX, CNRRSSA and the relevant officials of Transnet contravened sections 5 and 6 of POCA and sections 3 and 13 of PRECCA. The benefit to the Gupta enterprise means also that there are reasonable grounds to believe that Mr Singh, Mr Gama and Mr Shaw participated in the conduct of the affairs of the Gupta enterprise.

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[795] Transnet-06-431-436

588. These findings are to the effect that there are reasonable grounds to believe that these employees, board members of Transnet and some of the directors of CNRRSSA violated the Constitution and other legislation and were involved in corruption of the kind contemplated in TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

CHAPTER 7 – THE FINANCIAL ADVISORS

The creation of a monopoly and the scheme for money laundering to Homix and Albatime

589. In the period between 2012 and 2016 Transnet contracted with four companies to provide various financial and advisory services, namely: McKinsey, Regiments Capital, Trillian Capital and JP Morgan. The lead provider for the various financial services was initially McKinsey which over time ceded many of its rights and delegated obligations to the other companies, most notably Regiments, and later Trillian. These companies were small firms with limited capacity, had virtually no track records and were involved in the Gupta enterprise. Regiments and Trillian used a large network of shelf companies and investment vehicles through which money was then laundered for the benefit of the Gupta enterprise and Mr Essa.

590. It is reasonable to conclude that McKinsey chose to partner with Regiments and Trillian because it would be awarded high-value contracts for doing so. Eight significant contracts were awarded by confinement to McKinsey/Regiments in the period 2012 – 2015 which advanced the interests of the Gupta enterprise.[796] McKinsey has conducted its own investigation and admits that its SDP, Regiments, engaged in a pattern of misconduct. It has opted to return the fees it received from Transnet for projects on which it worked alongside Regiments.[797]

591. The most important contract, and perhaps most controversial, was the contract for advisory services related to the acquisition of the 1064 locomotives. The confinement memorandum for these services[798] explained that further work was

[796] Exh BB2.1(a), PSV-0054 *et seq*; and Transcript 10 May 2019, p 39 *et seq*

[797] Letter from Norton Rose Fulbright to the Acting Secretary of the Commission dated 12 August 2021

[798] Annexure PV 36, Exh BB2.1(d), PSV-1260

required to strengthen the business case. Further verification and validation was needed to: i) validate the market demand for targeted commodities; ii) mitigate the foreign exchange risks inherent in the acquisition from foreign suppliers; iii) review funding options; iv) enhance the programmatic procurement and contracting strategy; v) obtain an independent review of financial, operational and technical assumptions; vi) conduct comprehensive risk assessments and mitigating plans; and vii) assist with the final contract drafting.

592. The confinement to McKinsey was sought to be justified on the grounds of urgency and the fact that the services were highly specialised and largely identical to work previously done for Transnet by McKinsey. Although the confinement was agreed to in May 2012, McKinsey only signed the final contract on 21 February 2014 and Transnet signed it on 11 August 2014. The work under it was performed in terms of a letters of intent, the first of which was only signed in December 2012, thus bringing into question the justification of the confinement on grounds of urgency. This contract was ceded from McKinsey to Regiments on 4 February 2014 after Phase 1, the completion of the business case for the procurement. The cession to Regiments was in respect of the balance of the work. The original contract value was R35.2 million. Subsequent amendments resulted in a fee increase firstly to R78.4 million and a second amendment to include an "at risk" success fee of R166 million.

593. The other contracts were: i) the SWAT1 contract (valued at R174.6 million), a contract of services related to the MDS for expanding the rail, port and pipeline infrastructure; ii) the SWAT2 contract for capital optimisation and implementation support valued at R225 million; iii) a contract for professional services to increase the coal line with a breakthrough of 2 million tonnes per week ("the coal line contract") with an original value of R216.7 million (a fixed fee of R73.5 million plus

a contingent fee of R143.2 million); iv) a contract (valued at R248 million) for the renegotiation of the contractual arrangements with Kumba for the transport of iron ore; v) a contract for the manganese project execution support ("the manganese contract") valued at R179.9 million; vi) a contract related to the New Multi Product Pipeline ("the NMPP"), a pipeline project aimed at increasing volumes from 4.4 billion litres to 8.7 billion litres through the construction of a 555 kilometre, 24 inch diameter trunk line ("the NMPP contract") valued at R446.2 million; and vii) a contract for professional services to support Transnet in increasing general freight business ("the GFB contract") for a fee of R463.3 million.[799] The total value of the eight contracts awarded by Transnet to McKinsey during 2014-2015 amounted to R2.2 billion. Half of the revenue earned by Regiments on six of the eight contracts (the coal line contract; the Kumba Iron Ore contract; the manganese contract; the NMPP contract; the SWAT 2 contract; and the GFB contract) was diverted to a Gupta associated company, Homix (Pty) Ltd ("Homix") as part of the money laundering scheme described earlier in this report.[800]

594. All eight contracts were awarded by way of confinement and approved mainly by Mr Molefe, as the GCEO, on the basis of memoranda submitted to him by Mr Singh and Mr Pita.[801] The evidence establishes that McKinsey and Regiments were in possession of Mr Singh's confinement memoranda to Mr Molefe prior to their making these bids.[802] This, Mr Singh and Mr Pita agreed during their evidence before the Commission, was highly irregular, and points to a concerted effort to favour McKinsey and Regiments in furtherance of the money laundering and racketeering scheme. The use of confinements rather than open tenders created a

[799] Transcript 1 June 2021, p 137, line 15

[800] Transcript 9 March 2021, p 184-185

[801] Annexures PV 35 - PV 43, Exh BB2.1(d), PSV-1255-1322

[802] Transcript 17 June 2021, p 37-41

monopolistic situation which facilitated the scheme and was at odds with the policy of open competition and the introduction of new entrants into the market from previously disadvantaged communities.

595. The confinement memoranda sought to justify the use of confinements (rather than open tenders) on the grounds of urgency and the services being highly specialised and largely identical to work previously performed.[803] In terms of paragraph 15.1.2(a) of the PPM (2013) any urgency should not be attributable to a lack of proper planning and must be genuinely unexpected. Transnet's revenue risks (which formed part of the rationale for confinement in most of the McKinsey contracts) were not unforeseeable.[804] While the services were highly specialised and identical to work previously performed, it is doubtful whether proper consideration was given to the public interest in open and fair competition and the avoidance of a monopolistic situation. Mr Molefe testified that he had accepted the grounds of confinement presented by Mr Singh and did not bother to apply his independent judgement.[805] That was negligent and a failure by Mr Molefe to do his job properly.

596. Four of the confinements (the coal contract, the Kumba Iron Ore contract, the manganese contract and the NMPP contract) were approved by Mr Molefe over a period of four days - between 31 March 2014 and 3 April 2014. [806] The four contracts appointed Homix and Albatime (Gupta-linked laundering vehicles) as supplier development partners ("SDPs").[807] They had a combined value (at that

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[803] Transcript 10 May 2019, p 42 *et seq*; and Annexures PV 36 - PV 43, Exh BB2.1(d), PSV-1259-1322 – see para 15.1.2 of the PPM (2013)

[804] Exh BB2.1(a), PSV-0059, para 128

[805] Transcript 9 March 2021, p 159-160

[806] Transcript 9 March 2021, p 146-147

[807] Transcript 28 May 2021, p 94-98; Transnet-05-716; and Transnet-05-732

time) of R619 million. Although each of the transactions, viewed separately, fell within the delegation of authority for confinement given to the GCEO (at that time up to R250 million), the combined value of the transactions fell within the delegation of authority of the BADC (up to but not exceeding R1 billion). Given the fact that the transactions related to the same or similar services, and were awarded to one company within a few days of each other, confinement approval arguably should have been obtained from the BADC. The splitting of the transactions possibly amounted to a breach of the rules against parcelling.[808]

597. What is more, the four confinements were done unusually on a confidential basis.[809] As discussed earlier, confinement on a confidential basis is an effective way of by-passing some of the ordinary procurement safeguards. Paragraph 15.1.4(c) of the PPM (2013) permits the GCEO to approve a confinement without review, on grounds of confidentiality. However, confidentiality does not form a justification ground for not having an open tender process. While confidentiality may be a reason for bypassing the review processes, confidentiality is not of itself a ground for confinement.[810] Thus, the four confinements in the four-day period between 31 March 2014 and 3 April 2014 did not follow the normal review and sign off process, supposedly, for reasons of confidentiality. These four contracts in

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[808] Transcript 10 May 2019, p 57 ***et seq***; Exh BB2.1(a), PSV-0062-0063, paras 138-142; and see the discussion about confidential confinement at Transcript 10 May 2019, p 61 ***et seq***. Mr Singh in his belatedly filed re-examination affidavit argued that there was no parcelling because the full scope of the work was not known at the time when the procurement events were initiated –Transnet-05-2360, para 34 ***et seq***.

[809] Homix and Albatime were eventually paid more than R100 million of the value Regiments received under these contracts. Transcript 9 March 2021, p 147-150; Transnet-05-130, para 49; Transnet-05-331; Transnet-05-345; and Transnet-05-352

[810] Transcript 10 May 2019, p 61 ***et seq***; and Exh BB2.1(a), PSV-0063, para 149 ***et seq***. The Transnet board has recently decided to remove confidential confinement from the PPM because it is a huge risk. The whole process of confidentiality is an oddity because an RFP still has to be submitted after the approval of the confinement and once the contract is awarded, and is thus no longer confidential. Because confidential confinement avoids the robust review of lower management, it amounts to a deviation within deviation.

particular contributed substantial revenue to the money laundering scheme involving Regiments, Homix and Albatime. Mr Molefe accepted that the advantage of a confidential confinement was that it ensured it was done in secret without scrutiny.[811]

598. There is little by way of justification for the supposed confidentiality of these four confinements in the relevant memoranda. Paragraph 25 of the confinement memorandum for the manganese contract, for example, merely stated: "due to the confidential nature of the information, the engagement cannot be subject to an open tender process." It added that in terms of paragraph 15.1.4(c) of the revised PPM "the GCE may approve such confinement without it being routed via any other signatory."[812] The same statement was included in the memoranda for the other three contracts.[813] The memoranda thus made out no case for why the confinements in those instances were confidential. The rationale for the confinements was largely that there were declining volumes and revenue risks, but these grounds provide no basis for not following the normal review process.

599. When asked during his testimony before the Commission[814] what was confidential about the four confinements, Mr Molefe referred to the grounds for confinement in the coal line confinement memorandum prepared by Mr Singh.[815] However, these

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[811] Transcript 9 March 2021, p 178

[812] Annexure PV 41, Exh BB2.1(d), PSV-1303, para 25 – Mr Singh attempted in his testimony to justify these transactions in a lengthy discourse aimed at showing that there were processes that examined the advantages of confinement of the four contracts to McKinsey prior to the award of the contracts. His discourse (Transcript 31 May 2021, p 84-105) is inconsequential and does not detract from the fact that there was no proper justification for the urgent and confidential confinement of four contracts that contributed substantially to the money laundering and racketeering scheme.

[813] Annexure PV 39, Exh BB2.1(d), PSV-1287, para 29; Annexure PV 40, Exh BB2.1(d), PSV-1295, para 22; and Annexure PV 42, Exh BB2.1(d), PSV-1311, para 27

[814] Transcript 9 March 2021, p 164

[815] Annexure PV 39, Exh BB2.1(d), PSV-1287, paras 27-28

did not deal with the question of confidentiality.[816] When this was pointed out to him, he admitted that he was not concerned with confidentiality at the time.[817] Later he maintained that confidentiality arose in relation to McKinsey's "proprietary models".[818] While this rationale was advanced as a reason for confinement,[819] the confinement memorandum did not specifically rely on such as a basis for confidentiality. Mr Singh too sought to rely on McKinsey's interest in protecting its intellectual property as a justification for confidentiality. He had no cogent answer to the proposition that confinement on a confidential basis is intended to protect or advance the interest of Transnet not bidders for work.[820]

600. Some of the confinements to McKinsey were not in compliance with the mandatory requirement that consultants should only be appointed after a gap analysis has been done to confirm that Transnet did not have the requisite skills or resources in its full time employ to perform the work. Paragraph 4.1 of National Treasury Instruction 1 of 2013 issued on 19 December 2013 pursuant to section 38(1)(b) of the PFMA ("the NT Instruction") requires that a consultant may only be appointed to an SOE after a business case and a gap analysis have been done to confirm that Transnet does not have the requisite skills or resources. The NT Instruction[821] was applicable to some of the McKinsey contracts concluded after 1 January 2014.

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[816] Transcript 9 March 2021, p 166, lines 13-14

[817] Transcript 9 March 2021, p 168, line 1

[818] Transcript 9 March 2021, p 177

[819] See for example Annexure PV 39, ExhBB2.1(d), PSV-1286, para 28 (d)

[820] Transcript 31 May 2021, p 107-127; and in particular Transcript 31 May 2021, p 124-125 - In his belatedly filed re-examination affidavit Mr Singh attempted to make the case that the confinement approvals were not in fact confidential because the subsequent award of the contracts (after the approval of the confinements confidentially) were subject to some scrutiny and evaluation by a cross functional team – Transnet-05-2362, para 41 ***et seq***. Be that as it may, the fact remains that the confinement approvals were done with no apparent justification for confidentiality. The awards were made without a competitive, open and public tender process and advanced a monopolistic agenda and ultimately the interest of the Gupta enterprise.

[821] Effective 1 January 2014

There is no evidence that the relevant officials of Transnet conducted the necessary gap analysis before the appointment of McKinsey. This brings into question the validity of the appointment.[822] As discussed later, many of the tasks outsourced to the financial advisors at significant cost could have been performed by Transnet employees with the necessary skills.

601. The favouring of McKinsey and Regiments was further evidenced by the fact that supply chain management was instructed to make fee payments to McKinsey, even though the tender process had not been concluded and no contracts had been finalised.[823] On 9 April 2014, well before the RFPs were issued or contracts had been concluded with McKinsey, Mr Singh, as GCFO, wrote to both McKinsey and Regiments, requesting them to "mobilise a McKinsey led consortium to have initial discussions with our teams". McKinsey was advised that in the unlikely event that the contracts were not concluded, it would be reimbursed for all costs incurred.[824] In July 2014, while the bid evaluation process was still underway, Mr Edward Thomas, the Executive Manager, Group ISCM, instructed Ms Cindy Felix, Procurement Manager, ISCM, to create purchase orders for payments to be made to McKinsey where no contracts existed. In an email she recommended that the payments (approved by Mr Singh) should not be made until such time that the contracts (in relation to the coal line, Kumba iron ore, the MEP, the NMPP and the capital optimisation project) were concluded as the scale of the risk was significant and as per audit requirements the payments needed to be logged in the deviation register."[825] Mr Thomas replied and argued that a contractual obligation had been created once the confinement process was approved and a letter was issued to

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[822] Transcript 10 May 2019, p 76; Exh BB2.1(a), PSV-0065, paras 153-154

[823] See Annexure PV 45, Exh BB2.1(d), PSV-1341-1345

[824] Annexure PV 45(a), Exh BB2.1(d), PSV-1348-1349

[825] Annexure PV 45, Exh.BB2.1(d), PSV-1344-1345

McKinsey requesting it to commence work while the RFP was issued. [826] Ms Felix then authorised the payments to be made in accordance with Mr Thomas' instruction.[827]

602. Mr Thomas was mistaken. An approval to confine does not create a contract at all.[828] Paragraph 21.1 of the PPM (2013) specifically provides that no employee shall anticipate the approval of acceptance of bids and that no employee may enter into a contract verbally or in writing or place orders before the prescribed adjudication process has been performed and authority has been duly granted by a manager with the appropriate delegation of authority. Paragraph 15.1.3 of the PPM (2013) provides that once approval to confine is obtained, bids "will close at the relevant AC". This means that after an approval to confine has been obtained, the following further steps have to be taken: (i) an RFP has to be issued to the bidder; (ii) the bidder's response has to be received by the acquisition council secretariat; (iii) bids have to be properly evaluated; and (iv) the contracts have to be subsequently awarded by the person with the relevant delegation of authority.

603. Moreover, in May 2014 a directive had been issued specifically instructing end users not to engage suppliers to provide services before the confined tender process had run its course and a contract had been concluded.[829] It was accordingly irregular for Mr Thomas to have approved the payments. The confinements to McKinsey were *ex post facto* exercises to justify the award of business that had already occurred.

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[826] Annexure PV 45, Exh.BB2.1(d), PSV-1344

[827] Annexure PV 45, Exh BB2.1(d), PSV-1345

[828] Transcript 10 May 2019, p 51, lines 8-10

[829] Annexure PV 46, Exh BB2.1(d), PSV-1353 *et seq*; and Transcript 10 May 2019, p 56

604. As mentioned, the contracts concluded with McKinsey and Regiments (particularly the four concluded confidentially) contributed substantially to the money laundering scheme involving Regiments, Homix and Albatime. In the context of preparing joint proposals for these four contracts, on 13 June 2014 Regiments emailed McKinsey a spreadsheet containing a detailed breakdown of fees that were to be paid by Regiments to Homix and Albatime in their guise as SDPs of Regiments on the four contracts.[830] The spreadsheet attached to Regiments' email of 13 June 2014 provided for aggregate amounts in excess of R100 million to be paid to Homix and Albatime on the four contracts. McKinsey has confirmed through a statement made by Mr Fine to Parliament that neither Homix nor Albatime were involved in providing services on any project in which McKinsey were involved.[831]

605. Mr Molefe denied all knowledge of the money laundering scheme involving Regiments and Homix and maintained that the evidence before the Commission was insufficient to prove his involvement.[832] The manner in which he failed to apply his mind to the grounds of confinement, the inappropriate use of confidentiality, the irregular parcelling of the transactions, the creating of a monopolistic situation, the premature payments to McKinsey, and the failure to do a gap analysis all took place on his watch and provide reasonable grounds to believe that he was involved in the Gupta enterprise and participated in the conduct of its affairs.

606. Mr Singh had more information about the money laundering scheme which is clearly evidenced in a reconciliation Excel spreadsheet sent to him and later to Mr Pita (after Mr Singh had moved to Eskom). Regiments maintained a running reconciliation of the payments it had received from Transnet and the corresponding

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[830] See Annexures 3 and 4, Transnet-05-743 *et seq*

[831] Transnet-05-694

[832] Transcript 9 March 2021, p 185

payments it had made to Mr Essa's laundry entities and Albatime. The spreadsheet containing this reconciliation was named "Advisory Invoice Tracking".[833] Regiments forwarded copies of the Advisory Invoice Tracking spreadsheet to Mr Singh[834] when he was GCFO of Transnet on 18 May 2015 and to Mr Pita on 5 August 2015.[835]

607. Entries in the spreadsheet confirm the money laundering arrangement. For example, an entry for March 2014 in respect of "the 1064-Transaction Advisory" reflects a total payment of R6.128 million with amounts of R3.064 million (50%) and R285 000 (5%) payable to Chivita/Homix and Albatime respectively.[836] Likewise, an entry in respect of the NMPP contract invoiced on 30 March 2015 reflects the total amount due as R3.948 million. The amount recorded as payable to Chivita/Homix is R1.974 million (being 50% of the total) and the amount payable to Albatime is R197 391 (being 5% of the total).[837] This was in keeping with the money laundering arrangement that Regiments kept only 45% of the payments under the McKinsey contracts and forwarded 55% to Homix (Mr Essa) and Albatime (Mr Moodley). Several other entries in the Advisory Invoice Tracking prepared by Regiments reflect similar payments in respect of the various McKinsey and other contracts. The numerous recorded entries in the spreadsheet reflect a consistent pattern in keeping with the scheme of 45/50/5% involving Regiments, Homix and Albatime. Regiments paid total payments to these "business development partners" of

[833] Transnet-05-1924 *et seq*

[834] Transnet-05-706

[835] Transnet-05-709

[836] Transnet-05-1928

[837] Transnet-05-1925

R274.155 million in the 2015/2016 financial year alone, including payments aggregating over R100 million on the McKinsey contracts.[838]

608. This evidence establishes a strong *prima facie* case that Mr Singh and Mr Pita were aware of the payments being made by Regiments in terms of the confinements to the laundry entities controlled by Mr Essa and Mr Moodley. Such evidence will be relevant in any prosecution of Mr Singh on charges of corruption in terms of Chapter 2 of PRECCA and/or racketeering or offences relating to the proceeds of unlawful activity in terms of Chapters 2 and 3 of POCA. Mr Singh could not recall whether he opened the email of 18 May 2015 to him attaching these documents, but conceded that as it was addressed to his email address he probably did. He assumed the spreadsheet had been sent to him because the invoices were long overdue but implausibly maintained that he was not aware of all the information in the spreadsheet (especially that regarding the payments to Homix and Albatime) because he had not performed the single act of clicking the "unhide" function.[839] Given that Mr Singh is a chartered accountant working with Excel spreadsheets on a daily basis, it is highly unlikely that he would not have known of the "unhide" function applied to expand the first view of an Excel spreadsheet. Mr Pita claimed not to have any recollection of his receipt of the email.[840]

[838] Transnet-05-694, para 12

[839] Transcript 28 May 2021, p 130-140

[840] Transcript 1 June 2021, p 233-242

The non-responsiveness of the McKinsey bid for the provision of advisory services related to the 1064 locomotives acquisition

609. On 30 May 2012, a confinement RFP was issued to nine entities for the appointment of the transaction advisor.[841] Section 2.8 of the RFP set out the evaluation methodology and criteria. Four responses from three different consortia were received on the tender closing date, 7 June 2012. These were: KPMG Consortium; PWC Consortium; McKinsey Consortium; and Webber Wentzel attorneys (in respect of legal services only). On 26 July 2012, it was resolved to award the contract to the McKinsey Consortium,[842] which comprised: i) McKinsey Incorporated (main bidder); ii) Letsema Consulting (co-bidder); iii) Advanced Rail Technologies; iv) Nedbank Capital; v) Edward Nathan Sonnenbergs (ENS); vi) Koikanyang Incorporated; and vii) Utho Capital. The fee payable was R35 million as R15 million of the budgeted amount of R50 million was spun out for legal services, awarded to Webber Wentzel.[843]

610. The tender ought not to have been awarded to the McKinsey Consortium because it failed to meet the test for administrative responsiveness. The test for administrative responsiveness in the RFP included whether all returnable documents were completed and returned by the closing date. The RFP explicitly stated that the test for administrative responsiveness (step 1) "must be passed for a respondent's proposal to progress to step 2 for further evaluation". The returnable documents included audited financial statements for the previous three years.[844] McKinsey failed to submit its financial statements and submitted a letter indicating that if successful its accounts could be viewed through an on-site

[841] Transnet-Ref-Bundle-05622

[842] Transnet-Ref-Bundle-05512

[843] Transcript 27 May 2021, p 74

[844] See section 4 of the RFP at Transnet-Ref-Bundle-05647-05648

inspection. The letter did not comply with the tender requirements. The RFP specifically stated that the failure to provide the audited financial statements for the previous three years would result in a bidder's disqualification.[845] Section 1(i) of the PPPFA defines an "acceptable tender" as any tender which in all respects complies with the specifications and conditions of tender as set out in the tender document. Failure to comply with a peremptory requirement of the PPPFA offends the principle of legality.[846] Where the materiality of compliance with legal requirements requires to be assessed, it is necessary to link the question of compliance to the purpose of the provision.[847] Transnet could not achieve the purpose of the RFP due to the fact that McKinsey had failed to submit the audited financial statements or any other document reflecting verifiable financial stability as required in terms of the RFP and as such did not submit an "acceptable tender". Accordingly, the decision to appoint the McKinsey Consortium was irregular due to its failure to submit the mandatory returnable documents. McKinsey should therefore have been excluded and disqualified at step 1.

Appointment of Regiments Capital (Pty) Ltd

611. On 20 August 2012 Mr Singh addressed a memorandum to Mr Molefe[848] requesting approval for the appointment of the McKinsey Consortium for the advisory services and Webber Wentzel for the legal advisory work as transaction advisors on the 1064 locomotive tender. He also asked it to be noted that McKinsey would be advised to partner with another firm, with equal or better credentials than Letsema, for the procurement elements, due to a potential conflict with Barloworld and Letsema. Surprisingly, the memorandum did not explain or

[845] Transnet-Ref-Bundle-05648

[846] *Dr JS Moroka Municipality v Betram (Pty) Ltd* 2014 (1) SA 545 (SCA)

[847] *Allpay Consolidated Investments Holdings v CEO of SASSA* 2014 (1) SA 604 (CC)

[848] Transnet-Ref-Bundle-5528

discuss the nature of the alleged conflict of interest that had arisen. Nevertheless, it was recommended that McKinsey be advised to partner with another firm; which McKinsey eventually did, with Regiments, a key player in the Gupta enterprise.

612. Mr Molefe approved the recommendation on 22 August 2012. In his testimony before the Commission, he testified that Letsema had a conflict because Barloworld, which was either being advised by Letsema or was advising it, built engines that were used by EMD, a bidder on the 1064 locomotive tender. So, according to Mr Molefe, Letsema had a conflict. He did not know who brought the conflict to his attention or why it was not picked up earlier during the tender process.[849] Mr Singh too was vague about the precise nature of the conflict, why it had not been picked up earlier in the process or explained in his memorandum. He denied requesting McKinsey to sub-contract Regiments and could not recall interacting with Regiments at the time they were brought in to replace Letsema.[850] He believed Regiments would have been proposed by McKinsey and some sort of review of Regiments' credentials would have been done by the procurement team between August and December 2012. There is no evidence indicating that.[851]

613. Mr Singh's attempts to distance himself from Regiments are not credible. Correspondence between Mr Essa and Regiments (Mr Pillay and Mr Wood) on 28 November 2012 reflects that Mr Essa set up a meeting between Mr Singh and Mr Pillay of Regiments at Mr Singh's office on 3 December 2012.[852] Around this time,

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[849] Transcript 9 March 2021, p 49-53; and Transcript 8 March 2021, p 206-208

[850] Transcript 27 May 2021, p 65-73

[851] Transcript 27 May 2021, p 86-87

[852] Transnet-05-2203-2204. As mentioned above, Mr Singh denied that he had any contact with Mr Essa regarding this meeting and contended that Mr Essa played no role in facilitating the meeting. In his re-examination affidavit (Transnet-05-2426-2427), Mr Singh belatedly points to inconsistencies (times of sending, etc) between two sets of emails dealing with the meeting appearing at Transnet-05-1980 and Transnet-05-2203-2204. Due to the lateness of the affidavit, the issue was not investigated.

on 30 November 2012, Mr Singh addressed a letter of intent ("LOI") for the provision of the advisory services to McKinsey informing it that its offer had been accepted and that its consortium had been awarded the contract.[853] It recorded that the parties to the agreement were: Transnet, McKinsey Incorporated and the other members of the consortium, including Regiments Capital. Clause 1.1.5 of the LOI stated that McKinsey "agrees to partner with Regiments Capital, for the procurement and supplier development elements of this project". The LOI was signed by Mr Singh on 4 December 2012, the day after his meeting with Mr Pillay of Regiments, and by Mr Michael Kloss, a director of McKinsey, on 6 December 2012.

614. Regiments was included as a member of the McKinsey consortium in place of Letsema despite it not having tendered as part of the consortium. The tender was awarded to the consortium based on its composition at the time of the submission of its bid. The capabilities of the consortium members to perform the various aspects of the 1064 transaction advisory tender and the consortium's eligibility for the award was assessed based on the verification and evaluation of the claims made by its constituent members, of which Regiments was not one. The capabilities and other credentials of Regiments were not subject to the rigour of the verification, evaluation and adjudication process followed in relation to the tender.[854] The appointment of Regiments was therefore inconsistent with the constitutional requirements of transparency, fairness and competitiveness.

615. Regiments (and ultimately the Gupta enterprise) benefited substantially from the replacement of Letsema. Paragraph 17.2 of the memorandum of 22 August 2012

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[853] Transnet-Ref-Bundle-06570

[854] MNS Report Vol 2A (dealing with transaction advisors) appears at Transnet-06-359 *et seq* ("MNS Transaction Advisors Report"); see para 2.4. (Vol 2B of the report appears at Transnet-Ref-Bundle-6826 *et seq*.)

from Mr Singh to Mr Molefe recorded that the percentage split of work to Letsema as McKinsey's procurement partner amounted to 20% of the total.[855] An analysis of the evaluation criteria in the bid[856] indicated that Letsema would have been involved in almost all the aspects of the bid with the exception of the technical optimisation of capital equipment, the capital project optimisation experience, the business case development and evaluation for mega-projects, and the deal structuring and financing for large capital investment projects.[857] Mr Molefe testified that he did not consider the change from Letsema to Regiments (a transfer of 20-30% of the business under the tender) as a "big change".[858]

616. The appointment of Regiments in place of Letsema advanced the corrupt scheme in which Regiments agreed to pay 30% (later 50%) of all of its income from Transnet to companies appointed by Mr Essa and an additional 5% to Albatime – it being the company of Mr Moodley who introduced Regiments to Mr Essa, who played a key role in orchestrating the incorporation of Regiments as McKinsey's SDP.[859] The Money Flow Team of the Commission ("the MFT") in its report[860] dealing with Regiments' relationship with the Gupta enterprise summarised the scheme usefully as follows:

> "In some cases Regiments' laundering arrangements with Mr Essa and Albatime on joint McKinsey/Regiments' contracts with Transnet were fraudulently presented … as Regiments supply development arrangements…Through these laundering arrangements hundreds of

[855] Transnet-Ref-Bundle-05530, para 17

[856] Exh BB8(a), MNS-TS-72-74.

[857] Transcript 29 May 2019, p 109

[858] Transcript 8 March 2021, p 243-244

[859] Transnet-05-324

[860] Exh VV9, FOF-08-399; and Transnet-05-324

millions of rands were laundered through shell companies nominated by Mr Essa out of fees paid by Transnet to Regiments...The business development fees paid to Mr Essa were simply money laundering payments. The shell companies designated by Mr Essa to receive these business development fees changed over time. They included: a. Chevita Trading (Pty) Ltd; b. Homix (Pty) Ltd; c. Forsure Consultants (Pty) Ltd; d. Fortune Consulting (Pty) Ltd; Medjoul (Pty) Ltd; e. Medjoul (Pty) Ltd; f. Haustaff (Pty) Ltd; g. Maher Strategy Consulting (Pty) Ltd…All of these shell companies operated as out and out money laundering vehicles without any legitimate business activities. Revenue received from Regiments by these shell companies was within days, laundered to lower level money laundering entities. Apart from inflows from Regiments and other corrupt associates of Mr Essa and the Guptas, the shell companies had no income. Apart from outflows to lower lever laundry entities, the shell companies had no expenses of consequence. None of the shell companies paid PAYE (employees' tax) to SARS."

617. Although he approved the decision to substitute Letsema with Regiments, Mr Molefe "categorically" denied any knowledge of the money laundering scheme and his participation in it. His responses to questions arising from the MFT Report were generally non-responsive, evasive, pedantic and dismissive.[861] He mostly declined to engage with the allegations, saying that he would reserve his comment until after the Commission had made a finding in that regard. He eventually conceded that the MFT Report pointed to the possibility of a money laundering scheme of some magnitude.[862] However, he refused to comment on the

[861] Transcript 8 March 2021, p 213 *et seq*

[862] Transcript 8 March 2021, p 233-234

significance of McKinsey agreeing to repay Transnet R650 million in respect of fees paid to it in terms of various contracts with Transnet tainted by corruption.[863]

618. Mr Molefe's testimony about his lack of knowledge of the scheme involving Regiments and the Gupta associated companies must be assessed in the light of the evidence analysed earlier that he enjoyed a long standing relationship with the Gupta family and had been a frequent visitor to their Saxonwold compound between 2009 and 2016, the evidence that he received cash payments from the Gupta enterprise, and the evidence that the Guptas or their associates played a role in his appointment to the posts of GCEO of Transnet and GCEO of Eskom. The Gupta enterprise benefited substantially from Mr Molefe's approval of the appointment of Regiments.

The contractual arrangements for the provision of advisory services: The LOI and its addenda

619. The letter of intent ("LOI") of 6 December 2012 was intended to regulate the relationship between Transnet and the McKinsey consortium pending the conclusion of a Master Services Agreement ("MSA"). It provided that it would remain in effect until the MSA was signed or until 90 days elapsed from the date of issue of the LOI, whichever event should occur first.[864] The parties agreed to work towards concluding the MSA over a period of nine months, commencing 15 January 2013 and expiring 15 October 2013 (or sooner if completed). Clause 1.1.1 noted that the contract timeline could be for a longer period "at no extra cost to Transnet if the deliverables are not executed for whatever reason as this engagement is output-based, as opposed to time-based". The parties agreed to

[863] Transcript 8 March 2021, p 238; and see Transnet-05-403

[864] Transnet-Ref-Bundle-06571

use the LOI "as a proxy for the binding legal agreement and under its authority Transnet intends to request that the supplier commences the provision of such services as required, during which period the detailed agreement will be negotiated and finalised between the parties" (clause 1.1.2). Consequently, the LOI was valid for 90 days or until the earlier finalisation of the MSA and any deliverables not completed by 15 October 2013 would continue at no cost to Transnet.

620. Clause 3 of the LOI of 6 December 2012 provided that the fees for the services would be R35.2 million and any overrun in terms of time "will not be for the account of Transnet as the engagement is output-based and not time-based". Annexure A of the LOI reflected that different fees were allocated to different members of the consortium for different work. Nedbank/Utho Capital would be paid a fixed fee of R1.4 million and Regiments R6.1 million for contracting strategy. McKinsey would receive R6.6 million for business case validation, R13.5 million for technical evaluation and execution and R7.6 million for project management office, integration and shareholder management.[865]

621. The key deliverables under the LOI were the provision of advisory services related to the acquisition of the 1064 locomotives. This included: i) the developing and augmenting of the business case; ii) the procurement, legal, supplier development and localisation strategy; iii) technical/operations; iv) project management; and v) financial. The financial services have assumed some significance. They included "developing finance and financial options and develop deal structure (financing, hedging and de-risking options)".

622. As the LOI of 6 December 2012 was only valid for 90 days (from 6 December 2012 to 6 March 2013) or until the MSA was finalised, whichever of the two events

[865] Exh BB8(a), MNS-TS-78

occurred first, and because as at 4 March 2013, the MSA had not been finalised, the LOI would have expired on 6 March 2013. To avoid the expiry of LOI, Transnet and McKinsey concluded a "first addendum" to the LOI.[866] Clause 3 of the first addendum extended the validity date from 7 March 2013 to 15 October 2013 "to further conclude the MSA". A day before the expiry of the first addendum to the LOI, on 14 October 2013, Transnet and McKinsey concluded a second addendum to the LOI which extended the LOI's validity period from 15 October 2013 to 30 November 2013, to allow the parties to conclude the MSA. Both addenda recorded that the fixed contract price of R35.2 million was not affected by the extension of the original LOI.[867]

623. While the second addendum to the LOI was in operation, on 19 November 2013, Mr Singh addressed a letter to McKinsey confirming Transnet's agreement to a request by McKinsey for Regiments Capital to provide services in place of Nedbank (contracted to provide financing, funding options and deal structures) on the grounds of a potential conflict of interest.[868] The agreement increased the scope of Regiments' work to a stake of 30% in the McKinsey consortium - 20% from Letsema and 10% from Nedbank.[869] This substitution also advanced the money laundering scheme.[870] The memorandum motivating the substitution of Nedbank (prepared by Mr Singh) was approved by Mr Molefe some five months later on 17 April 2014.[871] It requested ratification of the substitution and the delegation of authority to Mr Singh to give effect to that approval. The approval of the substitution came one day after McKinsey informed Transnet in a letter dated

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[866] Transnet-Ref-Bundle-06581

[867] Transnet-Ref-Bundle-06584

[868] Transnet-Ref-Bundle-05342

[869] Transcript 27 May 2021, p 80

[870] Transcript 8 March 2021, p 256 *et seq*

[871] Transnet-05-888

16 April 2014 that it had ceded all of its rights under the contract for financial services to Regiments, a matter which is discussed more fully later.[872] Mr Molefe testified that he vaguely recalled the decision but not the details.[873]

624. As at 30 November 2013 Transnet and McKinsey had neither concluded the MSA nor an addendum to extend the validity period of the LOI. As a result the LOI lapsed due to the effluxion of time. As a consequence, there was no valid agreement governing the relationship between Transnet and McKinsey as at 1 December 2013. By this date, the total amount paid to the McKinsey consortium under the extended LOI was about R11 million.[874]

Regiments' capital raising and risk management proposal

625. In early January 2014, Regiments presented a proposal ("the Regiments capital raising and risk management proposal") to Ms Makgatho (the Transnet Group Treasurer) in respect of their role as advisors on the 1064 locomotives.[875] The proposal *inter alia* offered the delivery of "the optimal funding structure and financial risk solution for the 1064 locomotives acquisition"; the optimal risk management solution, funding structures and/or in separate risk overlays to deliver the right balance between funding cost and risk; a comprehensive evaluation of all potential funding sources and mechanisms to enable the selection of the most appropriate avenues to pursue and execute; and a fee structure based on "a modest fixed monthly retainer" and a performance fee for "best alignment of interests".

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[872] Transnet-Ref-Bundle-05367

[873] Transcript 8 March 2021, p 260-262

[874] Transcript 29 May 2019, p 117

[875] Annexure MM10, Exh BB10(a), MEM-084

626. Ms Makgatho had reservations about dealing with Regiments.[876] In late 2013, Mr Singh gave her a funding proposal ("the R5 billion proposal") from Regiments and informed her that it was a very important matter that Mr Molefe needed executed speedily. The proposal was that Regiments would facilitate a five-year, R5 billion loan facility to be funded by Nedbank through an "in-between structure" (similar to a Special Vehicle Structure) that would serve as a conduit between the lender Nedbank and Transnet who would pay interest to the "in-between structure" which would in turn remit the funds to Nedbank. This was unusual as Transnet normally deals directly with lenders and pays interest and capital directly into the lender's designated account. The proposed facility was also priced much higher than normal facilities, similar loan facilities or domestic bonds. As Transnet had a direct relationship with Nedbank, there was no need to use a conduit like Regiments to engage with Nedbank. Ms Makgatho calculated that Transnet would have to pay an additional R150 million per annum in interest payments over and above what Transnet normally paid for similar facilities. This translated into potential losses of R750 million over a five-year period.

627. Ms Makgatho confronted Mr Molefe telling him that the proposal was tantamount to theft and the structure was never implemented. Mr Molefe denied that he had directed Mr Singh to instruct Ms Makgatho to execute this proposal and shifted responsibility for it to him.[877] Mr Singh could not recall these events, saying that it was unlikely that he would have instructed Ms Makgatho as she described.[878] Mr Molefe's concession provides sufficient basis to conclude that such a proposal was made which was not in the interest of Transnet and from which only Regiments (and the Gupta enterprise) would have benefited had it been implemented.

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[876] Exh BB10(a), MEM-019-20, paras 68-77; Transcript 6 June 2019, p 118-128

[877] Transcript 9 May 2021, p 132-145

[878] Transcript 28 May 2021, p 67-71

628. Having had this experience,[879] Ms Makgatho was sceptical of the benefit or value of the Regiments capital raising and risk management proposal when she received it a few months later. Transnet simply did not require the services offered by Regiments because all the work mentioned in it could have been done by Transnet's treasury or were matters that fell within the scope of the business case or OEM requirements in the tender.[880] Thus, the funding requirements could have been done by the Structured Finance unit; the risk management and financial risk solution by the Risk Manager; and the development of strategy and execution by the Front Office. The "detailed evaluation of the economic social and sustainability impact" offered as part of the proposal was part of the business case, which had been completed. Likewise, the tendered "collateral assessment of the components" was a matter for the OEMs which had been dealt with by them in their tender documents. The services offered for project management could be provided by the business units at Transnet dealing with capital projects.

629. Ms Makgatho met with Mr Pillay of Regiments to discuss the capital raising and risk management proposal. The proposed fee was a R1 million monthly retainer and a performance fee equal to 20% of the savings over the interest rate of Transnet's most recent funding secured prior to 1 January 2014. Ms Makgatho reported back to Mr Singh and informed him that she had requested Regiments to revise the proposal and link the deliverables to proposed timelines and a proposed budget.

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[879] Ms Makgatho also testified about other suspicious proposals of little or no value. In 2013 Mr Wood came up with a cross-currency proposal for Transnet to suggest that the SARB act as cross-currency counterparty. This proposal posed volatility risks to the ZAR of such an order that it raised serious doubt about Regiments' judgment in financial matters and Mr Singh and Mr Molefe's intentions – Exh BB10(a), MEM-021-022, paras 78-85 and Transcript 6 June 2019, p 129-136. Similarly, in 2013 McKinsey attempted to persuade Ms Makgatho to agree to a proposal for a credit rating model at a cost of R15 million. Much to the chagrin of Mr Singh, she refused to agree to it. The treasury team then undertook the exercise at minimal cost and time – Exh BB10(a), MEM-022-023, paras 86-90 and Transcript 6 June 2019, p 136-145.

[880] See the organogram of treasury at Annexure MM 1, Exh BB10(a), MEM-037

Mr Singh responded with annoyance and informed her that she should not concern herself about timelines and budgets and that Regiments were not meant to be her advisors but his.[881] She was surprised as in her opinion, the proposal was very vague and she saw very little in the way of "value-add".[882] Ms Makgatho was not involved thereafter in the appointment of Regiments. It was paid about R320 million between May 2013 and July 2014, and its invoices were paid within a day of submission, rather than after the usual 30 days.[883]

The agreement of 23 January 2014 and the increased fees payable to Regiments

630. Despite Ms Makgatho's concerns and the fact that the agreement with the McKinsey consortium had lapsed, Mr Singh signed a contract ("the agreement of 23 January 2014") with Regiments on 23 January 2014.[884]

631. The agreement of 23 January 2014 recorded that subsequent to the issuance of the original LOI a conflict of interest required the reallocation of the tasks originally intended to be handled by Nedbank to other members of the consortium and thus Transnet wished to contract with Regiments for that purpose. The specified deliverables were those in the proposal: i) determining the impact of the acquisition; ii) a collateral assessment to the component level to determine the potential for concessionary funding; iii) developing and implementing a best practice risk management framework; iv) evaluating all potential funding sources and mechanisms; and v) providing support in respect to funding.[885] The proposed fee structure for the services would involve a retainer applicable every month and a

[881] Transcript 6 June 2019, p 108-111

[882] Transcript 6 June 2019, p 101-109

[883] Transcript 6 June 2019, p 111-118; and Exh BB10(a), MEM-017 *et seq*, paras 60-67

[884] Annexure MSM 7, Exh BB3(a), MSM-177 *et seq*; and Transnet-Ref-Bundle-06587

[885] See Transnet-Ref-Bundle-06588-06589

performance fee on the funding raised at interest rates below the benchmark. Deliverables (except the actual fundraising) were to be executed for a fee of R15 million over a period of twelve months and provision was made for a performance fee equal to 20% of the savings achieved against the benchmark interest rate, being the interest rate at which Transnet was able to raise its most recent funding prior to 1 January 2014.

632. Some of these terms were varied in manuscript at the end of the agreement. The handwritten words "subject to items listed below" appear immediately below Mr Singh's signature. Various handwritten terms appear at the end of the agreement (probably added by an employee in the procurement department).[886] The handwritten terms provided: "in terms of section 2 there will not be a performance fee for fundraising thus 2.1.2 will be removed as well". Clause 2.1.2 provided for the performance fee of 20%. It was further recorded that payments in terms of the agreement would be made to McKinsey and that the costs and payments against the scope could not be above R9 million, without specific approval from Transnet.[887] Mr Singh was unable to say whether the handwritten terms were a counter-offer by Transnet to which Regiments agreed.[888] He thought the performance fee would have been removed because funding was not on the agenda at that stage and that a performance fee would be negotiated later under a separate mandate.[889]

633. Mr Singh had no authority to appoint transaction advisors on behalf of Transnet without following a proper procurement process as such did not fall within his delegation of authority. Moreover, the agreement of 23 January 2014 was irregular

[886] Transcript 27 May 2021, p 97-98

[887] Annexure MSM 7, Exh BB3(a), MSM-180; and Transnet-Ref-Bundle-06590

[888] Transcript 27 May 2021, p 100-101

[889] Transcript 27 May 2021, p 101, lines 15-25

in that no procurement event preceded it. There is no evidence indicating that McKinsey was aware of this agreement. Thus, there was no valid amendment or variation of the LOI.[890]

The third addendum to the LOI for the provision of advisory services

634. On 4 February 2014 three months after the LOI had lapsed on 30 November 2013, Transnet and Regiments concluded the third addendum to the LOI, purporting to extend the scope of the lapsed LOI between Transnet and McKinsey.[891] It is recorded as being between McKinsey and Transnet. However, it was signed by Mr Wood of Regiments and Mr Singh. A typed reference to McKinsey as a party to the agreement on the last page of the third addendum is scratched out and replaced in handwriting by "Regiments Capital" and initialled by both Mr Singh and Mr Wood. According to Mr Singh, and as discussed presently, there was talk at the time of McKinsey ceding its rights to Regiments; and McKinsey had begun to demobilise its team. There is no reference to the purported cession in the preamble or in any clause of the third addendum to the LOI. Mr Singh signed the third addendum to the LOI with Regiments without having sight of any written cession. He sought to pass the buck for the irregular manner in dealing with the cession to the procurement department.[892]

635. Clause 3 of the third addendum to the LOI provided that the objective of the project was "to conduct all the necessary studies and preparatory work to enhance Transnet's ability to raise the required funding at a competitive interest rate and to achieve an optimal funding structure with minimal pressure on Transnet's future liquidity". The deliverables were virtually identical to those in the Regiments capital

[890] Transcript 29 May 2019, p 118-129

[891] Transnet-07-250.380; and Transnet-Ref-Bundle-06605

[892] Transcript 27 May 2021, p 104-111

raising and risk management proposal and the agreement of 23 January 2014. Clause 4 varied the contract price. It stated that as a result of the additional scope of work required on the financial phase of the contract, the initial price of R35.2 million would increase by R6 million, bringing the total contract value to the fixed amount of R41.2 million. The increase of R6 million was stated to be intended to provide a fee of R15 million for the funding and finance scope of the work by utilising the increase of R6 million plus funds of R9 million allocated to other deliverables no longer required.[893]

The cession of the advisory services contract

636. On 16 April 2014, Mr Sagar of McKinsey addressed a letter Mr Singh informing him that McKinsey had ceded its rights and delegated its obligations under the advisory services contract to Regiments on 5 February 2014 (the day after the third addendum to the LOI was concluded between Transnet and Regiments) and noting that all the work related to the mandate was in fact performed by Regiments.[894] There is no written cession agreement on record. The cession was invalid on the grounds that at the time when McKinsey purported to cede the contract to Regiments, McKinsey's rights in respect of the advisory services had lapsed as a consequence of the LOI having expired on 30 November 2013. In the light of that, McKinsey had no rights and obligations to cede to Regiments and consequently the cession was null and void. Practically (though perhaps not legally), Regiments became the principal contractor on a very substantial tender without having been

[893] Transnet-Ref-Bundle-06606; and Transcript 29 May 2019, p 130 *et seq*

[894] Transnet-Ref-Bundle-05367

awarded a tender or being subject to any verification, evaluation or proper assessment that is normally required for the award of a tender of this magnitude.[895]

637. A memorandum dated 19 May 2015 (a year after the purported cession) records that it was agreed by Transnet that McKinsey would cede the principal lead role in the contract to Regiments since phase 2 consisted of finance and deal structuring deliverables and the LOI was "amended by value to reflect additional scope of work to ensure better implementation and management of the risks". Regiments then indicated to Transnet that its preferred operating model for such engagements was a risk sharing model or success fee. The agreement was then amended by value, to reflect a change in the remuneration model as proposed by Regiments.[896]

638. From the letter, the memorandum and the third addendum of the LOI it is possible to infer that McKinsey and Regiments purported to enter into an out and out cession involving a transfer of the rights from McKinsey as the cedent to Regiments as the cessionary, which was effected by mere agreement without the prior knowledge or consent of Transnet, the debtor.[897] At the risk of repetition, it is important to emphasise that both the third addendum to the LOI as well as the purported cession were in all probability null and void. The third addendum to the LOI was concluded after the expiry of the LOI. Even if the LOI had not expired, the third addendum to the LOI was null and void as Regiments had no legal authority to amend the LOI unless a proper cession between McKinsey and itself had taken place, which was not the case at the time the third addendum to the LOI was concluded. The consequence of the invalid cession is that all contractual agreements concluded on the strength of the cession were also invalid.

