

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

09 MARCH 2021

DAY 357



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Recording & Transcriptions

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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 09 MARCH 2021

CHAIRPERSON: Good morning everybody. Well you will have to switch on your microphone otherwise I will not hear you.

ADV OLDWADGE: Morning Mr Chair.

CHAIRPERSON: Okay alright. We deal with the – Mr Gama's application for leave to cross-examine Mr Todd. I did have a look at the supplementary affidavit yesterday I am not sure whether it should have been filed but it does
10 say that it was just to err on the side of caution.

Yes you can – you may start.

ADV OLDWADGE: Thank you Mr Chair. So insofar as the application for condonation is concerned I submit with respect at the outset that ...

CHAIRPERSON: Ja you can – you can take it that I do not have difficulty with condonation.

ADV OLDWADGE: I am indebted Mr Chairperson.

CHAIRPERSON: Ja.

ADV OLDWADGE: I will then proceed to deal with what I
20 term to be the merits of the application and at the outset I wish to make reference to the opening statement of the legal team of the commission and in particular at paragraph 30 thereof and I quote as follows:

“Where the commission is asked to
interrogate an issue the legal team will not

presume a particular outcome. Witnesses may have different even contradictory versions in relation to a particular factual allegation or set of facts. It is our function to explore all material and relevant versions.”

My emphasis Chair of course being on the caption the legal team will not presume a particular outcome and the context of this application that serves before you Mr
10 Chair I advance the proposition having regard to that paragraph and in particular that caption of the legal teams’ opening statement it certainly was envisaged that the approach taken by Mr Todd in opposition to this application for him to be subjected to cross-examination is hardly an appropriate one.

I say with respect that much could be said about the fact that the commission’s legal team seems to want to rely on the submissions by Mr Todd in his answering affidavit.

He says too the purposes of my argument
20 fundamental things. Firstly he says I volunteered my testimony before the commission. I am a seasoned experienced litigator if I recall correctly he says he became a partner of Bowmans Attorneys way back in 1998.

It is not a lay witness that we are dealing with and by submitting that I am not conceding for one moment that

he is an expert witness albeit that he attempts to deliver expert testimony before this commission. Much will be dealt with in that regard if you permit with respect our application to cross.

CHAIRPERSON: I will – I will tell you what I am really interested in

ADV OLDWADGE: As you please.

CHAIRPERSON: I am very interested in whether there are any disputes or fact between mattes dealt with by Mr Todd
10 in respect of which he has personal knowledge and matters that Mr Gama wish to dispute or deny in terms of – in terms of press. So that is the one thing.

The second thing and that is not because it is less important than the first one actually it might be more important. I need you to address me on why I should grant Mr Gama leave to cross-examine that is if there are disputed facts between him and – and Mr Gama – Mr Todd.

Why I should grant him relief in circumstances where he says in his founding affidavit that whether or not
20 he presents himself to give evidence will depend on the outcome of the application. In other words he is not committing himself to giving evidence before the commission unequivocally and unconditionally but says depending on the outcome of the application and I think he says also depending whether it is desirable that is one of

his last paragraphs that is what he says he may then make himself available for – whether to give evidence.

Now I would be disinclined to grant leave to any person who says well if you rule against me I will not subject myself to the processes of the commission. In other words I want to cross-examine other people but I do not want to be questioned. So I would be disinclined to – to grant such a person leave. That is my understanding of what he says towards the end of his founding affidavit.

10 What do you say about that?

ADV OLDWADGE: Chair I – I submit that there is that possible interpretation If I might address the two questions posed to me by beginning with what Chair poses at the tail end.

CHAIRPERSON: Maybe just to be to be sure that you know what I am talking about. I am referring to paragaph3 5 of his founding affidavit and it reads:

20 “Should it be necessary or desirable thereafter and depending on the content and results of the cross examination I undertake to give evidence before the commission and to cooperate as best I can in order to advance the objectives of the commission.”

That – that – but that is how I am giving you – I

have given you my understanding; you might say that is one way but here is another way but that is part of my concern.

ADV OLDWADGE: I am fully alive Mr Chair to what is contained in that paragraph so it was not necessary for me to consider it as it features in the papers and I can immediately respond.

Perhaps to a certain extent it is praised regrettably ineloquently that is my starting point. There is to be read
10 into that caption nothing whatsoever which suggests that my testimony before this commission is dependent on whether in fact I am granted to leave to cross-examine but I hasten to add this Mr Chair and it is indeed so that my client has been preparing an opening statement and I do not want to make a submission on which I am contradicted at a later stage and I do this purely so as to be cautious in my approach to what I submit to Mr Chair.

It is in fact correct that Mr Gama wishes to cause the cross-examination of Mr Todd because he believes and
20 to deal with Mr Chair's first question I am going to refer and cite a perfect example of where he is accused by Mr Todd of being a fraudster. There is a stark dispute of facts in relation to that allegation yet will with respect focus on the GNS contract and what transpired particularly and in essence during the disciplinary hearing of my client before

Antrobus SC who was the Chairperson to make such a statement in the context of joining him almost to a conspiracy, a common purpose if you wish with people like Khanye and Senemela and to describe the trio as fraudsters should never have been condoned. In fact if that was not an absolute allegation then my learned friend Mr Myburgh ought to have corrected it.

I will refer in a moment to that but I do not want to dwell that for too long I want to return to the second
10 question if you will permit me Mr Chair?

So perhaps ineloquently phrased but it is not conditional only. The rules do not permit for that and I as Counsel would not permit that situation.

So with respect Mr Chair must please not interpret that there is a conditional undertaking to give evidence in these proceedings.

My client is a compellable competent witness as is by the way Mr Todd. He will comply with the processes and we have already indicated and there is an informal
20 arrangement as to when he will take the stand so to speak.

So if that answers the question it is not conditional. I know I sound repetitive but I want to make the position very clear. My client would not take that disrespectful stance towards Mr Chairperson and it is not his intention.

So I think what he is trying to perhaps illustrate is

he would be better positioned to during his evidence refer to certain aspects not necessarily contradictions per se perhaps admissions that are elicited during the cross-examination of Mr Todd if you will permit that and it will permit him as far as he sees it as a lay witness to advance perhaps more eloquently and efficiently his testimony before this commission.

Mr Chair if that then addresses the second aspect so...

10 **CHAIRPERSON:** Can I take this issue. Is the position that you are saying definitely there is no intention on his part to make his cooperation with the commission and the giving of evidence that he is supposed to do dependent on whether his application for leave to cross-examine is successful or not that that is not the intention and that is not his position.

ADV OLDWADGE: Absolutely not.

CHAIRPERSON: Okay.

ADV OLDWADGE: So it would be I repeat it would be
20 disrespectful of him to do so and that is not his intention,.

CHAIRPERSON: Yes. Okay no that is fine. And then I think the next thing is what the disputed facts are. You mentioned the issue about fraudster. Well just deal with the issue of what are the disputed facts or are disputed allegations of facts between the two.

ADV OLDWADGE: Mr Chair with respect I will address that issue but before I do so we – we have not having been traded with a copy of the commission's bundle and I am not pointing fingers I am simply saying I understand that to be protocol so as to enable Mr Chair to follow my reasoning and arguments we have prepared a bundle and with Mr Chair's leave I would like to hand that up so that you can follow more easily. I do not have the page numbering in the commission's bundle prepared for this application so
10 we have not been able to cross-reference.

CHAIRPERSON: Ja, no, no I will tell – I am not sure that I would need it I would simply look at his founding affidavit. I would look at Mr Todd's response and the reply because what the disputed facts are that cross-examination is supposed to resolve should appear from those affidavits. So – so I struggled a bit as I was reading them but then maybe there is something I did not understand where the disputed facts are. Okay.

ADV OLDWADGE: Thank you Mr Chair.

20 **CHAIRPERSON:** Yes.

ADV OLDWADGE: So I – my submission with reference to this fraudster issue is to be found in the transcript which is – which is an annexure to his founding papers.

CHAIRPERSON: Well start – start – start in the founding affidavit if you – if you do not mind.

ADV OLDWADGE: This aspect – this particular aspect is dealt with in an overarching way during – in other words where we say we take issue with how he has presented his evidence for instance that our client is implicated but it does not feature per se in the application it is of overarching nature.

CHAIRPERSON: Ja but...

ADV OLDWADGE: Like...

CHAIRPERSON: I will be disinclined to grant leave and
10 then the whole thing gets expanded to issues that really were not made clear in the founding affidavit because I mean the commission has very – has serious constraints on time. If I grant leave I will want to be sure that it is in respect of clear issues that have been covered in the papers.

ADV OLDWADGE: Very well Mr Chair. I will then commence with a reference to paragraph 4 and the way I have prepared this is to have regard to the replying affidavit in which we consider not only the founding
20 affidavit by my client but also the answering affidavit deposed to by Mr Todd. If you will permit me.

There is a cross-referencing and I will deal with that.

CHAIRPERSON: Yes but what – what I expect you to do is to start with the founding affidavit and say here are the

paragraphs where we raise disputed facts that will be resolved by cross-examination. Then to the extent that – and then go to the response or answering affidavit to say this is what he says and then if you need to go to the replying affidavit you may go but the founding affidavit is important as a starting point.

ADV OLDWADGE: As you please Mr Chair. We might as well commence with paragraph – there is a reference to paragraphs 22 to 32 that is from founding affidavit page 10
10 to say not only...

CHAIRPERSON: Okay do not speak too far away from the microphone otherwise I will not hear you and the record will not have – okay you said 22 to?

ADV OLDWADGE: At paragraphs 22 of the founding affidavit it is responded to by Mr Todd at paragraph 7 of his affidavit and it is then dealt with in the reply at paragraph 3 continue with paragraph 4.

Paragraph 22 which does not deal exactly with that first point in issue but it says that he sensationalised and
20 he came before this commission with a motive to implicate him and in certain respects implicate him falsely.

It is a denial by our client. Our client says that there is no merit to this kind of an allegation. It places the entire context of...

CHAIRPERSON: I am sorry the starting point must be this

is what Mr Todd said in his evidence or in his affidavit that I challenge.

ADV OLDWADGE: Mr Chair I will then move on from that aspect.

CHAIRPERSON: Ja Okay.

ADV OLDWADGE: It proves a little challenging because it was not quite how I planned to present this – this application but if we go to the very first aspect then.

CHAIRPERSON: Ja.

10 **ADV OLDWADGE:** Which is paragraph 23. Sorry paragraph 22 of the founding affidavit and it is referred to in paragraph 10 of Todd's affidavit and then in paragraph 4 of the replying affidavit. What we say in paragraph per the founding affidavit say that:

"The purpose of the testimony by Todd was to sensationalise matters and he recorded that our client had been copied in the email to which was attached a copy of the memorandum from Mr Mtetwa, General Manager of Transnet Rail."

20 There is a clear ...

CHAIRPERSON: What did Mr Todd say about that email?

ADV OLDWADGE: He said – Mr Chair he says in para 22.1 of his affidavit Mr Gama states that I sought to sensationalise matters by pointing out that he had been copied in an email which in turn attached a copy of a

memorandum from Mr Mtetwa.

He then goes on and he provides an exposition of why he says this is not sensationalism.

CHAIRPERSON: Yes but I want to start ...

ADV OLDWADGE: (Inaudible)

CHAIRPERSON: I am sorry. I want to start in – in your client's founding affidavit what does he say in his founding affidavit Mr Todd said about that affidavit that memo or email that he dispute? Because when I was reading...

10 **ADV OLDWADGE:** Mr Chair.

CHAIRPERSON: When I was reading the affidavit I will tell you what my challenge was. I struggled to understand whether the issue was that Mr Gama was saying Mr Todd says I wrote that memo or email or – and I did not write it or whether he was saying Mr Todd accepts that the email was written by – or was drafted by somebody else but for me and I just signed. So I think when he goes to his replying affidavit he may be using the word created – Mr Gama to say I did not create that memo or email. So – so

20 – and I tried to look for the email I could not – I could not find it immediately because I wanted to see whether this is a situation where he, the email on the face of it or memo came from him. It has got his name on but he was simply saying somebody else created it. It is somebody else's idea but I just had to – had to be under my name for

whatever reason. Or whether he was saying I was copied on it and that is all that there is to it, you know my connection with it. So I was struggling. What is the position as you understand it about that memo or email?

ADV OLDWADGE: Chair – Mr Chair Mr Gama says he was not the author of that memorandum.

CHAIRPERSON: But let us start – let us start with what did Mr Todd say about him and that email.

ADV OLDWADGE: And that is just the point I want to
10 advance before you with respect we should not remove it out of context because what we are saying is sensationalise and sensationalised in this sense that my client was there to influence certain committees and in particular the Risk Committee where Mr Mtetwa ultimately made a submission.

We are not privy to what that submission was. So what is Mr Todd doing? He is sensationalising. He does not know...

CHAIRPERSON: But what is ...

20 **ADV OLDWADGE:** He does not know.

CHAIRPERSON: What did he say that you interpret as sensationalising – what did he say about that email and Mr Gama that is seen as sensationalising?

ADV OLDWADGE: He is entire evidence if you consider it in context with respect is to suggest that my client had a

hand in and was party to influencing the powers that be at the – at the board level, at committee level and that my client was instrumental in that.

Now in the ordinary context when one says he was copied in it would suggest at best that the person copied in if he had read and considered the contents to the body of the mail would have acquitted knowledge.

But in this context it is something very different. My client did not have a hand in the creation of that
10 memorandum and in the ordinary course Mr Todd ought to know this protocol requires that memoranda are prepared and seen here as certain perks so the senior person signed off. That is the context Mr Chair and I want it in cross.

CHAIRPERSON: Okay. Okay I see that in paragraph 22.1 Mr Gama says that Mr Todd said...

ADV OLDWADGE: I am not following sorry Mr Chair.

CHAIRPERSON: I am sorry.

ADV OLDWADGE: Para – so I am not following you I apologise.

20 **CHAIRPERSON:** Yes okay alright. No I say I see that at paragraph 22.1 of Mr Gama's founding affidavit where he deals with the issue of this email. He says Mr Todd said he was copied in the email.

ADV OLDWADGE: Yes.

CHAIRPERSON: So in other words that is what he says Mr

Gama said. Now he – he confirms in the next sentence that he was copied. So that is common cause.

ADV OLDWADGE: Yes.

CHAIRPERSON: And he says he was copied since at the time he occupied the position of Chief Executive Officer of 00:26:23 there is thus nothing sinister in the fact that I had been copied and then that is where he stopped – I will – stops other than that he says Mr Todd sought to sensationalise matters. But they agreed that he was
10 copied.

He does not say what else Mr Todd said on the basis of which he says Mr Todd sought to sensationalise matters.

In other words he accuses Mr Todd of seeking to sensationalise matters but other than saying Mr Todd said he was copied he does not provide any basis for that criticism as I – as I read this.

Then he moves to another point. Okay. Is your understanding the same as well? It is the same?

20 **ADV OLDWADGE:** Mr Chair.

CHAIRPERSON: Yes.

ADV OLDWADGE: It is with respect the same.

CHAIRPERSON: Yes.

ADV OLDWADGE: However.

CHAIRPERSON: Yes.

ADV OLDWADGE: We are losing sight of context. That really is the nub of my client's complaint in this paragraph and the cause for him wanting to have Mr Todd cross-examined. And we should never leave – lose sight of the context.

CHAIRPERSON: Yes.

ADV OLDWADGE: And that is exactly that context that prevailed throughout the various witness statements five of them – five witness statement.

10 **CHAIRPERSON:** But that context ...

ADV OLDWADGE: Witness statements.

CHAIRPERSON: But that context should have been in the founding affidavit as well is it not so that Mr Cop – Todd could deal with it and the legal team could deal with it properly.

ADV OLDWADGE: I think...

CHAIRPERSON: To say in – to say this statement by Mr Todd that I was copied in regard to this email must be seen in the following context and then the context is set out.

20 And to say that is why we say he was seeking to sensationalise matters. Yes.

ADV OLDWADGE: I think in the commencement and the fact that our client was served with not only Rule 3.3 Notices and 10.6 Notices which required that to consider this evidence and this is perhaps my answer to that.

The fact that he was served with a Rule 3.3 Notice in relation to the testimony of Mr Todd and I want to add this in some instances he was never given that prior period what we term to be reasonable notice that was not there but certainly in the context of the 3.3 Notice that says Todd is going to testify and he is going to implicate. In that context we say and that is to be found when we deal with these aspects at the commencement of his founding affidavit that is the purpose with which Mr Todd
10 came to testify before this commission and then we say and then he proceeds to sensationalise. It is all with respect in the context of exactly that. One should not lose sight of the context which is at the commencement the party is coming and he is going to implicate you.

CHAIRPERSON: Ja.

ADV OLDWADGE: And by the way, with respect, before I allow that submission to disappear under a mist of obscurity.

CHAIRPERSON: H'm.

20 **ADV OLDWADGE:** He did just that.

CHAIRPERSON: Ja.

ADV OLDWADGE: Through much speculation and conjecture through sensationalism and as I will demonstrate later if time permits me to do so with evidence that is not factually correct. So we say with respect

Mr Chair. I have regard to what Rule 8.3 says.

All I want to advance before Mr Chair is that this Commission will be in a better position to determine where the truth lies, particularly, when you have regard to paragraph 22.1 when it says... Well, it is sensationalised in the context of him coming to implicate me.

CHAIRPERSON: Yes.

ADV OLDWADGE: Because it all is aimed at one thing Mr Chair and I do not want to reinvent the wheel.

10 **CHAIRPERSON:** H'm?

ADV OLDWADGE: It is all aimed at one thing.

CHAIRPERSON: H'm?

ADV OLDWADGE: Gama was described as one of the three architects of state capture.

CHAIRPERSON: H'm?

ADV OLDWADGE: If we consider that allegation alone...

CHAIRPERSON: Yes but hang on one second. I think we have dealt with the issue of the email that he says Mr Todd said copied on. He admits he was copied but he says he
20 sought to sensationalise his evidence. What other allegation of fact is disputed between the two of them?

ADV OLDWADGE: In relation to that point or might I continue with the affidavit?

CHAIRPERSON: No, in relation to another point.

ADV OLDWADGE: Oh ...[intervenes]

CHAIRPERSON: So I am not... Ja, other points
...[intervenes]

ADV OLDWADGE: I am indebted ...[intervenes]

CHAIRPERSON: Ja, ja.

ADV OLDWADGE: Thank you.

CHAIRPERSON: H'm.

ADV OLDWADGE: So if we then in turn deal with what is
contained at paragraph 42 of the founding affidavit. It
deals with the participation by Mr Todd together with a
10 partner of his at the law firm, Bowmans ...[intervenes]

CHAIRPERSON: I am sorry. I am sorry.

ADV OLDWADGE: Paragraph 23 Mr Chair of the founding.

CHAIRPERSON: Paragraph 23?

ADV OLDWADGE: Indeed.

CHAIRPERSON: Oh, okay. Yes?

ADV OLDWADGE: What happens there Mr Chair.
Mr Chair will recall this evidence by Mr Todd where he
says: Well, I went to a meeting with Mr Molefe. But we
hear nothing more about what transpired at that meeting.
20 Mister...

Chair, here is the importance in a knob of what I
bounce in support of this application as it pertains to this
paragraph. Meeting notes were prepared. We were never
furnished with a copy of that but in this context again,
because remember Mr Chair, what this seeks to achieve

through the testimony of Todd, simply this.

This reinstatement of Gama took place with no rational basis for it and in particular this aspect the halting, as it were, of the litigation against GMS or Abelose(?) [00:03:33] as it became a ...[intervenes]

CHAIRPERSON: You see, it is going to be more helpful to me if you start telling – if you start by telling me this is the allegation Mr Todd made according to the founding affidavit here on page – paragraph 23 that Mr Gama takes issue
10 with.

ADV OLDWADGE: What Mr Gama takes issue with ...[intervenes]

CHAIRPERSON: Yes, so in other words, what is the allegation made by Mr Todd against Mr Gama in paragraph 23 that Mr Gama takes issue with.

ADV OLDWADGE: He takes issue with the fact that there is no disclosure as to what transpired at that meeting. Mr Molefe is presently the subject matter of his evidence before the Commission. We do not know that that aspect
20 has been dealt with. I do not think it has been raised with him. So my client is in the dark but this is what we say.

Mr Chair, I hasten to add this. The purpose, with respect, to cross-examination is not merely to elicit contradictions. The purpose is to elicit to concessions, particularly, in circumstances where Mr Todd has created a

perception.

We want to disturb that inference that may flow from that perception having been created by means of cross-examining him and eliciting certain concessions. In this instances I am ...[intervenes]

CHAIRPERSON: So under paragraph 23, what you are saying to me is that, there is no positive allegation that Mr Gama relies upon which was made by Mr Todd against him but his issue is that Mr Todd did not include in his
10 affidavit or evidence what transpired in the meeting that he held with Mr Brian Molefe. His issue is the fact that he did not say anything about the content of the discussion.

ADV OLDWADGE: Mr Chair, partly.

CHAIRPERSON: Ja.

ADV OLDWADGE: That is partly correct.

CHAIRPERSON: H'm?

ADV OLDWADGE: With respect. However ...[intervenes]

CHAIRPERSON: Ja.

ADV OLDWADGE: ...again, I emphasise, the context with
20 in which this evidence was given.

CHAIRPERSON: H'm?

ADV OLDWADGE: Because you see it is in the context of undue untoward influence.

CHAIRPERSON: H'm?

ADV OLDWADGE: No rational basis ...[intervenes]

CHAIRPERSON: But ...[intervenes]

ADV OLDWADGE: ...the halting of that litigation against other Abelose(?) [00:06:17]. And here is the point. If I – if you permit me to just finish this point Mr Chair?

CHAIRPERSON: Ja.

ADV OLDWADGE: The point, really, is this.

CHAIRPERSON: H'm?

ADV OLDWADGE: What we later on learn is that there was good reason, there is what we call the Harris Newton
10 Molobatse report that says but here are facts advanced during our investigation which show that there was work performed by Abelose.

CHAIRPERSON: H'm?

ADV OLDWADGE: So it is in the context of that, that we say: But play your hand Mr Todd.

CHAIRPERSON: Yes.

ADV OLDWADGE: Tell us. You cannot talk about things which we have not seen. Which we are not a party to in the context, again, of you implicating our client in the so-
20 called undue attempt to stop the litigation.

CHAIRPERSON: Of course, if Mr Todd has said nothing about the content of the discussion and your client has evidence about what transpired, then his evidence would be unchallenged by Mr Todd.

ADV OLDWADGE: Mr Chair, he does not have that

evidence and this is what we seek to explore in cross because ...[intervenes]

CHAIRPERSON: So ...[intervenes]

ADV OLDWADGE: ...if we cross Mr Todd on this point...
Forgive me Mr Chair.

CHAIRPERSON: Yes.

ADV OLDWADGE: If we cross him on the point and we establish that that at meeting Mr Molefe conveyed to him the reasons why this litigation was halted. Well, then it
10 flies in the face of his testimony before this Commission, which was that there was no rational basis, at least not to his knowledge, for this litigation to have been halted. Mr Chair, that is my respectful submission.

CHAIRPERSON: Yes. Okay alright.

ADV OLDWADGE: Thank you.

CHAIRPERSON: And then, is there another disputed fact between ...[intervenes]

ADV OLDWADGE: There are number.

CHAIRPERSON: Yes.

20 **ADV OLDWADGE:** There are number Mr Chair. I do not want to waste your time.

CHAIRPERSON: Well, if you tell me where they are to be found in the founding affidavit then that would help.

ADV OLDWADGE: Yes.

CHAIRPERSON: But I remember that you know – I was

reading the founding affidavit. I thought possible too but you say there is a number. I must have. So let us identify them in the founding affidavit.

ADV OLDWADGE: Chair... Mr Chair, it follows. There is this theme that runs throughout the founding affidavit, with respect.

CHAIRPERSON: Ja, h'm.

ADV OLDWADGE: And it deals with these issues. And if you just have regard to the very next paragraph that
10 follows.

CHAIRPERSON: Ja, h'm?

ADV OLDWADGE: The one which we just dealt with. It is again this perception created of this undue influence because you will recall the testimony of Todd...[intervenes]

CHAIRPERSON: Ja, let us start in the founding affidavit. Tell me which paragraph you ...[intervenes]

ADV OLDWADGE: Paragraph 24. It says ...[intervenes]

CHAIRPERSON: 24 what? What is the allegation it says Mr Todd made against him?

20 **ADV OLDWADGE:** To the... I quote:

“...to the extent that Todd’s evidence creates the perception that I have somehow interfered with the influence that was drawn of the action against **Abelose(?) [00:09:16]**.

I deny any such alleged interference and/or

influence in the process...”

CHAIRPERSON: Well, he is not sure ...[intervenes]

ADV OLDWADGE: And ...[intervenes]

CHAIRPERSON: He is not sure if Mr Todd makes that allegation but he says in case he does he denies it. On the face of it, it seems to me that could be dealt with when Mr Gama gives evidence and says, well, if that is what Mr Todd intended to say, and I am not sure he intended to say that, that is not the case.

10 **ADV OLDWADGE:** Mr Chair, with the greatest of respect to the Commission.

CHAIRPERSON: H’m?

ADV OLDWADGE: The purpose of cross-examination, again, is ...[intervenes]

CHAIRPERSON: You must remember that the... In terms of the rules, you know, when I look at an application for leave to cross-examine, I must think of the work of the Commission and the interest of the Commission.

20 It may be that for a particular individual it might be very important to cross-examine a certain witness but it may well be that it will not advance much the work of the Commission in terms of its Terms of Reference.

It is some point that the individual affected might think it is quite important for him but in the end I must look at the interest of the work of the Commission and that

interest right now also takes into account the limited time that we have.

So if I grant leave, I must be satisfied that with the limited time we have, it is really appropriate, important.

ADV OLDWADGE: Mr Chair, I fully appreciate that.

CHAIRPERSON: H'm.

ADV OLDWADGE: But I simply want to make this one response. It serves – it will not serve this Commission's interests to have two competing versions in circumstances
10 that neither of them or at least not that of Mr Todd's has been tested under cross but I get – I fully appreciate the sentiment expressed and I respect that.

Mr Chair, so we go – we go further, paragraph 24 and again the context within which there is reference to it and there are two separate memorandums here, but again and just so that we do not waste time, it is said in the context of my client having had a hand in this so-called undue influence.

I want to cross-examine Mr Todd. I want to ask
20 him where is your evidence for this because you did not disclose it then. He says things, like, my client took certain steps. What were they?

You cannot give evidence-in-chief, as I term it, without making a full disclosure. With respect, we ought to be able to test that version.

CHAIRPERSON: Okay. What I will do now. I mean, obviously, this is quite important for your client. I propose to limit the time. Is it fine if I give you ten minutes and I am not going to interrupt you much? Ten minutes to make all your submissions you want to make. Is that time fine?

ADV OLDWADGE: I am a long distance runner with a long breath but I am going to do my level best Mr Chair.

CHAIRPERSON: Okay alright. Let us try and do that. I just see that it has been over, I think, 40-minutes if I am
10 not mistaken.

ADV OLDWADGE: As you please.

CHAIRPERSON: Ja.

ADV OLDWADGE: Thank you.

CHAIRPERSON: Okay.

ADV OLDWADGE: Mr Chair ...[intervenes]

CHAIRPERSON: But I have asked you questions. So that has taken some time as well.

ADV OLDWADGE: Yes. Mr Chair, I am going to commence then by doing that, by having regard to
20 paragraph 25. It is an aspect that deals with condonation. You will recall the testimony of Mr Todd, how he told you that he could not see, as though he was an expert witness, he could not see how condonation influenced the process.

I say in paragraph 25:

“You simply needed to have reference to

Nkonki and KPMG's report to understand the importance of..."

And here is the significance. That report served before the board. That before – and because I am under time constraint, I am not going to read the report. That report says, for instance, we have investigated, we have found that in the past the condonation process was employed. Mr Todd says it was never employed with reference to procurement processes.

10 Absolute nonsense. The report makes it clear that it was employed. We want to cross-examine Mr Todd. We want to understand on what basis and on what motivated him to make that submission that it did not matter when the Nkonki report which was its specific purpose to investigate this aspect. \

And this is crucial. Mr Gama was not given the opportunity by Ms Ramos, the Group Chief Executive Officer, if my memory serves me correctly, at the time to apply for condonation. It ...[intervenes]

20 **CHAIRPERSON:** He could have initiated that. He could have – he was the CEO. He could have requested it.

ADV OLDWADGE: My understanding of the process and the protocols works, you must be given leave to apply for condonation. It is common cause that he was not give leave to apply.

And what is particularly of significance Mr Chair, that aspect, it would appear, is something that persuaded not only the chairperson of the board in the form of Mr Mkwanaazi but also the board as a whole with one or two disciplines, to then find that the interest of justice, the probabilities – and we have regard to the Morton Rose report that says: Wow, you know what, you did not allow this condonation process. It proves problematic.

And it was on that basis that the referral to the
10 arbitration or rather the bargaining council, as it were, was abandoned and the settlement discussions commenced which resulted in a settlement agreement being concluded between my client and Transnet as a whole. That is not what you were told. There is regard for that.

If only he had read the report properly and had placed that before Mr Chair, it is a very different world and landscape. I want to cross-examine him. I want to ask him why is it that you put this set of facts and you are selective in what you are doing?

20 I think it would be best served for the Commission's work to understand why that happened instead of simply *mero moto* accepting that the evidence of Mr Todd is correct because clearly it is not, with respect. I hasten to move on. Mr Chair, time constraint ...[intervenes]

CHAIRPERSON: Yes.

ADV OLDWADGE: ...do not permit me to dwell too much on that aspect. We have paragraph 26 of my founding affidavit. It refers to the report by the Deneys Reitz Attorneys and it is very important that I simply tell you what this report says Mr Chair.

That there is a probability, not possibility as Mr Todd contended for, but probability and we know in law that the one has more prospects of happening than the other.

10 The probability that the bargaining council or the court considering the appropriateness of the sanction of dismissal of Mr Gama may reach the conclusion that dismissal was not appropriate having regard to the challenging sanction advanced by him. That instance, the court may either award compensation to Gama or find a lesser sanction ought to have been imposed and therefore... reinstate him.

It is not a thought there is no reason, no motivation, no rationale for his reinstatement. To instruct a
20 firm, a well-respected firm of attorneys, one of the biggest in the country, to give you an opinion and that opinion leads to this conclusion. Just like Mr Todd is a partner of one of the biggest law firms in this country, so was Denys Reitz prior to it being incorporated into Norton Rose.

They sought the opinion, they received it.

Whether we sit today, and as Mr Todd did, he is not an expert witness and this is the crux of my submission. He comes before you, with respect Mr Chair, and he wants to sit and interpret. He was not a party to the negotiations. He was not a party to the advice sought and obtained.

You do not come and give this sensationalised version: Well, my interpretation is not that. Let me take you to the next example. You have the evidence of Mr Molefe in the form of a letter sent by him.

10 You have Mr Mkwana. You have Mr Makona who says this. Well, this interpretation that the aspect concerning the legal fees is not something that was entertained. That is not correct. That is Mr Todd's version.

His interpretation of something to which he was never a party. Our version is that it did include the costs. Just by the way, something which ...[intervenes]

CHAIRPERSON: But that is just a matter of interpretation of the settlement agreement. Is it not?

20 **ADV OLDWADGE:** That is his interpretation Chair.

CHAIRPERSON: No, no. But the settlement agreement settled the dispute on certain terms and those terms are in the settlement agreement, is it not?

ADV OLDWADGE: I, by no means – I am not ...[intervenes]

CHAIRPERSON: There might be different interpretations of what the agreement means.

ADV OLDWADGE: Yes, yes.

CHAIRPERSON: That the ...[intervenes]

ADV OLDWADGE: This is our submission. I am not a commercial lawyer but I can say this. The little knowledge I have of commercial work is there is a thing that when you interpret the conduct of parties, which is contract by conduct, the conduct we have, Eskom paid. I beg your
10 pardon. I am also seized there with the... Transnet paid.

Mr Chair, but this is important for your purposes. That one million and sixteen thousand rands payment which Todd tells you. It is bizarre. There is no cause. Let me tell you Mr Chair. It is not true.

That payment, following the high court order where my client lost his application in his bid to stop the proceedings, that was a payment which my client made, by the way.

And when the settlement agreement was
20 concluded that money was paid back to him but I am going to continue with the affidavit.

CHAIRPERSON: Yes. Well, before you sit down. There is still about three minutes. One of the things I want to raise with you is this.

That it may well be that I should wait and not

make a decision on the cross-examination application and let Mr Gama take the witness stand, give his side of the story so that – and let him be questioned by the evidence leader, as Mr Todd has been questioned, and see whether at the end of that how much is still there that really requires to be resolved by cross-examination because if at the end of his evidence it becomes quite clear that really there is not much in terms of dispute between them, there might be no need.

10 You might not be pursue the application yourself. So there is that is also in mind to say: Well, Mr Todd has subjected himself to questioning by the evidence leaders. Maybe if Mr Gama did the same. And then I have both sides. The picture as to where the disputes lie might be clearer. So I would like you to say something about that as well.

ADV OLDWADGE: Mr Chair, I think, and I say this with respect, that is a very wise proposal by Mr Chair as to the future conduct of in particular this application is
20 concerned.

