

ANNEXURE "J"

IN THE DISCIPLINARY MATTER BETWEEN:

TRANSNET LIMITED

The Employee r

and

S GAMA

The Employee

FINDINGS IN DISCIPLINARY HEARING

INTRODUCTION

- 1 Hearings in this matter were held between 13 January and 25 February 2010 during which period there was some 14 days of hearing. Mr. Gama, the employee was represented by advocate G. Pretorius SC assisted by V. Ngalwane and instructed by attorney Mr. T. Langa of Langa Attorneys. Transnet the employer was represented by advocate P. Pretorius SC instructed by attorneys C. Todd and K. Savage of Bowman Gilfillan Attorneys. The parties agreed to waive the strict requirements of the Disciplinary Code and Procedure set out in paragraph 6.3 of the Transnet Code.
- 2 To understand the charges one needs to appreciate that although Transnet is a single company of which the government is the shareholder, it operates through various divisions including Transnet Freight Rail ("TFR") formally

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known as Spoornet and Transnet Rail Engineering ("TRE") formally known as Transwerk. The governance structure of Transnet is that it has Board which has four sub-committees including an Audit Committee and a Group Executive Committee. The main divisions of Transnet ordinarily replicate that governance structure. At group level there is a Group Chief Executive Officer, Chief Financial Officer and Chief Operating Officer as well as the Executive Responsible for Human Capital and the Executive Responsible for the Office of the Chief Executive. There are a number of sub-committees of the Group Board including the Capital Investment Committee.

THE CHARGES

- 3 Gama is the Chief Executive Officer of Transnet Freight Rail. He was suspended on 1 September 2009 pending the finalisation of the disciplinary process initiated by the delivery of the original charges on 24 August 2009 which notified him to attend a disciplinary hearing. It is apposite to set these charges out in detail. They are as follows:

- "1. You authorised the conclusion of a contract for the provision of security services by General Nyanda Security Advisory Services (Pty) Ltd (GNS) on confinement in excess of your delegated authority. This constituted a wilful or alternatively, negligent failure to carry out your duties in the manner expected of you, and has resulted in breaches of the PFMA that included but are not limited to, sections 50, 51, and 57 of the PFMA. This constitutes misconduct contemplated in section 51(1)(e) of the PFMA.*
- 1.1. The procurement process for the award of the contract was irregular.*
 - 1.2. When the irregularities in the process were brought to your attention you failed to take appropriate steps either to investigate the irregularities, to terminate the contract, or to implement any other appropriate measure to deal with the situation.*
 - 1.3. In your explanation for these failures you have refused to acknowledge that you exceeded your delegated authority, and failed to demonstrate an appropriate level of concern*

at the apparent manipulation of the procurement process, or to acknowledge the seriousness of the irregularities in that process, and you failed to accept responsibility for a decision for which you are accountable.

- 1.4. Your conduct in approving the contract with GNS falls far short of any standard that may reasonably be expected of a person in your position.*
- 2. You failed to comply with the terms of the Board resolution of 26 April 2007 which approved the acquisition of 50 "like new" locomotives and which authorised you to conclude, sign and execute the contract. Specifically you failed to conclude the contract or to execute the contract in compliance with the condition established by the Board that Transwerk (now Transnet Rail Engineering) would carry out all engineering on assembly and maintenance. This constituted a wilful or alternatively, negligent failure to carry out your duties in the manner expected of you, and has resulted in breaches of the Public Finance Management Act (PFMA), that included but are not limited to, sections 50, 51, and 57 of the PFMA. This constitutes misconduct contemplated in section 51(1)(e) of the PFMA.*
 - 2.1. When the failure to comply with the terms of the Board resolution was brought to your attention you failed to take appropriate steps to rectify the situation.*
 - 2.2. In your explanation for these failures you have refused to acknowledge that you did not comply with the terms of the Board resolution, and have failed to demonstrate an acceptable appreciation of your responsibility for the execution of a project of that size and significance.*
 - 2.3. In addition you have sought to redirect all responsibility for shortcomings in the project away from yourself and in the direction of your colleagues and subordinates. This demonstrates an unacceptable failure to accept responsibility for matters for which you are accountable.*
 - 2.4. Your conduct in relation to the conclusion and execution of the 50 like-new contract falls far short of the standard that may reasonably be expected of a person in your position.*

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- 4 Charge 3,¹ while not abandoned, was not persisted in during closing argument for Transnet and is not considered in detail in these findings. Charge 3 is in the alternative to charges 1 and 2, it being alleged in charge 3 that Gama's conduct in relation to the GNS contract and the 50 like new contract both constitute breaches of the Transnet Code of Ethics.
- 5 Subsequently the charges were amended by the addition of a further charge to which I shall refer as charge 4. This charge reads as follows:

"4. In dealing with the allegations which are the subject of the complaints set out in paragraphs 1 and 2, you have made statements, directly or through your attorneys, and in affidavits filed in the course of the high court proceedings instituted by you, concerning the motives, conduct, and integrity of senior executives of the Transnet and/or members of the Board of Transnet:

- 4.1. which were calculated or likely to cause harm to those persons and/or to Transnet: and/or*
- 4.2. which were not justified or reasonable for you to make in the circumstances: and/or*
- 4.3. which are indicative of an irretrievable breakdown in the trust relationship between you and Transnet.*
- 4.4. Specifically you made statements to the effect that:*
 - 4.4.1 The acting Group Chief Executive (GCE) has deliberately sought to tarnish your image and to embarrass you, and has conducted himself in relation to the subject matter of the complaints set*

¹ Charge 3 reads: *In the alternative, your conduct in relation to each of the matters deal with in 1 and 2 constitutes a breach of the Transnet Code of Ethics. More specifically, the Transnet Code of Ethics requires that employees ensure that their actions comply with applicable laws and regulations, internal controls, policies and procedures and that they are accountable for their actions and the safe maintenance of assets under their control. This is unacceptable performance for a person with your degree of responsibility within the organisation, and demonstrates an inability to perform to the standard reasonably expected of a person in your position."*

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- out in paragraphs 1 and 2 for an improper purpose or for an ulterior motive;
- 4.4.2 The acting GCE has fabricated allegations with an ulterior motive and in pursuit of his own personal interests;
 - 4.4.3 The acting GCE, other senior executives and one or more members of the Board have acted in a sinister and mala fide attempt to subvert your candidacy for the GCE position;
 - 4.4.4 The acting GCE and/or members of the Board and/or Transnet may have committed a criminal offence by instituting or endorsing the disciplinary proceedings instituted against you;
 - 4.4.5 The information relevant to one or more of the allegations of misconduct against you was obtained in the course of "malicious skulduggery" against you;
 - 4.4.6 The disciplinary proceedings were instituted in bad faith and for an ulterior motive;
 - 4.4.7 The complaints form part of a "witch hunt" by the acting GCE and "his Cabal" against you;
 - 4.4.8 The acting GCE and another senior executive conspired to "scuttle" or to prejudice your chances of being considered to the position of GCE;
 - 4.4.9 The acting GCE concealed information from the Board.
- 4.5. You stated that you were not interviewed in the course of the investigation of the allegations that are the subject of the complaints, when this is not true.
 - 4.6. Your conduct in making some or all of these statements has caused irreparable harm to the relationship of trust between you and Transnet and to the working relationships that are necessary to sustain your employment and/or has resulted in a situation of incompatibility between you and Transnet and/or its leadership."

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Understanding the Charges

- 6 Charge 1 relates in broad terms to the conclusion of a contract between Transnet and General Nyanda Security (Pty) Limited ("GNS")² allegedly in excess of Mr. Gama's delegated authority. For convenience I shall refer to this as "the GNS contract". In simple terms this charge alleges that Gama authorised the conclusion of a contract on confinement and did so in excess of his delegated authority. An examination of this charge immediately reveals the clauses 1.1 to 1.4 of this charge allege poor performance by Gama in that broadly he failed to take appropriate measures to investigate the irregularities associated with the awarding of this contract or to regularise the situation.
- 7 The second charge relates to a different aspect namely the signing of a contract for the acquisition of 50 reconstructed locomotives. During the hearing this was referred to as the "50 like new contract". The essence of this charge is that although Gama as CEO of Transnet Freight Rail was authorised to conclude the contract to procure these refurbished locomotives, such authorisation was subject to a clear written condition laid down by the Transnet board ("the board"). The allegation of misconduct is that Gama failed to execute and conclude this contract in compliance with the board's condition. As with the previous charge, paragraphs 2.1 to 2.4 of charge 2 then allege poor performance on Gama's part by virtue of his failure to take appropriate steps to rectify the situation when the failure to comply with the condition stipulated by the board was brought to his attention. It is Transnet's case that Gama refused to accept responsibility for the shortcomings of this project for matters for which he was accountable.

² See below discussion about the company name and identity



- 8 Charge 4 is essentially a complaint that Gama has directly or through his attorneys during the course of various High Court proceedings and more recently made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified and unreasonable and calculated to cause harm. This Transnet says is misconduct. It is also contended that these statements indicate an irretrievable breakdown in the trust relationship between Gama as the CEO of TFR and Transnet.

PRELIMINARY POINTS

- 9 On 20 November 2009, Gama delivered to the company a written response to the disciplinary charges. This written response³ raised three preliminary points. I shall deal first with two of those three points. It is convenient to deal with the third preliminary point later in these findings.

First Preliminary point: Alleged dismissal of the charges by Ms Ramos the Transnet CEO

- 10 As I understood Gama's counsel this point was ultimately not persisted in during closing argument. I shall accordingly deal with it only very briefly.
- 11 During one of the usual periodic meetings between Ms Ramos the CEO of Transnet and Gama at which key issues of TFR were discussed, Gama mentioned to Ramos that he had received an anonymous letter which implicated him in irregularities pertaining to the GNS contract. Ramos said she had received a similar letter which, upon inspection, proved to be identical to the letter which Gama had received. At that one-on-one meeting Ramos then said words to the effect that this was "rubbish" and that Gama should not bother himself with it. Gama subsequently contended in his

³ Bundle A1 pages 17-25

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written response that on the basis of this statement by Ramos to him Transnet considered the matter of his alleged misconduct in relation to the GNS contract closed and is now precluded from proceeding against him with the charges in relation to the GNS contract.

- 12 Gama's contention is that he reasonably understood that Ramos had, by way of this remark, dealt with and dismissed all allegations of wrongdoing on his part in relation to the GNS contract. I agree with the submission in argument that this contention reflects very poorly on Mr Gama. It is a rather startling suggestion. The evidence shows that Ramos, to whom the letter was addressed sent it on to Mr Chris Wells, then Chief Financial Officer (and later from March 2009 Acting Group Chief Executive Officer) and Mr Vuyo Kahl, Group Executive Legal with a note requesting that the matter be looked into "*as per normal processes*". Ramos not only called for the allegations to be investigated but she also followed up on the progress of the investigation both with Wells and Mr. Oates of Transnet Internal Audit (who oversaw the investigation) on a regular basis. This is clearly inconsistent with Ramos having waived or dismissed the charges as contended for by Gama. The evidence established that this complaint started a long process of investigation by Transnet Internal Audit ("TIA"). Moreover, in any event, it is not conceivable that at that stage, when Ramos was unaware of the full facts of the alleged misconduct on Gama's part (which had then not yet been investigated), that she could have excused him. The evidence of Oates of TIA was that the anonymous tip-off system received a 10 page letter concerning very various irregularities within TFR. Although the tip-off letter did refer to a suspicion that the GNS contract may have been secured in an under hand manner, the particular charge in relation to the GNS contract, namely that Gama had concluded the GNS contract in an amount beyond the level of his delegated authority, is *not* one of the alleged irregularities contained in the tip-off letter. Consequently, in fact, that charge could not have been waived by Ramos. Gama could

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simply not reasonably have understood that Ramos had excused him of all misconduct in relation to the GNS contract. Indeed when he was cross-examined on this issue, Gama was evasive and driven to seek to transform his complaint in this regard into one about his not having been informed until May 2009 of that there was in fact an investigation against him. Gama accepted under cross-examination that Ramos had not dismissed as rubbish any charge in relation to his signing a confinement beyond his authority.⁴ There is no merit in this first preliminary point.

The second preliminary point: Delay in preferring the disciplinary charges

- 13 In paragraph 4.2 of Gama's response to the disciplinary charges,⁵ he contends that bringing the charges belatedly was unfair and materially prejudicial to him. This argument was persisted in during the disciplinary hearing. Gama argues that the relevant facts were known to Transnet in 2007 and 2008 and that the inordinate delay in bringing the charges against him is unfair.
- 14 This preliminary objection requires fuller investigation and consideration and it is convenient to revert to this aspect later in these findings.

Third preliminary objection: Vagueness of the charges

- 15 Although in his written response to the charges Gama raised the vagueness of the charges as an issue and set out various grounds on which both the first and second charges were allegedly too vague and not sufficiently specific, the point was not persisted in at the outset of the disciplinary enquiry. In my view, while certain of the charges were wide of the mark, particularly viewed with hindsight, they were not so vague as to render the employee prejudiced in any way. There is no merit in this objection.

⁴ Gama, page 65

⁵ Bundle A1, page 20

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Background

- 16 Mr. Wells has been the Acting Chief Executive Officer for Transnet since March 2009 when he succeeded the former CEO Ms Ramos. Prior to that he was the Chief Financial Officer. He set out the structure of the organisation with its various divisions and governance structures with the Board and its various Committees. Transnet Internal Audit reports directly to the Audit Committee which is the Sub-Committee of the Board. For day-to-day operations Transnet Internal Audit (TIA) reports directly to the Chief Financial Officer's Department.
- 17 Gama joined Transnet in 1994, as the Business Development and Planning Manager for the Port of Durban. Previously he obtained a B.Com degree and studied towards an MBA. Having worked in Portnet for eleven years he then in 2005 was appointed as the Chief Executive Officer of Spoornet, now known as TFR. In that position he headed up a team of fifteen general managers involved in the various operations with four or five general managers beneath him dealing with the day-to-day running of the operational activities of TFR. The General Manager responsible for Safety and Security for part of the time relevant to the present matter was Mr. John Beattie. The CEO of Transnet Rail Engineering ("TRE") was Mr. Richard Vallihu. TFR employs approximately twenty five thousand employees.

Charge 1: EXCEEDING OF DELEGATED AUTHORITY IN APPROVING THE GNS CONTRACT

- 18 In relation to charge 1 Mr. Gama denies that he exceeded his delegated authority.⁶ He denies further that he was aware of any irregularities in the procurement process of the award before the contract was concluded. He

⁶ Bundle A1, page 23

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also denies that he failed to take appropriate steps to investigate the alleged irregularities once they were brought to his attention.

The Policy Framework

- 19 The Detailed Procurement Procedures ("DPP") policy of Transnet is relevant to this charge. This policy was in place at all relevant times and provides that the Transnet Board has delegated its powers for the day-to-day running of the business to the Group CEO who in turn has delegated certain powers to the CEO's of the relevant Transnet entities, of which TFR would be one such entity.
- 20 The DPP policy sets out the open tendering process (also referred to as the Request For Proposal or "RFP" process) in Transnet.⁷ The policy states that: *"The tendering system is regarded as the procurement mechanism which best ensures open and fair competition. Tenders are invited publically and any individual or enterprise is granted equal opportunity to tender for Transnet's business."*⁸ This general approach is however subject to an exception dealing with the circumstances in which the open public tender process is not adopted and where confined enquiries for quotations may be invited. This is the exceptional procurement process referred to as "on confinement", the idea being that the business will be confined to only one or a few tenderers rather than going on open tender. The policy states that the confinement mechanism *"... is ideally suited for circumstances where due to urgency, or restrictive market, etc, it will not be possible, practical or economically viable to invite open tenders."*⁹
- 21 The conditions for the application of the exceptional circumstances under which the confinement process may be adopted are set out in the DPP

⁷ Clause 2.2 of the Policy

⁸ Clause 2.2.1.6 of the DPP Policy

⁹ Clause 2.5

policy. The following sub-clauses of clause 2.5 are relevant for present purposes:-

- “2.5.1.1 *If the purchase, sale, hiring of movable goods or service which must be rendered, or the offer received, exceeds R2 million in value and is of such a nature that it cannot be dealt with in terms of any of the prescribed procurement/disposal mechanisms, the matter must be fully motivated in writing to the CEO, or his/her duly authorized delegate in the Procurement Function, depending on the value of the proposed confinement, who will, if he/she agrees with the reasons advanced for the proposed confinement, authorise the confinement of business to one or more contenders only.*”
- 2.5.1.2 *Important to note that the CEO or his duly authorised delegate in the Procurement Function, **who has been granted such specific powers in terms of hi/her Special Delegation of Authority**, may grant prior written authority to invite quotations or to consider an offer, provided that in his/her opinion it is in the best interest of Transnet.*”
- “2.5.2.3 **NB:** *It is accepted that in certain instances such as derailments, washaways or failure of critical equipment (such as an electric substation failure), or instances where any delay will result in the loss of lives, or loss of revenue, etc., it might be absolutely impossible to obtain the necessary prior authority to confine. In such an instance the emergency work is performed, and a full motivation only submitted afterwards, in the normal manner, to obtain the necessary “retrospective authority for confinement”. The words “in exceptional circumstances” shall be applied judiciously and restrictively. Misuse of this concession as an excuse for bad planning will be regarded as a serious contravention and will be dealt with severely.*”

It is clear from these provisions that the confinement process is exceptional in nature and is used where the particular nature of the circumstances under which the services or goods are required to be procured are such that it is not possible to follow the open tender process. The policy does make provision for retrospective authority for a confinement procedure, but makes

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it very clear that this retrospective authority is to be applied judiciously and restrictively.

- 22 A CEO, such as Gama, can act comfortably within his delegation of authority so long as the programme for which he is authorising expenditure has been approved in terms of the budget which is part of the corporate plan.¹⁰ Where expenditure falls outside of the corporate plan or has not been budgeted for then the Capital Investment Committee ("CIC") has to review the potential spend and, depending on the amount involved, the authorisation may need to go to the Board for approval.
- 23 It was contended for Transnet that whenever authority is required to exercise the procedures on confinement under clause 2.5 the person adopting the confinement procedure must apply his/her mind properly to the situation and is required to form an opinion on the basis of reasons given for why the exceptional confinement procedure needs to be adopted. This is indeed the case as appears from clause 2.5.1.1 of the DPP policy which requires that matters on confinement be fully motivated in writing by the CEO if he agrees with the proposed confinement. I did not understand Gama to contend that he was not required to exercise his mind and form his own independent view before authorising a contract on confinement.
- 24 In relation to contract acceptance the DPP policy provides that a manager may only communicate acceptance of a tender and conclude a contract if certain provisos have been adhered to, including that "*the value of the business awarded is within the level of his powers to contract in terms of his Special Delegation of Authority*".¹¹ The alternative, where the value of the business exceeds the level of a manager's delegated authority, the policy requires that "*he shall obtain a mandate from higher authority to conclude*

¹⁰ Dates page 42

¹¹ Clause 6.2.1.2

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and administer the contract.”¹² The DPP policy also provides that each division or business unit, such as TFR, will have its own Divisional Acquisitional Council (“DAC”) which will consider and approve all expenditure contracts falling within its jurisdiction and within the CEO’s delegated powers. Those transactions which exceed the CEO’s delegated powers will likewise be considered by the DAC, and if the DAC concurs with the recommendation, it will refer the matter to the relevant person in the hierarchy with the appropriate delegated powers for the particular Rand value of the transaction.¹³

The Transnet Delegation of Authority Framework¹⁴ is also relevant. It provides for the delegation of power in detail. For present purposes what is relevant are the provisions which deal with procurement¹⁵ and which provides that four steps must be followed namely: (i) Financial approval to spend the funds in terms of OPEX/CAPEX budget; (ii) Approach the market for quotes/tenders from potential suppliers; (iii) Evaluate quotes/tenders from potential suppliers and recommend award of business; and (iv) Conclude the contract with the successful supplier. In particular applicable to the present case is Note 5 of the Framework which reads as follows:

*“All confinement of tenders are subject to prior approval by the relevant official – see 5.4.2 below. Confinement of tenders above R2 million should involve the obtaining of 3 quotes from suppliers, failing which it must be fully justified. Also refer to section 8.1 and 8.2 of the Detailed Procurement Procedures (DPP).”*¹⁶ (my emphasis).

A further note provides that it is permitted to increase an existing contract value by up to 10% subject to certain procedures. Any increased amount exceeding 10% of the original contract value requires to be approved by the

¹² Clause 6.2.1.3

¹³ Clause 8.1 of the DPP policy

¹⁴ Edition approved on 30 October 2007

¹⁵ Clause 5.4

¹⁶ At page 19 of the Delegation of Authority Framework

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relevant Acquisition Council.¹⁷ Although the policy documents referred to an "Acquisition Council" this was frequently referred to in the hearing as the "tender board". Both terms are used interchangeably in these findings.

- 25 Where procurement for goods and services to the value of greater than R2 million is required the system requires that such procurement be referred to the Head Office Acquisition Council ("HOAC") which is a group of senior managers which meets weekly or fortnightly and deals with day to day procurement activities. Larger procurement projects above R15 million are referred to the Divisional Acquisition Council ("DAC") which meets on a monthly basis. Gama himself was not a member of either of those structures. He on one occasion chaired the DAC when it dealt with a very large acquisition of 212 locomotives where the procurement was worth some R6 billion.
- 26 Mr. Gama is the CEO of the operating unit TFR. The delegation document provides that he is authorised in relation to confinement tenders to approve an expenditure of up to but not exceeding R10 million.¹⁸ This authorisation is subject to a note that *"Exco Members have no authority to sub-delegate to Supporting Business CEO's on this transaction. The limits are per transaction/confinement."* The limit of Gama's authority in relation to the GNS security contract was therefore R10 million. This was confirmed by Oates¹⁹ and was not disputed by Gama.
- 27 The document which Gama signed approving the GNS contract is a TFR Divisional Acquisition Council Agenda Item document headed *"GNS confinement"*. It is a seven page typed document which reflects the *"Title of Submission"* on the first page as being *"Confinement (Provision of a total specialised security package)"*. The document deals with the GNS

¹⁷ Note 6 on page 19 of the Delegation of Authority Framework

¹⁸ Clause 5.4.2 on page 20 of the Delegation of Authority Framework

¹⁹ Oates pages 93 - 94

confinement process where GNS is the sole service provider referred to in the proposal for which the contract value/ tender price (excluding VAT) is reflected as R 18,9 million made up by R1,57 million per month over a contract period of 12 months.²⁰ The budgeted amount is reflected as R13 million.²¹ Nothing turns on the discrepancy between the tendered contract price and the budget amount as both exceed R10 million. The document uses the word "*confinement*" in some fifteen places including in the heading and in the title of the submission. The document concludes with the signature of Mr. Gama on 5 December 2007 in his capacity as CEO of TFR. I shall refer in these findings to this document as the "GNS confinement document".

- 28 Transnet's case is that the GNS confinement document is a representation of a confinement process having been authorised by Gama on 5 December 2007 in respect of a twelve month contract period which commenced on 1 November 2007 until 31 October 2008 for a value of R18.9 million which exceeds Gama's delegated authority limit on confinement of R10 million.
- 29 Transnet did not content itself with a consideration of the GNS confinement document and the immediate circumstances of the signature thereof by Gama but led a considerable amount of background evidence of what occurred prior to the signing of the GNS confinement document and the circumstances of the investigation and Gama's alleged lack of action once irregularities in the GNS contract and the process of securing that contract came to light. I turn now to consider in some detail evidence relating to the GNS contract.

²⁰ Bundle B1, page 115, paragraphs 11 and 4

²¹ Bundle B1, page 114, paragraph 3a

Evidence in relation to the GNS contract

- 30 The evidence for Transnet in relation to this charge was primarily that of Mr Oates and Mr Madhav. There was also the evidence of Mr Wells on this aspect. Mr. Oates is a partner at Ernest and Young. The Internal Audit at Transnet has been out sourced to Ernest and Young since 1 August 2005 and Oates has been involved in the Transnet Internal Audit ("TIA") since that time. Mr Madhav was the main investigator on this charge while Oates who was his superior, oversaw the investigation. Madhav is an Associate Director at Ernst and Young responsible for forensic investigation at TIA where he has been employed since October 2008. At the request of Oates he investigated the allegations relating to the TFR security department and in particular the GNS contract.
- 31 Madhav prepared report a into the security department dated 12 February 2009 (to which I shall refer as the "*Madhav report*").²² He submitted this report to Oates who in turn gave it to Ms. Ramos. Madhav testified about the content of his report at the disciplinary hearing. The report concluded that the value of the GNS contract amounts to R18 933 120.00 and that there was no written document confirming that the proposed confinement was escalated to the Group Chief Operating Officer. The report concluded that the GNS confinement was approved by Gama as CEO of TFR in contravention of section 5.4.2 of the Authority Framework document.²³ Oates confirmed that as at the date of the disciplinary enquiry no such document escalating the matter to the Group COO had been produced.
- 32 Oates testified that the GNS confinement contract is clearly for a period of 12 months and that there is no basis for saying that it was for only a 5

²² Bundle D, page 33, Madhav pages 58-59
²³ Bundle D1, pages 55 - 55

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month period as Gama contended in his written response to the charges.²⁴ He testified that had the GNS contract been concluded on an open tender process it would typically have not required any involvement of the CEO as other persons were empowered (within their delegated authorities) to award the contract provided it was pursuant to an open tender. Oates accepted that as a matter of courtesy a contract on open tender may however have gone to Gama despite there being no requirement that it had to.

- 33 As far as the Oates was aware, Gama's only involvement in any irregular process in the TFR security department was the signing of the GNS contract on 5 December when Mr Beattie presented the document to Gama and asked him to sign it.²⁵ Mr Beattie, as appears more fully below has left Transnet and lives in Australia.
- 34 Oates did not accept that it was in order for Gama, if he was approached and told that the GNS contract had been through the tender board process and needed his approval, to simply approve the contract without more. He said that Gama needed to apply his own mind to the issues and could not simply rely on his staff where the plain evidence in the document in front of him showed that it was not an open tender process but rather a confinement process. Oates did however accept that had the GNS proposal in fact been through an open tender process there would be nothing irregular about Gama's signing the GNS confinement document.
- 35 The crux of the issue on this charge is whether Gama was entitled, as he did, to simply accept that an open tender process had been followed when so advised by Beattie. Transnet's case was that when the document was presented to Gama it very clearly reflected that the contract was on confinement. The GNS confinement document referred to a company, GNS,

²⁴ Oates page 89

²⁵ A.t page 129

which Gama knew involved a friend of his.²⁶ Oates testified that in those circumstances the CEO should have been very careful to ensure that it was an open tender process and to ensure that he was acting within his level authority. Oates conceded that if Gama had looked only at the last page of the GNS confinement document presented to him that there is no reference to a confinement and nothing to indicate that the contract concerned a confinement. This is the page which contains the signatures of the persons who requested, recommended and supported the proposed GNS contract.²⁷ In fact this concession by Oates is mistaken because in the fine print at the bottom of each page of the document, including the final page, is a reference to confinement.²⁸

- 36 The GNS contract was recommended by the Head Office Acquisition Council TFR ("the tender board") when it was outside their level of authority to so approve it. Oates said that that of Mr L. Tobias, the Chairman of HOAC was on the list of persons with whom the TIA still needed to further discuss this matter. Other responsible persons involved may therefore still be disciplined for their involvement. Mr John Beattie the former General Manager : safety and Security TFR left the organisation in December 2007 as is more fully discussed elsewhere in these findings.
- 37 Oates testified that when Gama had reviewed the renewal of the previous service provider CPI he had made a written comment on one of the document calling for the contract to go on open tender and that the process must be advertised. Oates therefore accepted that Gama's approach was that security contracts had to go on open tender.
- 38 Mr Dingaan Senamela was employed by Mr. Gama as Senior Manager Security: TFR in which position he was required to oversee the entire

²⁶ A.t pages 131-2

²⁷ B 1 page 120

²⁸ This is clear from Bundle B, page 120H

security function for TFR as head of security.²⁹ Oates accepted that it was Senamela who had to explain why the extra R13 million extension was approved in respect of the GNS contract. Disciplinary steps have been implemented against the Senamela in relation to an irregular extension of the GNS tender. Oates also accepted that Mr. Fredricks was responsible for the letter written to GNS on 6 December 2007 informing that company that it had been appointed. These aspects of the GNS security contract were not matters for which Gama was responsible.