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[895] Transcript 8 March 2021, p 263-264

[896] Transnet-Ref-Bundle-05594

[897] Generally, no formalities are required for an act of cession of this kind and thus could have been concluded either expressly or tacitly, or may be inferred from the conduct of the parties.

The Master Services Agreement and the substantial fee increase

639. In terms of the original LOI, it was envisaged that on the expiration of the LOI, or before its expiration within a certain period, the parties would conclude a Master Services Agreement ("MSA"). On 11 August 2014, Transnet concluded a MSA with McKinsey (not Regiments). [898] If the purported cession between McKinsey and Regiments had been valid then McKinsey did not have any legal authority to conclude the MSA with Transnet as it had ceded its rights and obligations in terms of the cession to Regiments. The terms of the MSA simply reiterated the terms of the LOI, including the original contract value of R35.2 million. The MSA was silent on the agreement of 23 January 2014 between Transnet and Regiments, the purported third addendum to the LOI dated 4 February 2014, and the purported cession of 5 February 2014. Moreover, the MSA recorded that the commencement date would be 15 January 2013 and the expiry date would be 31 March 2014. Thus, the MSA was signed by Transnet five months after the MSA on its own terms had expired.[899]

640. On 24 April 2014 just over a week after McKinsey had informed Transnet that it had ceded and delegated its rights and obligations to Regiments on 5 February 2014, and four months *prior* to Transnet signing the MSA with McKinsey in August 2014, Transnet and Regiments concluded *a first addendum to the MSA* with a view to varying the MSA by adding additional scope and amending the price.[900]

641. Both the LOI and the MSA allocated R13.5 million for technical evaluation and execution services. These services included amongst other things the calculation of the escalation and hedging costs pursuant to the finalisation of the LSAs with the

[898] Transnet-Ref-Bundle-06609; and Transcript 27 May 2021, p 117

[899] Transnet-Ref-Bundle-06609; and Transcript 29 May 2019, p 133-134

[900] Transnet-Ref-Bundle-06644

OEMs. This was the price for the technical evaluation and execution services that was agreed to through a competitive bidding process by the McKinsey consortium and Transnet. [901]

642. On 16 April 2014 (the same day that McKinsey informed Transnet of the cession), Mr Tewodros Gebreselasie, a senior economic advisor at Regiments, sent an email to Mr Laher of Transnet enclosing a draft closeout letter and requesting that Mr Laher provide his input and comments thereon before the closeout letter was made final.[902] The closeout letter confirmed that the assignment (the transaction advisory services for the acquisition of the 1064 locomotives) had been successfully completed by Regiments within the specified timeframe. It also set out the nature of the mandate related to cost escalation, the cost of foreign exchange hedging and the cost of performance guarantees. The letter claimed that Regiments had made significant savings in hedging costs as its proposed structure assumed the foreign exchange hedging to be contained on balance sheets of the bidders thereby avoiding balance sheet impairment, cash flow and accounting implications for Transnet. It added that performance guarantee benchmarking and the ensuing negotiations with the bidders resulted in recommendations that also resulted in savings for Transnet. [903] Mr Laher responded to the email disputing the claim that "significant savings were achieved."

643. On the same day, Mr Singh addressed a memorandum to Mr Molefe[904] requesting him to: i) note the deliverables executed by the transaction advisor[905] compared to

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[901] See MNS Transaction Advisors Report, paras 2.5.4-2.5.15; and Transcript 29 May 2019, p 139 *et seq*

[902] Transnet-Ref-Bundle-05369

[903] Transnet-Ref-Bundle-05371-05372

[904] Transnet-Ref-Bundle-05537

[905] It is not clear whether the transaction adviser referred to in para 1.1 of the memorandum of 16 April 2014 was McKinsey or Regiments – see Transcript 9 March 2021, p 60-65

the original scope per the LOI; ii) ratify the amendment in the allocation of scope of work from McKinsey to Regiments; iii) ratify the amendment in the makeup in the transaction advisor consortium from Nedbank to Regiments; iv) approve a change in the remuneration model of the transaction advisor compared to the original remuneration model; and v) delegate power to Mr Singh to give effect to the noted approvals. Most importantly, Mr Singh sought payment to Regiments of an additional fee of R78.4 million (excluding VAT) which was an increase of approximately 200% of the original fee agreed with McKinsey. The recommendations were made by Mr Singh and approved by Mr Molefe without any supporting recommendation from the procurement department, governance or other interested persons or bodies.

644. The memorandum asserted further that value had been created by Regiments through the accelerated delivery schedule saving future inflation related escalation costs and foreign exchange hedging costs of approximately R20 billion (before "break costs" – batch pricing). According to Mr Singh, the overall cost of the 1064 locomotive transaction reduced from R68 billion to R50 billion. In addition, he maintained that Regiments achieved a saving of approximately R2.8 billion for the performance based foreign exchange and guarantee bonds.[906] He added without explanation that Regiments also achieved direct benefit to Transnet of R219 million and indirect savings of over R500 million. If the savings had not been achieved, Mr Singh said, the 1064 locomotive acquisition transaction would have been unaffordable at an amount in excess of R50 billion. All of this, in Mr Singh's view, justified a substantial increase in the fee payable to Regiments. The Regiments' operating model for such engagements is usually based on a risk sharing model or success fee (25% of value created/saved). However, in this instance an additional

[906] Transcript 27 May 2021, p 128-150

fee of R78.4 million excluding VAT (representing 0,042% of the total savings) was recommended. Mr Molefe approved the request in the memorandum of 16 April 2014 on 17 April 2014. He believed the increase of the fee was justifiable because Regiments supposedly had saved Transnet R2.8 billion.[907]

645. On 23 April 2014 Mr Danie Smit of Group Treasury wrote to Mr Wood questioning the alleged savings made by Regiments. He pointed out that the idea of transferring the forex risk to the balance sheet of the bidders came from Transnet and was included in the conditions of the RFP. Moreover, the cost of calculating the relevant forex forwards is a simple technique, easily accessible from Bloomberg, Reuters and Transnet's dealers as well. He concluded by expressing doubt that Regiments brought any savings on forex or the performance guarantees as only one small amount was involved. He was apprehensive that the auditors would challenge any payments for alleged savings he clearly thought were dubious.[908]

646. From a broader perspective, it is hard to see any savings brought about by Regiments. The original ETC for the 1064 locomotives was R38.6 billion while Transnet ended up paying an amount of R54.5 billion. According to Mr Chabi, the reasonable cost of the locomotives was R45.7 billion. It is thus at least doubtful whether any savings were secured for Transnet. Moreover, JP Morgan had hedged the financial risks that Regiments claimed derived a significant saving; the idea of transferring the forex risk to the balance sheet of the suppliers came from Transnet; and the performance guarantees did not result in savings due to the

[907] Transcript 9 March 2021, p 75-76

[908] Transnet-Ref-Bundle-05382

small amount used and the fact that the majority of the bonds were market related.[909]

647. During his evidence before the Commission, Mr Molefe confirmed that Mr Singh had taken him through the memorandum point by point and admitted that he did not know whether there had been any savings as he had relied exclusively on what his subordinate (Mr Singh) had told him.[910] He did not apply his mind to the question in an independent manner and took no steps to satisfy himself that the savings of R2.8 billion had in fact been made. He sought no additional information substantiating the nature and value of the alleged savings of R2.8 billion.[911] He said there was nothing that made him suspicious.[912]

648. On 23 April 2014, Mr Thomas sent a memorandum to Mr Pita (the GSCO) objecting to the payment of the increased fee to Regiments in these terms.[913] The benefit that Transnet obtained from the contract was in terms of a fixed fee agreement. The fact that Regiments' usual operating model was based on a risk share model or success fee was irrelevant. Regiments willingly accepted the rights and obligations of the existing contract, which provided for a fixed fee for the deliverables. Paragraph 22 of the memorandum of 16 April 2014 recorded that "Regiments was transferred a mandate and remuneration model already accepted by McKinsey".[914] Mr Molefe denied ever receiving this memorandum but conceded that had he seen it he might have reconsidered authorising the fee increase[915] and that McKinsey had not expected remuneration in accordance with the Regiments

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[909] MNS Transaction Advisors Report, paras 2.5.20-2.5.21.

[910] Transcript 9 March 2021, p 101

[911] Transcript 9 March 2021, p 99

[912] Transcript 9 March 2021, p 96-98

[913] MNS Transaction Advisors Report, para 2.5.14; and Transcript 9 March 2021, p 89-90

[914] Transnet-Ref-Bundle-05544

[915] Transcript 9 March 2021, p 91-92

model.[916] Mr Molefe thus agreed that there was accordingly no obligation on Transnet to agree an additional payment of R78.4 million for any of the services rendered by Regiments.[917]

649. An unsigned memorandum to Mr Singh in the name of Mr Pita (compiled by Mr Thomas) also challenged the decision to award Regiments an additional fee of R78.4 million on the same grounds.[918] Mr Pita did not sign the memorandum of 16 April 2014 because he did not agree with it.[919] Mr Singh admitted that he was aware of Mr Pita's objection but did not inform Mr Molefe of it.[920] When asked why he had failed to disclose an important difference of opinion among Transnet's senior executives about this wholly unjustifiable payment, Mr Singh maintained unconvincingly that there was adequate disclosure in the memorandum about the rationale for the additional fee of R78.4 million.[921]

650. The next day, 24 April 2014, despite the reservations by Transnet's treasury and supply chain management, Transnet, as mentioned earlier, concluded the first addendum to the MSA with Regiments at "a fixed fee" of R78.4 million. It was signed by Mr Singh on behalf of Transnet and by Mr Wood on behalf of Regiments.[922] Clause 4 stated that "as a result of a number of risks to which Transnet was exposed, Regiments utilised its extensive intellectual property and complex techniques and methodologies to mitigate the risks". It also stated that the scope of work in the MSA would be amended for Regiments to mitigate the risks by assisting Transnet with negotiations to accelerate the delivery schedule resulting in

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[916] Transcript 9 March 2021, p 76, line 9

[917] Transcript 9 March 2021, p 76, line 24

[918] Transnet-Ref-Bundle-05556

[919] Transcript 27 May 2021, p 141

[920] Transcript 27 May 2021, p 141-142

[921] Transcript 27 May 2021, p 143-144 and p 145-146

[922] Transnet-Ref-Bundle-06644

savings in costs for future inflation, foreign exchange hedging, and guarantee bonds. A mere six days later, on 30 April 2014, Transnet paid Regiments an amount of R79.23 million for "risk share – 1064 locomotives foreign exchange and warranty bonds".[923] A percentage of the additional fee paid to Regiments, facilitated and approved exclusively by Mr Singh and Mr Molefe was passed on to the Gupta enterprise in accordance with the established money laundering scheme.

651. An amount of R36.765 million was paid to Regiments between 18 February 2014 and 7 April 2014. These payments were made in terms of the purported third amendment to the LOI between Transnet and Regiments of 4 February 2014 and in terms of the MSA between Transnet and McKinsey (not Regiments) on 21 February 2014. The amount of R79.23 million paid to Regiments on 30 April 2014 flowed from the first addendum to the MSA between Transnet and Regiments (not McKinsey) dated 24 April 2014. The invoice was issued in respect of this last payment on 27 March 2014, before the first addendum to the MSA was concluded. Regiments was thus unjustifiably enriched with the additional payment of R79.23 million, as there was evidently no legal basis for the payment of this amount,[924]because the alleged cost saving was part of the LOI/MSA deliverable that had been budgeted for at a cost of R13.5 million.[925]

652. As there was no legal basis for Transnet to pay Regiments an additional fee on a risk sharing basis, both Mr Molefe and Mr Singh were in breach of their fiduciary duties and their conduct led to prejudicial expenditure not in the interest of Transnet in contravention of sections 50, 51 and 57 of the PFMA.[926] The contraventions of the PFMA constituted unlawful activity as defined in section 1 of

[923] MNS Transaction Advisors Report, para 2.5.18

[924] MNS Transaction Advisors Report, paras 2.5.19-2.5.23

[925] Transcript 29 May 2019, p 145-146

[926] MNS Transaction Advisor Report, paras 3.1.17 – 3.1.20

POCA and hence the payments to Regiments were the proceeds of unlawful activities. The acquisition and possession of these proceeds by Mr Essa's shell companies and the arrangement in terms of which they were transferred constitute the offences relating to the proceeds of unlawful activities contemplated in section 5 and section 6 of POCA. These planned and continuous money laundering offences, being offences in Schedule 1 of POCA, point to a pattern of racketeering activity by the Gupta enterprise. There are accordingly reasonable grounds to believe that Regiments, Mr Molefe, Mr Singh, Mr Essa, Mr Wood, Mr Moodley and others participated in the conduct of the affairs of the Gupta enterprise and may have committed one or more of the racketeering offences contemplated in section 2 of POCA. The matter should accordingly be referred to the law enforcement authorities for further investigation.

The Nkonki contracts

653. Nkonki was a service provider to Transnet for certain internal audit functions in terms of a contract valued at R500 million for a five-year period commencing on 1 August 2013. Trillian (in which Mr Essa had a 60% shareholding) acquired Nkonki in 2016.[927] In January 2017 Transnet received unsolicited bids from Nkonki for services related to supply chain efficiencies, the coal and iron ore line volume and tariff optimisation.[928] The proposal was aimed at reforming supply chain management practices at Transnet which were said to be bureaucratic and needed to be "reshaped and enhanced" to become more responsive, agile, and automated to reduce the cost of doing business with Transnet. Nkonki recommended an initial analysis to establish potential cost-savings, enhancement of the management information reporting system and the delivery of identified action plans.

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[927] Transcript 12 May 2021, p 294

[928] See Annexure MSM 37, Exh BB3(b), MSM-542

654. Mr Gama then requested the board to utilise the existing internal audit contracts to appoint Nkonki for these services as permitted non-audit services and to delegate authority to him to sign all documentation including the contract documentation.[929] He maintained that the initiatives were needed particularly to enhance the revenues earned from the iron ore and coal businesses and that Transnet Group Commercial did not have the necessary capability and resources internally to complete the initiatives, but Nkonki (an accounting and auditing firm controlled by Mr Essa) apparently did. The precise nature of those skills and capabilities were not clearly set out in the approval memorandum. The proposal envisaged "a gain share methodology" based on 12% to 14% of OPEX savings and 8% to 10% of CAPEX savings delivered.[930] The estimation optimistically predicted savings at between R1.1 billion and R2.6 billion resulting in a fee of approximately R260 million. In his testimony, Mr Gama said that he had anticipated a saving of R5 billion and thus he expected to pay Nkonki a fee of R500 million.[931]

655. On 17 February 2017 the BADC (chaired by Mr Shane)[932] approved the use of Nkonki as consultants and delegated to Mr Gama the authority to sign a LOI for consultancy services "up to a maximum cost of R500 million".[933] The suggested extension was an increase in value of 100% on the existing Nkonki contract and a further 20-month extension to 2 March 2020. The procurement was open to question because the award of the contract did not go out to open tender (it was an inappropriate "piggybacking" on an existing contract) and seemed a duplication of

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[929] Annexure MSM 38, Exh BB3(b) MSM-571

[930] Annexure MSM 38, Exh BB3(b), MSM-574, para 31.1.2

[931] Transcript 12 May 2021, p 290-293

[932] Transcript 16 May 2019, p 145; and Exh BB3(b), MSM-576

[933] Annexure MSM 39, Exh BB3(b), MSM-579

some of the services that were supposed to be rendered by McKinsey/Regiments.[934]

656. National Treasury Practice Note 11 of 2008/2009 governs unsolicited proposals.[935] It provides *inter alia* that institutions are not obliged to consider unsolicited proposals but may do so if a comprehensive and relevant project feasibility study has established a clear business case, the product or service involves an innovative design to project development and management, or presents a new and cost effective method of service delivery. The Practice Note provides further that the accounting officer must reject the unsolicited proposal if it relates to known institutional requirements that can, within reasonable and practical limits, be acquired by conventional competitive bidding methods or relates to products or services which are generally available.[936] Mr Mahomedy was of the opinion that the unsolicited Nkonki proposal did not contain any innovative solution, nor did it meet these requirements for acceptance.[937]

657. In March 2018 the Auditor-General requested state organs to consider termination of contracts with Nkonki because of its association with the Guptas. Transnet heeded the call of the Auditor-General and terminated the internal audit contract sometime before 31 July 2018.[938] By 2019 Transnet had paid R26.1 million for these related services, with a further R16 million outstanding which has been disputed by Transnet.

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[934] Transcript 16 May 2019, p 147-153; and Exh BB3(a), MSM-029, para 5.11

[935] Transnet-07-250.82

[936] Strictly speaking, National Treasury Practice Note 11 does not apply to Transnet. It applies to PFMA Schedule 3A, 3B, 3B and 3D entities. Transnet is a public entity listed in Schedule 2 of the PFMA. The policy in the practice note is nonetheless a salutary one.

[937] Transcript 16 May 2019, p 148

[938] Transcript 16 May 2019, p 140

658. Challenged during his testimony to the Commission with the criticism of Mr Mahomedy that he had facilitated the award of a contract with a potential value of R500 million to a Gupta linked entity, Mr Gama was dismissive. He accused Mr Mahomedy of being "very desperate to ingratiate himself with the Chairman of the Board of Transnet" because he was acting GCEO and wanted to be appointed as the GCEO and claimed that Nkonki "used to be a very good brand". He added that when he learnt that Nkonki had gone rogue he terminated the contractual relationship,[939] no doubt after being brought under pressure by the Auditor-General to do so. He was unable to recall whether Transnet had a policy dealing with unsolicited proposals.[940]

659. The 100% increase in the value of Nkonki's contract (the "piggybacking") was a contravention of paragraph 9 of National Treasury Practice Note 3 of 2016/17 (which applies to all scheduled entities) that limited the variation of Nkonki's contract to a maximum of 15% or R15 million.[941] Any deviation in excess of the prescribed thresholds is allowed only in exceptional cases subject to prior written approval from the relevant treasury. There is no evidence that written approval was obtained in this instance. When confronted with this contravention during his evidence before the Commission, Mr Gama gave a response that was incoherent. He conveyed the impression that his non-compliance was acceptable because he believed the requirement was unnecessarily restrictive.[942] This irregular transaction was thus in contravention of section 51(1)(h) of the PFMA by not complying with applicable legislation and has evidentiary value in relation to the racketeering activities of the Gupta enterprise and Mr Gama's association with it. The placement

[939] Transcript 12 May 2021, p 284-285

[940] Transcript 12 May 2021, p 286-287

[941] Transnet-07-250.97

[942] Transcript 12 May 2021, p 288-289

of Nkonki as auditor at Transnet, where the Gupta enterprise was engaged in irregular activities, was of strategic value to the enterprise and its associates.

CHAPTER 8 – THE FINANCING OF THE 1064 LOCOMOTIVES PROCUREMENT

The negotiations for the CDB loan

660. Due to rating agency requirements of matching commitment capital to committed funding sources to reduce liquidity risk, Transnet needed to identify appropriate and cost-effective funding sources to fund the 1064 locomotive procurement. To this end, Transnet concluded funding facilities with USEXIM and EDC to fund the GE and BT portions of the 1064 locomotive contracts. These facilities provided approximately R13 billion of the required funding. In August 2012 the Transnet board approved the use of a China Development Bank ("CDB") loan facility to fund the acquisition from CSR and CNR of the locomotives that were part of the 1064 locomotives transaction. The original intention had been to borrow USD2.5 billion from the CDB but it was decided later that only USD1.5 billion would be borrowed from the CDB and that the balance would be raised locally through a ZAR club loan.

661. A bipartite cooperation agreement between Transnet and the CDB was signed on 23 March 2013, but Transnet only started engaging with the CDB Johannesburg office on funding the Chinese locomotives in March 2014. The CDB proposed a 15-year loan of up to USD2.5 billion at a rate of 3 months Libor + 260-290 basis points ("bps").[943] This pricing translated into Jibar plus about 450 bps which was about 250 bps more than Transnet's normal pricing.[944] As the pricing was above Transnet's weighted cost of debt Mr Singh and Ms Makgatho travelled to China in July 2014 to discuss the pricing.

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[943] Transcript 7 June 2019, p 21

[944] Transnet paid Jibar+155 bps on the GE tranche of locomotives and Jibar+200 bps on the Bombardier procurement – Transcript 7 June 2019, p 18

662. After returning from China, Ms Makgatho discovered that the CDB was communicating directly with Regiments and that Mr Wood was leading the negotiations in parallel to Transnet. Mr Singh claimed that he got Regiments involved at this stage because Transnet was under pressure to demonstrate to the rating agencies that it had an acceptable AB ratio (comparing available funding to commitments). Mr Singh claimed that the Transnet treasury team had reached a point "where there was no significant traction" in the discussion with the CDB. He then decided to get Regiments involved to accelerate the process.[945]

663. The CDB financing nonetheless remained too expensive.[946] The CDB's pricing was at between 12.9% and 13.3% whereas Transnet's weighted average cost of debt was about 9.4%.[947] Other fees proposed by the CDB were not in line with similar facilities and the covenants were not "investment grade" in that the CDB sought to rate and compare Transnet with Angola.[948] Transnet had diverse sources of funding that were more attractive. At the meeting in Beijing Transnet had requested that the cross-currency swaps be carried by the CDB by providing Transnet with a ZAR loan and the CDB accepting the currency exposure on its balance sheet. Transnet's contracts with CNR and CSR were in ZAR and therefore a ZAR facility was a natural option for Transnet. An additional cost of converting the USD leg of the loan to ZAR via the use of cross-currency swaps made the CDB facility even more expensive. It later became clear that the CDB would only agree to a USD loan thus exposing Transnet to a hedging risk and the cost of a cross-currency swap.[949]

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[945] Transcript 28 May 2021, p 45

[946] Annexure MM 25, Exh BB10(a), MEM-213; and Transcript 7 June 2019, p 56

[947] Annexure MM 27, Exh BB10(a), MEM-229; and Transcript 7 June 2019, p 59-60

[948] Annexure MM 27, Exh BB10(a), MEM-230; and Transcript 7 June 2019, p 60

[949] Transcript 7 June 2019, p 42-47

664. Ms Makgatho repeatedly expressed her concerns about the financing of the procurement to Mr Singh and Mr Molefe and continued to argue against the CDB pricing proposal. She also strongly believed that there was no need to use Regiments because of Transnet's internal treasury capacity. She received information that Nedbank was able to price the swap cheaper at even less than Transnet's internal pricing (aligned to Standard Bank). Transnet's pricing model was tried and tested. However, Mr Wood later came up with a pricing proposal from Nedbank that was more expensive.

665. On 4 August 2014, Ms Makgatho was copied in an email[950] from the CDB to Mr Wood at Regiments which indicated that the CDB was in discussions with Regiments about the pricing of the loan. She then sent an email to Mr Molefe and Mr Singh pointing out that Transnet treasury had been negotiating with CDB since April 2014 regarding the terms and conditions of the facility and was busy comparing the current terms and conditions with similar facilities. She requested clarity about the role of Regiments in this matter at this point of the negotiations and what Transnet treasury's role should be giving the direct communication of Regiments with CDB.[951]

666. Mr Molefe called Ms Makgatho and Mr Singh to his office to discuss the matter. By then Ms Makgatho had lost confidence in Mr Molefe as she believed he was aligned with Mr Singh and intent on concluding the excessively expensive loan.[952] Mr Molefe then convened another meeting at the Melrose Arch Hotel between Transnet and Regiments to resolve the CDB pricing proposal "impasse". The meeting was attended by Mr Singh, Mr Molefe, Ms Makgatho, Mr Wood and Mr

[950] Annexure MM 6, Exh BB10(a), MEM-076

[951] Annexure MM 6, Exh BB10(a), MEM-075; Transcript 7 June 2019, p 63-64

[952] Transcript 7 June 2019, p 64

Pillay. At the meeting Mr Molefe and Mr Singh urged Ms Makgatho to accept the pricing proposed by Regiments. He saw the difference between Ms Makgatho and Mr Singh (as advised by Mr Wood) as a reasonable difference of opinion about which he took "a neutral position" and accepted the majority view put forward by Mr Singh and Mr Wood.[953] Ms Makgatho remained firm that the CDB facility was expensive and not worth it. She recorded her discomfort and disagreement with Regiments' role and pricing in an email on 21 August 2014 sent to Mr Molefe and Mr Singh.[954] She particularly did not support a R26 billion facility being negotiated and led by a transaction advisor "in isolation of Transnet's current R90 billion debt portfolio." She said:

> "The fact that Transnet's biggest ever transaction is negotiated and decided by outsiders (Regiments) is a cause for concern as it exposes the company to undue risk. When we negotiate a facility of this magnitude, we assemble a multi-disciplinary team that includes legal, tax, accounting, structured finance and risk management team members. This is to ensure that all potential risks related to the facility are identified and mitigated to the extent possible…
>
> It is my belief that the CDB facility in its current form is not in the best interest of the company or the country given potential capital leakage of up to R3.7 billion in excessive interest expense and excessive arrangement fees which may be classified as PFMA violation given the information at our disposal. The additional interest expense will have a negative impact on the already fragile cash interest cover ratio. I therefore recommend that we terminate discussions with China Development Bank and explore other sources of funds…."

667. When Mr Molefe was questioned during his testimony about this email, his reply was non-responsive. He did not take issue directly with Ms Makgatho's claim that

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[953] Transcript 9 March 2021, p 108-109

[954] Annexure MM 30, Exh BB10(a), MEM-241

the CDB facility was not in the best interest of Transnet, provided for excessive fees and was in violation of the PFMA.[955]

668. Mr Singh justified Regiments' involvement in the CDB loan negotiations on the basis that the Transnet treasury did not have the capacity to deal with the complexity of the transaction within the pressurised time-frames and lacked the wherewithal to execute the CDB loan because this was the first time Transnet had dealt with a Chinese development bank.[956] That explanation is implausible considering the evidence of the skills set of the treasury team[957] and the fact that it concluded significant funding transactions with development institutions as a matter of course. No gap analysis was conducted to determine the needs of Transnet for the financial advisory services in relation to the specific funding needs. A gap analysis (as required in terms of paragraph 15.8.2 of the PPM (2013) and NT Instruction 3) would have shown that Transnet had three highly experienced funding managers and an analyst and cumulative experience in excess of 50 years in fundraising in most capital markets. It was well-equipped and able to negotiate the CDB loan and to take responsibility for the lead and arranging of the loan.

669. On 20 August 2014 Ms Makgatho drafted an internal memorandum for Mr Molefe to present to the board for approval of the funding initiatives related to the procurement of the locomotives.[958] She again pointed out that the pricing was above Transnet's weighted cost of debt and that CDB requested the locomotives be used as security as well as the inclusion of financial covenants that Transnet did

[955] Transcript 9 March 2021, p 111, line 10

[956] Transcript 28 May 2021, p 49-53

[957] The team comprised 32 professionals supported by 8 administrative staff with an extensive and impressive array of skills and experience – Exh BB10(a), MEM-004, para 7; and Transcript 28 May 2021, p 53-54

[958] Annexure MM 37, Exh BB10(a), MEM-288

not offer other lenders.[959] The memorandum recommended that the board approve the initiative to secure the CDB facility, "subject to further terms and conditions negotiations as their proposed terms and conditions are currently not in line with similar asset backed and development finance institutions."[960] On the same day Ms Makgatho sent an email to Mr Singh in which she discussed issues arising in her memorandum for the board. She was concerned that the board should not be misled about the cost of the CDB loan.[961] On 27 August 2014 Mr Singh addressed a memorandum to Mr Molefe in response to the concerns raised by Ms Makgatho.[962] He recommended that Mr Molefe approve his response refuting Ms Makgatho's concerns that the CDB transaction was expensive.

670. Instead of approving Mr Singh's recommendation, on 28 August 2014 Mr Molefe merely "noted" the recommendation which Ms Makgatho understood to mean that he appreciated that Ms Makgatho's concerns had merit. In his testimony Mr Molefe denied that interpretation, again maintaining that he was simply adopting a neutral stance. He said that he believed it was prudent not to take the side of a "junior person" against her manager.[963] Considering the seniority of the Group Treasurer, Mr Molefe's explanation is not convincing and amounts to an abdication of responsibility in relation to a dispute with material financial consequences for Transnet, in respect of which he as GCEO had ultimate authority. He was willing to accept the possibly wrong view of Mr Singh above the correct view of Ms Makgatho simply on the basis that Ms Makgatho reported to Mr Singh as the GCFO.[964] Mr Molefe declined to take any responsibility for Transnet agreeing to the CDB facility

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[959] Annexure MM 37, Exh BB10(a), MEM-290, paras 10-11; Transcript 7 June 2019, p 88 *et seq*

[960] Annexure MM 37, Exh BB10(a), MEM-292, para 14(d)

[961] Annexure MM 38, Exh BB10(a), MEM-294

[962] Annexure MM 36, Exh BB10(a), MEM-285

[963] Transcript 9 March 2021, p 114

[964] Transcript 9 March 2021, p 114-116

because by June 2015 when the agreement was signed he had been seconded to Eskom.[965] His stance was inconsistent with his duty as the GCEO and a board member to act with fidelity and integrity in the best interests of Transnet and to prevent any prejudice to its financial interests. As such, there are reasonable grounds to believe that he contravened section 50 of the PFMA.

671. Mr Singh made a PowerPoint presentation to the board[966] that was based on an analysis provided by Regiments rather than Ms Makgatho's memorandum.[967] The analysis advised Transnet to take up the proposed loan because: i) the loan was fairly priced in comparison to foreign issuance of a USD denominated loan under the global medium term note ("the GMTN"); ii) it had a longer capital grace period of 54 months; iii) the starting date of the capital grace period was the first drawdown date as opposed to the date of signing of the loan agreement; iv) there was an improved capital repayment profile with increasing capital repayments towards the end of the loan tenure; v) volume consideration; and vi) the CDB agreed to transact cross-currency swaps such that Transnet would have a ZAR denominated loan on its books.[968]

672. Some of the reasons put forward by Regiments were factually incorrect and included significant misrepresentations, which, according to Ms Makgatho, exposed Transnet to R3.7 billion in capital leakage.[969] She stated that the oft-repeated proposition that the CDB loan was "fairly priced" was misleading, and the claim[970] that the pricing compared favourably to Transnet's average weighted cost

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[965] Transcript 9 March 2021, p 118-119

[966] Annexure MM 39, Exh BB10(a), MEM-295

[967] Annexure MM 31, Exh BB10(a), MEM-243

[968] Annexure MM 31, Exh BB10(a), MEM-245

[969] Transcript 7 June 2019, p 74-81; and Exh BB(10)(a), MEM-034, paras 137-141

[970] Annexure MM 39, Exh BB10(a), MEM-300

of debt was false. The loan did not compare favourably to Transnet's weighted average cost of debt which was 9.35% at the time.[971] Transnet's internal pricing of the CDB loan was a fixed rate of 12.71% (between 12.3% and 13.3% depending on the day) or a floating rate of 10.1%-10.5%.[972] The analysis also erroneously compared the CDB loan to the GMTN, a global bond[973], which, according to Ms Makgatho, was inappropriate as the CDB is a development financial institution ("DFI") and should be compared to other DFIs. Also, the CDB was a tied loan with collateral security over the locomotives while the GMTN is a listed bond (an untied loan negotiable in the market).[974]

673. In the memorandum of 27 August 2014 Mr Singh foreshadowed an intention to do an interest rate swap.[975] He stated that Transnet would consider fixing the interest rate exposure in 12 to 18 months "realising potential savings." If the rate was fixed at that point in time, the pricing proposal translated to a fixed rate of 12.09%. Ms Makgatho criticised this as introducing speculation contrary to Transnet's risk management framework. Mr Singh anticipated that going with a floating rate was problematic. As a result of all the funding initiatives related to the locomotives, he argued that an amendment to Transnet's policy on the current fixed rate vs floating debt ratio was required to move to 45% from the current 30% (floating). This amounted to an admission by Mr Singh that the Regiments' proposal was not in line with Transnet's policy regarding the fixed-floating debt ratio. He thus openly breached his duty to prevent expenditure not complying with the operational policies of Transnet in contravention of section 51(1)(b)(iii) of the PFMA.

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[971] See Annexure MM 27, Exh BB 10(a), MEM-229

[972] Transcript 7 June 2019, p 76

[973] Annexure MM 39, Exh BB10(a), MEM-307; Annexure MM 36, Exh BB(10)(a), MEM-286; and Transcript 7 June 2019, p 75

[974] Transcript 7 June 2019, p 75

[975] Annexure MM 36, Exh BB10(a), MEM-286, paras 3(b)(xii) and (xiii)

674. In the memorandum of 27 August 2014 to Mr Molefe, Mr Singh justified an expensive once off arrangement fee proposed by the CDB as follows:

> "The 118bps is high. However on balance taking into account CDB's concessions on the grace period, reduction of the credit margin and the repayment profile, [it] is reasonable…In comparison to arrangement fees of US Exim and ICBC of 100bps each for facilities of USD500 million and ZAR6 billion respectively, the 118bps is reasonable given the quantum".[976]

675. The 118 bps proposed by the CDB translated to R313 million to be paid within seven days of contract signature. Ms Makgatho believed that 50-60 bps would be reasonable which would have reduced the arrangement fee from R313 million to R159 million saving Transnet R154 million. She added that the figure of 100 bps for US Exim was a misrepresentation as the figure was in fact 12 bps.

676. Moreover, Mr Singh's claim in his PowerPoint presentation that the foreign currency exposure was eliminated was also misleading. His statement in the memorandum of 27 August 2014 that the CDB had "agreed to transact cross-currency swaps such that will have a ZAR denominated loan in its books"[977] was equally untrue. At the meeting in Beijing, the CDB had made it clear that it would only do the deal in USD.[978] Transnet thus had the burden to swap from USD to ZAR, which remained a risk. Thus, the statement[979] that the cross-currency swap executed by the CDB would benefit Transnet to the tune of R3.5 billion was another falsehood.

677. Mr Singh and Mr Molefe's refusal to take responsibility for the imprudence of the CDB facility appeared most starkly when they were asked during their testimony

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[976] Annexure MM 36, Exh BB10(a), MEM-286, paras 3(c)(xiv) and (xv)

[977] Annexure MM 36, Exh BB10(a), MEM-286, para 3(d)(xxii)

[978] Transcript 7 June 2019, p 80

[979] Annexure MM 39, Exh BB10(a), MEM-313

before the Commission to comment on the suggestion made by Mr Mahomedy that the terms of loan were not in the interest of Transnet and advanced the money laundering agenda.[980] Mr Singh and Mr Molefe without any foundation accused Mr Mahomedy (who has served as acting GCEO and GCFO of Transnet) of not being competent to comment on the arrangement and of dishonesty.[981]

678. Later in his testimony, in response to Mr Mahomedy's criticism, Mr Singh contended that Regiments had added significant value through its negotiations support and in its interactions with the CDB. He identified the following supposed achievements: i) a 15 year amortising profile was negotiated as opposed to the CDB's proposed 10 year amortising profile; ii) the longer duration of the loan provided better revenue generation and repayment of the loan, and thus a better matching of the revenue generation of the assets; iii) an extension of the capital grace period from 36 to 54 months; iv) the reduction of the CDB's pricing from 300 bps to 257 bps - a 43 bps saving; v) savings from changing the reference rate; vi) "sensitivity in executing a cross-currency swaps with JP Morgan resulted in a saving of a further 112 bps; and vii) the benefit of the standby facility - the facility was initially for USD2.5 billion, but the commitment to draw down was only USD1.5 billion, which meant there was USD1 billion committed to Transnet with no actual drawdown requirement.[982]

679. While these features of the CDB were possibly advantageous, it is not clear what role Regiments played in securing them or why they would not have been obtained by the Transnet treasury team. On the face of them, the realised advantages would

[980] Transcript 15 May 2019, p 145

[981] Transcript 28 May 2021, p 65-66 and Transcript 9 March 2021, p 125-126

[982] Transcript 28 May 2021, p 72-79

not have required much in the way of technical expertise that was not available within the team.

680. Pursuant to Mr Singh's presentation to the board, a Term Facility Agreement[983] was concluded with CDB for a facility of USD1.5 billion on 4 June 2015, committing Transnet to a very expensive loan. Clause 8 of the facility provided that the rate of interest on each loan for each interest period is the percentage rate per annum which is the aggregate of the applicable margin and Libor.[984] The margin is defined to mean 2.57% per annum.[985] Libor+257 bps equates with Jibar+337 bps,[986] a price substantially above the norm.

681. Ms Makgatho decided to resign with effect from 30 November 2014, as she felt that the environment in Transnet was not conducive for her to continue with her employment. She feared for her personal safety and well-being.[987] She was replaced by Mr Ramosebudi, who had previously worked at SAA and ACSA where he had been involved in corruption and associated with Regiments.[988]

The success fee of R166 million paid to Regiments for the CDB loan

682. On 28 April 2015 Mr Ramosebudi, who replaced Ms Makgatho as Group Treasurer, compiled a memorandum seeking approval from the BADC for the appointment by confinement of JP Morgan to hedge the financial risks emanating from the loan of USD1.5 billion from the CDB and of Regiments for transaction

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[983] Annexure MM 40, Exh BB10(a), MEM-317

[984] Annexure MM 40, Exh BB10(a), MEM-342

[985] Annexure MM 40, Exh BB10(a), MEM-327

[986] See Annexure MM 36, Exh BB10(a), MEM-287

[987] Transcript 7 June 2019, p 98 *et seq*

[988] FOF-08-005

advisory services to support Transnet on the 1064 locomotive transaction at an additional success fee of R166 million.[989]

683. The memorandum described the role of Regiments as advising on deal structuring, financing and funding options to minimise risk for Transnet. It stated that Regiments, working with the risk management and the middle office of Transnet treasury, had assisted with detailed negotiations to achieve "a better asset/liability match as opposed to CDB's proposed tenure amortizing profile as well as extending the capital grace period thereby lengthening the duration of the loan profile". In order to achieve a reduced blended rate in the funding of the Chinese portion of the locomotives, Regiments had recommended that Transnet only utilise USD1.5 billion of the CDB facility, and blend that with a USD1 billion ZAR syndicated loan issue. The ZAR syndicated loan issue would allow for reduction in the blended rate paid by Transnet of approximately 37 bps. The CDB margin compression, the blending of the ZAR syndicated loan, and the change in the applicable reference rate accrued financial benefits for Transnet in excess of R2.7 billion.

684. The memorandum explained that the financial advice and negotiation support provided by Regiments through the process was done at risk with an expectation of compensation only on successful completion of the transaction. The range of NPV fee outcomes for such work, it was said, can vary between 15 bps and 25 bps on a transaction of a similar nature – i.e. R166 million to R277 million based on yield. Given "the invaluable contribution of Regiments to the successful conclusion of this transaction", it was recommended that Regiments be paid a success based fee of 15 bps on the yield as reflected in the NPV calculation, being R166 million. Mr

[989] Transnet-Ref-Bundle-05579

Ramosebudi's proposal was supported by Mr Pita (GCSCO), Mr Singh (GCFO) and Mr Gama (acting GCEO).

685. The following day, 29 April 2015, the BADC approved the contract extension from R99.5 million to R265.5 million (an increase of R166 million) for the appointment of Regiments for transaction advisory services and support to Transnet on the 1064 locomotive transaction.[990] It is not clear how the figure of R99.5 million was made up, but must have been amounts that had been previously paid in terms of the various invalid contracts involving Regiments. The BADC also granted the acting GCEO (Mr Gama) the authority to approve all documentation.

686. On 16 July 2015 Mr Gama (in response to a request in a memorandum submitted to him by Mr Singh and Mr Pita dated 19 May 2015) approved the increase in the value of the contract to R265.5 million and "the allowance for the contract period to accommodate the successful conclusion of the funding and hedging agreements with CDB and JP Morgan in order to effect the remuneration (success or risk-based fee) to Regiments Capital".[991]

687. Before the final conclusion of the CDB loan and a second addendum to the MSA in July 2015, Regiments submitted an invoice to Transnet on 3 June 2015. The invoice was for "debt origination USD1.5 billion – China Development Bank" and "arrangement of cross-currency swap and credit default swap with JP Morgan". The amount owing was stated to be in respect of a "success contingency fee". The amount of the invoice was R189 240 000, made up of the success contingency fee of R166 million and VAT of R23 240 000.[992]

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[990] Transnet-Ref-Bundle-05516

[991] Transnet-Ref-Bundle-05597

[992] Transnet-Ref-Bundle-06712

688. When the second addendum to the MSA was eventually concluded on 16 July 2015,[993] it varied the MSA by changing the scope of services, the remuneration model, and the duration of the agreement. Clause 3 of the second addendum to the MSA provided for the variation of the conditions of the MSA, including the scope of the work, duration and value. Clause 3.1.1 provided that the scope of the work would be amended to include the following deliverables to be performed by Regiments: i) technical support including building cost escalation models and total cost of ownership models to inform and guide Transnet throughout the negotiation process; ii) develop a detailed funding plan for the acquisition of the 1064 locomotives; iii) matching of assets and liabilities; iv) identification and management of all financial risk (including liquidity, interest rate, credit currency risks); v) assist Transnet in the negotiations with all the identified Chinese potential funders and in particular the CDB; vi) assist Transnet in negotiating with a number of potential Chinese sources of ZAR funding; and vii) recommendation, advice and assistance post the successful conclusion of negotiations with respect to amortisation, interest rates, cross-currency swaps, calculations and forecasts, and blended funding models.

689. The second addendum to the MSA was *ex post facto* – in the sense that most of the deliverables had been performed in the previous year without this contract in respect of them being in existence at the time of performance.[994] The second addendum to the MSA, however, provided that Regiments would be entitled to a success fee or a risk-based fee of 15 bps on yield payable by Transnet which translated to R166 million. There was no legal cause for the success fee due to the fact that on 4 February 2014, Transnet and Regiments had concluded the third addendum to the LOI, which specifically allocated a fixed fee of R15 million for all

[993] Transnet-Ref-Bundle-06647

[994] Transcript 28 May 2021, p 31, line 20

the funding and financing services. The raising of the USD1.5 billion funding fell within the scope of the third addendum to the LOI, and therefore, Regiments should have been remunerated in accordance with the fees as set out in the third addendum to the LOI.[995]

690. Mr Singh disputed the claim that the work fell within the scope of the agreed fee of R15 million. He referred to the specific wording of the agreement of 23 January 2014 between Transnet and Regiments.[996] The original LOI had limited the financial deliverables to "developing finance and financial options and develop deal structure (financing, hedging and de-risking options)".[997] However, the deliverables in the agreement of 23 January 2014 included evaluating all potential funding sources and mechanisms (including local and international banks, development finance institutions, export credit agencies and vendor financing) to select the most appropriate avenues to pursue and execute and providing execution programme management and support in respect to funding.[998] Clause 2.3.6 of the agreement specified the support services to be rendered in respect of funding to include: assisting in the preparation and management of capital raising related tenders/RFPs and RFIs and participation "in the negotiation of the commercial terms of funding from the shortlisted funders" and "in the fulfilment of conditions precedent required by the funders".[999]

691. However, clause 2 of the agreement of 23 January 2014, it will be re-called, (and upon which Mr Singh relied to justify the R166 million fee in the second addendum to the MSA) provided that the proposed fee structure for the services to be

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[995] Transcript 27 May 2021, p 153

[996] Annexure MSM 7, Exh BB3, MSM-177

[997] Transnet-Ref-Bundle-06573-06574

[998] Annexure MSM 7, Exh BB3, MSM-179, clauses 2.3.5-2.3.6

[999] Annexure MSM 7, Exh BB3, MSM-179, clauses 2.3.6.1-2.3.6.5

rendered was understood by both parties to involve a retainer applicable every month and a performance fee on the funding raised at interest rates below the benchmark. It then stated that the deliverables (*except the actual fundraising*) were to be executed for a fee of R15 million and provision was made for a performance fee equal to 20% of the savings achieved against the benchmark interest rate. One of the handwritten variations, however, provided that "in terms of section 2 there will not be a performance fee for fundraising thus (clause) 2.1.2 will be removed as well". Mr Singh maintained that the performance fee was removed because a fee for actual fundraising would be agreed later. The fee of R15 million did not cover actual fundraising.[1000]

692. Although Mr Singh's argument seems supportable at face value, it is contradicted by the provision for fees in the third addendum to the LOI concluded on 4 February 2014. As set out earlier in this report, that agreement (like the agreement of 23 January 2014) identified the revised deliverables to include evaluating all potential funding sources and mechanisms to select the most appropriate avenues to pursue and execute the full spectrum of funding opportunities including: i) local and international banks; ii) local and international development finance institutions; iii) export credit agencies; and iv) vendor financing. In addition, Regiments/McKinsey was obliged to provide execution support programme management and support in respect of funding to: i) assist in the preparation and management of capital raising related tenders – RFPs and RFIs; ii) participate in road shows and assisting with the preparation of information memorandums; iii) participate in the fulfilment of the conditions precedent required by the funders; and iv) participate in due diligence exercise and responding to all credit queries raised by other funders.