CHAIRPERSON: H'm.

ADV OLDWADGE: But Mr Chair will appreciate, no doubt, that I am creature of instruction and ...[intervenes]

CHAIRPERSON: [Indistinct] Ja.

ADV OLDWADGE: ...if you permit me in circumstances

where I can say to this Commission ...[intervenes]

CHAIRPERSON: Yes.

ADV OLDWADGE: ...my client feels very strongly about this application.

CHAIRPERSON: Yes, yes.

ADV OLDWADGE: If I am permitted a very short adjournment ...[intervenes]

CHAIRPERSON: Yes.

ADV OLDWADGE: A few minutes ...[intervenes]

10 **CHAIRPERSON:** Yes.

ADV OLDWADGE: ...to canvass this issue.

CHAIRPERSON: Yes.

ADV OLDWADGE: It would be naughty of me not to do so.

CHAIRPERSON: Yes, yes.

ADV OLDWADGE: And return to a concession in that regard.

CHAIRPERSON: Yes.

ADV OLDWADGE: If you permit me that opportunity.

CHAIRPERSON: Yes, yes.

20 **ADV OLDWADGE:** It may be a wise approach to the matter.

CHAIRPERSON: Yes, yes.

ADV OLDWADGE: Might we take that short ...[intervenes]

CHAIRPERSON: Adjournment.

ADV OLDWADGE: ...adjournment so that I can consider it

because I am not anywhere near conclusion.

CHAIRPERSON: Yes.

ADV OLDWADGE: But I do understand that there are time constraints.

CHAIRPERSON: Yes, yes. No, no. That is fine. Mr Myburgh, is that fine with you.

ADV MYBURGH SC: [No audible reply] [Microphone not switched on.]

CHAIRPERSON: Okay let us take a five minutes' adjournment. Just a five minutes' adjournment.

ADV OLDWADGE: Thank you Mr Chair.

INQUIRY ADJOURNS FOR A SHORT BREAK

INQUIRY RESUMES AFTER SHORT BREAK

CHAIRPERSON: Yes, I... We are back.

ADV OLDWADGE: Mr Chair, we have taken instructions.

CHAIRPERSON: H'm?

ADV OLDWADGE: We concur with the view expressed by Mr Chair.

CHAIRPERSON: H'm?

20 **ADV OLDWADGE:** And then we propose that there not be an ultimate termination of this application until such time as you have suggested.

CHAIRPERSON: Yes, yes. No, I think that is good. So we would defer the application to after he has given evidence and then we can take it from there.

ADV OLDWADGE: There is, and I do not want to appear to be opportunistic.

CHAIRPERSON: H'm?

ADV OLDWADGE: There is potentially an application of sorts concerning the evidence of Mr Gama, particularly, as it pertains to the Fundudzi report.

CHAIRPERSON: H'm?

ADV OLDWADGE: But it is something that I have discussed with Mr Myburgh.

10 **CHAIRPERSON:** H'm?

ADV OLDWADGE: And the suggestion very early this morning, as discussed between, was that we approach you in chambers ...[intervenes]

CHAIRPERSON: Yes.

ADV OLDWADGE: ...for that purpose.

CHAIRPERSON: Yes.

ADV OLDWADGE: And I am simply requesting that we be granted that opportunity. We will be very brief.

CHAIRPERSON: You say that is an application for?

20 **ADV OLDWADGE:** It depends in part. The relief is two-fold. One that Mr Gama not be interrogated concerning the Fundudzi report.

CHAIRPERSON: Ja.

ADV OLDWADGE: But that he continues with his testimony.

CHAIRPERSON: Ja.

ADV OLDWADGE: And that at a later stage he will be given an opportunity to deal with the Fundudzi report and he may for that purpose be recalled upon receipt of a further supplementary affidavit from him. I make this submission before your Mr Chair in the context of this application will also be held over until that final termination.

CHAIRPERSON: Yes, yes.

10 **ADV OLDWADGE:** As it were.

CHAIRPERSON: No, okay that is fine. I think what we will do is that we will defer this application. That is one. Two. I would think that we then proceed – continue with Mr Molefe's evidence but at some stage you and Mr Myburgh could approach me about that other issue relating to the Fundudzi report. At some stage. Maybe later today or whatever time. That is what I think or did you want to talk to me now before we continue?

ADV OLDWADGE: There is a measure of urgency to what
20 I want to discuss ...[intervenes]

CHAIRPERSON: You think so?

ADV OLDWADGE: ...in the sense that if there is no compromise ...[intervenes]

CHAIRPERSON: Ja.

ADV OLDWADGE: ...we are going to serve our application

and I do not want to do that because ...[intervenes]

CHAIRPERSON: Yes.

ADV OLDWADGE: ...it is going to lead a whole new set of consequences.

CHAIRPERSON: Yes.

ADV OLDWADGE: So if we could.

CHAIRPERSON: Ja.

ADV OLDWADGE: If Mr Chair will indulge us for a few minutes now.

10 **CHAIRPERSON:** Yes.

ADV OLDWADGE: We would really, respectfully, appreciate that approach.

CHAIRPERSON: Yes. Okay. Let us do that then. Let me adjourn and then the two of you can see me and then we will take it from there.

ADV OLDWADGE: I am indebted.

CHAIRPERSON: Otherwise, this application is then deferred to – and will be dealt with at a later stage after Mr Gama has given his evidence.

20 **ADV OLDWADGE:** As you please Mr Chair.

CHAIRPERSON: Ja.

ADV OLDWADGE: Thank you.

CHAIRPERSON: Okay alright. Okay we will adjourn for seven minutes. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Are we ready to continue with Mr Molefe's evidence?

ADV MYBURGH: Yes, thank you, DCJ.

CHAIRPERSON: Yes, okay, let us continue. The affirmation you took yesterday, Mr Molefe, will continue to apply today.

MR MOLEFE: Yes, Chairperson.

CHAIRPERSON: Thank you.

10 **ADV MYBURGH:** Thank you, Chairperson. Good morning, Mr Molefe.

MR MOLEFE: Good morning.

ADV MYBURGH: I just want to go back a little before I go forward. Yesterday we dealt with the session by McKinsey to Regiments, do you remember that?

MR MOLEFE: Yes.

ADV MYBURGH: Was on the 16 April that Mr Sagar of McKinsey advised Mr Singh that McKinsey with effect from the 5 February ceded its rights and obligations to
20 Regiments. I just want to – I think you might have raised the point with me as to whether there was anything wrong with that cession from McKinsey to Regiments. I would just want to refer you to ...[intervenes]

CHAIRPERSON: I am sorry, Mr Myburgh, just some housekeeping. I do not propose to take another tea break,

to take tea break, so I propose that we proceed until one o'clock.

ADV MYBURGH: Thank you, Chairperson.

CHAIRPERSON: If that is fine with everybody, but if an urgent need does arise people will let me know.

ADV MYBURGH: Thank you, Chairperson.

CHAIRPERSON: Okay.

ADV MYBURGH: So I just want to raise one thing with you or show – point out one thing to you, could you please
10 go to bundle 6 to the MNS report. So this is then volume 27.

CHAIRPERSON: We are at bundle?

ADV MYBURGH: Bundle 6.

CHAIRPERSON: Bundle 6, okay.

ADV MYBURGH: EXHIBIT 27.

MR MOLEFE: Yes, which page?

ADV MYBURGH: Page 383.

MR MOLEFE: 382.

ADV MYBURGH: I just want to point out one thing to you,
20 if I could ask you to look at paragraph 2.4.20. In dealing with that session MNS say that:

“This session was invalid on the basis that at the time when McKinsey purported to cede the contract McKinsey’s rights in respect of the transaction advisory services had lapsed.”

And that is because the LOI, the letter of intent provided for a 90 day period and it lapsed on the 30 November. Do you want to just comment on that single finding made by MNS?

MR MOLEFE: I also note that the cession was not approved by Transnet.

ADV MYBURGH: Ja.

MR MOLEFE: And that the cession was only approved the following year in April. Sorry, in May. The LOI was
10 ...[intervenes]

ADV MYBURGH: Mr Molefe, I notice that you are reading from something on your phone.

MR MOLEFE: Yes.

ADV MYBURGH: I do not necessarily have an objection to that. Protocol would be that you would then have to share with us anything that you reading from that is in writing.

MR MOLEFE: It is my notes that I made last night.

ADV MYBURGH: As I say, I have no objection to that but the protocol is they should be shared with us.

20 **MR MOLEFE:** I have not made copies of these notes but it is just handwritten notes on the form.

CHAIRPERSON: Have you got a copy of the same notes?

MR MOLEFE: Can I use my notebook?

CHAIRPERSON: To do what?

MR MOLEFE: To read from.

CHAIRPERSON: Oh, you have made notes on the notebook.

MR MOLEFE: On the notebook or on the phone, it is the same notes.

CHAIRPERSON: Yes, you say the notes are both on the phone and in the notebook.

MR MOLEFE: Yes.

CHAIRPERSON: Same notes?

MR MOLEFE: Yes.

10 **CHAIRPERSON:** Yes, okay, then Mr Myburgh is simply saying then if they could have copies of the notes that you are going to use.

MR MOLEFE: The copies of my – of the notes that I made on my notebook as I was ...[intervenes]

CHAIRPERSON: Ja, as you going to rely on them in giving evidence.

MR MOLEFE: But I am just going to go ...[intervenes]

CHAIRPERSON: If you are not going to rely on them obviously you do not have to share them.

20 **MR MOLEFE:** No, but Chair, these notes are to remind me exactly what is written in this document and where it is.

CHAIRPERSON: Well, Mr Myburgh, do you want to...

ADV MYBURGH: I would not like for the questioning to be delayed perhaps it is something that we can try and deal with at lunchtime.

CHAIRPERSON: At lunchtime.

ADV MYBURGH: And if you could perhaps on that basis permit Mr ...[intervenes]

MR MOLEFE: But, Chair, if I see a section here that I want to refer to and then I wrote on my notebook that paragraph 2.4.2.1, must I then share that...

CHAIRPERSON: Well, it is innocuous like that, therefore you would not have any problem even if you were to share it but Mr Myburgh has requested me to allow you to look at
10 them and then around lunchtime – at lunchtime there can be a discussion, there can be a discussion about the use of the notes.

MR MOLEFE: Okay, I will not use the notes.

ADV MYBURGH: Alright. Chair, just a simple point, I mean, I am just pointing out to you the finding, you can deal with it if you want or not. They say that the cession was invalid because the LOI had expired. It is really as simple as that.

MR MOLEFE: Yes but the LOI had been renewed several
20 times.

ADV MYBURGH: Alright.

MR MOLEFE: And what I was just about to check now, because I did make a note about it, was in the three times, it was renewed three times, but I think it was also renewed – the MSA was then entered into at some point.

ADV MYBURGH: Yes, yes.

MR MOLEFE: So I just wanted to check exactly when and how ...[intervenes]

ADV MYBURGH: Mr Molefe, just so that I capture your evidence, you say you dispute that point because you say the LOI had been extended.

MR MOLEFE: No, I wanted to verify it for myself, Chair, but now if I cannot use my notes – alright, I do not dispute it.

10 **ADV MYBURGH:** Alright, now you do not, fine. So let us then go please – we added the page, remember when I read to you about Regiments Capital's replacement of Nedbank. I read you a letter yesterday. Now that has been inserted now into bundle 5, EXHIBIT 22, your exhibit, could you please go there?

MR MOLEFE: Regiments' letter?

ADV MYBURGH: Page 405.96.

MR MOLEFE: In bundle 5?

ADV MYBURGH: Yes. So that would be after – right at
20 the end of the file, after the CIPRO reports.

CHAIRPERSON: It will be 405 point?

ADV MYBURGH: 96, Chair.

CHAIRPERSON: 96.

MR MOLEFE: Yes.

ADV MYBURGH: So this is the letter that I read

yesterday, you see it is from Mr Singh dated the 19 November.

MR MOLEFE: Yes.

ADV MYBURGH: And ultimately – we have been through this before, it is really just a matter of placing the letter properly on the record.

MR MOLEFE: Yes.

ADV MYBURGH: The letter ends by Mr Singh saying:

10 “This letter serves to confirm Transnet’s agreement
to McKinsey’s request for Regiments Capital to
provide the required services in place of Nedbank.”

Do you see that?

MR MOLEFE: Yes. Nedbank was conflicted because they wanted to do the funding as well and McKinsey confirmed that Nedbank was conflicted.

ADV MYBURGH: Yes.

MR MOLEFE: And my understanding is that Regiments had a choice as to who should replace Nedbank in that consortium and they chose Regiments of their own volition.

20 **ADV MYBURGH:** McKinsey chose Regiments.

MR MOLEFE: Yes.

ADV MYBURGH: Are you aware of the evidence in relation to Mr Sagar at McKinsey?

MR MOLEFE: Which part of the evidence?

ADV MYBURGH: That there seems, as we went through

yesterday, there is a possibility that he – you can go back to the report, was dealing with Mr Essa.

MR MOLEFE: With?

ADV MYBURGH: Mr Essa.

MR MOLEFE: No, I am not aware of that.

ADV MYBURGH: But you confirmed that Regiments Capital then replaces Nedbank as per this letter.

MR MOLEFE: I confirmed that McKinsey then replaced Nedbank with Regiments.

10 **ADV MYBURGH:** Alright. Now ...[intervenes]

MR MOLEFE: And that is MNS.

ADV MYBURGH: Yes, we are going to come back to that. Now I also yesterday gave you the opportunity to reflect on two memoranda overnight. We had not dealt with the one but we had dealt with the first one.

MR MOLEFE: Yes.

ADV MYBURGH: Can I ask you please to go back to page 405.1?

MR MOLEFE: Of which bundle?

20 **ADV MYBURGH:** Of bundle 5. 405.1.

MR MOLEFE: Bundle 5?

CHAIRPERSON: Yes, bundle 5, page 405.1.

MR MOLEFE: Yes.

ADV MYBURGH: So, Mr Molefe, just to orientate you, this was the memorandum that you approved, where you

approved of the replacement of Letsema. Is there anything that you want to, now having had the opportunity of studying it, is there anything that you want to say more than what you dealt with yesterday?

MR MOLEFE: You say this memorandum approves the appointment of Letsema?

ADV MYBURGH: The memorandum you see at paragraph 1.1:

10 “The Chief Executive to note that McKinsey will be advised to partner with another firm with equal or better credentials than Letsema for the procurement elements due to potential conflict.”

MR MOLEFE: Yes, Letsema ...[intervenes]

ADV MYBURGH: Is there anything you want to add?

MR MOLEFE: Letsema had a conflict.

ADV MYBURGH: Yes, I know that.

20 **MR MOLEFE:** Because Barloworld, which was advising them, was also building engines for Caterpillar which engines were used by EMD and EMD was a bidder, so Letsema had a conflict. What then happened is that McKinsey was informed of the conflict and then asked to appoint somebody else instead of Letsema.

ADV MYBURGH: So who picked up the conflict? Not McKinsey.

MR MOLEFE: I think it was Transnet.

ADV MYBURGH: Yes, who.

MR MOLEFE: But the conflict was real, I am not sure who picked it up.

ADV MYBURGH: Was it you?

MR MOLEFE: No, I say I am not sure who picked it up.

ADV MYBURGH: Yes, well I am asking you, was it you?

MR MOLEFE: No, it was not me.

ADV MYBURGH: So you do not have firsthand knowledge of this?

10 **MR MOLEFE:** Of the conflict.

ADV MYBURGH: Well, you did not pick it up but you say it was brought to your attention, presumably.

MR MOLEFE: It was brought to Transnet's attention. This conflict must have been picked in the process of receiving the bids or, I do not know, but they knew that EMD, EMD's engines were going to be – sorry, EMD's engines were Barloworld engines from Caterpillar and so EMD was bidding or intended to bid for the 1064 and so there was potential conflict and this was raised and then after it was
20 raised – unfortunately, I do not have the piece of paper where it was raised.

ADV MYBURGH: You see, Mr Molefe, you said something quite important, you said this was picked up during the bids and then I think you sought to correct yourself because of course it was not picked up because what we

know, and we went through this yesterday, we know that on the 27 July the contract was awarded to the McKinsey Consortium including Letsema. Now what we see on the 22 of August, about a month later, is a decision in terms of which Letsema should be removed. So – sorry, if I am just going to press you, I am going to ask you only one more question. You do not know who brought this to your attention and you do not know why it was not picked up during the bids, is that correct?

10 **MR MOLEFE:** No, no, no, not during these bids.

ADV MYBURGH: Yes.

MR MOLEFE: Not during the appointment of the transaction adviser but after the appointment of the transaction adviser.

ADV MYBURGH: Yes, that I know.

MR MOLEFE: I cannot recall how but yesterday, last night, I did jog my memory.

ADV MYBURGH: Yes.

MR MOLEFE: And remembered that Barloworld Engines,
20 Caterpillar Engines, are used by EMD, which is an American company and EMD was going to – had expressed an interest to bid for the 1064 and, as I recall, Letsema was in partnership with Barloworld and so it was pointed out actually this is a conflict, Letsema cannot advise on the award of the 1064 when the engines for one of the

bidders was coming from Barloworld.

ADV MYBURGH: So just that we can move on
...[intervenes]

MR MOLEFE: So, unfortunately, because I am not at Transnet, I do not have access to the documents but as I was sitting and remembering the situation, this is what came to my mind and it actually just came back very clearly.

ADV MYBURGH: So I want to just confirm two facts
10 before I move on, you confirm that it was something picked up by Transnet.

MR MOLEFE: Yes.

ADV MYBURGH: Alright and secondly you do not know why it was not picked up during the bid adjudication process.

MR MOLEFE: I do not why it was not picked up during the bid adjudication process.

ADV MYBURGH: And thirdly, you do not know who brought this to your attention.

20 **MR MOLEFE:** I cannot remember who brought this to my attention.

ADV MYBURGH: Right.

MR MOLEFE: But, Mr Myburgh, if you are interested you can certainly ask Transnet to provide information on this. I am sure that there is information at Transnet.

ADV MYBURGH: We can ask Mr Singh, I suppose.

MR MOLEFE: You can ask Mr Singh.

ADV MYBURGH: Can we then get to ...[intervenes]

MR MOLEFE: But it would easier to get the documents from Transnet.

ADV MYBURGH: Can you then go to the next document and that you find at 105.7? I just started dealing with this yesterday when you indicated that you needed more time to reflect on it and we then adjourned early to enable you to
10 look at is. Now I want to go through this ...[intervenes]

MR MOLEFE: 105.7 in the same bundle?

ADV MYBURGH: Yes. What you did confirm yesterday ...[intervenes]

CHAIRPERSON: I am sorry, you said 105, is that right? Oh, 405.

ADV MYBURGH: 405, I beg your pardon, DCJ.

CHAIRPERSON: Okay, point?

ADV MYBURGH: Point 7 So if you could just – if I could take you please just to get you to confirm again what you
20 dealt with yesterday. If you go to point 15, 405.15..

MR MOLEFE: Yes.

ADV MYBURGH: So you noted that Mr Singh had sent this to you on the 16 April 2014.

MR MOLEFE: Yes, yes.

ADV MYBURGH: And we confirmed that that was the

same date that Mr Sagar had advised Mr Singh of the cession to Regiments, correct?

MR MOLEFE: [inaudible – speaking simultaneously]

CHAIRPERSON: Did you say 405.16?

ADV MYBURGH: 405.15.

CHAIRPERSON: Oh, okay.

MR MOLEFE: Yes.

ADV MYBURGH: And yesterday you confirmed and we went through the documents, Mr Molefe, that that is the
10 same date that Mr Sagar of McKinsey advised Mr Singh that McKinsey had ceded its rights and obligations to Regiments.

MR MOLEFE: Yes, with effect from the 5 February.

ADV MYBURGH: Yes but it is exactly the same date.

MR MOLEFE: Yes.

ADV MYBURGH: So let us then go through this document, if we may, in more detail and let me not just go to the conclusion. Now just to locate and perhaps remind the Chairperson the net effect of this because ultimately there
20 was approval for payment to Regiments I think of an additional R78 million in fees, correct?

MR MOLEFE: Correct.

ADV MYBURGH: Let us go through how that came about and let us have a look at this ...[intervenes]

MR MOLEFE: Have you just asked me a question?

ADV MYBURGH: Yes, we are going to deal with the memo and we will get there.

MR MOLEFE: No, I was just going to say the correct terminology would be that this document is a model for the remuneration of the transaction advisers.

ADV MYBURGH: Yes. Yes, it is a changed model.

MR MOLEFE: Yes, this is a new model.

ADV MYBURGH: It was proposed on the same day that McKinsey fell out with all its rights and obligations ceded
10 to Regiments on the same day, correct?

MR MOLEFE: Yes.

ADV MYBURGH: Alright. So let us then go to page 405.7. Now let us go through this thoroughly because it – I think you were right yesterday when you indicated that it is certainly deserving of this because of course we know that you approved of this. Now let us have a look at paragraph
1.

“The purpose of this memorandum is to request the Group Chief Executive to:

20 1. Note the deliverables executed by the transaction adviser on the locomotive transaction compared to the original scope per letter of intent.”

Now who is the transaction adviser there that is being referred to?

CHAIRPERSON: I am sorry, Mr Myburgh?

ADV MYBURGH: 405.7.

CHAIRPERSON: You have lost me or I have lost you.
405?

ADV MYBURGH: Bundle 5. Point 7, DCJ.

CHAIRPERSON: Point 7 or 17?

ADV MYBURGH: 7.

CHAIRPERSON: 7, oh.

ADV MYBURGH: It is a memorandum to Mr Molefe from
Mr Singh.

10 **CHAIRPERSON:** Yes, I have got it.

MR MOLEFE: Chairperson ...[intervenes]

ADV MYBURGH: Just hang on a moment? Do you have
it, DCJ?

CHAIRPERSON: Yes, I have got it, thank you.

ADV MYBURGH: Yes, Mr Molefe? Who is the transaction
adviser referred to here?

MR MOLEFE: I did make notes and I would request that –
and actually they are typed out properly and I would
request that when we get an opportunity to print them that
20 we share them, but that I be allowed to refer to them.

CHAIRPERSON: Yes. Mr Myburgh?

ADV MYBURGH: I just want to make the point that this is
something that you were asked to deal with in your
affidavit.

MR MOLEFE: I did. No, not in my affidavit, yesterday.

Yesterday when I got these documents.

ADV MASUKU SC: Chairperson?

CHAIRPERSON: Yes?

ADV MASUKU SC: As I understand it, Mr Molefe does not have any problem with the hearing – the notes that he had last night for the purpose of this hearing.

CHAIRPERSON: Ja.

ADV MASUKU SC: I do not know why should it be difficult for this hearing to accord him the opportunity to refer to
10 the notes because he is prepared to share these notes with ...[intervenes]

CHAIRPERSON: Well, if he is prepared to share, is there any problem, Mr Myburgh?

ADV MYBURGH: No, of course not, because that was the whole point that I made out the outset.

CHAIRPERSON: Yes.

ADV MYBURGH: I understood that Mr Molefe had decided he is not going to refer to his notes.

CHAIRPERSON: Ja, initially, yes.

20 **ADV MYBURGH:** If he now wants to refer to them and they have been typed out then perhaps it is best that we just get a copy.

CHAIRPERSON: Yes.

ADV MYBURGH: Especially if it deals with this.

CHAIRPERSON: Ja.

ADV MYBURGH: I am going to take Mr Molefe, though, and I am going to point out to him the 10.6's that were mentioned to him where he in fact, to the best of my recollection was asked to deal with this but Chair, we are in hands, if you wish ...[intervenes]

CHAIRPERSON: No, no, no, that is fine. You do not have copies, you just have notes but you tender them or ...[intervenes]

MR MOLEFE: I have the notes and soft copy, Chair.

10 **CHAIRPERSON:** Ja.

MR MOLEFE: My understanding is that I am here to assist the Commission.

CHAIRPERSON: Ja, ja, ja.

MR MOLEFE: And give evidence to the best of my ability.

CHAIRPERSON: Ja, ja.

MR MOLEFE: And that is what I am trying to do.

CHAIRPERSON: Ja.

MR MOLEFE: And I am saying that to do that I need to refer to what I wrote last night.

20 **CHAIRPERSON:** No, no, no, I think it is resolved now.

MR MOLEFE: After the discussion that we had last time.

CHAIRPERSON: Yes, I think it is resolved.

MR MOLEFE: I do not understand why it then becomes necessary to refer me back to the notices that were given me some time ago because ...[intervenes]

CHAIRPERSON: Well, maybe it will be why – at the time that Mr Myburgh will refer you to those notices, why. But I think the issue of you using notes is now resolved. As I understand it, there are no copies readily made available but you are ready if somebody from the legal team, technical team, wishes to make copies then those can be made.

ADV MYBURGH: Certainly.

CHAIRPERSON: Okay, alright.

10 **ADV MYBURGH:** So, Mr Molefe, as I say, let us sort that out over lunchtime, maybe the notes can be mailed to someone at the Commission and we will then print them out. Do not have any difficulty with you referring to your notes if you wish to on this. Alright? Now but before you tell us what is in your notes, I am going to take you through this memorandum ...[intervenes]

MR MOLEFE: But they are not – are you going to allow me to answer the question that ...[intervenes]

ADV MYBURGH: I want you to please answer my
20 question. Paragraph 1.1, when it refers to ...[intervenes]

MR MOLEFE: But there was a question before that.

ADV MYBURGH: The question is, who is the transaction adviser referred to in paragraph 1.1?

MR MOLEFE: Yes.

ADV MYBURGH: Who is it?

MR MOLEFE: That is why I wanted to refer to my notes.

ADV MYBURGH: Right.

MR MOLEFE: If you will allow me, Chair.

ADV MYBURGH: Are you able to tell us before you go into a long explanation who the transaction is or not?

MR MOLEFE: The MSA was not concluded on time.

ADV MYBURGH: Mr Molefe, I am happy to allow you to explain yourself but are you able to tell us who the ...[intervenes]

10 **MR MOLEFE:** Chair, I am really trying to help the Commission with information.

CHAIRPERSON: Ja.

MR MOLEFE: That I have.

CHAIRPERSON: Yes.

MR MOLEFE: And if Mr Myburgh is going to interject and pin me into answers that are not helpful, I do not think it is good for the Commission, I do not think the objective of the Commission of arriving at the truth will be achieved.

CHAIRPERSON: No, I [inaudible – speaking
20 simultaneously]

MR MOLEFE: I think Mr Myburgh must exercise some patience and listen.

CHAIRPERSON: Yes, I do not think there really is a problem. What he has put to you is a question that says do you know who the transaction advisers are that are

referred to in – is paragraph 1.1, Mr Myburgh?

ADV MYBURGH: Yes and ...[intervenes]

CHAIRPERSON: Or paragraph 1?

ADV MYBURGH: 1.1.

CHAIRPERSON: Ja. Now it helps to start by saying yes, I know. If you want to elaborate we can take it from there, but yes I know or no I do not [inaudible – speaking simultaneously]

MR MOLEFE: But give 15 seconds to say what I want to
10 say.

CHAIRPERSON: Ja, ja, what ...[intervenes]

MR MOLEFE: Which is that on the 21 February the MSA was concluded with McKinsey, on the 21 February. Now the reason this is confusing is because later on on the 16 April McKinsey then says that no, we are ceding everything to ...[intervenes]

CHAIRPERSON: Regiments.

MR MOLEFE: Regiments. And yet from the 5 February, and yet McKinsey had signed MSA on the 21st, on a date
20 after it had exited the transaction exposed to a date that is preceding. So as I was reading this, I myself got confused and wondered why the legal people never picked this up. So the answer to Mr Myburgh's question, I do not know, it is not a straightforward answer because McKinsey signed the MSA which made them the transaction adviser and then

later on they ceded it to – they ceded the ...[intervenes]

CHAIRPERSON: To Regiments.

MR MOLEFE: The agreement to Regiments. On that date that is before they signed so actually it is not a straightforward answer.

CHAIRPERSON: So you wanted to say ...[intervenes]

MR MOLEFE: So even as I am sitting here, I am confused, I do not ...[intervenes]

CHAIRPERSON: Ja, you wanted to say it is confusing, I
10 do not know what the answer is.

MR MOLEFE: I do not know what the answer is.

CHAIRPERSON: Ja. Okay, alright.

MR MOLEFE: Because it is confusing.

CHAIRPERSON: Ja.

MR MOLEFE: And even if I was going through this I was wondering myself but perhaps the legal people who were drafting these agreements and who were involved from a legal point of view on these matters should explain what really happened here because I was not even aware of this
20 until I went through it last night and get proper timelines about who did what where. But what then happened is, I was – the MSA was signed by McKinsey on the 21st.

CHAIRPERSON: Ja, before the actual session.

MR MOLEFE: Before the actual session ...[intervenes]

CHAIRPERSON: But the session referred to

...[intervenes]

MR MOLEFE: The cession was before the date.

CHAIRPERSON: Ja.

MR MOLEFE: Ja.

CHAIRPERSON: The effective date.

MR MOLEFE: The effective date was before the date that they actually signed. So I do not know actually that even on this day, if we had a transaction adviser because then on the 21st, when they signed, in terms of their cession, 10 they were no longer the transaction adviser, so I do not know who the transaction – it is a question that would require the legal people that were involved to explain.

ADV MYBURGH: Yes, so the short answer is you do not know.

MR MOLEFE: I do not know.

ADV MYBURGH: When you read this – because, of course you approved this, a hugely important ...[intervenes]

MR MOLEFE: Yes, after ...[intervenes]

20 **ADV MYBURGH**: Sorry, do you mind if I could just finish?

MR MOLEFE: Yes.

ADV MYBURGH: When you read this document before approving it, who did you think the transaction adviser was there?

MR MOLEFE: When I read ...[intervenes]

ADV MYBURGH SC: I am talking about at the time Mr Molefe?

MR MOLEFE: At the time yes, yes, Mr Myburgh I was talking about at the time, I do not think it was necessary to remind about that it was at the time. That is exactly what I was trying to say, please do not put words into my mouth Mr Myburgh.

ADV MYBURGH SC: Could you please just answer my question.

10 **MR MOLEFE:** Could you please allow me to answer it.

ADV MYBURGH SC: Fair enough.

MR MOLEFE: When I read this at the time, this was a model of how the transaction advisory services, I mean, the transaction, as I call it, the remuneration model for the advisors would work. And when I read this model, it was at the time it was with the understanding that we have appointed transaction advisors, I was not aware of all this contract, legalities of contracts that had transpired in the battle.

20 I thought that what was presented to me was that we have advisors, and this is how we are going to share - how we going to - the remuneration of the transaction advisors is going to work. So this was an approval of a remuneration model of the transaction advisors.

ADV MYBURGH SC: So then, at paragraph 1.2, it says:

“Ratify the amendment to the allocation of scope of work, from McKinsey to Regiments Capital.”

Correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: I think we understand that content.

MR MOLEFE: Yes, and my understanding of that was that McKinsey as the main contractor is allocating some work were done by Regiment and of course that is normal in the context of sub-contractor.

10 So I was not aware of what I had explained, I have explained earlier, that in fact, they had been, in fact, the session that happened on the day that the memo was sent to me, as well as that it was on the fifth and that they had fined the MSA on a later date.

ADV MYBURGH SC: So sub-three:

“Ratify the amendment in the makeup of the transaction advisor consortium from Nedbank capital to Regiments capital.”

I think we have dealt with that.

20 **MR MOLEFE:** Yes.

ADV MYBURGH SC: Sub-four:

“Approve a change in the remuneration model of the transaction advisor compared to the original remuneration.”

We have dealt with that.

MR MOLEFE: Yes.

ADV MYBURGH SC: Sub-five:

“Delegate power to the GCFO to give effect to the above budget approvals.”

MR MOLEFE: Yes.

ADV MYBURGH SC: Then if we go through the background...[intervene]

MR MOLEFE: Just to add, Myburgh.

ADV MYBURGH SC: Certainly.

10 **MR MOLEFE:** I had no beef with those with those intentions of the stuff.

ADV MYBURGH SC: Then we get although, as I understand you to be saying at the time, you did not know of the agreements and the background.

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright and then if we go to the background, it says at paragraph 2:

20 “The GC - and a lot of this we have dealt with already, the GC approved the appointment of the McKinsey Led Consortium to provide complete advisory services on the 1064 locomotive tender. The letter of intent was signed by the Group CFO on 4 December 2012.”

We know that that was signed by McKinsey on the 6th 4:35:2.

MR MOLEFE: Yes.

ADV MYBURGH SC: So that is how things started.

MR MOLEFE: Yes.

ADV MYBURGH SC: That I think we have we have gone through yesterday.

MR MOLEFE: Yes, and then that letter was amended three times.

ADV MYBURGH SC: Three:

10 “A separate letter of intent was signed for Weber Wenzel.”

We do not need to deal with that.

ADV MYBURGH SC: Four:

 “In May 2013 a potential conflict of interest was raised with McKinsey concerning Nedbank Capital, to which a response from McKinsey confirmed the conflict and an alternative as Regiments Capital was proposed.”

We have dealt with that, correct?

MR MOLEFE: Yes.

20 **ADV MYBURGH SC:** Five:

 “On 19 November 2013, the Group CFO confirmed Transnet’s agreement to replace Nedbank Capital with Regiments Capital.”

That is the letter that I showed you earlier this morning.

MR MOLEFE: Yes.