- 39 Oates testified that at the breakfast meeting of 10 December 2008 he informed Gama of the fact that the GNS contract was the subject of an investigation.³⁰ When he testified later Gama denied that he had been so informed by Oates at that meeting³¹ but this fact was not put in issue with Oates when he was cross-examined. It must therefore be accepted that Gama was informed as early as 10 December 2008 that there was an investigation into a complaint about the appointment of GNS. As Gama had himself authorised the appointment of GNS clearly this investigation of which he was told could possibly have related to Gama himself.
- 40 Oates said that in the meeting of 10 December 2008 between Gama and himself he asked Gama whether or not he knew General Nyanda. Gama responded by saying that he knows many people. Oates then asked him whether Nyanda was a friend of his to which Gama answered "*I have many friends*".³² It was put to Oates in cross-examination that at that meeting Gama did not say that General Nyanda was one of his many friends but said that he knew General Nyanda "*as you would know him as a public*

²⁹ Page 108

³⁰ Oates, page 81

³¹ Gama, page 59-60

³² Oates page 52

figure" or words to the effect. Oates denied this.³³ Oates said that his exact words were "*I have many friends*".

- 41 Mr. Karthi Naicker is the Transnet Group Forensic Manager. He also testified about the events of the breakfast meeting of 10 December 2008 which he attended with Oates and Gama. There was no transcript of this meeting which was an informal meeting. Naicker had never met Gama before the meeting. According to Naicker the nature of the discussion at the meeting was that Oates informed Gama that various call reports had made anonymous tip offs. The reports referred to a rape allegation and a recruitment irregularity in relation to security personnel at TFR. Gama indicated that he was aware of these issues. Oates then proceeded to tell Gama that there was also an issue around the appointment of GNS and he asked Gama whether he was happy with the performance of GNS. Gama responded that he was indeed happy with its performance. Oates had in general indicated that there was a need to investigate all these allegations and Gama was supportive indicating that he would provide cooperation and assistance in the investigation. Mr. Senamela was mentioned in the discussion and Gama indicated that he had employed Senamela with whose performance he said he was happy. General Nyanda was also mentioned. Oates asked Gama if he was friends with General Nyanda and Gama responded by saying that he knew a lot of people and had a lot of friends. According to Naicker the discussion concluded with Oates indicating to Gama that TIA would conduct an investigation into and verify the merits of the various allegations. Gama again said that he would provide the necessary assistance and support. It was also put to Naicker in cross-examination that Gama's recollection of this discussion was that when he was asked whether he knew General Nyanda he replied along the lines that he knew General Nyanda like you would know him because he is

³³ Oates page 12

a public figure. Naicker said did not recall this response by Gama at the meeting.

- 42 Madhav received the report sent to Ramos on 18 September 2008 together with the Anonymous Tip-Off's letter dated 21 October 2008 containing the allegations regarding irregularities at TFR Security. He also confirmed the second Anonymous Tip-Off's letter. Madhav was mandated to look into the contents of these documents to see whether there was any merit in the allegations and to authenticate them if possible. In order to do so he started an initial verification process as a result of which he concluded that there was some substance to the reports which needed further investigation. The allegations regarding irregular appointments of staff and the rape allegation took precedence, the former because at the time there was some 80 officials that had been interviewed in relation to employment in various security roles and a number of those candidates were apparently not suitable for the positions to which they were about to be appointed. This required urgent attention.
- 43 The investigation into the situation which preceded the GNS contract revealed that a company called CPI was appointed during November 2005 to conduct certain specialised security services relating to the apprehension and prosecution of persons responsible for cable theft in the Gauteng region. The value of this contract was R520 000 per month for two teams of investigators. CPI was appointed on confinement as it was the only known company to offer this service. The initial contract was for 6 months and was thereafter extended for a further 6 months.³⁴ At this stage Gama entered against his signature approving the contract a note which read: "*Enter into a 6 month contract and reassess*"³⁵

³⁴ Madhav page 73; Bundle B1, 8B

³⁵ Bundle 1, page 8B

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- 44 There were two further 6 month extensions to the CPI contract.³⁶ The second extension therefore expired at the end of December 2006. On 3 March 2007 Gama signed a further extension of the contract until the end of June 2007 with a note that CPI's services be reviewed in the interim to see whether they are required and instructing that the work go out on a public tender process for the contract with effect from 1 July 2007.³⁷ The extension of the CPI contract for the period December 2007 to March 2007 was therefore a retrospective approval by Gama.
- 45 The memorandum of agreement for the provision of security services between Transnet and CPI records that Transnet "...requires the services of an experienced security and investigative company with the... expertise and extensive knowledge of the scrap metal industry... so as to enable Spoornet to obtain its desired results of eliminating conductor/cable theft and theft of goods in transit as well as removing the leaders of the conductor/cable theft syndicates from society through arrest and prosecution."³⁸ The contract further records that CPI warrants "that it is a security and private investigative company with the necessary skill, knowledge and expertise, possesses the required security personnel and equipment, is fully conversant with Spoornet's problem and operations, and is willing to tender the services required so as to enable Spoornet to achieve its desired results."
- 46 Madhav testified that he could find no evidence to confirm that GNS met these requirements when it later contracted with Transnet.³⁹ The scope of services and performance assessment criteria were set out in the CPI contract and the geographical area of the contract applied to the Central region which Madhav explained extended from Gauteng to Ermelo, and

³⁶ Madhav, page 71

³⁷ Bundle B1, page 8H(i) replacement

³⁸ Bundle B, page 8L

³⁹ Madhav page 76

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Standerton and as far north as Musina. In this regard Transnet has Western, Central and Eastern regions. The principal region is the Central region in which most activity takes place. It is also the area which predominates from a crime point of view.

- 47 Madhav testified about the attempt to obtain a complete security package for 2 years across various regions under tender number 103098739.⁴⁰ This tender was issued on 17 July 2007 with a closing date of 7 August 2007 and a compulsory briefing on 27 July 2007. The final extension of the CPI contract expired on 30 June 2007, but a month-on-month extension was granted to CPI for July and August 2007. This was required because the aim of going out on public tender and obtaining a contract before 1 July 2007 had not been achieved. Madhav testified that by the end of August, when the month-on-month extensions to CPI expired, the tender process for the new contract had not yet been completed.⁴¹ Nevertheless the CPI contract was not extended any further. The investigation could not obtain any explanation for why there was no further extension, particularly as there was no apparent dissatisfaction with the services provided by CPI. In fact the evaluation report on the tender in question⁴² records that when assessing the previous business conducted "*the current contractor CPI are delivering great results with regards to cable theft etc*".
- 48 The investigation showed that an open tender was issued and eleven tenders were received.⁴³ The tender description was to provide a complete security package service for a two year period across the Central as well as the Eastern regions. The services required included the prevention of cable theft, visible policing, securing rapid response to crime incidents,

⁴⁰ Bundle B, page 9

⁴¹ Madhav page 81

⁴² Bundle B, page 28

⁴³ Madhav page 83, Bundle B, page 20

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investigations, arrests, prosecution and conviction of perpetrators.⁴⁴ Included among the eleven bidders were the following three companies: G4 Security Services, Vimba Group Holding and CPI. GNS was not one of the bidders in this process.

- 49 A short listing process resulted in four bidders being short listed namely G4 Security, Vimba Group Holding, Fidelity Security Services and CPI which had been the previous service provider.⁴⁵ As at 29 August the open tender process was ongoing and the four short listed firms were invited to attend a meeting on 31 August 2007 at which there would be a presentation and questions. The evaluation report of the Head Office Acquisition Council in relation to this tender reflects the same four bidders.⁴⁶ It is this document which contains the assessment of the previous business conducted from Spoornet which is referred to above and which recorded that CPI was delivering great results.
- 50 Madhav testified that various e-mail correspondences within Transnet reflected that as at 2 October 2007 the matter was ready to go to the relevant acquisition council for approval. Madhav testified that at a meeting held by Transnet at group level G4S was appointed to perform a group wide audit of all security services being provided to Transnet. For this reason it became inappropriate for G4S to continue to participate in the bidding process to provide services when it also had to audit those services.
- 51 On 15 October 2007 Khanye of TFR send an e-mail to Douglas Martin, the Supply Chain Manager at TFR, and others indicating that the open tender process should be put on hold because of this situation. There was a response the same day on the e-mail from Mr Nayager of TFR to Khanye (and others) rectifying the message in the previous e-mail and stating that

⁴⁴ Bundle page 18

⁴⁵ Madhav page 85, Bundle B, page 24

⁴⁶ Bundle page 29

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"it is an INSTRUCTION from Transnet to place this process on hold".⁴⁷

There was however no indication from whom this instruction had emanated.

- 52 A series of the e-mails were in the file Madhav obtained from Khanye.⁴⁸ These documents revealed that on 5 November Martin e-mailed Khanye asking him to send out an advice to the bidding firms that the process had been cancelled in its entirety.⁴⁹ The concern expressed by the investigators, and Transnet in the hearing, was that in a process where there were four short listed bidders that could potentially provide the security service and one bidder had to be excluded because a situation of conflict of interest arose, there was no reason why the process of short listing should not continue with the three remaining service providers. The cancellation of the open tender process and the substitution thereof with the confinement process was therefore extraordinary and unexplained.⁵⁰ This was particularly the case because the open tender process was already at an advanced stage in November 2007 when the process was cancelled. The four bidding firms had already been short listed and had made their presentations and had submitted their BEE requirements to the Acquisition Council, which indicated that the process was already at an advanced stage. The investigators could find no evidence of a reason for why the open tender process had been cancelled in its entirety. Explanations were obtained from the security managers concerned, namely Khanye and Nayager but they were not satisfactory. One explanation was that they did not want any repercussions and another explanation was that there were no other suitable bidders from the remaining three in the bidding process once G4S had dropped out. Neither of these explanations was satisfactory, particularly because CPI had previously rendered security services to TFR successfully. The investigators also investigated whether or not Transnet

⁴⁷ Bundle B, page 32B, Madhav page 92

⁴⁸ Bundle B1 pages 32A- 32C

⁴⁹ Madhav page 92, Bundle B, 32A

⁵⁰ Madhav page 93

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Limited had in fact issued an instruction at group level to cancel the open tender process. Ms. Dunswa, who would have been responsible for such an instruction, denied that she ever issued an instruction to stop the process.⁵¹ Their investigators were unable pinpoint precisely from where the instruction allegedly came, but it appeared to have emanated from the TFR security department.

- 53 Madhav testified that both Senamela the Senior Manager: Security TFR and Khanye Manager Security: TFR were both charged with misconduct in relation to irregularities in relation to the GNS contract.
- 54 Madhav testified that the DPP policy stipulates that on cancellation of an open tender process the relevant Acquisition Council (in this case HOAC) has to be notified of the cancellation of the tender process. There was no evidence that HOAC was ever notified of the cancellation in the present case.⁵²
- 55 The GNS confinement document signed by Gama on 5 December 2007 records that the service provider is "*General Nyanda Security (Pty) Limited registration number 1998/0122/0507.*" On the face of it the formal contract between TFR and GNS was later concluded with an entity styled "*General Nyanda Security (Pty) Limited*". That is the name of the company reflected immediately below the signature of the signatory who signed on behalf of GNS⁵³ and is similarly the name of the contractor as defined in the body of formal written contract.⁵⁴ The cover sheet to the GNS contract however reflects a different company name, namely "*General Nyanda Security Advisory Services (Pty) Limited*",⁵⁵ but with the same company registration number. The investigation showed that only a company by the name of

⁵¹ Madhav page 95

⁵² Madhav page 96

⁵³ Bundle B1, page 127 read with page 164

⁵⁴ Bundle B1, page 142 para 1.1.17

⁵⁵ Bundle B1, page 138

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"General Nyanda Security Advisory Services (Pty) Limited" existed and it has the company registration number 1988/12205/07. This latter company was registered with the Private Security Industry Regulatory Authority in terms of section 21 of Act, 56 of 2001 on 9 June 2008. A copy of the certificate of registration was produced in evidence.⁵⁶ A security service provider needs to be registered with the Private Security Industry Regulatory Authority ("PSIRA") and its employees need to be accredited. A statement from Mr. A. Malesa, the Registrations Manager of PSIRA was produced which showed that the company General Nyanda Security Advisory Services (Pty) Limited applied for registration with PSIRA on 5 June 2008 and was registered on 9 June 2008. At the time that Gama signed the confinement contract with GNS it was therefore not registered with the PSIRA. Neither was it registered at the time that the full written contract was concluded on 4 June 2008. Indeed GNS only applied for registration the following day.

- 56 Under cross-examination Madhav accepted that when referring to "GNS" one had to distinguish General Nyanda Security Risk Advisory Services (Pty) Limited from the close corporation associated with GNS. He accepted that whilst the company was not registered with PSIRA the CC was so registered. The members of the CC were Messrs. General Nyanda and Mr. Sylvester Sithole, who were also directors and shareholders of the GNS company. Madhav stated that when they investigated the financial affairs of GNS it was the financial affairs of the company and not the CC which they investigated.⁵⁷ The fact remains however that the company General Nyanda Security Advisory Services (Pty) Limited was not registered with PSIRA on 4 June 2008.⁵⁸

⁵⁶ Bundle B1, page 36

⁵⁷ Madhav page 117

⁵⁸ Madhav page 118

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57. It should be noted that the terms of section 20 of the Private Security Industry Regulations Act, 56 of 2001 no person may render a security service for remuneration or reward unless that person is registered as a security service provider in terms of the Act.⁵⁹ Moreover a security business may only be registered as a security service provider if all the persons performing executive or managing functions in respect of that business are registered as security service providers.⁶⁰ Any contract concluded which is inconsistent with these provisions is invalid to the extent of such inconsistency.⁶¹ On the face of it therefore the GNS contract when it was signed on 4 June 2008, being the last date of signature, was not valid. It is not necessary for purposes of this hearing to make a definitive finding in that regard. What the evidence in this regard does show is that GNS was established at the last moment before concluding the GNS contract – in fact too late. This contradicts the contention that GNS had any kind of prior record of providing services in the security industry as is suggested in the GNS motivation for confinement document which was prepared within TFR as is more fully canvassed below.
58. The date on which the open tender process was put on hold was 15 October 2007 and it finally cancelled on 5 November 2007 according to Madhav. The written proposal by GNS to TFR was contained in an unsigned document dated 4 October 2007⁶² which was *before* the open tender process had been stopped and indeed preceded the date upon which the tender process was put on hold. In addition on 3 October 2007 Mr. Khanye of TFR received an e-mail which contained a profile of GNS (Advisory Services).⁶³ Madhav confirmed that this proposal was received

⁵⁹ Section 20(1)(a)

⁶⁰ Section 20(2)(a) & (b)

⁶¹ Section 20(3) of Act 56 of 2001

⁶² Bundle B, page 52

⁶³ Bundle B, page 61

prior to the cancellation of the existing open tender process.⁶⁴ Madhav testified that given that the open tender process had already reached the stage of short listing and TFR was almost ready to make an award of the contract, it was highly irregular to be receiving profiles and proposals from an additional competing service provider which had not taken any part in the open tender process.⁶⁵ This was not challenged.

- 59 Madhav pointed out that the content of the GNS proposal was unimpressive and contained anomalies. It referred for example to past experience of the company GNS in "*exposing jury tampering, "bogus expert witnesses, counterfeit venues and conspiracies"*".⁶⁶ Madhav testified that there was no evidence to confirm that GNS had any previous experience in these areas. Although the proposal claimed that "*GNS provides the finest business intelligence available in the world today*",⁶⁷ Madhav testified that their investigation could find no evidence of GNS's previous performance or track record. Their investigation showed that as at 27 February 2007 the annual turnover for that year for GNS was approximately R3 million. The TIA investigation in this regard remains ongoing. Madhav's investigation revealed that GNS did have various motor vehicles reflected on its financial statements as its assets but had no other assets or security equipment.⁶⁸
- 60 The GNS profile reflected that GNS operated from what it termed a platform or consortium which comprised of "*Revert Risk Management Solutions*", a company with which it was in alliance as well as "*Nayle Outsourcing*" and "*Sithole Human Capital*" all of which contracted their services to GNS. There was no evidence from the GNS financial statements that it employed any staff or that it paid salaries and wages. An examination of the GNS tax

⁶⁴ Madhav pages 102-103

⁶⁵ Madhav page 103

⁶⁶ Bundle B, page 70

⁶⁷ Bundle B, page 71

⁶⁸ Page 105

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clearance certificated showed that it was not registered for UIF, PAYE or the Skills Development Levy which indicates that this company entity operated without employees. Madhav stated that their investigation showed that GNS was really a shell company which outsourced its services to other companies to perform all the work.⁶⁹ His evidence in this regard was not challenged.

- 61 Madhav testified that the GNS proposal to TFR was not contained in the confinement file. Subsequent investigation however found these documents in the office of Senamela the Senior Manager: Security TFR. These documents were not offered to the investigators by Mr. Senamela on request and were only found following a search of his office by the investigators. Senamela is presently subject to disciplinary proceedings.
- 62 Madhav referred to a proposal made by GNS to TFR dated 12 October 2007 which was signed as having been received on 15 October 2007 by Messrs. Nayager, Senamela and Khanye of the TFR security department.⁷⁰ The document was therefore produced shortly before the open tender process was halted and was received on same date that the tender process was halted. Madhav testified that their investigation could not find any evidence that the open tender process was in fact cancelled and stopped in an authorised fashion,⁷¹ or formally cancelled as required in terms of the DPP policy requirements. The GNS proposal of 12 October 2007 reflected as its purpose a project to address cable theft and theft of goods from TFR as paragraph 1.2 of the proposal reflects.⁷² The GNS proposal when describing the project background in paragraph 1.1 thereof reflects that GNS had information as to the operations of and operational requirements of TFR and the problems relating to high levels of cable theft and theft of

⁶⁹ Pages 106-107

⁷⁰ Bundle B, page 83, Madhav pages 108 and 112

⁷¹ Page 109

⁷² Page 109, Bundle B, 88

goods. This information, as far as Madhav could ascertain, had been furnished to GNS in earlier correspondence on 3 and 4 October 2007 in e-mails from TFR. This led the investigators to conclude that the GNS proposal was prepared with the assistance of someone from within TFR. This was not challenged by Gama. This assistance to GNS would have been provided probably at some time between 3 and 12 October 2007. The GNS proposal details the project approach⁷³ to include "Investigations and Analysis", "Monitoring and Evaluation", the development of an action plan as well as the gathering of intelligence. At clause 2.3 of the GNS proposal project cost estimations are provided. Madhav testified that the proposed costs for the services of GNS were significantly higher when compared with the costs of the services which had up until then been supplied by CPI and reflect a total pre-VAT costs of R2.2 million per month compared with the R520 000.00 per month then being charged by CPI. In other words the cost was approximately four times as high.⁷⁴

- 63 According to Madhav the investigation revealed that there was a second proposal received from GNS, similarly dated 12 October 2007. This was identical to the first proposal save that the cost estimates in clause 2.3 thereof were reduced from an overall pre-VAT cost of R2.2 million to approximately R1.5 million per month. The second proposal therefore revised the costing downwards. On investigation as to how this had occurred Mr. Nayager, Manager Security: TFR informed Madhav that following receipt of the initial proposal TFR security management engaged in negotiations with GNS in order to reduce their costing on prices and that this would have occurred around about 15 October 2007, almost 2 months prior to the signing of the confinement by Gama on 5 December 2007. Madhav said that the revised costing remained excessive when compared

⁷³ Paragraph 2.2

⁷⁴ Bundle page 94, Madhav pages 112-113

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with the charges by CPI for broadly the same service provision and was approximately three times as high.

- 64 The impact of this evidence as to the excessive cost of the GNS was significantly modified under cross-examination when Madhav conceded that a proper cost comparison was very difficult to make. In his report Madhav stated when dealing with financial considerations in paragraph 5 that "*It could not be determined whether the amounts paid to GNS were reasonable when compared to payments made to CPI, as we are unable to isolate common services performed by both companies*".⁷⁵ Madhav stood by this statement at the enquiry. When asked to explain how he could then assert that GNS was so much more expensive than CPI if he was unable to make the comparison, his explanation was that they had only been able to perform a comparison of the invoices at face value and because the descriptions in the invoices of the two companies may have been very different for what were in reality the identical services, it was not possible to isolate precisely what services had been performed by CPI when compared with GNS.⁷⁶
- 65 Madhav said that even if one assumed that the GNS contract was for a wider geographical region including not only the Central Region but also the Eastern Region, that the contract price still remained excessive because by far the greater services of Transnet occurred in the Central Region. The investigation therefore showed that prior to 15 October 2007 when the open tender process was put on hold, proposals had been received from GNS concerning its service and negotiations were taking place around GNS's proposed costing.⁷⁷

⁷⁵ Bundle D1, page 44

⁷⁶ Madhav pages 119- 120

⁷⁷ Page 117



The GNS Confinement Motivation

66 Madhav found a GNS confinement motivation document on Khanye's computer which was reflected as have been created on 29 October 2007. It set out the general problem Transnet faced of the rise in theft of copper and aluminium cable; stated that research done on the PSIRA website identified three companies that had never worked for Transnet before; commented on the profile of each these three companies and thereby excluded two the three leaving only GNS as a company which could offer the comprehensive specialised security package sought by Transnet. This motivation document concluded with the recommendation that GNS be afforded the opportunity to provide a solution to the cable theft problem. The document was prepared for signing by Senamela Senior Manager: Security TFR. The final paragraph of the document deals with "*Way Forward*" and suggests that TFR go out on open tender early in 2008 before April to secure a complete specialised security package. This suggestion is however contradicted by the recordal in the motivation itself which suggests that as the festive season approaches an alarming increase in copper theft has been shown and is to be anticipated unless a specialist security service is in place. Madhav's investigation did not reveal any further documentation in the form of either an open tender process having been adopted or in the form of any confinement authorisation or motivation having been prepared. Importantly no documents were found to show that GNS was ever involved in any form of open tender process.⁷⁸ The GNS motivation document was initially found on Khanye's computer and was not supplied to the investigators by the employees in the TFR security department on investigation. It was only traced when Khanye's computer was imaged. Madhav testified that it appeared that the document was authored by Khanye together with Senamela as a signed version of the GNS

⁷⁸ Pages 118 and 122

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confinement motivation was later obtained which bore the signatures of both Senamela and Khanye. The date on which this document was signed is unclear.

- 67 On 23 October 2007 one Bella Maja of TFR sent an e-mail to GNS and copied it to a number of people at TFR, including both Khanye and Senamela. In that e-mail Maja indicated that as per Khanye's request of 23 October 2007 GNS should complete and provide the information required in the attached pro forma Supply Declaration Form (SDF) for vendor creation.⁷⁹ Madhav explained that this was forwarded to GNS in order for it to complete the documentation so that it could be registered as a vendor on the SAP system so that payments could be affected by Transnet to GNS in the future. Although there was nothing irregular about creating a vendor on the system, the timing thereof is significant if one has regard to the fact that the open tender process for short listed bidders had been put on hold on 15 October but had not yet been stopped. It was therefore extraordinary that GNS was already being forwarded documentation to be created at a vendor on the Transnet system.⁸⁰ In addition also on 23 October, a letter was written by Mr Brian Fredricks, the Chief Procurement Officer: Spoornet Supply Chain Services to the Managing Director of GNS requesting that it supply Transnet with its BEE accreditation credentials. The letter indicates that the furnishing of a rating certificate regarding such credentials is a requirement for any future tender issued by Transnet.
- 68 The GNS confinement motivation document under the heading "*Current status quo*" states that "*Unfortunately CPI contract number ... expired on 31 August 2007*". Madhav testified that he failed to understand what was unfortunate. The expiry of the CPI contract had been extended month-on-month up to 31 August and could simply have been extended for a further

⁷⁹ Bundle B, page 111 A
⁸⁰ Page 121

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few months until an open tender process had been completed. No explanation was supplied by any of the players in the TFR security department as to why the services of CPI had been terminated at that stage.⁸¹

- 69 The GNS confinement motivation then refers to the (open tender) having been stopped *"on the instruction from Group Executive Virginia Dunjwa (the Group Chief Risk Officer) after it was realised that one of the companies we short listed (G4S) was awarded business by Transnet Strategic Sourcing (TSS) to audit private securities companies in use by Transnet."* Madhav's investigation revealed that the reference to G4S being awarded a contract to audit private security companies in use by Transnet was accurate but that the investigation revealed that no instruction was given by Dunjwa to halt the open tender process. He testified that it was unacceptable that the open tender process had come to a standstill and there was no reasonable basis on which that tender process was halted. The motivation document then refers to *"Since the expiry of the CPI contract in August 2007 and the mishap of not being able to finalise the RFP process, the copper theft syndicates gained momentum and as we approach the festive season our stats show an alarming increase in copper theft resulting in train delays and only the worst could be anticipated without specialised security in place."*⁸²
- 70 Madhav testified that the termination of the open tender process was no a *"mishap"*. Moreover, the accuracy of the statement regarding there being an increase in copper theft was tested during the investigation and it was found that whilst cable theft had increased in about July it had began to decrease in August and that from September to December 2007 it had continued to decrease so the statement made in October regarding an

⁸¹ Page 124

⁸² Bundle B, page 112

alarming increase was therefore simply inaccurate.⁸³ The motivation document then states that *"To counteract the above the Freight Rail Security Corporate Office comprising of the Senior Manager, Technical Security Manager and Contracts Manager were compelled by their KPA's to come up with a solution quickly enough to reduce the copper cable theft."* KPA's refers to the "key performance areas" of the various managers that were tasked with coming up with a solution. What the motivation documents says in effect is that those responsible had to put a solution in place fairly quickly. This was against the background of the fact that the option of simply extending and renewing the existing CPI contract on a month-to-month basis was not utilised. That of course was a simple and readily available solution and one which was already in place.

- 71 Asked to about the statistics on cable theft Madhav accepted that in July and August 2007, being the last 2 months that CPI was contracted, cable theft incidence numbered 179 and 178 respectively. The following month there was a significant reduction to 113. Madhav said they tried to investigate this significant drop in theft once CPI left but could not get a satisfactory answer as there was a whole host of factors that could have contributed towards this. Madhav did however point out that looked at in the longer term the base as from April 2007 was a fairly low base that this was coming off and the months of July and August seemed to be at odds with the general trend. Madhav referred to various graphs that had been prepared from the statistics recorded of cable theft. For the period August to December 2007 being the period during which the GNS motivation alleged a sharp increase in incidents, there was in fact in the 2007 year a consistent decline in incidents of cable theft. Similarly from July to December 2007 there was a consistent decrease.

⁸³ Page 126

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- 72 The GNS motivation document then refers to research having been done on the PSIRA website to identify companies which do not currently render services to Transnet. Madhav testified that there was no requirement that providers of security services that had previously worked for Transnet could not again render services. In any event, Madhav's investigation revealed that at the time when this research would have been done in October 2007 GNS was not registered with PSIRA and could not for that reason have appeared on its website. In addition, no details of GNS existed on the PSIRA website. The research referred to in the motivation as having been conducted was therefore highly suspect. Madhav's investigation and analysis did reveal that of the other two companies identified one was inappropriate in providing the required security services although the second company could have provided the pro-active approach of investigations and limited intelligence required by Transnet.⁸⁴
- 73 Madhav enquired into what communications had taken place between TFR and the two other companies identified as potential service providers. Circle 7 provided TFR with a company profile on 26 September 2007. Madhav's investigation revealed however that this company was requested by a manager from TFR security to provide a profile and assessment of security services on the Richards Bay Coal Line and *not* in relation to anything else for TFR security. The Circle 7 proposal was therefore limited and simply did not address a comprehensive security package.⁸⁵ The other identified service provider, Analytical Risk Management ("ARM"), was also approached. Madhav was informed by that company's senior managers that on around 29 September 2007 they received an urgent call from TFR security saying that there was a major issue in the Richards Bay coal line and asking that they provide a site assessment in the Richards Bay area. ARM accordingly submitted a response thereto and was never

⁸⁴ Page 129

⁸⁵ Page 130

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asked to submit a proposal regarding a comprehensive specialised security service. The investigation revealed that ARM had provided its company profile with a generic costing and that it was asked to do so around 22 September 2007 and to supply the proposal on 29 September 2007. This was the proposal which the investigators found attached to the GNS confinement document. The ARM manager Mr. Verner Steinhoble said that the TFR manager concerned Mr. Nayager had mentioned that an open tender process was underway. Steinhoble said he queried whether it was not premature for ARM to present its credentials given the fact of such a tender process. Nayager responded that Transnet had a prerogative not to award the open tender.⁸⁶ While this evidence is hearsay, there was no evidence to gainsay it. It does tend to show that there was not only no open tender process but that the limited enquiries on confinement were entirely inappropriate as regards the supply of a comprehensive security service by ARM or Circle 7. This would necessarily leave as a certain outcome the fact that GNS would reflect as the only realistic bidder for comprehensive security services.