[1000] Transcript 27 May 2021, p 157

693. Clause 4 of the third addendum to the LOI varied the contract price specifically to address the changed scope of variables. It stated that as a result of the additional scope of work *required on the financial phase of the contract*, the initial price of R35.2 million would increase by R6 million and that the increase of R6 million was intended to provide a fee of R15 million for the funding and finance scope of the work, by utilising funds of R9 million allocated to other deliverables no longer required.[1001]

694. The third addendum to the LOI did not include the deliverable stipulated in clause 2.3.6.3 of the agreement of 23 January 2014, namely "participate in the negotiation of the commercial term of funding from the shortlisted funders".[1002] However, the scope of the deliverables in the third addendum of the LOI contemplates deliverables of that order and the fixed fee was all-inclusive for "the required work on the financial phase of the contract" which included selecting the most appropriate funding sources and mechanisms to pursue and execute.[1003]

695. What is more, in his memorandum of 27 August 2014 to Mr Molefe in which he sought to rebut the assertion of Ms Makgatho that the appointment of Regiments to negotiate the CDB loan was unnecessary, Mr Singh stated:

> "Regiments Capital were appointed as transaction advisers on the 1064 locomotive transaction…to advise on deal structuring, financing and funding options to minimise risk for Transnet…Accordingly, the negotiation with CDB to successfully conclude a ZAR funding facility at a ZAR cost not exceeding 9.3% (depending on Jibar) for a tenor not less than 15 years at no additional fee is part of their mandate."[1004] (Emphasis supplied)

[1001] Transnet-Ref-Bundle-06606; and Transcript 29 May 2019, p 130 *et seq*

[1002] Compare Annexure MSM 7, Exh BB3, MSM-179, clause 2.3.3 with Transnet-Ref-Bundle-06606, clause 3.8

[1003] Transnet-Ref-Bundle-06606, clause 3.7

[1004] Annexure MM 36, Exh BB10(a), MEM-285

696. It is thus more than doubtful that Regiments was entitled to an additional success fee for its work on the CDB loan. The work on the CDB loan fell within the scope of deliverables Regiments had agreed to in both the agreement of 23 January 2014 and the third addendum to the LOI.

697. In his evidence before the Commission,[1005] Dr Jonathan Bloom, the financial expert, agreed that most of the services performed under the second addendum to the MSA were envisaged and covered by the third addendum to the LOI. In his opinion, the scope of the work in the second addendum to the MSA was merely "wordsmithed" to imply either an extension of the scope of the LOI or a totally revised scope of tasks stated in the LOI. There was a duplication of work in respect of cost escalation risk management services, development of a funding plan, and the evaluation of all funding sources. There was accordingly no proper basis for Transnet to conclude an agreement to pay Regiments on a risk sharing basis in relation to the funding secured from the CDB.

698. Dr Bloom investigated specifically how the R166 million success fee paid was calculated. The invoice for the R166 million (excluding VAT) claimed payment for two items: R152,756,408 was the fee payable to Regiments as the lead manager and debt originator for the CDB loan; and the balance related to the hedging structure for the CDB loan. The normal and accepted basis for debt originating fees entails the application of a percentage to the amount of money raised. The amount of money raised is calculated either as the original capital loan ("the notional value of the loan") or the aggregate of all repayments made over the full term of the loan ("the yield to maturity"). The notional value of the CDB loan was R18 billion. However, the yield to maturity, being the sum total of all the capital and interest

[1005] Transcript 31 May 2019, p 124-157

payments that would be paid over the loan from commencement to maturity, was much greater and in the amount of R102 billion.

699. The R153 million fee represented 0.15% of the yield to maturity. This was equivalent to 0.85% of the notional amount of R18 billion. This, Dr Bloom maintained, was way beyond the norm of between 0.2% and 0.5% on the notional amount.[1006] Market conventions and Transnet practices normally fix lead arrangement and debt originator fees on the notional value and not on the yield to maturity as Regiments did in this case. Regiments should have charged between 0.2% and 0.5% on the notional value. If one takes the average of 0.35% of the notional value of R18 billion as a fee, Regiments should have earned a fee of R63 million.

700. The market norm applies a much lower percentage to the yield to maturity than that applied to the notional value. Market convention and Transnet practice dictate a percentage of 0.06% of the yield to maturity as an acceptable fee. On a yield maturity of R102 billion, this would amount to a fee of R61.2 million. Dr Bloom suggested that a percentage of 0.01% would even be acceptable. This would amount to a fee of R10.2 million (which approximates the original fixed fee of R15 million agreed with McKinsey) as opposed to the fee of approximately R153 million that was paid.

701. On this basis, Regiments received a fee 10-15 times greater than that which the market would have found acceptable. Later in his evidence, Dr Bloom intimated that the overpayment of the fee was in the region of R90 million. This equates with his calculation of an acceptable fee as being either 0.35% of the notional value of

[1006] Transcript 31 May 2019, p 146

R18 billion or 0.06% of the yield to maturity of R102 billion. In either event, the fee of Regiments was inflated by an amount between R90 million and R140 million.

702. Regiments charged a fee to its obvious advantage that was not in line with market conventions and Transnet practice. Moreover, to repeat, and as Dr Bloom was at pains to emphasise, Regiments in any event should not have been paid such a fee firstly because it had agreed to a transaction advisory fee of substantially less (R15 million) and due to the fact that Transnet had sufficient capacity in internal skills to perform the required functions.[1007]

703. As mentioned, the payment advice from Transnet reflects that the invoice amount of R189.24 million (R166 million plus VAT) was paid to Regiments on 11 June 2015, before the second addendum to the MSA was concluded.[1008] Monies flowed from this payment to the Gupta enterprise via the money laundering scheme. The Advisory Invoice Tracking of 7 December 2015 produced by Regiments[1009] reflects that R147 607 200 was paid to Albatime (the Gupta-linked laundering vehicle) of which R122 million was laundered to Sahara Computers, part of the Gupta enterprise.[1010]

704. Mr Singh justified paying Regiments the R189.24 million prior to the conclusion of the second addendum to the MSA on the unsustainable basis that the BADC had approved the memorandum earlier. The approval of the BADC on 29 April 2015 granted Mr Gama the authority to conclude the second addendum to the MSA; it

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[1007] Exh BB8(d), JB12-JB13

[1008] Transnet-Ref-Bundle-06713

[1009] Transnet-05-761

[1010] Transcript 27 November 2020, p 186, line 3; and Transcript 28 May 2021, p 123, line 15

did not conclude the contract with Regiments.[1011] Mr Singh indisputably authorised payment of R189.24 million before the contract was concluded. [1012]

705. It was accordingly at the very least a breach of fiduciary duty (and likely corruption) on the part of the Transnet officials (Mr Singh and Mr Gama) involved in increasing this fee, as Transnet was entitled to this contractual performance against a fixed fee of R15 million.[1013] If the BADC on 29 April 2015 had properly scrutinised the request for confinement, it may well have established that there was no basis for paying R189.24 million since the third addendum to the LOI had provided for the fixed fee of R15 million. The members of the BADC therefore possibly failed to take reasonable steps to be informed of the matter under consideration and thus may not have exercised the reasonable degree of care, skill and diligence expected of them.[1014] Moreover, the extensive variation in the scope of the advisory contract actually required a new procurement event to be effected in terms of the Procurement Procedures Manual.

706. To recap: the initial contract value for the transaction advisory services was fixed (no performance fees or success fees were payable) at R35.2 million. However, as the role of Regiments expanded, so too did the fees payable to it. The contract value increased from the initial R35.2 million (December 2012) to R41.2 million in February 2014, to R78.4 million in April 2014, and eventually to an amount of R265.5 million (excluding VAT) paid to Regiments in July 2015. The increase in fees amounted to a 754% increase. Dr Bloom testified that professional advisory

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[1011] Transnet-05-1047

[1012] Transcript 27 May 2021, p 170-174

[1013] The examination of Mr Gama on the R166 million success fee is a bit confusing. He pointed out that the decision to pay the fee was made shortly after his appointment as acting GCEO and his move from TFR to Group. His evidence on the issue is inconsequential – see Transcript 11 May 2021, p 260-288

[1014] See MNS Transaction Advisors Report, paras 3.1.21 - 3.1.27

services, even in financing of the kind involved here, would normally be charged out at an hourly rate. Advisory companies or firms typically charge their staff out at an hourly billable rate. He was of the opinion that the R265 million paid to Regiments was "extremely excessive" in that a large number of consultants would need to work for an extended period of time at very high hourly rates to get close to that fee.[1015]

707. The proceeds paid to Regiments, as corrupt payments in contravention of various provisions of the PFMA and PRECCA were the proceeds of unlawful activities as contemplated in section 1 of POCA. The receipt of them by Regiments (Mr Wood and others) and the laundering of them to the companies of Mr Essa and Mr Moodley probably constitute offences relating to the proceeds of unlawful activity in contravention of section 5 and section 6 of POCA. These planned and continuing Schedule 1 offences may well constitute a pattern of racketeering activity and there are accordingly reasonable grounds to believe that Mr Molefe, Mr Gama, Mr Singh, Mr Ramosebudi and others are guilty of one or more of the offences of in Chapters 2 and 3 of POCA in respect of the fees paid to Regiments.

708. Transnet has issued summons against Regiments to recover the R166 million (excluding VAT) success fee on the basis that no work was rendered which justified such a payment.[1016]

The appointment of JP Morgan, Regiments and Trillian in respect of the ZAR club loan

709. There were also irregularities with regard to the fees paid in respect of the syndicated ZAR club loan. As explained, USD1 billion of the CDB loan facility was

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[1015] Transcript 31 May 2019, p 101-102

[1016] Exh BB3(a), MSM-016, paras 5.4.9-5.4.10

shelved in favour of a ZAR12 billion syndicated club loan for 15 years with a floating interest rate. The club loan for ZAR 12 billion that was agreed later in 2015 was made up as follows: Nedbank (R3 billion); Bank of China (R3 billion); Absa (R3 billion); Omsfin (R1 billion); and Future Growth (R1.5 billion).

710. Mr Gama signed a revised term sheet and mandate letter in April 2015 with CDB for a USD1.5 billion loan only.[1017] In the memorandum of 28 April 2015 (prepared by Mr Ramosebudi and submitted by Mr Gama to the BADC),[1018] Mr Gama recommended a dual-tranche denominated loan to fund the Chinese locomotive purchases by utilising only USD1.5 billion of the funding from CDB and the use of the balance sheet of JP Morgan to underwrite a ZAR funding facility of USD1 billion equivalent – the club loan. JP Morgan is an American multinational investment bank and financial services company, which provides hedging of securities, lead arranger and underwriting services. It is one of the largest banks globally.

711. In the memorandum of 28 April 2015 Mr Gama requested the BADC to approve the appointment of JP Morgan by confidential confinement to: i) hedge the financial risks (interest rate, credit and currency risk) emanating from the USD1.5 billion CDB loan; and ii) to lead and underwrite the equivalent syndicated ZAR loan of USD1 billion. At its meeting of 29 April 2015, the BADC approved the appointment of JP Morgan to hedge the financial risks but for reasons that are not evident, it appears not to have considered the appointment of JP Morgan as the lead arranger or underwriter of the ZAR club loan.[1019]

[1017] Transnet-Ref-Bundle-05582, paras 48-50

[1018] Transnet-Ref-Bundle-05579

[1019] See minutes of the BADC meeting of 29 April 2015 - Transnet-Ref-Bundle-05516. Loan syndication starts with the borrower awarding the mandate to one or more arrangers to syndicate the financing. The lead arranger is a commercial or investment bank that is mandated by the borrower to organise and syndicate a financing on

712. No proper case for confinement was made out in that the memorandum did not address what aspects of the economic crisis affected the transaction as to justify urgency.[1020] JP Morgan did not have unique skills in hedging the currency exposure or lead arranging the ZAR club loan. Moreover, once again, no gap analysis was conducted. Before procuring external consultants, Transnet was obliged to determine whether it had the internal skills and resources to perform the relevant tasks. As explained, Transnet treasury had the ability to raise the funds itself from diverse funding sources.

713. On 6 May 2015 Transnet issued the RFP for the provision of hedging financial risks (interest rate, credit and currency) and to lead and underwrite the syndicate ZAR loan.[1021] JP Morgan's bid tendered for the hedging of the USD1.5 billion loan facility at R40 million and for its services as lead arranger and underwriting of the ZAR club loan at R24 million. Based on the above estimates, it tendered 35% of contract value for supplier development, being R22.4 million.

714. Less than two months after the decision to confine the contract, on 8 June 2015, Mr Singh terminated JP Morgan's role as lead arranger on the ZAR club loan on the basis that Transnet had incorrectly assumed JP Morgan would provide the underwriting facility on the balance of the USD 1 billion. In the letter terminating the agreement Mr Singh stated that Transnet had decided to pursue an offer received from the Bank of China and any other available facility. The balance would be

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behalf of the borrower, on the basis of the negotiated terms and conditions set out in the term sheet and mandate letter. The lead arranger is responsible for negotiating the key terms and facility covenants and assigning the syndicate roles and titles. Also, as book runner, a lead arranger manages the syndication process, determines the loan pricing, allocations to each lender, and the final composition of the syndicate. The failure of the BADC to specify whether JP Morgan was appointed as the lead arranger and underwriter of the loan was thus somewhat problematic.

[1020] MNS Transaction Advisors Report, paras 2.7.4 - 2.7.18

[1021] Transnet-Ref-Bundle-05665

drawn from the USD1 billion standby facility and thus the coordination of ZAR loan was not required.[1022] According to Mr Ramosebudi, the real intention at the time was to award the lead arranger role to Regiments because JP Morgan did not have the capacity.[1023]

715. On 27 August 2015 Mr Wood of Regiments wrote to Mr Ramosebudi attaching a memorandum he had drafted for Mr Ramosebudi to present to Mr Pita for ultimate presentation to the board.[1024] The memorandum stated that in order to reduce the effective cost of funding of the 1064 locomotive acquisition, it was decided to blend the USD1.5 billion funding received from CDB with a ZAR loan which would serve to reduce the all-in cost of the required funding. The memorandum recorded that although JP Morgan was considered as the lead arranger for the ZAR funding and a proposal was received from JP Morgan in this regard, Transnet had subsequently decided to appoint Regiments to lead manage the ZAR club loan in terms of their existing mandate, on an on risk basis. The memorandum continued and said that Regiments was confident that through their experience, intellectual property and market contacts they could achieve significantly better priced funding for Transnet than JP Morgan was able to do.

716. Mr Wood's memorandum of 27 August 2015 stated further that Transnet's decision to appoint Regiments as lead arranger to raise up to R18 billion by means of a ZAR club loan, as opposed to appointing a lead book runner, resulted in a direct fee saving of approximately R36 million (lead manager fees). Mr Wood said that Transnet would also save R54 million in upfront fees payable to the lenders (as Regiments had an arrangement for an upfront fee of 30 bps payable to the lenders,

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[1022] FOF-04-385

[1023] Transcript 27 November 2020, p 191-195

[1024] FOF-04-444

as opposed to 75 bps proposed by JP Morgan). He said that the benchmarking against JP Morgan's proposal had revealed that Transnet achieved a saving of 100 bps on the pricing of the club loan via implementing Regiments' recommendation (3m Jibar+270 bps) as opposed to the option recommended by JP Morgan (3m Jibar+370 bps). The net savings Transnet would realise from securing the club loan at 3m Jibar+270 bps as opposed to the syndication initially contemplated, according to Mr Wood, was approximately R679 million (based on comparative NPV analysis). Regiments' value add to Transnet in relation to the 1064 locomotive ZAR club loan funding was thus stated to be R763 million. It was accordingly proposed that Regiments receive a 10% success fee of R76.3 million.

717. In response, Mr Ramosebudi wrote to Mr Wood suggesting that it would be better to do a comparison with the current CDB loan rather than with what JP Morgan had achieved. Mr Ramosebudi's criticism led to Regiments re-stating the saving to be R502 million and thus it reduced the success fee to R50.2 million.[1025] The final version of the memorandum with the reduced fee was emailed by Mr Wood to Mr Ashok Narayan, a Gupta associate, on 3 September 2015.[1026]

718. Five months after the request to appoint JP Morgan on confinement, Mr Gama approved and submitted a memorandum to the BADC on 22 September 2015 recommending that the BADC approve the appointment of Trillian Capital (Pty) Ltd ("Trillian") to replace JP Morgan as the lead arranger of the USD1 billion ZAR equivalent club loan.[1027] Mr Wood was involved in the establishment of Trillian after

[1025] FOF-04-453 - FOF-04-489; and Transcript 27 November 2020, p 198-200

[1026] FOF-04-470; and Transcript 27 November 2020, p 200, line 20

[1027] Transnet-07-250.298

falling out with his associates at Regiments.[1028] Mr Essa was the controlling shareholder of Trillian.[1029]

719. The proposal in the memorandum was recommended by Mr Ramosebudi, Mr Pita and Mr Thomas. The MNS Report (on transaction advisors) describes the memorandum of 22 September 2015 as a "copy and paste" of the memorandum of 28 April 2015 except that all the services attributed to Trillian were those that had already been rendered by Regiments.[1030] The copy and paste was obvious in the first iteration of the Trillian memorandum which erroneously left in one of the original references to Regiments. So paragraph 36 of the draft memorandum motivating payment to Trillian continued to refer to "Regiments value add to Transnet in relation to the 1064 locomotive ZAR club loan."[1031]

720. On 14 September 2015 a few days before Mr Gama submitted to the BADC the proposal for the appointment of Trillian, Mr Ramosebudi forwarded an email (without any comment) to Mr Wood attaching an order made to Land Rover Waterford for a Range Rover Sport valued at about R1.3 million. The balance on the invoice was R800 000 after a trade in.[1032] In his evidence before the Commission, Mr Ramosebudi explained that he knew Mr Wood's partner, Mr Litha Nyhonyha, was a part-owner of Land Rover and he was hoping he could "do something for me". Mr Ramosebudi saw no impropriety in his attempt to secure a

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[1028] Transcript 27 November 2020, p 212

[1029] A memorandum of 9 May 2016 from Mr Gama to the BADC requesting the cession of the GFB contract from Regiments Capital (Pty) Ltd to Trillian Capital (Pty) Ltd with an increase in contract value from R375 million to R463.3 million reflects that Trillian Holdings (Pty) Ltd held 60% of the shares in Trillian Capital (Pty) Ltd and that Trillian Holdings (Pty) Ltd was "wholly owned" by Mr Essa. 25% of the shares in Trillian Capital (Pty) Ltd were held by Numibrite (Pty) Ltd which was "wholly owned" by Mr Wood. Thus, Mr Essa and Mr Wood had 85% control of Trillian Capital (Pty) Ltd – Annexure MSM 34, Exh BB3(b), MSM-521.1, para 14.

[1030] MNS Transaction Advisors Report, para 3.1.34.1; and Transcript 27 November 2020, p 212-214

[1031] Exh VV4-PR-489

[1032] FOF-04-499

discount or a good deal at the time he was involved in closing a deal on behalf of Transnet with Trillian, as the vehicle was ultimately not purchased, and the deal with Trillian was "above board".[1033] Mr Ramosebudi's conduct is *prima facie* evidence that he agreed or offered to accept a gratification from Mr Wood/Trillian for his own benefit in order to improperly influence the procurement of the contract for Trillian and thus there are reasonable grounds to believe that he may be guilty of the offence of corrupt activities relating to contracts as contemplated in section 12 of PRECCA.

721. On 16 September 2015 Mr Thomas addressed an email to Mr Ramosebudi and Mr Pita raising certain queries about the Trillian proposal.[1034] Firstly, he pointed out that JP Morgan was still contracted to perform the currency swaps. Secondly, the confinement was silent on the fees for leading and underwriting the loan which JP Morgan had failed to deliver. If the fee for leading and underwriting the loan was not included in the costs of the funding, then there should have been or needed to be disclosure of that specific fee payable to Trillian. Mr Thomas expressed doubt that Trillian had the capacity to underwrite the loan. It was not a bank with significant assets. It was a company recently conceptualised by Mr Wood. He was also uncertain about how the role of and services to be provided by Trillian would differ to what had been offered by JP Morgan. Finally, he suggested that the prior payment of fees to Regiments had covered the services proposed to be done by Trillian and payment to Trillian would duplicate what was paid to Regiments.

722. On the same day, Mr Ramosebudi replied somewhat cryptically as follows:

[1033] Transcript 27 November 2020, p 216-220

[1034] FOF-04-504

> "Indeed the first point is correct; the fees were not (disclosed), this why we are now disclosing the fees for Trillian; Trillian has capacity and capability; Trillian will provide the same services; no duplication with Regiments."[1035]

723. During his testimony to the Commission, Mr Ramosebudi conceded that Trillian had no capacity (or the balance sheet) to underwrite the loan and thus that the services to be offered by Trillian were not the same as those offered by JP Morgan. Moreover, at the time of proposing the substitution of JP Morgan by Trillian, the persons having the capacity to arrange the loan were still at Regiments. No-one at Trillian had the capacity to arrange the loan. Mr Ramosebudi was thus compelled to admit that his answers to Mr Thomas in his email of 16 September 2015 were false and gave the incorrect impression. He could offer no plausible or credible reason for these misrepresentations.[1036] These concessions add to the case that Mr Ramosebudi was acting corruptly, in breach of PRECCA and the PFMA, and also (given Mr Essa's controlling interest in Trillian and the link to the Gupta enterprise) was associated with the enterprise and participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

724. Mr Gama's memorandum of 22 September 2015 sought: i) the appointment of Trillian; ii) the approval of the termination of JP Morgan on the ZAR club loan; and iii) the delegation of authority to him as GCEO to approve all documentation related to this confined award. Mr Gama justified the appointment of Trillian on the basis that it was a small black SDP.[1037] The BADC met on 1 October 2015.[1038] The meeting was chaired by Mr Shane, whose company Integrated Capital Management, would receive an aggregate amount of R9 370 800 from the

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[1035] FOF-04-514

[1036] Transcript 27 November 2020, p 222-240

[1037] Transnet-07-250.299, para 10-12; and MNS Transaction Advisors Report, para 2.7.21

[1038] See minutes at FOF-04-518

laundered proceeds of the CNR BEX kickback barely a month later.[1039] Mr Ramosebudi joined the meeting to deal with the change and took the BADC through the submission. The minutes noted that Trillian was a black owned company and SDP of Regiments "capable of delivering on the required club loan deal at a more comparable price than the JP Morgan proposal" resulting in a saving of approximately R820 million, with 10% fees being payable to Trillian for the transaction (R82 million). The BADC resolved to: i) appoint Trillian to replace JP Morgan as the "lead manager" of the USD1 billion ZAR equivalent club loan; ii) terminate JP Morgan on the ZAR syndication loan; and iii) grant the GCEO the necessary delegation of authority.[1040]

725. The appointment was problematic in the first place because JP Morgan was never appointed to the lead arranger role but was appointed only for the purpose of hedging the CDB loan. Furthermore, the description of Trillian as a black owned company capable of assuming the role of lead arranger and underwriter was a misrepresentation.[1041] Likewise, it is not clear how the assumed savings escalated from R502 million to R820 million with the concomitant increase in fees paid to Trillian. During his testimony, Mr Ramosebudi was unable to give a coherent account of how Trillian's fee increased by R32 million. He sought to transfer responsibility to other staff members in procurement and finance.[1042]

726. Mr Gama did not attend the meeting of the BADC. During his evidence before the Commission he attempted to eschew responsibility for the presentation to it. He

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[1039] Exh VV10C-Further Docs 032. The payments to Integrated Capital Management were laundered from BEX through two other entities, Green Blossom (Pty) Ltd and Block Mania (Pty) Ltd and were paid to Integrated Capital Management by Green Blossom in seven payments between 9 and 16 November 2015.

[1040] Transnet-07-250.63; and Transnet-Ref-Bundle-05518

[1041] Transcript 27 November 2020, p 244-246

[1042] Transcript 27 November 2020, p 247-252

said that Mr Ramosebudi was the author of the document and he had relied heavily on advice from Mr Pita before signing it. He conceded though that he was ultimately responsible as he, the most senior person, had made the recommendation to the BADC.[1043] He also signed the engagement letter appointing Trillian.[1044]

727. On 18 November 2015 Mr Gama and Mr Pita,[1045] on behalf of Transnet, and Mr Daniel Roy, on behalf of Trillian, concluded an agreement in respect of the ZAR club loan facility.[1046] The engagement letter set out the terms and conditions on which Trillian was engaged by Transnet "to act as Originating, Co-ordinating Mandated Lead Arranger" in relation to the proposed R12 billion facility.

728. Clause 1.1 of the engagement letter defined the scope of the mandate as the appointment of Trillian (acting through its investment banking division or any associate or other division thereof as it determined appropriate) on an exclusive basis as the "Originating and Co-ordinating Mandated Lead Arranger" to perform the following services in connection with the transaction: (a) acting as the principal and primary point of contact for Transnet in respect of the structuring and documentation of the club loan financing; (b) leading negotiations on behalf of Transnet (including co-ordination of lenders' positions) on the full documentation suite for the club loan financing; (c) liaising on behalf of Transnet with appropriate legal counsel, co-ordination of lenders' requests for advice and approval of legal

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[1043] Transcript 30 April 2021, p 95-97

[1044] Transcript 30 April 2021, p 103, line 15

[1045] Mr Pita attended the BADC meeting and recommended the proposal at that stage. Despite claiming no recollection of receiving the email sent to him including the invoice tracking document prepared by Regiments which reflected that 55% of all fees earned by Regiments were being paid to Homix and Albatime, he was probably aware of the money laundering scheme - see Transcript 30 April 2021, p 98-102 and Transcript 1 June 2012, p 233-242

[1046] Transnet-07-250.64; and Transcript 31 May 2019, p 165

opinions; (d) such other services as Trillian considered expedient and reasonable for the efficient management and completion of the documentation process for the club loan financing; and (e) acting as lead arranger and coordinator in accordance with the executed documentation for the club loan financing. The engagement letter expressly provided that nothing in it would be deemed to be a commitment by Trillian to provide or underwrite any financing. However, Trillian committed to provide financial risk management solutions which could be provided through its alliance with Regiments or any of its associates.

729. Transnet agreed to pay Trillian a fee of R82 million, due and payable upon execution of a club loan facility agreement relating to the transaction (including any facility agreement pursuant to which Trillian and its associates were the advisor, coordinator and provider of financial risk management solutions). Trillian issued an invoice for R93.48 million (R82 million plus VAT) on the same day that the mandate was concluded.[1047]

730. A payment advice signed by Mr Gama and Mr Pita was issued the next day, 19 November 2015.[1048] Mr Gama justified this on the basis that Trillian had carried out the work in the six months prior to the BADC granting approval for their appointment. He referred to paragraph 24 of the memorandum of 22 September 2015 which specifically stated that the financial advice and negotiations support that Trillian provided through the entire process took in excess of five months which was done at risk with the expectation of compensation only on successful completion of the transaction.[1049] At the time Mr Gama signed the payment advice authorising the payment of R93.48 million he had not met any person associated

[1047] FOF-04-568

[1048] FOF-04-569

[1049] Transcript 30 April 2021, p 104-110

with the Trillian group of companies, other than Mr Wood.[1050] Other evidence discussed later confirms that he also knew Mr Essa who had a substantial shareholding in Trillian.

731. The ZAR 12 billion club loan was concluded four days later on 23 November 2015.

732. The next day, 24 November 2015, Mr Ramosebudi compiled and signed a memorandum addressed to Mr Pita and Mr Gama requesting them to sign off on Trillian's invoice "for services rendered" and recording that Trillian had "engaged Transnet with a financing solution".[1051] Mr Pita signed the memorandum and the Trillian invoice on 2 December 2015. Mr Gama signed them on 3 December 2015.[1052] The money (R93.48 million – R82 million plus VAT) was paid into Trillian's bank account on 4 December 2015 – 16 days after the mandate was concluded.[1053] Four days later, on 8 December 2015, R74.784 million of that, being 80%, was transferred by Trillian to the Gupta money laundering vehicle, Albatime.[1054] This amount would ultimately be laundered on to secure a R104.5 million loan from the Bank of Baroda that was used by Tegeta Exploration and Resources to pay part of the purchase price for the Optimum Coal Mine.[1055]

733. According to Mr Sedumedi of MNS, the services specified in the engagement letter of 18 November 2015 had already been rendered by Regiments.[1056] The engagement letter attributed the services previously performed by Regiments (outlined in the memoranda of 28 April 2015 and 27 August 2015) to Trillian. The

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[1050] Transcript 30 April 2021, p 103-104

[1051] Transnet-Ref-Bundle-05613-05615

[1052] Transnet-Ref-Bundle-05615; and FOF-04-568

[1053] Transcript 30 April 2021, p 112-114; and Transnet-07-250.74

[1054] Transcript 27 November 2020, p 259; Transcript 30 April 2021, p 112-114; and Transnet-07-250.74

[1055] Transcript 25 June 2021, p 38-39

[1056] Transcript 29 May 2019, p 170, line 10 *et seq*

MNS Report shows that Regiments rather than Trillian had done the necessary work. It refers to: i) various emails from Regiment's personnel to Transnet; ii) a memorandum from Mr Singh and Mr Pita stating that Regiments "assisted Transnet" in negotiating with a number of potential Chinese sources of ZAR funding for the ZAR syndicated loan facility; and iii) a slide presentation by Regiments in June 2015.[1057]

734. During its investigation, MNS interviewed Ms Mosilo Mothepu (formerly employed by Regiments and then Trillian) and Mr Ramosebudi. Ms Mothepu confirmed that all the work done in relation to the ZAR club loan was executed by Regiments. Mr Ramosebudi confirmed that he had only dealt with Ms Mothepu and Mr Wood from Regiments. Even though he had drafted the memoranda recommending the appointment of and payment to Trillian and drove the process, he never dealt with any personnel from Trillian in relation to the services it supposedly provided. During his testimony to the Commission, Mr Ramosebudi conceded that the work had been done not by Trillian but by Regiments.[1058] His concession amounts to an admission that he misled the BADC, unless, of course, the members of the BADC were themselves aware of the true situation.[1059]

735. Mr Mahomedy testified that there was no documentary evidence at all confirming that Trillian had done any work on the ZAR club loan. He explained that the syndication of the loan was not a complex matter that normally would have been

[1057] See Transnet-Ref-Bundle-05474 *et seq*, which includes a list of deliverables performed by Regiments in respect of the club loan. The memorandum of 19 May 2015 from Mr Singh and Mr Pita to Mr Gama (Transnet-Ref-Bundle-05594) describing the scope of the work performed by Regiments indicates that the work supposedly reserved to Trillian was in fact performed by Regiments for which a success risk based fee was paid to Regiments. The slide presentation of Regiments dated June 2015 is at Transnet-Ref-Bundle-06698. It states at p 6702 that the transaction advisory services performed by Regiments included the funding plan preparation, execution and negotiation support in respect of the ZAR syndicated loan.

[1058] Transcript 27 November 2020, p 232; and Transcript 30 April 2021, p 118-120

[1059] Transcript 30 April 2021, p 120-121

finalised easily by the Transnet treasury on the basis of a straightforward proposal and negotiated terms with commercial banks. There was no documentary evidence indicating that Trillian had done this work.[1060]

736. When asked to comment on Mr Mahomedy's evidence, Mr Gama replied that he was not the person to talk to about this, saying "I did not get involved in these financial things". He had been informed that the work was done by Trillian and had authorised the payment of R93.48 million on what he had been told. He effectively admitted that as GCEO he authorised the payment of this substantial amount of money without satisfying himself fully about the nature of the work performed, when it had been performed, and by whom it had been performed.[1061] His stance in this regard was similar to that which he had assumed in relation to the confinement of the security services contract to GNS/Abalozi in 2009 and for which he had been justifiably dismissed as CEO of TFR.

737. In addition to the indications that the transaction advisory work charged for by Trillian had already been performed by Regiments, Trillian could not practically have done the work it was supposedly mandated to do. The engagement letter was signed on 18 November 2015. The syndicated ZAR club loan agreement was concluded five days later on 23 November 2015. Considering that there were five members of the syndicate and what would normally be involved in finalising the loan, it is inherently improbable that it was negotiated within a few days. It is hard to see how Trillian could have performed any work as the lead arranger of the loan in the time available. The task would have taken months.[1062]

[1060] Transcript 15 May 2019, p 132-133

[1061] Transcript 30 April 2021, p 116

[1062] Transcript 31 May 2019, p 169-170

738. On 12 September 2016, Regiments wrote a letter to Transnet in which it confirmed that it (not Trillian) had completed the work on the ZAR club loan by December 2015 and stated that the fee paid to Trillian was "excessive when compared with the amount Regiments has invoiced for the same work."[1063] The payment of R93.48 million to Trillian for work allegedly performed as part of the transaction advisory services was fraudulent, irregular and unjustified. The fee was paid to a company that did not do the work.

739. JP Morgan had also performed some of the services in respect of negotiating the ZAR club loan. If anything, JP Morgan's replacement by Trillian should have been only for the services that JP Morgan had not performed and by implication should have been for less than the agreed fee of R24 million payable to JP Morgan. The payment of R93.48 million to Trillian was R69 million more than the agreed amount that Transnet would have been liable to pay to JP Morgan in respect of the lead arranger and underwriting services. This deviation alone supports a finding that Mr Gama and Mr Ramosebudi probably acted fraudulently and corruptly.

740. Had the members (directors and officials) of the BADC applied their minds properly they may well have realised that JP Morgan had partnered with Regiments on this transaction and performed the services. Mr Gama, Mr Ramosebudi and the members of the BADC thus did not act in the best interests of Transnet.[1064]

741. Most significantly, the payment of 80% of Trillian's fee to Albatime confirms that the entire arrangement was part of the money laundering scheme associated with the Gupta enterprise.

[1063] Transnet-Ref-Bundle-05471

[1064] See MNS Transaction Advisors Report, paras 3.1.34 - 3.1.35

Mr Gama's links with Trillian

742. Mr Gama's involvement in the fraudulent and corrupt payment of R93.48 million to Trillian stands to be assessed in the light of his relationship with Mr Essa and the Guptas. The evidence in relation to his earlier dismissal and reinstatement, his receiving cash payments from Mr Essa, as well as Ms Hogan's evidence about President Zuma's efforts to have him appointed as GCEO, intimate strongly that he was favoured by those supporting State Capture. His appointment as GCEO of Transnet, in April 2016, took place shortly after he expedited the payment of R93.48 million to Trillian.

743. As discussed earlier, Mr Gama sought to distance himself from Mr Essa and the Guptas. He maintained that he only visited the Gupta compound once on invitation by Mr Essa, who he claims to have met only on four occasions:[1065] i) at a meeting with Regiments; [1066] ii) in a Transnet boardroom with Mr Singh in July 2015; iii) at the Gupta compound in Saxonwold in October/November 2015 – a meeting which he said he had angrily terminated and saw as an ambush by Mr Essa and a waste of time;[1067] and iv) in Dubai in January 2016 (shortly after he had approved the payment of R93.48 million to Mr Essa's company, Trillian).

744. The meeting in Dubai (where some of the Gupta businesses are based) is of most relevance to the present discussion. Mr Gama travelled to Davos, Switzerland on 17 January 2016 to attend the World Economic Forum.[1068] On his return from Davos to South Africa he stopped over in Dubai and met Mr Essa on 23 January 2016 at the Oberoi Hotel at which Mr Essa had made him a booking in a deluxe

[1065] Transcript 11 March 2021, p 44-58

[1066] Transnet-07-048

[1067] Transnet -07-049

[1068] Transcript 30 April 2021, p 19-34; and Transcript 11 May 2021, p 234-260

suite, on the account of Sahara Computers, a Gupta company.[1069] It is undisputed that Mr Essa instructed Sahara Computers to arrange the hotel booking on Mr Gama's behalf and that the invoice was sent to Sahara Computers for payment. Mr Gama however doggedly and unconvincingly insisted that he paid his own hotel bill.[1070]

745. Mr Gama's booking at the Oberoi Hotel by Sahara Computers is confirmed in an email sent by the hotel on 20 January 2016 to Mr Chawla, the CEO of Sahara Computers, who on the same day forwarded the reservation to Mr Essa. An invoice ("the first invoice") from the Oberoi Hotel for AED 4650 (including all the charges for the two-day stay) reflects that the booking was for "Mr Siyabonga Gama of Sahara Computers". The first invoice was signed by Mr Gama on 24 January 2016 when checking out of the hotel under a *pro forma* statement in the invoice which reads: "I agree that I am responsible for the payment of this bill in the event that it is not paid by the company, organisation or the person indicated."[1071] This confirms, at least *prima facie*, that at the time Mr Gama signed the bill, it had not been settled by Mr Gama and was to be paid by the company indicated, namely Sahara Computers.

746. On 2 February 2016, the Oberoi Hotel sent a composite invoice to Sahara Computers in respect of unpaid bills for stays by Mr Koko (of Eskom), Mr Mantsha (of Denel) and Mr Gama, thus again indicating that Mr Gama's bill had not been paid by him on 24 January 2016. Another composite invoice was sent by the

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[1069] Mr Gama testified that his main purpose in stopping over in Dubai was to purchase his daughter a dress – Transcript 30 April 2021, p 82 *et seq*

[1070] Transnet-07-053

[1071] Transnet 07-250.328

Oberoi Hotel to Sahara Computers on 23 February 2016 verifying that Mr Gama's bill still remained unpaid at that stage.[1072]

747. Notwithstanding this clear and convincing evidence, Mr Gama persisted with his contention that he paid the bill on 24 January 2016 when he checked out.[1073] He could not produce any other proof that he had paid the bill on 24 January 2016, nor could he remember if he had done so using his credit card (it seems unlikely that he would have had AED 4650 in cash). Had he paid the bill by credit card, the easiest way to prove it would have been through confirmation by his bank.

748. Mr Gama has not presented any evidence from his bank supporting his version, even though in August 2017 (when the bank records would have been easily accessible) a journalist (who wrote an article in September 2017 suggesting that the payment had been made by the Guptas) afforded him an opportunity to do so. Mr Gama did, however, provide the journalist with an invoice ("the second invoice" - printed in June 2017) which did not have the name of the hotel on it and gave no indication of who had paid the bill, with the journalist having been sceptical about its authenticity in his article.

749. In evidence, Mr Gama produced another invoice ("the third invoice"),[1074] which he said was emailed to him by the Oberoi Hotel on 19 February 2018, after he had requested it a few days earlier.[1075] Initially, Mr Gama adopted the position that he had sent the journalist the third invoice. This was obviously untrue (given the differences in the content and the dates of generation).[1076] He then changed tack,

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[1072] Transnet-07-250.334

[1073] Transcript 30 April 2021, p 24

[1074] Transnet-07-250.450; and Transnet-07-250.341

[1075] Transnet-07-250.447-449

[1076] Transcript 30 April 2021, p 35, lines 19-23

stating that he requested the third invoice because he had changed cell phones and did not have a copy of the second invoice he gave the journalist on his new phone.[1077] The third invoice is in Mr Gama's name, and contains a line item recording that AED 4650 was "Paid" on 24 January 2016.[1078] Mr Gama contended, in effect, that the third invoice settled any controversy about payment. This is not correct. The data in the second and third invoices (obtained in June 2017 and February 2018, respectively) reflecting that Mr Gama paid the invoice cannot be reconciled with the first invoice (signed by him when he booked out on 24 January 2016), which reflects that the invoice would be settled by Sahara Computers or with the two composite invoices issued to Sahara Computers by the Oberoi Hotel, which reflected Mr Gama's invoice was still outstanding on 2 and 23 February 2016, respectively. The first invoice, in the name of Sahara Computers and reflecting that it would settle the bill, is compelling contemporaneous evidence that the intention was that Sahara Computers, or probably Mr Essa, would pay the bill.

750. Mr Gama testified that the topic of discussion with Mr Essa at the Oberoi Hotel meeting was Mr Essa's vision to create a majority black owned management consultancy. Mr Gama stated unequivocally that no mention was made of Trillian or Regiments.[1079] He was, however, unable to hold this line upon being confronted with a newspaper article (published on 7 September 2017),[1080] which recorded that he told the journalist (in written responses to questions) that Mr Essa "raised the issue of his involvement in Trillian which was being formed as an offshoot of Regiments", and that "the expertise would remain the same as core resources

[1077] Transcript 11 May 2021, p 236, lines 17-22

[1078] Transnet-07-250.450

[1079] Transnet-07-053, para 32.6.3; and Transcript 26 April 2021, p 35, line 22 – p 36, line 5

[1080] Titled "*Transnet CEO's Dubai hotel stay – how the Guptas got the bill*" – Transnet-07-250.357

would migrate from Regiments and … the quality of the work for Transnet would be unaffected".[1081]

751. Mr Gama's desire to put distance between Mr Essa and Trillian (to whom Mr Gama had authorised payment of R93.48 million the previous month in controversial circumstances) is telling.

752. His evidence that he first came to learn that Mr Essa may have been associated with Trillian was when Transnet gave consideration to cancelling its contracts with Trillian and Regiments towards the end of 2016, in the light of the ongoing dispute between them, is equally not credible.[1082] That evidence cannot be reconciled with the memorandum of 9 May 2016 from Mr Gama to the BADC, which sought approval for the cession of the GFB contract from Regiments to Trillian, wherein (following a formal vendor approval process initiated by Transnet)[1083] the shareholding of Trillian was reflected as "Trillian Holdings (Pty) Ltd 60% … [w]holly owned by Mr Salim Essa".[1084] Mr Gama's suggestion that he just glossed over the memorandum before signing and recommending it (and was thus unaware of Mr Essa's involvement with Trillian at this time)[1085] is inherently implausible.

753. In the final analysis, it is more than unlikely that Mr Essa, the owner of a black owned consultancy (Trillian) which had recently performed under a contract concluded by Mr Gama and been paid R93.48 million in fees, the payment of which had been authorised by Mr Gama a few weeks previously, would not talk about

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[1081] Transnet-07-250.311; Transnet-07.250.361

[1082] Transcript 26 April 2021, p 36, lines 9-22

[1083] Exhibit BB 3(b), MSM-521, para 13

[1084] Exhibit BB 3(b), MSM-521.1, para 14

[1085] Transcript 11 May 2021, p 252, lines 10-12; p 253, lines 7-8

Trillian, but instead confined the conversation to a discussion in the abstract about the hypothetical formation of another black owned consultancy.[1086]

754. Mr Gama's dubious testimony about the extent of his relationship with Mr Essa must also be assessed in the light of other undisputed facts. By the time Mr Gama met Mr Essa in 2015, shortly after his appointment as acting GCEO, Mr Essa had in place the money laundering arrangement whereby 55% of the fees paid by Transnet to Regiments would be distributed through various vehicles to the Gupta enterprise. Mr Essa had also concluded several BDSAs with CSR and CNR on behalf of Tequesta and Regiments Asia in respect of the various locomotive procurements, and in terms of which his companies would be paid 20-21% kickbacks, most of which would be laundered to the Gupta enterprise. Mr Gama had accompanied Mr Essa to a meeting with Mr Rajesh Gupta at the Gupta compound in Saxonwold in November 2015, shortly after which he authorised a corrupt and fraudulent payment of R93.48 million to Trillian in early December 2015, 55% of which was channelled to the Gupta enterprise. A few weeks later, Mr Gama met Mr Essa in Dubai where his luxury hotel accommodation was probably paid for (or was intended to be paid) by the Gupta enterprise. Two months later Mr Gama was promoted to GCEO. Added to that is the evidence that Mr Gama received substantial amounts of cash from Mr Essa during 2017.

755. The undisputed evidence alone establishes strong probable cause (reasonable grounds to believe) that Mr Gama and Trillian were associated with the Gupta racketeering enterprise, and by authorising the wholly unjustifiable payment of R93.48 million to Trillian, Mr Gama acted corruptly and participated in the conduct of the affairs of the enterprise through a pattern of racketeering in contravention of

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[1086] Transcript 26 April 2021, p 39; Mr Gama eventually seems to have conceded as much – see Transcript 30 April 2021, p 80-81

sections 3 and 13 of PRECCA and various provisions of Chapters 2 and 3 of POCA.

The interest rate swaps on the ZAR club loan

756. Dr Bloom, the financial expert, analysed the risks associated with the CDB loan for USD2.5 billion and the ZAR12 billion club loan and the mechanisms used to mitigate those risks insofar as they related to interest rate and exchange rate fluctuations, credit risks and the manner in which these risks were addressed.[1087] The Transnet Financial Risk Management Framework ("FRMF") permits hedging (or de-risking) of funding in a foreign currency to mitigate potential risks and deals with how the risks associated with foreign borrowing and financing risks are managed. The risks that needed mitigation in respect of the Chinese locomotive procurement were the fluctuating exchange rates, the credit risks of a default on interest payments attributable to the borrower, a contingent default attributable to circumstances beyond the borrower's control, and the risk of increased financing costs (interest rate fluctuations). Hedging instruments (swaps) were used to hedge both the exchange rate and interest rate risks on the ZAR club loan.[1088] The instruments used particularly in relation to the ZAR club loan were applied corruptly to advance the interests of the Gupta racketeering enterprise.

[1087] Exh BB8(d), JB-01 *et seq*; and Transcript 31 May 2019, p 85-99. There were three types of risk applicable to the transaction. The first was the possible upward movement in interest rates where the capital is borrowed at a variable rate, resulting in an increase then in the cost of borrowing. The second risk was the possible fluctuations in the exchange rate, as the USD1.5 billion CDB loan was borrowed in USD to be transferred intermittently to South Africa and converted into ZAR. It was a term of the loan that repayment would be in USD with the result that if the ZAR weakened, then the cost of borrowing would also increase. The third risk was the two categories of credit risk: default by Transnet and default factors beyond Transnet's control.