ADV MYBURGH SC: Six:

“The entire scope of the engagement was allocated to Regiments, with McKinsey only responsible for the business case and limited technical optimisation aspects.”

So that is the change, correct?

MR MOLEFE: Yes, but this does not say that McKinsey is no longer in the picture.

ADV MYBURGH SC: Yes, no absolutely.

10 **MR MOLEFE:** It is not just about the distribution of work in the consortium.

ADV MYBURGH SC: “But the entire scope of the engagement was allocated to Regiments, with McKinsey only responsible for the business case and limited technical optimisation aspects.”

MR MOLEFE: As I say this was a this was a split of the work in the consortium.

ADV MYBURGH SC: So then, what I want to do is to take up please to paragraph 10 and that you find at page

20 405.12. **MR MOLEFE:** Yes.

ADV MYBURGH SC: It talks here under the heading value created by transaction advisor and then it deals with Regiments.

MR MOLEFE: Yes.

ADV MYBURGH SC: “Regiments assisted Transnet in

computing the effects of hedging and escalation based on the original delivery schedule, compared to an accelerated scope revised delivery schedule. As well as optimising the foreign exchange hedging and guaranteed bond pricing.”

MR MOLEFE: Yes.

ADV MYBURGH SC: 11:

10 “This enabled Transnet to accelerate the delivery schedule resulting in savings in future inflation related escalation costs and saving in foreign exchange hedging costs.”

Correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: If you could then drop down to paragraph 13, it deals with the allocation of locomotives dealt with in the previous paragraph.

“This allocation resulted in an increase in the cost per locomotive due to bidders having to allocate more of the overhead cost to a smaller batch.”

20 And then 14:

“The net saving as a result of this decision, as calculated by Regiments is reflected below.”

And if you go over the page to paragraph 16, records:

“As a result of the work done by Regiments, the delivery schedule was accelerated, thereby

ensuring that the locomotives arrived earlier resulting in savings in future inflation related escalation costs and saving in foreign exchange hedging costs of approximately R20billion.”

MR MOLEFE: Yes.

ADV MYBURGH SC: And then you say at 17 or it is recorded:

“In addition Transnet through Regiments efforts achieved a total saving of approximately R2.8billion
10 for the performance based foreign exchange and guarantee bond.”

Correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: And then if you drop down to paragraph 20:

“Regiments implemented - this under the heading change in remuneration model for the transaction advisor.”

Then it refers to Regiments:

20 “Regiments implemented extensive intellectual property and complex techniques and methodologies to achieve the above benefits to Transnet, thereby mitigating the risks identified above.”

Over the page paragraph 21:

“The Regiment's operating model for such engagements is usually based on a risk sharing model or success fee, 35% of value created or saved.”

Paragraph 22:

“In this case, Regiments was transferred a mandate and remuneration model already accepted by McKinsey, Regiments initial indications were that they would have preferred to be engaged on a model consistent with paragraph 21.”

24:

“This initial request was rejected. However, based on the significant value created/saved, as well as risks mitigated as noted above, a request to amend the remuneration model was submitted. Consequently, an additional fee of R78.4million excluding VAT is recommended to Regiments representing 0.042% of the saving.”

Is that right?

20 **MR MOLEFE:** Yes.

ADV MYBURGH SC: And then under the heading triple PPPM, General Amendment Principles, it says:

“Amendments in excess of 40% of the original contract value or contract period will be dealt with as follows.”

Sub-one:

“In such cases prior review and recommendation must be obtained from the appropriate AC first as well as the original signatory. Thereafter, the matter be submitted for approval to the person with delegations one level higher than the original contract signatory.”

If you have a look at Sub-two:

10 “However, this rule does not apply to amendments falling within the GCE, BADC or Board's delegation of authority.”

And then at Sub-three:

“The rules relating to contract amendments stated above apply to contracts awarded via open tender as well as those awarded by a confinement.”

And then a 28:

“In terms of paragraph 27.2, the content of this requests falls within the delegation of the GCE.”

You see that?

20 **MR MOLEFE:** Yes, I saw it last night when I was reading it.

ADV MYBURGH SC: So that is no doubt why it was brought to you by Mr Singh.

MR MOLEFE: Yes.

ADV MYBURGH SC: Then we get the financial

implications of this change. What we know at a point is that the contract value was an order of R50million. We have seen that yesterday, and now if you take the 51 and you - this then deals with the change in the model, if you look at Regiments, initially, they were going to be due R21million and if one then adds this additional R78million one gets to 99.5. Is that right?

MR MOLEFE: Yes.

ADV MYBURGH SC: And it was really on that basis that
10 the contract value increased from R51million to R119million.

MR MOLEFE: Yes.

ADV MYBURGH SC: Through this additional payment of R78million.

ADV MYBURGH SC: Okay, then the budget implications. Although it says:

“A tariff of 30 the additional amount was not explicitly budgeted for sufficient budget exists.”

And 31:

20 “The additional fee of R78.4million has not been included in the Capital budget however, significant savings were achieved.”

And then the recommendation which I took you to yesterday:

“It was recommended that you should one note the

deliverables executed by the transaction advisor.”

That must have referred to Regiments when we read it in context:

“On the locomotive transaction compared to the original scope of the LOI.”

And as has been mentioned, that had been transferred to Regiments, and then three:

10 “Ratify the amendment in the makeup of the transaction advisor consortium from Nedbank Capital with Regiments Capital for approve a change in the remuneration model of the transaction advisor compared to the original remuneration model, and delegate power then to the GCFO to give effect to the above approvals.”

So I think you summarised it well, earlier. I mean, really, what this memorandum captures, is a change in the remuneration model, applicable to Regiments, correct?

MR MOLEFE: However, I am not sure if you understand Mr Myburgh that what this memo actually says is that for
20 reason stated in the memo, Regiments managed to save us when R2.8billion. So they made - they saved us R2.8billion at Transnet and for the bringing into the kitty R2.8billion, it was being recommended that they should be paid R78million for the R2.8billion that they had put in.

And the memo says that, well, it is not possible to

pay them the R78million, because the original remuneration model does not allow it. This is despite the fact that Regiment had protested in the beginning, that they prefer to be remunerated on a different base, and now Regiment was coming back and saying, guys, I have already saved you R2.8billion. So please, can you reconsider the remuneration model that would effectively allow me to be paid another R78million and what I simply did, I looked at the situation, I thought R2.8billion is not
 10 bad for R78million, and I approved it, that is in English, that is what happened.

ADV MYBURGH SC: No then I think that you and then see eye to eye on this. I mean, effectively, the change in remuneration model, you are right, the original model would not have allowed this, but you reflected on the saving, and you agreed to change the model, and therefore agreed to pay them the R78million for R2.8billion. But and we are going to come to the technical aspects and of course, you did not have to do this.

20 **MR MOLEFE:** Chairperson, I did not have to but one of the things that was uppermost in my mind was that if these people have done what they say they have done, and they have saved us, R2.8billion you really have to incentivise them to do more, because by refusing, they will just stick to what – to doing what they get paid to doing.

And that is not necessarily in the interest of the company. So it is a well-known principle in business, that remuneration should be linked to the benefits to the company.

ADV MYBURGH SC: But that was not the original model and have a look at paragraph 22...[intervene]

MR MOLEFE: No, the original model did not anticipate the situation.

ADV MYBURGH SC: If I can just ask you to go to
10 paragraph 22, just so that we understand and I will then engage with you, paragraph 22 in this case:

“Regiments was transferred a mandate and remuneration model already accepted by McKinsey.”
So I think it is common cause then that that model did not provide for this, but because of the saving you agreed to change it in plain English as you say.

MR MOLEFE: Yes, because of the R2.8billion that was on the table, or whether or not I mean, R2.8billion that is purported to be on the table I was prepared to reconsider
20 and say, well, if these people are performing so well, we should consider paying them R78million out of the R2.8billion.

ADV MYBURGH SC: And you accept that you did not have to do that it was quite generous.

MR MOLEFE: No, we did not have to.

ADV MYBURGH SC: So it was generous of you.

MR MOLEFE: But we could.

ADV MYBURGH SC: Yes, but I am saying it was generous of you. I mean, you could have said, I am just holding you to the comment there was no - Mr Molefe there was nothing in law that was compelling you to do this.

MR MOLEFE: Mr Myburgh I am telling you, that the reason I did it, I did not do it, because I like Regiment. I did not do it, because I have a particular dislike for
10 anybody or whatever. I did it because there was R2.8billion on the table.

I do not know if you understand what R2.8billion means, for a company like Transnet, which made in 2016, a net profit after tax of R4billion. It was not insignificant and I think for R78million, I felt that this could be done. This is a decision that would typically be taken by a CEO in my position. This was nothing out of line, Mr Myburgh.

ADV MYBURGH SC: Alright, well, do you know what happened to half of this money?

20 **MR MOLEFE:** I do not know.

ADV MYBURGH SC: No, you do.

MR MOLEFE: Hey?

ADV MYBURGH SC: You do know what happened to half of the money Mr Molefe, that is the issue.

MR MOLEFE: Did you say I do?

ADV MYBURGH SC: Well, from what you heard yesterday, you have a sense of what happened to half of this money?

MR MOLEFE: No, I do not know what happened to half of the money.

ADV MYBURGH SC: Well, it was paid to Mr Essa.

MR MOLEFE: I did not know that at the time, even now I do not know it other than the fact that you said it.

ADV MYBURGH SC: You see, that is why this is placed
10 under scrutiny because you I think, have accepted that this was generous. You did not have to in law do this, you decided for business reasons to do it on your own.

MR MOLEFE: I think your question Mr Myburgh would be fair, if it was, had you known that half of this money would go to Mr Essa, would you have taken the decision?

ADV MYBURGH SC: And what is the answer to that?

MR MOLEFE: And the answer might be different, I do not know what I would have thought at the time and I do not want to speculate on it. But that is not what was on the
20 table at the time, we were confronting objective facts, and the objective facts are that there was R2.8billion on the table.

The people were asking to be remunerated for it and I thought that for all purposes of ensuring that in future, we can even have more savings if we can

encourage them to do these structures that they did, we should pay them R78million, what you came up with yesterday and what has come up in this Commission are things that were not in my knowledge at the time,

ADV MYBURGH SC: But I think that that as you know is...[intervene]

ADV MYBURGH SC: Because now you want to think, you want to say that I was paying R78million or half of it to Mr Essa and that is not true, I deny that in the strongest
10 possible terms.

ADV MYBURGH SC: I understand that but what you can understand why this contract is being placed under scrutiny, and of course, whether or not you knew what Mr Essa was up to you really needs to be decided when it has gone through all the facts one cannot deal with it now.

MR MOLEFE: Just to Mr Myburgh I actually did not know Me Essa.

ADV MYBURGH SC: But we have been through that Mr Molefe, you did not know him but you had a seat at the
20 table at the Gupta's...[intervene]

MR MOLEFE: Ja, but you are saying that money was paid to Mr Essa I did not even know who Mr Essa is.

ADV MYBURGH SC: And they were the beneficiaries of this money laundering, he was their money laundering, Lieutenant you knew them that is the problem.

MR MOLEFE: No, I knew when, where do you get the evidence that I knew? I mean, is it evidence that has been presented to the Commission or is it your own evidence that I knew? Where do you get it, so why do you make such a wild irresponsible accusation?

ADV MYBURGH SC: I said, you knew...[intervene]

MR MOLEFE: No, you cannot say that I knew that they were going to use it for money laundering unless you are a...[intervene]

10 **ADV MYBURGH SC:** Let me just retrace my steps if you do not mind.

MR MOLEFE: Which doctor?

ADV MYBURGH SC: Mr Molefe, I was trying to explain in fairness to you why one needs to from the Commission's perspective, place this memorandum under scrutiny, just bear with me.

MR MOLEFE: I do not mind what you going to – what you are trying to explain. I take exception to the fact that you say that I knew.

20 **ADV MYBURGH SC:** No, that is not what I said.

MR MOLEFE: What did you say, I mean?

ADV MYBURGH SC: I said...[intervene]

MR MOLEFE: Maybe we should ask for the record to be read again.

CHAIRPERSON: Okay, him say what he said and let us

take it from there.

ADV MYBURGH SC: I think the point that you made...[intervene]

ADVOCATE FOR MOLEFE: Chairperson.

CHAIRPERSON: Sorry?

ADVOCATE FOR MOLEFE: Chairperson, the record will reflect that, Chairperson he said he knew.

CHAIRPERSON: Yes, but let us hear what he says. He said, because I do not know whether he completed his
10 sentence before Mr Molefe...[intervene]

MR MOLEFE: No, he said you knew what was happening.

CHAIRPERSON: No, that is fine. One, if we need to check the record, it can be checked but let us hear what Mr Myburgh says he said.

ADV MYBURGH SC: Well, I would really like to cut through this, I mean, as far as you concerned, you did not know.

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright, and what I was trying to get
20 at is when I referred to Mr Essa, you said you did not know him. I then pointed out to you that you actually knew the Gupta's, that is where I am going to, but if you say you did not know this, that answer must be accepted, now, let us move on from this document.

But I am going to come back to the issue, ultimately

and I told you right up front, that ultimately whether you knew or not, and I am sure you must accept, must be determined once one's gone through all of the evidence, and then you look back on it, not one single thing would be determinative of that question.

MR MOLEFE: Yes, but I hope Chairperson that we are not in this commission to entertain Mr Myburgh's preconceived conspiracy theories. I hope that we are here to listen to objective evidence that is not tainted by what
10 Mr Myburgh may have read in the newspapers, may have read in other affidavits and so. I am not here to answer what is in Mr Myburgh's head or to confirm his conspiracy theory.

I am here to give evidence and my objective evidence is, I have approved this because there was R2.8billion on the table, and that I did not know that Mr Essa was involved. There is nowhere in this document that says that this money will go to Mr Essa.

CHAIRPERSON: Yes, no Mr Molefe that is fine but
20 remember what I said, I think yesterday, that each witness comes and gives answers to questions that the Evidence Leader is not obliged to, at this age necessarily accept that as true. He is entitled to probe further, to test it if he thinks it should be tested, as long as you are given a chance to deal with what he puts to you to try and test it.

So he mentioned yesterday, if I recall correctly, that one of the issues as he sees them, in regard to your evidence or your role, will be whether despite the fact that you had a certain relationship with Mr Ajay Gupta or the Gupta family. The position is that you might not have known of certain things that the Gupta's and their associates may have done in relation to Transnet or whether you knew, and therefore you may have been complicit, or it was a question of negligence.

10 And then I think he said, or whether the question is whether they were too smart for you to pick up what they may have been doing. So when he was putting this to you, he wanted to make sure that as he puts questions as we go further, you know that these are the things his trying to deal with so that you can answer knowing the context, you know.

 So that in the end, if I ask him the question when he makes his submissions or presents argument at the end, if I asked the question on this evidence, can it be said that
20 Mr Molefe knew what the Gupta's or their associates were doing? He can say, I put these questions to him, or he gave these answers and I did not just accept that I probed further, and these were his answers.

 Based on his answers, my submission is that he knew, or my submission that he did not know. So that is

what he is trying to do.

MR MOLEFE: Chair, my evidence is that I did not know, in the interest of progress let us move on.

CHAIRPERSON: Okay, no that is fine.

ADV MASUKU SC: Chairperson.

CHAIRPERSON: Yes.

ADV MASUKU SC: Can I just once more, just put it on record so that if it is possible, we can be able to move on.

CHAIRPERSON: Yes.

10 **ADV MASUKU SC:** Mr Molefe has already said yesterday and today. He has never met Mr Essa, he does not know Mr Essa. So, whatever Mr Myburgh may be having against Mr Essa cannot in any way be imputed to Mr Molefe, that is number one.

Number two, Chair I want to request that the Mr Molefe should be given an opportunity to testify freely in this Commission, he should not be interrogated and we have observed this from yesterday.

20 Firstly, he was patronised on a few occasions and he had to bring this to the attention of the Commission.

And secondly, it is as if his in an interrogation room, I thought the purpose of this proceedings is to get information and the witness should be able to do so freely, he should not be harassed when he has to give answers in this Commission, that is our request.

CHAIRPERSON: Yes, well, let me say this you will have noticed that in terms of the rules of the Commission, there is a rule that says the Evidence Leader is entitled to ask questions to get to the truth of the allegations or the evidence.

So you say he should not be interrogated but what I am sure you agree is that when he gives evidence as it should happen with all witnesses, if the Evidence Leader wishes to probe further, to test the veracity of that
10 evidence, the Evidence Leader should be entitled to do that, as long as Mr Molefe as a witness is given a chance to respond to that, what would not be right is not to give him a chance to respond to it.

MR MOLEFE: Chairperson, I agree, but I do not think...[intervene]

CHAIRPERSON: Okay, I am sorry, let me deal with one, when I deal with your counsel, let me deal with your counsel, yes.

ADV MASUKU SC: No, that is clear Chairperson as long
20 as ultimately Mr Molefe is not going to feel intimidated.

CHAIRPERSON: Yes, no, no.

ADV MASUKU SC: But how questions are also posed to him is very important, because if he feels attacked, then he is going to respond in a particular way and I think we need to get to that point.

CHAIRPERSON: No, no, I think we all appreciate that we want to make sure there is fairness but we want to make sure that there is proper understanding of what the evidence is and the way it needs to be tested, it is tested, but there must be fairness throughout. Okay, alright. Your counsel spoke, Mr Molefe do you - you look like you want to say something.

MR MOLEFE: No, I did not want to say something Chair, no, I did not want to say anything Chair I accept what my
10 counsel said, we can lay the matter to rest as long as we remember that my understanding is that this is not an accusatorial hearing.

CHAIRPERSON: Ja.

MR MOLEFE: It is here to extract information to get to the truth. Now the moment we start pointing fingers and said you knew despite the fact that I say I did not, I think it is problematic.

CHAIRPERSON: But you understand what I said earlier on about the probing and so on?

20 **MR MOLEFE:** Yes, no I understand Chair.

CHAIRPERSON: Ja, okay, Mr Myburgh.

ADV MYBURGH SC: Thank you, Mr Molefe could I ask you please to go to the MNS Report, bundle 6, exhibit BB27 and could you please turn to page...[intervene]

MR MOLEFE: Which page number?

ADV MYBURGH SC: 385.

MR MOLEFE: Yes.

ADV MYBURGH SC: It says and I direct your attention towards the foot of the page paragraph 2.5.9.

MR MOLEFE: Yes.

ADV MYBURGH SC: Surprisingly on 16 April 2014 Mr Singh wrote a memorandum to Mr Molefe to approve a change in the remuneration model of Regiments and that Transnet pay Regiments an amount of R78 million. You see that?

10 **MR MOLEFE:** Yes.

ADV MYBURGH SC: We dealt with that.

CHAIRPERSON: I am sorry did you say 8385?

ADV MYBURGH SC: 385.

CHAIRPERSON: Okay. I have got it.

ADV MYBURGH SC: Mr Molefe I suppose there is one thing I have not finalised.

MR MOLEFE: Oh I – are we done with that paragraph?

ADV MYBURGH SC: No I am going to come to that if I could just ask you to confirm. You signed the memorandum you
20 received from Mr Singh the next day?

MR MOLEFE: Yes.

ADV MYBURGH SC: On the 17th of April.

MR MOLEFE: Yes.

ADV MYBURGH SC: Yes do you want to comment on 259?

MR MOLEFE: It does not have the context that I put here.

ADV MYBURGH SC: Yes sure.

MR MOLEFE: To say that the R78.4 million was in recognition of the fact that they had saved us R2.8 billion. So the R78.4 million on its own make it like this – looks like a lot of money, it looks like unreasonable and it would surprise people with an untrained eye like MNS but if they had put it in context it might have not surprised me at all. So that is the comment that I want to make that this is actually misleading because it does not put everything into
10 context.

ADV MYBURGH SC: What MNS then do at paragraph 2.5.10 and 2.5.11 is they essentially summarised the memorandum we need not deal with that.

MR MOLEFE: Yes.

ADV MYBURGH SC: But could I ask you please then to go to 2.5.13 you have confirmed that on the 17th you approved that request.

MR MOLEFE: Yes.

ADV MYBURGH SC: Correct? And then what they refer to
20 is a memorandum from Mr Edward Thomas. Do you know who he was?

MR MOLEFE: No I do not know who he was.

ADV MYBURGH SC: I understand that at a time he was the Chief Procurement Officer.

MR MOLEFE: Yes. Yes.

ADV MYBURGH SC: Might he have been?

MR MOLEFE: Yes, yes I do not remember meeting him.

ADV MYBURGH SC: And it talks about a memorandum of his dated the 23rd of April and this is what he said at paragraph 11 from the memo.

“The benefits that Transnet obtained from the transaction although is a contract was as a result of the contracted or deliverables being provided in terms of the current fixed fee agreement Transnet has with the service provider.

10 **MR MOLEFE:** Yes.

ADV MYBURGH SC: So in other words he is saying well that is what you contracted for.

MR MOLEFE: Yes.

ADV MYBURGH SC: And then goes on to say:

20 “The fact that Regiments Capital operating model is based on a risk share model or success fee is irrelevant Regiments Capital willingly accepted the rights and obligations of the existing contract whose fees is fixed fee for the delivery of deliverables. Regiments also agreed to an increased fixed fee for the detailed deliverables that they delivered on.”

Next paragraph.

“Based on the above notwithstanding the

GCE's approval we do not agree to the implementation of the change in the remuneration model as the service provider has been sufficiently remunerated for the services provided as per the agreement."

You want to comment on that?

MR MOLEFE: Mr Myburgh I do not know why – I do not know why you choose to leave out what is in the MNS Report about Mr Thomas when he said that he wrote on the 24th of April a
10 memorandum objecting to the revenue sharing model. He wrote a memorandum which you are now referring to.

But in the MNS Report MNS says:

"Mr Thomas says that memorandum he could not confirm that that memorandum did reach Mr Molefe's office."

ADV MYBURGH SC: I am coming to that now Mr Molefe.

MR MOLEFE: No but Mr – Mr Thomas says the memorandum did not reach me. In fact he says he – it never reached Mr Singh or myself. So yes he wrote that
20 memorandum and in fact maybe if I had seen it at the time I may have reconsidered the decision that I had taken. But the fact of the matter is that I do not know why you are – you are leaving paragraph 25 – 2.5.15 of the MNS Report where he says Mr E Thomas could not confirm whether Mr G Peter shared the memorandum with Mr A Singh and Mr B Molefe.

ADV MYBURGH SC: And I was going to come to that Mr Molefe.

MR MOLEFE: No sorry I was under the impression that you just ignoring it.

ADV MYBURGH SC: Why – Why?

MR MOLEFE: I thought you are sweeping it under the carpet.

ADV MYBURGH SC: So let us – no of course not but let us first deal with the sentiment expressed. I am so – I accept it
10 records you did not get it but I...

MR MOLEFE: No – I would – I would prefer not to comment on Mr

ADV MYBURGH SC: Alright.

MR MOLEFE: Thomas' memorandum because it is a memorandum that never reached me that I did not have at the time a fair chance to consider.

ADV MYBURGH SC: But what about the proposition that I want to put to you that it was part of the deliverables that they had contracted for. That is what he is saying.

20 **MR MOLEFE:** Well the representations.

ADV MYBURGH SC: Yes.

MR MOLEFE: That had been made to me in the memorandum of the revenue sharing of the remuneration was that there had been savings of R2.8 billion and that those savings were not – were over and above what was

required to be done.

So if you say to me that the – well that was part of the deliverables then you are then suggesting that those representations to me were misrepresentations which at the time is not something I was not doubting anybody's bona fide's at the time.

ADV MYBURGH SC: Right. If I then take you to the next paragraph and you are quite right in an interview with Mr Thomas he confirmed that he had drafted a memorandum to
10 Mr Gary Peter objecting to Regiments payment on a risk shared basis however Mr Thomas could not confirm whether Mr Peter shared the memorandum with Mr Singh or Mr Molefe. As I understand your evidence.

MR MOLEFE: I would have preferred that you start there. To say that Mr Thomas did write the memo but that memo did not go anywhere and that for whatever reasons it did not go anywhere. It never came to the attention of Mr Molefe however Mr Thomas feels that the payment was not necessary.

20 **ADV MYBURGH SC:** Alright. And what is your view of that now seeing this – seeing the concern that he raised?

MR MOLEFE: No Chairperson I can only talk about what happened at the time. What I feel now I mean I feel that perhaps if I had seen Mr Thomas' memorandum I may have reconsidered but I did not.

ADV MYBURGH SC: Alright.

MR MOLEFE: And the objective facts are that I did not and that I at the time was convinced that the payment R70.8.4 million was justified.

ADV MYBURGH SC: Who was – what position did Mr Peter occupy at this time?

MR MOLEFE: Mr Peter was very senior more senior than Mr – I suspect Mr Peter was Mr Thomas' boss, yes Mr Peter was in the finance department I think not responsible for
10 procurement but responsible for I cannot remember the terminology now.

CHAIRPERSON: Treasury?

MR MOLEFE: No, no.

CHAIRPERSON: Not Treasury.

MR MOLEFE: I remember now – Supply Chain – no I am not sure but he was – he was in the procurement space. He put together the procurement transactions.

ADV MYBURGH SC: And if Mr Thomas had written this memorandum to him would you have expected Mr Peter to
20 provide you with the memorandum?

MR MOLEFE: Well it depends on what – to who the memorandum was addressed. If it was addressed to me by Mr Thomas with the intention that it should go through the different levels until it reaches me I would have expected it to reach me. But if it was a memorandum that he just

addressed to Mr Peter then – then perhaps the fact that it did not reach me should not surprise anyone.

ADV MYBURGH SC: Right. I am not sure who was it that it was addressed to?

ADV MYBURGH SC: I beg your pardon?

MR MOLEFE: Who was it addressed to?

ADV MYBURGH SC: I can find out for you.

MR MOLEFE: Yes.

ADV MYBURGH SC: On the reading of it it seems to me it
10 was addressed to Mr Peter.

MR MOLEFE: Yes.

ADV MYBURGH SC: So as I understand what your evidence is is that if it was one of those multilevel.

MR MOLEFE: Yes.

ADV MYBURGH SC: Memos it would have got to you but otherwise as I understand your evidence correct me if I am wrong it would have been up to Mr Peter to decide that.

MR MOLEFE: The way the system works – worked if Mr Thomas wanted to bring anything to my attention he had to
20 write a memo to Mr Molefe and at the bottom say that the – I have compiled this memo and these are the issue in the memo recommendation and so on. It would go to his boss. If the boss was not obliged to agree with him but he was obliged to pass it on to Mr Singh and then to myself and so it would arrive at me with memo compiled by Mr Thomas not

recommended by Mr Peter, not recommended by Mr Singh but nevertheless brought to me for my attention it was addressed.

ADV MYBURGH SC: Alright. And then if we just carry on there is just I think two other points I want to look at. 2.5.16 on 24 April 2014 Transnet and Regiments concluded the first addendum to the MSA which provided for a fixed fee of the R78 million. Correct?

MR MOLEFE: Yes. Now that adds to the confusion of who
10 signed the MSA that I referred to earlier which is a legal conundrum that has now just come to my attention.

ADV MYBURGH SC: Yes.

MR MOLEFE: Because now Transnet and Regiments conclude an addendum to the MSA and yet the evidence was on – I MNS Report that the MSA was signed by – by McKinsey after signing it to 00:10:52 transaction on a date after signing. So the – really my question I am really also flabbergasted now about how this could have passed through a legal department because all the agreements that we were
20 entering into there was a standard operating procedure that they had to be vetted by the legal department.

ADV MYBURGH SC: Yes. And what we do know...

MR MOLEFE: And – and can I tell you something also.

ADV MYBURGH SC: Yes.

MR MOLEFE: That also flabbergasts me genuinely is that

when payments other – for example the payment of that R78.4 million the finance division before they make a payment they have to see the agreement on which the payment is based. So my question then on reading this was so what was used? And those things were outside of my knowledge Chairperson.

ADV MYBURGH SC: Alright. Well it is those very points that you raised that obviously also things that concern the commission but we need not go through all of that. If I could
10 just direct your attention to paragraph 2.5 18 or just ask you to confirm that on the 30th of April Regiments was then paid the R79 million.

MR MOLEFE: Yes.

ADV MYBURGH SC: And you might then have seen at paragraph 2.5.20 that MNS having investigated the matter found that there were in fact no savings that Regiments secured for Transnet.

MR MOLEFE: Well that is news to me because as I say at the time of signing that memorandum I did not trust the bona
20 fide – I did – I did not question the bona fide's. There was nothing that would have made me to be suspicious that this is indeed not the case what has been represented.

CHAIRPERSON: Of course if any service provider says to you please let us revise my remuneration package or let us revise how much you are going to pay me because I have

saved you so much.

MR MOLEFE: Yes.

CHAIRPERSON: Before you agree to the revision you would need to satisfy yourself that the statement that they have saved you so much is factually correct.

MR MOLEFE: Yes.

CHAIRPERSON: Yes. So are you saying that in this particular case you – you did not do that. You accepted their word or not really?

10 **MR MOLEFE**: No it was recommended internally.

CHAIRPERSON: Yes okay.

MR MOLEFE: So the people that had engaged with the service providers.

CHAIRPERSON: Yes.

MR MOLEFE: Then sent it to me.

CHAIRPERSON: Yes.

MR MOLEFE: That everything is fine. However – however this statement of MNS may be disputed as well. Perhaps when they come here they will say we do not agree with MNS
20 that this was indeed the case and they will say that there were seen. All I am saying is the representation that was made to me was that there were savings and I had – and I trusted the bona fide's of my – the people that I worked with – my colleagues that this is in fact the case.

CHAIRPERSON: You – you did not say to them I guess that

flows from your evidence that you accepted their bona fide's. You did not say to them you know this is a huge saving you talking about. Is it R2, something billion?

MR MOLEFE: R2.8 billion.

CHAIRPERSON: Yes. Keep saving please come and show me how that has come about you need to go that far.

MR MOLEFE: No I did not Chair. You know...

CHAIRPERSON: Ja.

MR MOLEFE: We were – my attitude was when you are a
10 Group Chief Executive of a company they have to trust your colleagues – you have to trust your subordinates. So if they tell you that it is raining outside you do not take out your hands through the window and check if it is raining.

CHAIRPERSON: Ja.

MR MOLEFE: And – and unless that trust is broken at some point but I remember in team building there was an exercise that we used to do where we all hold hands in one line and everybody is blindfolded except the people – the person in front so you have to trust that person even if walking in
20 water. But you have to say okay he can see I cannot see and that is how it works because in a sense from where I see it this was not the only issue that I was dealing with and I had to trust the people that were giving me information on this particular issue.

CHAIRPERSON: My Myburgh.

ADV MYBURGH SC: Thank you. Just so that I understand it when you say you trusted your colleagues it was – are you referring here to Mr Singh?

MR MOLEFE: Yes.

ADV MYBURGH SC: I mean there was no one else.

MR MOLEFE: Yes.

ADV MYBURGH SC: Did you when you received this memorandum did you engage with Mr Singh?

MR MOLEFE: I think we may have had a discussion one on
10 one where I asked him to take me through the memorandum and explain to me what it is about and he did and that I was (inaudible).

ADV MYBURGH SC: You may have?

MR MOLEFE: I may have yes but that is not recorded anywhere and – but I seem to recall that we did that. That I said Anoj what is this about? And then he came into my office and said explain – took me through the memorandum point by point and said they have saved us R2.8 billion and then ...

20 **ADV MYBURGH SC:** In the process of doing that did he indicate to you when the McKinsey MSA was signed.

MR MOLEFE: No.

ADV MYBURGH SC: And there was a session.

MR MOLEFE: No I do not remember.

ADV MYBURGH SC: Did he bring all that to your attention?

MR MOLEFE: When they discussed – the discussion I just wanted to understand why we are paying Regiments R78 million.

ADV MYBURGH SC: So let us go back to the MNS memo and just I do not know if you know this. You know that Mr Sedumeni you know the author of this – when I say memo the report has testified in the commission.

MR MOLEFE: Who?

ADV MYBURGH SC: Mr Sedumeni.

10 **MR MOLEFE:** Sedumeni.

ADV MYBURGH SC: Ja you know that he has testified?

MR MOLEFE: Yes he has testified.

ADV MYBURGH SC: Alright.

MR MOLEFE: And I was forced to take both the report and as well as their testimony here with – with just a little bit more than a tablespoon of salt when it emerged in the press that in fact they were possibly involved in a bribe as MNS and although the press ombudsman had ruled that there was no substance to the allegation the press ombudsman did
20 publish a conversation between one of their partners and somebody at Transnet where they were really – were talking about the payment of – of what appeared to be a bribe. And so – and so even – even now when I read this report I – I read it in that context that these were possibly people that were not objective.

ADV MYBURGH SC: Aright. If we go back to paragraph 2.5.20 there were no savings that Regiment secured with Transnet in that one. JP Morgan hedged the financial risk which Regiment purports it arrived. A significant savings for Transnet too. Idea to transfer the FX risk to the balance sheet of the surprise came from Transnet and not Regiments and three the performance guarantees did not result in savings due to the small amounts used and the majority of the bonds were market related. I – as I understand it you
10 say you did not – none of it. Or perhaps I could just ask you to comment on that?