- 74 Madhav testified that there was no explanation and certainly no satisfactory explanation given for why the confinement motivation failed to include the three bidders which had already submitted their bids in the open tender process.
- 75 The confinement motivation document then referred to the fact that GNS was unique because it boasted experienced former SANDF and SAPS employees with years experience in their field of work. This he said was inaccurate because their investigation revealed that that GNS had no employees.⁸⁷

⁸⁶ Page 132

⁸⁷ Page 134

- 76 The GNS proposal submitted to TFR contains the following statement under the heading "A world of experience"⁸⁸: "GNS has a variety of specialists with experience in corporate and criminal law, finance, due diligence, forensic audits, intelligence, law enforcement, management consulting, military, regulation, research and security. The GNS team comprises of individuals of vast experience and are renowned subject matter experts in their areas of specialisation." Madhav investigated this statement and found that none of it was true. The investigation could find no evidence to confirm any of these assertions. There was moreover no evidence that any due diligence had been performed by TFR on GNS.⁸⁹
- 77 Madhav testified that Beattie signed a termination agreement with Transnet on 5 December 2007, being the very day that Gama signed the GNS confinement document. The termination agreement meant that Beattie's last day at work was 7 December 2007 and he was paid 15 months salary, but the termination document revealed no reason for his termination. He had been employed with Transnet for some 13 months prior to his leaving and received 15 months severance pay. It was put to Madhav in cross examination that Gama would say he signed Beattie's separation agreement on 5 December, that Beattie signed it on 6 December and that Beattie actually left Transnet's employ on or about 10 December 2007. Madhav stated that the termination agreement itself stated document stated 7 December 2007 as the last working day. Wells understood that Beattie was on a normal employment contract for an indefinite period, had worked for TRE for 13 months and was paid a severance package of approximately 15 months salary. This Wells said was shocking⁹⁰ as it was far too high and he said that an investigation was taking place into this issue.

⁸⁸ At page 66 and 97 of Bundle B

⁸⁹ Madhav page 3

⁹⁰ Page 29

- 78 Madhav also testified about the overall course of the implementation of the GNS contract. The monthly payment approved in the initial confinement was some R1.5 million per month (excluding VAT). The GNS agreement was later extended for a further period with a similar monthly payment being made to GNS. This extension was approved by Senamela the Senior Manager: Security TFR who approved the extension on 31 March 2008. Madhav said that the approval of the extension was not in accordance with Transnet's policies and procedures.⁹¹ There was a second further extension for a further 3 months from March to May 2008 with a monthly payment of R856 000.00 (ex-VAT). Again according to Madhav this was an extension obtained outside of the policies and procedures of Transnet. As far as Madhav was aware the GNS agreement was extended on a month-to-month basis until the end of January 2010 whereupon the GNS contract was terminated following non-cooperation by GNS in regard to its furnishing information which Transnet had asked be presented to it.⁹² No open tender process was ever conducted involving GNS either in relation to the original agreement or the two extensions thereof.
- 79 Madhav said that while they could not find any evidence to confirm GNS's alleged track record⁹³ by comparison CPI had a well documented track work record having performed work not only previously for Transnet itself but also having performed similar work for Eskom, City Power and Telkom.⁹⁴
- 80 In terms of the GNS contract GNS was prohibited from sub-contracting any of their services without Transnet knowing of this fact.⁹⁵ Madhav said that in fact GNS did so contract as they had no personnel employed in any

⁹¹ Page 7

⁹² Page 8

⁹³ Page 10

⁹⁴ Page 10

⁹⁵ Page 11

capacity as security personnel. Moreover GNS failed to comply with the reporting responsibilities contained in the GNS contract.

- 81 Madhav testified that including the extensions approximately 60 or 70 people needed to be employed for purpose of executing the required services required under the GNS contract. As previously mentioned the investigation could find no evidence of any employment by GNS which in fact sub-contracted the work. There was also no evidence to show that either Senamela or Khanye the two managers responsible for security in TFR ever took any steps to monitor and oversee the implementation of the GNS contract.

The GNS confinement document

- 82 Before the GNS confinement document was approved and signed by Gama, it went through a process. The proposal that GNS perform the work as contained in the GNS confinement document was initially referred by Senamela Senior Manager: Security TFR to the tender board (HOAC) for approval. HOAC approved the document subject to final approval for the CEO (i.e. Mr Gama). This appears from a copy of the minutes of the HOAC meeting of 7 November 2007.⁹⁶ The GNS confinement document itself makes no reference to an open tender process and the approval by the HOAC clearly refers to the approval of a confinement. Indeed the word "confinement" is referred to three times in the relevant six line portion of the minutes of the HOAC meeting.
- 83 The GNS confinement document makes no reference to a "consortium" of which GNS would be part. Neither does the GNS motivation document refer to a consortium of any type. Similarly, neither document refers to GNS having the right to sub-contract its obligations. Madhav confirmed the

⁹⁶ Bundle B, pages 121, 121a at 121d, Madhav page 23

signatories who signed off on the GNS confinement document as follows. Senamela: Senior Manager Security TFR who "requested" the confinement signed on 8 November 2007. The document was "recommended" by Beattie the General Manager: Safety and Compliance Freight Rail who signed on 14 November 2007 and was "supported" by Lloyd, Tobias Chairman of HOAC who signed on 23 November 2007. The document was thereafter approved by Gama as Chief Executive TFR who signed on 5 December 2007.⁹⁷

- 84 Madhav testified that absent any specific delegation of authority of which there was no evidence, no person other than Gama had authority to approve this confinement.⁹⁸
- 85 Madhav said that the investigation revealed an e-mail from one Relibile Mofokeng from GNS to recipients Jaco van Wyk and Khanye, the latter of TFR, which had as an attachment a letter to Transnet from GNS.⁹⁹ Under the heading "*Our Engagement*" the letter states:

"We refer to the above matter, in particular the telephonic conversation between your Mr. Siphon Khanye (Transnet Freight Rail) and our Mr. Relibile Mofokeng (GNS) on 22 November 2007. We confirm that following:

- GNS has been appointed to render services to Transnet Freight Rail based on the agreed costs as per our quotation dated 12 October 2007."*

- 86 The letter goes on to confirm that GNS will receive the appointment letter in due course and it confirms their instruction to liaise with Mr. Dingaan Senamela as a matter of urgency with regard to the above allocation of resources. This e-mail was sent on 23 November 2007 approximately two weeks *before* the confinement was signed and approved by Gama. Madhav

⁹⁷ Bundle B, pages 120 and 120H

⁹⁸ Page 25

⁹⁹ Bundle B, pages 122-3

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said that when he asked Khanye about this letter where he told Mofok eng that GNS had been appointed, he simply got no response from Khayne.¹⁰⁰ In addition, Mr. Jaco van Wyk is from Nayle Security Services or Nayle Consulting. The fact that he was copied on the e-mail indicates that Nayle was probably sub-contracted to GNS to perform services which is not permitted in terms of the DPP policy procedures.

87 By letter dated 6 December 2007 Mr. Brian Fredricks the Chief Procurement Officer, TFR wrote to GNS regarding the GNS confinement contract. That letter referred to the confinement as *"a comprehensive total security package to be supplied nationally for a one year period"* and confirmed the acceptance of the quotation and proposal and revised quote after negotiations undertaken dated 12 October 2007. This letter therefore indicates that the negotiations between TFR and GNS regarding the confinement contract pre-dated by 3 days the e-mail which placed the open tender process on hold.¹⁰¹ The content of that letter of 6 December 2007 is generally similar to the GNS proposal document dated 12 October 2007 as subsequently revised, both as to the content and the format of the document.¹⁰² This letter confirming the acceptance of the quote referred to various reporting requirements which Madhav testified were not complied with. Neither were the performance criteria met being a 25% reduction in cable theft after five months and a 50% reduction during the remaining contract period. The contract period was recorded as from 1 December 2007 to 31 December 2008 being a 13 month period.¹⁰³ At a later stage on 4 June 2008 a formal contract was concluded between General Nyanda Security (Pty) Ltd¹⁰⁴ and Transnet Limited which was signed by Mr. Peter

¹⁰⁰ Madhav page 133

¹⁰¹ Bundle B, page 127, Madhav page 29

¹⁰² Compare Bundle page 83 and following

¹⁰³ Bundle B, page 137

¹⁰⁴ referred to on the cover sheet as "General Nyanda Security Risk Advisory Services"

Fernhead the Chief Operating Officer for TFR and Mr. Relibile Mofokeng as Project Manager for GNS.¹⁰⁵

- 88 The formal contract provided in clause 19.1 that GNS afford access to Transnet's representatives to all data and information in its possession reasonably necessary to allow the verification of the content of the service provider's invoices submitted represent charges that had properly been incurred. Moreover the agreement provided in clause 20 that except with the written approval of Transnet, GNS would not in whole or in part assign, transfer or otherwise, dispose of its rights or obligations under the agreement or sub-contract any responsibility for the performance of its services. The investigation revealed that GNS used sub-contractors but there was no evidence that GNS ever notified Transnet that it was utilising sub-contractors. The formal contract recorded in clause 24.1 that the period of the agreement was from 1 December 2007 until 30 November 2008 being a 12 month period.¹⁰⁶ It also allowed in clause 24.2 for the termination of the contract by Transnet on one month's written notice.
- 89 The investigation revealed an e-mail sent from GNS to Jacques Seaward – apparently the Managing Director of Revert Risk Management Solutions - referring to an appointment letter wherein GNS appointed Revert to provide services to TFR for a period of one year.¹⁰⁷ That letter confirmed that payments would be made by GNS to Revert of R500 000.00 (including VAT) per month. The investigation also found a telefax from GNS to "Jacques" dated 21 January 2008 which referred to "our consortium"¹⁰⁸ and

¹⁰⁵ Bundle B, page 164

¹⁰⁶ Bundle B, page 158

¹⁰⁷ Bundle B127A(a), Madhav page 36

¹⁰⁸ Madhav accepted that the GNS proposal document reflected on its cover sheet the logos of "Revert" and "Nayle Outsourcing" which indicated that there was a consortium, although as he pointed out that it was merely the two logos which suggested this and the content of the contract document does not explicitly state that there is any such consortium of these three

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confirmed that "*Revert and Nayle outsourcing together approached Transnet Rail with regards to the provision of a comprehensive security package to TFR*". The letter confirms that the revised quotation of 12 October 2007 had been accepted and that the contract had been awarded for a period of one year and then set out the scope of the contract.¹⁰⁹

- 90 The investigation further revealed that on average payments made to CPI the previous service provider had been paid 62 days after invoice whereas payments to GNS were paid 20 days after invoice.¹¹⁰
- 91 As mentioned above the GNS contract was first extended on 31 March 2008 by Senamela despite the fact that he was not authorised to conclude such an extension to the agreement. The circumstances of this extension were that the services of a security service provider Singobile Equestrian Security Services (SESS) was terminated on 24 January 2008 and that firm was providing security at City Deep, Kaserne and Kavzon and GNS were contracted to temporarily secure these facilities until another service provider could be found. The investigation also found a motivation for this extension to the GNS contract.¹¹¹ The effect of the extension was to double the monthly amount paid to GNS to an amount of approximately R3.5 million per month. Madhav pointed out that the scope of the extension referred in identical terms to the project scope already contained in the existing GNS contract.¹¹² The motivation contained a handwritten note by Senamela the essence of which is that it required that GNS conduct an investigation into an incident at Kaserne. In fact this investigation was not performed by GNS but was performed internally at TFR by Mr. Pillay a

parties. The contract was awarded to GNS alone and not to a consortium or partnership. To my mind this is extremely flimsy evidence of a consortium.

¹⁰⁹

Bundle B127Ba

¹¹⁰

Madhav page 37

¹¹¹

Bundle B2, page 336

¹¹²

Bundle B2, page 337

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security manager and his team of investigators.¹¹³ The effect of this extension was that the monthly payment following the first extension of the GNS contract was increased to a monthly payment to well above the originally quoted amount.

- 92 In respect of the first extension HOAC retrospectively condoned the approval of the extension subject to the condition that the extension was only valid until November 2008 and subject to a report on the Kaserne incident being produced by 30 November 2008. In regard to the required authority to extend the scope of an original contract this can only be done to a value of less than 10% difference from that of the original contract which can then be approved by the relevant manager or person who approved the original contract. This is in terms of the DPP policy procedures. Increases of the nature of these two extensions of the GNS contract required that a tender process be followed which did not occur in either instance.
- 93 The GNS confinement document itself contained the word "*confinement*" not only in the heading and title of submission, but a further thirteen times in the body of the document. The contract period is stipulated as being from 1 November 2007 to 31 October 2008.¹¹⁴ Paragraph 2 dealing with "*Recommendation: reasons for issuing a confined tender*" refers to the open tender process having been stopped on instruction of Group Executive Dunjwa, and later records that an open tender process is to be followed after the confinement contract period expires.¹¹⁵ It refers in paragraph 14 to a monthly savings of some R692 000 which Madhav said was inexplicable as the CPI contract was for the lower amount of R520 000 per month. Paragraph 14 of the document refers to the commercial evaluation and to GNS being a company with a proven track record of providing security services. As set out above, Madhav testified there was no evidence of this.

¹¹³ Page 41

¹¹⁴ Bundle B, page 115

¹¹⁵ Bundle B, page 114, paragraph 2

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The investigator's interview with Gama

- 94 Madhav interviewed Gama on 8 April 2009 which was some 17 months after he signed the GNS confinement. That interview was recorded and transcribed. Madhav confirmed the accuracy of the transcript.¹¹⁶ The purpose of the interview was not for Madhav to decide on Gama's guilt or innocence but was to obtain clarity on documents and the process which had been adopted.
- 95 Madhav testified that during the interview Gama said that he could not recall that it was a confinement, that there was no need for any security service provider to go out on confinement and that an open tender process should be followed. In relation to the GNS confinement documents which he had signed Gama initially denied that it was a confinement and said that it was actually an open tender process by which GNS had been appointed. Madhav confirmed Gama's statement reflected in the transcript that Beattie, the General Manager: Safety and Security came to his office and said that we need to sign this document as it was urgent. Gama said asked Beattie why it was urgent and what the pertinent issues were. Beattie's reply was that they were putting new people on site, that the process had taken longer than they thought but they had three companies that had tendered and that they had chosen the best company and that they needed to start immediately because of issues around cable theft. Asked in the interview what documents had Beattie presented to him, Gama responded that it was the motivation. The only motivation which Madhav found was GNS motivation document prepared by Senamela and Khanye. That motivation document refers to a confinement process rather than to an open tender process.

¹¹⁶ Madhav pages 59-60

- 96 In relation to whether Gama had applied his own mind or relied on the views of others Madhav said that Gama stated that he relied heavily on the tender board doing its job which was to ensure that they had looked at the BEE requirements and whether the process was done properly in terms of Transnet procedures. Gama then said that obviously the tender board people had already signed it. He would know they had taken all that into account. He would then make sure that there was the budget for this expenditure, ask about the amount and then approve it. Gama then said that even if it was written "*confinement*" on the document it was not a confinement process because they had gone through a process and had showed him that process.¹¹⁷ Madhav testified that there was no indication of any other process other than the confinement process having been followed in relation to the GNS contract.
- 97 Madhav testified that he asked Gama to confirm that he had read the GNS confinement document when he was presented with it for signature. He did not receive a direct answer, as is reflected on the transcript. However, as part of his answer Gama did say that "*I do not think I would have gone into the detail, into all the details of this*".
- 98 The chairperson during this interview was Mr. Brenton Steenkamp.¹¹⁸ He asked Gama whether Beattie had alluded to the fact that it was a confinement as stipulated on the document and in the heading. To this query Gama responded: "*No, no, you see this thing of a confinement as I say, people sometimes write all kinds of things and say it is a confinement*". Gama then said that Beattie "*showed me three companies in this document to say: these are the three companies that we have interviewed. Here is the one company that we are choosing. These are the reasons. Mine was to say: Okay, have you taken it to the tender board? Yes, it has been taken*

¹¹⁷ Madhav page 54

¹¹⁸ Madhav page 55

to the tender board. This notion of a confinement in this contract is actually untrue. Because a confinement is if I approach you and I say: 'I am going to ask you, you are the only one that can do this...'. 'I have always maintained, and I have said to my people:: security contracts, there is no way that you can say you cannot go out on open tender'. Madhav testified that the reference to the three companies was a reference to the GNS motivation document where three companies are mentioned and which document he showed Gama during the interview.¹¹⁹ The GNS motivation document sets out the process that was followed and how the three companies were chosen and how the recommended service provider GNS was chosen for confinement. The GNS confinement document motivates a confinement and does not make reference to an open tender process save where it refers to the cancellation of the prior open tender process and, as Madhav conceded in cross-examination, where it refers in the final paragraph to the contract going out on open tender *in the future* before April.

- 99 Madhav testified that during the interview Gama asked that he be given all the documents and Madhav replied that there was only one other document that they had in their possession and that was the GNS motivation document which he produced. He said that what Gama was saying in the interview was that he in fact signed the approval of an open tender process and not, as indicated on the document which he signed, the approval of a confinement process.¹²⁰ Gama mentioned in the interview that the document which Beattie showed him reflected that three companies had participated in the process, whatever that process was. Madhav testified

¹¹⁹ At Bundle B1, page 112

¹²⁰ Madhav page 89; Bundle D1, page 87

that there was no other document other than the GNS motivation document that referred to three companies participating in a tender process.¹²¹

- 100 Madhav commented that insofar as Gama was saying that what he had signed was not really a confinement and was the approval of an appointment after an open tender process, then Gama probably never read the document before he signed it¹²² if in his mind it was not a confinement as the document clearly indicates it was. Gama stated in the interview that *"My role in this thing is to say to the GM who come to me: Do you have the funds for this? Have you followed the processes?"*¹²³ Madhav confirmed that was how Gama delineated his role.
- 101 When asked in the interview whether he had looked at the value of this particular contract when signing it off Gama replied *"With all these new contracts, I have an authority of 100 million on these things. This thing was R4.9 million"*. Madhav explained that the R100 million referred to Gama's authority to sign or approve a contract following an open tender process. Madhav explained that the reference to R4.9 million was a reference to the savings as reflected in the GNS confinement document rather than the value of the contract which was R18 million which is apparent from the confinement document.
- 102 Madhav testified that after again insisting in the interview that this was not a confinement, Gama in effect said that the security department personnel were not competent to write whatever was written on the motivation and on the Acquisition Council documents in the way that they were supposed to.¹²⁴ Madhav confirmed that towards the end of the interview Gama again stated that the document was not presented to him as a confinement but

¹²¹ Madhav page 60, Bundle D, page 86-87

¹²² Madhav page 60

¹²³ Bundle D1 page 89

¹²⁴ Madhav page 62

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was presented to him as the product of an open tender process.¹²⁵ Gama then asked Beattie whether he had taken it to the tender board and Beattie said "Yes, they have signed". Gama said: "Okay, that is good" asked "Have you got the money?" and Beattie replied "Yes, I have got it".¹²⁶

103 Madhav testified that when he put to Gama during the interview that what he signed was in fact a confinement and that there was only one tender price appearing thereon Gama responded: "No, but I am saying to you this is not true. Whatever they may have written in here, he (Beattie) has shown me documents. Okay? You know? And this, by the way, this was a five month contract"¹²⁷ Madhav testified that it was in fact a 12 month contract. The correct position, which Gama himself stated shortly thereafter in the interview, was that it was a one year contract with an initial approval period of five months and that there would be an assessment after five months. Madhav then informed Gama in the interview that the acceptance letter which went out was for a period of one year and that the contract value was R18 million made up of R1.5 per month for 12 months. Gama responded that the allegation that his confinement limit was R10 million and he had spent R18 million was not true "... because in my own analysis and in the documents that John (Beattie) gave me, very clearly we were not talking about a confinement".¹²⁸ Madhav testified that this was not correct based on the documentation and that the contract signed by Gama clearly was a confinement.¹²⁹

104 Gama then continued in the interview "And in any event, even if it was a confinement okay, these people are going to work for the first five months and then, and then check how far they have gone. What is the first five

¹²⁵ Bundle D1, page 94

¹²⁶ Bundle D1, page 94

¹²⁷ Bundle D1, page 96

¹²⁸ At D1, page 99

¹²⁹ Madhav page 64

months, at R7.5 million?"¹³⁰ Madhav testified that this referred to the value of the contract over the first five months being the period after which the performance review was to be conducted, but that the contract was in fact a 12 month contract subject to a five month performance review. The value of the contract has clearly to be based on the full 12 month period.

- 105 Madhav confirmed that in the interview Gama stated that he knew what his authority was in terms of confinements and he knew what his authority was in terms of what he was discussing with Beattie. He then said: *"But what I do want to say and to state unequivocally is that some of these discussions that we tend to have here, are really just discussions that are aimed by others to cast aspersions on my integrity and I am not going to allow that."*¹³¹ Madhav denied that he had in the interview said to Gama he was not telling the truth or that he had cast aspersions on Gama's integrity. When Gama made this comment in the interview about unidentified persons casting aspersions on his integrity, he did not explain who the other people were to whom he referred. In his testimony at the disciplinary hearing Madhav sought to go no further than to show that the facts relied upon by Gama are in fact untrue. Madhav did not contend that Gama was being wilfully untruthful or express any view in this regard.
- 106 Madhav said at no stage during the interview did Gama ask for an opportunity to read the documents in order to refresh his memory. On the contrary, he expressed no doubt about what he was saying. Towards the end of the interview Gama did however request that copies of the documents be made available to him. This was done approximately a week later. Gama never reverted and suggested to the investigators that he needed to correct anything he had said to them in the interview.

¹³⁰ Bundle D1, page 99

¹³¹ Bundle D1, page 101

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- 107 Madhav accepted that during the interview Gama had referred to documents which Beattie showed him in a file but said that they had been unable find a separate file held by Beattie as opposed to the documents to which Beattie would simply have had access.
- 108 Madhav accepted that when he went to interview Gama he knew according to the documentation which he then had that an open tender process had not been adopted. He also knew that Gama had previously told Oates that as far as he was concerned the GNS contract was the product of an open tender process.¹³² Madhav accepted that he nevertheless did not make the documents which indicated the contrary (i.e. that it was not an open tender process) available to Gama prior to the interview. During the interview Gama was shown documents as the interview proceeded. In the interview Gama maintained (as he had previously in documentation and in a discussion with Oates in March), that he believed the process leading to the GNS contract was an open tender process. In the interview Madhav showed Gama the GNS confinement document and asked him to confirm whether he had signed this document. In addition Madhav handed Gama the GNS confinement motivation document and Gama's response was that while "confinement" might be written on the document, as far as he was aware it was an open tender process.

Gama's evidence on the interview

- 109 Gama was not pre-cognized or shown any documents prior to his being interviewed by Madhav in April 2009. Gama explained that his statement during the interview that as far as he was concerned there was no confinement involved even if it looked like it was a confinement, was because of his previous instruction that security contracts should undergo the open tender process and because Beattie had indicated to him that the

¹³² Madhav page 127

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tender process had been completed.¹³³ Gama said that the GNS confinement document was amongst those presented to him by Beattie during their discussion.¹³⁴ He said that other documents were also presented to him by Beattie in the course of his motivation and to indicate the tender process which had taken place. Gama testified that there was nothing in the documents which he discussed with Beattie that indicated to him that this was a confinement which he was being asked to sign.

- 110 In his evidence Gama said that he was looking at the documents which Beattie had *"from the other side"* by which I understand he was reading the documents upside down and that he *"clearly believed at the time that they had in fact gone out on tender"*.¹³⁵ Gama was clear that at the time when he signed the document he believed it had gone through an open tender process. He confirmed his statement in the interview that he *"would not have gone into all the detail of this"*.
- 111 Gama confirmed his prior instruction that security contracts should be subject to an open tender process. He also confirmed his statement in the interview that he *"would not have read this thing word for word"* referring to the GNS confinement document. Gama testified that during the interview his belief was that an open tender process had been followed and this had been confirmed to him by Beattie at the meeting when he asked Gama to sign.
- 112 Gama testified that the tender board is required to check that the proper process is followed and to ensure that Transnet's requirements are satisfied, so that in essence once the document had been to the tender board reliance could be placed thereon in respect of the *"cleanliness of the process"* as he put it. Gama complained that during the interview the

¹³³ Gama, page 15

¹³⁴ Gama, pages 16-17

¹³⁵ Gama, page 17

documents he was being shown were produced by bit and he was being required to recall what had happened in a discussion some 17 months earlier without the benefit of having considered the documents beforehand. He therefore asked that all the documents be made available to him so that he could familiarise himself with them. This appears to be an entirely reasonable request in the circumstances. However, it must be borne in mind that shortly thereafter Gama obtained all the relevant documents and yet never reverted to the investigators to in any way qualify what he had said during the interview.

- 113 During the interview Gama said that even if he had read the entire GNS document he would still have said to Beattie that this was not a confinement because of what Beattie had orally told him about it being a tender process. Gama confirmed in his testimony at the hearing what he had earlier said during the interview, but went on to add: *"But if I had read the document and it said confinement, then we would have to carefully go through it and say, why do you say it's a tender process if it's a confinement?"*¹³⁶
- 114 Gama testified that he had asked the procurement staff to find Beattie's file and although they produced some documentation no specific comprehensive file was produced.
- 115 There was no dispute about the fact that the process of calling for tenders was guided by the procurement department and that it was common practice was in Transnet that the relevant acquisition council together with the relevant to general manager would deal with the process of procuring services for Transnet.¹³⁷

¹³⁶ Gama, page 26
¹³⁷ Gama, page 54

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- 116 At the stage in July 2009 when Gama prepared his written response¹³⁸ to Wells' concerns arising from the TIA investigations he had realised that the appointment of GNS was not through an open tender process and that the initial open tender process (of which GNS was not part) had not been pursued.
- 117 In his written response Gama denied any involvement in possible manipulation regarding the appointment of GNS and suggested too well that *"if indeed there was any manipulation that you suspect by any party, we would follow up on that matter and carry out an investigation."*¹³⁹ Gama testified that Wells never asked him to carry out any such investigation prior to his suspension.
- 118 Gama was never party to or privy to the open tender process from which G4S withdrew and which was later stopped because, as was usually the case, he did not get involved at that level of the procurement process.
- 119 In his written response Gama recorded¹⁴⁰ that the security department had verified the profile of the three companies GNS, ARM and Circle 7. This information he had obtained from a memorandum from Khanye a manager in the TFR security department dated 10 July 2009.¹⁴¹ He further referred to the minutes of the tender board of 7 November 2007 which recorded HOAC's support for the GNS confinement subject to the CEO's approval. Gama's written response also refers to the confinement being signed *"for a period of five months, 1 December 2007 - 30 April 2008 on a performance review period at R1.5 million (+-R7.8 million)".* This information Gama said was obtained not only from paragraph 4 of the GNS confinement document

¹³⁸ Bundle D2, page 1

¹³⁹ Bundle D2, page 18-19

¹⁴⁰ At paragraph 4.3

¹⁴¹ Bundle D2, page 91

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itself¹⁴² but also from members of the tender board. He contended in his written response that this fell within the R 10 million limit of his delegation of authority on confinement as the contract value was R7.8 million.¹⁴³ Gama did not go so far as to repeat this justification in his evidence at the disciplinary enquiry. Instead, he merely pointed out that if the consignment was for a five-month period then it fell within his delegated authority.¹⁴⁴ What Gama failed to point out is that the very next line in paragraph 4 of the GNS confinement document refers to the total contract period being a period of one year. What the written response goes on to say, and this was confirmed and repeated by Gama in his testimony at the enquiry, is that the GNS confinement document was poorly written and that he had instructed the (new) General Manager concerned (Siya Mtetwa) to follow up on the pertinent aspects relating to the poor quality of the documents submitted and that he had been informed that both a training intervention and an enquiry on security submissions in general was underway. He further explained that the Chief Procurement Officer had implemented a procurement management process to ensure that communication on tenders is dispatched to all parties that apply to participate in a tender. The written response then records Gama's general belief which is that security services can be obtained via a public tender process. It goes on to state that it is sometimes impossible not to enter into short-term confinement contracts where operational problems such as cable theft require this, and that it would be similarly negligent not to support efforts to curb that practice.¹⁴⁵ Gama's reliance in his written response on paragraph 4 of the GNS confinement document was selective and is not based upon a proper construction of the full document which in paragraphs 11 and 14 reflect that the contract period was for a full year. On the face of it the fact that Gama was selective in this way in interpreting the document in order to

¹⁴² At paragraph 4, Bundle B, page 120B

¹⁴³ Bundle D2, page 20

¹⁴⁴ Gama, page 41

¹⁴⁵ Bundle D2, page 20 paragraph 5.2; Gama page 42

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seek to persuade Wells that he had authorised a contract within his level of delegated authority was misleading.