[1088] Transcript 31 May 2019, p 177-212

757. On 3 December 2015, days after the conclusion of the ZAR club loan on 23 November 2015 at a floating rate, Mr Ramosebudi submitted a memorandum to Mr Pita, then still the acting GCFO, seeking approval for hedging the interest rate exposures from a floating to a fixed basis and permission to instruct Regiments to execute the hedges with Transnet approved counterparts. Mr Gama approved the request. The execution costs of the hedges by Regiments would be all inclusive in the rate of the interest rate swap.[1089]

758. Two tranches of interest rate swaps were executed by Regiments on the ZAR club loan with Nedbank as the counterparty, to the significant prejudice of Transnet. R4.5 billion of the ZAR club loan was swapped to a fixed rate of 11.83% for 15 years on 4 December 2015 and three months later R7.5 billion was swapped to a fixed rate of 12.27% for 15 years on 7 March 2016. The CDB debt was also swapped in cross-currency swaps from USD to ZAR at each draw down. There was no significant adverse effect for Transnet in the cross-currency swaps other than the fact that these transactions could have been executed by the Transnet treasury, most likely at a lower cost. Dr Bloom and Mr Mahomedy testified at length about the prejudicial nature of the interest rate swaps.[1090] Their evidence accords in all material respects.

759. An interest rate swap is a transaction between two parties in which fixed and floating interest rate payments on a notional amount of principal debt are exchanged over a specified time. One party pays interest at a fixed rate and receives interest at a floating rate. The other pays interest at the floating rate and receives the fixed-rate payment. The relationship in the hedge is between the

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[1089] Transnet-Ref-Bundle-07528; and Transnet-Ref-Bundle-06853, para 11.2

[1090] Exh BB8(d), JB-01 *et seq*; Transcript 31 May 2019, p 85-99; Exh BB3(a); MSM-019-023; and Transcript 16 May 2019, p 3-83

borrower (Transnet) and the counterparty (Nedbank) and does not involve the lender (the syndicate). The lender (the syndicate) will still receive the original interest rate as agreed, namely the floating interest rate. The borrower (Transnet) and the counterparty (Nedbank) enter into an arrangement which is completely separate from the static arrangement of the original loan. The counterparty to the swap arrangement (Nedbank) has nothing to do with the lender (the syndicate). The parties do not actually pay the rates to each other. The amount payable using the floating rate and the amount payable using the fixed rate are calculated, these are then reconciled and only the net portion is paid to the relevant party. This mechanism allows for a net cash flow of the interest payments to either of the parties. A swaps dealer (Nedbank) thus normally will profit from the difference between the fixed rate that it is willing to pay and the lesser floating interest rate which they are obliged to pay in terms of the swap.

760. In this case, the lender on the ZAR club loan, the syndicate, lent Transnet R12 billion, being the principal debt, against floating interest rates, meaning that the interest payable on the loan was subject to a fluctuating rate of interest. However, because Transnet supposedly had concerns about the risk of increasing interest rates (which would have increased borrowing costs and impacted on its cash flow) within days of agreeing the loan at a floating rate, it opted to swap the floating interest rate for a fixed rate by entering into an interest rate swap with Nedbank as the counterparty. Transnet then became liable to pay a fixed interest rate to Nedbank which in turn assumed the obligation to pay the floating rate to the syndicate, the lenders of the ZAR club loan. By fixing the rate and thus swapping it from a floating rate, Transnet aimed to transfer the risk to the counterparty, in this case Nedbank. If interest rates (over the 15-year period of the loan) rise beyond the fixed rate, then Nedbank will bear the cost of that increase. If, on the other

hand, the floating rates remained below the fixed rate, the arrangement will cause a loss to Transnet, as in fact happened.

761. On 2 December 2015, Mr Smit, Transnet's Deputy Group Treasurer, compiled a memorandum for Mr Ramosebudi and Mr Pita dealing with and making a recommendation concerning the proposed interest rate swaps.[1091] Mr Smit made essentially four points: i) if Transnet needed fixed rates when it was raising the club loan it should have raised a fixed rate club loan then not a floating rate loan; ii) if Transnet did an interest rate swap it would tie up a big proportion of the credit lines it needed; iii) it would be costly; and iv) the extra 2% was going to put pressure on the cash interest cover ratios. He therefore recommended that the ZAR club loan not be switched to a fixed rate exposure by means of an interest rate swap.[1092]

762. Shortly after receiving Mr Smit's memorandum on 2 December 2015, Mr Pita replied indicating his agreement with Mr Smit and asked Mr Ramosebudi for his view. A few hours later, Mr Ramosebudi forwarded the email correspondence to Mr Wood at Regiments remarking: "I need to sort this one out".[1093] When asked during his testimony what he meant when he told Mr Wood that he would sort the matter out, Mr Ramosebudi dissembled and falsely equivocated.[1094] His true intention appears in an email (overriding Mr Smit) sent to Mr Pita 18 minutes after he wrote to Mr Wood, in which he argued that it was prudent in a high inflation environment and volatile exchange rate to fix most of the commitment and promised to send a revised proposal.[1095]

[1091] FOF-04-572; Transcript 27 November 2020, p 262-265

[1092] FOF-04-575

[1093] FOF-04-578

[1094] Transcript 27 November 2020, p 267-271

[1095] FOF-04-580

763. In his evidence before the Commission, Mr Ramosebudi was unable to provide satisfactory answers to Mr Smit's reservations about the proposed interest rate swaps. This suggests that he had reasons other than the interest of Transnet for wanting an interest rate swap that in the end benefitted only Regiments and the Gupta enterprise.[1096] Regiments ultimately received R229 million from these interest rate swaps and others, over R200 million of which was laundered on to the Gupta enterprise to fund the purchase of the Optimum Coal Mine.[1097]

764. A second memorandum[1098] was then prepared seeking approval from the acting GCFO (Mr Pita) to hedge the interest rates exposures from a floating to a fixed basis for the amount of R12 billion and to instruct Regiments to execute the hedges with Transnet's approved counterparts. Paragraph 1.3 of the memorandum provided that the execution cost of hedges by Regiments would be all inclusive in the rate of the interest swap. This meant that the cost of those swaps in terms of the fee to Regiments would be hidden in the rate. The spread on the swap would go up by 20 bps for the benefit of Regiments. This added the R229 million fee[1099] in addition to the amount of R265.5 million (excluding VAT) paid to Regiments for advisory services. More than R200 million of the additional fee was laundered on to secure loans to Tegeta Resources and Exploration of R104.5 million and R152

[1096] Transcript 20 November 2020, p 272-276 – The precise amount paid to Regiments in fees for the interest rate swaps on the ZAR club loan is unknown. An associated company, Regiments Securities received five payments from the Transnet Second Defined Benefit Fund ("TSDBF") (which was managed by another associated company, Regiments Funds Managers) as follows: i) R56.72 million on 4 December 2015; ii) R1.09 million on 8 March 2016; iii) R63.92 million on 8 March 2016; iv) R67.4 million on 4 April 2016; and v) R39.85 million on 11 April 2016. The total paid was R228 983 985 – Exh VV10-SCFOFA-702, paras 98.1-98.5. The dates of the first three payments coincide with the dates of the interest rate swaps on the ZAR club loan. The other payment dates coincide with other interest rate swaps (discussed later) in which the TSDBF acted as the counterparty in relation to R11.3 billion of debt unrelated to the 1064 locomotive transaction. The TSDBF had no role in the ZAR club loan swaps yet may have paid the fee to Regiments Securities in respect of them.

[1097] Transcript 27 November 2020, p 266; Exh VV10-SCFOFA-438 – 445 paras 781 - 798 Table 259

[1098] FOF-04-584

[1099] Transcript 27 November 2020, p 284-285

million from the Bank of Baroda to part finance the purchase of the Optimum Coal Mine.[1100]

765. The proposal was approved by Mr Ramosebudi and Mr Pita on 3 December 2015 and the first interest rate swap (at a fixed rate of 11.83%) for the tranche of R4.5 billion was executed the next day. The ZAR club loan was signed on 23 November 2015 subject to floating interest rates, and then, on 4 December 2015, a mere week after entering into the ZAR club loan, the first interest rate swap was executed. The motivation for the swap was supposedly that short term interest rates were expected to increase over the medium period, posing a serious risk to Transnet debt portfolio, and the risk of a volatile currency, and thus it was important to manage the interest rate risk to contain its negative impact to the cash interest cover ratio.[1101]

766. The interest rate swap on the ZAR club loan by Transnet was highly imprudent for two reasons. Firstly, the ZAR club loan was negotiated at floating interest rates and literally within days of the agreement having been concluded the interest rate swaps were entered into changing the rates to expensive fixed rates. If there was concern about risk arising from interest rates a fixed rate should have been agreed to start with. Secondly, the fixed interest rate was set at a high level over a long period of time in an environment where it was likely that interest rates would decline and thus a floating interest rate was more beneficial to Transnet. The floating rates never exceeded the fixed rates and Nedbank's assumption that the floating rate would remain low and go lower, which seemed to be fairly predictable at the time, held true. Dr Bloom presented a graph illustrating that the floating rates did not reach the fixed rate level of 11.83% (the agreed fixed interest rate in terms

[1100] Exh VV10-SCFOFA-438 para 781 – 445-Table 259

[1101] FOF-04-585

of the interest rate swap) at any time between 1 December 2015 and 1 January 2018. Thus, instead of Transnet paying the floating rate which ranged between 8-10%, Transnet ended up paying a much higher rate of interest throughout that period.[1102]

767. In interest rate swaps the dealer (in this case Nedbank) profits not only from the fluctuations between the fixed rate and the floating rate, but benefits also from the difference between the market rate and the negotiated rate. The market rate is the rate at which capital can be borrowed in the market, and the negotiated rate is the rate at which the interest rate swap is concluded with the counterparty. The difference is referred to as the "delta" which is part of the profit that the dealer makes. The delta seeks to compensate for the counterparty risk by adding a couple of bps (a premium) to the fixed base rate. At the time of the conclusion of the ZAR club loan, the floating rate was between 9.18% and 9.22%.[1103] On 4 December 2015 the mid-market blended fixed rate was 11.16%. Regiments facilitated an interest rate swap at a fixed rate of 11.83%. That was 67 bps more than the mid-market blended rate at the time. Had Transnet concluded the loan on a fixed rate in November 2015, rather than at a floating rate, it probably would have paid the mid-market blended rate of 11.16%.

768. Regiments played the role of executing agent, being the party that executes the transaction or the swap every quarter.[1104] There were no special features to the transaction that justified the use of a service provider to execute the swaps. The swaps were so-called "vanilla swaps". Hence, the appointment of Regiments as an

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[1102] See Exh BB8(d), JB-36; and Transcript 5 June 2019, p 83 *et seq*

[1103] Transcript 5 June 2019, p 29; and Exh BB8(d), JB-43

[1104] Transcript 31 May 2019, p 207

executing agent was not necessary.[1105] Regiments nevertheless received a commission, or an additional percentage, for every trade or every swap that it did.

769. The decisions regarding the interest rate swaps were not consistent with the FRMF which dictates that the decision to secure funding on a fixed or floating interest rate should be taken at the time of concluding the funding transaction (at the source) to avoid unnecessary costs of revising the position at a later date. Had this been done in this instance, Transnet would have saved a substantial sum of money.[1106] The decisions were also inconsistent with its fixed to floating debt policy. Transnet had previously adopted a "fixed rate" strategy as a matter of practice. The floating to fixed rate ratio of the Transnet debt book stood at 60%-85% (fixed) and 40%-15% (floating) in March 2012. In February 2013 the fixed rate strategy changed to 70%-90% (fixed) and 30%-10% (floating). Had Transnet stuck to this policy, the ZAR club loan would have been entered into on a fixed interest rate basis.

770. The argument by Mr Ramosebudi that short term interest rates were forecast to increase relied inappropriately on a two-year view (for 2016 and 2017 - based on forecasts from the Bureau for Economic Research at Stellenbosch University) in respect of a 15-year loan. The forecast of interest rates is based on various modelling approaches which take into account various variables. The variables that were considered in determining the decision to enter into the ZAR club loan on a floating rate would not have varied in a matter of days.[1107] The decision to first agree to a floating rate for 15 years and then a few days later to fix a very substantial portion in one tranche was therefore unusual[1108] and was done at great

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[1105] Transcript 5 June 2019, p 19

[1106] Transcript 5 June 2019, p 80-90; Exh BB8(d), JB-38-39.

[1107] Transcript 5 June 2019, p 64 *et seq*

[1108] Transcript 5 June 2019, p 65-66

cost to Transnet.[1109] The only notable consequence in having done the interest rate swap in the manner it was done and the timing thereof, was that significant fees became payable to Regiments and Nedbank gained significant cash flow benefits.[1110]

771. The justification for making the swap was baseless for a few reasons. Firstly, the decision of Transnet to lock itself into the interest rate swap agreement for 15 years assumed an environment of higher interest rates over a period of 15 years. Transnet assumed a steep increase in the trajectory of long-term interest rates. There was no indication at that point in time and to date that such dramatic upward movement in interest rates would apply.[1111] It is not possible to predict interest rates so far into the future. Secondly, to minimise the fees payable to the execution agent and counterparty, a phased approach of swapping in small increments (based on evolving market conditions or when circumstances dictated) would have been more prudent.

772. The floating rate in respect of the second tranche of R7.5 billion (swapped on 7 March 2016) was between 9.617% and 9.717%. The mid-market blended fixed rate was 11.444%. The interest rate swap provided for a fixed rate of 12.27%, - 83 bps more than the mid-market blended rate.[1112] Transnet thus significantly overpaid for this swap too.

773. On 16 March 2016 Mr Ramosebudi wrote to Mr Moss Brickman at Nedbank specifically confirming that the interest rate swap on the second tranche was

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[1109] Transcript 5 June 2019, p 50-60; and Exh BB8(d), JB-29-33

[1110] Transcript 5 June 2019, p 80

[1111] Transcript 5 June 2019, p 74 *et seq*; and Exh BB8(d), JB-34

[1112] Transcript 5 June 2019, p 96; and Exh BB8(d), JB-44

executed at 12.37%, being 95 bps over the then mid-market value of 11.42%.[1113] Mr Brickman may have wanted a letter like this because there could be questions about a swap that was priced at 95 bps over mid-market value and he wanted confirmation that Transnet was aware that this was the case and agreed to it.[1114]

774. Looking at both interest rate swaps, it appears that the difference between the fixed to the floating rate on both swaps was exactly the same, approximately 2.65%. This was not in accordance with ordinary practice. Regiments and Nedbank profited from this excessive spread.[1115] Regiments would have known that the unnecessary interest rate swaps would result in it receiving significant fees.

The prejudice suffered by Transnet from the interest rate swaps on the ZAR club loan

775. Dr Bloom presented a table outlining the losses incurred by Transnet entering into these questionable transactions.[1116] The realised total negative cash flow for Transnet resulting from the first interest rate swap on the tranche of R4.5 billion was R299.3 million as at 14 May 2019, while the total negative cash flow for Transnet on the interest rate swap of R7.5 billion was R551.2 million. This translates into a total negative interest rate payment of R850 538 508. This amount of almost R1 billion would not have been payable had Transnet not effected the interest rate swaps. The table also reflects that the amount of the cost of exit[1117] (an unrealised negative cash flow) as at 14 May 2019 would be R980 478 025 in

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[1113] FOF-04-589

[1114] Transcript 27 November 2020, p 287

[1115] Transcript 5 June 2019, p 98-99

[1116] Exh BB8(d), JB-37; and Transcript 5 June 2019, p 86 *et seq*

[1117] The cost of exit is the cost that would be incurred at any point in time if the parties to the interest rate swap (Transnet and its counterparty Nedbank) were to agree that Transnet could exit the arrangement. The liability that would arise, the cost of exit, would be the amount that Nedbank would be able to claim as the amount it would have earned on the balance of the term.

respect of both interest rate swaps. In the result, the realised negative cash flow together with the unrealised cost of exit totalled an amount of R1 831 016 534.

776. Thus, Transnet incurred a realised loss of R850 million from December 2015 until 19 May 2019. Given the trajectory of interest rates since that time and going forward, it is likely that the full loss of R1.8 billion will be realised by Transnet. In other words, Transnet incurred a potential liability of more than R1.8 billion by reason of having entered injudiciously or imprudently into the interest rate swap arrangements negotiated and executed by Regiments.[1118]

777. Dr Bloom also presented a graph indicating Transnet's key debt points comprising a comparison between the interest rate payable in respect of the two tranches of R4.5 billion and R7.5 billion at the fixed rates agreed under the swap and the overall cost of debt paid by Transnet.[1119] The purpose of the graph was to illustrate how the amounts paid in respect of the interest rate swaps related to the overall cost of debt on average in Transnet.

778. The weighted average cost of debt paid by Transnet in the three-year period between 1 September 2015 and 1 March 2018 was approximately 9.4% to 10.7%. This amounted to a weighted average of 10.23% for the entire period. The graph shows that there was a marked increase in the cost of debt that Transnet was paying subsequent to the interest rates swaps in which it significantly increased its fixed rate debt.[1120] From 1 June 2016 until 1 March 2018 Transnet paid significantly more than the average rate for its debt. On the first interest rate swap on R4.5 billion, in respect of which Transnet was paying 11.83% as a fixed rate, it paid 1.6% more than its average rate of debt, which was 10.23%. In relation to the

[1118] Transcript 5 June 2019, p 86 *et seq*

[1119] Transcript 5 June 2019, p 101 *et seq*; and Exh BB8(d), JB-45

[1120] Transcript 5 June 2019, p 107

second tranche, the interest rate swap in relation to R7.5 billion, upon which Transnet paid a fixed rate of 12.27%, Transnet paid over 2% more than its average rate of debt.

779. Dr Bloom questioned the entire rationale of the interest rate swaps. Interest rates in relation to the swaps would have to become extremely high for an extended period of time before Transnet will be able to recoup the losses that it has incurred in relation to these interest rate swaps. [1121]

780. Shortly after Mr Mahomedy and Dr Bloom had testified before the Commission, Mr Neil McCarthy, the Executive Head of Risk of Corporate and Investment Banking at Nedbank, filed a statement dated 14 June 2019 with the Commission, dealing with the interest rate swaps and the evidence of Mr Mahomedy.[1122] In it he confirmed that Nedbank had worked closely with Regiments in arranging the interest rate swaps on the basis of a mandate signed by Mr Singh on 31 July 2014 appointing Regiments as an advisor in respect of deal structuring, financing and funding options. He said that Transnet and Regiments had always contemplated the possibility of interest rate swaps and contended that the arrangement was not unusual. He also said that at the time the swaps were arranged, Nedbank received no objection from Transnet's treasury about them and they were contractually agreed and legal. He acknowledged that the price of the swaps was above the norm but emphasised that Nedbank played no part in the negotiation of the fees paid to Regiments. He also made no mention of the Regiments money laundering scheme, possibly because he had no or insufficient knowledge of it.

[1121] Transcript 5 June 2019, p 134-135

[1122] SEQ 11/2019-019. On 28 August 2020, after having abandoned its application to lead oral evidence and cross-examine Mr Mahomedy (which had been granted), Nedbank was granted leave to have Mr McCarthy's affidavit admitted into evidence.

The cross-currency and credit default swaps

781. The cross-currency swaps arranged by Regiments were also problematic. A cross-currency swap was necessary to hedge Transnet's liability to repay the loan in the currency in which it was received. A cross-currency swap is an off balance sheet (over the counter) transaction in which two parties exchange principal (capital portion of the loan) in different currencies. The hedge takes the liquidity risk out of the equation.

782. The CDB loan was arranged as a floating rate loan denominated in USD with periodic draw-downs that occurred to pay either CNR or CSR in respect of the 1064 locomotive procurement. The LSAs between Transnet and CNR and CSR provided for payments to be made in ZAR. Consequently, the CDB debt facility needed to be swapped from USD to ZAR at each drawdown. Transnet accordingly entered into hedging transactions with JP Morgan in the form of a series of cross-currency swaps. JP Morgan in this case acted as the sole hedge counterparty to lead and underwrite the equivalent ZAR amount for a loan of USD1.5 billion.

783. There were two troublesome issues here. Firstly, the need for some of the services related to the forex hedging was questionable. There was sufficient capacity and know-how within the Transnet dealer room to price swap structures and to execute the cross-currency swaps. No need existed for external advice due to the nature of the swap being simple or standard (vanilla) swaps. Secondly, the payment of R7.5 million to Regiments as a contingency fee for advisory services in relation to structuring and arranging the cross-currency swaps was unjustified and thus wasteful and irregular expenditure. It is unclear why Regiments should have been paid this amount. The payment had no legal basis. The forex hedging contract was between Transnet and JP Morgan, which was appointed to deal with structuring

and executing the cross-currency swaps. Had Regiments performed any of the work on the cross-currency swaps as JP Morgan's SDP, JP Morgan would have invoiced the work and payment to Regiments would have been an internal matter between JP Morgan and Regiments and not between Transnet and Regiments. Moreover, the agreement to pay Regiments an amount of R166 million as a so-called success or performance fee arguably included R7.5 million for advice on the cross-currency swaps.[1123]

784. Transnet and JP Morgan also had an agreement in terms of which JP Morgan would execute credit default swaps and contingent credit default swaps in relation to the CDB loan. A credit default swap is contingent upon two triggers. The first is an ordinary credit default swap where the buyer receives the face value of the bond or loan from the protection seller in the event of a default. This is termed a credit event, such as defaulting on interest payments. The other trigger is specific to the contingent part of the credit default swap and is another event usually in relation to a macro-economic variable. A contingent credit default swap is designed to provide cover against unfavourable market movements.[1124]

785. In order to hedge the CDB loan and mitigate the risk, there was an apparent need for the application of a contingent credit default swap, introduced at each capital drawdown. Regiments charged a fee of R5.7 million. As with the cross-currency swap, there was no legal basis for Regiments to be paid a fee for the contingent credit default swaps.

786. Regiments claimed to have structured and arranged the contingent credit default swap structure to effectively reduce the ZAR interest rate payable on the loan

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[1123] Transcript 5 June 2019, p 30; see also Transnet-Ref-Bundle-06857, para 12.1

[1124] Transnet-Ref-Bundle-06857, para 12.2; and Transcript 5 June 2019, p 41 *et seq*

structured by Transnet. According to Dr Bloom, this was not true as the intellectual property to conceive, implement and execute the contingent credit default swap structure was introduced by JP Morgan in terms of their agreement with Transnet. There could be no justification for any payment to Regiments for the work they purported to have done.[1125] The financial risk mitigation instrument that was applied in this instance was highly complex and JP Morgan would have used its own intellectual property to execute this instrument. It is unlikely that Regiments could have added any value, yet it was paid the amount of R5.7 million for the work that JP Morgan was appointed to do.

The interest rate swaps involving the Transnet Second Defined Benefit Fund

787. Regiments also executed other interest rate swaps on Transnet debt not directly related to the financing of the 1064 locomotive acquisition.[1126] The decision was to hedge R11.3 billion of other Transnet debt at a floating rate by swapping it for a fixed rate of interest. The counterparty in this instance was the Transnet Second Defined Benefit Fund ("TSDBF").

788. This transaction was extraordinary because Transnet was in effect betting against its own pension fund in the hedging market. An interest rate swap always involves one party winning and one party losing. One party bets on a rise in interest rates and the other on a decline in interest rates.[1127] As it turned out, in this instance the TSDBF and its members benefited considerably at the expense of Transnet.

789. These swaps were done during the tenure of Mr Shane as the chairperson of the TSDBF. Indeed, there is evidence suggesting strongly that the appointment of Mr

[1125] Transcript 5 June 2019, p 40 *et seq*; and Transnet-Ref-Bundle-06857, para 12.2.3

[1126] Transcript 5 June 2019, p 111 *et seq*

[1127] Transcript 5 June 2019, p 115

Shane as Chairperson of the TSDBF was orchestrated by Mr Essa specifically to ensure that the Trustees of the TSDBF appointed Regiments Fund Managers (Pty) Ltd, a wholly owned subsidiary of Regiments, to manage a R9 billion portfolio of TSDBF for the benefit of Mr Essa and the Gupta family.[1128] At the time of the transactions, Regiments Fund Managers (Pty) Ltd) was the fund manager of the TSDBF, while Regiments was the transaction advisor and the execution agent for the swap. Regiments executed the transaction on behalf of Transnet and at the same time was advising Transnet while its associated company was in control of the investments of the pension fund. This gave rise to a clear conflict of interest.

790. The interest rate swaps involving the TSDBF comprised four separate deals relating to four different tranches of capital debt involving different loan counterparties. Dr Bloom presented a schedule indicating that the TSDBF had benefitted by an amount of R720.8 million at the cost of Transnet (the realised cash flow loss) as at 14 May 2019. The cost of exit as at 14 May 2019 (unrealised) was R815.68 million. The total realised and unrealised loss was thus about R1.536 billion. In other words, this swap has already cost Transnet R720 million and over the full period of the swap transaction on present day calculations will cost R1.536 billion.[1129] The two companies in the Regiments stable benefitted handsomely from this transaction. The group was paid an advisory fee for doing the swap, a cut of the profits made by the pension fund as an execution fee and a pension fund management fee.

791. Regiments Fund Managers started managing assets of the TSDBF in October 2015. Its mandate was terminated on 30 September 2016 after it was discovered

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[1128] Exh VV10-SCFOFA-069, para 60, Exh VV10-SCFOFA-690, paras 69-71, para 97.7 and Exh VV10-SCFOFA-811

[1129] Transcript 5 June 2019, p 125-129; and Exh BB8(d), JB-50

that Regiments Fund Managers had allocated itself fees of R228 million from the TSDBF relating to the various interest rate swap transactions.

792. The MNS Report commented on the fees paid to Regiments by the TSDBF as follows:

> "Regiments would have been paid 20bps as an execution fee totalling R112.4 million for the swaps related to the Transnet debt… Regiments received or drew R227.8 million from TSDBF for executing the swap transactions on 30 March 2016 and 8 April 2016 at a fee of 20 bps. The alignment of the fee paid to Regiments and the approach adopted for the analysis in this report, indicate that Regiments received 40.537 bps and not 20bps as per the memorandum (dated 28 August 2017 and prepared by the group treasurer) for the execution of each of the four swaps related to the TSDBF as counter party. This is well above market norms where transactions of this size may attract a fee of less than 1 basis point based on yield, and is therefore highly irregular and unwarranted."[1130]

793. In conclusion, all the interest rate swaps were probably planned principally to benefit Regiments and were achieved through the side-lining of Transnet's treasury.[1131] Transnet treasury had and still has the expertise to handle transactions of this kind, interest rate swaps, without the support of external transaction advisors or execution agents such as Regiments. The relevant transactions were typically vanilla (stock-standard) swaps. The treasury dealing room has done and does these periodically without external assistance.

[1130] Transnet-Ref-Bundle-06858, paras 13.3-13.6 – As discussed earlier, the total paid to Regiments for the interest rate swaps was R228 983 905 and was in respect of both the ZAR club loan and the R11.3 billion debt – despite the TSDBF having no involvement in the ZAR club loan interest rate swap.

[1131] Transcript 5 June 2019, p 137-143

794. The TSDBF went on to sue Regiments Fund Managers for amounts paid to it. In November 2019, Regiments settled the TSDBF action by paying it an amount of R500 million.[1132]

795. Regiments received an additional R228 million from the interest rate swaps. Part of these payments was transferred via the laundering vehicles to the Gupta enterprise. There are reasonable grounds to believe that in facilitating the interest rate swaps and incurring the fees and substantial losses associated with them, Mr Ramosebudi and Mr Pita acted in contravention of section 50 of the PFMA by acting without fidelity, integrity and not in the best interests of Transnet in managing its financial affairs. The payments and losses were therefore possibly the proceeds of unlawful activity as defined in section 1 of POCA. Further investigation is required to determine whether Regiments, Trillian, Mr Ramosebudi, Mr Pita, Mr Wood and others corruptly participated in the conduct of the affairs of the Gupta enterprise through a pattern of racketeering activity in relation to these transactions.

796. These findings are to the effect that there are reasonable grounds to believe that the mentioned persons violated the Constitution and other legislation and were involved in corruption of the kind contemplated in TOR 1.4 and TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

[1132] FOF-09-070-72, paras 61-71

CHAPTER 9 - THE MANGANESE EXPANSION PROJECT

797. Two witnesses before the Commission gave evidence of serious allegations of malfeasance in Transnet's Manganese Expansion Project ("MEP"), namely: Ms Deidre Strydom, a senior employee with long service at Transnet, and Mr Henk Bester, an employee of the Hatch group of companies ("Hatch"), a service provider to the MEP.

798. Mr Bester is a qualified professional civil engineer and an expert on railways. He worked for Spoornet between 1990 and 1998 before joining R&H Railway Consultants where he was Managing Director until 2008. He joined Hatch in 2008 as a senior engineer and later became the Global Director and Managing Director Rail responsible for Africa. Hatch is a global engineering company with expertise in rail in the mining, infrastructure and energy sectors. The head office of Hatch is in Canada and it has offices around the globe including in South Africa.[1133]

799. A third witness, Mr Gerhard Bierman, the former CFO of Transnet Capital Projects ("TCP"), filed an affidavit relating to the MEP, but did not testify before the Commission as he has emigrated to Australia.[1134]

800. The evidence of wrongdoing given before the Commission in relation to the MEP has a narrow scope. Essentially, it is contended that persons associated with the Gupta enterprise sought improperly to benefit from the project by seeking appointment as supplier development partners ("SDPs"). The rationale, financing and other commercial aspects of the project have not been directly challenged as corrupt or improper, though there is some suggestion that the budget may have

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[1133] Transcript 20 October 2020, p 12 *et seq*

[1134] Mr Bierman's statement was admitted provisionally - Transcript 20 October 2020, p 79

been inflated to accommodate payments for unqualified SDPs. Nonetheless, it will be helpful to examine the relevant details of the MEP to gain a better contextual understanding of the alleged wrongdoing.

The scope and purpose of the MEP

801. In 2009 Transnet decided to increase export capacity via the manganese ore terminal in Port Elizabeth (PE) to 5.5 mtpa. It was evident that demand for capacity would continuously exceed supply as a result of the unprecedented growth in manganese exports due to South Africa being viewed as a lucrative supply market to China. Transnet conducted feasibility studies into the investment case for expanding capacity to 16 mtpa by 2018/19 through the Port of Ngqura in the Eastern Cape. The MEP came to be seen as an anchor programme of the Market Demand Strategy ("the MDS"), aimed at expanding and modernising the country's ports, rail and pipelines infrastructure to promote economic growth in South Africa.[1135]

802. The MEP proceeded in two phases, Phase 1 and Phase 2. On 17 October 2012, the Group Exco recommended that the board approve the execution of the first two phases to expand the rail network capacity from the Northern Cape to the Port of Ngqura to support the MEP from 5.5 mtpa to 16 mtpa at a cost of R2.4 billion.[1136] An MEP Steering Committee was constituted of which Mr Gama, CEO of TFR, and Mr Singh, the GCFO, were members. Following the completion of the Phase 2 feasibility studies, the MEP Steering Committee endorsed the creation of a centralized Programme Director role for the MEP to which Ms Strydom was appointed and tasked with setting up and managing the MEP structure. She was

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[1135] Transcript 20 October 2020, p 15 *et seq* and p 157 *et seq*

[1136] Annexure DS 1, Exh BB20, BB20-DS-39

also required to deliver and maintain the integrity of the approved business case. When she became the MEP Programme Director, Ms Strydom reported to Mr Krish Reddy, the GM: Group Planning.

803. McKinsey developed a standard for capital execution for Transnet called the Platinum 20 Standard, which recommended that the capital expenditure for rail and port should be centralised so there should be from a Group perspective a central authority responsible for the management of the oversight of the capital expenditure reporting, etc. This was a departure from previous practice whereby the operating divisions were accountable for the management of the capital expenditure associated with projects.

804. Although the platinum standard recommended that the programme director should have control over capital expenditure that did not happen in the MEP. Ms Strydom had no financial delegation to manage the scope, cost and schedule of the MEP.[1137] TCP was appointed by the operating divisions to execute the respective capital projects on their behalf. This included the management of the transformation and economic development targets approved in the procurement strategy that accompanied the business case.

The proposed confinement of Phase 1 and the SD criterion

805. Phase 1 of the MEP was managed by TCP. During 2011, Hatch Goba was appointed by TCP via a task order under an existing "Hatch Mott McDonald Goba" contract[1138] to conduct the Front-End Loading ("FEL") 2 and 3 phases of Phase 1,

[1137] Transcript 20 October 2020, p 155; Exh BB20, BB20-DS-07, para 18

[1138] Hatch Goba (which later became only Hatch in South Africa) was appointed by TFR in 2009 as an extension to the Hatch Mott and Goba Contract ("HMG") to assist in options for exporting manganese to Port Elizabeth for volumes up to 12 mtpa. This project was a precursor to Phase 1 and included projects such as the manganese

i.e. rail and port pre-feasibility and feasibility studies supporting the MEP. Most of the outputs for the studies were concluded towards the end of 2012.

806. Given the materiality of the estimated cost of the expansion and the requirements to spend further time on scrubbing the overall cost and schedule, a decision was taken by the Transnet capital projects committee ("CAPIC") towards the end of 2012 to support the ring-fencing and acceleration of critical rail operational and safety related work packages where environmental authorisations had been received. The project was named "Rail Phase 1" or "MEP 1 (Phase 1)".[1139]

807. A memorandum dated 11 January 2013 was submitted by Mr Molefe to the meeting of the BADC of 29 January 2013, chaired by Mr Sharma,[1140] recommending an initial R2.38 billion "no regrets" rail infrastructure investment "in support of the overall manganese ore expansion programme from 5.5 to 16 mtpa". The BADC approved the "no-regrets" investment in the amount of R2.4 billion.[1141]

808. In terms of a memorandum submitted to Mr Molefe by Mr Charl Moller, Group Executive, TCP, dated 6 August 2013, Phase 1 comprised the partial doubling of the line section between Kimberley and De Aar, and the extension of the Rosmead passing loop at an estimated cost of R2.38 billion (equating to the "no-regrets" amount approved by the BADC in January 2013). The Engineering Procurement and Construction Management (EPCM) cost was stated to range between 15-18% of project cost and calculated to be R220 million. Following an internal risk review,

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5.5 mtpa expansion project specifically relating to the Hotazel Yard in the Northern Cape – see Exh BB19, BB19-HB-003, para 10

[1139] Exh BB20, BB20-DS-13, para 33

[1140] Annexure DS 1, Exh BB20, BB20-DS-31

[1141] Annexure DS 1, Exh BB20, BB20-DS-29

TCP recommended that the EPCM scope of the FEL 4 phase of Phase 1 (in which the project is executed to deliver the defined outcomes) be confined to Hatch.

809. Since the value of the transaction was below R250 million, final approval of the confinement resided with Mr Molefe, the then GCEO, in terms of the delegation of authority framework and thus he had the delegated authority to authorise the expenditure.[1142] Mr Molefe approved the confinement on 19 August 2013.[1143] Ms Strydom was informed by Mr Rudie Basson, then the General Manager of TCP, that the ETC was deliberately reduced to fit in with Mr Molefe's delegated authority so that he could authorise the expenditure without the approval of the BADC.[1144] Mr Molefe denied this.[1145] Be that as it may, Ms Strydom accepted that the confinement to Hatch was justified. Hatch had completed all the pre-feasibility studies so it was familiar with the detailed designs and engineering designs required for the rail scope of work at that stage. It was an extension of rail passing loops mainly and it would not have made sense to bring another company on board at that stage to start from scratch.[1146]

810. In his affidavit, Mr Bierman, the former CFO of TCP,[1147] explained that the supplier development ("SD") threshold was a contentious issue during the procurement process. The confinement for Phase 1 was structured as a fixed-cost contract with specific, high SD targets to be achieved by Hatch. For reasons that will become clearer later, Mr Singh increased the SD targets from 30% to 50% during the

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[1142] Annexures DS 3 and DS 4, Exh BB20, BB20-DS-47-55

[1143] Annexure DS 3, Exh BB20, BB20-DS-53

[1144] Exh BB20, BB20-DS-13, para 35

[1145] Transcript 10 March 2021, p 131

[1146] Transcript 20 October 2020, p 163, lines 1-10

[1147] TCP was responsible for the EPCM of the MEP

approval process.[1148] The final value for SD that was submitted to Mr Molefe for final approval was 50%.[1149] The RFP to Hatch thus included a clause that required 50% of the contract value to be spent on SD initiatives. This was a pre-qualification criterion which had to be met before a bidder could progress to the technical evaluation.[1150]

811. SDPs generally are Qualifying Small Enterprises ("QSEs"), Exempted Medium Enterprises ("EMEs") or emerging black owned companies. Leniency applies where an SDP entity does not have extensive experience. A designated sub-contractor (that is not an SDP) is required to have the necessary extensive experience. This meant that, in terms of the RFQ, 50% of the value of the work had to be sub-contracted by Hatch to QSEs or EMEs. Both Ms Strydom and Mr Bester testified that a SD requirement of 50% was inconsistent with the norm that public sector tenders should have a 30% SD component and was probably a disincentive in that it required bidders to take on 100% of the risk but only do 50% of the work.[1151] Mr Molefe did not consider the 50% threshold as high.[1152]

812. Events in the weeks preceding the confinement to Hatch illustrate why and how this unusual adjustment of the SD requirement came about.

DEC Engineering and PM Africa

813. On or about 15 July 2013, in an internal review session attended by Mr Bierman and others, Mr Singh requested that a company known as DEC Engineering ("DEC") be profiled for capacity and requested it be a designated sub-contractor on

[1148] The draft confinement memorandum dated 31 July 2013 allowed for 40% SD – see Exh BB20, BB20-DS-64

[1149] Annexure DS 3, Exh BB20, BB20-DS-52, para 30

[1150] Transcript 20 October 2020, p 169, line 20

[1151] Transcript 20 October 2020, p 18 *et seq* and p 166 *et seq*

[1152] Transcript 10 March 2021, p 132

Phase 1. Mr Bierman considered the request to be inappropriate because DEC did not have a proven track record within the rail industry in respect of railway tracks. Notwithstanding his concerns, Mr Bierman conducted the profiling and concluded that the company did not possess the core skills for railway track work. As discussed more fully later, he communicated his assessment to Mr Singh who appeared to accept his opinion.

814. However, on 6 August 2013, Mr Singh revised the SD pre-qualifying criteria from 30% to 50%. Mr Singh's possible motive for doing that, as appears from Mr Bester's testimony about the various meetings and engagements leading up to the confinement to Hatch, was seemingly to favour DEC as an SDP (rather than as a sub-contractor that required a proven track record).

815. Before the confinement to Hatch was approved, Mr Bester received a call from Mr Nalen Padayachee from PM Africa ("PMA") to discuss Phase 1. Mr Bester agreed to meet with Mr Padayachee on 22 July 2013 at the Hatch offices. Mr Padayachee was accompanied to the meeting by Mr Dave Reddy from DEC. Mr Padayachee explained that they knew about the potential confinement of Phase 1 to Hatch and wanted to be included as a primary SDP on the project.[1153] Mr Reddy informed Mr Bester that "Number 1" had sent him to form part of the Hatch team in executing Phase 1 of the project. Mr Padayachee and Mr Reddy suggested that their respective companies would form a joint venture to work with Hatch on Phase 1. Mr Bester expressed surprise that they knew about the confinement as this was not public knowledge nor had it been finally confirmed.[1154] Mr Reddy and Mr Padayachee explained that they knew everything about the project and the people "high up" in Transnet. Mr Bester asked Mr Reddy who "Number 1" was. Mr Reddy

[1153] Transcript 20 October 2020, p 19 *et seq*

[1154] Transcript 20 October 2020, p 23, line 20, and p 173, line 13.

responded that he could not divulge but that Mr Bester could figure it out. Mr Bester initially thought "Number 1" was a reference to President Zuma but he later realised in subsequent discussions with Mr Reddy and others that it was probably a reference to Mr Molefe as in "Number 1 at Transnet".

816. Mr Bester explained to Mr Reddy and Mr Padayachee that Hatch had various companies to consider as SDPs and that any approach in respect of SD would be dependent on the various regions where the work would be undertaken. When Mr Bester enquired about the type of work they could contribute towards the project Mr Reddy said that they had access to a lot of engineers in India who could assist with railway engineering. Mr Bester explained to them that SD was about the development of South African businesses and that Hatch did not need railway engineering support but rather other disciplines such as quantity surveying, general civil engineering, etc. Mr Reddy then indicated that this should not be a problem as PMA and DEC have access to resources in all fields of engineering.

817. Mr Bester asked Mr Reddy and Mr Padayachee to send him a Memorandum of Understanding ("MOU") which Hatch would consider before giving an indication of its willingness to use PMA and DEC as potential SDPs in the future.[1155] On 25 July 2013, Mr Bester received a draft MOU from Mr Padayachee by email.[1156] The contents of the MOU made it clear that PMA and DEC wanted to be the sole SDPs.

818. Mr Bester discussed the matter with Mr Alan Grey, the Managing Director (Industrial Infrastructure) at Hatch. Mr Grey and Mr Bester felt that the MOU was too "loose" and vague and that it needed greater precision, clearer definition of the

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[1155] Transcript 20 October 2020, p 23-24

[1156] Annexure HB 3, Exh BB19, BB19-HB-051

scope of the work and roles.[1157] Hatch decided that any MOU concluded with DEC and/or PMA would be on a non-specific and non-exclusive basis as would be applicable for any potential SDP. In other words, Hatch would not agree to include these companies specifically on the MEP.

819. On 26 July 2013, Mr Bester met with Mr Rudie Basson (the General Manager of TCP) and Ms Strydom to inform them about what had transpired and to seek their advice.[1158] Mr Basson was surprised that Mr Padayachee and Mr Reddy had met with Mr Bester. Mr Basson told Mr Bester that Mr Singh wanted a confinement approval condition included which stipulated that PMA and DEC should form part of the SD component for Phase 1, but that he and Mr Bierman had told Mr Singh that it would not be advisable to stipulate specific companies to be used in SD initiatives.[1159] Mr Singh's proposal was subsequently dropped and thus Mr Basson was surprised that Mr Padayachee and Mr Reddy had approached Hatch.

820. In his evidence before the Commission, Mr Singh equivocated and was evasive about whether he had indeed requested Mr Basson and Mr Bierman to include a confinement condition stipulating that PMA and DEC be part of the SD component as SDPs or sub-contractors. At first, he objected to the hearsay nature of the evidence but simultaneously stated that the requirement had been dropped, thus implying that he in fact had raised it with Mr Basson and Mr Bierman.[1160] When that became apparent, he sought to explain his intention in making such a request with reference to the context. He intimated that he made the proposal in the context of advancing the empowerment and SD agenda, as TCP was lagging behind, and the

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[1157] Transcript 20 October 2020, p 30

[1158] Transcript 20 October 2020, p 34 *et seq*. Ms Strydom confirmed the meeting and the events involving her - Exh BB20, BB20-DS-14-16 and Transcript 20 October 2020, p 171 *et seq*

[1159] Transcript 20 October 2020, p 35-37 and p 174-176; and Exh BB19, BB19-HB-008, paras 23-24

[1160] Transcript 12 March 2021, p 120, lines 15-16

MEP was an opportunity to drive the agenda.[1161] However, he denied that he gave a "direct instruction" to include the participation of PMA and DEC as a confinement condition.[1162]

821. After some equivocation, Mr Singh eventually settled on the following explanation for what had transpired between him, Mr Basson and Mr Bierman:

> "As I have explained... I wanted them to explore opportunities, alternatives of methods to enable Transnet Capital Projects to meet its mandates as it relates to transformation and supply development. As an example, I said why do you not explore this?"[1163]

822. Mr Singh accepted that it would have been improper to impose the request as a confinement condition.[1164]

823. Mr Singh's denial that he wanted to include the requirement is inconsistent with the contemporaneous communication that took place between Mr Singh and Mr Bierman at the time. In his affidavit, Mr Bierman explained that Mr Singh had instructed him to profile DEC.[1165] After the profile, Mr Bierman sent Mr Singh the following WhatsApp on 24 July 2013:[1166]

> "On Manganese confinement my Procurement team wants to strangle me. The view is that by designating a specific company as SD or subcontracting the process will fail fairness, transparency and equitable tests. We have considered options and investigated this previously. It would be great to do this but we are not allowed to. If Transnet chooses to go this route we have to still apply this

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[1161] Transcript 12 March 2021, p 121, line 15

[1162] Transcript 12 March 2021, p 122, line 20

[1163] Transcript 12 March 2021, p 122, line 20

[1164] Transcript 12 March 2021, p 124, line 2

[1165] See Annexure GB 1, Exh BB21, BB21-GB-13

[1166] Exh BB21, BB21-GB-06, para 18

consistently. We can be descriptive to ask them to subcontract to a ?% BO or BWO, but can't stipulate the firm. Your views? GB"

824. This clearly indicates that there was a discussion (probably initiated by Mr Singh) about designating specific companies as SDPs.[1167] In the WhatsApp, Mr Bierman is evidently writing to Mr Singh in response to a request to designate a specific company. In a WhatsApp reply to Mr Bierman, Mr Singh conceded that specific designation was inappropriate.[1168]

825. Confronted with the inconsistency of this WhatsApp communication with his denial, Mr Singh conceded that there was "a request from me to co-hire two companies".[1169] His concession reveals a willingness and proclivity on his part to equivocate and dissemble until confronted with the indisputable, thus introducing significant doubt about his overall credibility.

826. Taking account of Mr Singh's concession, his equivocation and lack of credibility, Mr Bester's hearsay evidence about what Mr Basson told him is a more probable and credible version of what transpired. On Mr Singh's own version, he at the very least suggested that PMA and DEC be included in the confinement. He was intent on advancing the interests of those companies.