MR MOLEFE: Yes I cannot comment on that – perhaps the people that had written the memo that has an opposing view to this if they come here perhaps they will give evidence to the extent that this is not correct. But like I said coming from MNS tablespoon of salt.

ADV MYBURGH SC: You, yourself do not know whether that saving was effected as I understand your evidence.

MR MOLEFE: No I know it to the extent that it was
20 represented to me.

ADV MYBURGH SC: It was told to you yes.

MR MOLEFE: Before.

CHAIRPERSON: Well I understand that answer to be saying you – you do not know as a matter of fact but you were told by somebody you trusted that there were such savings and

you accepted that.

MR MOLEFE: Yes.

CHAIRPERSON: Ja.

MR MOLEFE: And over and above that Chair I trusted that we have quite a robust internal audit and what I considered to be a robust legal department and that it was not possible for something like this to land up on my desk that was not – that was not correct.

ADV MYBURGH SC: Well I just wanted to ask you I mean
10 you see that on this memorandum there are not various levels of authority and Mr Singh is writing directly to you.

MR MOLEFE: Yes.

ADV MYBURGH SC: Is that right?

MR MOLEFE: Yes.

ADV MYBURGH SC: And what was my understanding of you evidence correct that you did not ever have an occasion to question Mr Singh's trustworthiness?

MR MOLEFE: No. No. It could have been drafted by somebody from Mr Singh that did not put their name. There
20 – it did not reflect that it had been recommended by anyone else but the fact that Mr Singh had recommended it was sufficient for me. In any way if it came to me with Mr Singh's recommendation and that is what I looked at.

ADV MYBURGH SC: So we started out yesterday dealing with the procurement of consulting and advisory services and

so far what we have been dealing with really is the 1064
revisory contract.

MR MOLEFE: Hm.

ADV MYBURGH SC: I want to change to another topic albeit
related but it the next contract that I want to look at and that
is the China Development Bank loan.

MR MOLEFE: CDB loan yes.

ADV MYBURGH SC: Now let me perhaps just summarise Mr
Molefe the – the – some of the evidence that I can get you to
10 the point where you and I can engage one another about
what I would like to ask.

What the evidence shows is that after the 1064
locomotive contract was awarded to the four OME's Transnet
of course knew this.

MR MOLEFE: OEM's.

ADV MYBURGH SC: Oh yes I beg your pardon. Transnet
needed to secure funding for this about R50 billion
expenditure.

MR MOLEFE: Yes.

20 **ADV MYBURGH SC:** And the two Chinese bidders CSR and
CNR they had included letters of funding support from the
Chinese Development Bank and that is what brings me to
this topic.

MR MOLEFE: Yes

ADV MYBURGH SC: Now Ms Makgatho she was –

MR MOLEFE: No Makgatho

ADV MYBURGH SC: Makgatho.

MR MOLEFE: Yes.

ADV MYBURGH SC: She was your head of Treasury is that right?

MR MOLEFE: Yes.

ADV MYBURGH SC: She gave evidence about a trip that she took to Beijing with Mr Singh in July of 2014 to meet the Chinese Development Bank and she went on to testify that
10 upon her return from Europe where she did some international travelling there at the end of July 2014 her evidence was that she was shocked to find out that Regiments were – were on the scene and negotiating with China Development Bank.

MR MOLEFE: Yes.

ADV MYBURGH SC: That is the rough background.

MR MOLEFE: Were in China?

ADV MYBURGH SC: No when she came back.

MR MOLEFE: When she was in – oh when she returned yes.

20 **ADV MYBURGH SC:** And that then brings us to the 4th of August 2014 when she sent you a memorandum.

MR MOLEFE: Yes.

ADV MYBURGH SC: Setting out her concerns.

MR MOLEFE: Yes.

ADV MYBURGH SC: Perhaps I could take you to that

memorandum and let me take you please to – just give me a second? Could I ask you please to fish out Exhibit BB10(a)?

MR MOLEFE: Yes.

ADV MYBURGH SC: Could I ask you please to turn to page 31 NEM31?

MR MOLEFE: Yes.

ADV MYBURGH SC: So at paragraph 126 she talks about returning from Europe and she was shocked to find out that the CDB was now communicating directly with Regiments
10 and that Eric Wood was leading the negotiations. And this was in parallel to Transnet furthering negotiations with the CBD. I just want to then take you to paragraph 127 over the page.

MR MOLEFE: Yes.

ADV MYBURGH SC: She said:

“I then complained bitterly to both Anoj Singh and Brian Molefe because I believed there was not need to use Regiments because of our internal Treasury capacity.”

20 She refers there to an Annexure MM6 that you find at page MEM75. Do you want to go there?

MR MOLEFE: Yes.

ADV MYBURGH SC: And do you accept that you received that email from her on the 4th of August?

MR MOLEFE: Yes.

ADV MYBURGH SC: Right. She goes onto say in her affidavit at paragraph 131 this is at page MEM33.

MR MOLEFE: Yes.

ADV MYBURGH SC: That you organised a meeting between Transnet and Regiments to resolve the CDB pricing proposal impasse and that meeting was held she says at the Melrose Arch Hotel. Transnet was represented by Mr Singh and yourself and herself and Regiments by Eric Wood and Niven Pillay. You confirm that?

10 **MR MOLEFE:** Yes.

ADV MYBURGH SC: She says that:

“Brian Molefe suggested that as everyone seemed to think that my pricing indication is off the mark and the one that Eric Wood received from Nedbank seems reasonable I should agree with them as I was the only one who did not agree. I told Brian Molefe that my position has not changed and will not change as the CDB facility is expensive and
20 not worth it.”

MR MOLEFE: Yes.

ADV MYBURGH SC: Do you want to comment on that?

MR MOLEFE: Again Mr Myburgh you started the story right in the middle and went to the end to paint a particular picture.

ADV MYBURGH SC: You stuck in the middle did you say?

MR MOLEFE: You started it.

ADV MYBURGH SC: Oh I beg your pardon.

MR MOLEFE: Yes. I do not know for what end but the story is that there was ongoing disagreements between Mathane Makgatho and Anoj Singh. Mathane Makgatho and I had worked at the Treasury. She reported to me at the Treasury when I was a Deputy Director General Assets and Liability Management.

10 **CHAIRPERSON:** You say she reported to you at National Treasury?

MR MOLEFE: Yes.

CHAIRPERSON: Yes.

MR MOLEFE: When I was Deputy Director General Assets and Liability Management she was Chief Director responsible for foreign funding. I have huge respect and knowledge of the international capital market as well as risk management and structure and the bond market. She – her knowledge is very superior. She came to me to complain before this
20 incident about two times about Eric Wood and Anoj Singh and their proposal. And on both occasions I said to her okay I hear you I will deal with it. And on both occasions I followed her advice. I did not do what Anoj Singh and Eric Wood had been proposing, but when it came to this, there was a big debate. I saw Mathane separately and I saw

Anoj separately. And they both presented their cases. Chair, when you are doing a transaction like this, there are numerous views about how to approach it. And Mathane had a view, Anoj had a view. And Anoj...

The advisors that were advising Anoj on the transaction with Eric Wood and Neville Pillay. And my feeling about that was that... thousand ideas... let us get more ideas. There is no harm in getting different perspectives. And Matane disagreed...

10 And instead of just dismissing what she was saying. I called a meeting which happened – to have happened at Melrose Arch. I said to her: Let us go to a meeting... And let us have a debate on this one, right?

So there was a debate, as she correctly pointed out but they were feeling – they felt that what they were presenting would be the best solution and in the debate she could not sway them to agree to her position.

I, actually, understood her position and sympathised with her position but I then said at the end of
20 the meeting: Matane, since you are the only one holding this position – because I excluded myself because I wanted to be... – since you are the only one ...[intervenes]

CHAIRPERSON: You wanted to be a like a judge.

MR MOLEFE: I wanted to be like... I wanted to be like you.

CHAIRPERSON: [laughs]

MR MOLEFE: [laughs] Since you are the only one who is holding this position. Are you prepared to say their position which is held by these three is something that you could go along with?

She said: No, I will not do it. I will not agree to it. I did not say you must go with it. I said would you be prepared to consider going along with this idea that they are proposing? And she said no.

10 Chairperson, and after she said no because I respected her immensely and I never implemented it despite the fact that the three gentlemen had opposition. I never implemented it.

ADV MYBURGH SC: Alright. And then, what we know at paragraph 133 is that after that Melrose Arch meeting, she then sent you ...[intervenes]

CHAIRPERSON: I am sorry. You are referring to what paragraph?

ADV MYBURGH SC: Paragraph 133.

20 **CHAIRPERSON:** Okay.

ADV MYBURGH SC: At MM... Sorry, MEM-33. Are you there Mr Molefe?

MR MOLEFE: Ja.

ADV MYBURGH SC: She said she sent you a further email. Perhaps you can go to that?

MR MOLEFE: Yes.

ADV MYBURGH SC: That is page 240.

MR MOLEFE: Yes.

ADV MYBURGH SC: I am not going to take you through this but she put forward her position in some detail, correct?

MR MOLEFE: Yes, yes.

ADV MYBURGH SC: And in fact, in the first introductory paragraph after “I trust that you are well...”, et cetera. It
10 says:

“For the avoidance of doubt, I will bring the following to your attention...”

And then she sought to emphasise points under the heading Overall Governance ...[intervenes]

MR MOLEFE: Yes.

ADV MYBURGH SC: ...Fees, Interest, Expenses ...[intervenes]

MR MOLEFE: Yes.

ADV MYBURGH SC: ...Once-off Arrangement fee. Which,
20 of course, there was a fee to be paid for this. That fee would go to Regiments. And then under the heading Conclusion, she said:

“It is my believe... [this is at page 242.1]
...that the CBD facility in its current form is not in the best interest of the company or the

country given potential capital leakage of up to R 3.7 billion in excessive interest expenses and excessive arrangement fees...”

MR MOLEFE: Yes.

ADV MYBURGH SC: “...may be classified as PFMA violation given the information...” So that was her view.

MR MOLEFE: It was her view and ...[intervenes]

ADV MYBURGH SC: There was another view held by Mr Singh, as you have said.

10 **MR MOLEFE**: Yes. The only thing that I did not do and which maybe may have resulted in being misunderstood was that I never chastised Mr Singh in front of Ms Mathane(?).

CHAIRPERSON: Just repeat that.

MR MOLEFE: I never chastised Mr Singh in front of Ms Mathane.

CHAIRPERSON: H’m.

MR MOLEFE: So I never in the presence of both said to Mr Singh you are wrong and she is right. And even when
20 she came to me, I never spoke bad about Mr Singh because Mr Singh was her boss. He was her superior.

And what I – the advice that I gave to Mr Singh is that you must take the disagreements on your staff very seriously. Listen to them. And please, I do not want this thing that your staff disagree with you and you are having

to come to me on conditions where your staff disagrees with you.

This was a private conversation that I had with Mr Singh. Please make sure that you sort out your house so that when you come to me you come with one position. But because of the disagreement, Ms Mathane's concerns, none of the structures that came that she objected to was implemented at...

ADV MYBURGH SC: Alright. And then, if you have a look
10 at paragraph 135. It reflects that Mr Singh then writes a memorandum in response. Can I ask you to just ...[intervenes]

CHAIRPERSON: Let us just to say 135 at MEM-33.

ADV MYBURGH SC: Yes, thank you Chairperson.

CHAIRPERSON: H'm.

ADV MYBURGH SC: That memorandum you will find at MEM-285. Could you go there, please?

MR MOLEFE: 258?

ADV MYBURGH SC: 258, yes.

20 **MR MOLEFE:** Yes.

ADV MYBURGH SC: And this – I would ask you to confirm, is Mr Singh's response, correct?

MR MOLEFE: Yes, yes.

ADV MYBURGH SC: He puts forward his case. And if you go to MEM-297 ...[intervenes]

MR MOLEFE: Yes?

ADV MYBURGH SC: ...you will see that what he asks you to recommend is:

“It is recommended that the Group Chief Executive approves the response to the Group Treasurer for issues raised under USD 2.5 billion loan facility with China Development Bank...”

So he ...[intervenes]

10 **MR MOLEFE:** Yes. So he wanted me to take a side.

ADV MYBURGH SC: Yes.

MR MOLEFE: Ja. So I did not approve it.

ADV MYBURGH SC: That is why you noted it.

MR MOLEFE: I just noted ...[intervenes]

ADV MYBURGH SC: Right.

MR MOLEFE: ...that that is his position.

ADV MYBURGH SC: So if you go to paragraph 136 at page MEM-33.

MR MOLEFE: Yes.

20 **ADV MYBURGH SC:** You will see there at the foot of the page Ms Makgatho said:

“I find Brian Molefe’s response noted instead of approved as per paragraph 5 of the memorandum interesting. This confirmed to me that Brian Molefe considered my analyses

and conclusion that approximately 3.7 billion could be wasted costs have merit...”

Do you want to comment on that?

MR MOLEFE: Ja, actually, she is also not correct. I did not take her side. That is what my – what my noted... I did not take a side. So I did not... Me saying noted, I was not taking a side because my advice to Anoj has always been: Go and discuss with your people and come with one... So the fact that...

10 So if I had said in that memorandum not approved, which means that I am taking Mathane’s side. I think as a manager it would be wrong because it would be taking a side of a junior person against her superior. That is a recipe for disaster.

So even if you agree, you have to get them to come to one position at some point.

CHAIRPERSON: Well, I would imagine that if it... I would imagine it would depend on what regime you have in the organisation.

20 You have a regime that says the CFO must have a discussion with his or her staff on matters that must come to you and as the head of that department, he must then give you his view and if he chooses to let you know that there is a view different from his, in his department, he must know he is taking the risk that now that you are

told about this other view, you might find it attractive.

And if it is the correct view, I would expect that you would not – you should not be prevented from taking the correct view just because it might... as the head of the department.

But another regime might be, you are the head of the department. You bring to me the outcome of the discussion with your staff. And that regime might mean, there might be disagreements within his staff but he must
10 take a view and that is the view that comes to the Group CFO.

MR MOLEFE: Yes, ja.

CHAIRPERSON: Would you agree with that?

MR MOLEFE: Ja, except that it is not called a regime in the literature(?) style, management style. Management style. So my management style is collaborative.

CHAIRPERSON: Collaborative?

MR MOLEFE: Collaborative means we do not suppress views irrespective of from how junior the person may... but
20 why we do not suppress views, you acknowledge that the executives that these people report to, if you like ego's(?), and that you...

So you have to find a way of accepting a view from a subordinate in a manner that does not create tensions in the organisation with the superior. So it must

be collaborative.

And Chair, I did not care how long it takes. I had resolved that they have to find each other ...[intervenes]

CHAIRPERSON: Ja.

MR MOLEFE: ...and come with a common position.

CHAIRPERSON: Ja.

MR MOLEFE: They have to find it.

CHAIRPERSON: And they did not find each other.

10 **MR MOLEFE:** And they were not finding each other.

CHAIRPERSON: And then you decided: Look, I will not say this one is right, this one is wrong.

MR MOLEFE: Ja. And I did not implement ...[intervenes]

CHAIRPERSON: Ja, you did not implement ...[intervenes]

MR MOLEFE: ...any of their propositions.

CHAIRPERSON: Ja.

MR MOLEFE: I agree that at some point I would have had to make a decision.

CHAIRPERSON: Yes.

20 **MR MOLEFE:** But I felt at that point had not ...[intervenes]

CHAIRPERSON: [Indistinct]

MR MOLEFE: We are not in a crisis.

CHAIRPERSON: Ja.

MR MOLEFE: Ja. So it had to be collaborative.

CHAIRPERSON: No, I understand.

MR MOLEFE: And so... Ja, in fact, when you read through her ...[intervenes]

CHAIRPERSON: Affidavit.

MR MOLEFE: ...affidavit. You will see that there were tensions. There were tensions.

CHAIRPERSON: Oh, ja.

MR MOLEFE: ...sensitive to that.

CHAIRPERSON: Ja.

10 **MR MOLEFE:** But I must repeat Chair that I did respect Ms Mathane Makgatho...

CHAIRPERSON: Ja.

MR MOLEFE: It is just that the situation that if she had been reporting to me and came with those structures ...[intervenes]

CHAIRPERSON: Ja.

MR MOLEFE: ...and I would also – and one of her subordinates had disagreed with her, I would have asked her to go back ...[intervenes]

20 **CHAIRPERSON:** Yes.

MR MOLEFE: ...until there is a ...[intervenes]

CHAIRPERSON: Consensus.

MR MOLEFE: Yes.

CHAIRPERSON: Okay.

MR MOLEFE: Ja.

CHAIRPERSON: No, that is fine. Mr Myburgh.

ADV MYBURGH SC: Thank you. Mr Molefe, that I think takes us to the 28th of August 2014 when you noted the memo. So you have got these two conflicting views.

MR MOLEFE: Yes.

ADV MYBURGH SC: What we do know is that an agreement was concluded with China Development Bank on the 4th of June 2015 but by this time, as I just ask you to confirm, you had been seconded to Eskom. Is that
10 correct?

MR MOLEFE: Yes. Yes, Chair.

ADV MYBURGH SC: And ...[intervenes]

MR MOLEFE: Ja, I will not express an opinion on that agreement but, ja, after I had left then it went in a particular direction.

ADV MYBURGH SC: I will ask you if you go, please, to page MEM-34?

MR MOLEFE: Yes.

ADV MYBURGH SC: Ms Makgatho then carries on with
20 the chronology. She talks about a presentation made by a Mr Singh. And then at paragraph 140, over the page, at MEM-35, she says:

“Pursuant to Mr Anoj Singh’s representation to the board, the attached CDB... facility agreement was signed on 4 June, committing

Transnet to a very expensive loan agreement...”

She seems to have maintained her view, but by that time, as you say, you have left.

MR MOLEFE: I had left and perhaps it is up to the board and Mr Singh and the people that signed the agreement to come and put their case ...[intervenes]

ADV MYBURGH SC: Yes.

MR MOLEFE: ...as to why they thought it was in the
10 interest of the company.

ADV MYBURGH SC: But as you say, you never, in the course of your term, put a stop to the potential Regiment's ...[intervenes]

MR MOLEFE: No. That is why – I did not see it as a Regiment's thing.

ADV MYBURGH SC: Yes.

MR MOLEFE: I saw it as a disagreement by professionals ...[intervenes]

ADV MYBURGH SC: Yes.

20 **MR MOLEFE**: ...on how to structure a particular role with the China Development Bank. And I also acknowledge that the China Development Bank... You see, Mr Makgatho and myself, we did transactions for the National Treasury.

We funded the fiscus on international capital markets and domestic capital markets but we always

funded the fiscus from loans sourced from the Western world, from Europe, from the United States and sometimes we ventured into Canada and then we did Japanese loans.

There we were very good. We understood how that works. The US financial market, the... markets, the institutions and the US, how they work.

ADV MYBURGH SC: Alright.

MR MOLEFE: When I went to China to have a meeting with the CDB, I discovered that actually they were... And
10 even as I was leaving the Treasury, sourcing funds from China was a new thing. There were some several markets that were different than what we were used to.

One of them was China and the other one was Suko(?), which is an Islamic – I think it is Islamic roles(?) with no interest. So we were exploring these as a – I do not want to use the word exotic but as alternative sources of funding but that are very different from what we used to.

So even in this disagreement, I was aware that, well, you know, part of the problem is that the CBD
20 operates slightly different from a multi-lateral institutions in the Western world.

ADV MYBURGH SC: So Mr Molefe, you have read, no doubt, that Regiments were paid 166 million as success fee for securing the CBD funding facility and their advice to split the capital raising between CBD and the so-called

...[intervenes]

MR MOLEFE: Yes.

ADV MYBURGH SC: Have you read about the fact that they have got ...[intervenes]

MR MOLEFE: Is this ...[intervenes]

ADV MYBURGH SC: the success fee? Yes? Have you read about that?

MR MOLEFE: Not particularly. I mean, I never look back at what was happening but in the context of the
10 Commission, yes, it appears that is what happened but when I had left Transnet, I did not try and do anything from the...

ADV MYBURGH SC: Yes. And certainly, on the money finances, half of that money would have found its way into a process of money laundering but as I understand it, your case is that you do not know about it.

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright.

MR MOLEFE: Yes...

20 **ADV MYBURGH SC**: Mr Mohammed ...[intervenes]

MR MOLEFE: Yes.

ADV MYBURGH SC: ...in addition to this, Makgatho also gave evidence about this loan.

MR MOLEFE: Yes.

ADV MYBURGH SC: And his evidence was to the effect

that Treasury had sufficient expertise to enter into the loan transaction. He was of the view that there was no need for external support and that there was no need for the loan agreement fees to have been incurred.

MR MOLEFE: Yes.

ADV MYBURGH SC: Arrangement fees.

MR MOLEFE: Yes.

ADV MYBURGH SC: Do you recall that evidence?

MR MOLEFE: Yes.

10 **ADV MYBURGH SC**: Do you want to comment on that?

MR MOLEFE: On reflection Chair, I think that perhaps where I failed Ms Mathane. Maybe what I should have said to her was, when we go to the meeting at Melrose Arch, bring two people with you that agree with you because then she can now argue that it was loaded against... Maybe she felt that way although that was not the intention.

The intention was to have a mature adult debate about this loan but perhaps on reflecting and on reading Mr Mohammed's comments, I felt that perhaps I should
20 have asked her to bring two people that agree with her so that we can have a proper debate. That did not, unfortunately, happened but...

Yes, it is one of the regrets that I have. Maybe that is what I should have allowed to have happened at the time. However, the disadvantage of that is that

Mr Mohammedi worked in the Treasury and was even – was reporting to Ms Makgatho.

So that would have – I mean, that would have, like, being bringing two people that are two or three levels below Mr Singh to come and argue with him. Sometimes that does not build... It is not that he is assertive. She would have stood her ground.

But, ja, maybe I should have said she can bring two people but then at the same time, sometimes people
10 when the GC is present, the CFO and the Treasurer and there is an argument, either just freeze and keep quiet. They do not want to take sides against anyone of those people because...

Ja, which is another reason why I feel that the evidence that you get from people that are still at Transnet and Eskom, you must treat it in that context Chair that they feel like if they do not say what they think the Commissions wants to hear, they may lose their jobs.

Ja, I am aware that there a lot of people that are
20 seen as Brian Molefe-people that were... because they were – they may – most people have not done anything, really. They were very professional people.

Unfortunately, they left. They had to leave because I have been painted as by the Public Protector as somebody who was potentially corrupt and so it had a

rippled effect on innocent people whose mission in life was just to look after their families.

ADV MYBURGH SC: So can I just ask you. Do you agree or disagree with the – Mr Mohammedi's view that he gave here before the Commission?

MR MOLEFE: What was his view again?

ADV MYBURGH SC: Well, it was simply that there was no need to incur the loan arrangement fees paid to Regiments.

10 **MR MOLEFE:** No, I cannot comment on it Chair.

ADV MYBURGH SC: Alright.

MR MOLEFE: Because it is a debate that happened after I left.

ADV MYBURGH SC: Alright. And perhaps just to conclude this, I will just put to you what he said in evidence that he gave on Day 93 and this you will find at page 144 of the transcript.

He said:

20 "The only possible plausible explanation from my perspective would be that there was an agenda for payment to be made to Regiments, ultimately, or some entity that existed outside of the system..."

I assume ...[intervenes]

MR MOLEFE: H'm. Is that here in the Commission?

ADV MYBURGH SC: Yes.

MR MOLEFE: Ja, I have experienced how the Commission and wants to make you say things that you feel at some point you are compelled to say just to get out of the situation. Unfortunately, it is not all of us that are assertive. So I would say that...

I mean, especially if you are still working at Transnet. Coming across a person like Mr Myburgh who says you knew and he knows that this means that – it could
10 mean that he is going to lose his job. Then he will say anything.

So I will take what he said with – well, not a tablespoon, just a pinch of salt and say that do not – and say that be careful to interpret that as an honest statement. We do not know what his real honest statement would have been if you remove the circumstances that he finds himself in.

ADV MYBURGH SC: And you feel comfortable saying that despite the fact that this was an agreement concluded after
20 your time?

MR MOLEFE: Saying what?

ADV MYBURGH SC: What you have just said about Mr Mohammedi.

MR MOLEFE: Ja, I am just saying that Mr Mohammedi may have been influenced by other factors.

ADV MYBURGH SC: Oh, I see.

MR MOLEFE: Yes. So it may well be his true feeling but I am just saying discount it and know that I know that there are a lot of people that have come here and said things that I know they would normally not say... It is like... They call it a fishpond thing. It is like a fish in a pond that is aware that it is being watched. He behaves differently...

ADV MYBURGH SC: Just so that I understand it. You were issued with a lot of 3.3. Notices ...[intervenes]

10 **MR MOLEFE:** Yes.

ADV MYBURGH SC: ...in this case, correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: And never once did you exercise a right, your right to put in a statement deposing what people said, correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: And never once did you exercise your right to cross-examine anybody, correct?

MR MOLEFE: Yes. Because... You want to know why?

20 **ADV MYBURGH SC:** You can go ahead Mr Molefe.

MR MOLEFE: Because, actually, going through those 3.3. Notices, I cannot recall, I may be wrong, but I cannot recall anyone implicating me in wrongdoing. In wrongdoing. None of them implicated me in wrongdoing.

And this morning when I came in here, I was

listening to an application to cross-examine and I was listening to the criteria that the Chairperson was using that in – the Chairperson is in a hurry to finish.

So if nobody has implicated me in wrongdoing, there was – then there is no need for me to come and waste the Chairperson's time.

ADV MYBURGH SC: So ...[intervenes]

MR MOLEFE: There was just once that mister... I got an instruction from the Chairperson to respond to
10 Mr Jabu Mabuza. Mr Jabu Mabuza who did not know what he was talking about, who had no idea what had been happening there and I responded to his, I think it is a Section 10 something notice that I got.

CHAIRPERSON: 10.6 Directive.

MR MOLEFE: Was it a 10.6 Directive?

CHAIRPERSON: Ja.

MR MOLEFE: Ja. The only 10.6 Directive was Mr Mabuza. It was very surprising because Mr Mabuza's evidence was things like: Ja, Mr Molefe has skills but he
20 was using these skills for other things. I mean, that is not an implication of wrongdoing Number one. Number two. He did not provide any evidence.

CHAIRPERSON: I thought ...[intervenes]

MR MOLEFE: My response, the other day I submitted was very, very brief. And I never heard anything from the

Commission after that. Even when we were – even my cross ...[intervenes]

CHAIRPERSON: On Eskom? Eskom?

MR MOLEFE: On the Eskom evidence.

CHAIRPERSON: H'm.

MR MOLEFE: His evidence was not referred to at all, just like Ms Madonsela's evidence was not referred to in the Eskom...

CHAIRPERSON: H'm, h'm.

10 **ADV MYBURGH SC:** So do I understand your ...[intervenes]

MR MOLEFE: So nobody... I cannot recall that anybody implicated me in wrongdoing.

ADV MYBURGH SC: So do I understand you to be saying, as you sit here now, that you do not feel that you have been implicated at all in any wrongdoing? It is different between guilty of wrongdoing. Is your sense that you have not even been implicated in wrongdoing by ...[intervenes]

MR MOLEFE: I cannot recall. Maybe you can
20 ...[intervenes]

ADV MYBURGH SC: Well, you have received all the 3.3's.

MR MOLEFE: I cannot recall that anyone of them implicated me in wrongdoing. Ja, they talked about me. I mean, I have got a 3.3. relating to Mr Pravin Gordhan who said that Mr Brian Molefe thought that the nuclear deal

could be funded. Of course I did. And there is nothing wrong with that. It could be funded.

He had to be corrected by Mr Pretorius in this room, saying: Mr Gordhan, in fairness, the engineering news has indicated how Mr Molefe says the nuclear deal can be funded, in an interview with Mr Molefe. And Mr Gordhan's response was: Ja, but you must remember that Mr Brian Molefe is highly trained by us and he understands these things and so...

10 And so I do not see why that was wrongdoing. Why I had to get a 3.3. Notice that says that Mr Gordhan says you think the nuclear deal can be funded.

Guess what? A couple of weeks later, maybe months the new Minister of Energy is appointed. This thing that he says is the future of this country is nuclear.

CHAIRPERSON: Well, I just want to say. It must have been in the other venue where Mr Pretorius would have been leading the evidence of ...[intervenes]

MR MOLEFE: No, what I am saying is. No, my – I mean,
20 like, in the ...[intervenes]

CHAIRPERSON: In the Commission.

MR MOLEFE: Ja, in this home, house.

CHAIRPERSON: Ja.

MR MOLEFE: Ja, this hall is not a house.

CHAIRPERSON: [laughs] Ja, ja.

MR MOLEFE: It is the people that... Yes.

CHAIRPERSON: Ja.

ADV MYBURGH SC: Mr Chairperson, I see that it is one o'clock. If this is a convenient time.

CHAIRPERSON: Yes. Okay. I think let us take the lunch break. We will resume at two o'clock. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay, let us continue.

10 **ADV MYBURGH:** Thank you, Chair. Mr Molefe
...[intervenes]

CHAIRPERSON: Maybe you could move your mic towards you a little bit.

ADV MYBURGH: Thank you.

CHAIRPERSON: Okay.

ADV MYBURGH: Before lunch we were dealing with the China Development Bank loan. I had wrapped up on that but I just wanted to ask you this. Did I understand your evidence to be that generally when it came to Mr Singh and
20 Ms Makgatho that you did not take sides or choose one above the other.

MR MOLEFE: Look, I mean, I cannot be categorical in answering that question or be absolute but generally, as a matter of style, I prefer to be collaborative.

ADV MYBURGH: Alright. Could I perhaps in that regard

ask you to turn to page 18, MEN18, so that is EXHIBIT BB10, Ms Makgatho's exhibit. I want to ask you a few questions in that context around the so-called R5 billion proposal which she deals with in her affidavit.

CHAIRPERSON: What is the page number?

ADV MYBURGH: MEN18.

CHAIRPERSON: Oh, okay.

ADV MYBURGH: Mr Chairperson, in EXHIBIT BB10a. Now if I could direct your attention to paragraph 68 and I
10 am not going to deal with the whole paragraph, I am just going to use the first sentence to locate us in time. She says at paragraph 68 that:

“My concerns about Regiments started in 2013, one day in 2013, I cannot remember the exact date but I believe it was in the third quarter of 2013.”

She goes on to say she received a call. Could I ask you then to turn over the page, to page MM19 and for us to pick up at paragraph 71.

CHAIRPERSON: Mr Myburgh, you appear to or sound like
20 you are saying MM each time you ...[intervenes]

ADV MYBURGH: I beg your pardon ...[intervenes]

CHAIRPERSON: MEN.

ADV MYBURGH: MEN, it is important, because of course MM is Mr Mohamed, I do beg your pardon.

CHAIRPERSON: Yes, yes.

ADV MYBURGH: MEN19. Are you there, Mr Molefe?

MR MOLEFE: Yes.

ADV MYBURGH: At paragraph 71 she says:

“The following days...”

That is after that telephonic discussion.

10 “I was a day where I had two important meetings,
Finco and Capic. These were monthly meetings
with Finco scheduled in the morning from 9 to 1 and
Capic in the afternoon from 2 to 5. These two
committees are subcommittees of Exco, are
responsible for finance and capital expenditure
matters. On that day Anoj Singh gave me a funding
proposal from Regiments in hard copy and he
informed me that it was a very important matter that
Brian Molefe needed executed speedily. He said
that I should excuse myself from attending Finco
and Capic and rather spend the day working on this
urgent proposal and draft a memo recommending
the proposal for his signature and approval by Brian
20 Molefe.”

Do you see that?

MR MOLEFE: Yes.

ADV MYBURGH: Do you want to comment on that?

MR MOLEFE: I cannot recall that I had needed an
instruction to be executed urgently.

ADV MYBURGH: Okay. She goes on to say at paragraph 72:

“The Regiments’ proposal was that Regiments will facilitate a five year R5 billion loan facility that was to be funded by Nedbank.”

Do you see that?

MR MOLEFE: Yes.

ADV MYBURGH: Does that job your memory at all?

MR MOLEFE: You say the Regiments will facilitate a five
10 year R5 billion loan? Yes.

ADV MYBURGH: Sorry?

MR MOLEFE: No, what I could not recall was that I had said it must be executed urgently.

ADV MYBURGH: Urgently, alright.

MR MOLEFE: Yes.

ADV MYBURGH: So if we could go then over the page to MEM20, paragraph 73.

20 “The proposed facility was priced much higher than normal facilities or similar loan facilities or domestic bonds. My calculation indicated that Transnet would have to pay an additional 150 million per annum in interest payments over and above what Transnet pays for similar facilities. This translated into potential losses of 750 million over a five year period. I shared my analysis with

Anoj Singh and indicated that I do not recommend the proposal given potential excessive costs in interest payments.”

MR MOLEFE: Yes.

ADV MYBURGH:

“He responded saying that it is an instruction from Brian Molefe and that I should quickly complete the memorandum for approval the same day.”

MR MOLEFE: No, I do not recall that there was such an
10 instruction from myself.

ADV MYBURGH: She says in the next paragraph:

“I felt very uncomfortable with the same day approval request as we have never rushed funding initiatives before and definitely not same day especially given the potential losses of 750 million over a five year period.”

MR MOLEFE: Yes.