- 120 In support of his submission that the GNS confinement document was badly drafted Gama then referred in his written submission to the fact that the 2008 tender audit for TFR scored poorly on tender administration and that remedial action had been instituted with the Chief Financial Officer and the Chief Procurement Officer.¹⁴⁶ Finally, Gama indicated that the new General Manager had been tasked with a full review of the security area to be completed within three months following an incident whereby a security manager had hired another security companies services without obtaining any authority. Gama testified that this review had already begun by the time he was suspended but that he was not able, in consequence of his suspension which occurred about a month later, to indicate what had transpired in regard to that review process. Gama also suggested that any suspicions which TIA had regarding existing contracts could be assessed and dealt with. He pointed out that TIA for their own reasons, had not shared their investigations with him.
- 121 Gama said that that had he known at the time that the document he was signing was a confinement not have approved it because of his belief that security contracts should go out on the open tender.
- 122 As discussed in detail elsewhere in this award Mr Khanye provided the team with a file which contained the signed GNS contract which Mr Fernhead had signed in June 2008, the GNS confinement motivation as well as the GNS confinement document which served before HOAC as well as some e-mails. Madhav testified that the confinement document was obtained from Khanye around early December 2008. The version of the GNS confinement motivation (there being two contained in the exhibits file) was identified as

¹⁴⁶ BundleD2, page 20 paragraph 5.3; Gama page 43

the one handed in at the hearing under bundle B1, page 112 which was signed by both Senamela and Khanye.

- 123 The chairman of HOAC is Mr. Lloyd Tobias. He was the only member of HOAC interviewed by the investigators. The minutes of HOAC reflect that they motivated a 12 month contract. Madhav accepted that HOAC had no authority to approve a confinement for R18 million. When Tobias was asked by investigators why his council had approved the GNS contract in that sum his answer was simply that the council does not *approve* the confinement which is subject to final approval by the CEO, the council only supported it.¹⁴⁷ Madhav testified that he asked Tobias how they could support something which they knew Gama could not approve. He said that Tobias was evasive in answering this question and Madhav conceded that Tobias' answers were not satisfactory. Despite this wholly evasive answer Madhav did not interview any other members of HOAC or officials who were present at the relevant HOAC meeting to explain this apparent anomaly.¹⁴⁸
- 124 Divisional Acquisition Councils are dealt with in paragraph 8.1 of the DPP policy which provides that the DAC will consider and approve all expenditure contracts falling within its jurisdiction within the CEO's delegated powers. Consequently, HOAC's authority on confinement is the same as the CEO's, in this instance R10 million. This was common cause. The provision in clause 8.1 continues: "*Transactions exceeding the CEO's delegated powers will likewise be considered by the DAC, and if it concurs with the recommendation, refer the matter to the relevant person in the hierarchy with the appropriate delegated powers for the particular R – value of the transaction*". Madhav conceded that if this was indeed a confinement of R18 million then HOAC was required to refer the matter to higher authority. It was put to Madhav that either Tobias was untruthful when he

¹⁴⁷ Madhav page 82

¹⁴⁸ Madhav page 84

said that the contract value was under R10 million or that HOAC was derelict in its duty by not referring the matter to the next level of authority. Madhav stated that it is possible that the council never applied its mind to whether it had to refer to the next level and that this was the subject of ongoing investigation. He accepted that no steps had been taken against any people at HOAC in this regard but said that their investigations revealed that action is probably to be taken against the council.

125 Mr. Fredricks (Head of Supply Chain Services: TFR) signed the appointment letter of 6 December 2007 which accepted the GNS proposal.¹⁴⁹ Madhav could not explain why Fredricks had never been interviewed during the investigation or asked about whether he had complied with the requirement in the DPP policy¹⁵⁰ that a person signing a legal document may only do so with the prior advice of the relevant legal services department. Madhav accepted that he should have pursued this question and that it was possible that someone from that legal department had told Fredricks that he could sign the letter.¹⁵¹ Madhav was not aware that Fredricks was facing any disciplinary steps.

126 The investigators had contacted Beattie, whom I understand now lives in Australia, but he said he could not recall anything. Madhav categorised Beattie's response as uncooperative as he would not give any answers and said he could not recall anything.¹⁵² Madhav accepted that he left in the air his evidence about the timing of Beattie's leaving Transnet.¹⁵³

127 In relation to the file of documents which Gama said Beattie brought him, the investigators were unable to find this file and had requested Gama

¹⁴⁹ Bundle B1, pages 127 - 137

¹⁵⁰ In clause 5.5. Note 1, Bundle A2, page 154

¹⁵¹ Madhav pages 108 -1 09

¹⁵² Madhav page 113

¹⁵³ Pages 113 -114

during his interview to produce the documents he was referring to. Gama said he would go and look for them.¹⁵⁴

- 128 Madhav accepted that the scope extension of the GNS contract from 1 April to 30 November 2008 (a period of 8 months) was subsequently condoned by HOAC on 13 August 2008 with an estimated contract value of some R13 million which, on the face of it, exceeded the authority of that council. The investigators did not discuss with the council members why they condoned the scope extension but Madhav conceded that Gama had nothing to do with the aspect of the extensions of the GNS contract.
- 129 Mr, the Chief Operating Officer: TFR signed the GNS agreement in June 2008. Madhav could not recall whether he had asked Fernhead whether he had referred the contract to the legal department before signing it. Madhav accepted that the investigation did not ascertain from Transnet Group Legal whether they had approved the agreement. Madhav accepted that Fernhead should have run the contract past Group Legal before signing it.
- * 130 Madhav's report recommended that corrective action be considered against Gama in relation to the approval of the confinement contract beyond his authority.¹⁵⁵ He did not recommend any corrective action against Nayager. He said it was only later in the legal opinion from Bowman Gilfillan that Nayager's name came up as somebody else who had transgressed the policy.
- 131 Madhav accepted that for an open tender process a tender would be adjudicated on by a cross functional evaluation team and thereafter by the relevant Acquisition Council (i.e. HOAC) which would decide whether the tender should be accepted or not and would then refer the matter for the

¹⁵⁴ Madhav page 111

¹⁵⁵ Bundle D1, page 58; Madhav page 124

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conclusion of the contract by someone else. None of this however had anything to do with Gama.

- 132 Gama's version as put to Madhav was that whilst the other signatories to the GNS confinement document had all signed on or before by 23 November 2007 Gama had no knowledge that as early as that date GNS had been informed that the contract would be awarded to them. Gama's version is that when he signed the document he believed at the time it was an open tender and only later, upon being shown the documents, did he come to understand that the process was in fact one of confinement.
- 133 The statement in the final two lines of the GNS motivation document that the contract should go out on open tender early in 2008 and before April, is nowhere stated in the GNS confinement document itself. Madhav pointed out under re-examination that if the intention was that the GNS contract would be a five month contract on confinement and thereafter a new contract would be awarded based on an open tender process, that there would have been no need for a *review* of the confinement contract after five months.
- 134 Madhav said that it would normally take anything from two to three months for a security contract to progress through and complete the open tender process. The original tender in this case was issued on 17 July 2007. Four months later in November 2007 the process was not yet complete.
- 135 It was pointed out by Madhav that in terms of the DPP policy and Delegation of Authority Framework policy the obligation to ascertain the relevant levels of authority lies on the person exercising that authority.
- 136 Wells accepted that as far as TIA was concerned up until the time of the hearing the only evidence implicating Gama in relation to the GNS contract

was the fact that he signed the confinement for R18 million when his delegated authority was only R10 million.

137 Wells denied that Gama had clearly said in his written response that he would take action to remedy the irregularities in regard to the GNS contract. Wells said that Gama had however also failed to take any action in regard to the irregularities in the process and no such action was taken by Gama before the time he was suspended.¹⁵⁶

138 In response to the suggestion that Gama was not given the full picture by the TIA Investigators and was only shown "*snippets*" of what they had found, Wells pointed out that he had in writing given full details to Gama in the letter which he wrote on 18 June 2009 raising his concerns and that Gama as the CEO at that stage had full access to all the information he could reasonably have required from TRE.¹⁵⁷ Wells also accepted that as the CEO Gama was entitled where he was not personally involved and where his line management were responsible, to rely on them.¹⁵⁸

Gama's evidence

139 I turn now to consider Gama's evidence on the GNS contract in detail.

Gama's evidence on the security contract

140 Gama's unchallenged evidence was that Beattie was head hunted from the private sector where he was very experienced in safety issues and came from a world-class save the environment. Although Beattie was experienced and able Gama explained that he was somewhat overwhelmed by the enormity and urgency of the security issues faced by Transnet. As a man in his 60's it was felt that he probably lacked the energy levels to

¹⁵⁶ Pages 135 - 136

¹⁵⁷ Page 136

¹⁵⁸ Page 137

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achieve what TFR required of him as the General Manager: Safety and Security TFR. Beattie discussed the situation with Gama and it was agreed that his contract would be terminated. Because Beattie had been head hunted from a stable environment and was nearing the end of his working life, the agreement was that he would receive a 15 month severance package. The unchallenged evidence of Gama was that this package was not out of line with packages paid to other general managers who had recently left Transnet. Accordingly, there is in my view nothing to be made the fact that at the time that Beattie approached Gama to sign the confinement document Beattie was about to leave Transnet within a few days.

141 Combined Private Investigations ("CPI") was the security company which preceded GNS. Gama signed the confinement document for the appointment of CPI in 2005. The reason for the confinement was that CPI was the only known company that offers the specialised service required. Against his signature at the time of approval of this confinement Gama noted that the contract should be entered into for six months and then reassessed.¹⁵⁹ Gama maintained that security services for Transnet should go out on public tender. In support of this being his attitude historically Gama referred to an evaluation report on tenders which he approved in March 2007 and which bore a handwritten note by him requiring that the security services being evaluated should go on a public tender process to ensure a new contract by 1 July 2007.¹⁶⁰

142 When approving the confinement for CPI in about October 2005 Gama read the confinement document, applied his mind to the issues and directed by way of a handwritten note that the period of the contract be reduced to six

¹⁵⁹ Bundle B, pages 8A at 8B

¹⁶⁰ Gama, page 4, Bundle B 8H

BA

months and then reassessed.¹⁶¹ On 3 March 2007 when considering the extension to the CPI confinement contract he again read the tender board agenda item document presented to him¹⁶² and appended a fairly lengthy note in which he instructed that the extension be only until the end of June and that in the interim a public tender process be undertaken and concluded by 1 July 2007.¹⁶³ He also considered the service very expensive and pointed to the need for meaningful key performance indicators. All of this required that he consider the contents of the document placed before him in some detail. Gama knew that the award of the security contract to CPI had followed a pilot project involving CPI.¹⁶⁴ Gama accepted that cable theft was an important issue for Transnet and that as CEO he would have regularly discussed this with both subordinates and superiors. The reasons for deviating from the prescribed open tender process with CPI were set out in some detail in the tender board agenda item document.¹⁶⁵ In signing his approval of this confinement Gama said he had regard to and examined those reasons to decide whether a confinement was justified.¹⁶⁶ Gama accepted that when he signed the extension of the CPI confinement on 3 March 2007 he exercised an independent discretion as evidenced by his handwritten note reducing the extension from 12 months to six months and did not simply rely on the representation by the tender board.¹⁶⁷

14-3 Gama testified that his involvement in the appointment of GNS began and ended on 5 December 2007 when he was approached by his then General Manager: Safety and Security TFR for his formal approval for the security contract. This occurred during the morning when Gama found Beattie

¹⁶¹ Bundle B8B, Gama page 69
¹⁶² Bundle B, page 8C-H
¹⁶³ Gama, pages 76-7
¹⁶⁴ Gama, page 76
¹⁶⁵ Bundle B, page 8H
¹⁶⁶ Gama page 74
¹⁶⁷ Pages 87-88

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waiting outside his office to see him urgently. Beattie had no prior appointment. He invited Beattie into his office. Beattie had with him a bundle of documents which would have filled approximately three quarters of a standard lever arch file. Beattie explained that he needed approval of the security contract and showed Gama an open tender document.¹⁶⁸ Gama asked him questions about the process and whether it had been to the tender board and whether the KPI's were finalised as these were relevant to whether penalties applied to service providers who were not performing. Beattie then produced the GNS confinement document for Gama to sign. From the final page of this document Gama could see that the tender board (HOAC) had considered the contract and signed in support. Gama then signed the GNS confinement document. Beattie also indicated to him that there was an urgency to signing because of operational problems regarding security. Gama stated that his meeting with Beattie lasted about 5 to 10 minutes.

144 Gama maintained that Beattie told him that the tender board had approved the contract which had gone through the tender process. He also said that on the document shown to him were reflected three companies that had gone to the second stage of the tender process.¹⁶⁹ Gama identified the copy of the GNS confinement document which was shown to him as the copy without handwritten markings thereon.¹⁷⁰ Gama confirmed his signature approving the appointment on 5 December 2007. He said that at the time he signed he believed the document indicated that a tender process had been gone through. He said he observed the signatures on the document, including that of Beattie, and the chairman of the tender board which indicated that the proper tender process had actually been followed. Gama maintained that it was always his contention that security contracts,

¹⁶⁸ Bundle B, page 9

¹⁶⁹ Gama page 9

¹⁷⁰ Bundle B pages 120A-H

where they were many service providers available, should be secured by way of open tender.

- 145 Gama testified that after he signed the document he had no further involvement in the appointment of GNS as Transnet's security company. He said that it was only in June 2009 when Oates approached him that he became aware that the document which he had signed was not the approval of an open tender but was in fact a confinement of the tender to GNS. Gama had no involvement in the formal appointment of GNS for a 12 month period by Transnet by way of a letter dated 6 December 2007 signed by Fredricks the Head of Supply Chain Services. The formal agreement between GNS and Transnet was concluded on 2 June 2008. This was signed by the COO of TFR and again Gama had no involvement in this process.
- 146 Despite the background knowledge on Gama's part about CPI and his instruction that a public tender process for security services be concluded before 1 July 2007 Gama contended that when he was asked on 5 December 2007 to sign the document before him by Mr Beattie, he was not aware of whether any tender process had been followed in the interim.¹⁷¹ Gama denied that this was extraordinary saying that he did not deal with tender processes and was not involved in the "nifty-gritty" of that process and would not have been aware of this unless it was raised at weekly operational meetings. He said he would not have enquired as to the situation unless one of his managers had raised the security contract as a problem. While Gama accepted that the issue of cable theft was one which he as the CEO was required to deal with proactively, he did not accept that contracting was an issue which required his active attention. This was despite his acknowledging that there were problems with procurement at TFR at the time and that there was a 24 month project called "Operation

¹⁷¹ Gama, page 77-8

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Cleanup" which was put in place to improve the TFR procurement systems. Gama maintained that he trusted his senior general managers entirely to deal with the contract issues.

147 Gama knew that he had instructed that the new security contract be concluded pursuant to an open tender process before 1 July 2007. He was also aware that CPI's services were extended on a month to month contract after the end of June 2007 but said that he did not specifically know who was performing security services after June 2007. He also did not know whether any procurement process had been put in place and whether or not a tender had ever been issued. He denied any knowledge of the short listing of four bidders on 23 August 2007 by HOAC.¹⁷² Gama accepted that several of his subordinates would necessarily have known about the open tender process for a security contract and that persons dealing with security contracts at group level also knew, because of the instruction to halt the tender process which apparently came from group level. He also accepted that prior to the open tender process being stopped GNS was on the scene as a prospective supplier of security services but denied knowing this at the time.¹⁷³ Gama accepted that there was nothing to prevent the original tender process from reaching its conclusion despite the fact that G4 Security had to be excluded from the tender process. He agreed that it was strange that the tender process was halted. Gama conceded that there would have been no difficulty in his establishing at any stage what the position was regarding the tender process and the short listing of bidders. He accepted that the tender process was halted shortly after GNS had started communicating with managers at TFR under his jurisdiction.

¹⁷² Gama, pages 85-88

¹⁷³ Gama page 80

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148 Gama conceded that when Oates approached him in early 2009 to discuss the appointment of GNS and how it had occurred, he informed Oates that like any other security company it had gone out on an open tender process.

Gama's relationship with General Nyanda

- 149 Gama accepted that there had been a sponsorship of the General Nyanda charity golf day on about 18 August 2007 of which he was aware and which was associated with General Nyanda. Gama conceded that he had instructed his lawyers to put to both Oates and Naiker that he denied their version of the discussion about his relationship with General Nyanda and had said that he knew him only as a public figure. Gama admitted in the hearing that this was not his relationship with General Nyanda whom he admitted was a personal acquaintance of his with whom he had played golf in the past, with whom he had spoken on occasion and with whom he would discuss telephonically bereavements in the family. Nyanda also called him to commiserate when Gama was suspended. He denied however that Nyanda was a friend or close friend. Gama explained that the reason why he had instructed his lawyers to put this version was because he wished to put some distance between himself and General Nyanda because of the implication that there was an improper relationship between them which he denies.¹⁷⁴
- 150 Gama accepted that he had given instruction to his counsel in an attempt to distance himself from General Nyanda the effect of which was that the contention conveyed was not true.¹⁷⁵ He accepted that his interpretation of the evidence of Oates and Naicker, namely that it was being alleged or inferred that there was a "friend" of General Nyanda was wrong. Gama accepted that General Nyanda was a personal acquaintance of his and said

¹⁷⁴ Gama, page 29

¹⁷⁵ Gama, page 95

that he had never denied this. He accepted that the version which had been put to the witnesses, namely that he knew General Nyanda like any other member of the public was incorrect and for that he apologised.¹⁷⁶ Gama's cellphone records showed that he was in telephonic communication with the general on 6 and 15 July, 27 August and 1 December 2007, the last communication being a matter of days before Gama signed the GNS confinement document. The retraction of Gama's version as to his relationship with General Nyanda was only made after telephone records were produced which showed communications between Gama and Nyanda which were inconsistent with Gama only knowing the general as would any other member of the public. Gama however denied that from his actual relationship with Nyanda any inference could be drawn of an untoward relationship.¹⁷⁷ He avoided answering the question of why it was, that if his relationship with General Nyanda was in truth entirely innocent, there would have been no reason for him not to give his lawyers the correct instruction rather than to instruct him as he had done with the version that he knew Nyanda as anyone else would know him, because he was a public figure.¹⁷⁸

151 Senamela was appointed as a manager in TFR on 23 July 2007 and Gama accepted that he was therefore new in the job during the period when the open tender process was taking place. Gama received reports regarding security issues including cable theft but could not recall whether he had discussed cable theft with Senamela, saying this may have been dealt with by Beattie.

152 On 5 December 2007 Gama knew that Beattie's departure was possibly imminent. On the previous day and Gama had proposed to Beattie that his role and responsibility be reduced essentially due to his inability to cope with the full scope of his mandated activities. Indeed, when Beattie

¹⁷⁶ Gama, page 97-9

¹⁷⁷ Gama, page 100

¹⁷⁸ Gama, page 100-106

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approached him that morning Gama anticipated that the discussion would be about his response to whether he would remain at TFR or not which was an issue was due to be discussed with Beattie later that afternoon. The negotiations regarding the terms of separation in fact took place on 5 December and were concluded that same afternoon by the time when the separation agreement was signed by Gama.

153 Under cross-examination Gama said that the final signing page (page 7 of seven) of the GNS confinement document was the only document which he looked at and actually read at the time when he signed it. Although the entire GNS confinement document was with Beattie, Gama said he was only handed the final page thereof which was the only page which he read.¹⁷⁹ He accepted however that at the bottom of that very page, in fine print, is a reference to the GNS contract being a confinement. When it was pointed out that the document had previously been signed nearly a month earlier by Senamela and at least 12 days earlier by the chairman of the tender board, Tobias, and yet Gama was being asked to sign it is a matter of urgency, Gama said that he probably didn't pay much attention to the dates on which others had signed the document. He said Beattie asked him to sign as a matter of urgency and indicated that he (Beattie) had omitted to deal with the matter and that the contractors needed to move onto site. Gama did not query why the matter was so urgent. He did not take time to read the document and said that when he signed it he did so without knowing to whom the contract was being granted.¹⁸⁰ He also said that the actual cost to Transnet was not discussed although he said he did ask whether there was money in the budget.

15-4 Gama said that he saw, in Beattie's possession a document which reflected a tender number, such as the cover sheet for the open tender issued on 17

¹⁷⁹ Gama, page 123-125

¹⁸⁰ Gama, page 121

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July 2007 which was produced in evidence and that he had no reason to believe that what he was signing was something other than an open tender.¹⁸¹

155 Gama accepted that what Beattie did by approaching him and persuading him that what he was signing was an open tender process was a complete and blatant fraud¹⁸² and that had Beattie informed him that it was a confinement his response would have been quite different. He accepted that when the fact that what he had signed was a confinement was brought to his attention (during the interview with Madhav in April 2009 as supplemented by the documents subsequently furnished to him shortly thereafter) that there may have been other persons equally guilty of this fraud which had been perpetrated on him.¹⁸³ Yet in his written response of 20 July 2009 there is no mention by Gama of a fraud having been perpetrated on him by either Beattie or anyone else. Gama's answer to this was that he indicated that he needed a period of three months to thoroughly investigate the matter and that insofar as there was an ongoing investigation into himself, who did not want to intervene and interfere with that investigation.

156 Gama conceded that had he read the GNS confinement document he would have concluded that what he was signing was a confinement for a period of one year with the contract value of some R18 million.¹⁸⁴ He accepted that had he read the document he would also have seen that there was in fact no open tender process because the process which had occurred had been stopped. He would also have seen that one of the beneficiaries of the contract was General Nyanda and, knowing that he was (at its lowest) an

¹⁸¹ Gama, page 134 read with Bundle B, page 9

¹⁸² Gama, page 138

¹⁸³ Gama, page 141

¹⁸⁴ Gama, page 148-149

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acquaintance of Nyanda that there was a potential for this to adversely affect TFR.

- 157 Gama accepted that the provisions in clause 5 of the Delegation of Authority Framework were aimed at preventing potential abuse of the confinement process. He further testified that it was not uncommon in TFR to find that standard documentation was incorrectly used in the procurement process and that, in consequence, as a general proposition this was even more reason to scrutinise very carefully documentation such as that authorising a security contract. In addition, although he was not himself the person responsible for executing the programme, he supported and was aware of the "Operation Cleanup" programme within TFR aimed at remedying problems in the procurement systems. He accepted that a CEO such as himself was expected to lead by example and to exercise his authority in accordance with the laid down Transnet procedures and that in the context of the problems regarding procurement within TFR and having regard to Operation Cleanup it was incumbent on him to execute his duties with due and particular care.
- 158 Gama agreed that when he related during the interview what had occurred on 5 December 2007 when he signed, he was relying on his memory of what had taken place on 5 December and not on any documents which he had obtained in the interim.¹⁸⁵ In the interview in response to the question of what documents Beattie had presented to him Gama told Madhav that it was "their motivation". Gama said at the disciplinary enquiry that this was a reference to the file of supporting documents which Beattie had and not a reference to the specific GNS confinement motivation document.¹⁸⁶ In my view Gama's version of this portion of the interview is to be accepted and one cannot in fairness find that he previously gave an inconsistent version.

¹⁸⁵ Gama, pages 29-30

¹⁸⁶ Gama, pages 30-32

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159 While Gama was clear that Beattie did not show him the documents page for page (there being three quarters of lever arch file of documents in Beattie's possession) he did testify that Beattie showed him "*the relevant documentation*" and in particular he accepted that Beattie showed him the document on which the names of three companies appeared.¹⁸⁷ Later in the interview he repeated that Beattie "*would have shown the names of companies*"¹⁸⁸ and that "*He showed me three companies in this document to say: These are the companies that we have interviewed.*"¹⁸⁹ Gama confirmed in his testimony at the disciplinary enquiry that he was shown the names of the companies. He also confirmed that he paid attention when Beattie said to him "*Here is the one company that we are choosing.*"¹⁹⁰

160 Under cross-examination Gama accepted that when he referred to the open tender process being stopped because of the participation of G4 Security he was recollecting his understanding of the situation prior to interview and as at 5 December 2007.¹⁹¹ Gama accepted that Beattie told him that one company had been dropped, that there were initially four and later three bidders, but did not mention that the entire tender process had been stopped. The interview then continues with Gama again saying that it was a tender process that somebody decided to call a confinement and he is recorded in the transcript as going on to say: "*There was a tender process, there were three companies that were approached. Okay? In terms of their requests for proposals.*"¹⁹² Gama denied at the hearing that he knew as at the time of the interview in or indeed as at 5 December 2007 that three companies were approached after the original tender process had been stopped. He said that by his use of the word "*approached*" in the quoted passage he had meant that there had been an "*adjudication*"

¹⁸⁷ Gama, pages 33-35 and 40

¹⁸⁸ Bundle D1, page 84; Gama, page 46

¹⁸⁹ Bundle D1, page 85; Gama, page 47

¹⁹⁰ Bundle D1, page 85; Gama, page 47-8

¹⁹¹ Gama, page 52

¹⁹² Bundle D1, page 87

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process resulting in the final three companies (and that this was therefore a reference to the open tender process rather than the confinement process). This is however a very strained interpretation of the language which he used in the interview.

161 To my mind the record of the interview reflects that Gama was aware on 5 December 2007 that only three companies were approached. The transcript later records the following, which Gama admitted at the hearing was a reference to his discussion with Beattie: *"We were discussing something where he said: Look we have gone out on tender. I had three companies. He did not say four, so I do not know anything about the fourth one. We had three companies, because they were to process this year, as you say. There was the process where they were ten companies or whatever, I do not know the actual number. But I can find out all that."* The importance of this is that, as appears earlier in these findings, the unchallenged evidence of Madhav was that the only document which refers to three companies was page 2 of the confinement motivation document which he showed to Gama during the interview.¹⁹³ There is no such reference to the three companies in the GNS confinement document itself which merely refers, in paragraph 2 thereof, to *"the motivation attached for a list of all companies interviewed together with GNS..."* It follows therefore that Gama was probably shown the confinement motivation document by Beattie at their 5 December 2007 meeting, as that is the only documentary source from which he could have obtained the understanding that there were three bidders who were approached. That being so, it is clear that Gama was given not only as the GNS confinement document which served before HOAC, and which on his version he said at the time was possibly merely wrongly completed to reflect a confinement when in fact the process was an open tender one, but he was also given that the GNS confinement motivation document.

¹⁹³ Bundle D1, page 87; Gama, page 59-60

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- 162 There are several references in the transcript where Gama refers to Beattie having shown him documents during their meeting on 5 December 2007. Gama testified that the documents were shown to him across the table by Beattie.¹⁹⁴ Gama made it clear that Beattie was in possession of a number of documents and that whenever he questioned Beattie on any aspect he would point out the relevant page in the documents relative to that question. In the course of his explanation Gama stated that "*we saw the documents, we went through them*" but explained that Beattie remained in possession of the file of documents.¹⁹⁵ It was then put to Gama that if he saw the documents and went through them with Beattie he would have seen the word "confinement" and he accepted that he would have seen the word. However, this answer must be seen in the context of his previous answer, which was to the effect that he would have seen the word "confinement" only if he had actually read the documents.¹⁹⁶
- 163 Gama accepted that when he referred in the interview to a tender process involving ten companies¹⁹⁷ that this was information which he had in his mind and which had not been imparted to him previously in the interview by Madhav. It follows that the reference to the names shown to him during the interview must be references to the names of the three applicant companies in the confinement process such as it was. In this regard, during the interview Gama stated that Beattie "*..even showed me the names*" and "*He showed me the names and said: These are the people.*"¹⁹⁸ The second page of the GNS motivation document was then shown to Gama in cross-examination and he agreed that it reflected two lists of the same three company names, including that of GNS. It is not entirely clear whether Gama admitted under cross-examination at this point that he was actually

¹⁹⁴ Bundle D1, pages 97 and 99; Gama, pages 77, 83,

¹⁹⁵ Gama, page 84 and 88-89

¹⁹⁶ Page 89

¹⁹⁷ Bundle D1, page 92

¹⁹⁸ Page 90; Bundle D1, at page 94

shown the name of GNS by Beattie in this way,¹⁹⁹ but in any event on the probabilities this was the list being shown to Gama at the time as there is no other document which lists only three company names.

Gama's response and alleged failure to himself investigate and take disciplinary action if necessary

164 Gama said that once he realised that what he had signed was in fact a confinement and that the tender process had been, contrary to his instruction, stopped and replaced with an unauthorised confinement process, there were a number of people both in the TFR security department and in procurement whose conduct needed to be investigated in order that they be called to account and possibly disciplined. According to Gama these included: firstly Beattie, Khanye, Senamela and Nayager in the security department as well as other persons in the procurement department including the Chief Procurement Officer who had issued the acceptance letter. Gama denied that immediately following the interview on 8 April 2009 when he was briefly shown two or three relevant documents, that he had sufficient information to act against these people. He said that he called for a file of relevant documents from the procurement department and was then going on leave for a period of some three weeks. It was, I think correctly, put to Gama that this was like asking the fox what was happening in the hen house because he was asking the very persons who were implicated to investigate themselves. The implication was that he ought to have elicited the assistance of TIA in this investigation, which he failed to do. In any event, on Gama's version by the end of July 2009 some three and a half months later, his investigations had not progressed beyond his determining that there was something amiss.