827. Mr Bierman expressed a similar opinion in his affidavit. He moreover believed that Mr Singh deliberately revised the SD criteria in order to accommodate PMA and DEC. As mentioned, on 6 August 2013, Mr Singh revised the SD pre-qualifying criteria from 30% to 50% in the confinement submission, without prior notice or consultation. Mr Bierman was initially surprised by the change because 50% was

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[1167] Transcript 12 March 2021, p 128-129

[1168] Exh BB21, BB21-GB-06, para 19

[1169] Transcript 12 March 2021, p 129, line 21

extremely onerous on the principal contractor. However, after learning from the Commission's investigators about certain meetings that took place between DEC, Mr Singh and Hatch in July-August 2013, he concluded that the change was intended to benefit DEC. In his view, after he advised Mr Singh that DEC could not be appointed by Transnet as a designated sub-contractor and that Transnet could not instruct Hatch which specific entity to appoint as a sub-contractor, Mr Singh found another way for DEC to participate in the contract by increasing the SD component to 50%. As an SDP, DEC would not be subject to the strict experience and skills requirement that would be required of an ordinary sub-contractor. Furthermore, it would also not be questioned why Hatch was contracting an SDP who had such limited experience because there is more leniency with an SDP since the goal is to develop and up-skill.[1170]

828. Ms Strydom testified that she was disconcerted on hearing at the meeting of 26 July 2013 that Mr Padayachee and Mr Reddy had approached Mr Bester to include their companies as sub-contractors or SDPs. Firstly, the information about the pending confinement was not public knowledge and was an internal matter; and secondly, Mr Reddy seemed to claim that he was acting with the authority of Mr Singh.[1171] Ms Strydom and Mr Basson advised Hatch not to sign the MOU. Ms Strydom suspected that corruption was at play.[1172]

829. Later that day, 26 July 2013, Mr Basson phoned Mr Bester and suggested (without giving a clear reason) that Hatch sign the MOU with PMA and DEC. Mr Basson said: "just sign the damn thing".[1173] Mr Bester speculated that Mr Singh must have insisted that the MOU be signed. Mr Singh in his testimony denied that he had

[1170] Exh BB21, BB21-GB-07, paras 21-26

[1171] Transcript 20 October 2020, p 173-174

[1172] Transcript 20 October 2020, p 175

[1173] Transcript 20 October 2020, p 39, line 5

done so and declined to comment about the discussions concerning the MOU.[1174] He sought to deflect by saying that it was "highly irregular" for Mr Bester to have engaged with Ms Strydom and Mr Basson in the manner they did while the confinement was still in process.[1175]

830. After Mr Bester and Mr Grey discussed the matter further, Hatch then amended the MOU, signed it and sent it back to Mr Padayachee.[1176] The key clause in the original version of the MOU read:

> "DEC PMA JV and Hatch have agreed to enter into this...MOU for the express purpose of partnering where applicable on an Enterprise Development basis and for specified Supplier Development initiatives related to engineering and project (on a project by project basis), of their own free will for the mutual benefit of both parties and hereby agree to honour and be bound by the following terms and conditions."[1177] (Emphasis supplied)

831. This clause was amended by Hatch to read:

> "DEC PMA JV and Hatch have agreed to enter into this...MOU for the express purpose of cooperating where applicable on an Enterprise Development basis and for specified Supplier Development initiatives related to engineering and project. This shall be on a specifically agreed project by project basis and on a non-exclusive basis. The parties shall engage of their own free will for the mutual benefit of both parties and hereby agree to honour and be bound by the following terms and conditions."[1178] (Emphasis supplied)

832. The main differences between the two versions were that the revised MOU specified that the parties would co-operate where applicable, whereas the initial MOU proposed partnering. The revised MOU made it clear that whatever

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[1174] Transcript 12 March 2021, p 125, lines 12-15

[1175] Transcript 12 March 2021, p 126

[1176] Transcript 20 October 2020, p 40-45

[1177] Annexure HB 3, Exh BB19, BB19-HB-051

[1178] Annexure HB 5, Exh BB19, BB19-HB-058

arrangement the parties agreed on, it would be on a non-exclusive basis whereas the suggested proposal in the initial MOU was that there would be exclusivity.

833. Hatch furthermore added an additional clause which read:

> "Should a project materialize it shall be executed on the basis whereby the DEC PMA JV shall act as a sub consultant to Hatch Goba on agreed scope, price and terms and conditions which shall be finalized prior to either bidding or commencement of the project."

834. Mr Bester met Mr Padayachee again at the latter's request on 5 August 2013.[1179] Mr Padayachee told Mr Bester that the confinement was imminent and Hatch had to sign an addendum before the confinement to Hatch by Transnet could be finalised. For that to happen, the MOU needed to specifically provide for DEC and PMA to be part of the MEP on an exclusive basis.[1180] The addendum[1181] provided:

> "The first project identified that the parties will engage on within the purpose and scope of the MOU is recorded as the Transnet EPCM FEL3/4 for the Manganese Line Upgrade. Hatch Goba will engage DEC PMA JV as the primary SD partner in the project."

835. Mr Bester understood that DEC and PMA were not happy with Hatch's amendment and that Mr Singh and Mr Molefe would not approve the confinement to Hatch unless it agreed to the addendum.[1182] He felt Hatch was being held to ransom.[1183] Mr Singh dismissed Mr Bester's assumption as unsubstantiated and spurious speculation.[1184] Mr Bester discussed the addendum with Mr Grey and they decided that Hatch would not sign the proposed addendum. Mr Bester discussed the matter

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[1179] Exh BB19, BB19-HB-010, para 29

[1180] Transcript 20 October 2020, p 49, line 20 *et seq*

[1181] Annexure HB 7, Exh BB19, BB19-HB-066

[1182] Transcript 20 October 2020, p 46, line 20

[1183] Transcript 20 October 2020, p 47, line 9

[1184] Transcript 12 March 2021, p 134, lines 2-8

further with Ms Strydom[1185] and given the tone of the interactions became fearful that harm would come to him and the other executives at Hatch. Nonetheless, Mr Bester called Mr Reddy and informed him that Hatch would not be signing the proposed addendum to the MOU. Mr Reddy replied that "Number 1 would not be happy with this".[1186] The following morning, 7 August 2013, Mr Grey and Mr Bester sent an email to Mr Padayachee and Mr Reddy informing them that they were not comfortable signing the addendum confirming the DEC/PMA joint venture as the primary SDP because they had other potential SDPs that needed to be considered in a transparent manner as appropriate in the roll out of Hatch's SD plan.[1187]

836. On the same morning, Mr Grey and Mr Bester met with Ms Strydom, who after discussing the matter with a colleague, Mr Johan Bouwer, escalated the matter to her line manager, Ms Cleopatra Shiceka - then also General Counsel. A meeting was arranged with Ms Shiceka at a restaurant at the Carlton Centre. At the meeting with Mr Grey, Mr Bester and Ms Strydom, Ms Shiceka stated that Hatch had done the right thing to elevate the matter. Ms Shiceka photographed the proposed addendum using her iPad and undertook to inform the right people at Transnet and advised Hatch not to take any further steps.[1188] Ms Strydom told Mr Bester that the matter was elevated to Mr Singh who considered the matter closed and directed that no further action was to be taken.[1189] Mr Singh denied that the matter was ever elevated to him.[1190]

[1185] Transcript 20 October 2020, p 179

[1186] Transcript 20 October 2020, p 56

[1187] Annexure HB 8, Exh BB19, BB19-HB-069

[1188] Transcript 20 October 2020, p 184 *et seq*

[1189] Transcript 20 October 2020, p 59-62 and p 186, line 14; and Exh BB19, BB19-HB-014, para 35

[1190] Transcript 12 March 2021, p 138-139

The confinement of Phase 1 to Hatch and further attempts to influence the appointment of SDPs

837. On 19 August 2013 the confinement was approved by Transnet. A full tender document was issued to Hatch on 27 August 2013. A supplier code of conduct declaration was included in the tender document that Hatch had to complete and sign as part of the tender submission. The document required Hatch to declare that it was satisfied that the process and procedures adopted by Transnet in issuing the tender and the requirements requested from tenderers in responding to the tender were conducted in a fair and transparent manner. Hatch believed that it had acted correctly during the process and there was no proof of any fraudulent or collusive activity on the part of Transnet officials. It had elevated the approach by PMA and DEC to the relevant Transnet officials through the correct channels. Hatch did not intend to engage with Mr Padayachee and Mr Reddy on Phase 1 nor their respective companies going forward. Any influence Mr Padayachee and Mr Reddy claimed to have had with Transnet regarding the award of the contract appears to have had no basis, especially in view of the fact that the confinement had been approved without Hatch having to conclude the MOU on Mr Padayachee and Mr Reddy's terms. Hatch thus concluded that the declaration could be signed and would remain the basis of all of Hatch's dealings in the future as it had been in the past.[1191]

838. There were ongoing engagements between Hatch, Transnet and Mr Reddy which culminated in a meeting at Transnet chaired by Mr Pita on 22 October 2013. This meeting was attended by Mr Grey and Mr Bester on behalf of Hatch and started late after Mr Singh failed to arrive, though Mr Bester saw him in the immediate

[1191] Transcript 20 October 2020, p 62 *et seq*

vicinity of the office in which the meeting was held.[1192] During his evidence, Mr Singh said he had no clear recollection of the meeting.[1193]

839. At the meeting, Mr Pita said that Mr Singh had requested that he speak to Hatch about the SD component. Hatch proposed that Transnet could itself nominate DEC as a SDP in writing if it proposed to do so. Hatch's background checks on DEC and PMA had not revealed any information about it on the Internet. From Hatch's perspective, if DEC was to be appointed as an SDP, it had to come directly from Transnet and not be perceived as a decision that Hatch made of its own accord. Mr Pita responded that Transnet could not instruct Hatch in writing to appoint a particular partner as a SDP, but Hatch insisted that Transnet would have to do so if it wanted it to partner with an SDP not of its own choosing. The meeting became heated with Mr Pita at one point aggressively telling Mr Bester that he must do as he was told.[1194] Mr Pita's involvement was unusual as up until then all the procurement in respect of the major projects was done through TCP's procurement department and not Transnet Group.[1195]

840. On 21 November 2013 Mr Molefe signed off on the memorandum, noting the award of the confinement of Phase 1 to Hatch.[1196] Paragraph 7 of the memorandum recorded that further negotiations led by Mr Pita had been conducted and that the requirement of 30% sub-contracting to emerging black owned companies was met by Hatch.

[1192] Exh BB19, BB19-HB-018, para 47

[1193] Transcript 12 March 2021, p 139-140

[1194] Transcript 20 October 2020, p 70, line 20

[1195] Exh BB20, BB20-DS-16, para 42; Transcript 20 October 2020, p 72 and p 187, line 10 *et seq*

[1196] Annexure HB 15, Exh BB19, BB19-HB-103

841. The conduct of Mr Reddy and Mr Padayachee in strong-arming Hatch to appoint DEC and PMA as SDPs *prima facie* amounted to an offer by them to accept a gratification (appointment as an SDP) from Hatch as an inducement to Hatch for influencing another person (Mr Molefe and other officials at Transnet) to award to Hatch the tender. Alternatively, the conduct amounted to an offer to give a gratification to Hatch in order to improperly influence the procurement of a contract with Transnet. Although Hatch was awarded the Phase 1 contract without it agreeing to the appointment of DEC and PMA as SDPs or sub-contractors, the mere offer to accept the gratification as an inducement to get Mr Molefe and Mr Singh to award the tender is sufficient. Consequently, there are reasonable grounds to believe that the specific offences of corrupt activities relating to contracts or the procuring of a tender as contemplated in section 12(1) and section 13(1) of PRECCA may have been committed in this instance.

842. There is no evidence directly linking Mr Padayachee, DEC or PMA to the Gupta enterprise or that they were employed by or associated with or participated in the conduct of the affairs of the enterprise through a pattern of racketeering. Mr Reddy's conduct though, as discussed later, may be construed as participation in the affairs of a racketeering enterprise as contemplated in section 2(1)(e) of POCA.

The Phase 2 tender and the preferred bidders

843. In May 2014, the then Minister of Public Enterprises, Mr Gigaba, approved the business case for the MEP, which included Phase 1 and 2.[1197] Ms Strydom saw the speed with which this business case was approved - within two months - as suspicious because elections were coming up and there were concerns that there

[1197] Annexure DS 2, Exh BB20, BB20-DS-41

would be a change in the cabinet and in particular within DPE.[1198] Concurrent with the accelerated PFMA approval of the MEP business case, TCP approached the market in April 2014 for the execution of the Phase 2 rail and port EPCM (FEL3b and 4) contracts. The contracts had an estimated value of approximately R700 million to R1 billion respectively. The tender process was managed as an audited high-value tender ("HVT").

844. The SD criterion and small business development criterion were set at high thresholds. Bidders were required firstly to commit to 45% of the contract value being assigned towards SD. Secondly, and distinctly (but not cumulatively) 30% of the contract value had to be sub-contracted to small businesses (EME and QSE start-ups and/or large significant black owned enterprises).[1199] Due to the onerous SD and performance bond requirements put forward in the business case, as advised by McKinsey, it was expected that no company on its own would have the financial backing to meet the tender requirements. Larger EPCMs had to form joint ventures and include smaller EPCM companies in their structures.[1200]

845. Two joint ventures, one comprising Hatch, Aurecon, Mott McDonald and Siyathuta ("H2N") and the other Fluor, Aecom and Gibb ("FLAG"), were identified as the preferred bidders for both the Rail Phase 2 and Port Phase 2 scope EPCM contracts. Both joint ventures were advised that they would be in contention for both contracts depending on the outcome of the contract negotiation process.

[1198] Transcript 20 October 2020, p 154, lines 1-10

[1199] Transcript 20 October 2020, p 195-205

[1200] Exh BB20, BB20-DS-19, para 50

The meeting with Mr Singh and Mr Essa at Melrose Arch

846. Prior to Transnet advertising the tenders for Phase 2 in early 2014, Hatch sought the assistance of Mr Reddy to arrange a meeting with Mr Singh to discuss outstanding invoices due to Hatch for work on the New Multi Product Pipeline ("NMPP") that were causing Hatch serious cash-flow problems.[1201] Mr Reddy agreed to arrange the meeting, mentioning that he had a close relationship with Mr Singh. A meeting was then arranged at a restaurant in Melrose Arch on an unspecified date in early 2014.

847. Mr Bester, Mr Craig Sumption and Mr Craig Simmer represented Hatch at the meeting. On arrival at Melrose Arch, as Mr Bester approached the restaurant, he was met by a man who introduced himself as Mr Salim Essa and said he was there to meet them with Mr Singh. Mr Bester asked where Mr Singh was. Mr Essa replied that he would call him when he was ready. When Mr Bester asked Mr Essa if he worked for Transnet, he responded that he was "doing a lot of things" or had a lot of businesses. Before entering the restaurant, Mr Essa told Mr Bester that he first needed to check if the restaurant was "clean". Mr Essa called Mr Singh, who arrived at the meeting a few minutes later.

848. The meeting focused on both the outstanding payments from Transnet to Hatch for work performed on the NMPP and the appointment of SDPs. Mr Singh did not offer any insight into the reasons for the late payments and Mr Essa was more concerned to convey that Hatch should appoint DEC as an SDP or sub-contractor on Phase 2. The meeting was brief and ended without any clear resolution of the

[1201] Transcript 20 October 2020, p 87-89

problem of the invoices. Mr Bester had the impression that "Mr Essa was the boss and Mr Singh was the subordinate".[1202]

849. In his testimony before the Commission on 23 April 2021, Mr Singh denied that he attended this meeting at Melrose Arch with Mr Essa and the representatives of Hatch. He maintained that Mr Bester's evidence was fabricated,[1203] but could offer no explanation for why Mr Bester would do so. He conceded that there were no issues between them.[1204] Mr Singh did not make application to the Commission for leave to cross-examine Mr Bester.[1205]

850. Mr Singh admitted that there had been problems with the invoices payable to Hatch under the NMPP. However, he sought unconvincingly to cast doubt on the credibility of Mr Bester on the basis that Mr Bester, as Director of Rail at Hatch, would not have been involved with the NMPP and had failed to attach the electronic invites to the meeting for Mr Sumption and Mr Simmer.[1206]

851. In an affidavit filed after Mr Singh had given evidence to the Commission on 23 April 2021, Mr Sumption contradicted Mr Singh's denial and confirmed that Hatch met with Mr Singh to discuss the reasons for delayed payment of invoices and the SD requirement.[1207] Mr Sumption confirmed that on arrival at the restaurant he and his colleagues were introduced to Mr Essa and Mr Singh arrived a few minutes after Mr Essa phoned him. During the meeting Mr Sumption sat next to Mr Singh. He had assumed that Mr Singh would take the lead since he was the GCFO, but in fact Mr Essa dominated the meeting. Although the intention was to discuss non-

[1202] Transcript 20 October 2020, p 91-98; Exh BB19, BB19-HB-022, para 57

[1203] Transcript 23 April 2021, p 41

[1204] Transcript 23 April 2021, p 42

[1205] Transcript 23 April 2021, p 47

[1206] Transcript 12 March 2021, p 141-144; and Transcript 23 April 2021, p 34-40

[1207] Transcript 27 May 2021, p 4-10

payment of invoices and issues with SD on the existing programs, Mr Essa wanted to discuss the SDPs for the next phase of the MEP.

852. Confronted with Mr Sumption's statement, Mr Singh again denied his attendance at the meeting adding that there was nothing further that could be said.[1208] Throughout his testimony Mr Singh sought to distance himself from Mr Essa claiming that he had met him only twice to explore business opportunities.[1209] This is contradicted by the evidence of Mr Gama who testified that he encountered and conversed with Mr Essa in Mr Singh's office at Transnet,[1210] which Mr Singh denied.[1211] It is also gainsaid by the extensive evidence that Mr Singh was shown to have visited Dubai at the same time as Mr Essa, on trips organised by the same travel agent who billed his flights to Mr Essa's accounts, and stayed at the same hotel as Mr Essa with both their hotel bills being paid by the Guptas.[1212] Despite his admission that he was in Dubai on the relevant dates, Mr Singh sought unconvincingly to portray this as pure coincidence and the documentary evidence confirming these facts as fabrications.

853. In response to Mr Singh's denial of Mr Gama's evidence about Mr Essa being at Transnet, the Commission obtained an affidavit under subpoena from Ms Nobahle Takane, Singh's secretary while he was at Transnet.[1213] She could not confirm Mr Gama's claim about Mr Essa meeting Mr Singh at Transnet. However, she described how in late 2012 Mr Essa had come to Mr Singh's office to pick up a document referring to Hatch Goba which Mr Singh had instructed her to place in an

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[1208] Transcript 27 May 2021, p 10

[1209] Transcript 12 March 2021, p 26-28; and Transcript 23 April 2021, p 29, line 24

[1210] Transcript 23 April 2021, p 59-62

[1211] Transcript 23 April 2021, p 62

[1212] Transcript 22 April 2021, p 54-120

[1213] Transcript 27 May 2021, p 12-16; and Exh BB23, BB23-AS-1607

envelope and address to "Mr Salim Essa", which name she herself typed on the envelope. She identified Mr Essa in a media photograph in 2015 as the man who collected the envelope from her in 2012. Mr Singh again dismissed this as fabrication, stating variously that Hatch Goba did not exist at that time, Mr Essa could not have obtained access to his office without security clearance, and that it was unlikely that Ms Takane could identify Mr Essa in the manner she had. He could offer no plausible reason why Ms Takane, his trusted secretary, would fabricate this evidence against him.[1214] Moreover, it was shown that Hatch Goba in fact did exist at that time and had during 2011 been appointed by TCP to conclude the MEP Phase 1 FEL 2 and 3 studies.[1215]

854. In the light particularly of the evidence of the trips to Dubai and the statements of Mr Sumption, Ms Takane and Mr Gama, Mr Singh's denials about his relationship with Mr Essa are not credible and again confirm his proclivity for falsehood.[1216] The version of Mr Bester and Mr Sumption of the meeting with Mr Singh and Mr Essa at Melrose Arch is accordingly more probable.

The second meeting with Mr Essa at Melrose Arch

855. Not long after the first meeting with Mr Singh and Mr Essa, Mr Bester received a call from Mr Reddy informing him that Mr Essa had requested a follow up meeting at Melrose Arch. That meeting was attended by Mr Essa, Mr Reddy and Mr Bester.

856. By then, H2N had already prepared its submission for Phase 2. At the meeting Mr Essa told Mr Bester that Hatch should include his company, which he did not name, in H2N's Phase 2 tender submission. Mr Bester told Mr Essa that H2N had

[1214] Transcript 27 May 2021, p 16-26

[1215] Transcript 27 May 2021, p 35-39

[1216] Transcript 22 April 2021, p 22-28; and Exh BB23, BB23-AS-420

already finalised its SD component and could not include his company in the submission at that stage. Mr Essa, seemingly undeterred, insisted and insinuated that he, Mr Singh and others had a lot of power. Mr Essa explained that they would increase the contract value after the award and that H2N should provide initially for an additional R80 million for SD,[1217] that in time would increase to something in the order of R350 million with the contract value for Phase 2 increasing to R2 billion or more. Mr Bester was dismissive but Mr Essa assured him that he would decide what the budget of the project would be and where it would end up.[1218] Mr Essa further offered to provide Mr Bester with the tender documentation submitted by all the other bidders.[1219]

857. Mr Essa went on to brag that "we" had already decided that the new boss of Eskom would be Mr Brian Molefe and that an announcement would be made in the newspapers soon.[1220] Mr Bester was unable to say whom Mr Essa meant by "we" because at the time he did not know about the Guptas. During his evidence, Mr Bester said that in hindsight (after Mr Molefe's appointment to Eskom and the exposure of the Gupta enterprise in the media) he realised that Mr Essa was referring to the Guptas.[1221]

858. Mr Molefe downplayed Mr Essa's attempt to impress Mr Bester with his insider knowledge about his upcoming appointment.[1222] It is not disputed that Mr Molefe

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[1217] Transcript 20 October 2020, p 100, line 20

[1218] Transcript 20 October 2020, p 101, lines 8-10

[1219] Exh BB19, BB19-HB-024, para 65

[1220] Transcript 20 October 2020, p 103-105; Exh BB19, BB19-HB-023, paras 62-66

[1221] In his written statement to the Commission, Mr Sumption maintained that Mr Essa made the comment about Mr Molefe becoming the new CEO of Eskom at the first meeting at Melrose Arch, after Mr Singh had left the meeting. It is possible that Mr Essa made the comment on both occasions - see Transcript 27 May 2021, p 9-10.

[1222] Transcript 8 March 2021, p 95-130

was a frequent visitor to the Gupta compound in Saxonwold.[1223] As discussed, the Guptas appear to have had some involvement in Mr Molefe's appointments at both Transnet and Eskom. Mr Molefe was appointed as GCEO of Transnet in February 2012 after an article appeared in the *New Age* newspaper predicting his appointment and being nominated and interviewed by Mr Sharma.[1224] An inference may be drawn from these facts that the Guptas or their associates had an evident interest in Mr Molefe's appointment to Transnet, which then subsequently happened. These events lend credence to Mr Bester's testimony that Mr Essa had implied that the Guptas had already decided that in due course Mr Molefe would be appointed GCEO of Eskom.

859. Mr Molefe's attempt during his evidence before the Commission to dismiss these two "predictions" (that turned out to be true) as coincidences and mere gossip was evasive and unconvincing.[1225] He was unconcerned that his name had been used by Mr Essa in the quest of a corrupt arrangement with Mr Bester.[1226] He maintained that he had done nothing wrong and had nothing on his conscience.[1227]

860. The second meeting with Mr Essa concluded with Mr Bester again telling Mr Essa that Hatch could not include Mr Essa's company in the H2N submission. Mr Essa, nevertheless, stated that he would be in contact. Mr Bester returned to Hatch's office and reported the discussion to his colleagues. He drafted an affidavit setting out what had transpired at the meeting for filing with Hatch's auditors.[1228]

[1223] Transcript 8 March 2021, p 142 *et seq*

[1224] Exh BB22, BB22-BM-398; Exh BB22, BB22-BM-399; and Transcript 8 March 2021, p 106; and Transcript 29 April 2021, p 242

[1225] Transcript 8 March 2021, p 112 *et seq*

[1226] Transcript 8 March 2021, p 127-129

[1227] Transcript 10 March 2021, p 134-136

[1228] Transcript 20 October 2020, p 108-109

861. Mr Reddy subsequently phoned Mr Bester and asked for an answer to Mr Essa's proposal. Mr Bester replied that Hatch would not include Mr Essa's company in the H2N bid.

862. The events at the second meeting are *prima facie* proof of corruption.[1229] Mr Essa demanded or solicited (thereby offering to accept) a gratification[1230] (an SDP appointment for his company) from Hatch for the benefit of himself and his unnamed company as an inducement (by influencing Mr Molefe and Mr Singh) to award the tender in relation to a contract for performing work and providing services on Phase 2 to Hatch. Mr Essa's stated intention to inflate the contract price to facilitate the bribe is also evidence of his association with and participation in the Gupta enterprise.

The award of the Phase 2 tender and the post tender negotiations

863. H2N's bid for the Rail project was approximately R800 million and was ultimately successful. However, while H2N's bid for the Port project, for approximately R500 million, was the cheapest, it did not succeed. On 30 November 2014 Mr Molefe signed a letter that awarded the Rail tender to H2N and the Port NMET tender to FLAG. Mr Bester suspected that the appointment of FLAG was possibly due to Mr Essa finding other ways of benefiting from the project.[1231] Mr Molefe denied being influenced by Mr Essa.[1232]

864. The post tender negotiations were led by Ms Corli van Rensburg and Mr Velile Sikhosana of TCP supported by Mr Thomas the GSCM. During the post tender

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[1229] In terms of sections 3, 12 and 13 of PRECCA

[1230] In terms of section 2(3)(a)(i) of PRECCA

[1231] Exh BB19, BB19-HB-026, para 71

[1232] Transcript 10 March 2021, p 129

negotiations, Mr Bester told Ms Strydom about the meetings with Mr Essa. She saw the proposed increase of the contract value by R80 million as a bribe. She testified that experience has shown that it is possible to create a surplus of R80 million on a project of this nature either by increasing the contract value during negotiations (after award) or by increasing the delegated contract value internally. She believed that there was a network inside and outside of Transnet acting "to improperly secure tenders to the benefit of the few".[1233]

865. Mr Pita and Mr Singh were in control of the approval of the contract value. During the post tender negotiations, the H2N bid for the rail project decreased by R287 million (from R1063 million to R776 million); while the FLAG bid for the port project increased by R64 million (from R687 million to R751 million).[1234]

866. Mr Bester testified that the post tender negotiations were fraught and matters escalated to the point where H2N left the negotiations until Ms Van Rensburg requested its return. Upon its return Mr Pita met with the H2N team and requested the team to calm down. On one occasion Mr Sikhosana warned Mr Bester to be careful saying "they will fuck you up" and that H2N was "dealing with very powerful people within Transnet" or something to that effect.[1235]

867. The post tender negotiations in respect of both Phase 2 Rail and Phase 2 Port contracts concluded in early December 2014. H2N was confirmed as the successful bidder for Phase 2 Rail scope, and FLAG as the successful bidder for Phase 2 Port scope. Ms Strydom considered the award of the Phase 2 Port scope to FLAG at an amount of approximately R200m more than the H2N bid for Port as

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[1233] Transcript 20 October 2020, p 209, lines 5-10 and p 211-212; and Exh BB20, BB20-DS-21, para 58

[1234] Annexure DS 8, Exh BB20, BB20-DS-85 - see Transcript 20 October 2020, p 212-215 where Ms Strydom presents a somewhat confusing account of the figures in Annexure DS 8.

[1235] Transcript 20 October 2020, p 130-138

suspicious, and in direct conflict with the project scrubbing process where the focus was to reduce capital estimates across all work packages.[1236] She rejected the rationale of awarding the Phase 2 Port scope to FLAG at the higher price as business risk mitigation. Price should have been the overriding qualifier or criterion at that stage and the award to FLAG was not consistent with the procurement policies.

868. After the post tender negotiations, but before the project kicked off in early 2015, the senior people of H2N were invited to a meeting with Mr Singh and Mr Pita at the Carlton Centre. Mr Singh told them that they were "very lucky" to have been awarded the tender and said he would watch H2N very closely. The H2N directors viewed Mr Singh's comments as negative and signifying that he was against the appointment of H2N. They surmised that this was because Hatch had refused to include Mr Essa's company in its submission. Mr Singh made similar negative comments at a small celebratory function.[1237] Mr Singh denied being negative or making the comment about H2N being lucky, but conceded that he had admonished Hatch on that occasion, supposedly to exhort it to observe a high standard.[1238]

869. Both Mr Bester and Ms Strydom were critical of the role played by McKinsey.[1239] During the execution of the Phase 2 project, McKinsey was always present on what H2N were told was a "review" basis. McKinsey apparently enjoyed unrestrained access to Mr Singh. On Phase 2, McKinsey's contract value to "oversee" the Project was in the region of R340 million, yet, according to Mr Bester, nobody on

[1236] Transcript 20 October 2020, p 217-218

[1237] Exh BB19, BB19-HB-029

[1238] Transcript 23 April 2021, p 52-58

[1239] Transcript 20 October 2020, p 218, line 5

the Transnet management team had a clear sense of what McKinsey's brief or deliverables were.[1240]

870. According to Ms Strydom, prevailing market conditions, in addition to Transnet's increasing capital affordability constraints, resulted in Transnet deciding to suspend the MEP and terminate the EPCM contracts in March 2017. Transnet was in a dire financial situation at that time and the manganese ore price bottomed out to the extent that customers questioned the viability of the expansion. Notwithstanding an intensive capital optimisation exercise jointly executed with the respective joint ventures, a decision was taken to put the expansion on hold and to terminate the rail and port EPCM contracts.

Corruption and racketeering

871. Towards the end of 2014, Mr Strydom reported her suspicions of fraud and procurement irregularities in relation to the MEP to Mr Bramley May, head of forensic investigations at TFR, who appears not to have pursued the matter and destroyed the tape recording of the interview as he felt it was irrelevant as it was not a TFR matter.[1241]

872. As explained, the evidence regarding the attempts by Mr Reddy and Mr Essa, with the assistance of Mr Singh, to secure appointment of their companies as SDPs on both the Phase 1 and Phase 2 contracts, provides reasonable grounds to believe that the offence of corruption was committed in those instances.

873. Mr Singh and Mr Essa's proven association with the Gupta enterprise, Mr Singh's earlier attempts to make the appointment of DEC a pre-condition to the award, his

[1240] Transcript 20 October 2020, p 140-145

[1241] Exh BB20, BB20-DS-24, para 69

manipulation of the SD component, the manner in which the meetings with Mr Essa were set up and their purpose, Mr Essa's disclosure of the *modus operandi* of inflating tenders for illegal purposes, together with Mr Reddy and Mr Essa's boasts about their access to Mr Molefe and their corporate and political influence, all may point to a pattern of racketeering involving the Gupta enterprise. There are thus reasonable grounds to believe that Mr Essa and Mr Singh may have committed corruption (a scheduled offence under schedule 1 of POCA) and, in the circumstances surrounding the award to Hatch of the tenders for Phase 1 and Phase 2 of the MEP, reasonable grounds exist to suspect that Mr Singh, Mr Essa, Mr Reddy and Mr Padayachee, whilst associated with the Gupta enterprise participated in the conduct of the enterprise's affairs through a pattern of racketeering in contravention of section 2(1)(e) of POCA.

874. These findings are to the effect that there are reasonable grounds to believe that Mr Essa, Mr Singh, Mr Reddy and Mr Padayachee violated the Constitution and other legislation and were involved in corruption of the kind contemplated in TOR 1.4 and TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 for investigation by the law enforcement authorities.

CHAPTER 10 - NEOTEL AND HOMIX

Introduction

875. Three witnesses testified in relation to the procurement process and transactions associated with contracts concluded between Transnet and Neotel (Pty) Ltd ("Neotel") – Mr Peter Volmink,[1242] Ms Sharla Chetty[1243] and Mr Gerhardus Van der Westhuizen.[1244] Two other witnesses, Mr Chetan Vaghela[1245] and Mr Shiwa Mazibuko,[1246] gave additional evidence regarding improper payments made by Neotel to Homix (Pty) Ltd ("Homix"), part of the Gupta enterprise.

876. Mr Van der Westhuizen is a qualified chartered accountant with experience *inter alia* in information technology audits and vendor management. From mid-2012 to April 2013 he was seconded to the Enterprise Information Management Services Department ("EIMS") where he reported to Mr Singh. His key responsibilities included oversight of network security and the management of service providers, specifically Neotel and T-Systems South Africa (Pty) Ltd ("T-Systems"). From April 2013 to December 2014 he was the Executive Manager: Office of the Chief Information Officer ("CIO") and responsible as the "business owner" for ICT procurement for the computer network and communications systems in the whole of Transnet.

877. The evidence in relation to the Neotel transactions reveals irregular conduct and a motive other than a business rationale for the decisions made in relation to the

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[1242] Exh BB2.1 and BB2.2; Transcript 10 May 2019

[1243] Exh BB6; Transcript 24 May 2019

[1244] Exh BB7(a) and BB7(b); Transcript 27 May 2019

[1245] Exh BB9; Transcript 11 June 2019

[1246] Exh BB12; Transcript 7 and 10 June 2019

tender awarded to Neotel, which sought to extract money from Transnet for the benefit of the Gupta enterprise, in particular by Homix, an entity related to Mr Essa.

The history of the Master Network Services Agreements

878. During the period January 2007 to December 2014, Transnet concluded three key contracts with Neotel: the 2007 Master Network Services Agreement ("the 2007 MSA"); the procurement of Cisco Equipment ("the Cisco Transaction"); and the 2014 Master Network Services and Asset Buyback Agreement ("the 2014 MSA").

879. Prior to 2009 two entities existed within Transnet which supplied IT services to Transnet. The first was Arivia which was the owner of Transnet's data centre, including all of the servers, information and data assets. It owned and operated all the hardware and software on which all the data of Transnet was kept. All the computer or electronic based information necessary for the operation of Transnet was thus centralised under the auspices of Arivia. The second entity was Transtel (Pty) Ltd ("Transtel"), a subsidiary of Transnet, the network services provider which controlled the information communications network. It was responsible for and owned all of Transnet's fibre assets, copper assets, routers and switches that enabled all of Transnet's information applications to talk to each other. This comprised more than 9000 kilometres of fibre and copper cabling for regional communication and within Transnet campuses, as well as other substantial infrastructure including the switches and routers necessary for the electronic communication to take place. A decision was made in 2007 by Transnet to dispose of both businesses on the basis that they were not core to the operations of

Transnet. A competitive procurement process resulted in T-Systems and Neotel respectively being the successful bidders for the data centre and the network.[1247]

880. The network services (telecommunications business) previously provided by Transtel were sold by Transtel to Neotel as a going concern in terms of a sale and purchase agreement ("SPA") prior to the conclusion of the 2007 MSA[1248] in December 2007. As will become clearer later, this sale had significant strategic repercussions as it transferred control of Transnet's network assets to an outside service provider, making it difficult (and prohibitively expensive) for Transnet to contract with any other service provider to take over the network at a later date.

881. The 2007 MSA required Neotel to provide network services for a period of five years from 1 April 2008 until 31 March 2013. Clause 2.1 of the 2007 MSA provided that Neotel would "operate the business, assets, and infrastructure heretofore owned by Transnet and operated by Transtel in the provision of voice and data and additional telecommunications services to Transnet and its various divisions". Hence, after the sale of Transtel, Transnet's IT network, upon which it relied completely for the conduct of its business, was wholly outsourced and owned and managed by Neotel as an external service provider. At the same time, T-Systems managed Transnet's data centre.[1249] Thus, the network was managed by Neotel and the data centre by T-Systems.

[1247] Transcript 27 May 2019, p 13-18

[1248] Annexure A, Exh BB7(a), GJJVDW-023

[1249] Transcript 27 May 2019, p 11, line 20

882. In 2012 Transnet opted not to extend the 2007 MSA with Neotel, but to put the IT network contract out to open tender.[1250] The time consuming procurement process led to the extension of the 2007 MSA until late 2013.

The RFP for the 2014 MSA

883. In June 2012 nine months before the due expiry of the 2007 MSA, Transnet issued an RFP for a service provider to conduct a comprehensive due diligence exercise on its network assets and to develop a network sourcing strategy. The due diligence bid was awarded to Detecon International GmbH ("Detecon"), a company associated with T-Systems. Transnet further procured the services of another consulting firm, Gartner, to assist with the development of an RFP for the IT network services.

884. At a special meeting of the BADC held on 29 May 2013, the BADC resolved to authorise the GCEO "to approve the network services RFP, advertise, negotiate, award, contract and sign all relevant documentation in line with the approved strategy".[1251] On the same day, Mr Singh and Mr Pita addressed a memorandum to Mr Molefe requesting him to approve the network services sourcing strategy and to grant authority to advertise an RFP to the open market for the provision of network services from August 2013 for three years with an option to extend for two years.[1252] The estimated spend for the network services contract was R1.5 billion over a period of three years, or R2.5 billion over five years, based on an estimate of R500 million per year. Mr Molefe approved the request and granted the necessary authority on 9 June 2013.

[1250] See minutes of the BADC meeting of 27 February 2013 - Annexure C1, Exh BB7(a), GJJVDW-099

[1251] Annexure PV 16(a), Exh BB2.1(c), PV-0983

[1252] Annexure D1, Exh BB7(a), GJJVDW-119

885. The RFP was issued on 14 June 2013 with an initial closing date of 16 July 2013 and later extended to 13 August 2013.[1253] Five bidders submitted proposals: i) Neotel; ii) Telkom SA SOC; iii) Dimension Data; iv) Vodacom (Pty) Ltd; and v) T-Systems in collaboration with Broadband Infraco SOC Ltd ("BBI"). BBI is a state owned company ("SOC"), which at the time was working in co-operation with T-Systems. Mr Essa was appointed a director of BBI on 3 October 2011 and resigned on 14 October 2014.[1254]

886. The procurement process could not be completed by 31 August 2013, mainly due to extensions requested by the bidders, and thus the 2007 MSA was extended from 1 September 2013 to 31 October 2013 at a flat rate fee of R42.3 million per month (excluding VAT) less a discount of 0.25% per month, regardless of usage by Transnet.[1255]

The evaluation of the bids for the 2014 MSA and the initial award of preferred bidder status to Neotel

887. Mr Molefe favoured T-Systems (a company linked to the Gupta enterprise)[1256] and attempted (in the end unsuccessfully) to award the network services contract to it, in addition to the data contract it already had. For that to have happened, the assets underlying the network business (the cables, the switches and the routers sold to Neotel by Transtel) needed to be transferred from Neotel. T-Systems, or for

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[1253] Annexure E3, Exh BB7(a), GJJVDW-215

[1254] Annexure L1, Exh BB7(b), GJJVDW-349. Mr Essa was appointed by Mr Gigaba – Transcript 27 May 2019, p 43, line 14

[1255] Annexure G2, Exh BB7(a), GJJVDW-225

[1256] T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems. Sechaba was T-Systems' SDP in Transnet contracts. T-Systems paid Sechaba more than R323 million between February 2015 and December 2017. The Gupta enterprise controlled Sechaba from mid-2015. Sechaba made multiple payments to Gupta laundry vehicles (including Albatime and Homix) running to R2.8 million while it was T-Systems' SDP - FOF-09-93-99; and FOF-09-182-184.

that matter, any other bidder for the 2014 MSA, required the network assets in order to provide the service to Transnet. However, after the sale and purchase agreement ("SPA") those assets were owned by Neotel and had been securitised by it after it concluded the 2007 MSA. Neotel had borrowed money and put up the assets as security for its loans.

888. The arrangement under the 2007 MSA had exposed Transnet to significant risk. Neotel as owner of the network assets had it in its power to switch off Transnet's network preventing it from using the network infrastructure, rendering it a "captive client". In addition, there was an exclusivity clause in the 2007 MSA which obliged Transnet to purchase all network equipment from Neotel.[1257] So it was impossible for any other service provider (such as T-Systems) to provide the services unless it leased or bought the assets from Neotel; or Transnet replaced the assets at a significant cost.[1258] This led to the procurement of new equipment from Cisco, the supplier of the equipment, and efforts to buy back some of the assets from Neotel during the negotiations of the 2014 MSA. Once it seemed likely that T-Systems would get the contract, and considering that much of the equipment was near the end of its life, Transnet officials entered into proactive discussions with Cisco to acquire the equipment through Neotel (due to the exclusivity clause) in order to start installing it and to transition the network from Neotel to T-Systems. Transnet at that point wanted to re-acquire ownership of the equipment but had to buy any new Cisco equipment via Neotel.

[1257] Clauses 2.2 and 3.2 of the 2007 MSA appointed Neotel as the sole service provider and supplier and Clause 3.2.1.3 provided that the acquisition and management process included the purchase of all networking equipment, including new equipment, upgrades to existing equipment, or purchase resulting for a service or repair request - see Annexure W2, Exh BB7(b), GJJVDW-527, paras 9-11.

[1258] Transcript 27 May 2019, p 20-29

889. Two issues arose during the tender evaluations that gave rise to concern. The first related to a conflict of interest involving T-Systems and Detecon. T-Systems International GmbH was the majority shareholder in T-Systems and also the sole shareholder of Detecon, the company awarded the due diligence tender. The HVT team at Transnet took the position that T-Systems SA was an "affiliate" of Detecon by virtue of their common parent, T-Systems International and should be disqualified from the bidding process in terms of the RFP and LOI.[1259] Governance did not support the disqualification of T-Systems because of certain ambiguities in the governing provisions. The matter was resolved by T-Systems furnishing an affidavit stating that it had not gained any information from Detecon, agreeing that Transnet was entitled to take the necessary remedial steps against it if it was shown otherwise.[1260]

890. The second concern related to the rounding off of T-System's score for functionality. T-Systems scored 69.93% and thus missed the functionality threshold of 70% by a fraction. Regulation 11(4) of the PPPFA Regulations 2011 provided that points had to be rounded off to the nearest two decimal places. Rounding off to the nearest two decimals would have meant that T-Systems achieved 69.94% and still failed the functionality threshold. However, if the score was rounded off to the nearest whole number (70%) T-Systems would have qualified. Paragraph 13.1.3 of the Implementation Guide to the PPPFA Regulations, the provision dealing with rounding off scores, only dealt with the principle of rounding off in the context of the price and preference stage, and not the functionality stage. Governance opposed the idea of rounding off T-System's scores to the nearest whole number as that would be inconsistent with the PPPFA Regulations.

[1259] Transcript 9 May 2019, p 131 *et seq*; and Exh BB2.1(a), PSV-0035, para 82 and Annexure PV 9 Exh BB2.1(c), PSV-0839

[1260] Transcript 9 May 2019, p 135-16; and Exh BB2.1(a), PSV-0036, para 82.7

891. Transnet accordingly sought the advice of National Treasury on the matter. National Treasury advised that the manner in which points were to be rounded off should have been explained in the RFP. It added that if at the time of evaluation the evaluation committee had to deal with decimals that were not anticipated at the bid planning stage (and thus not dealt with in the RFP) it could either round off to the whole number or round off to the nearest two decimal points.[1261] In response to this advice, Transnet took a decision to round off to the nearest whole number, with the result that T-Systems met the threshold for functionality.[1262]

892. Neotel, Dimension Data and T-Systems were the only bidders that passed the functionality threshold and were thus considered for commercial evaluation. After a series of clarification sessions with the bidders and BAFOs were received, Neotel was ranked first of the bidders based on price and preference, with a price of R1.363 billion and preference points of 90. Dimension Data was ranked second with a price of R1.585 billion and preference points of 75.37. T-Systems was ranked third with a price of R1.737 and preference points of 65.35.

893. During the final clarification session held with the bidders, T-Systems indicated that its joint venture partner, BBI, was willing to negotiate optimization with its shareholders which would result in an overall reduction of R248 million on their tendered pricing. T-Systems made this offer unilaterally and without being invited to do so at a time when the price negotiations were completed.[1263] Other bidders were not invited to make a corresponding offer of a price reduction, but some may have indicated the possibility of minor price adjustments. These proposals however were

[1261] Annexure PV 12, Exh BB2.1(c), PSV-0913

[1262] Transcript 9 May 2019, p 138-151; and Exh BB2.1(a), PSV-0037, para 83

[1263] Transcript 9 May 2019, p 159

not taken into consideration by the evaluation team.[1264] Had T-System's offer been taken into account, it would have been placed second and Dimension Data third.

894. The evaluation team recommended that the tender should be awarded to Neotel. According to Mr Volmink, "the officials from Group Strategic Sourcing, the technical people, the Governance people, supply chain officer, the chief information officer, the CFO, everyone had looked at it and were happy for the award to be made to Neotel".[1265]

895. On 30 October 2013 Mr Mahomedy (acting GCFO), Mr Matooane (CIO) and Mr Pita (GCSCO) addressed a memorandum to the acting GCEO at the time, Ms Chetty (then Pillay), requesting her, in accordance with the recommendation made by the CFET, to approve the procurement process, the award of business to Neotel and to sign the letter of intent ("LOI") and the letters of regret to the four unsuccessful bidders. Mr Molefe had appointed Ms Chetty to act in his position as the GCEO for the period 28 October 2013 – 1 November 2013 and delegated his powers to her.[1266] After considering the TEAR report,[1267] three TIA reports (confirming that the procurement process was compliant with Transnet policies), and an excerpt of the decision of the board approving the extension of the 2007 MSA, Ms Chetty approved the procurement and signed the letters as requested.[1268]

[1264] See the Tender Evaluation and Recommendation Report ("TEAR report") - Annexure H3, BB7(a), GJJVDW-239

[1265] Transcript 9 May 2019, p 63, line 10

[1266] Exh BB6; SC-002, para 5

[1267] The TEAR report discussed the entire procurement process, from stages 1-5 and highlighted certain discrepancies that were identified during stage 3 and clarified the corrective measures that were taken to resolve them. Ms Chetty was satisfied that the conflict of interest had been resolved and the issue regarding the rounding-off of the scores had been sufficiently addressed through the confirmation received from National Treasury.