ADV MYBURGH: Paragraph 75:

20 “I decided to discuss the matter directly with Brian Molefe and went to his office. I told him that he understood that he expects me to urgently recommend a R5 billion five year loan that Regiments is proposing wherein a 150 million will be unnecessarily incurred per annum accumulating to 750 million over a five year period with no clear

benefits for Transnet. I was irate at that time, that I explicitly told him that should we approve the structure we will go to jail for stealing money as we are the custodians of Transnet's funds."

Do you recall that?

MR MOLEFE: I do but I wish you could jump to paragraph 83 and just leave all the drama and go to paragraph 83.

ADV MYBURGH: Look, Mr Molefe, just can we – I am going to come to paragraph 83 if you would like to.

10 **MR MOLEFE:** Oh, okay.

ADV MYBURGH: But let me first deal with paragraph 75. Do you have any comment on it?

MR MOLEFE: No, no comment.

ADV MYBURGH: But do you remember this meeting where she said if we recommend this, if we do this, we are going to go to jail for stealing money.

MR MOLEFE: Yes, yes, I remember that discussion.

ADV MYBURGH: So you do remember that?

MR MOLEFE: Yes.

20 **ADV MYBURGH:** So had you given the instruction that this funding proposal be completed and signed off in one day?

MR MOLEFE: Which is why I was asking you to go to paragraph 83 and leave all the drama.

ADV MYBURGH: Okay, so let us then go to 76:

“The structure was overpriced, we have a direct relationship with Nedbank, there was no need to use a conduit like Regiments to engage with Nedbank. Brian Molefe agreed with me and said that he will handle the matter. The structure was never implemented.”

With that – would you agree with that?

MR MOLEFE: Yes.

CHAIRPERSON: Well, I just wanted to say, Mr Molefe,
10 sometimes the drama is necessary so that one has a good picture of how the atmosphere was in that room as something was being discussed. So I just wanted to say sometimes one needs it, sometimes not. Okay, alright.

MR MOLEFE: Yes, Chair, the bottom line is that I agree with her.

CHAIRPERSON: Yes.

MR MOLEFE: That the structure was never implemented.

CHAIRPERSON: Ja, okay.

ADV MYBURGH: But, of course, the question arises is
20 how could you ever have required Ms Makgatho to sign off on this in one day, firstly.

MR MOLEFE: I just said I ...[intervenes]

ADV MYBURGH: And sorry, if you will let me finish. And secondly, on this version how possibly could you have sought to endorse this type of proposal?

MR MOLEFE: I have said to you I have no recollection of asking anyone to implement a structure in one day. I am not sure where it comes from.

CHAIRPERSON: To prepare, to prepare, rather than to implement, you mean.

MR MOLEFE: Come again?

CHAIRPERSON: You say you have no recollection of having instructed anyone to prepare the memorandum in one day.

10 **MR MOLEFE:** In one day, yes.

CHAIRPERSON: Ja, ja. And I am just mentioning because you said implement in one day so but I am saying prepare in one day.

MR MOLEFE: Yes, to execute. I mean, this was a request to execute in one day.

CHAIRPERSON: Oh, okay, as opposed to preparing a memorandum in one day?

MR MOLEFE: I do not know, my understanding ...[intervenes]

20 **CHAIRPERSON:** I thought it was the preparation of the memo ...[intervenes]

MR MOLEFE: ...was prepare the memorandum and execute.

CHAIRPERSON: No, I may be mistaken, I thought it was just the preparation of the memorandum.

MR MOLEFE: Perhaps it is myself who is maybe mistaken, Chair, but my recollection is that she came to my office ...[intervenes]

CHAIRPERSON: Well, I see in paragraph 74 of her affidavit that she talks about (the approval) so the approval was to be in the same day, I think.

MR MOLEFE: Yes.

CHAIRPERSON: Ja, okay.

ADV MYBURGH: so you do not have any recollection of
10 that? This was a proposal ...[intervenes]

MR MOLEFE: But I do note that she does say that I said to her that the structure should not be supported.

ADV MYBURGH: Yes but that does not – that is not an answer to what I am probing with you, if you do not mind. This was a Regiments' proposal, is that right?

MR MOLEFE: Was it?

ADV MYBURGH: Ja, she says at 72:

“The Regiments proposal was that Regiments will facilitate a five year R5 billion loan.”

20 **MR MOLEFE:** Yes, yes, yes. Yes, her evidence says it was Regiments' proposal.

ADV MYBURGH: And what would the arrangement fee typically have been?

MR MOLEFE: I do not recall, Chair.

ADV MYBURGH: Yes, I am asking you typically what

would it have been for a loan like this? You dealt with Regiments and McKinsey in other context like we have been through.

MR MOLEFE: No, it depends on what it is.

ADV MYBURGH: Are you able to give us any insight from the position of Group Chief Executive what – well, what sort of transaction arrangement fee would you have expected Regiments to levy for this sort of loan facility?

MR MOLEFE: So the capital amount is at 750 million,
10 maybe marching on 2 basis points.

ADV MYBURGH: So how much would that have translated into?

MR MOLEFE: Two basis points is .002%.

ADV MYBURGH: Yes?

MR MOLEFE: Times 750, 35 million, thereabouts.

ADV MYBURGH: Right. And the other thing I wanted to indicate to you, how could you – but I think you accept that what you dispute is you did not require this to be done in a day but you were effectively looking to implement this loan
20 agreement.

MR MOLEFE: No, no I ...[intervenes]

ADV MYBURGH: Is she wrong? Is she wrong when she says that.

MR MOLEFE: Yes.

ADV MYBURGH: Oh.

MR MOLEFE: Maybe that is the impression that was created.

ADV MYBURGH: Right.

MR MOLEFE: For her, to her. I remember her bursting into my office and say this cannot be done and so on and so forth and I said what is it and then she explained to me and I said do not worry, I will not support that structure.

ADV MYBURGH: But Mr Singh's evidence is it is what you wanted or play her version of what Mr Singh says is that it
10 is something that you wanted.

MR MOLEFE: Well, I say I do not recall asking for anything like that.

CHAIRPERSON: Ja, well I wanted to say I think his position in relation to the proposal being completed in one day or executed in one day was he could not remember whether he gave such an instruction or not, is that correct?

MR MOLEFE: Yes, yes.

CHAIRPERSON: Ja, okay.

MR MOLEFE: Well – yes, yes.

20 **CHAIRPERSON:** Okay.

ADV MYBURGH: Now that I understand, but was it still your proposal? I understand that you did not ...[intervenes]

MR MOLEFE: No, it was not my proposal.

ADV MYBURGH: So insofar as she is saying that Mr

Singh told her that that – I suppose we will have to canvass with Mr Singh.

MR MOLEFE: You have to canvass with Mr Singh.

ADV MYBURGH: This paints you in a very – potentially a bad light, does it not?

MR MOLEFE: No, it does not.

ADV MYBURGH: Does it not?

MR MOLEFE: No. No, it does not.

ADV MYBURGH: So ...[intervenes]

10 **MR MOLEFE:** If I had said to her we must do it.

ADV MYBURGH: I am just wondering why you never put in a statement contesting this.

MR MOLEFE: Because it was never done. Paragraph 83.

ADV MYBURGH: But, Mr Molefe, the fact something is not done does not mean that it does not reflect potentially very poorly on you.

MR MOLEFE: It does not reflect on me because I do not recall such a ...[intervenes]

ADV MYBURGH: But then why did you not at least put in
20 a statement to say that or something?

MR MOLEFE: I deal with the evidence of Ms Makgatho .

ADV MYBURGH: Yes.

MR MOLEFE: In my affidavit, I cannot recall what I say there. Well, in paragraph 69 of my statement I say:

“I deny any suggestions of impropriety on my part.”

ADV MYBURGH: Oaky, so just so that I have this because of course Mr Singh is going to give evidence. Do you, as far as you are concerned, was this Mr Singh's proposal.

MR MOLEFE: I do not know whose proposal it was, Chair, I have no recollection of the origin or where this thing came from. All I remember is Ms Makgatho coming into my office very irate, explaining to me what was about to happen that there is a structure that needs to be done in
10 one day and saying that it is just never done and I said do not worry, I will not support it.

ADV MYBURGH: And she did not tell you who the instruction had come from?

MR MOLEFE: No. She said Mr Singh, she said ...[intervenenes]

ADV MYBURGH: Oh, so you now – it was Mr Singh.

MR MOLEFE: But she said – that is her evidence.

ADV MYBURGH: Her evidence, when you point to that says that Singh says it was your proposal.

20 **MR MOLEFE:** Ja, ja, ja, ja.

ADV MYBURGH: Ja.

MR MOLEFE: It was – the person that she spoke to was Mr Singh. I do not know what is the point of your semantics.

ADV MYBURGH: I beg your pardon?

MR MOLEFE: I say I do not know what is the point of your semantics.

ADV MYBURGH: No, it is not semantics, Mr Molefe, I am trying to get to the bottom ...[intervenes]

MR MOLEFE: Ms Makgatho spoke to Mr Singh about this structure.

ADV MYBURGH: I want to simply ask you and I am going to move to another topic then.

MR MOLEFE: Yes.

10 **ADV MYBURGH:** You understand that it was Mr Singh's proposal. You say it was not your proposal. Did you understand from your interaction with Ms Makgatho that it was Mr Singh's proposal?

MR MOLEFE: Well, let me just say I do not know whose proposal it was then.

ADV MYBURGH: Well, who would have the authority to make such a proposal?

MR MOLEFE: I do not know – to have such a proposal, to make such a proposal? I do not know.

20 **ADV MYBURGH:** To ask Ms Makgatho to approve such a proposal in one day. Who would have been able to give her such an instruction?

MR MOLEFE: Well, Mr Singh would because ...[intervenes]

ADV MYBURGH: Anybody else?

MR MOLEFE: Mr Singh was her superior.

ADV MYBURGH: Would anybody else have been able
...[intervenes]

MR MOLEFE: Not to my knowledge.

ADV MYBURGH: So on the face of it, it seemed – did you
assume that it was Mr Singh or not?

MR MOLEFE: To tell you the truth, I did not apply my
mind to this, it was just a something that was just not
going to happen in one day.

10 **CHAIRPERSON:** Let me just ask this to clarify. We know
that in her affidavit Ms Makgatho says this came – that Mr
Singh came to her with this proposal.

MR MOLEFE: Yes.

CHAIRPERSON: Did you get that from her affidavit or
from when she was testifying or is the position that when
she came to your office she also said that?

MR MOLEFE: No ...[intervenes]

CHAIRPERSON: That it was Mr Singh who came with the
proposal to her but he had said you had given the
20 instruction.

MR MOLEFE: Well, her evidence, paragraph 81, says she
had lost patience with Anoj Singh and Eric Wood. So it
those two people that she had a discussion with.

CHAIRPERSON: No, but I was – what I wanted to clarify
is whether when she spoke to you, Ms Makgatho, in your

office, when she came to your office and she was very irate, whether she did mention that it was Mr Singh who gave her the instruction to complete the – or prepare the proposal.

MR MOLEFE: She said she had been in a discussion with Anoj Singh and Eric Wood.

CHAIRPERSON: Oh, okay.

MR MOLEFE: Yes.

CHAIRPERSON: Okay, alright.

10 **ADV MYBURGH:** Thank you, Chairperson. Alright, I would like to turn then to a different topic. Still under the heading of procuring consulting or advisers.

CHAIRPERSON: Do we keep the bundles that we were working with?

ADV MYBURGH: No, that bundle can be put away. If I could ask you please to retrieve, Chairperson, bundle 5.

CHAIRPERSON: That is the Transnet ...[intervenes]

ADV MYBURGH: EXHIBIT 22, yes.

CHAIRPERSON: And then bundle 5 continues to stay?

20 Okay, alright.

ADV MYBURGH: EXHIBIT 22, yes, thank you.

CHAIRPERSON: Okay.

ADV MYBURGH: Now what I am going to deal with, Mr Molefe, are the – what I refer to as the McKinsey/Regiments consultancy contracts. But perhaps I

could start by asking you to go to page 129 of EXHIBIT 22. Bundle 5, it is your exhibit.

CHAIRPERSON: I think it is better to always refer to the bundle, Mr Myburgh [inaudible – speaking simultaneously]

ADV MYBURGH: Bundle 5, EXHIBIT 22, page 129, Chair.

CHAIRPERSON: 129.

MR MOLEFE: Yes.

ADV MYBURGH: Thank you. I would like just to draw your attention to a chronology set out – this is the first
10 money flows report and we will come back to it later.

MR MOLEFE: Yes.

ADV MYBURGH: But it is paragraphs 44, 45 and 46 on page 129.

MR MOLEFE: Yes.

ADV MYBURGH: You will see that it is recorded that:

“On 31 March 2014 Transnet decides to award the coal line contract to McKinsey and Regiments on a confinement basis without competitive bidding.”

MR MOLEFE: Yes.

20 **ADV MYBURGH:** Then:

“On 1 April 2014 Transnet decides to award the Kumba Iron Ore contract to McKinsey and Regiments on a confinement basis without competitive bidding.”

And at paragraph 46:

“On 3 April 2014 decides to award the manganese contract and the NMPP contract to McKinsey and Regiments on a confinement basis without competitive bidding.”

So that is four contracts in the space of it seems four days, is that right?

MR MOLEFE: Yes.

ADV MYBURGH: And then if you could go to paragraph 49, that is over the page, you will see there they record
10 that:

“From 28 May 2014 to 24 June 2014 McKinsey and Regiments prepare bids for the coal line, Kumba Iron Ore, Manganese and NMPP contracts with Transnet. Regiments indicates that they will be using Albatime and Homix as its supplier development partners. Albatime is Moodley’s company, Homix is a Gupta laundering vehicle which is ultimately paid more than R100 million of the value Regiments receives under these
20 contracts.”

Do you see that?

MR MOLEFE: Yes.

ADV MYBURGH: And whilst we are here, perhaps I could ask you to turn to page 330 in the same bundle and at 330 you would find the bid by McKinsey, also included

Regiments we will see in a moment and this related to the coal line. Do you see that, at 330?

MR MOLEFE: Yes.

ADV MYBURGH: If I could ask you please to go forward to page 345? You will see there that there is a piece on McKinsey and Company and then at the bottom of the piece on Regiments. Do you see that? At 345.

MR MOLEFE: Yes.

ADV MYBURGH: Then over the page to 346 there is a
10 bullet point saying:

“We...”

That being Regiments.

“...will subcontract consultants and services from a company advisory from Homix and Albatime and provide them with skills development.”

Do you see that?

MR MOLEFE: Yes.

ADV MYBURGH: And then ...[intervenes]

MR MOLEFE: What is this document, by the way? Is it
20 their bid.

ADV MYBURGH: Yes.

MR MOLEFE: It is a bid document?

ADV MYBURGH: Yes.

MR MOLEFE: Yes.

ADV MYBURGH: Did you ever see this document?

MR MOLEFE: No, no, I never see ...[intervenes]

ADV MYBURGH: And then if we go to page 350, this is a similar bid dealing with the ...[intervenes]

MR MOLEFE: 350 does not have – 351.

ADV MYBURGH: 350 is the cover sheet, you are right. 351 and 352, you will see it deal with the bid in relation to NMPP. Do you see that?

MR MOLEFE: Yes.

ADV MYBURGH: Contains the same content if you go to
10 361 in relation to McKinsey and then over the page 362 you will see this time the third bullet point under the heading Regiments Capital:

“We will subcontract consultants and services from companies such as company advisory, Homix and Albatime.”

Do you see that?

MR MOLEFE: Yes.

ADV MYBURGH: So the long and the short of the money flow streams work reflects that we have four contracts
20 concluded on a confinement basis in four days and then there were bids submitted by McKinsey and Regiments, they indicated, that Regiments, that they would be appointing Homix and Albatime as their skill development partners and money flows say that ultimately what happened is that Homix, the Gupta laundering vehicle was

ultimately paid more than R100 million from the proceeds received. Do you see that?

MR MOLEFE: Yes.

ADV MYBURGH: Now, as I understand your evidence, Mr Molefe, and I do not want to make you angry after lunch, as I understand your evidence, you say you knew nothing about this.

MR MOLEFE: I never saw bid documents.

ADV MYBURGH: Ja.

10 **MR MOLEFE:** But do you have the contracts?

ADV MYBURGH: We are going to come to that now, I just want to understand, you knew nothing about, as you said repeatedly, the money laundering.

MR MOLEFE: I knew nothing about?

ADV MYBURGH: The money laundering.

MR MOLEFE: Yes.

ADV MYBURGH: Okay. So could I ask you please to go to EXHIBIT BB2.1(d).

MR MOLEFE: Yes.

20 **ADV MYBURGH:** Just give me a second please?

MR MOLEFE: I want to take you to the confinements. So we have four contracts, four confinements, coal, Kumba, Manganese and NMPP. Could I ask you to turn firstly to page – and these are the typed page numbers, PSV1283.

MR MOLEFE: This goes on to 838.

ADV MYBURGH: Ja, 1283. You may have the wrong file, so it is BB2.1(d). I think you may have preceding number.

MR MOLEFE: Little d for Delta?

ADV MYBURGH: D for Deidre, ja.

CHAIRPERSON: Well, let me make sure that I have got the right one because I might not be having the right one. The one I have on the spine, on the spine is written Transnet Exhibit BB2.1(a).

ADV MYBURGH: No.

10 **CHAIRPERSON:** That is not the one?

ADV MYBURGH: No, you need small letter d, so Mr ...[audio cut] ... in regard to Annexures A, B, C and D.

CHAIRPERSON: Okay, alright.

ADV MYBURGH SC: I think put differently it is the last form in file insofar as that might help.

CHAIRPERSON: Ja.

ADV MYBURGH SC: Your registrar.

CHAIRPERSON: What was the page?

ADV MYBURGH SC: PSV1283.

20 **CHAIRPERSON:** Okay, thank you. Yes, I believe I have got it now.

ADV MYBURGH SC: Thank you. Mr Molefe do you have page 1283?

MR MOLEFE: [no audible response]

ADV MYBURGH SC: Alright so this is the ...[intervenes]

CHAIRPERSON: Switch on your mic Mr Molefe.

ADV MYBURGH SC: So, this is the – my shorthand, the coal confinement, is that right?

MR MOLEFE: Yes.

ADV MYBURGH SC: And I just want to take you to page 1289, it's recommended that the Group Executive approve sub (1) the resourcing strategy and remuneration model for the coal line and then (2) confine and award services for support to the internal team, to McKinsey & Company and its BEE consortium partners, you signed off on that, correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: And then – that's just for the sake of the record, because I understand that none of this is an issue unless you tell me differently. Will you please, then turn to the second confinement, PSV1291.

MR MOLEFE: Yes.

ADV MYBURGH SC: And of course, on each of these confinements you set out your grounds for confinement, that we see as we page through, at the end of this is 1297 and you approved, again, confine and award services or support to the internal team to McKinsey & Company and its BEE consortium partners, correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: Proposed by Mr Singh, like the

previous time.

MR MOLEFE: Yes.

ADV MYBURGH SC: Or compiled by Mr Singh, I suppose is the correct word.

MR MOLEFE: Yes.

ADV MYBURGH SC: And approved by you.

MR MOLEFE: Yes.

ADV MYBURGH SC: Then, if I can ask you please to go to page PSV1299, is the Manganese confinement, if I could
10 ask you to fast forward to page PSV1305 and there's you'll see similarly at 40.2, confining and awarding the service to support the internal team to McKinsey & Company and its BEE consortium.

MR MOLEFE: Yes.

ADV MYBURGH SC: That, we see you approved on the 3rd of April 2014, correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: And then the last contract or the last confinement the NMPP, that you find at PSV1307.

20 **MR MOLEFE:** Yes.

ADV MYBURGH SC: If you would then go to the end of that contract or that confinement rather you find that at 1313, it's the same language at paragraph 41.2, confine, and award services for support to the internal team to McKinsey & Company and its BEE consortium partners

approved by you, again, on the 3rd of April 2014, is that right?

MR MOLEFE: Yes.

ADV MYBURGH SC: Now, just by way of contrast could I ask you – and we may come back to this, to go to page 1273, this is a different contract, it's not amongst the four that I'm dealing with now, it's a different confinement rather, I beg your pardon, it deals with capital optimisation and implementation support, do you see that?

10 **MR MOLEFE:** Yes.

ADV MYBURGH SC: PSV1273, are you there?

MR MOLEFE: Yes.

ADV MYBURGH SC: Just by way of contrast if I could ask you to go to page 1280, you'll see that this has various levels of recommendation. There you have Mr Mahomedy, Mr Pita, Mr Singh, Mr Molefe and also – then recommended separately, it seems by Mr Volmink, do you see there?

MR MOLEFE: Yes.

ADV MYBURGH SC: That the different type of
20 confinement or a different means, correct?

MR MOLEFE: What do you mean it's a different type of confinement?

ADV MYBURGH SC: What I'm saying to you is, here the various levels of authority and recommendation whereas in respect of the four confinements that I've taken you to,

there we see compiled by Mr Singh and approved by you.

MR MOLEFE: Yes, but it's not a different type of confinement it's just...[intervenes].

ADV MYBURGH SC: Well, it's a different – and my language is wrong, you're right it's a different approval mechanism?

MR MOLEFE: Yes.

ADV MYBURGH SC: Okay, now, Mr Volmink gave evidence about these four confinements that you approved,
10 could I ask you please to go to Exhibit BB2.1 and you can, perhaps leave that file open. I want to take you to a different Exhibit, Exhibit BB2.1 but little (a), Mr Molefe?

MR MOLEFE: Yes.

ADV MYBURGH SC: 2.1 (a).

CHAIRPERSON: Will somebody please help the witness, so he doesn't have to stand and look for a file?

ADV MYBURGH SC: Could I ask you please to turn to page PSV57.

MR MOLEFE: Yes.

20 **ADV MYBURGH SC:** Mr Volmink says, and you would have seen this, in the interest of time I'm not going to take you through all of it, he deals with grounds for confinement, paragraphs 125 through to paragraph 131 at page PSV60 and his evidence was that there were no proper grounds for confinement. If I could take you to 126

at page PSV58 he says,

“The confinement memos rely mainly on two grounds, urgency and that services are highly specialised and largely identical”,

And then he deals with that and he provides a criticism.

MR MOLEFE: Yes.

ADV MYBURGH SC: Now, you’ve seen this Mr Molefe, what is your response to Mr Volmink?

10 **CHAIRPERSON:** It might be better, Mr Myburgh if you just summarised or tell him the gist so that the public can follow, also, when he gives an answer.

ADV MYBURGH SC: So, what Mr Volmink says at 127,

20 “Where urgency was evoked as a ground for confinement the case for urgency was based on revenue related risks and you need to deliver on the MDS. The memos further stated that if the mitigation plans were not put in place, the corporate plan, capital plan and funding pre-requisites would not be met which would place the entire MDS at risk, however, as already indicated in part one above, the PPM makes clear that confinements will only be considered where a genuine, unforeseeable urgency has arisen”,

And, ultimately, the point that he makes is it wasn’t

– the submissions you see in the middle of the next paragraph over the page, the submissions do not explain why revenue risk was unforeseeable, do you want to comment on that?

MR MOLEFE: So, the issue is urgency or the advisability of revenue risk.

ADV MYBURGH SC: “Must be genuine unforeseeable urgency”.

MR MOLEFE: Yes.

10 **ADV MYBURGH SC:** He says, the submissions do not explain why the risk was unforeseeable. Mr Molefe you’ve looked at all of this before.

MR MOLEFE: To be quite honest here I am thoroughly confused. The names that you were talking about earlier but, by the way, I think it’s in [d].

ADV MYBURGH SC: Those were in little d, I think I asked you keep that file open if you wanted to.

MR MOLEFE: Yes, but the first one, what page was it, 1273?

20 **ADV MYBURGH SC:** Ja the first one is, I think at 1283. Mr Chairman, if I may just place one thing on record?

CHAIRPERSON: Yes.

MR MOLEFE: 1283?

CHAIRPERSON: 1283.

ADV MYBURGH SC: 1283, Mr Volmink here, deals with

these four contracts and he motivates why the confinement of the four were inappropriate. We must, however, just bring to your attention, you will recall the evidence of Deirdre Strydom, her evidence was that she considered the confinement of the Manganese contract to be appropriate, so I just don't want to be taken for misleading the witness, I need to make that qualification.

CHAIRPERSON: Ja, okay.

MR MOLEFE: What's the qualification?

10 **ADV MYBURGH SC:** In respect of one of these contracts, another witness, Deirdre Strydom, gave evidence, the Manganese contract that she considered that the confinement was appropriate.

MR MOLEFE: Ja.

ADV MYBURGH SC: Mr Molefe perhaps...[intervenes].

MR MOLEFE: If you look at the first one, 1283, and you go to page 185 and paragraph 26 dealing with the grounds for confinement it says,

20 "Appended below for ease of reference...[intervenes].

ADV MYBURGH SC: Sorry, what paragraph?

CHAIRPERSON: 26.

MR MOLEFE: 26.

CHAIRPERSON: Page 1285.

ADV MYBURGH SC: Yes.

MR MOLEFE: “Appended below for ease of reference is.

an extract from the current procurement procedures manual which sets out the grounds for confinement”,

And it has ground A, B, C and D and then over the page it says,

“We are of the view that this matter complies with grounds A and D as set out below and specific emphasis is placed on ground A and D due to the potential business risks associated with approaching the market on an open tender process as well as the credentials listed above,

And then in paragraph 28 there’s a table there that sets out confinement considerations. So, I’m not sure which of these in these memoranda that – or even in this memorandum that Mr Volmink specifically found offensive.

ADV MYBURGH SC: So, do I understand you to be saying, that different to Mr Volmink that you consider the confinements to have been properly motivated?

MR MOLEFE: Yes, because I can only go with the memo that was presented to me and not Mr Volmink’s subsequent interpretation.

ADV MYBURGH SC: So, it was a memo presented to you?

MR MOLEFE: Yes, the memo presented to me has grounds for confinement, paragraph 25 to 29 so I wonder if

there is any of these paragraphs that Mr Volmink considered offensive.

ADV MYBURGH SC: Well, I think what he's saying is, he doesn't believe that the requirements for confinement were met. As I understand you to be saying, well, if you look at the memo what was presented to me was a memo where, on the face of it, those requirements had been met.

MR MOLEFE: Yes, because it sets out what are the grounds for confinement, it actually quotes verbatim the
10 procurement procedure manual and then it says, which of the grounds in the procurement procedure manual are applicable.

ADV MYBURGH SC: Alright.

MR MOLEFE: Which is A and D and then it goes on to take the grounds for confinement as per the procurement procedure manual and then gives in tabular form the confinement considerations. I mean I can go through everything and read it as it is in the memo.

ADV MYBURGH SC: Can I take you please – are you –
20 you have Mr Volmink's affidavit still open there?

MR MOLEFE: Yes.

ADV MYBURGH SC: So, this is Exhibit BB2.1 (a) would you go to page PSV63.

MR MOLEFE: 63?

ADV MYBURGH SC: Ja.

MR MOLEFE: Yes.

ADV MYBURGH SC: You're in the wrong file Mr Molefe, 2.1 (a) is it not that one that you have in front of you?

MR MOLEFE: Yes.

ADV MYBURGH SC: Can I direct your attention to paragraph 143 under the heading, "confidential confinements".

MR MOLEFE: 143?

ADV MYBURGH SC: 143 yes at page PSV63, are you
10 there?

MR MOLEFE: Yes.

ADV MYBURGH SC: It says,

20 "Because of the potential for abuse of the confinement process the PPM introduced multiple levels of review and control to service safeguards. First the end-user department and the operating divisions, Chief Procurement Officer had to submit the request for confinement to the OD's divisional acquisition council and the OD's CEO for prior written support. If a request for confinement was poorly motivated the submission would be sent back for re-motivation. The submission would be sent to Group for sign-off only if it was supported at OD level, it goes on to say at 144, at Group level, the submission had to be reviewed by the Group Chief

Supply Chain Officer, GCSCO and the Group Finance Officer, CFO. The practice at Group was that confinements were first sent to the SC and governance for review before they were signed-off by the GCSCO and the GCFO”.

MR MOLEFE: Yes.

ADV MYBURGH SC: Over the page PSV64, paragraph 145,

10 “If the GCSCO and the GCFO supported the confinement it would be submitted to GCE, the BABC or the Board itself for final approval, depending on the value of the transaction. The process for the approval of confinements is more fully described etcetera. At paragraph 146, these levels of review were introduced as safeguards to ensure that confinement submissions were subjected to a robust review before they were submitted to the GCE or higher for sign-off. These safeguards serve to protect the integrity of the

20 confinement process and provided assurance to the ultimate approval authority that the confinement memo was properly considered before being sent to him or her for sign-off, that being the GCE”.

MR MOLEFE: Yes.

ADV MYBURGH SC: 147,

“However, for reasons of confidentiality some of the McKinsey confinements such as Manganese, NMPP and iron ore transaction did not follow the normal review and sign-off process. This meant that the confinements were taken to the GCE with little or no input from reviewing bodies”,

You see that?

MR MOLEFE: Yes.

ADV MYBURGH SC: Now, we’ve seen, in relation to those
10 contracts they were compiled by Mr Singh and you signed them.

MR MOLEFE: Please go on to read 148?

ADV MYBURGH SC: I beg your pardon?

MR MOLEFE: Please go on to read 148?

ADV MYBURGH SC: “The 2013 PPM states that, in
instances where a confinement is confidential the GCE may approve such confinement without the confinement requests being routed by any other authority. This was base on a provision in the 2013
20 DLA framework that allowed for confidential confinements. There are a number of concerns with the manner in which confidentiality was invoked in the McKinsey confinements. First, as already stated, multiple layers of review were bypassed as a result of invoking the confidentiality provisions”.

MR MOLEFE: Yes, no, not my point was – or it could be done in terms of the 2013 PPM but also if you look at the footnote, on page 64, Mr Volmink says,

“The 2013 version of the PPM applied to the McKinsey confinement”.

ADV MYBURGH SC: Yes, but perhaps I could ask you if you wouldn’t allow me to also go to another paragraph in the affidavit.

MR MOLEFE: Yes.

10 **ADV MYBURGH SC:** So, firstly, it says there, a number of concerns and he talks about the multiple layers, I understand your answer to that then he says,

“Secondly the confinement memos contained very little, if anything that explains why the submissions were confidential”.

MR MOLEFE: Yes.

ADV MYBURGH SC: Why were these contracts – why were they confidential because there could be a bypassing of the process, potentially but then of course it would need
20 to be confidential. What was confidential about these four contracts?

MR MOLEFE: If you go to the memo, itself, in the memo it says that the ...[intervenes].

ADV MYBURGH SC: So, what page are we on now?

MR MOLEFE: 1286.

ADV MYBURGH SC: 1286, yes.

MR MOLEFE: Ja, it says,

“We are of the view that ...[intervenes]”.

ADV MYBURGH SC: Sorry?

MR MOLEFE: 1286, paragraph 27.

ADV MYBURGH SC: Yes.

MR MOLEFE: “We are of the view that this matter.

complies with grounds A and D as set out below and

the request for confinement is therefore fully

10 supported”.

ADV MYBURGH SC: Yes.

MR MOLEFE: Now, E in page 1285 says,

“When goods or services being procured are highly specialised and largely identical with those previously executed by that supplier and it is not in the interest of the public or the organisation to solicit other tender offers as it would result in wasted money and/or time for transfer. When this particular ground is intended to be used as a
20 ground for confinement it is important to note that all pre-requisites must be satisfied. That is, the goods or services must be highly specialised, almost identical”.

And then, in paragraph 28 at the bottom in the table,

“Any new service provider would have to develop its own methodologies and tools as well as obtain operational experience within a coal ...[indistinct] environment. Due to the specialised nature of the work, the new service provider will be required to understand the intricacies of Transnet’s operations, capital programme and overall NDS”.

ADV MYBURGH SC: Yes, so what you’ve explained ...[intervenes].

10 **MR MOLEFE:** Those are the reasons I could advance.

ADV MYBURGH SC: Yes, but those reasons – and that’s Mr Volmink’s point, those are reasons A and D why you go the confinement route, they don’t deal at all with confidential confinements.

MR MOLEFE: But it’s supplied in there,

“The specialised nature of the work, the new service provider will be required to understand the intricacies of Transnet’s operations, capital programme and overall...[intervenes]”.

20 **ADV MYBURGH SC:** Yes, but why does that make it a – the need for a confidential confinement?

MR MOLEFE: No, the question is, did I understand that, at the time.

ADV MYBURGH SC: Did you?

MR MOLEFE: Of understanding Mr Myburgh, please be

patient with me.

ADV MYBURGH SC: Sure, I'm asking you, did you understand it at the time.

MR MOLEFE: No, I don't think that was necessary because I was explaining.

CHAIRPERSON: Sorry, what do you think was not necessary, understanding the need for confidentiality or is it something else you're talking about?

MR MOLEFE: No, Mr Myburgh interjected as I was
10 answering and said, did you.

CHAIRPERSON: Oh, okay.

MR MOLEFE: And I felt that, that was not necessary.

CHAIRPERSON: Okay.

ADV MYBURGH SC: Mr Molefe if I might just say that I interjected asking exactly the same question as the Chairperson, I simply didn't understand what you said. You're more than at liberty to answer the question.