165 This does appear to me to be an entirely inadequate response from a CEO who at that stage held the view that he had been misled by his General Manager and possibly also misled by staff in the security and procurement departments. The lack of a more vigorous investigation does tend to show that Gama was less than enthusiastic in pursuing these suspected irregularities, particularly given the implications for his position personally which he can hardly have failed to realise. When Wells informed Gama that he was himself the subject of an investigation in relation to the GNS contract Gama said he adopted the view that he should not be seen to be interfering with the investigation of TIA and should remain aloof rather than himself investigating his subordinates.

166 Gama accepted under cross-examination that Transnet was entitled to investigate allegations concerning the award of the GNS contract and call him, as the CEO, to account in relation to that. However, in addition he contended that Transnet was obliged to inform him that he was formally under investigation.²⁰⁰ I fail to see from where the obligation arises that a person must be informed of any investigation against him. The fact that Gama may previously have been told of investigations in his area of responsibility does not give rise to any obligation on Transnet's part. Be that as it may Gama should have realised on 10 December 2008 when Oates told him there was an investigation into irregularities surrounding the GNS contract that the investigation could have related to him. He was formally ^{to TIA} that he was the subject of an investigation in this regard on 11 May 2009 and those concerns were reduced to writing on 18 June 2009.

167 Wells expressly raised Transnet's concerns on 18 June 2009 surrounding the GNS contract. In this regard, in his letter to Gama raising the concerns expressed by TIA Wells specifically invited Gama²⁰¹ to indicate what action

²⁰⁰ Gama, page 67-8

²⁰¹ At paragraph 8, Bundle D1, page 141



he considered appropriate to resolve the concerns and what corrective steps he would recommend be taken from a management point of view to deal with the GNS appointment. In this context, of his having been specifically asked what should be done, Transnet contends that Gama's response contained in his written response of 20 July 2009 was wholly inadequate having regard to what he suggested under cross-examination at the hearing should be done by way of an investigation of the GNS contract irregularities. On this issue Gama's response was that he required all the documentation and that he never received the reports from the internal auditors with their concerns or the documents which they had obtained in relation to the alleged irregularities, which he maintained were related to managers several levels below him in the hierarchy. Gama also attributed his failure to pursue an investigation to the fact that he no longer believed that the approaches to him by Wells were genuine.²⁰² That however in my view is no reason why his responsibility as CEO to call his subordinates to account could and should not have been fulfilled. There was no reason why at the time immediately after the interview Gama as the CEO could not have called his staff to account. He had the authority and the power to secure the relevant documentation himself. Indeed, during the interview, the investigator asked that he furnish all relevant documents. Gama retained the responsibility to perform his own investigation into the persons under his command and control. It is in my view no answer to say that he was unable to perform such an investigation because the internal auditors were performing a similar investigation. In this regard Gama referred to the "practice" in Transnet that the internal auditors would approach him regarding issues and to request documentation. He was clearly suspicious because in this instance it appeared to him that TIA already had certain documentation which was not given to him in the normal way. The unchallenged evidence of Madhav was that towards the end of the interview

²⁰² Page 105

Gama asked for documentation which was made available to him about a week later and that Gama never reverted to him to correct anything that he had said during an interview or to respond at all.²⁰³ Gama's response at the hearing to the effect that he had requested the Chief Procurement Officer to obtain the documents, that the latter had indicated that certain of the documents were with the auditors but that he would compile a file and that Gama then went on leave for some three weeks, that on his return he did have two files and was still considering these when he met with Wells on 11 May 2009 when he was first informed that he was himself the subject of investigation. Gama contended that at least in part why he did not pursue such investigations was because he did not want to be accused or suspected of engaging in any form of cover up. He therefore felt that he could not continue with the investigation which he had started.

168 I am doubtful about how determining the extent of the irregularities associated with the GNS contract in the security department and the procurement department could reasonably lead to a conclusion that Gama was attempting to cover up. Moreover, if this was genuinely a concern on Gama's part at the time, one would have expected that this would have been expressly raised in his written response of 20 July 2009, but no such concerns were expressed. All that was expressed in that letter in relation to this is that an investigation is required into the GNS contract and that the new General Manager for security had been asked to investigate and that three months would be required to complete such a review dealing with the suspicions of internal auditors.²⁰⁴

169 In his written response on 20 July Gama stated the following in paragraph 4.1: *"I deny any involvement in any possible manipulation that you may be referring to relating to the GNS appointment. If indeed there was any*

²⁰³ Page 112

²⁰⁴ Bundle D2, at page 21

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manipulation that you suspect by any party, we would follow up on that matter and carry out an investigation." Gama's position at the disciplinary hearing was that he considered he had been misled at least possibly fraudulently by Beattie and possibly others, that there were clearly irregularities which needed to be investigated in the security and procurement departments. He even named some of the individuals whom he said needed to account for their conduct. This position is entirely inconsistent with the statement which he made in his written response as set out above. Neither does the suggestion later in his written response that he has tasked the new General Manager security to investigate the matter and requires three months to complete the review constitute an adequate explanation for this response which refers not to any manipulation or irregularity suspected only of Gama himself, but refers to any irregularity by "any party" which would include the managers and Gama's insubordinates in the security and procurement departments.

170 Also noteworthy is the fact that in his written response Gama completely failed to mention the fraud and misrepresentation committed upon him by Beattie or the possible involvement of others in the irregularities surrounding the GNS contract, which had been listed in detail in Wells' letter where these concerns were raised.²⁰⁵ This would of course have been uppermost in Gama's mind and would have been a simple matter to include in his written response. When this failure was put to him, Gama's response was that he was under time pressure to respond. Even accepting that he had other duties to perform this is to my mind an inadequate response given that he had more than a month in which to reply to Wells' letter. Neither is Gama's contention that he later realised that certain issues which he had raised in draft versions of his written response were somehow omitted in the final version at all convincing. If indeed he later realised that

²⁰⁵ Bundle D1, page 140

certain responses had been omitted one would have expected that he would have simply supplemented his response to Wells. There was no evidence that he did so, and neither did he produce at the disciplinary enquiry the drafts which he alleged contained the omitted material.

- 171 In fact, Gama's explanation in relation to the appointment of GNS in his written response was merely to deny any personal involvement in either any manipulation relating to the appointment of GNS or the original open tender process and to seek to provide reasons for why the appointment of GNS on confinement was justified. The approach of seeking to justify the appointment of GNS on confinement is entirely inconsistent with Gama's approach during the disciplinary enquiry. As was pointed out for Transnet the failure to seek to call anybody to account and the approach adopted by Gama in his written response and the failure to investigate what he by then knew to be serious irregularities and procedural defects, is consistent with Gama knowing about the irregularities and procedural defects but seeking to avoid any investigation into them possibly because anybody called to account would simply point out Gama's own involvement.
- 172 Gama denies that he had sufficient information on 5 December 2007 to alert him that he needed to make further enquiry before authorising the confinement and that his failure to do so was gross negligence on his part. He stated that he trusted that there had been an open tender process followed to the letter involving adjudication committees and a tender board and that he had no reason to suspect anything untoward. Gama denied that he new GNS was being favoured in the appointment by virtue of the confinement process having replaced the earlier open tender process.
- 173 Gama was not able to offer any reason for why Beatty would have wanted to mislead him into signing a confinement for GNS. All he could suggest in this regard was that he did not suspect that Beattie would have willingly

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done so, and that perhaps Beattie was merely repeating what he had been told by others.

Discussion and conclusions on the GNS contract charge

- 174 Gama admitted signing the GNS confinement document. It is common cause that the document which Gama signed was in fact the approval of a confinement contract and was not the product of an open tender process. Gama's version is that when he signed the GNS confinement document he believed at the time it was an open tender and only later, upon being shown the documents, did he come to understand that the process was in fact one of confinement.
- 175 Clearly Gama ought to have known that what he was signing was a confinement. The document which he signed was headed "*GNS confinement*"²⁰⁶ and clearly reflects in no less than 15 places over 7 pages that it is a contract on confinement. Even as the busy CEO of a large organisation Gama was negligent if he failed to observe that what was presented to him was a document for the approval of a contract on confinement. Gama says that he placed reliance on Beattie as a trusted General Manager who informed him at the time that there had been an open tender process. In the circumstances where the document which he was being shown reflected something quite different, namely a confinement process this information from Beattie should have raised warning bells.
- 176 The crucial issue in dispute under this charge is whether Gama knew at the time he signed that what he was signing was the approval of a confinement or whether he believed at that time that he was signing the approval of a contract pursuant to an open tender process.

²⁰⁶ Bundle B1 page 114

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177 If Gama signed knowingly and aware that it was a confinement to GNS beyond his delegated authority then his actions were wilful rather than merely negligent. The investigator Madhav did not contend even at the disciplinary hearing that Gama was knowingly not telling the truth. It was nevertheless argued for Transnet that a finding should be made on the probabilities that Gama's actions in relation to signing the GNS confinement document were wilful. In this regard Transnet led extensive evidence regarding the circumstances leading up to the signing of this document and also led evidence about the circumstances during the implementation of the GNS contract and about the circumstances of Gama's alleged failure to take sufficient steps to investigate the irregularities around the GNS contract. Gama denied knowledge of the circumstances relating to irregularities preceding his signing of the confinement document on 5 December 2007.

Summary of background facts and circumstances which existed prior to Gama's signing of the GNS confinement

178 The investigation found no links between Gama and GNS according to Madhav.²⁰⁷ The only link is the fact that General Nyanda, whilst not a close personal friend, was more than a casual acquaintance of Gama's. This is discussed more fully below.

179 The evidence established that in the normal course Gama would have played no part in and had nothing to do with an open tender process which would be adjudicated on by a cross functional evaluation team and thereafter by the relevant tender board which would decide whether the tender should be accepted or not and would then refer the matter for the conclusion of the contract by an executive official. There was also no direct evidence to link Gama with the previous steps taken in securing and

²⁰⁷ Madhav page 146

motivating GNS as the preferred service provider on confinement. Gama's first involvement with this process of which there is direct evidence was of the one on one meeting on 5 December 2007 in his office when Beattie asked him to sign the GNS confinement document. Only Gama gave evidence of the circumstances of that meeting.

- 180 Some years earlier when Gama signed approval for the appointment of CPI as security services provider he wrote a note that the contract should be entered into for 6 months and then be reassessed. This indicates that he considered that security contract with some care and formed a view that the services provided by CPI should be tested. This approach illustrates that he took care and himself considered, independently of the advice of his more junior staff, whether in the interests of Transnet the CPI confinement contract should be approved. This careful and considered approach by Gama is to be compared with his own version that he took no similar care when he signed the GNS confinement document which was similarly for a security service contract. He said that the reason that he failed to take such care was because he did not read the GNS confinement document in the quiet of his own time while going through his in tray in the normal course. Instead he signed the document without giving it proper considered and independent consideration because he was asked to sign the document in circumstances where Beattie his General Manager approached him asked him to do so saying it was urgent and that an open tender process had been followed. It was not suggested that Gama fabricated the entire incident and that he did not meet Beattie at all or that he did so under wholly different circumstances to those about which he testified.
- 181 Beattie has since emigrated to Australia and was not available to give evidence. He told investigators that he could not assist as he could not recall the events in question. There was accordingly no witness who could directly contradict Gama's version of the events during their meeting.

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- 182 The evidence which tends to contradict Gama's version is therefore all in the nature of indirect evidence from which inferences must be drawn. There is nevertheless much to be said for Transnet's contention that when Gama signed his approval of the GNS contract it was probably in the knowledge that it was a confinement contract with GNS – a company controlled and owned by a high profile acquaintance of his, namely General Nyanda. Although as stated there is no direct evidence of Gama's knowledge in this regard – which would establish the necessary intent on his part to make this conduct wilful rather than negligent, the surrounding circumstances which prevailed undoubtedly lead to a high level of suspicion that Gama in fact concluded the GNS contract with full knowledge that it was a confinement and that it was a contract with GNS. Clearly something was amiss in the TFR security department in relation to the securing of GNS as the service provider for the comprehensive security package required by Transnet. The onus of showing that Gama wilfully approved a confinement process in favour of GNS lies on Transnet on a balance of probabilities.
- 183 The irregularities and untoward aspects associated with the procurement of the services of GNS and which tend to show that Gama had knowledge of the confinement to GNS may be summarised as follows.
- 183.1 No open tender process was followed as required under the DPP policy, and as Gama himself had previously specifically required in relation to security services.
- 183.2 This was not a simple case of a failure to follow the open tender process. In fact an open tender process commenced and reached an advanced stage with four bidders being shortlisted. The tender process was initially put on hold and thereafter cancelled entirely. The cancellation was effected on the basis of an "instruction" from group level, but the person who was responsible for issuing that

instruction denied ever having given the instruction. There was moreover no good reason to halt the open tender process merely because one of the four bidders had become ineligible to continue bidding. The other three bidders remained unaffected by G4S having to withdraw from the process. The cessation of the open tender process is therefore not satisfactorily explained and remains highly suspicious.

- 183.3 Strictly, there was no urgency at the time in relation to securing the relevant services because the work was being undertaken by CPI. Although the end of the contract period with CPI had been reached CPI was evidently performing the work competently and the security contract with CPI was being extended on a monthly basis. Accordingly there was no crisis with there being a security void which needed to be filled. On the contrary – in the area of specific concern - namely cable theft, the statistics of incidents over the relevant period in 2007 showed a steady decline. Nevertheless the contract with CPI was terminated. (There was, correctly, no suggestion that the urgency to which Beattie referred constituted urgency for the purposes of the policy provision which permitted a deviation from the tender process by reason of urgency.)
- 183.4 Even before the open tender process was stopped and the participating bidders notified thereof, TFR staff had approached GNS to seek its proposal for the required security services. The evidence shows that there probably was assistance to GNS from inside TFR in the preparation of its proposal.
- 183.5 A misleading motivation document was produced by Senamela and Nayager of the TFR security department in which GNS was promoted as the sole suitable provider of the services. At the time GNS was not so much as registered with PSIRA.

- 183.6 The fact that there was probably collusion between senior management within TFR security department and GNS. Such collusion is shown at least, as mentioned above, to the extent that GNS was assisted in putting together its proposal to provide the security services and that this was done at a stage when the open tender process was still in place and had not yet been stopped. Secondly the motivation for the confinement of the contract to GNS is, on a proper examination thereof, a set up job designed to ensure that only GNS and neither of the other two so-called competing companies would be viewed as acceptable and able to perform the required work. This too suggested a collusive relationship with GNS.
- 183.7 No proper investigation or due diligence process was conducted into the ability of GNS to perform the required security work or as to its proven track record. In fact GNS employed no staff at all and contracted out all the work which was in breach of the contract with Transnet.
- 183.8 The proposal to engage GNS on confinement had proceeded through the recommendation process to HOAC which was the relevant tender board. HOAC had recommended the appointment of GNS on confinement subject to the approval of the CEO. This recommendation was irregular in that the tender board should have realised that the value of the proposed contract exceeded its level of delegated authority, as it also Gama's level of delegated authority, and the tender board should therefore have referred any recommendation to a level higher than Gama as the CEO.
- 183.9 The improbability of Gama not knowing and bothering to discover to whom the security contract was going, particularly as even on his own version he looked at least cursorily at the GNS confinement document presented to him for signature.

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- 183.10 The fact that had the appointment process adopted been an open tender process there would have been no need for Gama to sign of the GNS confinement at all. It was however possible that as a matter of courtesy it would have been given to the CEO to sign.
- 183.11 On his own version at the enquiry Gama felt that he had been misled by misrepresentations made to him by his sub-ordinates as to the tender process which had been followed when he was asked to sign the GNS confinement. He knew that irregularities must have occurred, yet despite this knowledge he made the extraordinary statement in his written response on 20 July 2009 that he would follow up and investigate if Wells suspected any "manipulation" by any party. This is entirely inconsistent with Gama's own position as evinced at the disciplinary hearing that he knew there must have been procurement irregularities and that he personally felt misled by the representations which had been made to him at the time of his signing. Gama's failure to investigate his subordinates promptly in these circumstances was not satisfactorily explained and suggests the inference that he failed to immediately conduct an investigation into the conduct of his subordinates for his own reasons, possibly because he knew all along since 5 December 2007 of the situation that GNS had irregularly secured the contract on confinement.
- 184 On the other hand in evaluating the probabilities of whether Gama had knowledge of what he was signing and intended to confine the contract to GNS there are also a number of factors which tend to show that Gama did not have such knowledge. These are the following:
- 184.1 Gama as the CEO of the largest division of a very large corporation – while he is ultimately responsible for the whole of TFR – is not directly responsible for the day-to-day operations of the TFR security department or the procurement department. There is no



direct evidence that Gama personally had any involvement in the process preceding his signing of the GNS confinement document.

- 184.2 There is no direct evidence that Gama was in cahoots with the security managers who were apparently improperly engaged in assisting GNS to secure a contract on confinement.
- 184.3 There is no evidence that Gama issued or influenced the instruction to stop the open tender process. Indeed that instruction is recorded in the documents as having emanated from Group level (although the person who is alleged to have issued the instruction denied having done so).
- 184.4 Gama had historically himself consistently expressed the attitude that security contracts should go out on open tender. This attitude was of course contradicted by the fact that Gama had himself signed and approved the original CPI contract on the basis of a confinement, because that company was said to be the only company capable of providing the required services. (No impropriety was suggested in regard to the approval of the CPI contract, but this illustrates that a security company was in fact previously appointed by Gama himself on confinement rather than on open tender.)
- 184.5 Gama had expressly issued an instruction in early March 2007 that an open tender process be conducted and concluded by no later than 1 July 2007. (In this regard it is strange and somewhat improbable that despite frequent discussions with his senior managers, probably on an almost weekly basis, at management meetings regarding what was an acknowledged high priority problem, namely cable theft, and despite Gama's instruction to conduct an open tender process, he nevertheless maintained that he had never kept track of or discussed the progress of that open

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tender process which was designed to secure a competent and comprehensive security service to deal with the cable theft problem. In this regard there is again no direct evidence to contradict Gama's say-so that as a high level executive he was unaware of the details of the situation in regard to the progress of the tender process which he had instructed should occur.)

- 184.6 There is the fact that Gama would have known it could readily be shown having regard to the paper trail of procurement procedures that what he was approving was indeed a confinement, and the inherent improbability of his taking that risk.
- 184.7 There is no evidence of Gama in anyway having benefited personally from the award of the contract to GNS. (I would observe however that by its very nature such evidence may be very difficult for Transnet to obtain even if it indeed existed.)
- 184.8 The fact that there had been an open tender process and that Gama could well have seen in Beattie's possession the front cover of the document which it was common cause was sent out calling for open tenders. Gama could in consequence have understood or wrongly assumed that an open tender process had been properly and procedurally conducted to finality.
- 184.9 The fact that the tender board is required in terms of the DPP policy to refer any proposed contract to the person in the hierarchy with the appropriate delegated powers for the value of the transaction and the tender board in fact referred the proposed GNS confinement contract to Gama as the CEO even though the contract value meant the contract was outside of his delegated authority. The tender board (HOAC) had no authority to approve a confinement for R18 million. Mr Tobias was questioned as to why the tender board, of

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which he was chairman, had approved the GNS contract in that sum. His answer to the effect that it only "supported" and did not finally "approve" the confinement which always remained subject to final approval by the CEO was unsatisfactory in that he tender board supported a contract which it knew the CEO could not approve. HOAC's delegated authority to approve expenditure was the same as the CEO's, namely R 10 million. Insofar as HOAC had approved the GNS contract this therefore virtually amounted to a representation to Gama and certainly suggested to him that the value of the GNS contract was under R 10 million, because if the value of the transaction was for an amount greater than R 10 million HOAC ought to have referred the matter to an authority higher than Gama whom it knew had the authority to approve contracts for more than R10 million. In my view Gama is probably entitled to contend that this misled him as to the value of the GNS contract. On the other hand Gama was required to exercise an independent judgment in considering whether to approve the GNS confinement document – which, had he examined it properly, would have revealed to him that the transaction was for an amount in excess of his delegated authority of R 10 million.

184.10 As to the fact that HOAC referred the GNS tender proposal to Gama when it should have referred the matter to the next higher level of authority, four possible options arise. (i) HOAC believed that it was a confinement for less than R10 million and that they were therefore within their rights to refer it to Gama as CEO; (ii) HOAC was in cahoots with Messrs. Khanye and Senamela who put up the GNS motivation document; (iii) HOAC was in cahoots not only with Khanye and Senamela but also it with Gama himself when they referred the GNS motivation document to Gama; (iv) HOAC was derelict in its duty by referring it to Gama when it was outside of his

jurisdiction. As to option (i) properly considered there is really no basis in the GNS confinement document itself for under R10 million. Options (ii) and (iii) seem inherently improbable given the large number of people who would have needed to be part of some form of conspiracy. That leaves option (iv), namely that HOAC was simply negligent in its duties, as the most likely scenario.

- 185 The immediate circumstances under which Gama was asked on 5 December 2007 to sign the document by Beattie are also relevant to Gama's state of mind at the time and whether he signed the document in the knowledge that it was a confinement. Gama was presented with the GNS confinement document by his General Manager Beattie who asked him to sign it. Gama contends that he is entitled to trust and rely on his senior managers and that Beattie was such a trusted manager whom he had no reason to doubt. This was supported to some extent by Wells who accepted the general proposition that Gama was entitled to rely on his subordinate employees in his department where he was not personally involved in something which had happened.²⁰⁸ Also relevant is the fact that Gama knew at the time that Beattie's departure from Transnet was imminent. In fact Beattie's termination agreement was signed later the same day and his last working day was a few days later.
- 186 It is apparent that Gama failed to read and properly consider the documents placed before him by Beattie. In the interview Gama delineated his role as limited to asking his General Manager whether funds were available and whether the correct procurement process had been followed. At the hearing his evidence in this regard was to much the same effect, namely that he asked Beattie about the process and whether this was budgeted for and then simply signed the final page of the GNS confinement document without first reading the contents thereof. Gama's explanation for his failure

²⁰⁸ Wells, page 137

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to properly read the document was that he trusted Beattie's explanation. This may of course be a false explanation in that Gama may well have known at the time that what he was approving was a service contract on confinement, that the value of the contract exceeded his delegated authority and that the contract was being awarded to GNS a company owned and controlled by a person with whom he was personally associated General Nyanda. These are all facts which a careful and non-negligent CEO should have known and could have ensured that he was aware of by the simple precaution of reading the documents placed before him for signature and properly ventilating with Beattie and with regard to the other supporting documents why it was that the documentation clearly reflected the process as one of confinement and not as an open tender.

187 Gama's explanation about what occurred on 5 December 2007 in the meeting with Beattie may be a false explanation. In this regard it is relevant to consider that Gama was not open about his relationship with General Nyanda. He initially down played and denied the fact that he was more than merely an acquaintance of General Nyanda. Gama put up a false contention during the hearing that he knew General Nyanda only as any other member of the public would. He later admitted, after the cellphone records had been produced, that he was more than an acquaintance of Nyanda – though he would not describe him as a friend. I describe this relationship as more than an acquaintance in that their relationship was such that they had played golf together, they clearly had each other's cellphone numbers and Nyanda called Gama to express his condolences when a member of Gama's family died and to commiserate when Gama was suspended. Those are acts which one would not expect of a mere acquaintance and are to my mind the acts of a person one would probably describe as a friend, though not necessarily a close friend. Gama explained that the reason why he gave his lawyers a misleading version was because he wanted to gainsay the inference which he felt was being drawn, namely

that he was a close friend of Nyanda's, even though that was not what the witnesses had in fact said. My impression is that Gama was evasive in this area of his testimony. While he explained why he had wanted to mislead the enquiry, the fact is he was prepared to do so and could well have similarly been prepared to present incorrect facts on other aspects of the enquiry, particularly as Beattie was not available to testify in order to gainsay anything Gama said about the events of their meeting on 5 December 2007.

188 Gama's version as to what was discussed at the December breakfast meeting was in my view inconsistent with his earlier version thereof during his interview. He testified at the hearing that at the breakfast meeting with Oates the issue of the GNS contract was not discussed. According to him the only mention of GNS was when he was asked whether he was aware that a company called GNS was being used, to which he answered that he had become aware of that because of reports from his managers Fernhead and Senamela that GNS had assisted in securing a lot of prosecutions regarding cable theft.²⁰⁹ This was then followed up at the breakfast meeting with a question as to whether he knew that General Nyanda owned GNS, to which he replied that he did know this. The transcript of the interview, as confirmed by Madhav shows that during the interview Gama gave a different version. During the interview when the topic of discussion was Gama's understanding of security contracts at the end of 2007 and in particular whether the contract was one of confinement with GNS, he said that at the meeting with Naicker²¹⁰ (which was the breakfast meeting) "*We discussed this thing...., and as far as I am aware and as far as I am concerned, there was never any confinement on this particular matter, even if somebody may have, for some reason, then returned it in a manner and*

²⁰⁹ Gama, pages 24-25

²¹⁰ That transcript refers incorrectly to "Michael", that there was no dispute about the fact that this was the meeting at which Gama was briefed by Oates and Naicker.

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*the way that it then looked like it was a confinement.*²¹¹ There is little doubt in the context that Gama was there referring specifically to the GNS contract as having been discussed at a breakfast meeting. Moreover, Gama's explanation at the disciplinary enquiry that this was a observation referring in general terms to the issue of personnel wrongly completing standard forms, is quite simply not a satisfactory answer as the passage of the transcript in question is not capable of that interpretation, as Gama himself then conceded when the next passage in the transcript was brought to his attention.²¹²

189 Gama's reference during the interview to the contact value only being R4.9 million (when it was in fact over R 18 million) may have been a genuine misreading of the GNS confinement document which he quickly looked at during the interview, or it may have been an attempt to mislead the investigators as to what he had signed or an attempt by Gama to convince the investigators that he believed at the time was that he was signing approval for an amount within his level of delegated authority. The same situation prevails in relation to Gama's further reference in the interview to the five month review period being the basis of the valuation of the GNS contract at R7.5 million.

190 While Gama was clear that Beattie did not show him all the documents, page for page (there being three quarters of lever arch file of documents in Beattie's possession) he did testify that Beattie showed him "*the relevant documentation*". In particular he accepted that Beattie showed him the document on which the names of three companies appeared.²¹³ Later in the interview he repeated that Beattie "*would have shown the names of companies*"²¹⁴ and that "*He showed me three companies in this document*

²¹¹ Bundle D1, page 78; Gama page 24-28

²¹² Gama, page 28

²¹³ Gama, pages 33-35 and 40

²¹⁴ Bundle D1, page 84; Gama, page 46

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to say: *These are the companies that we have interviewed.*²¹⁵ Gama confirmed in his testimony at the disciplinary enquiry that he was shown the names of the companies. He also confirmed that he paid attention when Beattie said to him *"Here is the one company that we are choosing."*²¹⁶ In the light of this testimony of Gama it is hard to accept, though it is possible, that if he was shown the names of three companies he remained unaware that the contract he was approving was an agreement with GNS which was one of those three companies.

191 In assessing Gama's credibility it must be said that he was cross-examined extensively about events that occurred some time ago and some of which were not necessarily within his personal area of operation within Transnet. He cannot in fairness be described as a generally poor or unreliable witness but there were, as set out above certainly *unsatisfactory aspects* of his evidence apart from his lack of candour about Nyanda for which he apologised.

192 Madhav's testimony was in my view fairly balanced and credible. As the investigator he could well be tempted to defend the results of his investigation and to guild the lily in his evidence in order to do so. It is however so that in one instance Madhav conceded under cross examination that he had been mistaken. Madhav was challenged over his testimony about the circumstances of and timing when which Beattie left Transnet. Madhav accepted that he left in the air his evidence about the timing of Beattie's leaving Transnet. In this regard Madhav's evidence was rather unsatisfactory in that he seemed to leave the impression that the fact that Beattie was leaving very much at the time when he asked Gama to sign the GNS confinement document was somehow suspicious, particularly as Beattie was paid a 15 months severance payment having only worked for

²¹⁵ Bundle D1, page 85; Gama, page 47

²¹⁶ Bundle D1, page 85; Gama, page 47-8

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Transnet for a period of 13 months. Madhav had not however examined Beattie's contract of employment, did not know whether he was on a fixed term contract or what the precise terms of his severance agreement were. I am not persuaded that Madhav intentionally gave misleading evidence on this aspect. He simply answered the questions which were put to him. Madhav generally made concessions where he should have – for example that the responses by Tobias of HOAC and by Senamela and Khanye to queries put to them by the investigators were not satisfactory. There is no reason to doubt Madhav's veracity.