[1268] Transcript 24 May 2019, p 51-59; and Exh BB6, SC-002-004, paras 7-11 and Annexures SC9-15

The reversal of the award to Neotel

896. After Ms Chetty approved the award to Neotel and signed the letters of intent and regret, Mr Pita requested Mr Van der Westhuizen not to issue the letters, as he had been directed by Mr Singh not to do so, on the instruction of Mr Molefe, who was abroad at that stage and apparently wished to review the process upon his return.[1269] Neotel was then requested to continue providing the services.[1270]

897. During November 2013, Mr Van der Westhuizen was called to a meeting with Mr Molefe, Mr Matooane, Mr Thomas and Mr Singh. When he arrived for the meeting, he was requested by Mr Molefe's personal assistant to hand over his cellular phone to her before entering his office.[1271] The other attendees were requested to do the same. He thought this was strange as he had previously attended meetings in Mr Molefe's office and had not been requested to hand in his phone.[1272] During the meeting,[1273] Mr Molefe indicated that he did not support the recommendation to issue a LOI to Neotel as the preferred bidder for various reasons which he later set out in a memorandum dated 20 November 2013. Mr Van der Westhuizen did not agree and raised various objections which Mr Molefe ignored. Mr Van der Westhuizen realised that his viewpoint was not being well received and decided in the interests of his career to refrain from challenging Mr Molefe.[1274]

[1269] Transcript 27 May 2019, p 45-46

[1270] Annexure J, Exh BB7(b), GJJVDW-326

[1271] Mr Molefe confirmed during his testimony that he had requested the handover of cell phones because he feared outside persons would listen in or the meeting would be taped by one of the participants - Transcript 10 March 2021, p 109-110.

[1272] Transcript 27 May 2019, p 47

[1273] Transcript 27 May 2019, p 48 *et seq*

[1274] Transcript 27 May 2019, p 64

898. Mr Van der Westhuizen saw the collaboration between T-Systems and BBI, of which Mr Essa at that time was a director,[1275] as factoring into Mr Molefe's decision.[1276] During his evidence, Mr Molefe admitted knowing that BBI was an SOE but denied knowing that Mr Essa was a director of it.[1277] Mr Essa was involved in other companies associated with T-Systems, besides BBI. As explained, T-Systems had been appointed by Transnet to manage part of its IT infrastructure. In 2013-2014 Transnet Group Capital leased approximately 2200 computers through the T-Systems contract. Despite paying for 2200 computers only 1100 were employed. The contract for the computers was ceded[1278] on 1 December 2014 initially to Zestilor (Pty) Ltd ("Zestilor") the company of Ms Osmany who is married to Mr Essa. Mr Molefe signed the cession to Zestilor on behalf of Transnet.[1279] Mr Molefe denied knowing Mr Essa or his wife or of her interests in Zestilor.[1280]

899. After the meeting, Mr Singh instructed Mr Van der Westhuizen to draft a memorandum to record the outcome of the meeting. Mr Van der Westhuizen then prepared a draft memorandum, which was signed by Mr Molefe and sent to Mr Singh, Mr Matooane and Mr Pita on 20 November 2013. The memorandum[1281] overturned the decision of Ms Chetty to award the tender to Neotel and awarded it instead to T-Systems. Mr Molefe specifically approved taking the R248 million into consideration as part of T-Systems' best and final offer ("BAFO") and referred to the following: i) Neotel had indicated an intention to sell the network assets to

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[1275] Annexure L1, Exh BB7(b), GJJVDW-349; and Transcript 10 March 2021, p 115-116

[1276] Exh BB7(a), GJJVDW-009, para 33

[1277] Transcript 10 March 2021, p 114

[1278] Annexure MSM 40, Exh BB3(b), MSM-580

[1279] Exh BB3(a), MSM-031, para 5.12.3; Transcript 10 March 2021, p 118-123; and Transnet-05-405.89

[1280] Transcript 10 March 2021, p 124

[1281] Annexure K2, Exh BB7(b), GJJVDW-331

Vodacom; ii) the concentration risk arising from Transnet being Neotel's largest client; iii) information that Neotel had diluted black ownership of the company; iv) an information security incident at Neotel that had exposed Transnet to unnecessary risk; and v) problems with the functioning of Neotel's security cameras in the ports. Mr Molefe recorded his view that awarding the business to Neotel would expose Transnet to unnecessary risk.[1282]

900. Management, including the technical experts, were of the view that the perceived risks had been mitigated and that these risks posed no obstacle to the award to Neotel and provided no basis for excluding Neotel.[1283] The counterparty risk was mitigated by the possible benefits of convergence with Vodacom and could also have been firmed up in the contractual negotiations. Concentration was not a serious risk as Transnet only contributed 15% of Neotel's revenue. Awarding the bid to T-Systems would have increased the concentration risk since T-Systems already managed Transnet's Data Centre. The due diligence report also indicated an amber status for T-Systems which indicated a risk of them not adequately supplying the service to Transnet. Moreover, the B-BBEE component was part of the evaluation criteria and considered in arriving at the recommendation. It should not have been considered again in isolation from the other evaluation criteria. The report that Neotel was busy diluting its shareholders to the detriment of its B-BBEE partners was a mere allegation to which Neotel had not been given an opportunity to respond.[1284]

901. As for the information security incident, in terms of the Procurement Procedures Manual ("PPM") unless a bidder has been disqualified or backlisted it is not

[1282] Annexure K2, Exh BB7(b), GJJVDW-336, para 20

[1283] Annexure PV 18, Exh BB2.1(c), PSV-0992

[1284] Transcript 27 May 2019, p 50, lines 1-10

permissible to use previous contract experience not to award business to the bidder if the process followed was fair and transparent. The incident mentioned should have been managed through the current contract and not used to prejudice the bidder. Likewise, with the CCTV network issues. This should have been dealt with contractually with Neotel.[1285] Mr Molefe's reliance on the identified risks was thus inappropriate.[1286]

902. Mr Molefe justified his decision on the basis of the BADC's delegation of authority to him and stated (for the first time during his evidence)[1287] that he was entitled to reverse the award because Ms Chetty had made the award conditional upon Neotel giving certain assurances about its relationship with Vodacom.[1288] There is no evidence of such conditions. However, and more importantly, the powers vested in the GCEO by the BADC to award business to Neotel had already been exercised by the acting GCEO, Ms Chetty, and could not be exercised again or rescinded. Ms Chetty had exercised the power sub-delegated to the GCEO by the BADC.[1289] The BADC did not delegate the approval authority for the MSA to Mr Molefe personally, but rather to the holder of the post. The decision was also taken in a procedurally unfair manner. Neotel was not afforded an opportunity to make representations regarding the rescission.

903. Finally, as Mr Van der Westhuizen had told Mr Molefe in the meeting, it was inappropriate to take into account T-System's offer to reduce the price by a further R248 million because that gave T-Systems an opportunity to improve its pricing after the BAFO stage had closed without re-opening price negotiations for the other

[1285] Transcript 24 May 2019, p 79

[1286] Transcript 24 May 2019, p 78 *et seq*

[1287] Transcript 10 March 2021, p 101-103

[1288] Transcript 10 March 2021, p 95-97

[1289] Transcript 9 May 2019, p 166-172

bidders. The decision thus violated the principles of equal treatment and fairness.[1290] Even if the R248 million discount offered by T-Systems and BBI was taken into account, T-Systems would still only be the second best bidder, after Neotel. Mr Molefe admitted during his testimony that he was wrong to have taken the proposed price reduction into account.[1291]

904. On 20 November 2013 pursuant to Mr Molefe's decision, letters of regret were issued to Neotel, Telkom, Dimension Data and Vodacom and a LOI was issued to T-Systems, informing it that it had been identified as the preferred bidder and inviting it to post tender negotiations to conclude an MSA.[1292] Neotel wrote to Mr Molefe to obtain clarity but did not challenge the award of the tender to T-Systems.[1293]

The procurement of equipment from Cisco and the first payment to Homix

905. The award of the preferred bidder status to T-Systems by Mr Molefe made it necessary to plan for a transition of network services from Neotel to T-Systems. At the time, Neotel was still managing the ICT network and the relationship between it and Transnet had become strained. Mr Molefe was obliged to extend the 2007 MSA on 11 December 2013 for a period of 12 months at a substantially increased monthly fee.[1294] Having sold its network assets to Neotel in 2007, Transnet was in a weak bargaining position.[1295] Neotel also advised that certain network equipment had reached end-of-life and needed to be replaced. Transnet accordingly engaged with Neotel in an effort to purchase or lease the network related hardware and

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[1290] Transcript 9 May 2019, p 189-191

[1291] Transcript 10 March 2021, p 106, line 23

[1292] Annexure PV17, Exh BB2.1(c), PSV-0990; and Annexures K3 and K4, Exh BB7(b), GJJVDW-338-346

[1293] Transcript 27 May 2019, p 80 ***et seq***; and Exh BB7(a), GJJVDW-010-011, paras 34-40

[1294] Annexure O3, Exh BB7(b), GJJVDW-421-423; and Transcript 27 May 2019, p 83-84

[1295] Transcript 27 May 2019, p 86-88

infrastructure deployed in the yards and ports of Transnet. Neotel was not amenable to the sale of these assets due to the fact that they had been securitised. It was also reluctant to replace any equipment during the extension period as the duration of the extension was uncertain.[1296]

906. On 21 February 2014 Mr Van der Westhuizen addressed a memorandum to Mr Singh requesting approval to procure equipment (switches and routers for all Transnet campuses) from Cisco via Neotel (which had an exclusivity agreement) to a maximum value of R305 million.[1297] T-Systems undertook to remove this cost from their tender.[1298] Mr Singh approved the request on 21 February 2014 and Mr Van der Westhuizen immediately directed Mr Francois Van der Merwe, the executive at Neotel responsible for the Transnet account,[1299] to proceed with ordering the equipment from Cisco.[1300]

907. On the same day, 21 February 2014, Mr Taufique Hasware Khan, the CFO of Homix (a company associated with Mr Essa), sent an email[1301] to Mr Van der Merwe at Neotel which read:

> "Enclosed please find a copy of the letter which was faxed to you on Jan 6 2014. We would request you to kindly revert on the proposal outlined in the letter at your earliest convenience."

908. The letter attached to the email read:

> "Following our discussions, we are pleased to confirm that we are in a position to deliver on an opportunity at Transnet that we have been working on for some time.

[1296] Transcript 27 May 2019, p 150 *et seq*

[1297] Annexure W2, Exh BB7(b), GJJVDW-525

[1298] Transcript 27 May 2019, p 151, line 20

[1299] Transcript 27 May 2019, p 155

[1300] Annexure W5, Exh BB7(b), GJJVDW-544

[1301] Annexure W3, Exh BB7(b), GJJVDW-539

> The opportunity involves replacement of Network Equipment for a value of approximately R315 million excluding VAT. The full details of the opportunity will be disclosed to you after we have agreed on the conditions of the deal as listed below.
>
> We are in a position to offer Advisory Services to Neotel for this opportunity and ensure that support from the current contract holder is obtained to facilitate a direct award of the Contract from Transnet to Neotel.
>
> In lieu of the services so provided to Neotel, and in consideration of the risk factor undertaken by us in the entire project, we would request a success fee to be paid to us to the value of 10% of the contract, excluding VAT, payable to us within 14 days from the date of the award of Contract to Neotel.
>
> Please advise if you are in agreement with our proposal. In the affirmative, please advise if you wish to enter into a separate agreement pursuant to this letter to enable all stakeholders to have a level of comfort with respect to the deal." [1302]

909. The next day, 22 February 2014, Mr Van der Merwe emailed Mr Khan at Homix attaching a letter of acceptance that read:

> "We hereby confirm our acceptance in principle of the proposal on the conditions stipulated by you in paragraph 5 of the proposal that the parties enter into a detailed written agreement pursuant to the proposal which detailed agreement will contain the terms of the proposal and incorporate other commercial terms pertinent to transactions of this nature. The parties shall conclude such detailed agreement within fourteen days of the date of this letter."[1303]

910. Mr Van der Westhuizen testified that he had not met any person or representative from Homix during the interaction with Neotel on the Cisco switches transaction. It was unclear to him how Homix identified this "opportunity" and was surprised that Homix knew about the approval of the transaction by Mr Singh on the very day of approval.[1304] He doubted whether Homix could have added any value. The

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[1302] Annexure W4, Exh BB7(b), GJJVDW-541

[1303] Transcript 27 May 2019, p 157, line 12

[1304] Transcript 27 May 2019, p 156

exclusivity arrangement obliged Transnet to procure network equipment from Neotel and thus Neotel would have had no need at all for any services from Homix. Moreover, if there had been a genuine need for Homix's facilitation services on the Cisco transaction, it would have been brought to Mr Van der Westhuizen's attention as he was the team leader of the commercial team. This did not happen, which strongly intimates that no facilitation by Homix in fact took place.[1305]

911. A fee of R30.3 million (excluding VAT) was nonetheless paid by Neotel to Homix in respect of its alleged rendering of services in the Cisco transaction.[1306] There is no documentary evidence supporting this payment. However, the evidence of Mr Mazibuko, Head of Financial Surveillance at the SARB, confirms that Homix was paid R75.5 million by Neotel in 2015.[1307] This amount seems to be made up of the payment for the Cisco transaction and the payment in terms of a business consultancy agreement that is discussed below. It is likely that the additional cost was passed on to Transnet.[1308]

912. In the premises, there are reasonable grounds to believe that Mr Khan at Homix, Mr Van der Merwe at Neotel, and perhaps others, committed the offence of corruption relating to procuring the tender of R305 million from Transnet, as contemplated in section 13 of PRECCA. Mr Khan offered to accept a 10% commission, ultimately R30.3 million, (a gratification) from Neotel as an inducement (by influencing persons at Transnet) to award a tender for supplying the Cisco equipment. As Homix was an entity associated in fact with the Gupta enterprise, the planned participation and involvement in that corruption may be relied on to establish that Homix, Mr Khan, Mr Van der Merwe, Neotel, and

[1305] Transcript 27 May 2019, p 162-165

[1306] Exh BB9, CV-025, para 86

[1307] Exh BB12, SEM-025, para 72.2

[1308] Transcript 27 May 2019, p 165, lines 10-20

possibly some officials at Transnet, by virtue of their involvement with this transaction, were associated with and participated in the affairs of the Gupta racketeering enterprise through a pattern of racketeering activity, and hence committed the offence envisaged in section 2(1)(e) of POCA. The likely offences should accordingly be referred in terms of TOR 7 for further investigation by the law enforcement authorities.

The decision to reverse the award of preferred bidder status to T-Systems

913. During April 2014 Transnet's external auditors reported that T-Systems should have been disqualified from the tender due to the conflict of interest issue and the rounding-off issue.[1309] They also questioned Mr Molefe's authority to revoke the award and expressed the view that the factors which Mr Molefe took into consideration undermined the fairness and transparency of the tender process.[1310]

914. After considering various legal opinions and representations received from T-Systems, Mr Molefe took a decision to revoke its status as preferred bidder.[1311] The concerns of the auditors and the three legal opinions were set out in a memorandum from Mr Singh and Mr Pita to Mr Molefe in early June 2014, which recommended that Mr Molefe revoke T-System's status as preferred bidder. Mr Molefe approved the request by signing the memorandum on 6 June 2014.[1312] T-Systems accepted and consented to the revocation of its preferred bidder status.[1313] The award of the tender was then made to Neotel. On 1 July 2014 Mr

[1309] Exh BB2.1(a), PSV-0043, para 95

[1310] Annexure PV 20, Exh BB2.1(c), PSV-1007

[1311] Annexure PV 24, Exh BB2.1(c), PSV-1051

[1312] Annexure Q1, Exh BB7(a), GJJVDW-435

[1313] Annexure PV24, Exh BB2.1(c), PSV-1052

Singh and Mr Molefe addressed a memorandum to the BADC explaining what had transpired in relation to the tender.[1314]

915. Mr Molefe's conduct in relation to the tender for the 2014 MSA is questionable and of relevance on two fronts. Together with the inappropriate rounding-off of the scores favouring T-Systems, the reliance on the belated offer by BBI to reduce its price by R248 million, his dubious rationale for rescinding the award to Neotel, the supposed risks, and his refusal to entertain the opposition of the business owner to his irregular conduct, all exhibit a lack of honesty and integrity not in the best interests of Transnet in the managing of its financial affairs. The award of preferred bidder status to T-Systems was not fair and would have amounted to expenditure not complying with the operational policies of Transnet. There are strong reasonable grounds to believe that his conduct was in contravention of section 50(1)(b) and section 51(1)(b)(ii) of the PFMA and of evidential value in establishing that he was one of the individuals "associated in fact" with the other persons of the union or group constituting the Gupta "enterprise" and participated in the conduct of the enterprise's affairs through a pattern of racketeering established by his involvement in other Schedule 1 offences not linked to this particular tender.

The 2014 MSA negotiations

916. The negotiations with Neotel to finalise the 2014 MSA took place in the final quarter of 2014. There were two streams in the negotiations: a commercial stream and a technical stream. Mr Van der Westhuizen led the negotiation team in the commercial stream. A contentious issue during the negotiations was the buyback by Transnet of its ICT network assets and infrastructure. Transnet sought to re-

[1314] Annexure PV25, Exh BB2.1(c), PSV-1053-1064

acquire ownership of the equipment and infrastructure that it had imprudently sold to Neotel as part of the Transtel sale.

917. The negotiations were difficult and at a point in time there was a temporary stalemate when the negotiations came to a standstill as a result of the inability of Transnet and Neotel to find agreement on a number of issues.[1315] In an attempt to resolve the stalemate, Mr Singh became involved as did Mr Sunil Joshi, the CEO of Neotel. A meeting took place between Mr Van der Merwe from Neotel and Mr Singh, on 8 December 2014, in Umhlanga. Mr Van der Westhuizen was unaware of the purpose of that meeting or why the Transnet GCFO would meet directly with the supplier during the contractual negotiations without including anyone from the Transnet negotiating team. Mr Singh testified that he could not recall the meeting.[1316]

918. Three days later, on 11 December 2014, another meeting took place at the "SLOW Lounge" in Sandton attended by Mr Van der Westhuizen and Mr Singh from Transnet and Mr Joshi and Mr Van der Merwe from Neotel. Mr Singh testified that the meeting was proposed either by Mr Van der Westhuizen or the negotiating team. A long list of issues still needed to be finalised and the negotiations had become strained. Mr Singh testified that a meeting was justified and there was nothing untoward in meeting Mr Joshi to discuss the matter because a stalemate had been reached by the two parties. It was necessary to engage with Neotel constructively at a senior management level to regularise the relationship.[1317] At some stage during this meeting, Mr Singh and Mr Joshi met separately to discuss

[1315] See Exh BB7(a), GJJVDW-014-015, para 49.4

[1316] Transcript 17 June 2021, p 175

[1317] Transcript 17 June 2021, p 163-176

the final terms of the repurchase of the network assets and infrastructure. Mr Van der Westhuizen was not provided with feedback after this breakaway meeting.[1318]

919. A final meeting to finalise the MSA took place on Saturday 13 December 2014 at the offices of Neotel. When all was done, Mr Van der Westhuizen gave Mr Singh the final draft of the negotiated MSA and relevant approval documents. That day was Mr Van der Westhuizen's last day in the employment of Transnet. The 2014 MSA was signed by Transnet on 15 December 2014 and by Neotel on 19 December 2014.[1319]

920. Clause 25 of the 2014 MSA governed the asset buy-back issue. It dealt with distinct classes of assets differently. It provided inter *alia* that on the termination or expiration of the MSA, Transnet could exercise its rights to purchase any Service Provider Owned Equipment dedicated to the provision of services in accordance with clause 54.3.6 of the 2014 MSA. Clause 54.3.6 essentially provided that if and as requested by Transnet, as part of the disengagement, Neotel would convey to Transnet (from among those dedicated assets used by Neotel to provide the services) such assets as Transnet might select at specified prices. Further, in terms of clause 25.4, Neotel agreed to sell immediately to Transnet the assets identified in Attachment P to the agreement, used exclusively to provide services to Transnet and physically held within Transnet premises, for an amount of R200 million. Evidently then, the asset buy-back had been successfully resolved by Monday 15 December 2014 when Transnet signed the 2014 MSA.

[1318] Transcript 27 May 2019, p 102-106; and Exh BB7(a), GJJVDW 016-017, paras 51-55

[1319] Annexure V4, Exh BB7(c), GJJVDW–SUP-003-178

The business consultancy agreements between Neotel and Homix

921. On Friday 12 December 2014, unknown to Mr Van der Westhuizen, the CFO of Homix, Mr Khan (who was also associated with BEX, the Gupta linked company that benefited from the relocation of CNR to Durban), addressed a letter to Mr Joshi which read:

> "This letter serves to confirm today's engagement with Neotel pertaining to their Master Services Agreement and the related Asset Sale Negotiation with Transnet SOC. The talks have reached an impasse and Neotel wishes to engage the services of Homix to analyse both entities requirements to find a workable solution.
>
> The work is to be carried out on a Pure Risk basis and Homix shall not bill for any time and material or any out of pocket expense. If successful, Neotel shall pay Homix:
>
> - For the Asset Sale a Full and Final once off fee of R25 000 000 (Twenty Five Million Rand), payable 30 days after signature.
> - For the Master Services Agreement a fee of 2% of the contract (currently at R1.8 billion).
> - These fees are excluding VAT.
>
> These Fees are Success Fee Commissions payable because of the assistance and expertise provided by Homix enabling Neotel to close these two deals that are currently agreed to be lost business as confirmed by both Neotel and Transnet.
>
> Please concur the above together with the success-fee structure, where the latter shall become binding on Neotel."[1320]

922. This proposal by Homix thus envisaged that Neotel would pay Homix two amounts totalling R61 million: R25 million for the asset buy-back agreement and R36 million (2% of R1.8 billion) on conclusion of the MSA. The letter was sent by Homix shortly after Mr Van der Merwe on 11 December 2014 shared confidential Neotel

[1320] Annexure V3, Exh BB7(b), GJJVDW- 519

documents with Homix, including a briefing document for Mr Joshi, the CEO of Neotel, in preparation for his meeting with Transnet later that day.[1321]

923. The assertion in the letter that the two deals (the 2014 MSA and the asset buy-back) were "lost business" on Friday 12 December 2014 (and confirmed as such by both Neotel and Transnet) is not credible considering that both deals were closed the next day (Saturday 13 December 2014) and signed by Transnet on Monday 15 December 2014. It seems improbable that services of Homix to the value of R61 million were either necessary or rendered in the 24 hours from Homix's proposal to the conclusion of the 2014 MSA and asset buy-back.

924. Mr Joshi signed two "business consultancy agreements" with Homix, which are annexed to the statement of Mr Van der Westhuizen and are referred to hereafter for convenience respectively as "Annexure V1" and "Annexure V2" - on 19 February 2015, two months after the 2014 MSA and asset buy-back was concluded.[1322] Both are signed and dated by Mr Joshi, and signed but not dated by Mr Khan.[1323] Neotel paid Homix R41.04 million (being R36 million plus VAT of R5 040 000) on 27 February 2015.[1324]

925. Although the preamble and other clauses intimate that the two agreements were concluded in respect of future services, the other terms of the agreements indicate that in important respects they related to the 2014 MSA and the asset buy-back which had been concluded two months earlier. Thus clause 4.1 of Annexure V1 provided that Homix undertook to facilitate the successful conclusion of the asset sale referred to in the MSA concluded between Neotel and Transnet and clause

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[1321] Annexure CV14, Exh BB9, CV-090

[1322] Annexure V1, Exh BB7(b), GJJVDW-493; and Annexure V2, Exh BB7(b), GJJVDW-506

[1323] Annexure V2, Exh BB7(b), GJJVDW-504 and 517

[1324] See Exh BB9, CV-004, paras 9-10

4.2 defined the "Project" to mean "the successful conclusion and signature of the asset sale".

926. Clause 6 of Annexure V1 dealt with the fees payable to Homix. It provided for the payment of a fee of R25 million for the successful implementation and finalization of an operational agreement relating to the assets bought by Transnet from Neotel. The fee was stated to be "a success fee commission payable because of the assistance and expertise provided by the Consultant enabling Neotel to successfully close the Project which Project is currently agreed to be lost business as confirmed by both Neotel and Transnet…" Satisfactory performance would be evidenced by the successful conclusion of an agreement giving effect to the sale of assets as contemplated in the MSA concluded between Neotel and Transnet on 19 December 2014, and confirmation and agreement of a related asset sale and the conclusion of an operational agreement in that regard by no later than 18 March 2015. It was agreed further that Homix would only become entitled to a fee upon payment by Transnet to Neotel of the upfront payments agreed to in the MSA, suggesting that it had been factored as a cost into the 2014 MSA.[1325]

927. Annexure V1 was thus restricted to the asset buy-back agreed in principle in the 2014 MSA. Clause 6 of Annexure V1 recognised that, but in contradictory fashion, described the issue as "lost business" and provided for an "operational agreement" to be concluded by 18 March 2015, presumably to rescue that "lost business". That characterisation of the services to be rendered under Annexure V1 is inconsistent with the tenor and express terms of clause 25 of the 2014 MSA which on the face of it constituted an adequate contractual mechanism making provision for the asset buy-back.

[1325] Transcript 27 May 2019, p 143-45

928. Although Annexure V1 was signed by both Neotel and Homix, no fee appears to have been paid to Homix in terms of it. Moreover, there is no evidence that the contemplated "operational agreement" was concluded by 18 March 2015.

929. Annexure V2, the second "business consultancy agreement", is almost identical to Annexure V1, except that clauses 4 and 6 differ significantly. Clause 4 of Annexure V2 defined the "consultancy services" as follows:

> "The Consultant agrees to undertake to analyse the requirements of both Neotel and Transnet SOC to find a workable solution to the impasse in negotiations between Neotel and Transnet in regard to their Master Services Agreement."

930. Clause 6 of Annexure V2 provided for a success fee of "2% of the value of the contract (currently at R1.8 billion)" for the successful conclusion of the MSA and "the assistance and expertise provided by the Consultant enabling Neotel to successfully close the Master Services Agreement currently agreed to be lost business as confirmed by both Neotel and Transnet..." The payment was also conditional upon payment by Transnet to Neotel of the upfront payments agreed to in the MSA.

931. It is notable that Annexure V2 characterised the MSA as "lost business", two months after the satisfactory conclusion of it. It also spoke about the MSA prospectively as if it had not been concluded with the entitlement to a fee vesting at some future date on conclusion and signature of a contract that had already been concluded. These aspects point to the inauthentic, fraudulent and corrupt nature of this contract.

932. The amount payable under Annexure V2 was R41.04 million (being R36 million plus VAT of R5 040 000). There is an invoice for this amount addressed by Homix

to Neotel dated 2 January 2015 included in Annexure V1.[1326] It is stated to be for "Master Services Agreement Successful Conclusion Success Fee". As mentioned, this amount was paid to Homix by Neotel on 27 February 2015, about a week after Annexures V1 and V2 were signed by Mr Joshi and Mr Khan.

933. Mr Van der Westhuizen, who successfully led the negotiation of the MSA to a conclusion on 13 December 2014 (the day after Homix's initial letter proposing a business consultancy agreement with Neotel) was unaware of the existence of Homix at the time he closed the deal. He said that he subsequently learned in the media that Homix was paid by Neotel for allegedly facilitating negotiations between Neotel and Transnet. He testified that he never met or had anything to do with any person or representative of Homix during the negotiations with Neotel.[1327] No member of his team had anything to do with any person from Homix during the negotiations or on the day prior to or of the closing of the deal.[1328] He said that the reference in the letter of 12 December 2014 to "lost business" and the representation of the negotiations as being at "impasse" was nonsensical in the light of the successful conclusion of the deal the next day. The idea that any representative from Homix would have been able to get the parties to reach agreement within a single day is implausible.[1329]

[1326] Transcript 27 May 2019, p 136-136; Annexure V1, Exh BB7(b), GJJVDW-493 at p 505

[1327] Transcript 27 May 2019, p 107; and Exh BB7(a), GJJVDW-017, para 56; and Transcript 27 May 2019, p 111-147

[1328] Transcript 27 May 2019, p 140-141 – Mr Van der Westhuizen could not recall all the persons present in the final hours of the negotiations; he mentioned: Mr Maluleke (Procurement), Mr "Belfie" (Supplier Development), Mr McLaren (External Consultant), Mr Matthews (Gartner), Mr Molebatsi (External Legal), Mr Clara (Neotel) and Mr Van der Merwe (Neotel). None of them mentioned any contact with Homix.

[1329] Transcript 27 May 2019, p 142

934. Mr Singh could not confirm that Homix had performed in terms of the agreements and had no idea why Neotel had paid Homix R41 million. He testified that he had no interaction with Homix.[1330]

Homix's justification of its fee of R41.04 million

935. After the auditors of Neotel, Deloitte, queried this transaction, Neotel was compelled to conduct an investigation into it. During the course of that investigation, Mr Ashok Narayan of Homix wrote a letter to Mr Joshi dated 2 July 2015 justifying the fee it received.[1331] No witness for Homix has testified before the Commission regarding the content of this letter. It is nonetheless the only account of Homix's version on record.[1332]

936. The letter commences with the inaccurate statement that "both the Asset Sale and the MSA were covered under a single Agreement between Homix and Neotel." That is not correct. There were two agreements – Annexure V1 and Annexure V2. Moreover, the fee (R36 million) paid to Homix in terms of the invoice of 2 January 2015 was limited to a "success fee" for the successful conclusion of the MSA. No fee was paid (R25 million) for the asset buy-back. The letter sets out that Mr Van der Merwe met Homix's representative, Mr Mandla, at JB's Restaurant in Melrose Arch (the same restaurant at which Mr Bester of Hatch met Mr Essa in relation to Transnet's MEP project) on 11 December 2014. At the meeting Mr Van der Merwe "requested consulting assistance with a fresh perspective to help Neotel close the deal". The following day, 12 December 2014, Mr Van der Merwe and Mr Mandla met again and agreed on a fee of 2%. The letter sets out the services rendered over three days supposedly justifying a fee of R36 million as follows:

[1330] Transcript 17 June 2021, p 173-174

[1331] Annexure CV 15, Exh BB9, CV-105

[1332] The letter is discussed by Mr Vaghela the Deloitte auditor at Transcript 11 June 2019, p 110 *et seq*

"Dec 11 2014 – Homix deputed senior consultants with a high level of Telecom expertise to quickly de-construct the deal with a view to understand both parties' view of the transaction. After the team reported back, it became evident to Homix that the conceptual understanding from the Transnet negotiation team (senior managers) was not the same as the view given by Neotel. Thus Homix immediately realised that they could add value by finding a lever that could possibly help Neotel to negotiate an agreed position.

Dec 12 2014 – Subsequent to receiving verbal confirmation from FvdM, we immediately assigned our senior consultants, who were on standby, to work round the clock and conduct intensive research from various sources, with a view to find the lever that would help Neotel get back to the negotiating table and bring all on the same page on the real issues. Fortunately, our team was successful in coming up with a tangible solution which pinpointed several key factors and a principal lever (as detailed below) that FvdM could use. FvdM subsequently used the material provided to interact with Transnet. We also advised FvdM to adopt an urgent approach with Transnet citing the grounds that Transnet were scheduled to go on leave and if this matter was not urgently resolved, the extension period would kick in and Transnet would be liable for wasteful expenditure, which would be reported to Parliament. Using this approach, FvdM was able to convince the Transnet negotiating team and executives to agree on a course of action and minimum terms with deadlines no later than Monday the next week. This was Homix's first step to get both parties back to the negotiating table.

Dec 12 2014 – Homix advised FvdM to facilitate a meeting between Transnet CFO and the Neotel CEO, which he did. The meeting took place and both stakeholders agreed that their respective teams would meet on Dec 13 2014 and not leave until they addressed all issues outstanding. In this context, Homix strongly advised FvdM to ensure that the Neotel executive decision makers be present in the meeting to ensure immediate decisions could be taken.

Finally, due to Homix's intervention, both parties understood each other's position and now that the executives were on the same page, agreement was reached on the outstanding points of dissension."

937. The first observation that can be made about this explanation, besides its lack of specificity, is that it implies that Homix consulted with Transnet senior managers to assess the problem. The letter does not disclose who at Homix engaged with whom at Transnet and Neotel, besides Mr Van der Merwe. Mr Van der Westhuizen

made it clear that neither he nor any member of his team knew of the existence of Homix or discussed the 2014 MSA or asset buy-back with it. Mr Singh confirmed that. Secondly, the claim that research by unidentified senior consultants (with unstated expertise) unearthed "a lever" is not substantiated. The auditors were unable to find any evidence that corroborated any of the assertions in the letter.[1333]

938. Furthermore, the advice allegedly given by Homix was so banal as to render the explanation wholly incredible. What it boils down to is that Homix advised Mr Van der Merwe, an experienced manager with negotiating experience, to: i) act urgently to avoid censure by Parliament; ii) arrange a meeting between Mr Singh and Mr Joshi; and iii) ensure the presence of Neotel executives in the negotiations. This intervention, together with the pinpointing of "several key factors and a principal lever", Homix contended led both parties to understand each other's positions and reach agreement without further difficulty, thus justifying a fee of R36 million. It achieved this result without meeting with or consulting a single member of the Transnet team and by limiting its contact with Neotel to one or two meetings with Mr Van der Merwe.

939. The lever supposedly unearthed related to the asset-buy back and to the trite considerations of the preferred duration of the 2014 MSA and the financing of the asset buy-back. Clause 25.4 of the 2014 MSA (the terms of which would have been agreed on 13 December 2014) provided for an asset buy-back of R200 million. That was simply not the result of any effort by Homix. Importantly though, the fee of R36 million paid to Homix was not paid in terms of Annexure V1 but in terms of Annexure V2. The agreement under Annexure V1 was to pay R25 million for "the successful implementation and finalization of an operational

[1333] Transcript 11 June 2019, p 116, line 20

agreement" relating to the asset buy-back. No operational agreement is on record and that fee was never paid - though it may have reflected in the accounts as an accrual.[1334] One may assume that if Homix had played a role in agreeing the asset buy-back, it would have immediately submitted an invoice for it. There is no invoice for the R25 million on record.

940. The supposed "value add" by the intervention of Homix in the last hours of the negotiations is wholly improbable and a likely *ex post facto* false justification of a corrupt payment made to the Gupta enterprise as part of a pattern of racketeering activity. The whole story in the letter is a complete fabrication.

941. Mr Van der Westhuizen was not able to say whether Neotel inflated its price in order to use the additional money to pay the fee to Homix.[1335] He did consider the final price to be excessive, but Transnet was in a weak bargaining position because Neotel was in possession of the network assets, the 2007 MSA was about to expire and a further extension of the 2007 MSA would have been expensive.[1336]

942. In paying the R41.04 million to Homix, Neotel breached clause 65.6 of the 2014 MSA which included a warranty against corrupt payments and permitted Transnet to cancel the 2014 MSA. There are strong grounds to conclude that Neotel and Homix were involved in fraud and corruption.

The Deloitte investigation of the Homix transactions

943. During the audit of Neotel for the 2015 financial year, Neotel's auditors, Deloitte, became concerned that the payments by Neotel to Homix were irregular. As part of

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[1334] Transcript 11 June 2019, p 67-69

[1335] Transcript 27 May 2019, p 143-144

[1336] Transcript 27 May 2019, p 146-147

its routine audit testing, the Deloitte audit team was provided with a creditors' age analysis at 28 February 2015, which identified Homix as a new vendor and reflected a debit balance of an amount of R41.04 million which was not disclosed properly in the financial statements.[1337] The incomplete and questionable nature of the available information prompted Mr Andre Dennis and Mr Vaghela of Deloitte to meet with Mr Steven Whiley the CFO of Neotel on 9 April 2015, and with Mr Joshi and Mr Whiley again on 11 April 2015.[1338]

944. Mr Joshi and Mr Whiley confirmed that Neotel had made two payments to Homix during the 2015 financial year totalling R75.57 million: an amount of R34.53 million was paid on 3 April 2014 in relation to the Cisco deal and R41.04 million was paid on 27 February 2015 in relation to the MSA.[1339] The controls applied by Neotel for the loading of creditors on its system were not followed in respect of Homix. The contract with Homix in relation to the 2014 MSA was concluded by Mr Joshi, without board approval and in the opinion of the auditors fell outside the scope of his authority. The payments were approved by both Mr Whiley and Mr Joshi.[1340] They explained to the auditors that Homix had come on board on 12 December 2014 to assist with the supposed impasse in the 2014 MSA negotiations and was paid R41.04 million for one day's work. The suggestion to use Homix had come from Mr Van der Merwe. Neither Mr Joshi nor Mr Whiley could offer much in the way of description or explanation of the work performed by Homix other than to say that it had resolved the impasse.[1341]

[1337] Transcript 11 June 2019, p 9-10

[1338] Annexure CV1, Exh BB9, CV-030; and Annexure CV2, Exh BB9, CV-032

[1339] Transcript 11 June 2019, p 17-20

[1340] Transcript 11 June 2019, p 55-56; and Exh BB9, CV-10-11, para 38

[1341] Transcript 11 June 2019, p 25

945. Mr Vaghela met with Mr Van der Merwe on 13 April 2015.[1342] He became aware of Homix for the first time when he received the letter from Homix in early 2014 notifying him of the Cisco deal for which Neotel had not been invited to tender. This explanation is inconsistent with the fact that Transnet was tied into an exclusive supplier agreement with Neotel and thus did not need to tender. Mr Van der Merwe claimed Homix was a Dubai based company offering specialised consultancy services with a staff of 100 employees and offices in Silverton, Pretoria. He usually met with Homix, particularly Mr Ashok Puthenveedu, at Melrose Arch.[1343] Mr Van der Merwe believed that the fee of R41.04 million for work of one or two days by Homix was justifiable. The Deloitte audit team doubted the commerciality of the fee paid and assumed it was a "facilitation payment" (a payment of a fee for no value).[1344]

946. Subsequent investigations established that Homix was a shell company with little or no resources.[1345] A CIPC search on the registration number of Homix returned no result; telephone calls made to the specified contact details were unanswered; an internet search on the registered address of Homix returned the address as being registered to a charity; and the website address mentioned in the Homix contract did not return a valid webpage. Searches on Mr Puthenveedu revealed that he was associated with Sahara Computers, a company linked to the Gupta enterprise.[1346]

947. The auditors were of the opinion that Mr Joshi had breached the Neotel delegation of authority when he authorised the transaction and payment to Homix without

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[1342] See the minutes - Annexure CV3, Exh BB9, CV-034; and Transcript 11 June 2019, p 38 *et seq*

[1343] Transcript 11 June 2019, p 41-48

[1344] Transcript 11 June 2019, p 31, line 20

[1345] Transcript 11 June 2019, p 31, line 10

[1346] Transcript 11 June 2019, p 50-51; and Exh BB9, CV-009, para 35

board approval, breached section 76(3) of the Companies Act, obliging him to act in the best interests of Neotel, and that the payment made by Neotel to Homix caused material financial loss to Neotel. Deloitte then, on 28 April 2015, reported a reportable irregularity ("the first RI") to the IRBA in terms of section 45 of the Auditing Profession Act ("APA").[1347]

948. Further engagements and correspondence[1348] did not lead to a satisfactory resolution. However, subsequent to a special audit committee meeting, the board of Neotel initiated an independent professional investigation into the transaction by Werksmans Attorneys. During the investigation, on 19 May 2015 (a few weeks after he had been appointed as acting GCEO of Transnet), Mr Gama addressed a letter to the chairman of the board of Neotel stating that Transnet was "comfortable and confident of the veracity of its procurement process" and that there had been no irregularity in the award of the contract to Neotel. He confirmed that it was normal practice for Transnet to engage business consultants or advisors "to navigate complex financial, technical and commercial aspects of transactions" and that Transnet was aware that Homix had played a similar role on behalf of Neotel.[1349] In saying this about Homix, Mr Gama exposed his dishonesty. Homix was a shell company, with which Neotel was engaged in fraudulent and corrupt activity to the detriment of Transnet. Yet, Mr Gama essentially vouched for it.

949. In a letter to Deloitte, dated 26 May 2015,[1350] Mr Srinath (the chairman of Neotel) disputed the auditors' contention that Mr Joshi lacked the delegated authority to incur expenditure, arguing that it fell within his powers and authorities "in respect of the day-to-day management of the company" and his authority to sign all

[1347] Annexure CV6, Exh BB9, CV-043

[1348] Exh BB9, CV-014-016, paras 50-57

[1349] Annexure CV14, Exh BB9, CV-097

[1350] Annexure CV11, Exh BB9, CV-078-079

documents and contracts for and on behalf of the company.[1351] Deloitte disputed that interpretation.[1352] In a subsequent letter,[1353] dated 5 June 2015, Mr Srinath provided a summary of the findings of the investigation conducted by Werksmans, and answered questions posed by Deloitte in a letter of 17 April 2015.[1354] He conceded that Mr Van der Merwe had acted wrongfully but informed Deloitte that he had resigned before disciplinary action could be taken. Mr Srinath, however, held firm in the view that the payment of Homix for its role in supposedly resolving the impasse in the 2014 MSA negotiations justified the fee.[1355] Due to the severe time constraints no service providers other than Homix were considered. The credentials and expertise of Homix that Neotel relied on was its prior successful engagement with Transnet during the Cisco transaction. The work to be done by Homix was: i) engage relevant procurement and financial executives at Transnet; ii) present the "value proposition" of the Neotel bid; iii) assist with resolving the issues causing the impasse; and iv) conclude the 2014 MSA and asset buy-back.[1356]

950. Mr Srinath did not explain why staff members of Neotel were incapable of performing these routine tasks. In answering the question about what Homix "brought to the table", Mr Srinath stated: "Homix was doing business in Transnet and understood the procurement processes as well as having visibility in regard to opportunities in Transnet as demonstrated by the previous CISCO contract". He added that management at Neotel understood that Homix "had the capacity to provide the resources" to engage executives, present the value proposition, resolve

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[1351] Annexure CV11, Exh BB9, CV-078-079, paras 3.1 and 3.6

[1352] Transcript 11 June 2019, p 86-87

[1353] Annexure CV14, Exh BB9, CV-089

[1354] Annexure CV4, Exh BB9, CV-037; and Transcript 11 June 2019, p 92 *et seq*

[1355] Annexure CV14, Exh BB9, CV-093, para 4.1

[1356] Annexure CV14, Exh BB9, CV-091-095

disputes and close the deal.[1357] The letter is vague as to what precisely those resources were, how they would be applied and why Neotel lacked them.

951. On 9 June 2015 Deloitte responded to Neotel's letter. It remained convinced that the commerciality of the transaction was questionable. It accordingly advised Neotel that persons in authority at Neotel had reporting obligations in terms of section 34 of PRECCA and that failure to report the transaction could in itself constitute a reportable irregularity.[1358] Neotel subsequently reported the Homix transactions and laid the blame for any wrongdoing exclusively with Mr Van der Merwe alleging that his conduct constituted fraud.[1359] Deloitte reported a second reportable irregularity to the IRBA on 14 July 2015 on the basis that Mr Joshi and Mr Whiley had breached the Companies Act and their common law duties as directors of a company to act in the best interests of the company, resulting in a substantial financial loss to Neotel.[1360] After further engagements,[1361] the auditors on 8 February 2016 reported other reportable irregularities to the IRBA,[1362] in particular that the directors of Neotel had failed to report the corrupt transactions to the Financial Intelligence Centre within 15 days as required in terms of section 29 of FICA[1363] and section 34 of PRECCA.[1364] Neotel took issue with some of the

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[1357] Annexure CV14, Exh BB9, CV-094, para 8

[1358] Transcript 11 June 2019, p 107; and Annexure CV15, Exh BB9, CV-100

[1359] Annexure CV16, Exh BB9, CV-102-103

[1360] Annexure CV18, Exh BB9, CV-117

[1361] Transcript 11 June 2019, p 120-135; and Exh BB9, CV-18-25, paras 67-84

[1362] Annexures CV22-26, Exh BB9, CV-137-153

[1363] Section 29(1) of FICA provides that a person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that a transaction or series of transactions to which the business is a party has no apparent business or lawful purpose must within the prescribed period (15 days) after knowledge was acquired or the suspicion arose, report the transaction and relevant details to the FIC.

[1364] Section 34(1) of PRECCA provides that any person who holds a position of authority and who knows or who ought reasonably to have known or suspected that any person has committed corruption must report that to a police official.

reporting obligations which the auditors alleged applied to it in terms of FICA and PRECCA.[1365] However, it agreed on the advice of counsel to file some reports out of an abundance of caution, but denied that there had been any breach of fiduciary duty in the failure to report and contended that in some instances it had complied with its PRECCA obligations.

952. Mr Joshi and Mr Whiley were placed on special leave by Neotel on 31 July 2015 and eventually resigned on 30 November 2015 during the disciplinary proceedings against them. The audited financial statements were qualified in respect of the commerciality of the Homix transactions and disclosure on the matter is noted in the financial statements.

The SARB investigation of Homix

953. Mr Mazibuko, the Head of Department: Financial Surveillance ("FinSurv") of the South African Reserve Bank ("SARB") testified before the Commission in respect of Homix and its directors (Mr Taufique Shaukat Hasware (Mr Khan), Mr Yakub Ahmed Suleman Bhikhu and Mr Gamat Shakif Adams) and the flow of funds on bank accounts held by Homix domestically and internationally.

954. FinSurv established that Homix operated accounts at Standard Bank.[1366] From March 2014 (about the time of the Cisco transaction) there was a marked increase in the number of transactions in the accounts. During this period, the accounts received several large deposits. A cash flow analysis for the period 28 March 2014 to 3 December 2015 showed credits of more than R660 million among which were

[1365] Annexure CV 28, Exh BB9, CV-164

[1366] Transcript 10 June 2019, p 29 *et seq*

the two payments totalling R75.57 million from Neotel. Homix also received R179.5 million from Regiments Capital (Pty) Ltd during this same period.[1367]

955. The bank statements of Homix reflect regular large transfers to the accounts of two local entities, Ballatore Brands (Pty) Ltd ("Ballatore Brands") and Bapu Trading Close Corporation ("Bapu Trading") respectively. Notably, during April 2014, an amount of R34.5 million (including VAT) in respect of the Cisco transaction was transferred from Neotel to the Homix account at Standard Bank, after which the entire amount was depleted by means of electronic transfers to Ballatore Brands and Bapu Trading.[1368] The sole director of Ballatore Brands was Mr Mohamed Akram Khan who was the sole director of Syngen Distribution (Pty) Ltd ("Syngen"). It appears from the statements of Bapu Trading's bank account held with Standard Bank that funds received from Homix were mainly transferred to Syngen's bank accounts.[1369]

956. The disbursement of the funds in the Homix Standard Bank accounts (including the money paid by Neotel) breached the Exchange Control Regulations.[1370] The exchange control function of the SARB is primarily governed by section 9 of the Currency and Exchanges Act[1371] read with the Exchange Control Regulations. The Exchange Control Regulations prohibit various transactions which may only be entered into with the permission of the Treasury or persons authorised by the Treasury.