MR MOLEFE: My understanding is that in terms of this memo that was put forward to me the reasons – the
20 grounds for the confinement were stated and the grounds for the confinement referred specifically to the procedure procurement manual, paragraph 16.1.2 and that they were elaborated on and I saw nothing untoward at the time of signing. So, when Mr Volmink, exposed afterwards, says that no it did not cover confidentiality sufficiently, well I

must say that that was not a concern that I had at the time. The fact of the matter is that the grounds for confinement are in paragraphs 25, 28 and at the time of signing this memorandum I had no issues with the grounds that were advanced, in fact I felt they were sufficiently articulated.

ADV MYBURGH SC: But you approved this by yourself, these four contracts, you did it yourself.

MR MOLEFE: I approve everything by myself.

ADV MYBURGH SC: Yes, but the point is ...[intervenes].

10 **MR MOLEFE:** After recommendation.

ADV MYBURGH SC: Well, that's really what I'm getting at.

MR MOLEFE: Ja.

ADV MYBURGH SC: I mean, we've seen other examples...[intervenes].

MR MOLEFE: No, the people that recommend...[intervenes].

ADV MYBURGH SC: Mr Molefe wouldn't you let me speak.

20 **CHAIRPERSON:** Mr Molefe, let him finish, Mr Myburgh.

MR MOLEFE: No, but Chair when he does the same you must also tell him to let me finish.

CHAIRPERSON: No, I've done so before, even yesterday so I protect each one of you from each other.

MR MOLEFE: Yes, I think it will be better if we address

the Chair.

ADV MYBURGH SC: Well, that's it – you can do what you want but the point is, do you accept that...[intervenes].

CHAIRPERSON: You can't divert everything to me.

ADV MYBURGH SC: You're probably much worse off if the Chair was asking the questions, so let me rather ask them.

CHAIRPERSON: [Laughter].

ADV MYBURGH SC: And I mean, in some respects you
10 could help us understand this. In relation to these four contracts, and you must tell me if my understanding is wrong, from what I've seen, you approved them yourself, I mean Mr Singh, it wasn't a recommendation by him, he compiled it, he gave it to you, and you approved it.

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright, we've seen one other contract – I beg your pardon, confinement that went through multiple layers of approval, also of a confinement, correct?

20 **MR MOLEFE:** Yes.

ADV MYBURGH SC: Now, as I understand what Mr Volmink is saying, is that, really you don't have the power as the Group Chief Executive to, yourself, approve any confinement. The only time that you might be able to get close to doing that is in the case of a confidential

confinement but even then, he explains that it needs to be reviewed by other parties. I just want you to assist us with understanding how did you come to – you know we talked about these one-man acquisition councils, how did you come, in the absence of confidential to approving these contracts.

MR MOLEFE: No I do not agree with you.

ADV MYBURGH SC: Okay.

MR MOLEFE: That there was an absence of confidentiality.

10 **ADV MYBURGH SC**: Alright so then I need to – and before I move on Mr Forming ...

CHAIRPERSON: Well maybe Mr Myburgh before you continue let me just go back a little bit I wanted to ask something about the fact that Mr Singh presented himself in that memo as the compiler of the memo.

MR MOLEFE: Yes.

CHAIRPERSON: Whereas we have seen other memos where he was recommended.

MR MOLEFE: Yes.

20 **CHAIRPERSON**: So the question I wanted to ask you is whether – where a memo that lands on your desk for you to provide approval for something has somebody who has compiled the memo but there is no indication that that person recommends that you should approve.

ADV MYBURGH SC: Yes.

CHAIRPERSON: Whether the compiler is taken as somebody who is recommending or not necessarily he is just a compiler and it means that you have approved if you do approve you have approved without there being anybody recommending approval.

MR MOLEFE: Yes. Chairperson if we go to Mr Volmink's – Volmink's affidavit.

CHAIRPERSON: You – you swallowed the last word.

MR MOLEFE: If you go to Mr Volmink's affidavit.

10 **CHAIRPERSON:** Oh yeah. You have it or you are looking for it?

MR MOLEFE: It is on...

CHAIRPERSON: Do you want Mr ...

MR MOLEFE: Exhibit BB2.1(a).

CHAIRPERSON: Did you say D or E at the end?

MR MOLEFE: A – A for apple.

CHAIRPERSON: A – oh okay. Okay just continue.

MR MOLEFE: Which page was that Mr ...

CHAIRPERSON: Oh the one with compiler? The memo?

20 **MR MOLEFE:** No Mr Volmink's affidavit.

CHAIRPERSON: Oh Mr Volmink's affidavit. Mr Myburgh do you want to help Mr Molefe.

ADV MYBURGH SC: Yes you will find that – we were at page 64 last time of Exhibit BB2.1(a).

MR MOLEFE: He has visit before.

ADV MYBURGH SC: Sorry PS ja PSV64 that is where we had stopped or in fact I think we had stopped at PSV65.

CHAIRPERSON: Yes I am at 65.

MR MOLEFE: 65. Now Chairperson first look at the footnote 75 at the bottom of the page.

CHAIRPERSON: Footnote at 65 yes.

MR MOLEFE: 64- ESB006 – it says there 2013 version of the PPM applied to the McKinsey confinement.

CHAIRPERSON: At page 64 footnote 75 you say?

10 **MR MOLEFE:** Yes.

CHAIRPERSON: The 2013 version of the PPM applied to the McKinsey confinements.

MR MOLEFE: Ja.

CHAIRPERSON: Huh-uh.

MR MOLEFE: And in paragraph 148 it says that 2013 PPM stated that in instances where or confinement is confidential a GCE may approve such confinement without the confinement request being rooted via any other authority.

CHAIRPERSON: Yes.

20 **MR MOLEFE:** Yes.

CHAIRPERSON: Yes.

MR MOLEFE: So it was possible to do what you were doing.

CHAIRPERSON: Yes, yes.

MR MOLEFE: And – so the question becomes did we consider it – did we consider these confinements to be

confidential?

CHAIRPERSON: Ja.

MR MOLEFE: And then I fail to...

CHAIRPERSON: Okay before you go far I know I think you probably have my question in mind and Mr Myburgh's question in mind. What you have just said I think I understand within the context of Mr Myburgh's question but for me the only question I was asking is whether compiler was taken to be also recommending or not necessarily?

10 **MR MOLEFE:** Well these things...

ADV MYBURGH SC: Whereas Mr Myburgh's question related to whether you could approve something without it being recommended by somebody else?

MR MOLEFE: Ja but it says without the confinement request being rooted via any other authority.

CHAIRPERSON: No, no I understand that insofar as you mean. You did not need to have it recommended by somebody?

MR MOLEFE: Yes.

20 **CHAIRPERSON:** I understand that part.

MR MOLEFE: Yes.

CHAIRPERSON: Is that supposed to mean compiler means just compiler and not necessarily that (inaudible).

MR MOLEFE: Ja it could have been a compiler, it could have recommended.

CHAIRPERSON: Yes.

MR MOLEFE: Or he could have compiled.

CHAIRPERSON: Yes okay.

MR MOLEFE: Yes. Ja.

CHAIRPERSON: Okay you could approve without so to speak a recommendation?

MR MOLEFE: Yes.

CHAIRPERSON: Ja okay.

MR MOLEFE: Although it is a recommendation – oh ja okay
10 let us just say even if it is not a recommendation.

CHAIRPERSON: Okay alright.

MR MOLEFE: So now the question becomes do these qualify from the point of confidentiality to be treated in the manner that the 2013 EPM

CHAIRPERSON: Prescribed.

MR MOLEFE: Envisaged – prescribed and what I said is – alright okay fine. Now where are those things Mr Myburgh – oh here. If you go to the memo the – the memo on PSB1286.

20 **CHAIRPERSON:** 1286?

MR MOLEFE: Yes PSB1286. So if you look at 1286 in that table – PSB1286.

CHAIRPERSON: Is that BB2.1.d – not on the spine? Is that Exhibit...

MR MOLEFE: It is PSB1286.

CHAIRPERSON: On the spine what is written?

MR MOLEFE: BB2.1.d for Delta.

CHAIRPERSON: D for Delta. Okay. And then page 1286.

MR MOLEFE: 1286.

CHAIRPERSON: Okay I have got it. Yes.

MR MOLEFE: Now – so now we are trying to determine whether these things can be considered confidential. So the second – the second block D – Goods and services being procured is highly specialised and largely identical. Now the
10 – on the right it deals with the speci – this specific case. The left if what the procurement manual requires. So there are bullet points there amongst them.

“The skill requires specialised management skill in managing operations within a coal rail environment. McKinsey has a proprietary coal demand and supply models as well as key operating philosophies that Transnet can use. The tool is available from only one supplier that is McKinsey. We have satisfied
20 ourselves that there is no new entrant who can perform the work through the following manner. These philosophies and tools have been implemented and delivered. Increases in volume tempo at desired levels in the past. McKinsey has provided this type of

service in the past to Transnet Freight Rail.

Any new service provider would have to develop its own methodologies and tools as well as obtain operational experience within a coal rail environment. Due to the specialised nature of the work a new service provider will be required to understand the intricacies of Transnet's operations capital programs and overall market demand structures."

10

So what it is saying there is that McKinsey has done this work they have a proprietary ownership of the models that they have used. A new entrant would either have to take Mc – use McKinsey's models or develop their own. And then they would have to understand Transnet's business operating model, capital program and overall MPA.

I think that this satisfied the confidentiality.

CHAIRPERSON: Well I am sure Mr Myburgh is going to ask you how.

20 **ADV MYBURGH SC:** Chair I am just going to ask one question really and that is – we have got a lot else to deal with. But Mr Volmink deals with that and he says in effect you make out a good case for why there should have been a confinement but you make out no case for why it had to be confidential. Because it is only confidential confinements

that you are allowed to – as you point out approve without rooting to any other authority. But I am not sure there is anything else that needs to be said here. Do you want to add anything more to your answer?

CHAIRPERSON: Confidential of course means ...

MR MOLEFE: Secret.

CHAIRPERSON: Only a few – ja only a few people should know about it.

MR MOLEFE: Oh about the memo?

10 **CHAIRPERSON:** Well if you – I take it that if it is said that certain confinements must be confidential the requirement of confidentiality is there to protect certain interests that is what I am thinking.

MR MOLEFE: Yes.

CHAIRPERSON: Ja.

MR MOLEFE: In this instance it was the proprietary coal demand and supply models. I agree they were not in the memo but I understood – my understanding of confidentiality was that we are dealing with confidential Transnet
20 information and in this instance the confidential information of McKinsey of the proprietary models of McKinsey. So that is where in my understanding confidentially – confidentiality kicked in in this instance. That was my understanding it may have been flawed but that is how I understood it at the time.

CHAIRPERSON: Hm okay. Mr Myburgh.

ADV MYBURGH SC: Yes I just wanted to perhaps to put to you I mean is a good example not of a confidential confinement really where you did not want anyone to know within your organisation you were doing something that needed to be secretive because if people knew about it that it would undermine them. I mean one can think of many examples I suppose but is that not really what – when you would invoke...

MR MOLEFE: But the PPM said confidentiality.

10 **ADV MYBURGH SC:** Yes.

MR MOLEFE: It did not say within the organisation.

ADV MYBURGH SC: Sure.

MR MOLEFE: Ja.

ADV MYBURGH SC: But I am just trying to engage here would you agree with me – I am trying to work out when would you invoke a confidential confinement presume it is because you do not want other people to know. You do not want it to go around the organisation because that could itself then breach the confidentiality.

20 **MR MOLEFE:** No in this understanding I am saying my interpretation of confidentiality means the confidentiality of the tools and the information that a supplier would need to have. So it is not confidentiality within the organisation but confidentiality in – as I understood it here confidentiality in as far as if other suppliers came in.

ADV MYBURGH SC: Alright – yes. So I do not think I can it much further just to repeat that Mr Volmink is saying in response to what you say is that you have made out a good case as to why there should be a confinement on grounds a and b but not one as to why you should invoke the extraordinary confidentiality confinement provision.

MR MOLEFE: He is entitled to his view.

ADV MYBURGH SC: I beg your pardon.

MR MOLEFE: He is entitled to his view.

10 **ADV MYBURGH SC:** Sure and it seems that you at loggerheads there

MR MOLEFE: Sorry.

ADV MYBURGH SC: You have different views when it comes to that.

MR MOLEFE: Ja it would appear that we have different views.

ADV MYBURGH SC: Oh okay. Now let me move on – I have then dealt really with so far a whole series of contracts, consultancy contracts, advisory contracts involving
20 Regiments.

CHAIRPERSON: I do not want to disturb you. I just mention this and Mr Molefe you can say something if you wish to but you do not have to. It may well be that that requirement of confinement was put in there for Transnet's benefit.

MR MOLEFE: Yes.

CHAIRPERSON: And not for outsiders because it is the confinement that must be confidential. So you want to ...

MR MOLEFE: Yes the reason for the confinement Chair is that where you cannot source the goods or services anywhere else then you can confine.

CHAIRPERSON: Hm.

MR MOLEFE: Let us take ...

CHAIRPERSON: That is just the confinement.

MR MOLEFE: Ja that is just the confinement.

10 **CHAIRPERSON:** Ja I understand that part ja.

MR MOLEFE: Ja so let us say that – let us say that the – the – what the required is a Mercedes Benz C Class you will not get it from BMW. Now part of the reason you cannot get it from BMW is that Mercedes Benz has proprietary assets – proprietary knowledge of the Mercedes Benz C Class and that is secret. That is confidential to them and therefore for reasons of confidentiality you cannot go out and say I would like for example Kentucky Fried Chicken with its secret recipe from everybody.

20 **CHAIRPERSON:** Well you see I think when you talk about it in that context.

MR MOLEFE: Yes.

CHAIRPERSON: Then the requirement for confidentiality is not necessarily for the benefit of Transnet but it is for the benefit of the person who has got some proprietary rights.

MR MOLEFE: Yes.

CHAIRPERSON: Whereas the proposition I was putting to you earlier was that it may well be that the requirement in Transnet's policy that there should be certain confinements that are confidential was put in there for the benefit of Transnet not for the benefit of outsiders.

MR MOLEFE: Well the PPM did not go that far.

CHAIRPERSON: Ja. Okay alright. Mr Myburgh.

ADV MYBURGH SC: Thank you. Could I then take you back
10 please to Bundle 5 Exhibit BB22 your exhibit.

MR MOLEFE: So we can put away this one?

ADV MYBURGH SC: I think you can keep those – just keep them for the moment.

MR MOLEFE: Bundle 5.

CHAIRPERSON: Did you mention the page already or not yet?

ADV MYBURGH SC: 130 Chairperson – 130.

CHAIRPERSON: Thank you.

MR MOLEFE: Yes.

20 **ADV MYBURGH SC:** Let me direct your attention to two other contracts that you were involved in. At paragraph 51 on 9 September 2014 deadline for submission of the SWAT 2 bid of McKinsey and Regiments. This is another contract that has been awarded for McKinsey and Regiments on a confinement basis without competitive bidding and which is

later discovered to have been used by Regiments to launder Transnet's payments through Homix and other Gupta laundry vehicles designated by Essa. You recall that you were one of the signatories to the SWAT 2 confinement?

MR MOLEFE: Ja I may have been do you have the agreement.

ADV MYBURGH SC: We will come to that now. And then the next paragraph 52 we see on the 24th of March 2015 there is a – was an entry in Mr Sagar's diary for a meeting
10 with Mr Essa and Wood – you can leave that out for present purposes. On the same day 25 March Brian Molefe issues his recommendation for the GFB contract to be awarded to McKinsey and Regiments on a confinement basis without any competitive bidding. This is another contract which is discovered to have been used by Regiments to launder Transnet payments through Gupta laundering company. You see that?

MR MOLEFE: Yes.

ADV MYBURGH SC: Perhaps I could just take you to those
20 two contracts quickly. We are back in Mr Volmink's bundle Exhibit BB2.1(d).

MR MOLEFE: Yes.

ADV MYBURGH SC: And this confinement appears at page 1273 or one of them does. 1273 and it is signed at 1280.

MR MOLEFE: Yes.

ADV MYBURGH SC: And that goes through various layers correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: And then the GFB contract I think we find at page 1314 or 1315. PSB 1315. Is that right?

MR MOLEFE: 1315?

ADV MYBURGH SC: Yes and it is signed I think through multiple layers at 1322.

MR MOLEFE: Yes.

10 **ADV MYBURGH SC:** Mr Gama, Mr Singh, Mr Molefe this time. You see that?

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright so just to summarise Mr Molefe what we have been dealing with for the better part I suppose of the day is the – the 1064 transaction advisors contract that we started out with yesterday.

MR MOLEFE: Yes.

ADV MYBURGH SC: We have dealt with increases in the scope of that contract. Increases in payments to Regiments.
20 We have dealt with the allied China Development Bank loan and payments to Regiments. We have dealt with the four confinement contracts or confinements that were entered into in four days. And we have also dealt with these remaining two contracts SWAT 2 and GBF.

MR MOLEFE: Yes.

ADV MYBURGH SC: That is what we have been dealing with for the better part really of a day.

MR MOLEFE: Yes.

ADV MYBURGH SC: And as you know certainly according to the money flows team.

MR MOLEFE: Yes.

ADV MYBURGH SC: All of the or half of the remuneration in effect that was earned by Regiments in respect of those contracts working alongside McKinsey and sometimes by
10 themselves went to Mr Essa and there was then money laundering in favour of the Gupta's. I just wanted to put that to you so that you understand the extent of the money laundering. It ranges through all of those contracts. You appreciate that I know by now?

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright. I want then to turn to the next topic and that is the procurement...

MR MOLEFE: Before we close that if I may Chair? I think the discussion of these contracts clearly show that the
20 contracts were awarded in terms of Transnet policy and that I was involved in the award of the contracts and that there were clear recommendations for the award of the contracts and the grounds for the award of the contracts was clearly set out in the memorandums and that on the basis of what was presented in the memoranda for the award of the

contracts they were awarded. However what was not – was not shown was that I knew that part of the payments would go to Mr Essa or that there would be money laundering involved. That has not been shown. Or that I knew or intended that the contracts should be used for money laundering by Mr Essa. It actually starts with the fact that I do not even know Mr Essa. But – but I do not think it was shown in this exercises that I knew or intended that the – and so just to close the comment I also deny any suggestion
10 that I knew or intended that these contracts would be used for money laundering or any other purpose other than what is contained in the memoranda that I have signed.

ADV MYBURGH SC: Thank you. So Mr Molefe I want to now move from the procurement of consultants and advisors to the procurement of – of locomotives and I am going to ask you some questions I am sure as you can imagine in relation to the 95 locomotives, the 100 locomotives.

MR MOLEFE: Can I just...

CHAIRPERSON: Which bundle should we go to?

20 **ADV MYBURGH SC:** It is not one discreet bundle.

CHAIRPERSON: Oh okay.

ADV MYBURGH SC: Chairperson.

CHAIRPERSON: Okay. Okay do (inaudible).

ADV MYBURGH SC: And you also want to undertake a bit of housekeeping for that ...

CHAIRPERSON: If you – you let us know once we do need to go to any particular bundle.

ADV MYBURGH SC: I am going to start by going to Exhibit BB3(a). That is Mr Mahomed's bundle.

CHAIRPERSON: BB22 can go for now? I take it can go – can be taken away for now?

ADV MYBURGH SC: Yes Chairperson.

CHAIRPERSON: Ja. Okay. Yes.

ADV MYBURGH SC: Now Mr Molefe I am sure you will
10 appreciate that I am going to have to try and focus in relation to the locomotives onto the core issues otherwise we could literally be here forever. So you will bear with me. I am not – I am not trying to be – to trick you or not tell the whole story I deliberately want to try and focus on what I consider to be the key issues. And in relation to the 95 locomotives I want to start off by just dealing with one discreet issue if I may.

And if I could ask you please to turn to Exhibit BB3(a) that is Mr Mahomed's exhibit and ask you to turn to
20 page NSM203. You will see at pages 203, 204 and 205 there the effect of series of emails which I just want to ask you one or two questions about it if I may?

MR MOLEFE: Yes.

ADV MYBURGH SC: The – we know that the RFP in relation to the 95 locomotives was issued on the 6th of December

2011.

MR MOLEFE: 6th of December.

ADV MYBURGH SC: The RFP was issued.

MR MOLEFE: Yes.

ADV MYBURGH SC: On 6 December 2011.

MR MOLEFE: Yes.

ADV MYBURGH SC: Is that correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: Now if you have a look at the email at
10 the foot of page 203 it is from Mr Gary Peter to someone at
CRS and it says:

“Dear Mr Wang Pan my CEO Mr Brian Molefe
advised me that you met in early December.
He also stated that CSR showed interest in
participating in our next tender for the 95
electric locomotives. I wish to advise you
that this tender has been released and is
available.”

So when in December did you meet with this gentleman?

20 **MR MOLEFE:** My – my recollection was that it was before
the 6th.

CHAIRPERSON: It was before?

MR MOLEFE: The 6th – before the tender was issued.

CHAIRPERSON: Oh okay.

MR MOLEFE: Yes. But what actually happened the meeting

was organised by the I think it was the Chinese Embassy and they said that there is a company that manufactures locomotives in China and they have never done any business with Transnet and that they would like to come to South Africa to have a meeting with Transnet to understand the Transnet's business. So they came quite a big delegation and they – they made a presentation about their company and they manufacture locomotives and who their clients are and so on and so forth. At the beginning of course we made
10 speeches about how the people of China and the people of South Africa have always worked together and the brothers and so on so it was a very nice diplomatic meeting. And at the end of the meeting I said well if you are interested we will soon be having a tender for the acquisition of locomotives. You are more than welcome to bid. And I think that either Gary Peter was in that meeting or I must have said to him afterwards this company, maybe I did not even give him a profile - is interested in bidding for the 95 locomotives. Please contact them because they did say
20 that they are interested.

ADV MYBURGH SC: So do I understand that at the time that you met with CSR you knew that you were on the point of issuing an RFP?

MR MOLEFE: Yes. Yes. And I mean, that was in the MBS.

ADV MYBURGH SC: So it must have been a few days before, on your version?

MR MOLEFE: I think it was a few days before because Gary Pita says here in early December.

ADV MYBURGH SC: Yes.

MR MOLEFE: So it was maybe a few days before but it was definitely before.

ADV MYBURGH SC: Yes.

MR MOLEFE: Because I remember saying to them we will
10 be going out to market very soon and if you really keen on starting to do business with us, maybe if you start by submitting a tender.

ADV MYBURGH SC: And then if you go towards the top of the page, there seems to be ...[intervenes]

MR MOLEFE: And Chairperson, encouraging people to submit a tender is not a bad thing because it improves the competitive tension in the tendering process.

ADV MYBURGH SC: What we see at the top of the page, there seems to be a response from CSR on the
20 19th of December.

MR MOLEFE: Yes.

ADV MYBURGH SC: Yes.

“Thank you for your email. We were pleased to have a chance to meet with your Group CEO, Mr Brian Molefe, at the beginning of

December...”

MR MOLEFE: Yes.

ADV MYBURGH SC: Yes.

“We expressed our interest in your tender for
95 electric locomotives in the South African
market as well...”

And then it ends off:

“You are very kind to facilitate us your support
on the tender document if we need and inform
you...”

10

MR MOLEFE: Yes.

ADV MYBURGH SC: You confirm that?

MR MOLEFE: Yes. I think that, like I said, out of the –
about mister..., this may be – this sentence may be a
reflection of how they would have put in Chinese but not to
write it in English, to say that... Ja, I do not know. We are
interested in this.

ADV MYBURGH SC: Alright.

MR MOLEFE: Any assistance would be welcome. Or
20 something like that but it is not elegant.

ADV MYBURGH SC: And then ...[intervenes]

MR MOLEFE: It is a reflection of a... It is something that
is done by people who are second or third or fourth
language, English speakers like myself.

ADV MYBURGH SC: Could I ask you then to, please, go

to page MSM-205?

MR MOLEFE: Yes.

ADV MYBURGH SC: Now it seems that what happens there is that the email at the foot of the page comes from CSR.

“Dear Mr Molefe. Please be kind to check attached letter which has already been sent to you, sent by fax to you...”

Do you see that?

10 **MR MOLEFE:** Come again?

ADV MYBURGH SC: Do you see the email that I am referring you to?

MR MOLEFE: Yes, yes.

ADV MYBURGH SC: On the 19th. And do I understand at the top of the page, is that your response?

MR MOLEFE: Yes.

ADV MYBURGH SC: Yes.

20 “Thank you for your letter. I forwarded to Mr Gama. We will process and respond to your request. Thank you for the interest shown in the tender...”

MR MOLEFE: Yes.

ADV MYBURGH SC: And can you recall what that letter had said or provided for?

MR MOLEFE: I think that letter was a – may or may have

been a request to visit our facilities, our TFR facilities. And all I did was to send it to Mr Gama firstly because he is the Group Executive for TFR.

And secondly. In this, people who are bidding, the bids were being evaluated from TFR and so they will deal with the fact that if this guy is a bidder and is making contact, what are the implications.

So I did not do anything with this letter other than to forward it to TFR for them to deal with as they see
10 appropriately. And what I did was to inform them that is what I did.

ADV MYBURGH SC: Alright. I would like now to move to the 100, 21 E-electric locomotives. Alright?

CHAIRPERSON: A 100 and 21?

ADV MYBURGH SC: A 100, 21 E-electric locomotives. Perhaps just for easy of reference, a hundred locomotives Chairperson.

CHAIRPERSON: Oh, okay.

MR MOLEFE: I do not know ...[intervenes]

20 **CHAIRPERSON:** And the page where we are going, would be?

ADV MYBURGH SC: I think we are going to start getting into Mr Callard's exhibits now.

CHAIRPERSON: H'm?

ADV MYBURGH SC: Uhm...

CHAIRPERSON: Mr Callard's one is a different bundle?

ADV MYBURGH SC: Yes. It is, yes.

MR MOLEFE: So we are done with this one?

CHAIRPERSON: It is a different bundle.

ADV MYBURGH SC: Mr Callard is BD-4a.

MR MOLEFE: [No audible reply]

ADV MYBURGH SC: Alright. Again, I am going to summarise some of the evidence so that we can try to get to the point. You will remember that in relation to these
10 locomotives, there was an improved Business Case for confinement to Mars which it also referred to as Mitsui on occasion.

MR MOLEFE: There was an approved Business Case for confinement to Mars.

ADV MYBURGH SC: Ja, but we can ...[intervenes]

MR MOLEFE: Mars is Mitsui.

ADV MYBURGH SC: Yes, okay.

MR MOLEFE: Yes.

ADV MYBURGH SC: I mean, should I call it Mars or
20 Mitsui? Which would be the better term?

MR MOLEFE: Oh, either one. As long as you understand that we are talking about Mitsui.

ADV MYBURGH SC: Okay, let us use Mitsui then. But we know that ultimately - and we are going to come to the detail - we know that you withdrew this and you

recommended instead confinement to CSR. Correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: In a memorandum to the board dated the 21st of January 2014.

MR MOLEFE: Yes.

ADV MYBURGH SC: And I take it that you would accept that several grounds for confinement in the Mitsui memo were then reproduced in the CSR memo?

MR MOLEFE: Yes.

10 **ADV MYBURGH SC**: Now you accept also that Mr Callard was the author of the Mitsui Business Case?

MR MOLEFE: Ja, you see, Mr Callard was the author of the Business Case for the confinement of 100 locomotives.

ADV MYBURGH SC: Ja. Alright. But I think we agree with one another.

MR MOLEFE: [No audible reply]

ADV MYBURGH SC: Now I want to go to the 23rd of January 2014 where Mr Callard complaint to Mr Gama.

20 **MR MOLEFE**: Yes.

ADV MYBURGH SC: And I see you have some documents there. Do you want to refer to them or what...?

MR MOLEFE: Yes. Mr Callard ...[intervenes]

ADV MYBURGH SC: You want to refer to those documents now or do you want to do so later or...?

MR MOLEFE: Well, before you are going to ask your question. Mr Callard says that he did not know about the confinement to CSR. And I have, firstly - and the reasons for the confinement to CSR. Firstly, I have documents here Chairperson that I got also in the course of the last one or two days.

CHAIRPERSON: Do not speak away from the mic.

MR MOLEFE: I said, firstly, I have a few documents here that I got in the last – in the course of the last
10 ...[intervenes]

CHAIRPERSON: In the course of...?

MR MOLEFE: In the course of the last one or two days.

CHAIRPERSON: Oh, okay.

MR MOLEFE: Ja, I have got some more documents with me.

CHAIRPERSON: Would we ...[intervenes]

MR MOLEFE: And these are documents – and these are -- and these I have not seen before but somebody who is at Transnet came to me.

20 **CHAIRPERSON:** Okay?

MR MOLEFE: And said that I am aware ...[intervenes]

CHAIRPERSON: That they are relevant?

MR MOLEFE: ...Mr Callard is saying that he did not know about the confinement for the 100 and the reasons for not confining to Mitsui. But these are reports from engineers

that detailed the failures of the Mitsui locomotives over a period of time.

In fact, what this guy was telling me was that the train drivers and the engineers on the coal line were relieved but eventually did not confine to Mitsui. And these are letters and emails to Mars to the – Mr Ravi Nair, acting Chief Executive of Transnet Freight Rail...

CHAIRPERSON: I guess what we should do is. Have you got copies for the legal team or not really? Do you have
10 ...[intervenes]

MR MOLEFE: Chairperson ...[intervenes]

CHAIRPERSON: Did you get a chance to have copies made for the legal team or ...[intervenes]

MR MOLEFE: I do not have copies.

CHAIRPERSON: Okay but you can ...[intervenes]

MR MOLEFE: But I do not mind parting with these copies.

CHAIRPERSON: Well, maybe you can make them available to ...[intervenes]

MR MOLEFE: Because after today, if somebody says
20 Transnet to me...

CHAIRPERSON: ...to the legal team and they will in due course have a look at them and see what should be made of them.

MR MOLEFE: But what ...[intervenes]

CHAIRPERSON: But ...[intervenes]

MR MOLEFE: ...there is that ...[intervenes]

CHAIRPERSON: If you need to refer to them in your evidence, I am sure that can be dealt with.

ADV MYBURGH SC: Alright. I would like to take you, please, to page FQC-216.

MR MOLEFE: [No audible reply]

ADV MYBURGH SC: Alright. So on the 23rd of January, Mr Callard writes to Mr Gama.

MR MOLEFE: Yes.

10 **ADV MYBURGH SC:** And it seems also to – is it Mr Jiyane, it would have been?

MR MOLEFE: Come again?

ADV MYBURGH SC: Who is Thammy Jiyane.

MR MOLEFE: Ja. That is Mr Jiyane as well.

ADV MYBURGH SC: Sorry?

MR MOLEFE: Did you say he writes to Mr Jiyane?

ADV MYBURGH SC: No, I am asking you. It says: Dear Sia and Tammy. Is that Mr Jiyane?

MR MOLEFE: That is Mr Jiyane.

20 **ADV MYBURGH SC:** Alright. He says:

“This is a difficult mail to write. In helping to format a recent version of the 180 locomotive Business Case on Wednesday, 22... [that was the day before] ...I notice that the case was changed from that which I had submitted on

Monday.

This email is because of the nature of those changes and the implications.

The implications are technical and in the rationale for the acquisition which was speedy delivery to mitigate MDS volumes at risk.

Project Shongololo was predicated on 19 equivalent locomotives.

These locomotives are 26-ton per axel...”

10

And then he says in the next paragraph:

“The locomotives proposed... [and this is in your Business Case] ...are not explicitly specified but if a current and delivered design is the criteria then it is the E-20.

This locomotive is a 22-ton axel locomotive...”

And he goes on to say:

“This was specified as a GF locomotive.

20

The implications are that the locomotive is not a heavy haul locomotive, is not as powerful and the locomotive calculations for Operation Shongololo no longer hold and the project and volume targets may be at risk.

Furthermore, the locomotives cannot inter-operate with the current 19-E locomotives, adding further complexity.

To have the 20-E inter operate with the E-19 will require that they be fitted with wired DP at an additional costs of around a million rand per locomotive.

If the locomotives are of a new coco design, which will meet the primary requirements, then all the arguments relating to time saving use and improving design and eliminating type testing no longer hold...”

10

And over the page at FQC-217:

“...between the assembly line to the current 20-E has yet to produce a locomotive.

If local assembly is the criteria then ramping up this line up to meet the 95 20-E and this 100 delivery criteria is a risk that has not, in my humble opinion, been visible addressed.

If imported as complete units then the local content is problematic although the delivery programme is achieved.

20

Respectfully for your information and consideration.”

Now did you ever see this email from Mr Callard?

MR MOLEFE: No, I just saw it recently.

ADV MYBURGH SC: Alright. So I would want to take you,

if I may, to page FQC-219.

MR MOLEFE: [No audible reply]

ADV MYBURGH SC: Mr Gama and Mr Callard sent the email to Mr Gama on the 23rd of July – sorry, January – at 15:50. That evening at 21:22, Mr Singh – sorry, Mr Gama wrote to Mr Singh.

MR MOLEFE: Yes.

ADV MYBURGH SC: It says:

10 “Hi, Mr Singh. I am afraid the submission of
the 100 locomotives is a mess and would need
to be withdrawn...”

MR MOLEFE: Yes.

ADV MYBURGH SC: Yes.

“The 20-E locomotive is a 22-ton...”

This really mirrors what Mr Callard had said.