193 There is similarly no reason why the evidence of Oates, Naicker and Wells should be called into question.

194 On Gama's own version he did nothing by way of reference to the GNS confinement document (or any other document) to satisfy himself, as opposed to relying merely on Beattie, as to the content of the document which he was signing. He accepted that he was aware of the stipulation in the DPP policy that he was required to satisfy himself whenever he signed in terms of the delegated authority. He said that he was satisfied by virtue of the answers which Beattie gave to his questions which were around process. Gama accepted that he and Beattie never discussed the fact that the previous signatories had all approved the GNS proposal on condition that the CEO also approved it. It is noteworthy that the only questions which he asked Beattie related to the process which had been undertaken and whether the cost was budgeted for. As mentioned he said he never looked carefully at the documentation²¹⁷ though he accepted that he "perused" the documents²¹⁸ which Beattie was showing him while he was simultaneously talking to Beattie. He failed to ask Beattie who the other contracting party was and signed the document without ever knowing this

²¹⁷ Gama, page 126

²¹⁸ Gama, page 69

important fact. He failed to determine in any detail what the cost of the contract was, and he failed to read the document which was in terms which made it abundantly clear that he was in fact dealing with the confinement. Gama didn't know for what period the contract was. He was content to accept Beattie's indication that there would be a trial period. In fact, had this been a tender process, Gama's signature would not have been required at all. This fact together with the fact that his signature was being sought should have alerted him to conduct a closer investigation. In addition, Gama's evidence it seems to me does disclose that he read other documents at least in part, including one which informed him that there had been three companies considered in the tender process. That information does not appear from the final page of the GNS confinement document. Gama's evidence under cross-examination that this was the *only* document which he read therefore contradicts his earlier evidence from which it is clear that he read the cover page of the document which called for open tenders. It also contradicts his version during the interview from which it appears that he also read – even if fleetingly – that part of the GNS motivation document which contained the list of the three companies considered for the confinement tender.

- 195 It was contended for Transnet that it was improbable that Gama as the CEO had simply signed a document which consisted of a page of signatures after a five to ten minute discussion in circumstances where he knew that there were problems with procurement procedures in TFR. There is considerable force in of this submission. Gama was the last person in the chain of authority that approved the contract. Placing reliance on the fact that the proper process had been followed without ensuring and satisfying himself that this was so and then simply signing a page of signatures which was presented to him does seem somewhat inexplicable and therefore improbable. Gama's explanation to the effect that both he and Beattie were in a hurry; that he relied on the fact that the tender board had looked at the

issues and signed its recommendation; the fact that Beattie his trusted General Manager had signed the document; and the fact that he posed process questions to Beattie who answered to his satisfaction is not a satisfactory explanation for his failure to properly execute his duties as CEO. In his own words his signature was "*an oversight*" and he "*probably just absentmindedly signed it*".²¹⁹ On his own version he didn't even satisfy himself that what he was signing was in fact of the GNS confinement document which preceded the page of signatures which he did look at. Gama conceded that with hindsight he failed to perform his duties as he ought to have done.²²⁰ He later agreed that even the one final page which he was handed and read he "*glossed over*" as he had discussed in detail with Beattie the process that had been followed.²²¹

196 As has been recorded above Gama conceded that had he read the GNS confinement document he would have concluded that what he was signing was a confinement for a period of one year with the contract value of some R18 million.²²² He accepted that had he read the document he would also have seen that there was in fact no open tender process because the process which had occurred had been stopped. He would also have seen that one of the beneficiaries of the contract was General Nyanda and, knowing that he was (at its lowest) a personal acquaintance of Nyanda he would have known that there was a potential for this to adversely affect TFR. All this shows clear and serious negligence on Gama's part.

197 For Transnet it was contended, correctly in my view, that Gama's exposition of his role in the procurement process - namely to enquire of his General Manager whether there were sufficient funds and whether the process had been followed - was wholly inadequate. As the senior executive authorising

²¹⁹ Gama, pages 133 and 130

²²⁰ Gama, page 134

²²¹ Gama, page 43

²²² Gama, page 148-149

the transaction he does not constitute a check-point in any sense in the procurement process if he relies entirely on the say-so of others. He is required at least to check the documents which he is approving in order to satisfy himself that the procurement process and transaction that he is being asked to authorise are what they purport to be, are correct, that the contract is cost-effective, and that the correct procurement process has been followed before he authorises the transaction. It is no answer to say, as Gama does, that the questions which he asked of Beattie concerning the process followed were sufficient, when clearly they were not. The document which he was signing reflected something different and on his own version he was being misled. Gama said that he trusted all his General Managers to do the right thing, but in this instance that trust was misplaced. In short, it was his duty to check more carefully what he was signing and his failure to do so was negligent. Indeed, Gama himself agreed this was an oversight on his part and it was not sufficient where the requirement was that he satisfy himself as one of the various check points in the procurement process, for him merely to check whether one of the earlier stages in the procurement hierarchy was satisfied and therefore himself adopt the same position.²²³

198 Gama admitted under cross-examination that he had an opportunity during his interview to *peruse* the GNS confine document. He also said that he did not have the opportunity to *study* the document and that they were merely *glossing over* it. Nevertheless, he accepted that he had the opportunity of looking at the document.²²⁴ It is clear from the transcript and Madhav's evidence that on several occasions during the interview Gama referred to facts contained in the GNS confinement document, and indeed I understood Gama to concede this at one stage under cross-examination, although elsewhere he seemed not to accept this. I find it improbable that a man of his seniority, confidence ability could not, had he wanted to, simply have

²²³ Gama, pages 64-65

²²⁴ Page 69

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insisted on having the opportunity to read the GNS confinement document during the interview. In my view he was probably free to examine the full text of the GNS confinement document during the interview and the full text of the GNS motivation document had he asked to do so.

- 199 Transnet's case is further that Gama's failure to complain about the fact that he had been misled coupled with his failure to take action to investigate and hold responsible the persons who misled him is significant, and a pointer to his true state of mind. To my mind the evidence does establish that there was failure on Gama's part to point out that he had been the victim of a misrepresentation. It is clear however that by that stage Gama's attitude was that he was being singled out and that in his view Transnet had failed to provide him with documentation and failed to alert him that he was the subject of an investigation, which he contended was the normal procedure. It is clear that his suspicions in this regard had been heightened by his having been informed by Mr Dube about the discussion aimed at preventing him becoming the group CEO. As he put it, his "antenna was up". Whilst Dube's evidence was not credible it cannot I think be said that he did not ever approach Gama and convey to him what he said he overheard about ensuring that Gama should be prevented from becoming the group CEO. The fact remains however that Gama did not respond, as one would normally anticipate he should have, by saying that he was himself a victim of a serious misrepresentation. He also did not vigorously pursue investigating who may have been responsible for the irregularities within the security and procurement departments. His explanation for why he was tardy in that respect and that he did not want to be seen to be interfering with an investigation which was looking into his own conduct is only partially convincing.
- 200 Gama accepted, as appears in the interview transcript, that Madhav told him that the acceptance letter which was sent out confirmed a contract for a period of one year valued at R18 million or R1.5 million per month. On

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Gama's version what he authorised was a five-month trial period contract, yet he did not raise the fact that the conclusion of a 12 month contract pursuant to what he had authorised was in any way irregular. The fact that Gama never raised this irregularity was never properly answered by Gama and tends to show that his version of what he authorised should not be accepted because his reaction when he learned of the 12 month contract is not consistent with what he contends was his understanding of what he authorised.

201 The company bears the onus to establish that Gama signed with knowledge that he was signing the approval of a confinement. The company has shown that the document Gama signed was a confinement beyond his delegated authority. It has further shown that objectively on the probabilities there were serious irregularities in the TFR security department and irregularities in the procurement process and in the conduct of the tender board. However the evidence of Gama's knowledge of those irregularities and the circumstances surrounding the securing of GNS as the service provider is entirely circumstantial and all based on indirect evidence from which one is asked to infer that Gama had knowledge which he denies. As the trier of fact I am required to have regard to the wider probabilities and the credibility of the witnesses must be weighed in relation to these. The principles for dealing with circumstantial evidence were enunciated in the well known criminal law case of *Rex v Blom*²²⁵ and have been modified by our courts to be applicable where the civil standard of proof of a balance of probabilities applies such as in this disciplinary enquiry. The test is twofold. (a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (b) The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If the proven facts allow for

²²⁵ 1939 AD 188 at 202-3

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another more or equally probable inference, the inference sought to be drawn cannot prevail.²²⁶ Thus where one conclusion is more natural and probable on the evidence, then that is the version which the trier of fact should accept on the probabilities. Circumstantial evidence which meets this standard may be accepted and can be as weighty and compelling as direct evidence.

202 Is the inference that Gama signed knowing that he was approving a confinement consistent with all the proven facts? The answer to this depends on whether it has been proven on the probabilities that Gama saw enough of the documents which he so fleetingly perused. In particular has it been shown on the probabilities that Gama knew at the time that a tender process had not been followed. That I think has not been shown. He knew he had previously given an instruction that an open tender process should be followed. He observed the cover sheet of an open tender process document in Beattie's possession. That goes a considerable way to reasonably persuading someone in Gama's position that an open tender process was probably followed. To add to that there is the fact that Beattie confirmed that an open tender process had occurred. I do not think that on the probabilities it has been shown that Gama knew there was no open tender process. Probably he thought there had been such a process and that is a reasonably probable inference. Though he was in fact mistaken I am not persuaded that in such circumstances the most probable inference is that he knew that he was signing a confinement. The inference sought to be drawn by Transnet as to Gama's knowledge has simply not in my view been shown to be the most probable inference. Gama denies that he actually had knowledge of the content of the document he was signing as constituting a confinement. Given the absence of Gama's involvement in the prior tender processes I am not persuaded that the suspicions which

²²⁶ MacLeod v Rens 1997 (3) SA 1039 ECD at 1049 A-C; H. Mohammed and Associates v Buyeye 2005 (3) SA 122 CPD at 129 C-E.

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arise as to his knowledge and from the inconsistencies in his version of events and the seeming failure on his part to later complain about being misled and his failure to vigorously investigate the irregularities show that it is more probable than not that Gama knew what he was signing. The version that he did not know is at least equally probable and ultimately, despite their being serious suspicions and factors which show the contrary, in weighting up the probabilities the required inference of actual knowledge of a confinement cannot be drawn. I find that I am unable to conclude that it is more probable than not that Gama signed knowing that he was approving a confinement and that Transnet has therefore failed to show that Gama acted wilfully rather than merely negligently.

Conclusion on charge 1

203 In conclusion therefore I find that on charge 1 Gama is guilty of misconduct in that:

203.1 He negligently authorised the conclusion of a contract for the provision of security services by GNS on confinement and failed to carry out his duties as CEO in the manner expected of him; and

203.2 He negligently failed to take appropriate steps to investigate the irregularities associated with the halting of the open tender process and the replacement thereof with the GNS confinement tender process and the presentation to him of a document for approval which was the product of a confinement process but which was presented to him on the basis that it was an open tender process.

Having reached the conclusion which I have under this charge, it is unnecessary to consider whether Gama's conduct under this charge also constitutes poor performance as is alleged in the alternative.

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Charge 2: GAMA'S ALLEGED FAILURE TO COMPLY WITH THE BOARD STIPULATED CONDITION FOR THE 50 LIKE NEW CONTRACT

Background to the charge

- 204 Gama painted a picture of TRE being a business which faced serious difficulties, was losing market share and in 2005 made a loss of some R21 million which, by the end of the financial year 2009 had been turned around to an operating profit of over R5 billion. However, the average age of the locomotives in the fleet was 32 years as compared with an average of 12 years for locomotives in comparable railways around the world. To fix these problems it was necessary to assemble a competent team of general managers and managers and a number of managers were let go and replaced.
- 205 Electro Motive Division ("EMD") was previously General Motors Locomotive Division and is a corporation which has been involved in diesel locomotive manufacture for more than a century. Its major competitor is General Electric. Both of these corporations are very large diesel locomotive manufactures in North America and are represented in South Africa. Sibambene Trade Services (referred to as either "Sibambene" or "STS") was the local agent for EMD, principally to sell spare parts to the maintenance market including TRE which maintains locomotives on behalf of TFR.
- 206 In 2006 a joint venture comprising of EMD and STS presented an unsolicited bid, not as part of a tender process, to TRE which was a proposed solution to the problem of the ageing locomotive fleet suffering frequent breakdowns. TFR needed in excess of 1500 locomotives over the next 10 years, but the EMD/STS proposal was a stop-gap solution to provide 50 like new locomotives. The "like new" aspect of the proposed project was that many of the components were not in fact new but were

refurbished. The proposal was that EMD would supply components to South Africa and that a local manufacturer, TRE would assemble these components in order to create the like new locomotives. The traction motors as well as the engines to be supplied were between 5 to 8 years old but would be refurbished and reconditioned and work "like new" and would enable TFR to use new digital equipment in combination with these locomotives. Thus the end product would be a combination of new and like new components. The advantage from TFR's point of view was that the cost of the like new locomotives would be in the order of R10 million less per unit. This unsolicited bid was brought to TFR at the time when it was preparing a major plan for presentation to the Board for replacement rolling stock.

207 Evidence was led of a memorandum from the Transnet Group Financial Planning which was presented to the Transnet Capital Investment Committee on 17 October 2006 regarding the possible acquisition of 50 diesel locomotives from EMD. The purpose of that document was to obtain approval to confine the tender process for the acquisition of the 50 locomotives to EMD/STS.²²⁷ The memorandum also sought authorisation for the Group CEO to conclude sign and execute the commercial contracts for the manufacture and supply of these 50 locomotives. Gama testified that this document was presented and discussed at the Capital Investment Committee meeting.²²⁸

208 A document containing the business case was prepared by the Capital Investment department in support of the 50 like new locomotives from EMD at the end of which a number of signatures appear.²²⁹ Persons who signed in support of the proposal were Mr. Frederick Potgieter the General Manager Transwerk (TRE) Operations, Mr. Percival Mosweu General

²²⁷ Bundle C, page 2; Gama page 21

²²⁸ Page 22

²²⁹ Bundle C, page 40

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Manager (Capital Programme) and Mr. Nick Thomson the Chief Financial Officer for TFR. Gama also signed his support for the proposal.²³⁰ The document was similarly signed by Mr. Louis Van Niekerk the Chief Operating Officer for Transnet who noted against his signature that "*Transwerk should be involved*".²³¹ Gama said that his understanding of this was that TRE would be involved in performing some of the work.

209 Mr. Wells, then Chief Financial Officer Transnet, also signed the document. He noted against his signature "*It was agreed that STS would not be involved. Any engineering or assembly to be done by Transwerk*". Finally, on 29 October 2006 Maria Ramos the Group Chief Executive of Transnet signed the document and noted "*I had exactly the same understanding as Chris (Wells) so this is approved on the basis set out above*".

210 There was a discussion at the Capital Investment Committee meeting of 17 October 2006 concerning the fact that Transnet did not need STS to participate. This was because STS was no more than a parts supplier and were in fact an agent and accordingly there was no need for them to be involved in the programme to construct the 50 locomotives.

The Policy Framework

211 The policy framework against which the 50 like new contract was concluded is as follows. The Procurement Policy ("DPP policy") read together with the Delegation of Authority Framework are important policies which establish the boundaries and powers and guidelines within which business decisions are made. Transnet's procurement objectives are set out in the DPP policy. It is the policy of Transnet when purchasing or selling goods and obtaining services, to follow a course of optimum value and efficiency by adopting best purchasing practices in supply management; and ensuring where

²³⁰ Bundle C, page 41

²³¹ Bundle C, page 42

possible that open and fair competition has prevailed. Due regard must be had to the importance of *inter alia* the promotion of Transnet's Interdivisional Support Policy²³² which is contained in and forms part of the DPP policy.²³³ Clause 2.1.1 of the Interdivisional Support Policy contains the following provision:

*"The following Operating Division/Business Units which have been identified as being strategically important to the core business, **must** be utilised by the core businesses and **under no circumstances** may the external market be approached for goods and services falling within their core-competency area. These support units are... Transwerk: Heavy engineering including wagon and locomotive repairs..."*

Later in the same clause the following provision occurs:

*"**Only if the above strategically important Operating Division/Business Units have indicated in writing** that they do not have the capacity to provide the required goods or services, may this be sourced from the external market."*

212 The aim of this policy is to ensure that work which it is within the capacity of the various divisions within the Group to do is in fact not given to outside sources. Wells confirmed that this policy applied to the 50 like new contract.²³⁴ Wells testified that it was very much contrary to the interest of Transnet to permit STS to perform the work in the 50 like new contract and develop a capacity in competition with TRE rather than to allow TRE to perform the assembly work and have the opportunity to improve its ability to produce work of world class standards.

²³² Clause 1.3.1.4(i) of the DPP Policy, Bundle A2 at page 46

²³³ Clause 2.1 of the DPP Policy

²³⁴ Page 73

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213 Transnet Group Delegation of Authority Group Limits of Authority document applied at the time.²³⁵ Clause 4.1 of that Delegation of Authority framework provides for the sub-delegation of authority in certain circumstances but this, according to Wells did not apply to the specific delegation afforded to Gama by the board in relation to the 50 like new contract. In any event Wells pointed out that the level of authority for the CEO of an operating unit²³⁶ such as Gama was, was up to R25 million for an unforeseen CAPEX matter where the expense was not budgeted for. The 50 like new contract was valued at over R800 million and therefore the delegation would have to be from the board and in writing. Wells testified that when one signs a document by way of executing a delegation of authority from the board you need to have the board resolution before you to ensure that the contract complies with the requirements of that board resolution.²³⁷

214 Also relevant to this charge is Note 1 in clause 5.5 of the Delegation of Authority Framework deals with contracts and provides in relevant part:

*"Any person who has been authorised to execute any legal documents, including... contracts... on behalf of Transnet and/or its divisions... may only do so with prior advice of the relevant Legal Services department as set out in the Transnet Group Legal Policy."*²³⁸

215 Because of the nature of the contract and the amount involved the 50 like new contract required the approval of the full board of Transnet. That approval first occurred on 13 February 2007 when the matter was

²³⁵ Bundle A2, page 173

²³⁶ Clause 5.1.2 of the Framework document

²³⁷ Page 31

²³⁸ Bundle A2 page 154; page 21 of the Framework document

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discussed by the board and a resolution taken.²³⁹ This first resolution was later amended in circumstances which appear more fully below.

- 216 In terms of the board resolution the responsibility for the implementation of the resolution was delegated to the Spoornet (now TFR) Chief Executive, namely Mr. Gama. This was unbudgeted expenditure that was not in the plan for the year and Gama as the CEO of TFR did not have authority to conclude the contract which was beyond his delegated authority level. It was therefore required that the board delegate this authority specifically to him. Gama did not have authority to sub-delegate this board delegated authority. This evidence was not disputed.
- 217 Gama therefore concluded the contract on basis of the authority delegated to him by the board which authority imposed a specific condition on the contract, but the board condition was not met in contract signed by Gama.
- 218 A complaint was later received in relation to the 50 like new contract and was investigated. Before considering that evidence it is convenient to consider the evidence of Wells which deals broadly with the circumstances and also with Gama's role and conduct.
- 219 Wells set out the background circumstances. He explained that because the 50 like new contract was for over R800 million and was an unbudgeted expenditure not in the corporate plan it required board approval and was therefore processed through the Capital Investment Committee ("CIC") which needed to approve the project. Approval was first required at the divisional CIC Committee and so a document containing the proposed business case for the purchase of the 50 locomotives was put up to that committee. Wells referred to this document²⁴⁰ which at the end thereof was signed variously on 6 and 9 October 2006. All the signatures that appear

²³⁹ Bundle C, page 46

²⁴⁰ Bundle C, page 11 - 42

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on the penultimate page of the document are those at divisional level including the Chief Executive Spoornet, Mr. Gama who signed on 9 October 2006. This was prior to the Group CAPEC meeting on 18 October 2006. Wells himself chaired the Group CAPEC meeting in his capacity as CFO at the time. Wells testified that the document was not presented at that CAPEC meeting but an investment summary was presented at the meeting. The purpose of the business case document is stated therein to be *inter alia*:

*"To confine the tender process for the acquisition of 50 EMD's to Diesel (EMD)/Sibambene Trade and Services" and "that the Group Chief Executive be authorised to conclude, sign and execute the commercial contracts for the manufacturing and supply of 50 EMD's..."*²⁴¹.

This proposal came from the Investment Forum at Group level and proposed that ultimately Mr. Gama the CEO of then Spoornet was authorised to conclude sign and execute the contract.²⁴²

220 Wells testified that the discussion around this project was that it was a progressive project which on the face of it provided delivery within a 12 month period of 50 locomotives at a substantially reduced price compared to new locomotives. Moreover, the project had the potential to achieve precisely what Transnet wished to do strategically both for TRE and with its capital programme generally, namely to localise and build expertise for locomotive engineering maintenance and assembly. Wells testified that what was unclear and confusing was the identity of STS as most members of CAPEC, including himself and the Group CEO Ms. Ramos, did not know who STS was, why they should be involved and precisely what the role of TRE would be in this project. It merged that STS was a parts distributor for EMD. The attitude of CAPEC was that it saw no reason why STS should be

²⁴¹ Bundle C page 2, paragraphs 4 and 6

²⁴² Bundle C, page 6

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involved as it was the first locomotive purchase ever executed and Transnet wanted to deal directly with EMD which was known and was the original equipment manufacturer ("OEM") in order to get the OEM's warranty and reputation behind the project. That was quite apart from the security of Transnet dealing with EMD and the OEM as the counter-party as regards risk. Transnet wanted TRE, whose expertise was repair and maintenance of locomotives, to have the opportunity to build expertise and a business and to secure employment and roll out a production facility. Wells said that the discussion got fairly heated but that it was an exciting project and it was clear that CAPEC would agree to it but certain conditions were made very clear, one of which was that STS would not be involved at all. In this regard Wells pointed out that Transnet was sceptical about middlemen having suffered in the past from circumstances where they simply added cost and complexity but no value to projects. At the time TRE had spare capacity and needed more work so this project was an ideal opportunity to grow the business and extend the type of engineering work performed by TRE. The idea was therefore that TRE would do all the work that could be done locally in order to build expertise and improve its engineering standards, and this project provided an ideal opportunity to do so. Mr. Gama was present at that CAPEC meeting. Initially Gama was very strongly in favour of the involvement of STS, but the CAPEC committee was adamant that they did not want to have any involvement of STS. Ultimately the decision to proceed with the project was approved, but the conditions attached were that STS was not to be involved and that TRE would do all the engineering and maintenance work and assembly work that could be done in South Africa.²⁴³

227 The business case proposal document needed some amendments and then required to be signed by the Group CFO and Group CEO before the project

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could be admitted into the capital expenditure system. At Group level the Chief Operating Officer, at that time Mr. Louis Van Niekerk, was also required to sign the business case document. The expenditure on this project was beyond even the Group CEO's authority for capital expenditure, which for unplanned items like this was R700 million, whereas the 50 like new contract was for over R800 million. Gama signed his approval of the business proposal on 9 October 2006 it as it was presented and without alteration and before any of the group executives signed it. The three group executives who subsequently signed it however all required an alteration to the business plan. Against his signature on the business plan the COO Transnet, Louis Van Niekerk noted: "*Transwerk should be involved*". Wells then CFO inserted a handwritten note next to his signature which read: "*It was agreed that STS would not be involved. Any engineering or assembly to done by Transwerk*". His signature is dated 20 October. The third signature was that of the Group CEO, Ramos on 29 October 2006. She appended a handwritten note which reads "*I had exactly the same understanding as Chris (Wells) so this is approved on the basis of set out above.*"

222 Wells testified that the reason it was necessary to make these handwritten notes and qualifications upon signature was because the business case which was presented after the CAPEC meeting of 18 October did not capture the concerns of CAPEC and needed amendment as it did not clearly address the issues which had been raised at the CAPEC Committee regarding STS. The two key issues not addressed in the written business case as presented to the group executives for signature were first that TRE would be involved in all the localised work, and secondly that STS would have no involvement. Wells testified that he discussed these aspects with Van Niekerk who had already appended his handwritten note before Wells signed and that Van Niekerk was in agreement with the note added by Wells. Moreover Ramos later approached Wells to discuss the matter with

him as she could not understand why the business case had not been amended appropriately. She too was very clear that it could only be approved subject to conditions as stated by Wells in his handwritten note. Ultimately the project required to be approved by the board which as at 29 October 2006 when Ramos signed the business proposal had not yet given its approval.

223 Gama then addressed a letter dated 25 October 2006 to EMD and STS²⁴⁴ in which he referred to the 50 like new contract and stated:

"Your proposal to Spoornet delivered on 14 September 2006 with regard to the above refers. Spoornet is hereby pleased to inform you that your offer is hereby accepted for the purchase of 50 like new GT26CU-3 locomotives subject to the conclusion of a formal written agreement between yourselves and Spoornet."

Wells testified that this letter, signed by Mr. Gama was inappropriate. Firstly, he could not issue such a letter until board approval had been obtained and there was as at that date no such approval. Secondly, after the CAPEC meeting of 18 October approval could only have been given for the amended business case whereby STS was not involved and TRE would do all the local work. The letter which Gama signed on 25 October 2006²⁴⁵ gave no indication of either of these conditions which had been stipulated. The request for approval of the 50 like new project was not approved by the board at its November meeting because the Company Secretary had not yet received an amended business case taking into account the requirements of CAPEC and the conditions stipulated by Wells and Ramos. It was only at the board meeting on 13 February 2007 that the signed

²⁴⁴ Bundle C, page 43

²⁴⁵ Bundle C, page 43

business case, containing the handwritten notes of van Niekerk, Wells and Ramos, served before the board.²⁴⁶

224 Wells himself presented the business case to the board and it was accepted by the board with the specific condition reflected in Wells' handwritten note. The board acknowledged the strategic intent and passed a resolution that STS could not be involved and that TRE would do all the engineering and assembly work.²⁴⁷ The board resolution passed at the meeting 13 February 2007 reads as follows:

"Spoornet: Purchase of 50 EMD Class 34/37 Upgraded Diesel Locomotives for Spoornet GFB

The Board resolved that it grants approval for:

- *The implementation of the critical phase of the locomotive fleet modernisation plan which includes an investment of R874.57 million (nominal) in the acquisition of 50 EMD Class 34/37 upgraded diesel locomotives for Spoornet GFB;*
- *The confinement of the tender to Electromotive Diesel (EMD);*
- *The conclusion signing and execution of the contract by the Spoornet Chief Executive for the manufacturing and supply of the 50 diesel locomotives to be delivered within 12 months of date of signature.*

The condition for the above approval is that Sibambene Trade Services would not be involved in the contract and that Transwerk would carry out all engineering on assembly and maintenance."

225 Wells testified that the source of the board resolution was his handwritten note against his signature on business case document. The board condition was in the same terms as Wells' note save that the words "engineering or assembly" were changed to "engineering on assembly". This was a pure typing error by the Company Secretary and was not an

²⁴⁶ Bundle C, pages 11 – 42; page 25

²⁴⁷ Bundle C, page 46

aspect that was discussed. Wells testified that the intention was very clear both at the board meeting and from the discussions at CAPEC that all the work that could be done locally by TRE would be done by them.

226 Despite the board stipulation that STS should not be involved, contract negotiations were pursued between TRE and STS. Had the board resolution been given effect to no such contract negotiations would have been required. The fact of such contract negotiations appears from the minutes of the meeting of 5 March 2007 at which Percy Mosweu, Rubin Molhabeng and Pinkie Msoupye represented TRE and negotiated with Messrs. Adams and Erasmus of STS. This was despite the fact that the Gama had knowledge²⁴⁸ of the 13 February 2007 board resolution which excluded the involvement of STS. Mr. Mosweu was the Senior Engineer in TFR responsible for locomotive projects and for this project in particular. It was however the responsibility of Gama to ensure that the conclusion of the 50 like new contract was effected in line with the board resolution. Gama had no power to sub-delegate his duties and responsibilities in this regard given that it was a specific board designated authority without any further authority to sub-delegate without first obtaining an amendment to the board resolution.²⁴⁹

227 Wells testified that given the value of the 50 like new contract and its importance to Transnet it would normally be the responsibility of the Group CEO to conclude, sign and execute such a contract. That is moreover what was reflected in the CAPEC business summary.²⁵⁰ In this instance Gama requested that he be the person in charge of concluding signing and executing the contract. He did this at the CAPEC meeting as this was included in the business case which went to the Investment Forum and later to the COO. This authority was expressly sought in paragraph 14 of the

²⁴⁸ Page 30

²⁴⁹ Page 31

²⁵⁰ Bundle C, page 2 paragraph 6

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business case where it was recommended "That the Chief Executive (Spoornet) be authorised to conclude, sign and execute the contract for the manufacturing and supply of 50 diesel locomotives, to be delivered within 12 months of dated of signature of contract."²⁵¹

228 After the 13 February 2007 board meeting Gama addressed a note to Ms. Zola Stephen, the then Company Secretary, in which he indicated a preferred wording of the board resolution which altered its previous wording. The amendment which he sought was that the condition read "*The condition for the above approval is that EMD would work with Transwerk during manufacturing and maintenance of the locomotives*".²⁵² Wells said that the concern with this wording was that the notion of EMD "working with" Transwerk was very unclear as that could be either a lot or a little work and Transnet did not want a competitor to TRE being established when TRE could itself do the work and thereby utilise its own facilities to full capacity. Wells knew that Stephen did not accede to Gama's request because of what had occurred at a Group Executive Committee ("Exco") meeting held on 28 March 2007.