[1367] Exh BB12, SEM-23-26; and Annexure 20, SEM-353 *et seq*

[1368] Transcript 10 June 2019, p 48-49

[1369] Exh BB12, SEM-25-26, paras 73-76

[1370] Promulgated on 1 December 1961 in Government Notice R.1111

[1371] Act 9 of 1933

957. Most foreign exchange transactions are dealt with by authorised dealers, appointed to act as such in terms of the Exchange Control Regulations. No person may use or apply foreign currency acquired from an authorised dealer for any purpose other than that stated in the relevant application.[1372] The authorised dealers administer exchange control transactions within the parameters of the Currency and Exchanges Manual for Authorised Dealers ("the Manual"). Section B.1(B) of the Manual provides that authorised dealers may only effect foreign currency payments for imports against relevant documentation including the prescribed SARS customs clearance declaration ("declaration") bearing the "movement reference number" ("the MRN") as evidence that goods in respect of which transfers have been effected have been cleared. The MRN is a unique number generated by SARS under its Electronic Data Interchange ("EDI") system in response to a declaration lodged by or on behalf of an importer of goods.

958. In May 2015, Mercantile Bank Ltd ("Mercantile"), an authorised dealer, referred certain suspicious foreign exchange transactions involving Homix to FinSurv. During the period 21 to 28 May 2015, Homix effected 13 cross-border foreign exchange transactions via Mercantile, with an aggregate value of approximately R51.8 million at the relevant time.[1373] On 29 May 2015, Homix attempted to effect a further three transactions, to the value of an additional R14.47 million, but was prevented from doing so by FinSurv. The relevant documentation revealed that Homix effected 16 payments in favour of only two beneficiaries domiciled in Hong Kong, being Morningstar International Trade Ltd ("Morningstar") and YKA International Trading Company ("YKA") that had little online or other commercial presence. Three movement reference numbers (MRNs) were supplied by Homix to justify the 16 transactions. Investigations on the SARS system revealed that while

[1372] Regulation 2(4)(a)

[1373] Transcript 7 June 2019, p 142 *et seq*; and Annexure SEM 7, Exh BB12, SEM-315

the MRNs were valid, the total value of goods cleared amounted to less than R50 000. Hence, the value of the payments made out of South Africa did not match the value of the goods claimed to be imported. Authorisation was sought for R51.8 million to leave the country, while only R50 000 worth of goods were to be imported.[1374]

959. All of the relevant transactions were "booked" with Mercantile via Peritus Forex Solutions (Pty) Ltd ("Peritus"), a treasury outsourcing company which acts as intermediary between an authorised dealer and a client attending to foreign exchange transactions on behalf of the client. A "trading account" was opened for Homix at Mercantile, and a mandate provided to Peritus to transact on its behalf. Peritus received instructions for the relevant foreign exchange transactions for Homix from Bhikhu. After examining other documents, FinSurv was persuaded that the SARS EDI documentation provided to Mercantile by Homix was falsified.[1375]

960. After the finalisation of the investigation, a letter was sent by email and registered mail to Homix inviting it to make representations as to why the funds "blocked" in the Mercantile account should not be declared forfeit to the State. FinSurv never received a response to this letter, nor did any person contact it in regard to the contents thereof. The amount of R14.47 million was declared forfeit to the State in terms of Regulation 228 on 30 December 2016.

961. Mr Mazibuko testified that the Homix transactions displayed all the hallmarks of a money laundering scheme aimed at disguising the origin, true nature and ultimate

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[1374] Transcript 7 June 2019, p 161 *et seq*

[1375] Transcript 7 June 2019, p 180-196; and Transcript 10 June 2019, p 1-7; and Annexures SEM12 and SEM14, Exh BB12, SEM 18-19, paras 50-53

destination of funds.[1376] This was the company that Mr Gama defended in his letter of 19 May 2015 as having rendered the services it alleged it had rendered when it in fact had done no such thing.

962. The evidence as a whole therefore provides reasonable grounds to believe that in relation to the payment of the R41.04 million to Homix, there was planned participation by Mr Joshi and Mr Van der Merwe in the offences of corruption, money laundering and fraud, as well as contraventions of the exchange control legislation (all scheduled offences under schedule 1 of POCA) for the benefit of the Gupta enterprise. The authorisation and facilitation by Mr Joshi, Mr Whiley and Mr Van der Merwe of the illegal payments to Homix whilst associated with the racketeering enterprise, in particular, give rise to reasonable grounds to believe that they participated (possibly along with Mr Singh) in the conduct of the enterprise's affairs through a pattern of racketeering and thus contravened section 2(1)(e) of POCA. These findings are to the effect that there are reasonable grounds to believe that these persons violated relevant legislation and were involved in corruption of the kind contemplated in TOR 1.4 and TOR 1.5. The likely offences and identified wrongdoing should accordingly be referred in terms of TOR 7 to the law enforcement authorities for further investigation.

[1376] Mr Mazibuko also testified to the existence of a link between the Homix transactions and two other entities that were previously under investigation being Viper Wholesalers (Pty) Ltd ("Viper") and FGC Commodities (Pty) Ltd ("FGC Commodities"). Morningstar, Viper and FGC Commodities share the same sole director, being Mr Mahashveran Govender. Other persons involved in Homix were Mr Sheldon Breet and Mr Matthew Breet who transferred money from Homix to Morningstar in August 2016 - See Exh BB12, SEM 21-22, paras 59-66

CHAPTER 11 - T-SYSTEMS: THE IT DATA TENDER

The 2015 RFP for IT data services

963. During January 2010, Transnet entered into an agreement with T-Systems for the provision of IT data services. Five extensions of the contract took place between 2010 (when the contract was concluded) and 2019.[1377] The total value of the contract over the nine years of its operation was approximately R4.8 billion.

964. Issues arose with T-Systems in 2015 when it was discovered that Transnet Group Capital was paying T-Systems for approximately 2200 computers when only 1100 were employed by the division. Furthermore, 450 computers leased through the T-Systems contract in July 2015 were delivered to Transnet but disappeared. The forensic team of Transnet found that these computers could not be traced as the tracking software was not installed. The relevant contract was subsequently ceded initially to Zestilor and then later to Innovent Rental and Asset Management Solutions (Pty) Ltd ("Innovent"). Zestilor, as discussed earlier, was owned by Mr Essa's wife.[1378] Transnet carried on paying rent for these leased computers for a number of years without having the benefit of them. Other evidence (discussed below) shows that T-Systems made regular monthly payments to Zestilor for the benefit of Mr Essa and his wife, thus establishing some link between T-Systems and an associate of the Gupta enterprise.

965. During November 2015, Transnet issued an RFP to the open market for the supply of IT data services. Prior to issuing the RFP, Transnet contracted Gartner Ireland to review the services procured from T-Systems through the IT Outsourcing Master

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[1377] Transcript 10 May 2019, p 1 *et seq*

[1378] Exhibit BB3(a), MSM-030, para 5.12; and Transcript 16 May 2019, p 154 *et seq*

Services Agreement and to draft new technical specifications, technical evaluation criteria and improved service level agreements. The process was initiated by the Group Chief Information Officer ("the GCIO") of the time, Dr Mantsika Matooane, who approved the business case, the service requirement specifications, the evaluation criteria and the appointment of the cross functional evaluation team ("CFET").[1379] Before the RFP was issued, Transnet extended the T-Systems contract until 31 December 2016. The Transnet board sub-delegated its authority to the GCEO (Mr Gama) to approve the RFP, issue the RFP and conduct due diligence and post tender negotiations.[1380]

966. The RFP was for the outsourcing of data services for the whole of Transnet. The outsourced services related to the build and upkeep of Transnet's IT estate which included: i) the data centre and hosting services - which included servers, databases, storage, mainframe and the disaster recovery of these services; ii) the help and services desk; iii) the collaboration services and applications used by Transnet; and iv) end user computing (desktop support). The tender, estimated to cost R1.85 billion over five years, was a consumption based contract and had an un-costed portion driven by new projects when required.[1381]

967. Four witnesses testified in relation to the award of the RFP and the controversy that arose in relation to it: Mr Popo Molefe,[1382] Mr Volmink,[1383] Mr Mahomedy[1384] and Ms Makano Mosidi.[1385]

[1379] Exh BB11, MMAM-003, para 8

[1380] Annexure MMAM 02, Exh BB11, MMAM-029, para 5

[1381] Exh BB11, MMAM-005, paras 13 and 14

[1382] Exh BB 1(a), PSM-001, para 10.12.12 *et seq*; Transcript 7 May 2019, p 86 *et seq*

[1383] Exh BB2.1(a), PSV-048, para 105 *et seq*; and Transcript 10 May 2019, p 1 *et seq*

[1384] Exh BB3(a), MSM-30, para 5.12; and Transcript 16 May 2019, p 154 *et seq*

[1385] Exh BB11, MMAM-01; and Transcript 10 June 2019, p 64 *et seq*

968. Ms Mosidi held the position of GCIO at Transnet from 1 June 2016 until she resigned on 30 September 2018. She is an information and technology specialist with senior management and executive experience.[1386] The RFP process for the IT data services was already underway when Ms Mosidi took up her position with Transnet. She became the business owner of the tender when she assumed her position as GCIO in June 2016.

969. In January 2017, the T-Systems contract was extended for a second time by a further nine months to enable Transnet to finalise the award of the RFP, which at that time was still at the adjudication stage. Transnet was obliged to extend the contract three more times between October 2017 and 8 March 2019.[1387]

970. The evaluation process resulted in seven bidders meeting the technical standards of the tender: T-Systems; Gijima Holdings (Pty) Ltd ("Gijima"); Ubuntu Technologies (Pty) Ltd ("Ubuntu"); Wipro Technologies South Africa (Pty) Ltd; Business Connexion (Pty) Ltd; EOH Mthombolo (Pty) Ltd; and Mobile Telekom Networks (Pty) Ltd.[1388]

The shortlisting of T-Systems and Gijima

971. Ms Mosidi became involved with the procurement process at Step 7 of Stage 2 after the evaluation process was complete.[1389] All the bidders that reached Step 7 had met the mandatory requirements (pre-qualification administrative and substantive responsiveness) and the minimum thresholds of the tender (local content, supplier development and functionality/technical). The mandatory

[1386] Transcript 10 June 2019, p 72-75

[1387] Transcript 10 May 2019, p 9 *et seq*; Exh BB2.1(a), PSV-0048, para 105; and Annexure PSV 28, Exh BB2.1(c), PSV-1085

[1388] Transcript 10 June 2019, p 90

[1389] Transcript 10 June 2019, p 80

technical, risk and financial requirements had all been met.[1390] The final determining criterion for the award of the tender at this point was the best and final offer ("BAFO") submitted by the bidders.

972. On 30 June 2016, Ms Mosidi received an email from Mr Pita recommending a shortlist of only two bidders for the final round of adjudication, namely T-Systems and Ubuntu. These, he explained, provided the first and second lowest priced bids in terms of the PPPFA 90/10 principle - 99% and 86.2% respectively.[1391] Ms Mosidi responded recommending to Mr Pita and Mr Gama (then GCEO) that four bidders be shortlisted because she was concerned that bidders sometimes would withdraw unexpectedly in complex and commercially sizeable tenders, resulting in the extension of the evaluation process unnecessarily. She thought that a shortlist of two bidders was cutting it too fine. Seven bidders had successfully satisfied the technical requirements and increasing the shortlist from two to four would not be onerous.[1392]

973. In an email[1393] addressed to Ms Mosidi and Mr Pita dated 6 July 2016, Mr Gama rejected Ms Mosidi's proposal saying it was "adialectic to think negotiating with more will save more time or money". Ms Mosidi in reply pointed out that due diligence exercises often revealed what proposals on paper did not and limiting the negotiation to two bidders could lose more time.[1394] Ms Mosidi's view proved to be correct. On 20 July 2016, Ubuntu withdrew from the PTN process. On the

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[1390] Transcript 10 June 2019, p 91

[1391] Annexure MMAM 01, Exh BB11, MMAM-025

[1392] Transcript 10 June 2019, p 106-107

[1393] Annexure MMAM 01, Exh BB11, MMAM-024

[1394] Annexure MMAM 01, Exh BB11, MMAM-024

instructions of Mr Gama, the third highest ranking bidder, Gijima, was then added to the shortlist.[1395]

The due diligence and the initial recommendation of Gijima

974. During July-August 2016, due diligence was conducted on T-Systems and Gijima, after which they were requested to submit their BAFO. Gijima provided the lowest priced bid and scored a final score of 99%. T-Systems scored a final score of 85.07%.[1396]

975. Section 2(1)(f) of the PPPFA provides that a contract must be awarded to the tenderer that scores the highest points, unless objective criteria justify the award to another tenderer. The term "objective criteria" is not defined in the PPPFA. However, the PPM (2013) provides examples of what may be regarded as objective criteria in the Transnet procurement process.[1397] These include the existence of a "material risk" in the award of the business to the top-ranked bidder.[1398] Paragraph 20.3 of the PPM states that the concept of "material risk" must be interpreted restrictively and be limited to instances where Transnet would be seriously prejudiced by the award of business to the top-ranked bidder. A factor that featured during the evaluation of a bid cannot be revisited under the guise of "objective criteria" which are criteria "other than the criteria used to evaluate the bid".[1399] It would be unfair to rely on particular criteria to evaluate a bidder for functionality, and then once the bidder is found to have passed the functionality

[1395] Transnet-07-160, para 38.4

[1396] Annexure MMAM 02, Exh BB11, MMAM-033, para 24

[1397] See Transcript 10 June 2019, p 118-122

[1398] PPM para 18.7.3

[1399] PPM para 18.7.3(b)

threshold and scores the highest points overall, to use the very same criteria as "objective criteria" to deny the highest scoring bidder the tender award.[1400]

976. After the due diligence exercise (done by Gartner Ireland),[1401] Mr Pita and Mr Thomas prepared a memorandum addressed to Mr Gama recommending the award of the tender to T-Systems.[1402] The purpose of the due diligence was to identify business risks in order to minimize Transnet's operational risks after contract award. No major risks were identified on T-System's bid. However, a number of risks were identified in relation to Gijima's bid. These included: i) a risk that the data centre still needed to be built and outstanding equipment needed to be procured from overseas, which may have delayed the transition; ii) a marginal security risk that Gijima did not have a dedicated security operations centre; and iii) a major risk with regards to Gijima's transition commitment from the current service provider (T-Systems) which would lead to additional cost for Transnet in the migration from current mode of operation to future mode of operation.

977. An engagement with Gijima about addressing the risks did not prove satisfactory. The CFET felt that Gijima did not provide a strategy on mitigating the risks, which it believed were material. It was concerned that by selecting Gijima "with their current proposition", Transnet ran the risk of not being at either current mode of operation or future mode of operation within six months. There was also a risk of the transition project over-running, which meant that T-Systems would have to continue to service Transnet for some of the services that were not fully transitioned – this would be costly for Transnet.[1403]

[1400] Transcript 10 May 2019, p 16-17

[1401] Annexure MMAM 03, Exh BB11, MMAM-041

[1402] Annexure MMAM 02, Exh BB11, MMAM-029

[1403] Annexure MMAM 02, Exh BB11, MMAM-034, paras 30-36

978. Based on the identified business risks, the CFET decided that Gijima should not be recommended for the award of the tender and that T-Systems instead be recommended as the successful bidder.

979. On 22 September 2016, Ms Mosidi was presented with the complete file of the evaluation process by Mr Thomas, the then GCSCO, and was requested to sign the memorandum to Mr Gama recommending the award to T-Systems. She went through the file and could not "reconcile some evaluation aspects to the final recommendation". While the procurement process was in accordance with the procurement policy, she felt the recommendation was not in line with the evaluation outcome. The bidders had submitted their BAFO in August 2016, which meant that all technical evaluations and risks had been assessed and finalised, with the result that the only consideration left for bid assessment was pricing. As mentioned, Gijima had offered the lowest priced bid in the BAFO stage. The recommendation of T-Systems as the preferred bidder, in her opinion, was accordingly inconsistent with the outcome of the BAFO evaluation process.[1404]

980. Ms Mosidi was later called to a meeting at the Carlton Centre to conclude the adjudication process and append her signature to the memorandum as the business owner.[1405] The memorandum presented at the meeting was similar to the memorandum she had seen earlier. It was compiled by Ms Pheladi Xaba, Commodity Manager: Group Strategic Sourcing.[1406] Despite her ambivalence and not wanting to delay the process,[1407] Ms Mosidi appended her signature to the

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[1404] Transcript 10 June 2019, p 106-111

[1405] The following persons were present at the meeting: the Procurement Officers, Ms Pheladi Xaba and Mr Macdonald Maluleke as well as Mr Thulani Mtshwene and Mr Martin Sehlapelo. The events of the meeting are discussed at Transcript 10 June 2019, p 122-132.

[1406] Transcript 10 June 2019, p 138

[1407] Transcript 10 June 2019, p 10, line 20

recommendation but added in manuscript at the end of the document that she thought the risks as captured could be mitigated, Gijima could deliver against the requirements and had the right profile.[1408] Mr Thulani Mtshwene, the Executive Manager: Governance also had some reservations and noted on the memorandum that his signature was conditional on the high value tender report being satisfactory and that objective criteria were applied.[1409]

981. The discomfort that Ms Mosidi experienced about the recommendation to award the bid to T-Systems led her to write a detailed response regarding each mentioned risk, explaining why they were not real risks.[1410] She gave the document to Mr Mboniso Sigonyela, the Executive Manager in Mr Gama's office who advised her to hold back her response for "the right time".

982. At about the same time, Ms Mosidi was made aware of a letter, dated 5 October 2016, addressed anonymously by a group of "Concerned and Proud Transnet Employees" to Ms Disebo Moephuli, the then Chief Corporate and Regulatory Officer, pertaining to the tender.[1411] It is clear from its contents that the employees were either members of the CFET or worked closely with it.[1412] The letter made several allegations including: i) the procurement process had been corruptly manipulated as part of state capture; ii) the Gijima award was R230 million cheaper; iii) the identified risks were manufactured to award the bid to T-Systems despite it losing on merit; and iv) Gijima, a local company with better B-BBEE credentials, had been prejudiced by a deliberate flouting of the procurement

[1408] Exh BB11, MMAM-010, para 25

[1409] Annexure MMAM 02, Exh BB11, MMAM-039; and Transcript 10 June 2019, p 133, line 25

[1410] Ms Mosidi was unable to locate a copy of the document

[1411] Annexure MMAM 04, Exh BB11, MMAM-066; and Transcript 10 June 2019, p 143-152

[1412] Transcript 10 June 2019, p 153

policies. The letter confirmed Ms Mosidi's discomfort about there having been something untoward in the process.[1413]

983. Around the same time (October 2016), Ms Mosidi met Mr Gama at the Tintswalo Hotel in Waterfall Estate, Johannesburg where they discussed the tender.[1414] She assumed that he had read her memorandum and knew of her objections.[1415] Mr Gama had not at any point in the past taken a contrary position to her or openly disagreed with her reasoning.[1416] Ms Mosidi explained to Mr Gama that the decision to award the tender to Gijima was the right one,[1417] as it was inappropriate for risks which were an integral part of the evaluation process up to Step 8 to be re-introduced post the BAFO stage. The risks were irrelevant, misleading or immaterial.[1418] Mr Gama in response prevailed upon Ms Mosidi to get her facts straight as procurement could be a life endangering business if one scuttles a party.[1419] Mr Gama's warning rattled Ms Mosidi.[1420] She understood him to be asking her if she was aware of the dangers of going against the tide.[1421]

984. In his evidence before the Commission, Mr Gama denied that he attempted to intimidate Ms Mosidi at the meeting at the Tintswalo Hotel. He said that he intended to assure her that she had his full support to carry out her role as the GCIO and to determine why she had signed the September 2016 memorandum recommending that T-Systems should be awarded the business, despite her discomfort. He also said he had a sense that she may have been intimidated to

[1413] Transcript 10 June 2019, p 152

[1414] Transcript 10 June 2019, p 157-161

[1415] Transcript 10 June 2019, p 163, line 10

[1416] Transcript 10 June 2019, p 162, line 15

[1417] Exh BB11, MMAM-011, para 28

[1418] Exh BB11, MMAM-004, para 11; and Transcript 10 June 2019, p 115-116 and p 140-141

[1419] Transcript 10 June 2019, p 159

[1420] Transcript 10 June 2019, p 161

[1421] Transcript 10 June 2019, p 161, line 25

sign the document and he needed to engage with her to give her the comfort that she could disagree with things. He also needed to get a sense of whether she had the courage to disagree and put forward facts of her own in order for her to be able to make those decisions. He admitted though that he might have said people are willing to pay lots of money to do surveillance on people who are making decisions about procurement.[1422]

985. The version that Mr Gama may have put pressure on Ms Mosidi gains a measure of credibility from the ultimate award of the tender to T-Systems. As will become clearer later, key decision-makers at Transnet were determined to give the contract to T-Systems and most likely wanted the support of the GCIO to advance that preference.

986. In late December 2016 Ms Mosidi met with Mr Gama and Mr Thomas in Mr Gama's office. Mr Gama suggested that she as GCIO and the business owner of the tender should test the identified risks with Gijima. He also directed that the procurement department should facilitate an engagement and send questions to Gijima.

987. On 19 January 2017 Mr Macdonald Maluleke, Category Manager: Group Strategic Sourcing, addressed a letter to Gijima posing a number of questions related to the identified risks associated with Gijima's transition plan, possible delays; the reduction of its final price by 31% and the like.[1423] At a meeting held at the offices of Transnet Engineering in Kilner Park on 23 January 2017, Gijima was able to address all the issues raised concerning the transition from the current mode of operation to the future mode of operation, their R500 million price reduction, the steps to be taken in getting the data centre operational, the pre-ordering of

[1422] Transcript 12 May 2021, p 257-266

[1423] Annexure MMAM 05, Exh BB11, MMAM-071

equipment etc.[1424] At the end of the meeting, the Transnet team agreed that all risks had been mitigated and agreed that the tender should be awarded to Gijima.[1425]

988. In early February 2017, two separate memoranda were drawn up with different recommendations for Mr Gama's signature. The one memorandum from Mr Pita (then GCFO)[1426] recommended the award of the tender to T-Systems, and the other from Ms Mosidi[1427] recommended the award of the tender to Gijima. Mr Gama requested Mr Pita and Ms Mosidi to "iron out" their differences and submit one memorandum to him for approval.[1428] They finally signed a memorandum dated 8 February 2017 recommending that the tender be awarded to Gijima.[1429]

The BADC and board meetings and the award to T-Systems

989. The BADC met on 13 February 2017 to consider the award of the tender. Before the commencement of the BADC meeting, Mr Shane, the chairperson of the BADC (who replaced Mr Sharma as chair of the BADC and was a business associate of Mr Essa at the time),[1430] requested that the meeting be adjourned in order to brief Mr Gama. During the adjournment, Mr Shane informed Mr Gama that the non-executive directors intended to overturn the recommendation of management to

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[1424] Transcript 10 June 2019, p 171-173

[1425] Exh BB11, MMAM-0012, para 31

[1426] Annexure MMAM 06, Exh BB11, MMAM-075

[1427] Annexure MMAM 07, Exh BB11, MMAM-087

[1428] Transcript 10 June 2019, p 175-181

[1429] Annexure MMAM 08, Exh BB11, MMAM-109

[1430] Transcript 12 May 2021, p 266-267

award the contract to Gijima because they believed that management had not properly assessed the risks.[1431]

990. The tender was discussed in detail when the BADC meeting re-convened. Mr Thomas, Mr Mosidi and Mr Silinga made extensive submissions in support of the recommendation.[1432] Most members of the BADC were not favourably disposed to awarding the tender to Gijima. The minutes of the meeting[1433] accurately summarise the different points of view that were expressed and are reflected in the transcript[1434] of the meeting. The transcript of the meeting discloses a degree of irrationality and adverse animus or bias against Gijima on the part of some members of the BADC.

991. The interventions by Mr Shane in particular were troubling. His contribution was at times rambling, intemperate, incoherent and of a low standard. His tone was generally condescending and derogatory. He seemed mostly concerned about not attracting adverse publicity for himself in the media. He was apprehensive that people in his community would regard him as a "crook".[1435] He referred to the actions of the previous chair of Transnet, "the great Ms Maria Ramos",[1436] as "stupid"[1437] and to both bidders as "disingenuous, dishonest, thieving outsource partners".[1438] His pre-disposition favouring T-Systems was plainly evident, improperly motivated by irrelevant extraneous factors and demonstrated a failure to appreciate his fiduciary duty to act in good faith by testing the market and to

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[1431] Transcript 12 May 2021, p 267-270; and Exh BB22, BB28-SG-159

[1432] Transcript 10 June 2019, p 191-192

[1433] Annexure MMAM 09, Exh BB11, MMAM-130

[1434] Annexure MMAM 10, Exh BB11, MMAM-137

[1435] Annexure MMAM 10, Exh BB11, MMAM-159, line 10

[1436] Annexure MMAM 10, Exh BB11, MMAM-159, line 22

[1437] Annexure MMAM 10, Exh BB11, MMAM-163, lines 15-20

[1438] Annexure MMAM 10, Exh BB11, MMAM-159, line 25

seek alternative partners where there was compelling evidence that the incumbent was performing below par. His stance was sufficient reason to set aside the award of the tender to T-Systems.[1439]

992. Interventions by other members of the BADC were equally unedifying. Mr Nagdee (another member of the BADC alleged to have links to the Guptas) revealed a lack of understanding about the purpose of the clarification meeting with Gijima when he expressed the concern that Gijima was "given so many opportunities to fix things, to mitigate the risks you know, and there is no opportunity for anybody else".[1440] Ms Mabaso also believed that Gijima acted illegitimately when "all of a sudden they tricked and changed their price all of a sudden".[1441] Other members supported awarding the tender to T-Systems on the basis of the risks which were accepted to be "objective criteria". Some were concerned about the price reduction and Transnet having been too lenient to Gijima in affording it an opportunity to mitigate the risks.

993. Ms Mosidi made a valiant attempt to assure the members of the BADC that a proper assessment had been done on Gijima and that the risks had been appropriately mitigated. She explained that the R500 million reduction of the price came about after Gijima received further clarification on the scope of the contract, which it had previously misunderstood. The pricing risk could be easily mitigated and managed. The cost of data was progressively declining which also contributed

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[1439] Annexure MMAM 10, Exh BB11, MMAM-163, line 20 and MMAM-164, line 20; see the remarks of Mr Popo Molefe at Transcript 7 May 2019, p 89-90

[1440] Annexure MMAM 10, Exh BB11, MMAM-146, line 15. In his report Mr Holden stated that there is strong evidence suggesting that Mr Nagdee had, by February 2017 (the time of the BADC meeting), been operating as a money launderer for the Gupta enterprise and had used his company, Lechabile Technologies, to expatriate more than R5 million in proceeds of kickbacks paid to the Gupta enterprise in respect of corruptly procured public sector contracts – FOF-09-092, para 101

[1441] Annexure MMAM 10, Exh BB11, MMAM-148, line 10

to the reduction in price. As for the "perceived leniency" towards Gijima, Ms Mosidi explained that the clarification meetings were a standard process of engagement. Moreover, the tender to Gijima would introduce a saving of R1 billion. The entire motivation for issuing an RFP to the open market was for Transnet to test the market and consider new partners. Over the seven years T-Systems had provided services to Transnet, it had not abided the guiding principles of the tender.

994. The BADC (particularly the chairperson) said it did not have faith that the risks could be adequately monitored and managed through contract management due to the existing challenges related to contract management that plagued Transnet. Mr Shane described the performance of those responsible for contract management in derogatory terms.[1442] The BADC accordingly chose not to support the award of the tender to Gijima and recommended to the board that it approve the award of the tender to T-Systems.

995. In his affidavit filed with the Commission, Mr Gama maintained that he supported the recommendation that Gijima be awarded the tender.[1443] The transcript shows that his support was not as unequivocal as he suggested. He told the BADC that he could live with either scenario and essentially deferred to the BADC.[1444]

996. During the meeting, Mr Gama sent Ms Mosidi an SMS or WhatsApp telling her to "stop fighting because it was clear what the board wanted." She only saw the message after the meeting. Mr Gama explained that he sent the message because

[1442] Annexure MMAM 10, Exh BB11, MMAM-166, line 16

[1443] Transnet -07-163, para 42.4

[1444] Annexure MMAM 10, Exh BB11, MMAM-157-158

it was clear to him that the non-executives, led by Mr Shane, had made up their minds to overturn management's recommendation.[1445]

997. On 15 February 2017 Mr Gama and Mr Pita addressed a memorandum to the board of Transnet recommending that it approve the award of the contract to T-Systems for a period of five years with an option to extend for a further two years.[1446] The memorandum explained that the BADC had not supported the recommendation for the award of the contract to Gijima, the first ranked bidder, based on the identified "objective risks". On 22 February 2017 the board decided not to award the IT data services contract to Gijima based on the various risk factors and awarded it to T-Systems.[1447] This in Mr Volmink's view amounted to an "opportunistic use of risk" to illegitimately disqualify a deserving bidder.[1448]

Gijima's complaint and the final award of the tender

998. During March 2017 Gijima lodged a complaint with the Transnet Procurement Ombudsman objecting to the invocation of the perceived risks as "objective criteria" to justify not awarding it the contract. Because the complaint related to a decision taken by the board, Transnet referred the matter to National Treasury for investigation.[1449]

999. National Treasury, in a letter dated 29 July 2017, concluded that the award had to be made to Gijima, as the highest scoring bidder. It held that the objective criteria on which the board sought to rely ought to have been stated upfront in the tender

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[1445] Transcript 12 May 2021, p 270; and Transnet-07-163, para 42.5

[1446] Annexure MMAM 11, Exh BB11, MMAM-189

[1447] Annexure PV 30, Exh BB2.1(c), PSV-1097, para 3

[1448] Transcript 10 May 2019, p 18

[1449] In terms of para 3.3 of SCM Instruction 3 of 2016/17 on Preventing and Combatting Abuse in Supply Chain Management System

document. The letter said that since the bid document did not specify the objective criteria, Transnet was obliged to award the bid to Gijima as the highest scoring bidder.[1450] Factors already considered during the evaluation of the bid may not be revisited under the guise of "objective criteria". When Gijima's bid was evaluated it was found that it had passed all relevant thresholds and met all bid requirements. The same factors were taken into account a second time as objective criteria by the BADC and board in disqualifying Gijima in a procedurally unfair and irrational manner. The evidence showed that the perceived risks had been mitigated.[1451]

1000. On 27 July 2017, Mr Silinga and Mr Volmink recommended to Mr Gama that: i) Transnet abide by the ruling of National Treasury; ii) T-Systems be invited to make representations on Transnet's proposed decision to abide the ruling of National Treasury; and iii) Transnet proceed to make the award to Gijima, after following a judicial process to set aside its award of the tender to T-Systems.[1452] On 27 September 2017, the board resolved to set aside its earlier award to T-Systems.[1453] In 2018, Transnet approached the High Court for an order declaring its decision to award the tender to T-Systems to be invalid and a direction that the tender be awarded to Gijima. T-Systems and Gijima eventually indicated that they would abide the decision of the court. On 12 December 2018, the Johannesburg High Court granted the order as prayed for by Transnet.[1454] Referring to Mr Shane's performance during the BADC meeting, the court remarked that it was left wondering whether the BADC was not driven by "extraneous considerations" (despite management's satisfaction with Gijima's bid) to award the tender to the lower scoring bidder.

[1450] Transcript 10 May 2019, p 19 ***et seq***; and Annexure PV 30, Exh BB2.1(c), PSV-1099, para 10

[1451] Annexure PV 31, Exh BB2.1(d), PSV-1119

[1452] Annexure PV 30, Exh BB2.1(c), PSV-1111, para 50

[1453] Annexure MMAM12, Exh BB11, MMAM-203

[1454] Annexure PM 11, Exh BB1(b), PSM-483

1001. The conduct of Mr Shane and Mr Nagdee in relation to this tender was suspect and evinces a clear intention to favour T-Systems above Gijima. T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems. Sechaba was T-Systems' SDP in Transnet contracts. T-Systems paid Sechaba more than R323 million between February 2015 and December 2017 (while the MSA was extended). The Gupta enterprise took over, controlled or owned Sechaba from mid-2015. Sechaba made multiple payments to Gupta laundry vehicles (including Albatime and Homix) running to R2.8 million while it was T-Systems' SDP.[1455]

1002. Zestilor (owned by Mr Essa's wife) was paid a monthly retainer by Sechaba of R228 000 between October 2015 and May 2016, rising to R342 000 per month between June 2016 and October 2016. In total Zestilor was paid more than R5 million by Sechaba. Zestilor itself made payments to first-level laundry entities during the period July 2014 to November 2016 totalling over R2 million. From 2012 to 2015 T-Systems made regular monthly payments of more than R80 000 to Zestilor. More than R3 million was paid over that period. Moreover, as mentioned, T-Systems ceded to Zestilor the equipment sale and rental elements of the MSA that it had with Transnet. Following the cession by T-Systems of the equipment rental and supply elements of the MSA to Zestilor, Zestilor made a number of large payments to Sahara Computers using funds paid to it by Transnet.[1456]

1003. As already mentioned, both Mr Shane and Mr Nagdee have links to the Gupta enterprise. Mr Gama stated that he was not aware of these things.[1457] There is a *prima facie* case that in seeking to favour T-Systems they did not act with fidelity, honesty, integrity and in the best interests of Transnet. They acted prejudicially to

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[1455] FOF-09-93-99; and FOF-09-182-184

[1456] FOF-09-93-99; and FOF-09-182-184

[1457] Transcript 12 May 2011, p 275-277

Transnet's financial interests by unjustifiably favouring a bid that was R1 billion more expensive on spurious "objective criteria". There are accordingly reasonable grounds to believe that they contravened section 50(1)(b) and (d) of the PFMA.

1004. The evidence does not disclose any basis for concluding that Mr Gama, Mr Shane or Mr Nagdee accepted any gratification connected to their failed attempt to favour T-Systems and hence any reasonable grounds to believe the offence of corruption was committed by them in relation to this transaction. However, given the links of T-Systems, Mr Shane, Mr Essa and Mr Nagdee to the Gupta enterprise, their conduct may be of evidential value in establishing that they were individuals "associated in fact" with the other persons of the union or group constituting the Gupta "enterprise" as defined in section 1 POCA and may be criminally liable in terms of section 2(1)(e) of POCA for participating in the conduct of the enterprise's affairs through a pattern of racketeering established by their involvement (if any) in other Schedule 1 offences not linked to this particular tender.

CHAPTER 12 – REMEDIAL ACTION AND RECOMMENDATIONS BY THE BOARD OF TRANSNET

1005. Mr Popo Molefe, the chairperson of Transnet, testified before the Commission on 7 May 2019 about specific remedial steps taken by the new board of Transnet since he became chairperson of the board in 2018. Subsequent to his giving evidence to the Commission, he filed a supplementary affidavit in 2020 dealing with broader remedial action taken and required.[1458]

Remedying state capture at Transnet

1006. Criminal investigations are underway in respect of the individuals and companies involved in the purchase of the 1064 locomotives. Transnet is also in the process of launching legal proceedings against the four OEMs which were contracted to provide the 1064 locomotives. The intention is to set aside the contracts as unlawful.

1007. Disciplinary action has been taken and claims for damages instituted against several former Transnet executives including Mr Gama, Mr Jiyane, Ms Mdletshe, Mr Thomas, Mr Ramosebudi, Mr Singh, Mr Pita and Mr Brian Molefe.

1008. Transnet has instituted multiple actions against persons who have been found to have either been paid without just cause or colluded in the payment of those persons. Two actions were instituted against Regiments for the amount of R189.24 million and R79.23 million respectively relating to unjustified overpayments. Transnet instituted four claims against Trillian for varying amounts totalling the sum of R145.92 million for monies paid without just cause for work

[1458] Exh BB1(b), PSM-516

purportedly executed by it as lead arranger of the ZAR club loan and other supposed financial structuring advisory services. Transnet has recovered R618 million from CSR unjustifiably paid under the maintenance agreement.

1009. Through the office of the Chief Legal Officer, Transnet has strengthened its relationship with the SIU. This has resulted in the referral of cases to the SIU where there are suspicions of fraud, corruption, money laundering and any illegal activity. The relationship between Transnet and the SIU, particularly the use of the SIU's subpoena powers, has already yielded positive results by enabling Transnet to successfully discipline and secure the dismissal of executives who have misconducted themselves.

1010. The Forensic Department at Transnet has undergone restructuring. All investigations are now centrally managed with investigators no longer allocated to a particular operating division. The operating divisions no longer have a forensics function. Reports are now processed through the Chief Security Officer who serves on the Exco and reports directly to the GCEO. This allows for the central management of all investigations as opposed to the CEOs of the operating division being left to decide on matters that require forensic investigation.

1011. During the period under investigation, the Transnet Internal Audit ("TIA") completely outsourced its function to external audit firms. This in turn reduced the level of exercise and control that Transnet had over this function. The complete outsourcing of this function was highly problematic especially where it emerged that some of the firms had been complicit in the corruption within the organisation. As a measure of increasing accountability over the audit function, Transnet has adopted a hybrid model whereby the audit function is outsourced and insourced. The insourcing of this function will enable Transnet to develop the audit function

internally. This will allow Transnet to hold the external audit firms to a high standard of accountability going forward.

1012. Transnet has recognised the importance of lifestyle audits in addressing corruption in the organisation. Accordingly, with effect from 1 March 2020, Transnet adopted its Lifestyle Audit Policy, applicable to all employees.

Restructuring governance and oversight at Transnet

1013. Following the dismissal of Mr Gama in October 2018, the position of GCEO was occupied in an acting capacity by Messrs Tau Morwe (November 2018 to May 2019) and Mohammed Mahomedy (May 2019 to January 2020). On 31 January 2020, Cabinet approved the appointment of Ms Portia Derby as GCEO. This appointment was the first step to bring about certainty in the executive leadership of Transnet and the strengthening of its response to state capture. For all intents and purposes Ms Derby came to clean up and rebuild where Mr Brian Molefe and Mr Gama had inflicted considerable damage.

1014. Upon becoming GCEO in 2016, Mr Gama restructured his executive. He created an Exco of mainly support services with all the CEOs of the operating divisions reporting to the Group Chief Operations Officer ("GCOO") (a position he created). The GCOO was the direct line of report for all the CEOs of the operating divisions. By virtue of reporting to the GCOO, the CEOs were not members of the Exco. That organisational structure has since been changed and the CEOs of the operating divisions now participate directly in the Exco which holds each CEO accountable for the performance of the operating division. This restructuring saw the dissolution of the position of GCOO. Ms Derby has overseen the appointment of new permanent CEOs to head up the operating divisions. The new Exco structure is an essential step in the stabilisation of the organisation. The new management team

brings an impressive and diverse range of skills, coupled with a wealth of experience and knowledge to help steer Transnet's business operations going forward.

1015. The sole shareholder of Transnet is the government duly represented by the Minister of Public Enterprises. The Department of Public Enterprises remains responsible in terms of oversight in the discharge of its mandate to the Parliament of the Republic of South Africa. A greater oversight role must be played particularly by the Parliamentary Portfolio Committee on Public Enterprises in ensuring that SOEs are not vessels of corruption, fraud and state capture.

1016. The Minister is vested with wide powers to make appointments of not only the non-executive directors but also the executive directors, the GCEO and the GCFO. The power to appoint the GCEO is not in the hands of the board and is placed solely in the hands of the Minister. This could be abused and result in the deployment of a candidate whose loyalties are to the Minister rather than the organisation.

1017. The recent history of state capture is replete with instances where the boards, CEOs and CFOs of SOEs were appointed for ulterior purposes and not in the best interests of the SOE. This, according to Mr Popo Molefe, raises the question whether government should allow the boards of SOEs to make the appointments without political interference. He contends that it will be sensible for the board to appoint the GCEO and GCFO as it interviews the candidates and is thus best placed to determine the most suitable candidate.

1018. The GCEO and GCFO should feel that they are first and foremost loyal to the company and not the Minister. As directors, their fiduciary duties are owed to the company. Enabling the board to direct the course of the company through the appointment of the key executive directors would reintroduce the balance of power

and increase the executive directors' accountability to the board and shatter any illusions of such accountability being to the Minister. This in turn would foster a better professional relationship as the board would not find itself in a position where the executive directors have in essence been imposed on them by the Minister.

1019. Board appointments have also been the prerogative of the Minister. Politicians invariably will seek to influence the appointment of their allies so that they can make decisions that would materially benefit them. Mr Popo Molefe proposed that the appointment process ought to be more rigorous. He suggested that candidates for appointment should be interviewed by a body or committee that is representative of various stakeholders, in a similar manner as judges are interviewed and screened by the Judicial Service Commission. The relevant body or committee ought then to make recommendations to the Minister. This will shift the balance of power from a single political figure, being the Minister, to the body or committee. This will allow for more transparency in the appointment process and in turn reduce appointments that are based on cronyism and the returning of favours. The reconfiguration on the appointment of directors to boards of SOEs will minimise any political influence that a Minister may be under.

1020. Good governance at board level across all SOEs begins with the appointment of individuals who possess the necessary competency, skills and expertise to provide leadership and guidance in attainment of the SOE's objectives. Directors appointed to boards must always remember that they are appointed to serve the company and thus owe their loyalty to it as opposed to the politicians that appointed them.

Reform of procurement processes

1021. The evidence before the Commission points to the shortcomings in the procurement processes at Transnet. It further demonstrates the degree to which

the procurement function within Transnet was manipulated, particularly at TFR during the acquisition of the locomotives. Transnet has committed to restructuring and reorganising the procurement function across the organisation in accordance with the following principles: i) transparency of the procurement process; ii) standardisation of the procurement process across Transnet; iii) ensuring that procurement staff are competent and accordingly skilled; and iv) ensuring that doing business with Transnet is not complicated.

1022. Much of the irregular expenditure at Transnet during the state capture period is directly attributable to decisions made by executives and board members. All the transactions that lie at the heart of the state capture allegations at Transnet were decided by Exco and/or board members. Decisions were made at that level with less regard to applicable procurement rules. Mr Volmink accordingly recommended that Supply Chain Management ("SCM") should have representation at Exco level. Currently, SCM reports to the GCFO who represents the function at Exco level. Past experience has shown that the function should rather be represented by an executive whose primary focus is the overall management of the SCM function, namely the GSCO.[1459] This representation could be limited to attendance by the GSCO when SCM matters are on the agenda. Mr Volmink however urged for the GSCO to be a full member of Exco in order to provide an SCM perspective to matters that might be of impact to ongoing procurements and financing.

1023. According to Mr Volmink, a fundamental overhaul of the regulatory system is also required. The regulatory framework is fragmented and on the whole, poorly drafted. Regulatory provisions are scattered over a myriad pieces of legislation, regulations, instruction notes, guidelines and standards. This gives rise to confusion and

[1459] Transcript 9 May 2019, p 106-109

competing interpretations of instruments often in conflict with each other.[1460] Mr Volmink thus urged for the passage of the Procurement Bill through the legislative process to be expedited.

1024. There also needs to be greater transparency on how procurement awards are made in the SOEs. In his opinion, an independent body must be created with powers to review procurement awards. The current practice of appointing firms of auditors to review procurement transactions has not been very effective within Transnet. Instead, in his opinion, an independent body with legislative powers should be established to perform this function.

[1460] Transcript 9 May 2019, p 19

CHAPTER 13 – SUMMATION AND RECOMMENDATIONS

1025. The evidence establishes convincingly that State Capture occurred at Transnet in the period between 2009 and 2018. This was accomplished primarily through the Gupta racketeering enterprise and those associated with it who engaged in a pattern of racketeering activity.

The Gupta racketeering enterprise

1026. Racketeering is not *per se* an offence in our law. POCA does not provide for an offence of racketeering, nor does it define the term. Instead it specifies and proscribes particular conduct which may be regarded as racketeering offences. As discussed earlier in this report, section 2(1) of POCA provides for two categories of offence: i) offences associated with receiving and using property derived from racketeering activities; and ii) participation offences committed by persons managing, controlling and associated with the racketeering enterprise.

1027. The recurring elements in all of the offences are a pattern of racketeering activity and the existence of the racketeering enterprise. A pattern of racketeering activity is defined in section 1 of POCA to mean "the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in schedule 1 and includes at least two offences referred to in schedule 1 of which one of the offences occurred after the commencement of this Act and the last offence occurred within ten years (excluding any period of imprisonment) after the commission of such prior offence referred to in schedule 1."

1028. Section 1 of POCA defines an enterprise to include: "any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity."

The Gupta network was a group of individuals and entities associated in fact, and thus an "enterprise".

1029. The offences in section 2(1) of POCA related to the receipt or use of property all require that the property be derived from a pattern of racketeering activity and be used or invested in the acquisition of any interest in, or the operation, establishment or activities of the enterprise. The participation offences require the accused to have participated in the affairs of the enterprise "through a pattern of racketeering activity."

1030. Thus, a successful prosecution on any of the racketeering offences in section 2(1) of POCA will require proof that the recipient of property or the participant in the affairs of the enterprise committed two predicate or underlying offences in addition to the receipt of property or participation in relation to the enterprise. Schedule 1 of POCA includes more than 30 predicate offences. Most important for the purpose of this report are: i) corruption; ii) the common law offences of extortion, theft, fraud, forgery and uttering; iii) offences related to exchange control; and iv) offences relating to the proceeds of unlawful activities, including money laundering.

1031. Some of the instances of wrongdoing that took place at Transnet during the period under consideration constitute (at least *prima facie*) Schedule 1 offences and thus possible predicate offences on a charge of racketeering. However, a successful prosecution of any individual on racketeering, as just said, will require proof of two predicate offences by that person within ten years of each other. There would be no requirement that both predicate offences relate to the activities at Transnet. The activities of the Gupta enterprise extended to various SOEs and the commission of predicate offences by any person associated with the enterprise at different SOEs

will be sufficient to sustain a racketeering conviction in addition to any conviction for the predicate offences themselves.

1032. As stated, the extensive scheme of wrongdoing that afflicted Transnet between 2009 and 2018 was conducted by a racketeering enterprise (comprising a group of individuals and companies associated in fact) aligned with the Gupta family and its associated companies. Racketeering is by nature a group activity undertaken by the enterprise. Any analysis of the operation, activities and the affairs of a racketeering enterprise therefore must focus on the relationship between those who participated, the enterprise and the pattern of racketeering activities. A racketeering activity is an event. The relationship of the events to one another, or of an event to the enterprise, or of an event to the common objective of the enterprise, establishes a pattern.