“The 20-E locomotive is a 22-ton per axel locomotive suitable for GFB while the 19-E locomotive is a 26-ton per axel beast suitable for the coal line.

20 The two locomotives types are not inter-operable while CSR can make additional locomotives in China in a very short space of time to mitigate against MDS volume loss.
This will be counter to localisation strategy and would have to be spelt out.

The 85 locomotives to be assembled by... has not yet commenced.

We cannot yet make any argument that this would reduce the risk.

In an argument, therefore, on the 20-E ought to have been a GFB argument which then means we accelerate GFB but we need to go out to tender for wanting E-type locomotives.

10 The 20-E Loco is not heavy haul locomotive but is a less powerful loco than the 19-E..."

So would you accept that what Mr Gama really does, is he forwards to Mr Singh the same concern raised by enlarge Mr Callard?

MR MOLEFE: The same misinformed concern.

ADV MYBURGH SC: Sorry?

MR MOLEFE: I say, the same misinformed concern.

ADV MYBURGH SC: Yes. And ...[intervenes]

20 **MR MOLEFE:** Their understanding was that he confinement to CSR was for a GFB locomotive and not a heavy haul locomotive. And in fact, Mr Callard may have implied that CSR does not have the capacity to manufacture a heavy haul locomotive but CSR did have that capacity to manufacture the – a heavy haul locomotive.

In fact, the heavy haul locomotives that they

manufactured were much, much more powerful for our requirements that were in operation in China. And also, the speed with which they could manufacture the locomotives, I mean, I – their production line is very impressive in how they can turn locomotives out of their production line.

So I think that to the extent that Mr Callard and subsequently Mr Gama think that CSR was incapable of manufacturing heavy haul locomotive, they were not
10 correct but I think that you may have to speak to Mr Gama himself and to Mr Jiyane.

ADV MYBURGH SC: No we certainly are going to ...[intervenes]

MR MOLEFE: [Indistinct] I met Mr Jiyane socially somewhere and he said to me that the Commission is refusing that he comes and gives evidence.

ADV MYBURGH SC: Refusing?

MR MOLEFE: Yes. Those were his words.

ADV MYBURGH SC: Alright.

20 **MR MOLEFE:** He said: They do not want me there. He says he has requested and requested and requested. And they do not want me to come and give evidence.

ADV MYBURGH SC: And did he indicate to you that he is happy to give evidence?

MR MOLEFE: He said the Commission. I do not know

who it is but ...[intervenes]

CHAIRPERSON: Well, it would be important to see if he has got any correspondence to that effect or he can give people's names, but what I can say is that, for some time knowing that our last pen is limited. We have been seeking to make sure that we are careful in terms of our – the importance of evidence that witnesses will give, who will come will give.

But if there is any correspondence, I am not
10 aware that necessarily anybody has made any decision on that but it may well be that what he is talking about is that he may have been in communication with either some members of the Legal Team or members of the Investigation Team and they have not said they would ...[intervenes]

MR MOLEFE: No, he showed me correspondence from – before he left Transnet.

CHAIRPERSON: H'm

MR MOLEFE: From an acting Group Chief Executive, not
20 the current one, but the guy who was acting before. I cannot remember his name.

CHAIRPERSON: H'm.

MR MOLEFE: Email, which specifically forbid him to come to the Commission.

CHAIRPERSON: Somebody from Transnet?

MR MOLEFE: From Transnet. But also on his own volition, he made contact with the Commission.

CHAIRPERSON: Ja.

MR MOLEFE: And was given a cold shoulder.

CHAIRPERSON: Ja.

MR MOLEFE: And Mr Jiyane(?), Chair, was at the centre of these locomotive's acquisition.

CHAIRPERSON: H'm.

MR MOLEFE: He was quite central.

10 **CHAIRPERSON:** H'm?

MR MOLEFE: He is the person that the newspapers – or Mr Popo Molefe in his evidence here said that he replaced somebody with 17-years' experience with a teacher. Mr Jiyane is that guy who is called the teacher.

He started off as a teacher but ended up with two degrees in business. So it was not correct for Mr Popo Molefe to say that a teacher replaced the Chief Executive of Transnet Rail Engineering. That was Mr Jiyane.

20 I think it is key and should be listened to by the Commission if you really want to know what happened to the locomotives' acquisitions.

CHAIRPERSON: Well, all I can say is that, if he has been in communication with the Commission and he believes he has information that would be helpful to the Commission

and has supplied any information or has not supplied but would like to supply, he should write to the Secretary or if he wishes to take advantage of the fact that you met each other recently, he gives it to you to give to your lawyers to send to Mr Myburgh whatever information, he may do so.

All what I can say is. There will be people who would have wished to come and testify that will not have the chance to, simply because of the reality of time.

Some of the people, if they had approached us
10 much earlier, they may have been accommodated but others might not be because they may have been approaching us late but certainly what we would want to do is look at the information that anybody brings and assess its importance.

As we speak, we are two and a half weeks away from we were supposed to end with oral evidence. So that – and there are a lot of people ...[intervenes]

MR MOLEFE: Mr Gary Pita ...[intervenes]

CHAIRPERSON: ...to try and accommodate.

MR MOLEFE: I will give him your cell phone number Chair
20 because the Secretary is not very helpful because he has issues. I think it has to do with the fact that he once lost a tender and lost a court case.

CHAIRPERSON: Well, can we say ...[intervenes]

MR MOLEFE: [Indistinct]

CHAIRPERSON: ...speak to Mr Jiyane. If he does not

mind, then maybe if he can channel whatever documents through your lawyers to Mr Myburgh and then we can take it from there.

MR MOLEFE: To Mr Myburgh?

CHAIRPERSON: Ja.

ADV MYBURGH SC: Certainly.

MR MOLEFE: Chairperson?

CHAIRPERSON: Yes?

MR MOLEFE: We really thank you for the offer and we
10 will make use of this offer.

CHAIRPERSON: Yes.

MR MOLEFE: We will contact Mr Jiyane and compile all the information relay it to Mr Myburgh.

CHAIRPERSON: Yes, yes.

MR MOLEFE: And... the Secretary of the Commission.

CHAIRPERSON: Yes, okay. No, thank you.

MR MOLEFE: Thank you very much.

CHAIRPERSON: Okay.

ADV MYBURGH SC: Thank you Mr Molefe. So just so
20 that I understand it. When you say that Mr Gama – because we know that we are going to have Mr Gama here. We will, in time, deal with these locomotives with him but just so that I understand it. You say you also go the wrong end of the stick?

MR MOLEFE: I think from reading this.

ADV MYBURGH SC: Yes.

MR MOLEFE: Yes.

ADV MYBURGH SC: And just so that I understand it. At this point in time, was presumable Mr Gama was the CEO of Transnet Freight Rail?

MR MOLEFE: Yes.

ADV MYBURGH SC: He was presumable a rail expert.

MR MOLEFE: Mr Gama?

ADV MYBURGH SC: Yes.

10 **MR MOLEFE:** No, the engineers are the experts.

ADV MYBURGH SC: Well ...[intervenes]

MR MOLEFE: Mr Gama was like me, he was a Chief Executive. He was just an overhead expenditure like me.

ADV MYBURGH SC: Well, we certainly know ...[intervenes]

MR MOLEFE: ...were doing the work. The experts are the train drivers and the engineers.

ADV MYBURGH SC: So really Mr Callard was an expert.

MR MOLEFE: No, Mr Callard was not an expert.

20 **ADV MYBURGH SC:** Alright.

MR MOLEFE: Except the people that wrote those letters that say that the Mitsui locomotives were failing on the coal line.

ADV MYBURGH SC: Okay. Mister ...[intervenes]

MR MOLEFE: Mr Callard, Chairperson, is also conflicted

because he works for MNS, I think Fuluzi or MNS. He was hired by MNS in – as part of their forensic investigation. And I think in the process of this Commission, he was at pains to explain or to show how useful he could be to the MNS people but he was a hired hand. He is missionary(?).

ADV MYBURGH SC: So Mr Molefe, what I just wanted to do is to carry on with this email stream or string. If you go to page FQC-222.

CHAIRPERSON: Maybe Mr Myburgh, we could take a
10 break now. I see we are at four o'clock. Maybe we could take a break. Are we still on the understanding that we will continue and see how it goes? What is your assessment of how much time?

ADV MYBURGH SC: I have quite a lot still to get through Chair.

CHAIRPERSON: Yes.

ADV MYBURGH SC: But I am going to try my best to focus on what I consider to be the key-issues.

CHAIRPERSON: No, no. That is fine. Do you have an
20 assessment of how long that might be, without saying that I will hold you to that?

ADV MYBURGH SC: Well, I would think, probably, past seven o'clock.

CHAIRPERSON: Yes.

ADV MYBURGH SC: Six, seven. I do not know.

CHAIRPERSON: Okay alright. I must say that for some reason something tells me that I may have arranged for some evening session this evening but hopefully I did not. If I did, we will see what the people ...[intervenes]

ADV MYBURGH SC: Or perhaps you will tell us that when we convene.

CHAIRPERSON: Ja, when we ...[intervenes]

ADV MYBURGH SC: And then we can tailor things accordingly.

10 **CHAIRPERSON:** Yes.

ADV MYBURGH SC: I mean, we would like to finish today but if we cannot, I suppose that is not the end of the world.

CHAIRPERSON: Ja-no, there may be that there is not, you know. I do not know why I was feeling like we would have that problem. So we will take the break now and then we will continue and see how it goes. Okay alright. Let us take a ten minutes' break. I am saying ten minutes. We are at eighteen minutes past four. Let us return at quarter past. We adjourn.

20 **INQUIRY ADJOURNS**

INQUIRY RESUMES

CHAIRPERSON: Okay, let us continue.

ADV MYBURGH SC: Mr Molefe, I was just dealing with these emails and we have dealt with Mr Gama's email. Could I ask you please to go to FQC222 and you see there

it appears that Mr Singh then says to Mr Gama on the 24th of January, quite early in the morning at 07H02, let us discuss this morning.

MR MOLEFE: Yes.

ADV MYBURGH SC: Now we know that you then go or there is a memorandum that you signed, that is presented at a BACD meeting. That is on the 24th of January, correct? The same day.

MR MOLEFE: On the?

10 **ADV MYBURGH SC**: 24 January. Could I ask you please to go to page FQC244?

MR MOLEFE: Yes.

ADV MYBURGH SC: And this is quite a lengthy document, it ends at page 267.

MR MOLEFE: Yes.

ADV MYBURGH SC: And you see that that was not signed by Mr Gama. Can you explain why not?

MR MOLEFE: I cannot remember why Mr Gama did not sign.

20 **ADV MYBURGH SC**: Alright. Then let us go to the BADC meeting on the 24th of January where this memorandum served. Those minutes we find at FQC228.

MR MOLEFE: FQC228?

ADV MYBURGH SC: Yes.

MR MOLEFE: Yes.

ADV MYBURGH SC: The attendance reflects you and Mr Singh as being present and partial attendance only by Mr Gama, correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: Now at this meeting on the 24th of January, were the concerns of Mr Callard and Mr Gama raised and discussed?

MR MOLEFE: I cannot remember that they were, but like I say, raised by who?

10 **ADV MYBURGH SC:** I beg your pardon?

MR MOLEFE: I say were they raised by whom?

ADV MYBURGH SC: Well, did you raise them?

MR MOLEFE: No, those emails were not me.

ADV MYBURGH SC: Yes, but I mean the point is that the concerns raised by Mr Callard and Gama, were they discussed at this meeting, yes or no?

MR MOLEFE: No, no. I cannot remember that they were.

ADV MYBURGH SC: Alright, thank you. Now let us go to the affidavit of Mr Callard, and could I ask you please to
20 turn to paragraph 49 at page FQC12?

MR MOLEFE: FQC12?

ADV MYBURGH SC: FQC12, yes. So Mr Callard at paragraph 50 at FQC12 says:

“The minutes do not reflect that the BADC was informed of my concerns raised in the email

correspondence.”

And over the page at FQC13:

“The minutes reflect that the BADC according to Mr Callard was misled by management as to the validity of the confinement process by one, creating the impression that the 26 tons heavy hall CSR locomotive existed when in fact this is not the case, using Chinese manufacturing facilities to motivate for speedy delivery which would have negated local content requirements. See Mr Gama’s mail in this regard and three, reporting that the confinement was in compliance with the PPM, where no previous product existed.”

Do you want to comment on that?

MR MOLEFE: Yes, the Chinese had a heavy hall locomotive that in fact was even above the standards that were required. So that is not correct and I even have a model of bad locomotive. So that locomotive did exist.

20 **ADV MYBURGH SC:** Alright, any other comment?

MR MOLEFE: The Chinese manufacturing facilities would be used, because manufacturing these locomotives in China would give us the hundred locomotives very quickly. On the coal mine, which was in dire straits because the coal producers, so this takes us back to what I had said in

the Eskom stream, because the coal producers had been complaining that their coal is not being taken to Richards bay.

So we said we can get the locomotives very quickly, but you have to sign take or pay agreements and then there was an incident with Glenco and secondly the GFB, because we would take one hundred locomotives from the GFB from the coal mine GFB to revise the GFB business.

So the GFB business required the locomotives and
10 in as far as I am concerned, the confinement was in compliance with the procurement procedure model.

ADV MYBURGH SC: Alright. Then you see at 53 that the hundred locomotives were confined to CSR.

MR MOLEFE: Yes.

ADV MYBURGH SC: And then on the 4th of February Mr Callard receives an SMS from Mr Gama in response to his email of the 23rd of January, stating I have just seen your email. I would explain to you the GCE's thinking. He says that was not followed up.

20 Of course he had seen it before because he addressed Mr Singh in relation to it, but:

"I have just seen your mail. I will explain to you the GCE's thinking."

Have you any idea what that entails?

MR MOLEFE: I do not know. Maybe, I do not know. I do

not know what he was, what it was that he was going to explain to him, but I suspect it may be what I have just told you now.

ADV MYBURGH SC: Why did you just not stick with Motsui?

MR MOLEFE: Because they were failing, number one. Number two, there had apparently been several confinements to them. There had been confinements to them in the past and a view had been expressed that we
10 should try not to have existing suppliers that have been supplying locomotives.

So they had won the tender quite a few years back and there had been a few confinements in between, and so there was a concern that we would be entrenching monopolies. Yes, those are the words. Entrenching monopolies by using suppliers that won a tender a few years ago and then we just mandate creep or scope creep.

Every time we need locomotives we just confine to them.

20 **ADV MYBURGH SC:** So just as I understand it though, you were in favour yourself of confinement to Motsui?

MR MOLEFE: Yes.

ADV MYBURGH SC: And you motivated it on a series of ground saying it must go to Motsui.

MR MOLEFE: Yes.

ADV MYBURGH SC: Subsequently you were in favour of confinement to CSR.

MR MOLEFE: Yes, when ...[intervenes]

ADV MYBURGH SC: And you motivated on the same grounds.

MR MOLEFE: On the same grounds.

ADV MYBURGH SC: Right.

MR MOLEFE: Because what we needed, was a hundred locomotives.

10 **ADV MYBURGH SC:** And the only thing that caused that as I understand it, is you say a concern was raised about entrenching monopolies.

MR MOLEFE: Entrenching monopolies.

ADV MYBURGH SC: And who raised that concern?

MR MOLEFE: I cannot remember but it was in the context of the BADC.

ADV MYBURGH SC: But had it not been for that, the tender would have been awarded obviously to Motsui.

MR MOLEFE: Might have been awarded.

20 **ADV MYBURGH SC:** Yes.

MR MOLEFE: But subsequent to that, and this I had forgotten. There had been complaints that the Motsui locomotives had been failing and I had actually forgotten that until I was reminded.

ADV MYBURGH SC: Yes. Now let us deal with another

issue.

CHAIRPERSON: Just remember not to be too far from the mike.

MR MOLEFE: Okay.

CHAIRPERSON: Ja, alright.

ADV MYBURGH SC: I want to turn then to another topic relating to the hundred locomotives and that is the increase in the ETC from 3.8 billion to 4.8 billion.

MR MOLEFE: From?

10 **ADV MYBURGH SC:** 3.8 to 4.8. So the evidence seems to be that ...[intervenes]

MR MOLEFE: Okay.

ADV MYBURGH SC: If tender was awarded to CSR on the 17th of March 2014, would you confirm that?

MR MOLEFE: Yes.

ADV MYBURGH SC: And what Mr Lehur said and he was part of the negotiations, he said that during negotiations an offer was made by Transnet of 38.5 million per loco. The counter offer from the suppliers was 49 million and you
20 agreed then to 44 million.

Does that roughly accord with what you remember?

MR MOLEFE: No, what I remember is that the base price of the locomotive was 28 million per locomotive. That was the base price of the locomotive.

ADV MYBURGH SC: Yes.

MR MOLEFE: Now the thing about locomotives, depending on where you buy them, is that there are other costs and the other costs include the, the lifetime cost of the locomotive, which is a cost of maintenance and maintaining it or the lifetime.

But also the cost of financing as well as the costs of hedging the purchase price of the locomotives. So in this instance and in the other instances as well, our preference was to get a fixed price. Fixed price means
10 irrespective of what happens, there is exchange rates to interest rates and to inflation.

This is the price that we will pay. So if we are not entering into a contract where after a few, a few years or even a few months a supplier will turn around and say you know that the price three months ago. Since then the price of steel has gone up, interest rates, differential between the countries.

Our countries is widened and that the exchange rate as you can see has moved. So we prefer the fixed
20 price. Now when you go for fixed price, typically the suppliers would make you pay for it, and this differed and was a subject of negotiation.

So the important thing is to know that the base price was 28 million and then the other fields put it up and those other fields would differ depending on where you

buy. You are buying from China and buying from Japan and buying from America is not, the thrills are not the same.

ADV MYBURGH SC: Now ...[intervenes]

MR MOLEFE: But what was comparable is the base price.

ADV MYBURGH SC: Mr Molefe, what happened then according to Mr Lehur.

MR MOLEFE: According to mister?

ADV MYBURGH SC: Mr Lehur.

10 **MR MOLEFE:** Lehur.

ADV MYBURGH SC: Is that Mr Singh requested him to prepare a memorandum explaining why the price had increased from the business case submission, effectively to justify what had been agreed, and then he went on to say that on the 23rd of May 2014 you approved the memorandum to the Board of Directors for an increase in the ETC from 3.8 to 4.8.

Let me take you to this document that Mr Lehur prepared together or an instruction of Mr Singh. That you
20 find in Exhibit BB4(f) and then 2. So it is quite a complicated ... BB4, you will find in Exhibit BB4(f). I do not have [indistinct – 00:14:59] and then it is second space.

Alright. So it is BBf, sorry BB4(f) and then there are more than one statement in that bundle. It is the

second statement and that is why it is BB4(f2).

MR MOLEFE: Yes.

ADV MYBURGH SC: And I would like to go to page 46, in fact the memo starts at 47.

MR MOLEFE: 46?

ADV MYBURGH SC: YLRESP, 47. So hopefully we all have the same thing. Mr Molefe, do you have there a memorandum at 47 to the Transnet board from yourself?

MR MOLEFE: Yes.

10 **ADV MYBURGH SC**: And if we go to page YLRESP60, there you find the signature page.

MR MOLEFE: Yes.

ADV MYBURGH SC: And that reflects that you, it was recommended by you on the 23rd of May 2014, correct?

MR MOLEFE: Yes, by Mr Gama and Mr Singh.

ADV MYBURGH SC: Ja, you are correct. Mr Singh, so it is three levels of recommendation. Mr Singh, Mr Gama and yourself.

CHAIRPERSON: I am sorry, I thought you said page 60.

20 Mr Myburgh?

ADV MYBURGH SC: It starts at page 47 and the document, the memorandum is signed Chairperson, at page 60. YLRESP060.

CHAIRPERSON: Maybe this is the wrong file. I think, is that the memo that on page 60 has the heading

methodology of scoring and meetings held, on page 60. Is that the one?

ADV MYBURGH SC: The memorandum that we are looking at, starts at page 47 Chairperson.

CHAIRPERSON: No, I think I do not think ... let us get, what is the bundle. Is it Exhibit BB4(f)?

ADV MYBURGH SC: BB4(f), yes.

CHAIRPERSON: Okay, and what is the page? If you just tell me the page, not the exhibit number. Just the page.

10 **ADV MYBURGH SC:** The page is 47, but there is two dividers. There is a first statement and a second statement. One needs to get to the second statement, because it does not seem to be consecutively numbered.

CHAIRPERSON: Oh, is that so? I think that is what maybe ...[intervenes]

ADV MYBURGH SC: Ja.

CHAIRPERSON: So it is not sequential.

ADV MYBURGH SC: Not throughout the file, no.

CHAIRPERSON: I am not sure of the file. Okay, so I must
20 go to behind, after the second divider?

ADV MYBURGH SC: That is correct Chairperson.

CHAIRPERSON: Well, the dividers are numbered. There is one, two, three, four, five. So is it the second one?

ADV MYBURGH SC: In fact mine are numbered differently so, perhaps I could ask my ...[intervenes]

CHAIRPERSON: Okay, let me ... let me see where is, this is the reason why I have been insisting that the ...[intervenes]

ADV MYBURGH SC: Mr Molefe has divider number 25. Do you have a 25 Chairperson?

CHAIRPERSON: The bundle or the divider?

ADV MYBURGH SC: Divider number 25.

CHAIRPERSON: Let me see.

ADV MYBURGH SC: Or it is Exhibit 25.

10 **CHAIRPERSON:** That is why I insisted the pagination should be sequential from the first page of the bundle up to the end, so that when anybody says page so and so, then we all know there will only be one such page.

ADV MYBURGH SC: You will remember Chairperson, it seems that this was in the very early days of the commission.

CHAIRPERSON: Oh, okay. Now I think I, there is a memo here at page 47. This is page YLRESP047.

ADV MYBURGH SC: That is correct.

20 **CHAIRPERSON:** Is that the one?

ADV MYBURGH SC: Yes, thank you.

CHAIRPERSON: Okay, alright.

ADV MYBURGH SC: Alright. So this is the memorandum that we have been speaking of and what I have done, is I had taken you to the signature page just so that DCJ can,

Chairperson can see now that he has, we all have the document.

MR MOLEFE: Yes.

ADV MYBURGH SC: At YLRSP060 ...[intervenes]

MR MOLEFE: Yes.

ADV MYBURGH SC: There is the ...[intervenes]

CHAIRPERSON: Yes, I have got it now.

ADV MYBURGH SC: There is the recommendation by the three of you Mr Singh, Mr Gama and yourself, and the
10 recommendation 89(b) at the end, is the BOD approves an increase in the estimated total cost for the acquisition of the hundred equivalent class 19E dual voltage electric locomotives or the export coal line from 3.87 billion to 4.840 billion.

You confirm that?

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright. Now evidence has been given by Mr Callard to the effect that this increase of a billion rand was excessive and unjustifiable. You know of
20 that evidence?

MR MOLEFE: Yes, I may have seen it in the papers, yes.

ADV MYBURGH SC: And also, perhaps more importantly, there was the evidence of an expert in the form of Mr Tjabi who also testified that the increase was excessive and unjustifiable. Have you seen that evidence?

MR MOLEFE: Both from MNS?

ADV MYBURGH SC: So what Mr Tjabi said and we can go to his report, is that an increase to 4.1 billion from 3.8 was reasonable but he considered the additional 800 million to be not justifiable. Have you seen that evidence?

MR MOLEFE: No.

ADV MYBURGH SC: Well, let me take you to that. You were I think previously given this, but where you will find it, if you will just give me a second ... is in Exhibit BB8(b).

10 **MR MOLEFE:** Come again, which ...[intervenes]

ADV MYBURGH SC: So it is BB8(b) and that is divided into point 1 and point 2. There are two reports by Mr Tjabi contained in BB8(b).

MR MOLEFE: Ja. Which page number?

ADV MYBURGH SC: So Chairperson, do you have Exhibit BB8(b)? Then you have a point 1 and point 2.

CHAIRPERSON: I have got BB8(b) point 1 and (b) point 2.

ADV MYBURGH SC: That is right. If I could take you please to, if you could please go to (b) point 2. It is the
20 second report in that file, right towards the end.

MR MOLEFE: What is the page number?

ADV MYBURGH SC: And it starts, the first page of Mr Tjabi's report is page and these are only red numbers AOC100001.

MR MOLEFE: 100 001?

ADV MYBURGH SC: It is actually the first page, not ... Mr Molefe, you have the report? It starts at page 1, are you there?

MR MOLEFE: Yes. Yes, I have got it.

ADV MYBURGH SC: You have previously been provided with this and you have seen this before.

MR MOLEFE: I cannot say that I have, but ...[intervenes]

ADV MYBURGH SC: Alright. It was actually in fact attached to your, it is one of the annexures to the request
10 for you to file an affidavit.

MR MOLEFE: Yes.

ADV MYBURGH SC: But let us not worry about that for the moment. Are you at page 1?

MR MOLEFE: Ja, yes.

ADV MYBURGH SC: Could I ask you to turn to page 20? Under the heading conclusion at 5.33 in concluding, having built up the price of the E20 dual voltage electric locomotives provided by CSR as at April 2012 to March 2014, allowed for design modification costs as at March
20 2014 to meet Transnet's 19E dual voltage electric locomotive requirements and mitigated for risks such as foreign currency and inflation, a reasonable stroke acceptable price ETC for the transaction would have been 4.1 billion.

The excess of 739 million could not be justified on

the basis as explained above. Have you got any comment on that?

MR MOLEFE: He is talking rubbish.

ADV MYBURGH SC: Okay. Let us then and why do you say that?

CHAIRPERSON: Ja.

MR MOLEFE: Yes, let me come to why I say that. Chairperson, if you look at the memorandum in RESP049, paragraph 22, it says:

10 “A, forex movements from the approved business case to the award date.”

So the reasons for the increase in ETC, inflationary related escalations, variations to design for a higher specification, the cost of fixing future escalations over the life of the contract. So this is from the time that the contract is entered into for the life of the contract, and it says:

“Forward looking risk mitigation.”

And then it says:

20 “Cost of fixing forex exposure, forward looking risk mitigation.”

And it says:

“Contingencies related to variation orders. Contingencies related to variation orders as part of the negotiation process, a further

discount of 2.2.4 million per locomotive was negotiated.”

Now my point is, in arriving at the figure based on what is in the memorandum, assumptions would have to be made. So when you say that forward looking, we have to make assumptions. From one economist to the other, the assumptions will not be the same.

Even if the assumptions are the same, they will not arrive at the same ...[audio cut] ... that is just how it is.

10 That is how, so the risk mitigation and calculations for risk like this, forward looking, is not a science. It is an art. So you cannot calculate it to the cent, because it is about assumption. So what he did, is that he came up with his own assumption and arrived at another number.

The people that would be in this memo and that were doing this calculation here, had other assumptions, perhaps even the same assumptions but different parameters and variables in their assumptions, and by definition they came with a different numbers.

20 That cannot be imputed to mean impropriety. It is just that if you took, take two risk, risk specialists and you put them in one room or in two separate rooms, and give them the same things, and ask them to calculate a forward looking price, they will come at different numbers.

They will arrive at different numbers and part of

what influences them, part of what influences them are subjective factors. Subjective factors. I mean it comes at the point where, even what they had for breakfast influences what their feeling is about a particular issue on that particular day.

So this is not a science. I noticed yesterday when you were explaining the meaning of ETC, the E in ETC is estimated and the thing about estimated, is that if I asked everybody in this room to estimate anything, we will not
10 have the same number. So it is not a science, it is an art. Estimation is an art.

So this is the work of two artists.

CHAIRPERSON: Of course, of course even if you are talking simply about estimating anything.

MR MOLEFE: Yes.

CHAIRPERSON: There will be parameters. You say if somebody says what is, what do you estimate what the price will be of that bottle in front of you, if somebody suddenly says a particular figure, everyone will say no, that
20 is just out.

So but if there would be certain amounts, if people give different amounts within a certain range, it is taken that that is reasonable. You accept that?

MR MOLEFE: No Chair. We were in class when the lecturer demonstrated this, and he took a wine glass.

CHAIRPERSON: Ja.

MR MOLEFE: And he filled it with tic-tacs, small sweets and we were about 15 in class, and he says please walk around this wine glass and estimate the number of sweets, and write down your estimate. From 15 people, the range valued from about 75 to 400.

He says that is your lecture for the day on estimation.

CHAIRPERSON: Ja, but maybe we should not spend too
10 much time on this. I mean ...[intervenes]

MR MOLEFE: It does not mean anything, because what you do not know is what is in fact the wine glass.

CHAIRPERSON: Yes, no what I am saying is it might differ in terms of what you are talking about, but if somebody is going to come and say they estimate that bottle in front of you to cost R20 000-00, you know many people are going to say that is completely out.

Just an empty bottle you know, so it might depend on a number, but if they say maybe R50-00, R20-00 you say
20 maybe that is within a certain range, R5-00, R10-00, but there comes a time when you say but that is too out.

MR MOLEFE: Yes.

CHAIRPERSON: Ja, ja. Mr Myburgh?

ADV MYBURGH SC: Yes, I just really wanted to make the point that Mr Tjabi is an expert.

MR MOLEFE: Mr Tjabi is an expert?

ADV MYBURGH SC: Yes, he gave expert evidence and you have seen his report before.

MR MOLEFE: Is he expert to you? I mean, I do not consider his work to be the work of an expert.

ADV MYBURGH SC: But you were given this report before.

MR MOLEFE: Yes.

ADV MYBURGH SC: Correct?

MR MOLEFE: Yes.

10 **ADV MYBURGH SC:** You did not go to your own expert to get a contrary view, you just want us to accept that look, this is an art, not a science? I mean that is essentially what you want the Chairperson to do.

MR MOLEFE: That is what I am saying. I am saying that the estimation is an art, not a science. So Mr Tjabi cannot come here with definite numbers when all he did was estimate.

ADV MYBURGH SC: Alright. Have you got anything else to say about Mr Tjabi's expert opinion?

20 **MR MOLEFE:** No.

ADV MYBURGH SC: I just want to take you to something in your ...[intervenes]

CHAIRPERSON: Remember to speak not too far from the mike.

ADV MYBURGH SC: I beg your pardon Chairperson.

CHAIRPERSON: Ja, ja.

ADV MYBURGH SC: Bundle 5.

MR MOLEFE: Yes.

ADV MYBURGH SC: Exhibit B22. I just want to take you please to the Regulation 10(6) notice, which you will find at page 12, or sorry page 14, black numbers.

MR MOLEFE: Bundle 5, yes.

ADV MYBURGH SC: Bundle 5, Exhibit 22.

MR MOLEFE: Yes.

10 **ADV MYBURGH SC:** Page and now we are referring to the black numbers on the left hand side, page 14.

MR MOLEFE: One four?

ADV MYBURGH SC: Yes.

MR MOLEFE: Yes.

ADV MYBURGH SC: There, perhaps I can ask you to turn to page 17 and I would like to refer to paragraph 1.6. Just to confirm that you were asked about the opinion of Alistair Tjabi, at page 17, that the increase in the ETC of a hundred locomotives from 3.8, I paraphrase to 4.8 was unjustified,
20 your attention being drawn to his statement dated the 26th of November 2019, Exhibit BB8(b)2.

You were given this report?

MR MOLEFE: Yes, yes.

ADV MYBURGH SC: Right, and whilst we are on that, there is something I have wanted to ask you some time ago.

If you have a look at paragraph 1.9 on the opposite page, page 18, you see there you were asked a series of questions about McKinsey and Regiments.

MR MOLEFE: Yes.

ADV MYBURGH SC: Sub one, the confinement and appointment of the consortium including McKinsey, Letsema, etcetera.

MR MOLEFE: Yes.

ADV MYBURGH SC: Then the decision to replace Letsema.

10 **MR MOLEFE:** Yes.

ADV MYBURGH SC: And Nedbank with Regiments.

MR MOLEFE: Yes.

ADV MYBURGH SC: The session and the payment of the 78 million, things we have gone through already. The confinement and the appointment at paragraph 194 of McKinsey on those four contracts that you were involved in.

MR MOLEFE: Yes.

ADV MYBURGH SC: And also the confinement and award of the GFB breakthrough.

20 **MR MOLEFE:** Yes.

ADV MYBURGH SC: Those are things that you have already dealt with in a lot of detail.

MR MOLEFE: Yes.

ADV MYBURGH SC: But what I wanted to ask you Mr Molefe, is where do we find in your affidavit your response

to all of these issues dealing with the McKinsey and Regiment contracts? Your affidavit we know, starts at page 28 of Bundle 5, Exhibit BB22.

There is your affidavit. Perhaps you could just page through it.

MR MOLEFE: Yes.

CHAIRPERSON: I am sorry, Bundle 5 you said?

ADV MYBURGH SC: Yes.

CHAIRPERSON: Yes.

10 **CHAIRPERSON**: Okay, no I did not realise it is right in front of me.

ADV MYBURGH SC: It has been a long day Mr Chair.

CHAIRPERSON: It has been a long day. Did you say 22?

ADV MYBURGH SC: To 28 is Mr Molefe's affidavit.

CHAIRPERSON: Okay.

ADV MYBURGH SC: So unless I have it wrong and you can correct me, you do not deal with McKenzie or Regiments at all, or do you?

MR MOLEFE: No, I do not.

20 **ADV MYBURGH SC**: You do not?