229 Wells attended the Group Exco meeting held on 28 March 2007. Gama raised the issue of STS's participation in the 50 like new project saying that the board resolution wording was incorrect and needed to be amended. The Group CEO, Ramos responded by saying that one cannot simply change board resolutions and that they can only be amended by the board itself. Gama's attitude was that the contracting parties were not appropriate and that it was not up to Transnet to prescribe who the contracting party should be and that since his previous presentation, EMD and STS were close to consummating a joint venture agreement between themselves and that the contracting party ought to be that joint venture. The concern was

²⁵¹ Bundle C, page 39

²⁵² Bundle C, page 54A

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expressed in the meeting by Exco was that it did not understand why the OEM, namely EMD would seek to prescribe to a customer who should be the supplier and the contracting parties. However, Gama was adamant in the meeting that he had spoken to them and that EMD said they would only do the South African business through the joint venture with STS. Eventually, the Group CEO, wanting to cut debate on the issue which was fairly heated, agreed to go "off-line" (by which is meant outside of the usual line of authority) and Exco agreed that the wording of the amended Exco resolution would be sought by way of a round robin prior to it being taken back to the board. This appears from paragraph 11.1 of the minutes of that Exco meeting which records the following:

"The Committee agreed that the matter be taken off line between Messrs. Gama, Wells, Vallihu, Kahla and Ms. Stephen and the required Committee resolution be sought by way of a round robin, prior to it being taken back to the Transnet Board".²⁵³

230 Wells said that it was understood that the only change which would be made to the previous board resolution would be the identity of the contracting party. Wells said that in the discussion at Exco it remained clear that TRE would do all the work that could be done in South Africa and that the OEM would provide a guarantee. Under those circumstances the joint venture could be a contracting party provided the guarantee was in place and that there was no additional cost to Transnet and that STS was not involved in any assembly work whatsoever. Wells said that Gama's view at the meeting was that he was keen that STS had an involvement. The attitude of the Exco was however to insist that TRE do all the work because strategically that would equip TRE to expand its ability to assemble and do manufacturing work for the original equipment manufacturer, to retain employment and indeed expand and to introduce world class

²⁵³ Bundle C.54J, paragraph 11.1

standards into the business. Specifically TRE did not wish to introduce a competitor in the business into South Africa. It was also important that TRE be equipped to carry out maintenance of the locomotives after production as they did with every other locomotive in TRE.

231 Gama then prepared a document in the form of a memorandum to be circulated to Exco for approval in the round robin process and submitted that document to Stephen under cover of an e-mail dated 12 April 2007.²⁵⁴ On the face of it and according to the title of the document prepared for circulation to Exco it was a recommendation to amend the previous board resolution. However, as Wells pointed out, it did not address the precise concern of the board, namely that STS would be able, at the expense of TRE establish local facilities and expertise. For example in the recommendation section of the document proposing the amendment it is recorded that: "*The relationship (between STS and EMD) enables EMD to develop a local enterprise which does not have assembly capability and skills, increase local content and create employment.*" As Wells pointed out this expressly says that STS does not now have the capacity, but this contract will enable it to build that capacity. The document also indicated that the joint venture was in an advanced stage of finalising the involvement of Transwerk in the assembly of 40 of the 50 locomotives on Transwerk facilities, with the initial 10 to be assembled in the United States.²⁵⁵ Wells testified that from the subsequent negotiations which occurred, it is apparent that this statement was not correct.

232 The memorandum also stated that "*tremendous capacity building and business will flow to Transwerk as a result of this transaction.*" Following

²⁵⁴ Bundle C, pages 55 and 54K
²⁵⁵ Bundle C, page 57

the execution of the contract this did not occur as STS began to perform the engineering and assembly work, until this situation was later corrected.²⁵⁻⁶

233 The memorandum prepared by Gama then refers to an enclosed revised resolution which the Company Secretary could then recommend to the board for ratification.²⁵⁷ That proposed amended resolution changed the wording of the condition to read as follows: "*The condition for above approval is that EMD would work with Transwerk during the manufacturing and maintenance of the locomotives*".²⁵⁸ This wording was identical to the wording previously proposed by Gama to Stephen (i.e. before the Exco meeting at which this matter was discussed in detail) and did not comply with the decision taken at the Exco meeting of 28 March 2007.²⁵⁹ Wells testified that this wording specifically did not comply in that the idea was not that EMD work with TRE but that the change to the wording of the board resolution would only be that the contracting party would be the joint venture, the other conditions, namely that TRE would do all the work and that STS would not do the work were to remain unaltered.

234 In the event the Company Secretary did not circulate the memorandum for round robin approval by the Exco members because she did not believe that it addressed the requirements stipulated by Exco.

235 As far as Wells was aware, Gama was on leave at the time. Stephen discussed the memorandum with Wells at the time and with Vuyo Kahla, head of Group Legal at the time. The Company Secretary attempted to redraft the wording of the resolution but was running late for the preparation of board meeting submissions which needed to be with board members a week prior to the board meeting. A discussion was held between Wells,

²⁵⁶ Page 41
²⁵⁷ Bundle C, page 58
²⁵⁸ Bundle C, page 59
²⁵⁹ Page 42

Kahla, Stephen and the Group CEO Ramos who said that it was not necessary to redraft the resolution as the only requirement that was to differ from the original board resolution which would otherwise remain intact, was that the contracting party had changed. Nothing else needed to change.

236 At the April board meeting Mr. Kahla presented the facts, but no new documentation and then amended the proposed amendment to the resolution to read: "*The condition for the above approval is that Transwerk would carry out all engineering on assembly and maintenance*".²⁶⁰ Wells said that the intention was to amend the resolution only in relation to the identity of the contracting parties. That amended resolution was then passed at the meeting of the board of 26 April 2007.

237 The amended board resolution of 26 April 2007 reads in full as follows:²⁶¹

"The Transnet Board of Directors Resolved that it approves the amendment to the condition contained in the Board Resolution 07/1/3 precluding participation by Sibambene Trade and Services, and that the amended Resolution read as follows:

That The Board resolved that it grants approval for:

- The implementation of the critical phase of the locomotive fleet modernisation plan which includes and investment of R874.57 million (nominal) in the acquisition of 50 EMD Class 34/37 upgraded diesel locomotives for Spoornet GFB;*
- The confinement of the tender to Electromotive Diesel (EMD);*
- The conclusion signing and execution of the contract by the Spoornet Chief Executive for the manufacturing and supply of the 50 diesel locomotives to be delivered within 12 months of date of signature.*

The condition for the above approval is that Transwerk would carry out all engineering on assembly and maintenance."

²⁶⁰ Bundle C, page 61; page 48

²⁶¹ Bundle C page 61

238 According to Wells, the February board resolution was in all material respects the same as the amended April board resolution, save for the identity of the contracting party.²⁶²

239 Gama was not at the board meeting of 26 April 2007.

240 Gama then signed the 50 like new contract between Transnet Limited and EMD, STS joint venture.²⁶³ He did so on 1 May 2007 which was a public holiday. The signing took place at his home. At that stage the contract had been prepared on the basis that the board would agree to change the contracting party and that was the only matter requiring confirmation by the management team before he concluded the contract.²⁶⁴ There was only one working day between 26 April, the day on which the board amended the resolution, and 1 May. Wells testified that unless there had been a special request it was extremely unlikely that any form of communication would have occurred before 2 May 2007 through the office of the Company Secretary notifying persons in the company of resolutions of the board taken at the meeting of 26 April.²⁶⁵ It appears that the contract was already prepared in final form on 25 April 2007 (as is reflected in the header of the signed contract document) and that Gama could therefore not have given the board resolution taken on 26 April 2007 to anyone who was involved in the preparation of the draft contract before 1 May 2007 when he himself signed the contract.²⁶⁶

241 Nearly a year later in around March 2008, Wells learned from the CEO of TRE, Mr. Richard Vallihu, that STS was establishing a separate manufacturing facility at Iscor. Wells discussed the matter with Van Niekerk

²⁶² Page 135

²⁶³ Bundle C, pages 62 - 129 at page 129

²⁶⁴ Gama, page 29

²⁶⁵ Page 51

²⁶⁶ Bundle C, pages 62-129

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the Group COO and together they went to see Ramos. She was extremely perturbed and asked Wells to investigate which he did.

242 Wells' investigations ascertained that Vallihu was in fact correct. During the course of his making enquiries in this regard with Mr. Thomson, the CFO of TRF who was responsible for ensuring compliance with guarantees, payment delivery schedules and other problems relating to the 50 like new contract, Wells said to Thomson he would like to have a meeting with EMD and the various other players to ascertain what was going on and to see whether they could restore what the original board resolution had required. Thomson suggested that Wells simply attend a meeting which had already been arranged of all the parties and set for 10 April 2008 to discuss implementation problems with the contract.

243 Wells attended that meeting of 10 April 2008 at which there were EMD representatives from the United States, local EMD representatives, STS representatives and TRE executives, as well as managers from TFR. Gama was not present at that meeting as he was on leave at the time. A transcript of the relevant portion of the meeting was produced in evidence.²⁶⁷ At that meeting Wells tabled his proposal that TRE do all the engineering work as required in terms of the board resolution and that the parties needed to explore implementing that. Ultimately, the sentiment of the meeting was unanimous, including both EMD and STS, that it would be the appropriate course of action²⁶⁸ to restore the intention of the board resolution and ensure that TRE did all the construction, assembly and maintenance work which it was possible to do in South Africa. It was specifically agreed that the locomotive assembly work would be done by TRE; that work at the Iscor premises would stop, and that the assembly would take place at the TRE Koedoespoort facility. A steering committee

²⁶⁷ Bundle C, page 240
²⁶⁸ Page 57

was established comprising members of TFR and TRE with various representatives from EMD to begin addressing this process. Gama was not himself present at this meeting but Van Niekerk, COO of TFR and two other executive members from TFR were at the meeting and party to the decision and were involved in the steering committee that would give effect to what had been agreed. At no stage did Gama raise any objection to the decision taken at that 10 April 2008 meeting.²⁶⁹

244 Wells testified that on 10 April 2008, after the portion of meeting for which the transcript was later prepared, a closed meeting was held between EMD, STS and Transnet representatives at which total commitment was given to make the proposed changes with the work being done by TRE. At that closed meeting EMD raised the fact that they had "sunk" costs into establishing the Iscor premises and that whilst they were a hundred percent supportive of the decision to move the manufacturing to TRE, they requested compensation for the sunk costs incurred because they had followed the terms of the contract and they wanted to be reimbursed for those costs. Wells asked for an estimate of those sunk costs. The estimate given was in the order of R5 - 10 million, represented primarily by the cancellation of leases and salary payments and some rectification work that had already been done. It was agreed that Transnet would compensate EMD for those costs to the extent that they were valid and that they would need to be audited so that they could be approved by the CFO of TFR. TIA was assigned to audit these costs. In relation to the overall contract price of more than R800 million this was considered immaterial in relation to achieving the strategic aim of TRE performing the work.²⁷⁰

245 Wells later became aware that what had been negotiated between STS and TRE pursuant to the 50 like new contract was that TRE would perform a

²⁶⁹ Page 59

²⁷⁰ Pages 62 - 63

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very limited role, not in compliance with the board resolution. Following the remedial changes the amount of work that TRE performed was approximately three times what they had previously been required to do in the execution of the 50 like new contract.

246 In July 2008 the Group CEO, Group COO, CEO of TRE Vallihu, CEO of TFR Mr Gama and Wells, then Group CFO, all travelled to the United States to meet face to face with the two original equipment manufacturers, General Electrical and EMD to deal with concerns regarding the awarding of the tender to EMD for the 212 locomotives. That process was irregular and had had to be terminated. The value of the 212 locomotive contract was over R6 billion and Transnet needed to deal with EMD's concern that its preferred bidding status was being withdrawn. Discussions in the USA also centred around the move of the 50 like new contract to TRE. The agreement of both STS and EMD to this move was confirmed and the issues of the sunk costs in relation to the 50 like new as well as certain sunk costs on the 212 locomotive contract in respect of design drawings were also discussed. Gama was present when the sunk costs in relation to the 50 like new contract was discussed in the United States in July 2008. According to Wells he raised no objection either during those meetings or privately saying that the compensation for these costs was irregular or wasteful.²⁷¹ In addition, EMD in fact submitted a schedule of sunk costs to TFR and no complaint about this was raised by Gama. Later after STS retracted its position there was a mediation between Transnet and STS in late 2009 early 2010 the outcome of which was that STS did not accept the changes to the 50 like new contract. An agreement was however reached between the parties on sunk costs and the engineering hours wasted on the 212 locomotive agreement.

²⁷¹ Page 67



247. Wells also testified that there was a TFR Audit Committee meeting held in April 2009 at which both he and Gama were present. At that meeting the issue of the sunk costs was raised by the CFO of TFR and he at the time commented that he had not reported on any PFMA implications as the investigation was underway with TIA and he was not yet in a position to assess the implications. To Wells' knowledge Gama never raised any complaint or objection about the issue of the sunk costs between the 10 April 2008 meeting and the April 2009 Audit Committee meeting. (The first time that Wells became aware of any complaint on Gama's part in relation to the change in the contractual report arrangements was in Gama's formal response to Wells' letter raising his concerns arising from the TIA investigations which letter was dated 20 July 2009.²⁷² That aspect is dealt with more fully below).
- 248 Wells explained that in the process of a rectification of the contractual arrangement no insurmountable obstacles arose in relation to pricing guarantees or location of assembly. Indeed he indicated that if for example TRE had been asking prices that were too high in the negotiations with the EMD joint venture, this was an issue that would have been dealt with by referral up the line ensuring that TRE was not being obstructive either on price or for any other reason. Pricing was therefore no excuse for TRE not doing the work. That could simply have been resolved, as was done in other instances by either himself the Acting CEO or by the COO or the Group CEO (at the time Ramos) getting involved or making a decision as to what was fair.
- 249 Wells testified that the 50 like new contract signed by Gama does not comply with the board resolution as stipulated on 26 April 2007 because the board required that TRE do all the work in respect of assembly and maintenance and engineering that could be done and the contract does not

²⁷² Page 70

provide for this. In effect the contract gives STS the ability to decide what work it would do and what work it would sub-contract to TRE or others, if it indeed sub-contracted any work at all.²⁷³

- 250 In June 2009 after TIA had reported and raised its concerns regarding the 50 like new contract and Gama's involvement, Wells addressed a letter to Gama about these concerns.²⁷⁴ Gama responded in detail to those concerns on 26 July 2009.²⁷⁵ I shall refer to this letter as Gama's "written response". He also attached to his written response various e-mails in support of his contentions to which I shall revert later in these findings.
- 251 In his written response to Wells' letter Gama referred to the fact that other persons, and in particular Group Legal and Group Finance executives had to read and confirmed the 50 like new contract and were aware of what was contained in the drafts of the 50 like new agreement. Gama said that he was advised by Group Legal that he could proceed with the signature of the contract and this was also his evidence at the disciplinary hearing.
- 252 Wells testified that even if sign-off had been obtained for example from the CFO at Group level, in terms of the responsibility delegated to him by the board, Gama remained the person who was responsible as the person with delegated responsibility. Wells said that if Gama required sign-off from another executive prior to himself signing, what would be required was a specific sign-off sheet which would enable the person so signing off to state what they had reviewed and whether they had any reservations. This was not done. According to Wells it was not sufficient to simply send a copy of the contract to other executives in a series of e-mails. He pointed out that executives would receive literally thousands of e-mails, copied to them as a means of other people in the organisation saying that they had kept the

²⁷³ Page 75

²⁷⁴ Bundle D1, page 134

²⁷⁵ Bundle D2, page 1

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executives informed, But if a review was required of a document that needed to be obtained in writing.²⁷⁶ Wells explained that a reviewer would typically have to indicate what it is that had been reviewed, whether it was the whole agreement or merely portions thereof and whether he or she had reservations. It would remain incumbent on the person responsible for signing the contract to ensure that any such reservations were dealt with prior to the signing of the contract. Wells accepted under cross-examination that his evidence was that if one wanted to rely on signing off responsibility in regard to agreements that had to be in writing of the person whose sign-off was being obtained was probably something that was not in any Transnet policy. He nevertheless said this was standard practice which was applied generally in Transnet, because otherwise if you wanted to rely on another party's sign-off on an agreement you could not be sure what they had done before signing off.²⁷⁷ When it was put to Wells that no such sign-off documents could be found and that it simply was not the practice, he accepted that it may not be, but said that one would still not be able to rely on the involvement of any particular executive or department unless you obtained the relevant signature.

253 There are three places in which Gama is on record as having dealt with his signing of the 50 like new contract namely, in his written response of 20 July 2009; in the High Court papers and in correspondence. In his written response to the issue of whether the contract was being executed outside of the ambit of the board resolution Gama's response focused on Wells' involvement in the meeting on 10 April with all relevant parties present when it was agreed that the right way to go was to revert to what the board had intended and that setting up a competing works for STS at Iscor was precisely what the board did not want to happen. Gama was well aware of

²⁷⁶ Pages 25 - 26

²⁷⁷ Record page 132



the board's intention, yet in his written response he criticised Wells²⁷⁸ for closing the door on the Iscor works and setting up a process to exclude STS from the joint venture. Later in the same document Gama points the finger at Wells saying that it was his decision at the meeting of 10 April to unwind the existing infrastructure at Iscor.²⁷⁹ Further in the same document²⁸⁰ Gama says of Wells that this decision to unwind the position whereby STS was in competition "resulted in wasteful expenditure where you unilaterally made a decision to compensate without exploring what options were available that could be cheaper". Wells said that this not a unilateral decision at all. He said he to was invited to the meeting which he had not called, so he raised at the meeting the fact that the relationship between the parties which had actually eventuated was not what the board had intended and that what really ought to happen was that the position should be rectified. He pointed out that it was the requirement of the CEO of Transnet that the board's intention be implemented.

254 Similarly in paragraph 2.38 of his written response²⁸¹ Gama accuses Wells of embarking on a mission to redraft the contract at major cost to Transnet that ended up being a huge waste of money when the parties refused to sign it. Wells pointed out that what had really occurred was that in the face of a clear board resolution Gama had permitted a situation to develop which the board had never envisaged and at no stage was any approach made to the board to say that there was a better way of doing things or an alternative way or that a mistake had been made. Neither Gama nor any of his executives had ever approached the board with any such suggestion. What had ensued was in fact unauthorised being outside of the ambit of the board resolution. Gama's response was that the rectification process was a huge waste of money and that calling him to account for the concerns of

²⁷⁸ Paragraph 2.37, page 14

²⁷⁹ Bundle D.2, page 15 paragraph 2.35

²⁸⁰ At paragraph 2.37 on page 15

²⁸¹ Bundle D.2, page 16

Wells and the board was an attempt to shift blame onto him. Wells testified that this was absurd. That the 50 like new contract was a massive one with an extraordinarily high profile and that the Group CEO and the board were informed all along as to the process. In fact many senior executives went to the United States to meet with the original equipment manufacturers, and EMD to openly discuss the 50 like new contract, the implications of how it was progressing and ensured that the entire process was transparent. There was no possibility of this having been something which Wells had simply ordered and effected on his own. Ultimately, the process was rectified and the project of assembly of the 50 like new locomotives was conducted on the premises of TRE. A pamphlet showing the assembly work at TRE premises was produced in evidence. This construction work was conducted at Koedoespoort. According to Wells this effected an important enhancement of the capacity of TRE by ensuring employment and skills transfer in relation to the assembly of the locomotives.

255 Wells testified that the 50 like new project once it moved to Koedoespoort was a great success with TRE's employees developing enhanced skills in line with international best practice and that following delivery of the first 50 locomotives TRE intends to offer the product to other markets and has just signed a contract for the procurement of 100 locomotives with another company on the identical conditions as those for the 50 like new project.

256 Wells testified that had Gama reacted differently once it was realised that he had failed to comply with and implement the condition contained in the board resolution, that Gama may well not have ended being disciplined. He said that had Gama really believed that this had occurred because his subordinates had failed to advise him properly and because he failed to obtain the proper advice from the legal advisers through whom the 50 like new contract document was processed, that he would have identified who had failed to advise him properly and taken whatever action he believed was appropriate to remedy that position in order to prevent a similar



occurrence in the future. Moreover, had Gama acknowledged that there was a problem and participated fully in trying to remedy the position and tried ensure that the contract was put in place properly, the position would have been quite different. Wells maintained Gama failed to do this.²⁸²

257 Gama's contention has all along been that the charges brought against him and his suspension were deleterious to his candidacy for the Group CEO post. Wells stated that although any charges which appeared to have substance would be considered in any selection process for the selection of a CEO, the charges would have been brought in the normal course even had Gama already been the Group CEO. Wells also pointed to the fact that the charges arose out of a process the origins of which preceded and had nothing to do with the selection of the new Group CEO.²⁸³

258 Wells accepted in cross-examination that if Gama had in fact sought and obtained legal advice on the 50 like new contract on the issue as to whether it complied with the board resolution and was told that the reference to a "key contractor" being defined as Transwerk in the 50 like new contract constituted compliance with the board resolution, he should be entitled to accept that this constituted compliance with the explicit condition of the board.²⁸⁴ He also said that Gama should have said to the legal adviser show me where that appears in the draft contract and satisfied himself that the contract clearly provided for compliance with the board's requirement in the condition.²⁸⁵

259 Wells accepted that there was no criticism of Gama for having not personally conducted the negotiations with the EMD joint venture for implementation and that it was acceptable that these were handed, together

²⁸² Pages 97 - 99

²⁸³ Pages 105 -107

²⁸⁴ Pages 117 -118

²⁸⁵ Page 117

with the board resolution, to TRE to deal with STS/ EMD joint venture as Gama explained in his written explanation.²⁸⁶

The origins of the complaint and the investigation

260 Oates testified that the complaint concerning the 50 like new contract originated externally to Transnet through the Public Service Commission which received a complaint which was forwarded to TIA. This was received by TIA in the form of a letter from the Minister of Public Enterprises to the Chairman of Transnet dated 31 January 2008 requesting that the complaint which had been reported should be investigated and a report back made to the Minister of Public Enterprises.²⁸⁷ The complaint was based on a hotline Case Call report related to the 50 like new locomotive contract and was received in the Transnet Chairman's office on 5 February 2008. Three days later on 8 February 2008 TIA was instructed to investigate the matter to determine whether further action needed to be taken. This resulted in a forensic investigation and a report being prepared by TIA.

261 Derek McMaster is an employee of Ernst and Young employed as a Senior Manager in the Forensic Department and has been posted to TIA since May 2006. He has a diploma in criminal justice and forensic investigation. On 8 February 2008 he was instructed to investigate the allegations received. The lead investigator was initially a Mr. Terrence Koekemoer who immigrated to Australia in July 2008, whereupon McMaster became the lead investigator. They worked both together and independently on the investigation until the stage when Koekemoer left.

262 The investigation by TIA culminated in a thirteen page report prepared by McMaster and dated 12 February 2009 (the "McMaster report"). It was handed to the Group CEO Ramos the same day. That report found that the

²⁸⁶ Bundle D.2, page 6, paragraph 2.13; Record page 137

²⁸⁷ Bundle D, page 1

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50 like new contract was signed on 1 May 2007 by Gama as CEO of TFR in terms of a board resolution dated 13 February 2007.²⁸⁸ The report concluded that the condition laid down by the board on 26 April 2007 that Transwerk (now TRE) would "carry out all engineering on assembly and maintenance" was not taken into account in the contract.²⁸⁹ The McMaster report recommended that action be taken against Gama as the relevant signatory who had concluded the contract with the supplier.²⁹⁰ The report also recommended that the 50 like new agreement be rectified to fully reflect the resolution of the board.²⁹¹

263 Oates testified that the mechanism in the 50 like new contract adopted in order to secure fulfilment of the condition stipulated by the board on 26 April was through the definition of "Key Contractors" being defined in the agreement to refer to Transwerk as one of the main sub-contractors. This was in order to ensure that there was no doubt about the role that TRE (then Transwerk) would play in the contract. This definition has to be read with clause 7.5 of the contract where it was agreed that:

"STS shall procure that- (a) the Key Contractors notified to it by Spornet prior to the Effective Date enter into, simultaneously with or prior to the signing of this Agreement, an agreement substantially in the form set out in schedule 005 (Collateral Agreement)."

Oates testified (and McMaster confirmed) that there was no such schedule 5 to the agreement which meant the agreement was open-ended and that it

²⁸⁸ Bundle D, page 28

²⁸⁹ Bundle D, page 28

²⁹⁰ Bundle D, page 32

²⁹¹ Bundle D, page 31

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was therefore required of TRE to negotiate with STS as to its role in the execution of the 50 like new contract.²⁹²

- 264 The investigation looked into whether Gama had sought advice from the legal department before he signed the contract. Gama stated that he had obtained such advice. Oates could not say whether the legal department gave advice on the agreement in general and on compliance with the board resolution in particular, and deferred to his investigator McMaster on that issue.²⁹³ Oates' understanding was that the legal advice provided was only in relation to how the agreement should be constructed in order to manage the risk between TFR and TRE²⁹⁴ and that while Gama did obtain legal advice he was not advised that he could sign the 50 like new agreement.²⁹⁵
- 265 It should be noted that it appears that the 50 like new contract was already prepared in final form on 25 April 2007 (as is reflected in the header of the signed contract document) and that Gama could therefore not have given the board resolution taken on 26 April 2007 to anyone before 1 May 2007 when he himself signed the contract.²⁹⁶
- 266 McMaster interviewed various persons from the Group Legal department including Mr Vuyo Kahla Group Executive: Legal, all of whom indicated that they had not been requested to look at the 50 like new contract at the time of the signing of the contract. Following Mosweu's disciplinary enquiry McMaster said followed up with various other persons at Group Legal as to the role they had played in the drafting of the 50 like new contract. They were not completely unaware of the contract, having been copied with e-

²⁹² Bundle C, pages 72 and 81

²⁹³ Oates, page 120

²⁹⁴ Oates, page 118-120

²⁹⁵ Oates, Page 118

²⁹⁶ Bundle C, pages 62-129

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mails containing drafts of the agreement being negotiated.²⁹⁷ McMaster also said that Group Legal said they had never seen the contract before,²⁹⁸ which in the context of his other evidence must I think refer to the final draft of the contract. It was put to McMaster in cross-examination that legal services advice was that Gama could sign the agreement and that it took care of the board resolution. McMaster denied this saying that the legal services person said they had never seen the contract before.²⁹⁹ Again in the context of his evidence as a whole this appears to refer to Group Legal department. Although at one point in his evidence McMaster said that there was no explanation given by the Group Legal for why they did not consider the drafts of the contract e-mailed to them,³⁰⁰ McMaster later said that when he asked Kahla about this he explained that although they received copies of the e-mails there was no request made to Group Legal to revise and look at the contract and that the contract was not finalised.³⁰¹

267 McMaster admitted in cross-examination that Kahla was aware of the board resolution as he was the person who in April had motivated the amendment to the earlier February board resolution so that STS would not be involved.³⁰²

268 When the distinction between obtaining advice from Group Legal department or the TFR legal department was explicitly made clear in cross-examination McMaster said that Cleopatra Shiceka Legal Executive at TFR advised Gama in relation to the draft contract but she told McMaster that she was not aware of the board resolution.³⁰³ Pinkie Msoupye however knew about the board resolution and was intimately involved in drafting the

²⁹⁷ The evidence of the detailed content of those e-mails and to whom they were sent is canvassed later in this award

²⁹⁸ McMaster page 130

²⁹⁹ Page 130

³⁰⁰ Page 109

³⁰¹ Page 109

³⁰² Page 122

³⁰³ Page 132

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agreement and liaised with Shiceka.³⁰⁴ She told McMaster that she advised mostly on the TRE resolution and the EMD parent guarantee.³⁰⁵ McMaster said that when he interviewed Shiceka she indicated that the 50 like new contract did allow for TRE to use a sub-contractor and that negotiations with a sub-contractor were conducted from March 2007 and were concluded on 1 February 2008.³⁰⁶ Shiceka indicated that it was Mr Percy Mosweu's responsibility as the project manager and General Manager: Engineering TFR to ensure that TRE assembled the locomotives in accordance with the board resolution.

269 McMaster accepted that Gama had said that the reason it was decided to have a sub-contract because Transnet was reluctant to accept responsibility by TRE for penalties if there were delays because TRE and TFR are the same business under the umbrella of Transnet.³⁰⁷

270 McMaster did not personally interview any of the EMD representatives although Mr. Patrick Nolan the Vice President of EMD was interviewed by Koekemoer before he left. McMaster could not say whether EMD was aware of the board resolution or whether Koekemoer had raised it with Nolan.