1033. The central elements of the pattern of the racketeering activity at Transnet, as set out earlier in this volume of the report, comprised: i) the kickback agreements between CNR/CSR/CRRC and Mr Essa's companies; ii) the inclusion of Gupta linked companies as supplier development partners ("SDPs") on Transnet contracts; iii) the money laundering arrangements between Regiments and the companies associated with Mr Essa and Mr Moodley; and iv) the payment of cash bribes to officials and employees associated with Transnet presumably for their role in facilitating transactions that favoured the Gupta enterprise. Other instances of wrongdoing also advanced the interests of the Gupta enterprise and the racketeering scheme all of which require further investigation and possible prosecution by the law enforcement authorities on charges related to the specific offences and also (where appropriate) on racketeering charges.

A chronological summation of the pattern of wrongdoing at Transnet during 2009-2018

1034. State Capture at Transnet began after the resignation of Ms Ramos as GCEO in 2009. Thereafter, President Zuma thwarted the efforts of Ms Hogan to appoint a GCEO for a period of 18 months because he preferred Mr Gama, the then CEO of TFR who was facing serious charges of misconduct, until he replaced her in November 2010 as Minister of Public Enterprises with Mr Gigaba, an admitted associate of the Gupta enterprise who had regular and frequent contact with Gupta family members.

1035. Mr Gigaba immediately reconstituted the board of Transnet with his preferred appointees and initiated the process that led to the appointment of Mr Molefe as GCEO. Mr Molefe was also an associate of the Guptas and a regular visitor to the Gupta Saxonwold compound. Mr Molefe's appointment was accurately predicted by the Gupta owned newspaper, the *New Age*, and he was recommended for appointment by Mr Sharma who Mr Gigaba attempted unsuccessfully to have appointed as chairman of the Transnet board. Mr Sharma was a business associate of Mr Essa, a key associate of the Gupta enterprise. Around about the same time, Mr Gigaba appointed Mr Essa as a director of BBI (an SOE in the IT sector), which played some role in attempting to secure IT contracts from Transnet for the benefit of the Gupta enterprise.

1036. Mr Molefe (although not being the highest scoring candidate) was appointed GCEO on the recommendation of Mr Gigaba on 16 February 2011. Thus, Mr Gigaba (a friend of the Guptas) was instrumental in the appointment of Mr Molefe (another friend of the Guptas), with his appointment predicted in the Gupta

owned newspaper, the *New Age*, and initiated by Mr Sharma (another Gupta associate).

1037. Mr Sharma went on to serve as the chairperson of BADC, which was established in February 2011 as a subcommittee of the board. Prior to the establishment of the BADC in February 2011, the board of Transnet was not directly involved in procurement. Many of the procurement transactions which favoured the Gupta enterprise after 2011 arose in the context of the Market Demand Strategy ("the MDS") which was developed by Mr Molefe and Mr Singh (then the acting GCFO) and approved by the BADC (chaired by Mr Sharma under its increased authority) in 2011.

1038. One week after Mr Molefe was appointed, Mr Gama, who had been dismissed for serious irregularities in 2010, was reinstated as CEO of TFR on 23 February 2011, in terms of a wholly indefensible settlement agreement that included a payment of R17 million to Mr Gama for benefits and legal costs. Mr Gama's early efforts to be appointed as GCEO in 2009 (despite the allegations of impropriety against him and the board of Transnet considering him unsuitable for the position) was vocally and publicly supported by members of President Zuma's cabinet, Mr Gwede Mantashe (then the Secretary-General of the ANC), other high profile persons associated with the ANC, and presumably by the deployment committee of the ANC. After his reinstatement, Mr Gama was centrally involved in key transactions that favoured the Gupta enterprise. The evidence on record gives rise to reasonable grounds to believe that Mr Gama was reinstated as a consequence of an instruction or direction by President Zuma.

1039. It is undisputed that from July 2011 Mr Molefe intensified his contact with the Gupta family, frequently visited the Gupta compound in Saxonwold and was in

regular contact with Mr Ajay Gupta in particular. Mr Molefe's driver testified that in the period between July 2011 and August 2014, he transported Mr Molefe to the Gupta compound and reasonably suspected that Mr Molefe received substantial cash payments during those visits. The testimony of the drivers of Mr Gama, Mr Gigaba, Mr Singh and Mr Pita gives rise to reasonable grounds to believe (or suspect in the case of Mr Pita) that they too received cash payments from the Gupta enterprise during the period under consideration.

1040. The first transactions tainted by corruption and advancing the interests of the Gupta enterprise concerned the procurement of cranes from ZPMC and Liebherr. As explained earlier, these transactions are not analysed in this volume of the report. However, the evidence shows that the contracts were procured in 2011-2014 by corrupt payments to the Gupta enterprise.

1041. Following the Transnet board's approval of the locomotive fleet modernization plan in April 2011, there were three significant locomotive transactions involving respectively the procurement of 95, 100 and 1064 locomotives.

1042. The procurement of 95 electric locomotives from CSR, shortly after the appointment of Mr Molefe as GCEO and the reinstatement of Mr Gama as CEO of TFR, was the first significant locomotive transaction tainted by corruption. The board approved the acquisition of 95 electric locomotives at its meeting of 31 August 2011. The transaction was approved by Mr Gigaba on 21 December 2011 at an ETC of R2.7 billion.

1043. The evidence in relation to the procurement of the 95 locomotives founds reasonable grounds to believe that it was attended by irregularities including: i) a prior decision by Mr Molefe to favour CSR as a bidder; ii) inappropriate communication with CSR prior to the closing of the bid; iii) communication between

CSR and the Gupta enterprise during the bidding process; iv) the failure to disqualify the bid by CSR on the grounds of it being non-responsive by not furnishing returnable documents; v) the improper changing of the evaluation criteria to favour CSR; vi) the failure to obtain the authorisation of the Minister for a cost overrun of R700 million; and vii) the non-recovery of late delivery penalties.

1044. All these irregularities favoured CSR and were against the best interests of Transnet. In addition to forming the basis of recommendations for further investigation and prosecution by the law enforcement authorities, the relationship of these events to one another and to the common objective of the Gupta enterprise is of evidentiary value in establishing a pattern, as part of the requirement of a pattern of racketeering activity, on a racketeering charge. They must be assessed in the light of the corrupt payment of USD 16.7 million (made in terms of an agency agreement concluded in relation to the "95 project" in April 2012) by CSR (Hong Kong) to Regiments Asia (Pty) Ltd (a company associated with Mr Essa) and the subsequent laundering of these unlawful proceeds onto companies forming part of the Gupta enterprise.

1045. During 2011, work had commenced on the business case of the 1064 locomotives transaction. In May 2012, Mr Molefe approved the confinement to the McKinsey consortium of the contract for advisory services related to the acquisition of the 1064 locomotives aimed at strengthening the business case by validating the market demand, reviewing funding options and mitigation of various risks. The contract was only signed in August 2014, but McKinsey commenced work in 2012 in terms of a LOI dated 6 December 2012. On 30 November 2013 the LOI expired with the consequence that although work continued to be performed by the McKinsey consortium there was no valid agreement governing its services to Transnet from that date. Moreover, the contract should never have been awarded

to McKinsey as its bid was non-responsive on account of it refusing to furnish its financial statements.

1046. The RFPs for the acquisition of the 1064 locomotives was issued in July 2012. Mr Singh was appointed as GCFO in July 2012 and Mr Sharma was appointed chairperson of the BADC in August 2012. The BADC's authority was increased to R2 billion at the same time. The board in August 2012 also approved the use of a loan facility from the China Development Bank ("the CDB") to fund the 1064 acquisition.

1047. In December 2012, Mr Essa appears to have facilitated a meeting between Mr Singh and Mr Pillay of Regiments in close proximity to Regiments replacing Letsema in the McKinsey consortium in terms of the LOI. Regiments thus became a member of the consortium without having tendered as part of it. Shortly before this, in October 2012, according to the evidence of Mr Sinton of Standard Bank, McKinsey agreed to appoint Regiments as its SDP subject to Regiments agreeing to share with Mr Essa (or one of his companies) 30% (later increased to 50%) and Mr Moodley (or one of his companies) 5% of all income received from Transnet. It is not disputed that neither Mr Essa nor Mr Moodley (or any of their companies) rendered any services of any kind to McKinsey or Transnet beyond the introduction of Regiments to McKinsey. This money laundering arrangement is further evidenced in the so-called "advisory invoice tracking" document which was sent by Regiments to Mr Singh and Mr Pita in 2015.

1048. The board approved the business case for the 1064 locomotive acquisition on 25 April 2013. The closing date for the bids was 30 April 2013 and the evaluation commenced in May 2013. During March 2013 to May 2013, prior to the submission of the bids for the 1064 locomotive procurement, Transnet engaged in direct

negotiations with CSR and the CDB with a view to concluding a tripartite agreement, the original draft of which explicitly provided for cooperation on the procurement of the locomotives. This is again an indication that the senior executives of Transnet were favourably disposed to CSR and CNR. The final version of the agreement merely provided for Transnet and the CDB to identify opportunities for CDB to participate in funding. Even then, given the relationship between the CDB and CSR, the perception that Transnet was favourably disposed to the Chinese OEMs is inescapable. Mr Gigaba, the Minister of Public Enterprises, approved the business case for the 1064 locomotive procurement in August 2013.

1049. The *modus operandi* of the Gupta enterprise was revealed in another transaction involving Transnet at this time. During July and August 2013, Mr Singh and Mr Essa engaged with Hatch, a bidder for work on Transnet's Manganese Expansion Project ("the MEP") in an attempt to strong arm it into agreeing to their preferred companies, DEC and PMA, being included as SDPs in the successful consortium that bid for the tender. The evidence in relation to these incidents provides reasonable grounds to suspect corruption in that Mr Essa and Mr Singh attempted to make the award of the tender conditional on Hatch's appointment of their preferred SDPs, to be paid an inflated fee of R80 million (later to be increased to R350 million) that would be laundered onto the Gupta enterprise. Hatch resisted these efforts to involve it in the corrupt scheme.

1050. Besides the evident corruption in relation to the MEP tender, the proven association of Mr Singh and Mr Essa with the Gupta enterprise at this time, the manipulation of the supplier development ("SD") component in the transaction by Mr Singh, Mr Essa's disclosure at a meeting with Hatch of the *modus operandi* of inflating the price of Transnet tenders for illegal purposes and a claim by him that

he and his associates would have influence in the subsequent appointment of Mr Molefe as CEO of Eskom, all point to a pattern of racketeering activity.

1051. In late 2013 Mr Singh agreed to an increased scope of work for Regiments on the financial services contract in relation to the 1064 locomotive procurement by replacing Nedbank with Regiments in the McKinsey consortium. This increased the scope of work of Regiments on the contract to 30% and thus the fee paid to it, 55% of which was intended to be laundered onto the Gupta enterprise. Around the same time, Regiments presented the so-called "R5 billion proposal" proposing a R5 billion loan facility to be funded by Nedbank through an "in-between structure" which had the potential to cause Transnet a R750 million loss and from which only Regiments would have benefitted in fees. Although the proposal was not implemented, it again evidences a pattern of conduct.

1052. In October 2013, the board approved the business case for the second significant locomotive transaction, being the procurement of 100 additional locomotives for use on the coal export line aimed also at the release of older locomotives from the coal export line for use in general freight business ("GFB"). The original intention was to acquire the locomotives by confinement on grounds of urgency and standardization from Mitsui which had supplied similar locomotives in the recent past. The evidence reveals that Mr Molefe, Mr Singh, Mr Pita and Mr Sharma all played a role in altering the confinement memorandum to award the contract to CSR which undermined the rationale of urgency and standardization as CSR had not produced similar locomotives.

1053. The alleged wrongdoing in relation to the procurement of the 100 locomotives during the course of 2014 included: i) management misled the BADC and the board in early 2014 by misstating the rationale by confinement and not disclosing

the concerns of the technical staff about CSR's inability to deliver the 100 locomotives in accordance with the required specifications; ii) non-compliance with the urgent delivery requirement; iii) non-compliance with the local content requirement; iv) the payment of excessive advance payments (60%) prior to the delivery of any locomotives; v) the payment of the advance payments without CSR furnishing the requisite security (advance payment guarantee); vi) the unjustifiable increase in the price of the procurement by R740 million without prior authorization of the board; and vii) the unjustifiable inflation of the base price of the locomotives and the reliance on incorrect assumptions in relation to cost factors and escalations. CSR (or CRRC) paid a kickback of R925 million on this contract to one of Mr Essa's companies, JJ Trading FZE.

1054. The most significant locomotive transaction was the procurement of the 1064 locomotives at a cost of R54.5 billion. As mentioned, the board approved the business case for the 1064 locomotives on 25 April 2013. The evaluation process and BAFO stage of the procurement process for the 1064 locomotives endured from May 2013 to January 2014. On 24 January 2014, the BADC and the board resolved to split the procurement into four contracts and appointed four OEMs as preferred bidders. Post tender negotiations took place in February 2014 and the locomotive supply agreements ("the LSAs") were concluded on 17 March 2014.

1055. While the post tender negotiations in relation to the 1064 procurement were under way, on 5 February 2014, McKinsey purported to cede its rights under the contract for the provision of advisory services to Regiments and informed Transnet that all the work related to the mandate had in fact been performed by Regiments.

1056. During the evaluation process, CSR's bid was favoured through the irregular adjustment of its price to account for its use of Transnet Engineering ("TE") as a

subcontractor and CNR was favoured by the exclusion of key costs from its best and final offer ("BAFO") that normally would have been included. There are thus reasonable grounds to believe that but for these irregular adjustments, CSR and CNR would not have succeeded as bidders. It is not clear from the evidence which employees of Transnet were responsible for these irregular adjustments and thus further investigation is required to determine the nature of any criminal or civil liability in this regard.

1057. During the post tender negotiations in relation to the 1064 locomotives, the price of the procurement increased substantially to the detriment of Transnet's interests, partly as a result of an improper agreement by Mr Singh and Mr Jiyane (overriding Mr Laher) to include batch pricing at a cost of R2.7 billion in the agreed price. In addition, the negotiations team, led by Mr Singh and Mr Wood of Regiments, imprudently agreed to excessive advance payments particularly to favour CSR and CNR which negatively impacted Transnet's cash flow going forward. Furthermore, the negotiations team agreed to terms of the contract contrary to the local content requirement of the RFPs that should have disqualified the bidders at that stage.

1058. As stated, the LSAs were concluded on 17 March 2014 at an increased price of R54.5 billion, being R15.9 billion more than the ETC stipulated in the business case. On 28 May 2014, the board accepted the recommendation of Mr Molefe and Mr Singh to increase the ETC from R38.6 billion to R54.5 billion on the premise that the original ETC stipulated in the business case had excluded forex and escalation costs. This was a false premise, following a misrepresentation by Mr Molefe and Mr Singh in a memorandum dated 18 April 2013, in that the ETC had in fact included forex and escalation costs in an amount of R5.9 billion. Mr Singh repeated the misrepresentation in correspondence to the Minister of Public Enterprises on 31 March 2014. Mr Singh and Mr Molefe furthermore failed to obtain

the approval and authorization from the Minister for the price increase in contravention of section 54 of the PFMA with the result that the legality of the LSA is brought into question.

1059. Mr Molefe and Mr Singh, in their memorandum to the board dated 23 May 2014 justifying the price increase of the procurement of the 1064 locomotives, also misrepresented the profitability of the procurement. The business case provided for a positive net present value ("NPV") of R2.7 billion based on the original ETC using a hurdle rate of 18.56%. The increase in price to R54.5 billion produced a negative NPV. Mr Molefe and Mr Singh however informed the board that the NPV remained positive using a changed hurdle rate of 15.2%. Mr Singh, in his capacity as GCFO, had changed the rate from 18.56% to 16.24% on 20 May 2014, but rather than use that reduced rate, he used an even lesser rate of 15.2% in his submission to the board. There are reasonable grounds to believe that Mr Singh used this lower hurdle rate to ensure a positive NPV, in the context of the 41% increase in the price of the procurement, in order to persuade the board that the NPV remained positive when in fact there were doubts about the profitability of the project overall.

1060. The actuarial evidence presented to the Commission provides a reasonable basis to conclude that the increase in the ETC by R15.9 billion included amounts totalling R9.124 billion that were unjustifiable expenditure. The unjustifiable amounts related to inflated provision for backward and forward forex and escalation costs, batch pricing and an excessive provision for contingencies. The evidence further indicates that Regiments, led by Mr Wood, played a key role in finalising and agreeing the unjustifiable forex and escalation costs during the post tender negotiations. The memorandum of 23 May 2014 submitted by Mr Molefe to the board justifying the increase specifically stated that the escalations had been

verified by Regiments "using their intellectual property methodology and techniques".

1061. CSR paid a R3.81 billion kickback in respect of the 359 electric locomotives awarded to it as part of the 1064 locomotive transaction (of which 85% was laundered further onto companies associated with the Gupta enterprise). It is also reasonable to conclude that the unjustifiable expenditure of R9.124 billion which increased the price paid to CSR probably facilitated the ability of CSR to make the kickback payment. The kickback in this instance was made in terms of a BDSA concluded in May 2015 by Mr Essa acting on behalf of Tequesta and CSR (Hong Kong) and in terms of an earlier agreement between CSR Zhuzhou Electric Locomotive Co Ltd and JJ Trading FZE.

1062. A kickback of R2.088 billion was paid by CNR to Mr Essa's company Tequesta in terms of an exclusive agency agreement (which superseded an earlier agreement of 8 July 2013 between CNR and CGT). This kickback was in respect of the 232 diesel locomotives awarded to CNR as part of the 1064 locomotive procurement.

1063. Thus, CSR and CNR (later amalgamated as CRRC) paid approximately R5.9 billion in kickbacks in relation to the 1064 locomotive procurement. This amount fell within the R9.124 billion margin of unjustifiable expenditure in respect of all the 1064 locomotives.

1064. In March 2014, shortly before the conclusion of the LSA in relation to the 1064 locomotives, a decision was taken to locate the manufacturing and assembly of the CNR and Bombardier locomotives in Durban. The initial costing of the relocation of CNR was estimated to be R9.8 million. Transnet eventually agreed to pay approximately R647 million to CNR (CNRRSSA) and approximately R618 million to Bombardier, a total of R1.261 billion of which R617.6 million was actually paid.

Further investigation is required to definitively determine the justifiability of these costs. However, the available evidence establishes strong grounds to believe that CNRRSSA made a corrupt payment of approximately R77 million to BEX (a company associated with the Gupta enterprise) which was laundered onto other shell companies including Integrated Capital Management of which Mr Shane (a director of Transnet who succeeded Mr Sharma as chairperson of the BADC) was a director. The payment to BEX was ostensibly for services rendered in relation to the relocation. However, the BDSA with BEX resembled the other kickback BDSAs facilitated by Mr Essa in relation to the locomotive transactions with the services rendered being of dubious value. The inclusion of BEX in the arrangement was consistent with the methodology of the Gupta enterprise of inflating the value of tenders to enable payments to the enterprise via chosen SDPs that were typically shell companies.

1065. The LSA concluded between CSR and Transnet in relation to the 359 locomotives as part of the 1064 locomotive transaction envisaged the parties concluding a maintenance services agreement for the locomotives supplied. In June 2015, CSR concluded a BDSA with Mr Essa's company, Regiments Asia, in relation to a proposed 12-year maintenance plan in terms of which Regiments Asia would supposedly provide advisory consulting services in exchange for a fee of 21% of the contract price of the maintenance services amounting potentially to R1.3 billion. The Transnet board approved the conclusion of a 12-year maintenance plan for an amount of R6.18 billion on 28 July 2016. Transnet paid CSR an advance payment of approximately R705 million in terms of this agreement in October 2016. The evidence indicates that R9.4 million of this was paid to Tequesta (another company associated with Mr Essa). Amidst allegations of corruption, Transnet terminated this agreement in October 2017 and sought repayment of the monies that had been advanced. In December 2018, CSR refunded Transnet R618 million. It is

unclear whether CSR has repaid to Transnet the VAT and interest in the amount of R223 million in respect of the R705 million advanced.

1066. The wrongdoing in relation to the 1064 locomotive procurement comprised, *inter alia*: i) the misrepresentation to the board of the components of the ETC; ii) non-compliance with the preferential points system; iii) the unfair favouring of CSR through the TE adjustment; iv) the factoring of a R2.01 million discount for TE back into the price of CSR's locomotives; v) the irregular understating of CNR's BAFO price by approximately R13 million per locomotive; vi) the marginalizing of Transnet's treasury; vii) the inflation of the price through the inappropriate use of batch pricing; viii) the inappropriate calculation of escalation costs, forex and contingencies; ix) the manipulation of the delivery schedule; x) the payment of excessive advance payments favouring CSR and CNR; xi) non-compliance with the local content requirements; xii) the failure to obtain the approval of the Minister for the substantial increase; xiii) the misrepresentation to the board of the NPV by using the wrong hurdle rate; xiv) the dubious maintenance services agreement and the failure to recoup the excessive advance payment timeously and the VAT and interest on it; and xv) the BDSA kickbacks.

1067. Regiments began to assume a greater role at Transnet in the immediate period leading up to the conclusion of the LSA's in respect of the procurement of the 1064 locomotives and the 100 locomotives confined to CSR on 17 March 2014 and in the subsequent period in which the financing of the 1064 transaction was finalised. On 23 January 2014, Mr Singh, without appropriate authority concluded a contract with Regiments in relation to the 1064 locomotive procurement. This was followed on 4 February 2014 by Mr Singh concluding with Regiments a third addendum to the LOI with McKinsey. McKinsey then purported to cede its rights to Regiments on 5 February 2014 in terms of an invalid cession. Regiments was then paid

R36.77 million between 18 February 2014 and 7 April 2014 in terms of the purported invalid third amendment to the LOI concluded on 4 February 2014. An additional payment of R79.23 million without any legal basis was paid by Transnet to Regiments on 30 April 2014.

1068. During 2014-2015, McKinsey and Regiments were awarded contracts valued at R2.2 billion by way of confinement rather than by open public tender. Half of the revenue received by Regiments under these contracts was directed to Homix, a Gupta associated company, in terms of the agreement with Mr Essa and Mr Moodley. The evidence establishes that McKinsey and Regiments were irregularly in possession of the confinement memoranda prior to making the bids on their contracts. Four of the confinements were approved by Mr Molefe over a period of four days between 31 March 2014 and 3 April 2014. These contracts all appointed Homix and Albatime (Gupta linked laundry vehicles) as SDPs. Fee payments (in an unknown amount) were irregularly made to McKinsey and Regiments in July 2014 in terms of these contracts prior to the conclusion of the tender process. Correspondence of 13 June 2014 confirms that provision for fee payments to Homix and Albatime in excess of R100 million were to be made in terms of these contracts. Mr Fine of McKinsey confirmed in a statement to Parliament that neither Homix nor Albatime were involved in providing any services on any project in which McKinsey was involved.

1069. In April 2014, shortly after the conclusion of the LSAs in respect of the 1064 locomotives, negotiations began in earnest with the CDB for the financing of the procurement of the locomotives from the Chinese companies. Regiments assumed a lead role in the negotiations while the Group Treasurer and treasury team of Transnet were side-lined. The Group Treasurer, Ms Makgatho, valiantly challenged the relegation of the Transnet treasury team. She repeatedly raised her concerns

about her marginalisation and the unsatisfactory proposed terms of the CDB facility with Mr Molefe and Mr Singh, but to no avail. Ms Makgatho resigned from Transnet in November 2014 as she feared for her safety and wellbeing. She was replaced by Mr Ramosebudi who had links with the Gupta enterprise.

1070. During August 2014, Mr Singh, with the assistance of Regiments, presented misleading information to the board which committed Transnet to a loan of USD1.5 billion from the CDB on relatively unfavourable terms.

1071. During this period, on 4 August 2014, Mr Molefe signed a deed of settlement agreeing that Transnet would pay the costs of GNS/Abalozi and its directors (including General Nyanda, a member of President Zuma's cabinet) on a punitive scale in litigation about the termination of a services contract with GNS /Abalozi, which had led to the dismissal of Mr Gama in 2010. The deed was apparently signed on behalf of GNS/Abalozi by General Nyanda, who was a friendly acquaintance of Mr Gama. The agreement to pay these costs was unjustifiable in a number of respects and should not have been concluded. Moreover, properly taxed the costs envisaged in the questionable settlement agreement would not have exceeded R200 000 at that particular stage of the litigation between Transnet and GNS/Abalozi. Yet, on 16 January 2016, Mr Molefe agreed to pay GNS/Abalozi R20 million to settle all legal claims against Transnet. The amount paid was an excessively inflated assessment of the legal costs payable and was paid to settle claims that had already been settled or had prescribed. This expenditure was wholly unjustifiable.

1072. On 17 April 2015, consistent with what Mr Essa had told Mr Bester of Hatch during the course of 2014, Mr Molefe was seconded from Transnet and became acting CEO of Eskom. On 20 April 2015, the board of Transnet appointed Mr Gama as

acting GCEO of Transnet. Four days earlier, on 16 April 2015, Transnet paid Mr Gama's attorneys R1.4 million in relation to his dismissal and reinstatement in 2010/2011 (four years previously). This payment was without any legal basis as it was probably a duplication of a costs payment made to Mr Gama's attorneys earlier which itself should never have been paid for various reasons, including the fact that it related in part to costs that had been awarded to Transnet in Mr Gama's failed High Court application and moreover was in any event not due in terms of the indefensible settlement agreement to reinstate Mr Gama.

1073. A week after Mr Gama's appointment as acting GCEO, Mr Ramosebudi who had succeeded Ms Makgatho as Group Treasurer of Transnet, compiled a memorandum seeking *inter alia* approval from the BADC for the payment to Regiments of R189.24 million as a "success fee" in relation to the USD1.5 billion facility with CDB (concluded eventually on 4 June 2015). The proposal was supported by Mr Gama, Mr Singh and Mr Pita. The BADC approved the request on 29 April 2015. Mr Gama approved the additional fee on 16 July 2015. Before the conclusion of the CDB loan, Regiments submitted an invoice for R189.24 million on 3 June 2015. The evidence discloses that the work performed in respect of this fee fell within the scope of an earlier agreed fee of R15 million. Additionally, the expert evidence of Dr Bloom confirms that the fee of R189.24 million was 10-15 times greater than the market norm for the work supposedly performed by Regiments, and was probably inflated by an amount of between R90 million and R140 million. The fee was paid to Regiments on 11 June 2015 and the record shows that R147.6 million of it was paid to Albatime (the Gupta linked laundry vehicle) of which R122 million was laundered further to Sahara Computers, another company in the Gupta enterprise.

1074. As discussed earlier in this report, USD1 billion of the USD2.5 billion CDB loan facility was shelved and Regiments advised and arranged for Transnet to conclude a ZAR12 billion club loan instead. Regiments originally replaced JP Morgan as the lead arranger on this loan. However, when Mr Wood moved from Regiments to Trillian Capital (Pty) Ltd (a company which Mr Wood helped to establish and in which Mr Essa was a controlling shareholder), Mr Gama submitted a memorandum to the BADC on 22 September 2015 recommending that the BADC approve the appointment of Trillian to replace JP Morgan as the lead arranger on the ZAR club loan.

1075. The proposal to appoint Trillian was supported by Mr Ramosebudi, Mr Pita and Mr Thomas. It was initially intended to pay Regiments a success fee of R50.2 million. However, Trillian was eventually paid a success fee of R93.48 million. Mr Thomas in an email to Mr Ramosebudi and Mr Pita challenged the propriety of the proposal on the grounds that prior payments to Regiments had covered the services supposedly performed by Trillian and expressed doubt that the newly incorporated Trillian had the capacity to underwrite the loan. Trillian was not a bank with significant assets but a company recently conceptualized by Mr Wood.

1076. On 14 September 2015, a few days before Mr Gama submitted the proposal to the BADC, Mr Ramosebudi forwarded an email to Mr Wood to which he attached an order to Land Rover Waterford (a dealership partly owned by Mr Wood's partner, Mr Nyhonyha) for a Range Rover Sport valued at R1.23 million in the corrupt hope that Mr Wood could "do something for him".

1077. On 18 November 2015, Mr Gama and Mr Pita concluded a mandate with Mr Roy of Trillian engaging it as the lead arranger for the ZAR12 billion club loan. On the same day Trillian issued an invoice for R93.48 million. The next day, 19 November

2015, Mr Gama and Mr Pita signed a payment advice. Four days later on 23 November 2015, the ZAR club loan was concluded. The next day, 24 November 2015, Mr Ramosebudi compiled a memorandum requesting Mr Gama and Mr Singh to sign off on the Trillian invoice which they did in early December 2015. The money was paid into Trillian's account on 4 December 2015, a mere 16 days after the mandate was concluded. Four days later on 8 December 2015, R74.8 million of that fee was transferred by Trillian to the Gupta money laundering vehicle Albatime.

1078. The evidence convincingly confirms that Trillian had not in fact performed any services in relation to the ZAR club loan and that the lead arranging work had been performed earlier by JP Morgan and Regiments. In addition, Trillian could not have practically done the work in the limited time available to it as it would have needed to be done in the months leading up to the conclusion of the ZAR club loan.

1079. Shortly after Mr Gama approved the wholly unjustifiable payment of R93.48 million to Trillian, he met with Mr Essa at the Oberoi Hotel in Dubai on 23 January 2016. Evidence before the Commission confirms that Mr Gama's hotel bill in Dubai was either paid or was intended to be paid by Sahara Computers or Mr Essa, both associates of the Gupta Enterprise. A few weeks later, on 24 February 2016, Ms Mabaso, the chairperson of the Transnet board recommended the appointment of Mr Gama as GCEO to replace Mr Molefe (who had resigned in September 2015 to assume the position of CEO at Eskom). Ms Mabaso recommended the appointment of Mr Gama without any formal, competitive recruitment process. Ms Brown, the then Minister of Public Enterprises (appointed by President Zuma) appointed Mr Gama as GCEO on 12 March 2016, despite the fact that Mr Gama had on two prior occasions been found unsuitable for the post by the Transnet board.

1080. On the same day that Mr Gama authorized the unjustifiable payment of R93.48 million to Trillian – and just 10 days after the conclusion of the ZAR12 billion club loan, at a floating interest rate – Mr Ramosebudi submitted a memorandum to Mr Pita, the then acting GCFO, seeking approval for hedging the interest rate exposure from a floating rate to a fixed rate and permission to instruct Regiments to execute the hedges with approved counterparties. Mr Gama approved the proposal and two tranches of interest rate swaps were executed by Regiments on the ZAR club loan. R4.5 billion was swapped to a fixed rate of 11.83% for 15 years on 4 December 2015. Seven months later, on 7 March 2016, R7.5 billion was swapped to a fixed rate of 12.27% for 15 years.

1081. These interest rate swaps were highly imprudent for various reasons, caused substantial losses to Transnet, and should never have been concluded. The realised total negative cash flow for Transnet on these interest rate swaps was R850.5 million by 2019. This amount would not have been payable had Transnet not effected the interest rate swaps. As at 14 May 2019, the amount of the cost of exit (an unrealised negative cash flow) would have been an additional R918.48 million, giving a total negative cash flow of R1.83 billion at that date.

1082. Other interest rate swaps executed by Regiments on Transnet debt in the amount of R11.3 billion, not directly related to financing the 1064 locomotive transaction, and unusually using the TSDBF as a counterparty, resulted in an additional realised cash flow loss of R720.8 million and an unrealised loss of R815.7 million, totalling R1.5 billion, for Transnet. Regiments received a fee of R229 million in respect of these transactions.

1083. Other transactions in relation to Transnet's IT and data network were tainted with corruption and irregularity. In October 2013, the acting GCEO of Transnet awarded

the tender for Transnet's network services to Neotel when Mr Molefe, the GCEO, was absent on business elsewhere. On his return, and most likely in contravention of the PFMA, Mr Molefe revised the award and granted the tender to T-Systems which had bid for the contract in conjunction with BBI, the SOE to which Mr Essa had been appointed as a director by Mr Gigaba. T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems, its SDP, which made various payments to Gupta laundry vehicles (including Homix and Albatime) and which during 2015 and 2016 paid Zestilor (a company owned by Mr Essa's wife) a monthly retainer of R228 000.

1084. Mr Molefe's decision was subsequently reversed and the award to Neotel was reinstated after Transnet received a negative opinion from its auditors and legal advice that Mr Molefe's decision was irregular.

1085. The evidence establishes convincingly that during 2014-2015, Neotel made two corrupt payments to Homix (a Gupta enterprise laundry vehicle), in the amount of approximately R75 million. The first payment of R34.5 million was in respect of the acquisition of equipment from Cisco for use in the Transnet IT network and another payment of R41 million supposedly for services rendered over two days in concluding the Master Services Agreement ("the MSA") for the network services between Neotel and Transnet. Neotel also agreed to pay R25 million to Homix for services it supposedly rendered (over the same two-day period) in relation to an asset buy back agreement between Transnet and Neotel. The amounts paid to Homix by Neotel were then laundered onto the Gupta enterprises in contravention to the exchange control regulations.

1086. A further unsuccessful attempt to favour T-Systems was made in 2017. On that occasion, the BADC chaired by Mr Shane (seemingly supported by Mr Gama)

refused on dubious grounds to award the tender to the first placed bidder, Gijima, and instead awarded it to T-Systems, the lowest scoring bidder whose bid was R1 billion more expensive. The decision was eventually reversed and the tender was awarded to Gijima, but the conduct of the members of the BADC, particularly Mr Shane and Mr Nagdee (both with links to the Gupta enterprise) evinced a clear intention to favour T-Systems. There are reasonable grounds to believe that their conduct contravened section 50 of the PFMA and is evidence establishing their links to the Gupta racketeering enterprise.

1087. In the light of this extensive range of wrongdoing, viewed in the light of the evidence in relation to the cash bribes and the kickback agreements, the following recommendations are made in terms of TOR 7 of the Commission's terms of reference.

Recommendations in relation to the kickback and laundering of the proceeds of unlawful activities

1088. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution here or abroad of Mr Essa and his various companies (Regiments Asia, Tequesta, JJ Trading FZE and Century General Trading FZE) and the relevant functionaries of CSR Zhuzhou Electric Locomotives Co, CNR and CRRC on charges of corruption as contemplated in any law, including Chapter 2 of PRECCA, and the racketeering offences and the offences relating to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA, in relation to the various contracts (including BDSAs and exclusive agency agreements) concluded between 2012 and 2016 that led to the payment of at least R7.34 billion in kickbacks to companies controlled by Mr Essa and the Gupta enterprise.

1089. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with the view to the possible prosecution of Regiments Capital (Pty) Ltd, Mr Wood, Mr Essa (and any company under his control), Mr Moodley (and any company under his control) and Mr Singh, as well as any persons associated with them in illegal conduct, on charges of fraud, corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the alleged arrangement and agreement whereby it was agreed to appoint Regiments as an SDP on Transnet contracts in exchange for Regiments paying 30-50% of its fees to Mr Essa and/or his associated companies and 5% of its fees to Mr Moodley and/or his associated companies amounting to more than R1 billion for little or no consideration.

Recommendations in relation to the receipt of gratification by individuals

1090. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Gigaba, Mr Gama, Mr Pita and Mr Jiyane on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to cash payments allegedly received by them during visits to the Gupta compound in Saxonwold in the period 2010-2018.

1091. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to cash payments that were allegedly made to them at the Three Rivers Lodge, Vereeniging in July 2014 by two unidentified Chinese men.

1092. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to his Dubai travel expenses during the period between April 2014 and June 2015, which were allegedly paid for by Sahara Computers or Mr Essa.

1093. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to the payment of his Oberoi Hotel bill for 22-24 January 2016, which was allegedly paid by Sahara Computers.

Recommendations in relation to the unjustifiable reinstatement of Mr Gama

1094. It is recommended that steps should be taken by Transnet in terms of section 77 of the Companies Act 71 of 2008 to recover from those members of the board who supported the unjustifiable settlement agreement between Transnet and Mr Gama concluded on 23 February 2011, the amount of approximately R17 million paid to and for the benefit of Mr Gama pursuant to the agreement.

1095. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether the crime of fraud was committed by any person in relation to the payment of R1 399 307.11 on 16 April 2015 by Transnet to Langa Attorneys (in respect of costs allegedly owed to Mr Gama).

1096. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary, with a view to the possible prosecution on a charge of corruption in terms of Chapter 2 of PRECCA, and/or a racketeering

charge in terms of Chapter 2 of POCA, to determine whether the reinstatement of Mr Gama as CEO of TFR at the instance of Mr Zuma, Mr Gigaba and Mr Mkwanazi constituted an improper inducement to Mr Gama to do anything, thus amounting to corruption.

Recommendation in relation to the settlement agreement with GNS/Abalozi

1097. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether Mr Brian Molefe acted wilfully or grossly negligently in contravention of sections 50 or 51 of the PFMA with a view to his prosecution on a charge in terms of section 86(2) of the PFMA in relation to his agreement on 16 January 2016 to pay GNS/Abalozi an unjustifiable payment of R20 million.

Recommendations in relation to the procurement of the 95 locomotives

1098. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Gama on a charge of contravening section 50(1)(a) of the PFMA and/or on an offence relating to the proceeds of unlawful activities and/or racketeering as contemplated in Chapter 2 and 3 of POCA in relation to their decision to recommend to the board the change in the evaluation criteria in the procurement of the 95 locomotives so as to favour CSR as a bidder for the tender.

1099. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine if the board (the accounting authority) of Transnet wilfully or grossly negligently contravened section 51(1)(b)(i) of the PFMA by failing to recover delay penalties allegedly due to Transnet in terms

of the LSA concluded between Transnet and CSR in 2012 in respect of the procurement of the 95 electric locomotives.

Recommendations in relation to the procurement of the 100 locomotives

1100. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Jiyane and Mr Gama on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by presenting misleading information and failing to disclose material information to the board of Transnet in January 2014 regarding the acquisition of 100 electric locomotives from CSR by means of confinement.

1101. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet in terms of section 86(2) of the PFMA in respect of the authorisation of advance payments of approximately R3 billion to CSR in the period between March 2014 and November 2014 with no security in the form of advance payment guarantees being in place.

1102. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R740 million in relation to the procurement of 100 electric locomotives from CSR.

Recommendations in relation to the procurement of the 1064 locomotives

1103. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet on a charge in terms of section 86(2) of the PFMA by wilfully or grossly negligently contravening section 51 of the PFMA by wrongfully deviating from the evaluation criteria of the instruction note of National Treasury of 16 July 2012 and the provisions of regulations 5 and 6 of the PPPFA regulations in relation to the evaluation of the bids for the 1064 locomotives

1104. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh and Mr Gama for fraud and on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by misrepresenting to the board of Transnet in April 2013 and May 2014 that the ETC of R38.6 billion for the procurement of the 1064 locomotives excluded provision for forex and escalations when it in fact did so in the amount of R5.892 billion.

1105. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the Minister of Public Enterprises in an email of 31 March 2014 that the ETC of R38.6 billion approved by the Minister in August 2013 excluded provision for the impacts of foreign exchange and escalations when it in fact included provision for such costs in the amount of R5.892 billion.

1106. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any official or employee or former employee of Transnet on a charge of fraud or in

terms of section 86(2) of the PFMA in wrongfully adjusting the prices of the bid of CSR by an irregular adjustment for the TE scope and by an inappropriate reduction of CNR's BAFO price in the procurement of the 1064 locomotives so as to favour them and with the result that their bids succeeded when they should not have.

1107. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh and Mr Jiyane on a charge of fraud or in terms of section 86(2) of the PFMA by wrongfully agreeing to increase the price of the procurement of the 1064 locomotives by including an unjustifiable provision of R2.7 billion for batch pricing when there was no contractual obligation to do so.

1108. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the negotiations team that conducted the post tender negotiations on behalf of Transnet in relation to the procurement of the 1064 locomotives on charges of corruption in terms of Chapter 2 of PRECCA, or in terms of section 86(2) of the PFMA for wilfully or grossly negligently contravening section 50(1)(b) of the PFMA, by acting corruptly or not acting in the best interests of Transnet in managing its financial affairs by agreeing to the payment of excessive advance payments to CSR and CNR and not complying with the local content requirements of the RFPs of the tender in relation to this transaction.

1109. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the board of Transnet that the 1064 locomotive project was NPV positive and profitable by applying an

inappropriate hurdle rate of 15.2% when the project may in fact have had a negative NPV.

1110. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or in a grossly negligent way contravening sections 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R9.124 billion in relation to the procurement of the 1064 locomotives from the relevant OEMs.

1111. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of the majority directors of CNRRSSA, BEX, Mr Shaw, Integrated Capital Management, Confident Concepts and any other associated persons and companies on a charge of corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the payment of approximately R76.59 million made by CNRRSSA to BEX on 25 September 2015.

1112. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Nair and the members of the negotiations team that represented Transnet in the negotiations with CNRRSSA and Bombardier concerning the relocation of the manufacturing and assembly lines to Durban in 2014-2015 on a charge in terms of section 86(2) of the PFMA for contravening section 50(1)(b) of the PFMA by failing to act in the best interests of Transnet in managing its financial affairs by negotiating and agreeing to variation orders in the total amount of

approximately R1.2 billion, when there may in fact have been no proper basis for agreeing to the payment of that amount.

Recommendations in relation to the financial advisors

1113. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Wood, Regiments and any other person associated with them in illegal conduct on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA, and in terms of section 86(2) of the PFMA (where appropriate) for contravening section 50(1)(b) of the PFMA by acting corruptly and receiving and laundering an amount of R79.23 million paid by Transnet to Regiments on 30 April 2014.

1114. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama on a charge in terms of section 86(2) of the PFMA for contravening section 51(h) of the PFMA by concluding a contract in 2017 with Nkonki valued at R500 million in contravention of paragraph 9 of National Treasury Practice Note 3 of 2016 thereby not complying with legislation applicable to Transnet.

1115. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 51(1)(b)(iii) of the PFMA in that on 27 August 2014 he breached his duty to prevent expenditure not complying with the operational policies of Transnet by recommending to the board a proposal made by Regiments that was not in line with Transnet's policy regarding the fixed-floating debt ratio.

1116. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by not acting in the best interests of Transnet by recommending to the board the conclusion of a loan of USD1.5 billion on 4 June 2015 at a price substantially above the market norm.

1117. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Singh, Regiments, Mr Wood, Mr Moodley, Albatime and Sahara Computers on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA and (where appropriate) in terms of section 86(2) of the PFMA in relation to the payment by Transnet to Regiments on 11 June 2015 of an amount of R189.24 million and the on payment of R147.6 million of that amount to Albatime and Sahara Computers by Regiments.

1118. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Ramosebudi, Mr Pita, Mr Wood, Mr Essa, Trillian and Albatime on charges of fraud, corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activities in terms of Chapter 2 and 3 of POCA in relation to the payment by Transnet to Trillian on 4 December 2015 of an amount of R93.48 million and the on payment of R74.78 million of that amount to Albatime.

1119. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr

Ramosebudi and Mr Wood on a charge of corruption in terms of sections 12 and 13 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in relation to his soliciting or offering to accept a gratification from Mr Wood, Trillian or Mr Nyhonyha on 12 September 2015 in the form of a discount or reduction of the price payable for a Range Rover Sport motor vehicle from Land Rover Waterford for his benefit as an inducement to award a contract appointing Trillian for a fee of R93.4 million to replace JP Morgan as the lead arranger of the ZAR12 billion club loan.

1120. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Ramosebudi, Mr Pita, Regiments Capital (Pty) Ltd, Regiments Fund Managers (Pty) Ltd, Mr Wood, Mr Shane and any other persons associated with them in illegal activity on charges of fraud, corruption or in terms of Chapter 2 of PRECCA, racketeering and the offences relating to the proceeds of unlawful activity under Chapter 2 and 3 of POCA, or where appropriate in terms of section 86(2) read with section 50(1)(b) of the PFMA, in relation to the realised losses of more than R1.5 billion caused to Transnet and the fees paid to Regiments Fund Managers in the amount of R229 million in respect of various interest rate swaps, cross-currency swaps and credit default swaps executed by Regiments on behalf of Transnet in the period between 2015 and 2019.

Recommendations in relation to the MEP

1121. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Reddy and Mr Padayachee with corruption as contemplated in section 3, section 12(1) or section 13 of PRECCA in their offering in July 2013 to accept a

gratification (in the form of an appointment as an SDP) from Hatch as an inducement for influencing officials at Transnet to award Hatch the tender in relation to phase 1 of the MEP.

1122. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Essa and Mr Singh on charges of corruption in terms of Chapter 2 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in demanding or soliciting in early 2014 a gratification (an SDP appointment for a company favoured by Mr Essa) for the benefit of Mr Essa's company and himself and as an inducement (by influencing officials at Transnet) to award the tender in relation to a contract for performing work and providing services on phase 2 of the MEP to Hatch.

Recommendations in relation to the IT contracts

1123. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Khan, Homix, Neotel and Mr Van der Merwe on charges of corruption in terms of section 13 of PRECCA and on racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA in relation to the offering by Mr Khan to accept 10% commission, in the amount of approximately R34 million, from Neotel as an inducement to influence officials at Transnet to award a tender to Neotel for supplying equipment to Transnet from Cisco and in relation to the on payment of such funds to the laundering vehicles of the Gupta enterprise.

1124. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Neotel, Mr Joshi, Mr Van der Merwe, Mr Khan, Homix and any other person associated with them in illegal activity on charges of corruption in terms of Chapter

2 of PRECCA, racketeering offences in terms of Chapter 2 of POCA and offences relating to the proceeds of unlawful activity in terms of Chapter 3 of POCA, in relation to the payment by Neotel of R41.04 million to Homix and the promise by Neotel to pay R25 million to Homix in the period between December 2014 and February 2015 supposedly for services rendered in relation to the MSA and asset buyback agreement concluded between Neotel and Transnet in December 2014.

1125. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Shane and Mr Nagdee on a charge in terms of section 86(2) of the PFMA for contravening section 50 of the PFMA by acting prejudicially to Transnet's financial interests in a meeting of the BADC on 13 February 2017 by unjustifiably favouring the bid of T-Systems on spurious grounds.