MR MOLEFE: No, I do not. I think that it was an error Chairperson.

ADV MYBURGH SC: Let us ...[intervenes]

MR MOLEFE: And please, remember that this was the 20th, the 12th day of November 2020 and this notice required us

or me to deal with this, with all of these issues within seven weeks, and then on the same day there was another directive that said that, which was an Eskom directive, which required me to deal with quite substantial issues within 30 days.

On top of that Chairperson, I am actually a student. It was in the middle of my exams. If I put away all of these directives, and finished my exams, then I was under pressure to finish the 30 day directive. I even think I asked
10 for an extension.

While I was still busy dealing with it, there was a subpoena to appear on the 15th of January. The subpoena came with its own issues and the 15th of January was about the same time as, as this affidavit was due. So there was a lot of pressure and what I did is I dealt with it to the best of my ability, and I must apologise if in the process I may have neglected to deal with the McKinsey issues.

However, having said that, I would hope that my dealing with the issues today, was ...[intervenes]

20 **CHAIRPERSON:** Was adequate?

MR MOLEFE: Give them justice, yes. I hope that we dealt with them adequately and that there is nothing that I have said today that I would not have said, had I had sufficient time to prepare and finalize my affidavit properly.

ADV MYBURGH SC: Mr Molefe just understand, that in

your affidavit nowhere do you say that there is certain topics that I have not dealt with or I have not had enough time.

UNKNOWN: Chairperson, if I can be helpful in this regard?

CHAIRPERSON: Yes.

UNKNOWN: The Regulation 10(6) notice that was brought to our attention, which was signed by the Chairperson dated the 12th of November 2020, has specific areas which required Mr Molefe to prepare his affidavit on and this
10 Regulation 10(6) notice makes no reference to McKenzie.

CHAIRPERSON: You might not be having the right one. The one that Mr Myburgh referred to, does have reference, you might be looking at the wrong one. I think Mr Molefe had it, I had it and ...[intervenes]

ADV MYBURGH SC: Yes, I think my learned friend perhaps ...[intervenes]

CHAIRPERSON: Yes.

ADV MYBURGH SC: Mr, we might not be on the same page literally. Mr Molefe was issued with two different, two 10(6)
20 directives.

CHAIRPERSON: Ja, yes.

ADV MYBURGH SC: I am referring to ...[intervenes]

CHAIRPERSON: Apart from the Eskom one ...[intervenes]

ADV MYBURGH SC: Yes.

CHAIRPERSON: I think he also said he got ...[intervenes]

ADV MYBURGH SC: I am referring to the second one.

CHAIRPERSON: [indistinct – 00:14:25] once.

ADV MYBURGH SC: Alright.

CHAIRPERSON: So you might be having one, one of them but not the one he was referring to.

UNKNOWN: Okay, thanks Chairperson.

ADV MYBURGH SC: Alright, well let us leave it at that. So just so that I understand it Mr Molefe, before we move on. Did you then forget to deal with McKenzie Regiments or did
10 you deliberately not deal with it because you did not have enough time?

MR MOLEFE: I think I did not deal with it because I did not have time.

ADV MYBURGH SC: Yet you did not mention that in the affidavit?

MR MOLEFE: But as you may have noticed from the way that I have dealt with it today, had I had time to deal with it, I would have dealt with it exactly as I dealt with it today.

ADV MYBURGH SC: Alright. Could I then please take you
20 to Exhibit 27? That is Bundle 6.

CHAIRPERSON: Are we going to go back to PSB any time soon or can I ...[intervenes]

ADV MYBURGH SC: No, I do not think we are Chairperson.

CHAIRPERSON: Yes, so they can take it away.

ADV MYBURGH SC: Could I take you please to page 117

of that exhibit, Exhibit 27 in Bundle 6? This is the Fundudzi report.

CHAIRPERSON: Just for the record, that is Transnet Bundle C and it is at page 177?

ADV MYBURGH SC: 117.

CHAIRPERSON: 117, thank you.

ADV MYBURGH SC: Are you there Mr Molefe?

MR MOLEFE: Yes.

ADV MYBURGH SC: I would just like to draw your attention
10 to some paragraphs in this report. It starts on page 117
with paragraph 5.6.4.8. Are you there? In about the middle
of the page. Mr Molefe?

MR MOLEFE: Yes.

ADV MYBURGH SC: It says:

“That from Motui’s July 2013 proposal we
determined that their ETC for 119 E
locomotives was 3.188 billion. ETC included
all costs. Motui indicated that there were not
going to be any escalation costs except for
20 material, steel [indistinct – 00:18:50].”

You see that?

MR MOLEFE: Yes.

ADV MYBURGH SC: Do you have any comment on that?

MR MOLEFE: No.

ADV MYBURGH SC: And then ...[intervenes]

MR MOLEFE: I have no comment, other than to say that price was not the reason why we did not go for Motui as I said.

ADV MYBURGH SC: And then at paragraph 5.6.4.11, at the top of page 118, you say:

“Based on our calculations we determined that the total ETC of 3.8 billion was based on 112 locomotives at an estimated cost of 34.34 million per locomotive. As discussed below ...”

10 The next sub paragraph:

“We noted that the number of locomotives was reduced to one hundred without reducing the ETC of 3.8 billion. It should have been reduced to 3.4 billion.”

Do you have any comment on that?

MR MOLEFE: No, I have no comment.

ADV MYBURGH SC: If you go over the page please to 119, at paragraph 5.6.4.18:

20 “Based on documentation, it should have reduced the ETC from 3.8 billion to 3.4 billion in line with the reduced number of locomotives from 112 to a hundred.”

I think we have already dealt with that.

MR MOLEFE: Yes.

ADV MYBURGH SC: Then towards the bottom of the page,

the third last paragraph, paragraph 5.6.4.20.3:

“Sharma, the Chairperson of the BA ...”

That should presumably be BC:

“Was comfortable with the business plan.

However he requested consideration of other alternatives to the proposed consignment.”

So was it Mr Sharma that requested that? That ...[intervenes]

MR MOLEFE: I cannot quite recall exactly who it was.

10 **ADV MYBURGH SC**: But it could have been him?

CHAIRPERSON: Just repeat that ...[intervenes]

MR MOLEFE: I cannot quite recall exactly who it was.

CHAIRPERSON: Oh.

ADV MYBURGH SC: You cannot presumably rule out that it was Mr Sharma?

MR MOLEFE: It could have been.

ADV MYBURGH SC: Then over the page, page 120. The fourth paragraph, paragraph 5.6.4.20.9:

20 “Sharma later supported the confinement through CSR and did not raise that confinement would affect competition.”

MR MOLEFE: 5.6.4.20?

ADV MYBURGH SC: Point 9. So he supported the confinement to CSR. Well, presumably he must have because he was the Chairperson of the BADC.

MR MOLEFE: And I would also presume that he was not the only one.

ADV MYBURGH SC: Yes. Then if we can go over the page, page 121. Paragraph 5.6.5.2:

“We determined that on 11 October 2013 Singh, Mohammed, Peter and Gama signed a memorandum of submission to BADC for the approval of acquisition of one hundred locomotives through a confinement to Motui.
10 We noted that the memorandum was dated 15 October 2013 although it was signed on 11 October 2013. We determined that Molefe did not sign the said memorandum.”

Do you have any comment on that?

MR MOLEFE: Ja, I cannot recall why I would not have signed it, and perhaps ...[intervenes]

ADV MYBURGH SC: And then if we can ...[intervenes]

MR MOLEFE: Because, because the standard practice is that if I do not approve, I say so. That it is not approved.
20 So if something is brought, I either approve or I do not approve or as in the case of that memo with Ms Makgatho, I say noted or I make a comment.

But that I did not even express an opinion or sign at all, I cannot recall what the reason was.

ADV MYBURGH SC: Could I take you then please to page

123, and to the heading the BADC of 21 October, and let me draw your attention to the last two paragraphs. Paragraph 5.6.7.2:

“We determined that the memorandum dated 15 October 2013 as reflected above was discussed at the BADC meeting on 21 October 2013.”

Sub one, or let me take you to sub two:

10 “[indistinct – 00:23:50] sought clarity on the withdrawal of the hundred locomotives submission from the agenda as the committee had requested it to be tabled, due to urgency of the transaction.”

Do you have any recollection of that?

MR MOLEFE: I cannot recall that this was discussed in the formal meeting and I cannot recall who raised it. I do recall something like this, but I remember just thinking that look, this is not something that we should involve ourselves in, and that we need to decide whether we are going with Motui or not, and we have to find reasons why we are not going
20 with Motui if we are not going with Motui and why we could go with CSI.

Ja, I just remember vaguely this allegation and I cannot recall that it was in the formal meeting. So I do not know if it is in the minutes or whether it was raised on the side of the meeting, but there was I think in the township

they call it [indistinct – 00:25:07].

The people just talking about this and not really coming forward.

CHAIRPERSON: Gossip?

MR MOLEFE: Gossip yes, gossip.

CHAIRPERSON: Okay.

MR MOLEFE: It is not even saying here who raised that issue.

ADV MYBURGH SC: Could I then please take you to page
10 124.

MR MOLEFE: Yes.

ADV MYBURGH SC: At the top, paragraph 5.6.7.2.3:

“Management represented by Molefe, Singh, Peter, Difito and Mosia, indicated that upon reflection they opted to withdraw the matter after considering that when the initiatory confinement was made in 2010 there were press reports alleging that the company Motui had entered into a 1.4 billion locomotive
20 procurement secret deal.”

MR MOLEFE: Sorry, where are you reading? Which paragraph?

ADV MYBURGH SC: The first paragraph at the top of page
124.

MR MOLEFE: 124?

ADV MYBURGH SC: So they indicated that they opted to withdraw, because after the initial confinement there were press reports, alleging that Motsui had entered into a 1.4 billion locomotive procurement secret deal that was concluded without being put out to tender, which the then special advisor to the former Deputy President Mohlante was said to benefit from.

MR MOLEFE: Who said this?

ADV MYBURGH SC: Well, it says management represented
10 by Molefe, Singh, Peter, Difito indicated that upon reflection they opted to withdraw because of this.

MR MOLEFE: Well, I was never a part of talking about that secret deal.

ADV MYBURGH SC: Then at paragraph 5.6.7.2.6:

“During our consultation with Callard he indicated that on 21 October 2013, Molefe withdrew the hundred locomotives memorandum.”

Correct?

20 **MR MOLEFE:** Yes.

ADV MYBURGH SC: And then sub paragraph 8 under that:

“During our consultation with Gama, he confirmed that Molefe withdrew the said memorandum. Gama further indicated that the reason why Molefe did not sign the

memorandum of 15 October 2013 was because he had changed his mind and did not want Transnet to confine the acquisition of a hundred locomotives through Motsui.”

MR MOLEFE: I cannot comment on that.

ADV MYBURGH SC: Next sub paragraph:

10 “As reflected above, one of the reasons advanced not to confine to Motsui, was the alleged negative publicity relating to allegations of links between Motsui and a special advisor to the former Deputy President.”

Any comment on that?

MR MOLEFE: No, I cannot comment on that. I, ja I cannot comment on that.

ADV MYBURGH SC: “During our consultation ...”

The next sub paragraph:

20 “With Giyane, he indicated that the allegation against the special advisor to the former President Mohlante was never investigated at the time the motivation to Motsui was rejected by the BADC.”

Do you want to comment on that?

WITNESS: Yes, that is true that it was never investigated. I am not aware that there was an investigation.

ADV MYBURGH SC: In the next sub paragraph:

“In his response to our questions relating to the memorandum of 11 October 2013, Sharma stated that your finding at the BADC meeting of 21 October 2013 deliberated and rejected, the submission is incorrect as the matter did not serve before the committee meeting. The minutes which you are in possession of did not support your finding.”

10 Any comment on that?

MR MOLEFE: Well, the minutes would reflect exactly what happened at the meeting.

ADV MYBURGH SC: And then sub 13, two paragraphs below that. They say:

20 “It cannot be a coincidence that the memorandum that Molefe did not sign on 15 October was the same memorandum that the BADC rejected in its meeting of 21 October 2013. It is further not a coincidence that the BADC rejected the confinement through Motsui. The recommendation to which Molefe did not sign prior to the presentation to BADC.”

Do you want to comment on that?

MR MOLEFE: Well, ja. This is now become stranger than fiction. So there was a memorandum that I did not sign,

that never the less ...[audio cut] BADC is that – I do not know is that what happened because if I had not signed it it could not have gone to BADC and if it did it would have been irregular. And as I have said before that memorandum was not signed and it did not indicate whether I disapproved or approved or had reservations. I did not give reasons. A normal practice would have been for me to sign but then indicate, bring the matter to finality one way or another.

ADV MYBURGH SC: Alright and then if I can move onto...

10 **MR MOLEFE:** So – so if it was a memorandum that I had not signed it is a memorandum that does not exist.

ADV MYBURGH SC: Now I want to move on to page 126.

MR MOLEFE: Yes.

ADV MYBURGH SC: Under the heading Memorandum to confine through CSR dated 21 January which we have dealt with and go to paragraph 5.6.8.10 the second last one on that page.

20 “We determined that after Singh received the memorandum from Gama he either changed it or had it changed from a confinement to Mitsui to a confinement to CSR. This is based on the fact that a confinement of the said document signed by Singh and Molefe on 21 January 2014 and 22 January 2014 respectively had the name of the entity for

confinement changed from Mitsui to CSR.”

MR MOLEFE: Yes.

ADV MYBURGH SC: I think you have accepted that.

MR MOLEFE: So whilst it was determined that we are not going through Mitsui with Mitsui as I say the business case did not change. So the business case for getting 100 locomotives for the coal line was still there and so the reasons were still the same.

ADV MYBURGH SC: And then the last paragraph on page
10 126, 5.6.8.11

“Gama indicated that the memorandum presented by BADC sorry to BADC by Molefe to confine through CSR did not originate from TFR.”

Could you take issue with that?

MR MOLEFE: I – I cannot comment on that.

ADV MYBURGH SC: Well where did it originate from?

MR MOLEFE: Well the – the paragraph before says that it was the same as the Mitsui memorandum.

20 **ADV MYBURGH SC:** Ja.

MR MOLEFE: So the business case for the 100 locomotives.

ADV MYBURGH SC: Yes no we know that.

MR MOLEFE: It comes from TFR.

ADV MYBURGH SC: Yes but then there was a change from Mitsui to CSR.

MR MOLEFE: Ja it was a change in the party.

ADV MYBURGH SC: Yes.

MR MOLEFE: And not in the ...

ADV MYBURGH SC: Who affected that change?

MR MOLEFE: I think it was between myself and Mr Singh.

ADV MYBURGH SC: Yes well precisely.

MR MOLEFE: Yes.

ADV MYBURGH SC: It did not originate from TFR.

MR MOLEFE: No the origin – well – well maybe ...

10 **ADV MYBURGH SC:** Yes.

MR MOLEFE: We do not understand each other because ...

ADV MYBURGH SC: No I think we perhaps do on this occasion.

MR MOLEFE: Ja. Ja the memorandum for Mitsui was a – a motivation.

ADV MYBURGH SC: Yes.

MR MOLEFE: For the acquisition.

ADV MYBURGH SC: Correct.

MR MOLEFE: Of 100 locomotives.

20 **ADV MYBURGH SC:** Yes. And that came from TFR.

MR MOLEFE: That came from TFR. In that sense it originated from TFR.

ADV MYBURGH SC: But what did not come from TFR was the motivation for confinement to CSR.

MR MOLEFE: Yes.

ADV MYBURGH SC: Correct.

MR MOLEFE: And that is what I am saying here.

ADV MYBURGH SC: Okay. That was done by Mr Singh and you as you say.

MR MOLEFE: Yes.

ADV MYBURGH SC: He further stated that he made the said conclusion based on the fact that none of the TFR officials signed it and further that TFR recommended a confinement through Mitsui and not CSR. I presume there is not an issue
10 there.

MR MOLEFE: Yes.

ADV MYBURGH SC: And so...

MR MOLEFE: So now Mr ...

ADV MYBURGH SC: Yes.

MR MOLEFE: I forget your name now.

ADV MYBURGH SC: Myburgh.

MR MOLEFE: Myburgh.

ADV MYBURGH SC: It is late in the day.

MR MOLEFE: Yes.

20 **ADV MYBURGH SC:** Mr Molefe.

MR MOLEFE: Yes, yes. As I say over the weekend I got things that jogged my memory and these are reports from engineers.

ADV MYBURGH SC: Sure.

CHAIRPERSON: Do not speak away from the microphone.

MR MOLEFE: I said as I say that I got things that jogged my memory and these are reports that came from the engineers that the Mitsui amongst others – the Mitsui locomotives had been failing. But this was 2000 and – 2000 – was it 2013?

ADV MYBURGH SC: 14.

MR MOLEFE: 14 the tender had been awarded in 2010 and between – for fourteen years in between there had been confinements.

CHAIRPERSON: Four years you mean you said 2010 –
10 2014.

MR MOLEFE: No it was not 2010 it was – it happened for quite a long time.

CHAIRPERSON: You said the award was made in 2010.

MR MOLEFE: Yes I made a mistake.

CHAIRPERSON: And this was 2014.

MR MOLEFE: It was before that. It was before 2010. But for quite a number of years and I cannot remember exactly when it was awarded I can find that out. For quite a number of years the – the tender had been awarded quite a long time
20 ago and in between there had been confinements. Ja so there was this issue of entrenched monopoly number 1 and number 2 the locomotives had been failing.

Yes.

ADV MYBURGH SC: Alright and then if we could go please to page 127 paragraph 5.6.8.12 the top of the page. You will

see that the recorded that:

“Gama indicated that he found out for the first time that the confinement was changed from Mitsui to CSR when he was at the BADC meeting of 24 January.

MR MOLEFE: Yes I cannot comment on that. That is what Gama said.

ADV MYBURGH SC: I see. And then if you go to page 129 towards the middle of the page at paragraph 5.6.9.3 this is Mr Jiyane the gentleman you mentioned. According to
10 Jiyane

“The confinement of the 100 locomotives to CSR was brought to his attention by Singh on 24 January 2014 before their attendance to BADC meeting of the said day.”

MR MOLEFE: I cannot...

ADV MYBURGH SC:

“Mr Jiyane and Singh – Jiyane and Gama.”

MR MOLEFE: Ja I cannot comment on that. Is that what Jiyane says?

20 **ADV MYBURGH SC:** Yes.

MR MOLEFE: Ja I cannot comment on that.

ADV MYBURGH SC: But it is – it is consistent with the fact that – that you and Mr Singh were involved in changing the name as I understand it.

MR MOLEFE: Yes.

ADV MYBURGH SC: Late in the day.

MR MOLEFE: Yes.

ADV MYBURGH SC: So it is possible that these people did not know about this?

MR MOLEFE: It is possible but I cannot comment on it. I cannot say for sure that that was indeed the case.

ADV MYBURGH SC: But if you could understand this – this is Mr Gama the CEO of TFR.

MR MOLEFE: Yes.

10 **ADV MYBURGH SC:** Right and Mr Jiyane occupies what position at this time?

MR MOLEFE: Well this is not them saying it.

ADV MYBURGH SC: But what position did Mr Jiyane occupy?

MR MOLEFE: No this is not them saying it.

ADV MYBURGH SC: But it is recorded as them saying it.

MR MOLEFE: It is – it is – who was it? MNS.

ADV MYBURGH SC: Yes.

MR MOLEFE: Saying that they said so.

20 **ADV MYBURGH SC:** Yes.

MR MOLEFE: Yes. So I would rather that they come here and say so.

ADV MYBURGH SC: So...

MR MOLEFE: So let us wait for their evidence.

ADV MYBURGH SC: Alright but I need to of course then...

MR MOLEFE: Because – because what – I think because this is what – what MNS says they said.

ADV MYBURGH SC: But further Mr Molefe that I understand but you will appreciate that if we had to run that way the commission would never come to an end. I need to put to you what they found and we are going to get Mr Gama here you know and we will deal with this.

MR MOLEFE: No I would rather that I – I am not accused of things.

10 **ADV MYBURGH SC:** Surely.

MR MOLEFE: In the interest of time.

ADV MYBURGH SC: I am not accusing you of anything. I am simply saying...

MR MOLEFE: No that...

ADV MYBURGH SC: To you.

MR MOLEFE: No just saying that – well Mr Gama was the CEO of TFR and he did not know about it.

ADV MYBURGH SC: Yes.

20 **MR MOLEFE:** Now I must comment on it and as I say I cannot but Mr Gama will come here and he will have an opportunity to find out exactly what ...

ADV MYBURGH SC: Let me put the question another way. Are you ...

MR MOLEFE: If Mr Gama repeats this and confirms it as true then it is fine then I can come back and answer to it.

ADV MYBURGH SC: Are you – are you able to help the Chairperson with the question of whether you think Mr Gama knew about the change before the BADT meeting do you know whether he knew yourself?

MR MOLEFE: Well that is something that would have been internal to Mr Gama.

ADV MYBURGH SC: Okay.

MR MOLEFE: It is difficult for me to say. And he is the best person placed to talk about that.

10 **ADV MYBURGH SC:** When you changed the business case you and Mr Singh the – from Mitsui to CSR did you tell Mr Singh that he should distribute that business case to Gama and Jiyane?

MR MOLEFE: As I say we have reports here that say that the locomotives were failing.

ADV MYBURGH SC: No that is not my question Mr – please Mr Molefe.

MR MOLEFE: Oh sorry what was your question?

ADV MYBURGH SC: My question is when you – when you
20 affected the change you and Mr Singh.

MR MOLEFE: Ja.

ADV MYBURGH SC: To the business case the name – the party Mitsui to CSR did you tell Mr Singh that he must send that revision or new case to Gama and Jiyane?

MR MOLEFE: No I think – I think there was a discussion.

We felt that the fact that we were not going to get the Mitsui locomotives and that the TFR people were happy with the Mitsui locomotives we would put the market demand strategy at risk. I was explaining yesterday to the Chairperson that the – the funding of the MDS 70% of it had to come from operations – from improved operations. This exercise would have improved the volumes and operations by injecting 100 locomotives and into the coal line improving the efficiency of the coal line and taking the old coal line locomotives and
 10 putting them onto the GFB business and improving volumes and generating revenue of to fund the MDS.

So in deciding on the confinement we had to do something that was practical and that could work. The fact that we were going to buy a re-confined to an entrenched monopoly and when there had been reports that the locomotives are failing may not have helped our case.

So the concern was to move with speed so that we can improve the operations of the business and generate the money that we need for the MDS.

20 The MDS was not just about rail I see the commission's concern is just rail but there were – the MDS included the ports, it included the pipelines, it included a project to manufacture our own locomotive that would be made in South Africa. In – in business – in – not business development but in technology development at CSIR so we

needed the money desperately to make the MDS a reality.

And I remember having this meeting with Mr Singh and saying we must just decide and move on.

ADV MYBURGH SC: So do you feel you have answered my question?

MR MOLEFE: Yes.

ADV MYBURGH SC: But my question had nothing to do with that at all.

MR MOLEFE: Oh it did not.

10 **ADV MYBURGH SC:** No.

CHAIRPERSON: It has been a long day.

MR MOLEFE: What was it about?

ADV MYBURGH SC: It was a very simple question and that is when you changed the party in the confinement/

MR MOLEFE: Yes.

ADV MYBURGH SC: In the business case from Mitsui to CSR you and Singh did you tell this to Singh that he must send that new thing – that new document to Jiyane and Gama?

20 **MR MOLEFE:** No.

ADV MYBURGH SC: That is all it is.

MR MOLEFE: My answer was it was a discussion and I gave you the context.

ADV MYBURGH SC: But when you – when you told us about your discussion now right at the end you said you had a

discussion with Singh you never mentioned Gama.

MR MOLEFE: Did you say – when I – when I had a discussion with Singh did I talk about Gama?

ADV MYBURGH SC: No.

CHAIRPERSON: Okay no he – he – the question was Mr Molefe after you and Mr Singh had changed the case.

MR MOLEFE: Yes.

CHAIRPERSON: From Mitsui to CSR.

MR MOLEFE: Yes.

10 **CHAIRPERSON:** Did you ask Mr Singh – instruct Mr Singh – tell Mr Singh to share that document with Mr Gama and whoever else?

MR MOLEFE: Oh.

CHAIRPERSON: Ja did you do that? Did you – ja.

MR MOLEFE: Shared with – ja.

CHAIRPERSON: Ja.

MR MOLEFE: No I cannot recall that – I cannot recall that we did that.

20 **ADV MYBURGH SC:** Okay. Alright. So then I have taken you to paragraph 5.6..3 at page 129 let us go to the next paragraph.

“Jiyane further indicated that he was not provided with the memorandum to confine to CSR before the BABC meeting held on 24 January.”

MR MOLEFE: 5.6.9.3?

ADV MYBURGH SC: 5.6.9.3 it is just below.

MR MOLEFE: Yes.

ADV MYBURGH SC: He says:

“He was not provided with it and according to Jiyana had a glimpse of the memorandum confining to CSR after Singh presented it to the BADC.”

MR MOLEFE: Yes I think...

10 **ADV MYBURGH SC:** Any comment on that?

MR MOLEFE: I think that this is what MNS is saying about Jiyane and I would rather that he comes here and explains.

ADV MYBURGH SC: And then I must then put to you perhaps finally in that regard two paragraphs below that 6.5.9.6

“Jiyane indicated that he was not certain that CSR could manufacture the 19E locomotives as required by TFR because they had not supplied the 19E locomotives to TFR before.”

20 **MR MOLEFE:** Chairperson Jiyane would have to come here and on this one I am quite confident that he would disagree with MNS that this is what he said.

ADV MYBURGH SC: And then two last paragraphs if I may at page 130 in the middle of the page paragraph 5.6.9.10.

“We determine that as per the procurement

procedures manual version 2 October 2013
requirement the end user in this case TFR
should be the one motivating the
procurement process to be followed ie
confinement or tender before the
memorandum may be taken to Transnet
Group for recommendation to be BADC. We
determine that Gama and Jiyane as the end
users did not motivate with the confinement
10 of 100 locomotives to CSR.”

You did and Mr Singh did.

MR MOLEFE: Yes.

ADV MYBURGH SC: What is your response to this?

MR MOLEFE: I would rather Jiyane and Gama answer when
they come here and ...

ADV MYBURGH SC: But this is not – this is not a Gama and
Jiyane thing. You have accepted that you and Singh
motivated.

MR MOLEFE: Yes.

20 **ADV MYBURGH SC:** The point is that what MNS is saying is
that is in breach of the PPM.

MR MOLEFE: Ja Chairperson this may have been an
oversight on our side.

ADV MYBURGH SC: An oversight not to include the people
from TFR?

MR MOLEFE: On – on the – the need for the locomotives had been determined.

ADV MYBURGH SC: Yes alright.

MR MOLEFE: Ja.

ADV MYBURGH SC: And then let us go to the last paragraph I want to take you to 5.6.9.11.

10 “We determined that paragraph 15.1.5 of the
2013 PPM states that “the submission for
confinement must be fully motivated in
writing by the end user and the operational
division Chief Procurement Officer TFR to
operational divisions main acquisition council
AC and the operations division Chief
Executive Officer for prior written support of
the recommendation to confine. The
submission should be submitted on the
relevant template undercover of a memo.”

Any comment on that?

20 **MR MOLEFE:** This is the 2013 PPM. Ja it may well have
said so but as we discussed earlier it also said other things.

ADV MYBURGH SC: So you think this may have been an oversight as you have said?

MR MOLEFE: Come again.

ADV MYBURGH SC: You have said it could have been an oversight as you put it?

MR MOLEFE: Ja it could have been an oversight but now reading this if the reliance was on the 2013 PPM what I am saying is that MNS is quoting this part of the PPM but not – does not quote the sections that we were dealing with earlier of the PPM that allowed for exactly what happened in the end.

ADV MYBURGH SC: If I may just take us – a moment?

CHAIRPERSON: Are you talking about your power?

MR MOLEFE: Yes.

10 **CHAIRPERSON:** Your power to approve without a recommendation?

MR MOLEFE: Yes.

CHAIRPERSON: Okay.

MR MOLEFE: That was in the 2013 PPM.

CHAIRPERSON: Hm.

MR MOLEFE: As we discussed it.

CHAIRPERSON: I thought Mr Myburgh said Mr Volmink's point in regard to that was that you only had that power in cases where you are dealing with a confidential confinement.

20 **ADV MYBURGH SC:** Yes absolutely.

MR MOLEFE: Yes.

CHAIRPERSON: And not just a normal confinement if I can put it that way.

MR MOLEFE: Yes. Yes.

CHAIRPERSON: Ja.

MR MOLEFE: Ja and then...

CHAIRPERSON: So this – this one – was this one not – is the position that here you were not dealing with confidential confinement?

MR MOLEFE: Ja perhaps Chairperson that technicality could be sustained.

CHAIRPERSON: Ja okay.

ADV MYBURGH SC: Of course one is dealing here with the high volume or high value contract – massive contract,
10 correct?

MR MOLEFE: Yes.

ADV MYBURGH SC: Alright let us then move on to the procurement of the 1064 locomotives.

MR MOLEFE: Yes Chairperson I have a request and my request is that I am really exhausted.

CHAIRPERSON: Yes.

MR MOLEFE: And..

CHAIRPERSON: No, no that is understandable.

MR MOLEFE: And I do not think that I will do the 1064
20 justice if we could ...

CHAIRPERSON: Yes. No that is understandable. Mr Myburgh.

ADV MYBURGH SC: Well I assume that Mr Molefe says he wants to call it a day now.

CHAIRPERSON: I think...

ADV MYBURGH SC: Or does he want to take a break?

CHAIRPERSON: I think so or – I think you said you are already exhausted?

MR MOLEFE: Yes.

CHAIRPERSON: So you would like that we adjourn?

MR MOLEFE: Yes Chairperson especially that last night.

CHAIRPERSON: Ja.

MR MOLEFE: I have to stay up and read the documents.

CHAIRPERSON: No I think that is fair enough.

10 **ADV MYBURGH SC:** Ja I really do not think that is unreasonable at all Chairperson.

CHAIRPERSON: Ja ja, ja. Let us talk about what should be the way forward.

ADV MYBURGH SC: Chair just to perhaps outline what I have still got to deal with.

CHAIRPERSON: Yes, ja.

ADV MYBURGH SC: We must deal with the 1064 which I think will probably take as much time as dealing with the 100 an hour or two. Then what we need to deal with are some
20 procedural issues in relation to that. Then we have got to deal with some of the Neotel and T-System contracts and then a number of miscellaneous issues and of course we have not got yet to Witness 1 and 3. So there is quite a bit that still needs to be traversed I am afraid.

CHAIRPERSON: Yes. And would your estimate of time be

something like what three hours or more?

ADV MYBURGH SC: I would certainly try my best to finish Mr Molefe in the morning session.

CHAIRPERSON: Ja.

ADV MYBURGH SC: If we were to start at ten or half past nine by one o'clock.

CHAIRPERSON: Ja.

ADV MYBURGH SC: I do not think it can be done realistically faster than that Chairperson.

10 **CHAIRPERSON:** Ja. No, no, that is fine I just wanted to have an idea. Now subject to both Mr Molefe's availability and his legal team's availability and whatever arrangements may have – may exist would you propose that we continue with him tomorrow morning or would you propose to go to the next witness give him a break and then he comes back or?

ADV MYBURGH SC: So I would prefer and I am in your hands Chairperson to finish Mr Molefe.

CHAIRPERSON: With his evidence yes.

ADV MYBURGH SC: But as you know with Mr Gama there is
20 some flexibility because we..

CHAIRPERSON: Yes.

ADV MYBURGH SC: Have agreed to reduce the issues that would be dealt with.

CHAIRPERSON: Ja

ADV MYBURGH SC: It may be that we can even confine

them

CHAIRPERSON: Ja.

ADV MYBURGH SC: To a greater extent.

CHAIRPERSON: Yes.

ADV MYBURGH SC: So that we do not disturb the schedule too much.

CHAIRPERSON: Ja, ja. So you would propose that we continue tomorrow morning with Mr Molefe?

ADV MYBURGH SC: Yes with your leave.

10 **CHAIRPERSON:** Yes.

ADV MYBURGH SC: Mr Chairperson.

CHAIRPERSON: Yes, no that would be fine from my side. Would that be fine with you Mr Molefe?

MR MOLEFE: Yes I also prefer to finish with Mr Myburgh.

CHAIRPERSON: Yes. Your legal team is fine as well I guess?

ADV MASUKU: We are – we okay tomorrow Chair.

CHAIRPERSON: You okay.

20 **ADV MYBURGH SC:** What it would also enable us to do is I mean the documents the four documents that Mr Molefe has introduced it is obviously important.

CHAIRPERSON: Yes.

ADV MYBURGH SC: That we get the Secretariat to add those formally to the bundle.

CHAIRPERSON: Yes.

ADV MYBURGH SC: And they will be paginated and added to all our files and he can then address them. I do not want it to be seen that we are not giving him opportunity to discuss those documents.

CHAIRPERSON: No that is fine. So let us then adjourn and start at ten o'clock tomorrow. Ja okay alright we will adjourn now and then we will resume tomorrow at ten o'clock in the morning.

ADV MYBURGH SC: Thank you Chairperson.

10 **CHAIRPERSON:** We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 10 MARCH 2021