271 Whilst initially the investigators accepted that there appeared to have been compliance with the board resolution, McMaster said that they later revised this opinion in around October or November 2008 when it was realised that in terms of the contract STS was always going to assemble the 50 locomotives and that it was never intended that TRE would be the party doing the assembly as required by the board resolution. That was at the

³⁰⁴ Pages 132-3

³⁰⁵ Page 133

³⁰⁶ Page 83

³⁰⁷ Page 133

time that STS refused to continue to co-operate to reverse the situation as is referred to below.

- 272 McMaster testified about the meeting which took place on 10 April 2008 attended by representatives of TRE (previously Transwerk) and TFR, STS, EMD as well as Oates and Wells.³⁰⁸ McMaster did not attend the meeting but understood that the aim thereof was to get the locomotive manufacturing schedule back on track as production was behind schedule. In summary, at the 10 April 2008 meeting all the parties agreed to rectify the failure to comply with the board resolution subject to Transnet reimbursing STS for their sunk costs. The meeting also sought to ensure that TRE would become the assembler of the locomotives in accordance with the board resolution. The conclusion of the meeting was that all the various parties agreed that the implementation of the board resolution had not been taken into account fully and it was agreed that TRE would become the assembler of the locomotives. What had occurred was that STS had incurred costs and expenditure in setting up the locomotive production works at Iscor and Transnet agreed that it would pay these wasted costs once they were audited and that the manufacturing plant would then be set up at TRE. McMaster was tasked with auditing these wasted costs (referred to above as "sunk" costs) which was his focus in relation to the 50 like new contract at the time following the April 2008 meeting.
- 273 Prior to the 10 April 2008 the responsibility for the issue of failure to comply with the board resolution had been regarded as that of Percy Mosweu. After the 10 April 2008 meeting the approach was that the board resolution would be complied with and the contractual obligations regularised
- 274 On 16 October 2008 a letter dated 6 October 2008 was received by Transnet from Werksmans attorneys representing STS indicating that STS's

³⁰⁸ There is a transcript of this meeting at Bundle C, page 240 with a large number of "inaudibles"

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role in the joint venture was to perform the assembly of the 50 like new locomotives in terms of the contract which the joint venture had concluded with Transnet. In October 2008 it therefore became apparent that STS was not prepared to hand over the work to TRE in order to have TRE perform the assembly of the locomotives in terms of the board resolution.

275 McMaster also explained that Transnet required an additional 100 locomotives which were put out for tender as a separate acquisition. The joint venture then sought to interdict that 100 locomotive tender arguing that it would interfere with the contract relating to the 212 locomotives. TIA's resources were taken up with dealing with those interdict proceeding as McMaster as the lead investigator had the knowledge of the circumstances surrounding the 50 like new contract as well as the 212 locomotive contract and Koekemoer had left in July that year. In February 2009 McMaster was asked to submit a report on the issues arising from 50 like new contract. He did so and presented the McMaster report to Oates on 12 February 2009.³⁰⁹

276 In the course of his investigation McMaster concluded that Gama, who had signed the 50 like new contract, had failed to ensure that the condition laid down by the board resolution which authorised Gama to conclude the contract had been complied with. The way that this should have been achieved was to ensure that prior to the conclusion of the contract with the joint venture a sub-contract was in place with TRE doing the work as a key contractor sub-contracted to the EMD/STS joint venture to perform the work identified in that sub-contract.

³⁰⁹ Bundle D, page 20

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277 McMaster's report recommended that the agreement be rectified to fully reflect the board resolution and that action be taken against the signatories involved who had concluded the 50 like new contract.³¹⁰

8 April 2009 interview with Gama

278 McMaster thereafter interviewed Gama on 8 April 2009 in order to clarify Gama's understanding of the board resolution in relation to the 50 like new contract. McMaster confirmed the accuracy of the transcript of the portion of that meeting in which he was involved.

279 McMaster said that the responsibility in terms of the board resolution rested on Gama to conclude sign and execute the contract.³¹¹ McMaster confirmed that in the interview Gama suggested that it was Mosweu of TRE once the contract had been handed over to them, who had the responsibility to ensure that the terms of the board resolution were complied with.³¹² McMaster said that this was incorrect because a person delegated and authorised to perform a task by the board was personally responsible and could not further delegate that obligation imposed on him by the board.

280 McMaster interviewed the CEO of TRE Mr. Richard Vallihu who stated that he had not seen the board resolution when the contract was being negotiated. (This evidence that Vallihu did not know about the board resolution and the attitude of the board was contradicted by Wells' evidence when he accepted that Vallihu was present at that Exco meeting of 28 March 2007 and would therefore have known that the intention of the board

³¹⁰ Bundle D.1, pages 31 -32

³¹¹ Page 104

³¹² Page 100

as reflected in the 13 February 2007 board resolution was that TRE do all the work.³¹³)

281 The investigation revealed difficulties encountered in the course of negotiations between TRE and STS. Vallihu of TRE indicated that STS sought to acquire the Transwerk premises on a lease and then employ the Transwerk staff to perform the work on the TRE premises.

282 McMaster said that Gama's statement made during the interview that it was not possible for Transnet to supply premises was incorrect. Although premises were not available at the TRE facility at Koedoespoort, TRE did offer premises in Bloemfontein which STS turned down on the basis that the location was too distant. Negotiations were underway for TRE to provide premises to STS in Germiston when those negotiations fell away because STS found premises at Iscor.³¹⁴

283 In relation to the rectification of the contract McMaster testified that an agreement was concluded on 28 July 2008 between the EMD wing of the joint venture on the one hand and TRE and TRF on the other for the performance of the work in relation to the 50 like new contract being done by TRE. That was a satisfactory resolution to the whole issue and initially was thought to have settled all the issues between the parties. As already referred to above STS later disputed the position and sought to enforce the contract of 1 May 2007 being the 50 like new contract and claim damages. McMaster testified that that issue with STS remained unresolved as at the time of Gama's disciplinary hearing.

³¹³ Page 127

³¹⁴ Page 102

- 284 There were various e-mails referred to in evidence in relation to the drafting of the 50 like new contract. In support of his contentions Gama attached and referred to various e-mails in his written response letter³¹⁵.
- 285 These e-mails refer to various drafts of the 50 like new contract and aspects of the contract then being prepared.³¹⁶ These e-mails are essentially a series of e-mails between the legal advisors of EMD and Transnet concerning various contractual provisions.
- 286 McMaster accepted that the e-mail of 12 April 2007 was sent by Cleopatra Shiceka: General Council Spoornet to EMD's attorney and to various persons in Transnet including Peter Volmink in the Transnet Legal Department, Martha Ngowe also in the Legal Department and Vuyo Kahla of Group Legal. A similar e-mail was also sent later the same day to the same parties and in addition to Pinkie Msoupye of TRE. The e-mail concerned the EMS JV contract and commented on various clauses in the contract, including clause 7.1 and called for comment to be made to either herself or Pinkie Msoupye.³¹⁷ There was also an e-mail from Shiceka to most of the same recipients on 19 April 2007 enclosing a copy of the latest proposed parent guarantee by EMD and calling for comment thereon. A further e-mail was sent by Shiceka to EMD's attorney, Gustav Adams of STS, Frikkie Marais of Spoornet and Kabamba Muteba of Spoornet and again copied to Msoupye, Ngowe, Kahla, Volmink and also to Mandisa Mondie as well as to Nick Thomson both of Spoornet. That e-mail similarly attached the EMD parent guarantee and referred to the final draft thereof. There were three attachments to the e-mail but McMaster did not ascertain what those were.³¹⁸ He accepted that they were probably the parent guarantee clause, the board resolution in some form and the version of the

³¹⁵ Bundle D2, page 1

³¹⁶ Bundle D.2, pages 140 - 149

³¹⁷ Pages 122 - 123; D2, page 140

³¹⁸ Page 125

50 like new contract as at 19 April 2007. In addition there was an e-mail from Rothschild, EMD's attorney, to Shiceka dated 19 April 2007 which was again copied to a large number of persons within Transnet including Msoupye, Muteba and Frikkie Marais in which *inter alia* Rothschild says "I am assuming that Spoornet has confirmed its prior agreement that only the STS sub-contracts will be subject to the collateral agreement provisions of section 7, and the revised agreement attached so reflects".³¹⁹ McMaster confirmed that the contractor here referred to the "key contractor" in the agreement. This e-mail also referred to the standard Transnet sub-contract which Msoupye was using.

287 McMaster said that Msoupye was managing the contract process and on 26 April 2007 Shiceka sent an e-mail to one Hannalie Kumm of Spoornet with the "Contract 50 like new locomotives final contract" attached together with a request that it be printed and file created for it.³²⁰ The previous day, Msoupye who was managing the process sent an e-mail to Shiceka on 25 April attaching various schedules and drawing to the attention of Kabamba Muteba and Frikkie Marais that "I do not have schedules 5, 14, 19 and 20 please check your records and update the information with list of schedules on page 3 of the contract document." (Schedule 5 was the critical schedule which was missing from the contract ultimately signed.) This e-mail clearly points out at that at stage that the schedule was missing. McMaster did not ask Marais what had happened to schedule 5.³²¹ Earlier the same day Mosuype sent a contract referring to the 50 like new final contract which reads "Enclosed herewith schedules to the above contract which I sent through in batches of three e-mails". It also notes that "Siya (i.e. Gama) will

³¹⁹ Bundle D.2, page 145; page 126

³²⁰ Bundle D.2, page 148; page 128

³²¹ Page 129

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*need a special power of attorney from the Group CE to sign this contract as the contract value is in excess of R300 million.*³²²

288 The latest in these e-mails was the e-mail from Cleopatra Shiceka on the afternoon of 26 April 2007 which was the same day as the board meeting at which the condition to the resolution was amended. It is clear that the exchanges between the legal advisors in relation to the contractual provisions at that point, did not take into account the wording of the amended board resolution which, at that stage could not have yet been available to them.

289 It was pointed out to McMaster that Note 2 under clause 5.4 of the DPP policy states:

"Any commercial agreement (for the purchase of goods of services) must be signed by an authorised employee Supply Management (Procurement) to indicate that all steps as per clause 5.5 below have been followed and that all procurement related governance has been adhered to".

Asked whether this had been complied with McMaster said there had been no sign-off at Group level and he could not say who at Supply Management Procurement was responsible for signing off in terms of this clause.³²³

290 It will be recalled that the 50 like new agreement was signed on 1 May 2007. McMaster testified that up until the point when Mr. Adams of STS reversed the approach indicated at the 10 April 2008 meeting that the parties would correctly implement the board resolution so that TRE would perform the assembly work, it appeared that the 50 like new contract had actually taken into account the board resolution which had simply not been complied with in the implementation of the contract.³²⁴ He accepted that the

³²² Bundle D2, page 148

³²³ Page 135

³²⁴ Page 136

people who believed that the contract had in fact taken the board resolution into account included Shiceka, Msoupye, Oates of TIA and McMaster himself. McMaster accepted that Mr. Nick Thomson (the CFO of TFR) also accepted that the contract took into account the board resolution as is evidenced in the transcript of an interview with him.³²⁵ McMaster said that it was only the implementation of the contract which had to be corrected.³²⁶ Indeed all concerned believed as at 10 April 2008 that the 50 like new contract did comply with board resolution and that it was simply a case that the contract had not been correctly implemented.³²⁷

291 McMaster accepted, that on the basis of the evidence and the letters from Gustav Adams of STS that STS was contractually entitled to do the work that understanding changed. McMaster said that he had during the investigations and in the course of discussions in September through to November 2008 realised that the contract actually did not comply with the board resolution. In December 2008 there was a legal opinion which advised that the board resolutions had not been complied within the 50 like new contract. However during that period the investigators including himself were engaged in dealing with the interdict process before they proceeded to obtain the relevant legal advice regarding non-compliance with a board resolution in the 50 like new contract.³²⁸

292 In a status report on 50 like new locomotives dated 25 March 2008 and prepared by Mr. Rheeders Matthys Project Manager of TRE³²⁹ it is reported that during May 2007 it was agreed that the scope of work in the assembly of the locomotives would be changed and that since the original requirement from EMD/STS the scope was reduced substantially.³³⁰

³²⁵ Bundle D.2, page 64; page 139

³²⁶ Page 139

³²⁷ Page 137

³²⁸ Page 138

³²⁹ Bundle D.2, pages 135 - 138

³³⁰ Bundle D.2, page 135 - 136; page 141

Subsequent to that and in the meeting in April 2008 it was agreed how the implementation of the contract would be rectified.

293 McMaster accepted that Gama had said that board resolution had been handed to TRE although it was available to the persons negotiating the agreement.

294 It was put to McMaster in cross-examination that it is inconceivable that Mr. Vallihu, Chief Executive TRE was unaware of the board resolution despite his having told McMaster that he was unaware of the board resolution.³³¹ On Wells' evidence this appears to be correct as discussed above. It was further put that Gama signed the agreement acting on legal advice which he received from in-house legal personnel and that as far as he was aware the contract complied with the board resolution and that was also the view of all concerned until October 2008. McMaster accepted that this was correct.³³²

295 In re-examination McMaster confirmed that it had been put to him that Mr. Vallihu was present at the CAPEC meeting of 13 November 2006.³³³ The evidence is that the board resolution in its final form was determined on 26 April 2007 and that as at 13 November 2006 the board resolution was vastly different and was not settled in its final form.³³⁴ It was then pointed out that the series of e-mails in relation to the contract between Transnet and the STS/EMD joint venture were being circulated as at 25 April 2007, whereas the amended board resolution was only finalised the following day on 26 April 2007. McMaster testified that the amended board resolution was vastly different from that of 13 February 2007,³³⁵ and that it further differed from the resolution proposed in Gama's memorandum dated 11 April 2007

³³¹ Page 144

³³² Page 144

³³³ Bundle C, pages 9-10

³³⁴ See Bundle C, page 10

³³⁵ Page 147

in which he recommended the amendment to the board resolution³³⁶ and attached his proposed amendment.

296 Gama testified that because STS was part of the team that had brought the concept to Transnet it was foreseen that it may be difficult to pursue the project while excluding STS. On the other hand STS did not ever have the capability to perform the assembly themselves. This was a capability which TRE had and Gama was quite sure that TRE would be able to execute the project.³³⁷

297 Gama said that the issue of STS's involvement had first been raised by Mr. Vallihu the CEO of TRE saying that STS was simply a parts manufacturer. The other executives and managers at the Capital Investment Committee meeting had concurred with him that there was no need to involve STS and that it was much more appropriate for Transnet to deal directly with the original equipment manufacturer which was EMD. The idea was that EMD would supply all the components on a complete knockdown basis to TRE which would then assemble the components into a locomotive. Quality assurance and supervision would be maintained by EMD because they had performed such work before. No major issues were foreseen with this arrangement.³³⁸ Gama testified that by the time he attended the Capital Investment Committee meeting on 17 October 2006 it had been decided that STS would be excluded and that TRE would perform the work.³³⁹ Gama denied that the debate at the CIC meeting on 17 October where it was decided to exclude STS from doing the work had been a heated debate as Wells claimed.³⁴⁰

³³⁶ Bundle C, page 55 at pages 58 and 59

³³⁷ Gama page 24

³³⁸ Gama page 25

³³⁹ Gama page 26

³⁴⁰ Page 26

298 On 26 October 2006 Gama signed a letter addressed to Mr. Albert Enste, Vice President, International Sales and Services for EMD as well as to Mr. Gustav Adams the Managing Director of STS.³⁴¹ This letter informed EMD and STS that:

"Spoornet is hereby pleased to inform you that your offer is hereby accepted for the purchase of 50 like new... locomotives, subject to the conclusion of a formal written agreement between yourselves and Spoornet".

299 Gama explained that although he signed this letter and it went out under his name it was not drafted by him. He described this letter as a "non-binding letter of intent" which he said the "engineers" had requested immediately after the discussions on 17 October 2007. The reason was that it was necessary to enable EMD to at least start to procure some of the long lead items required for the manufacture of the locomotives. Gama explained that the issue was raised with the General Manager Mr. Percy Mosweu of TFR and the CFO of TFR Mr Nick Thomson who had then drafted the letter which he had signed. He said that it was an oversight that the letter was addressed to STS as well as to EMD despite there having been a decision on 17 October that STS should be excluded.³⁴² He said that at that stage the engineers had probably not been properly briefed as to the need to exclude STS, and hence the oversight.³⁴³

300 Gama testified that in January 2007 Mr. Enste of EMD visited South Africa. At that time he indicated that EMD wanted to ensure that they were compliant with South Africa's BEE requirements, that he was here to formalise some kind of joint venture with STS and that STS would be the

³⁴¹ Bundle C, pages 43 -44

³⁴² Gama pages 26 -28

³⁴³ Gama page 28

contact for Transnet on the project. Gama indicated to him that as far as TRF was concerned STS was simply a parts manufacturer and that as agreed with Transnet they would be excluded from the project. EMD then indicated that they had already had discussions with STS about the joint venture, that EMD was geographically far away and needed a local project manager for logistic and supply chain issues and that STS could do this work. Enste said that they could not see their way clear to excluding STS who, apart from anything else had conceived of the 50 like new concept.³⁴⁴ EMD felt they could not exclude STS in the circumstances.

Discussion and conclusions: 50 like new contract

- 301 It is common cause that Gama signed the 50 like a new contract on the strength of the authority delegated to him by a board resolution. It is also common cause that in the terms of the 50 like new contract, properly construed, and particularly having regard to the absence of schedule 5 thereto, Gama failed to give effect to the condition stipulated by the board to the effect that "*TRE would carry out all engineering on assembly and maintenance*".
- 302 The above quoted portion of the board's condition for the approval of the contract was not amended by the changes which were effected to the board resolution of 13 February 2007 by the later resolution of 26 April 2007. What did change between those two resolutions is that the original wording to the effect that "*Sibambene Trade Services would not be involved in the contract*" was omitted from the amended board resolution.
- 303 Having regard to the evidence of what led up to the amendment of the board resolution, it is clear that the only change which it was contemplated would be made to the previous board resolution was the identity of the

³⁴⁴ Pages 29 - 30

contracting counter-party. From the discussions of which Gama was well aware, the board was prepared to countenance the involvement of STS as part of a joint venture with EMD provided that TRE did all the engineering on assembly and maintenance and provided STS was not involved in any assembly work whatsoever. The board resolution was under those circumstances amended in order to permit STS to be a party to the proposed contract.

- 304 Gama signed the 50 like new contract on 1 May 2007. The draft of the contract which had been prepared for Gama to sign was prepared on 25 April 2007 and was therefore drawn without having regard to the amended board resolution which was only taken the following day.
- 305 As to the key aspect of TRE being required to perform the work and STS not doing the work, the fact that the amended board resolution may not have reached Gama or come to his knowledge before he signed the 50 like new contract is immaterial as both those notions were already contained in the previous board resolution passed in February. Even on Gama's own version (at the hearing anyway) neither of those aspects was the subject of the amendment which he sought as that change related only to STS being a possible counter-party. (It is of course so that if Gama signed believing that the board resolution had been amended so as to encompass his proposed wording that TRE would "work with" STS, this would tend to support Transnet's contention that Gama sought to obtain the alteration to the board resolution so as to permit STS to set up in opposition to TRE and perform all or most of the work. That belief on Gama's part has however not been shown on the probabilities).
- 306 The absence of schedule 5 to the contract (what was termed a "collateral agreement") was not explained. It is clear from the series of e-mails exchanged shortly before the contract was signed and in particular on 25 April 2007, that the TFR managers concerned were aware that this

schedule was missing.³⁴⁵ McMaster did not ask Mr. Frikkie Marais (author of the e-mail of 25 April 2007 which queried the absence of schedule 5) what had happened to schedule 5. The nature of schedule 5 in general terms – as I understand it – is that it would be a collateral agreement setting out the work which TRE would perform as a sub-contractor. On the evidence it is not clear whether there ever was a schedule 5 in existence or not. There is no explanation for why schedule 5 was never obtained and attached to the contract.

- 307 The effect of the absence of any such clause in the contract and the absence of schedule 5 having regard to the provision of clause 7.5 and the definition of “key contractor” in the contract was that it was not guaranteed that TRE would carry out all of the work on assembly and maintenance. After some coaxing under cross-examination Gama agreed that there was no clause in the contract which secured TRE doing all the local work on engineering, assembly and maintenance.³⁴⁶ He accepted that there was no guarantee that TRE would carry out any work as a matter of certainty.³⁴⁷ In fact TRE had to go and negotiate with the STS/EMD joint-venture, cap in hand as it were, to try to secure some of the assembly and maintenance work in relation to the 50 locomotives which the contract envisaged would be assembled in South Africa. Therein lay the failure to comply with the board resolution.
- 308 It was common cause that with this contract in hand, STS proceeded to set about establishing an engineering assembly works at the Iscor premises. The STS engineering works was in direct competition with the work performed by TRE.

³⁴⁵ Bundle D1, page 148

³⁴⁶ Gama, pages 31-33

³⁴⁷ Gama, page 26

- 309 Gama had no authority to conclude the 50 like new contract other than the authority delegated to him in terms of the board resolution. The evidence also established that it was not open to Gama to delegate his responsibilities in regard to ensuring compliance with the board resolution.³⁴⁸ Clearly therefore, his authority was subject to ensuring compliance with the condition contained in that resolution. Gama failed to ensure such compliance.
- 310 The question which arises is whether Gama's failure to comply with the board resolution was negligent or whether, as was contended for by Transnet, the probabilities establish that he wilfully disregarded Transnet's intentions as contained in the board resolution and which he clearly understood.
- 311 In support of the submission that Gama wilfully sought to circumvent the import of the board resolution Transnet relied on the following facts and circumstances.
- 311.1 After the board resolved in the first (February) resolution that TRE would carry out the work, Gama specifically advocated the inclusion of STS in the joint-venture in his memorandum of 11 April 2007. The basis on which he sought to do so was with a proposed wording being that *"The condition for above approval is that EMD would work with Transwerk (now TRE) during the manufacturing and maintenance of the locomotives."*³⁴⁹ (underlining added). This would have had the effect that it would permit STS/EMD to perform the work which the board expressly wanted TRE to perform and would potentially permit STS to establish itself as a major competitor of TRE.

³⁴⁸ Oates page 93

³⁴⁹ Bundle C, page 59

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- 311.2 Gama's version that the intention of his proposed rewording of the resolution was merely to secure that STS could be a counter-party to the contract and was not in order that estimates perform the work, is possible, but the inaccurate wording of his proposed amendment clearly raised alarms at the time for the other executives involved, who accordingly refused to adopt that wording
- 311.3 Gama signed the contract without proper and careful determination that the requirement of the board that TRE do the local work was adequately captured in the agreement.
- 311.4 Regardless of whether Gama was aware of the terms of the amended wording of the resolution at the stage when he signed on 1 May 2007 (the amended resolution only having been passed days before on 26 April 2007), he was certainly clearly aware of the import and intention of both Exco and the board in relation to TRE doing the local assembly and maintenance work.
- 311.5 Gama then entrusted the implementation of the 50 like new agreement to Mr. Percy Mosweu General Manager: Engineering TFR. Gama failed to himself monitor the implementation of the agreement in such a manner so as to ensure that the condition that TRE do the work was complied with. In this regard it was pointed out that Mosweu was later shown to have an interest in STS which was in conflict with his duties as a manager representing Transnet. There is however no evidence that Gama either knew or should by the exercise of reasonable care have discovered Mosweu's conflict of interest. The fact that Gama entrusted implementation to Mosweu when the latter in fact was conflicted may be a suspicious circumstance, but until the evidence links Gama by showing that he knew of Mosweu's position or was in cahoots with Mosweu, it remains no more than a suspicion. As Wells I think conceded, Gama

was perfectly entitled generally to delegate the implementation of the 50 like the agreement to his General Manager Mosweu, so nothing adverse can be inferred from his conduct in this regard.

- 311.6 What is also relevant is the fact that Gama failed to inform his management team of the clear and unequivocal instructions of senior executives of Transnet and of the board as reflected in the amended resolution in regard to the requirement that the TRE to all the local work. The context of this failure is that this was a very sizeable contract and there was only a single condition imposed by the board.
- 311.7 Also relevant to this picture is the fact that Gama says that he was not informed by his subordinates that STS was in the process of establishing a facility in competition with TRE. This was despite his meeting regularly with Mosweu his General Manager responsible for the implementation of the contract. In this regard of course the fact that Mosweu was shown to have an interest in STS probably means that Mosweu would not have volunteered information about the establishment of STS's competing facility as he would probably want to keep such information away from Gama. Nevertheless, Gama failed to himself make direct enquiries. Gama did not assert that Mosweu has misled him. On Gama's version he only became aware of what had occurred when this was later brought to his attention by Group executives. This occurred after Mr Vallihu the CEO of TRE had alerted Wells (then Acting Group CEO) to the problem.
- 311.8 The evidence of Gama's lack of interest in remedying the situation once it was realised that is STS had set up in competition with TRE and his failure to pursue and investigate those of his subordinates and even legal advisers who were responsible for having not

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advised him adequately, may in principle properly be regarded as a factor tending to show that Gama intentionally evaded compliance with the board resolution. The evidence in this regard is not however particularly convincing. It should be said in Gama's favour that the decision to rectify the situation was really a *fait accompli* after the 10 April 2008 meeting (at least until STS decided in October 2008 to enforce the contract) and that the implementation thereof could legitimately have been left in the hands of Gama's subordinates. It was also pointed out for Gama that the only outstanding aspect of the reversal of the position was the contract negotiation with STS which admittedly remains outstanding, but there is no evidence that Gama was ever asked to conduct or had anything to do with those negotiations.

311.9 Another factor is the letter which Gama signed on 17 October 2007 and addressed to STS as well as to EMD despite there having been a board decision that STS should be excluded.³⁵⁰ Gama said that it was an oversight. In the context of Gama's knowledge of the board's attitude at the time, this is a serious oversight. The fact that this letter was prepared by Gama's subordinates does not excuse Gama's negligence in this respect.

312 It was argued that Gama's conduct was consistent throughout with an intention on his part to sideline TRE in favour of STS setting up in competition. This, so it was argued for Transnet, is the most probable scenario which emerges on the evidence.

313 Gama's case is that he should be acquitted of this charge and its alternative. It was submitted for Gama that the evidence establishes that he obtained legal advice which confirmed that the contract gave effect to the

³⁵⁰ Gama pages 26 -28

board resolution and that initially at least, Oates and his forensic team were similarly persuaded that this was so.

- 314 It was pointed out that at the latest on 10 April 2008 it was clear to all concerned that the board resolution had not been carried out and there was no difficulty in establishing that Gama had signed the contract which failed to implement that resolution. In fact, the situation was reversed and the work reverted to TRE by about July 2008 as was evidenced by a glossy marketing brochure produced in evidence.³⁵¹ It was contended that as at 10 December 2008 according to Oates there was absolutely nothing to implicate Gama. It is argued that this situation changed in December 2008 or January 2009 following the obtaining of a legal opinion a copy of which was not made available by Transnet, despite two the other legal opinions having been produced.
- 315 Gama submits that he relied on the legal advice which he obtained from the TFR legal department and on his version also from the Group Legal department. In fact Sicheka of the TFR legal department did furnish some legal advice. Sicheka's explanation as to how the board resolution was complied with satisfied with the investigators at least until legal advice was obtained.
- 316 It was submitted that as the CEO of a very substantial organisation Gama of necessity had to rely on his subordinates and could never have negotiated and executed the contract on his own. It was submitted that Gama's explanation as to why he acted as he did and relied on the advice he obtained does not justify the conclusion that he failed to accept responsibility.

³⁵¹ Bundle c, page 434

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- 317 Before signing the 50 like new contract Gama was required in terms of the Transnet policies to obtain prior advice from the relevant Legal Services department.³⁵² The evidence is not clear as to whether in this case that requirement meant that the advice had to be obtained from the Group legal department or the TFR legal department. In fact the Group legal department probably played no role in the drafting of the contract.³⁵³ Although the Group Legal staff were copied on various e-mails which contained a draft of the contract they stated that they were not ever requested to look at and review those contracts or the final contract.³⁵⁴ It was Shiceka in the TFR legal department who in fact advised Gama in relation to the contract.
- 318 McMaster said that Shiceka told him that she was however not aware of the board resolution.³⁵⁵ Msoupye, also of the TFR legal department, did however know about the board resolution. Msoupye was intimately involved in drafting the agreement and liaising with Shiceka. The advice given to Gama was however channelled through Shiceka.³⁵⁶
- 319 McMaster said that he asked the Group Legal executives, including Kahla, why it was that they had been copied on the e-mails with the draft contracts, but there was no explanation for this. These were draft contracts in the course of the negotiations and Kahla said that they were never requested to review the final contract and the contract was never finalised.³⁵⁷
- 320 Gama's answer to the allegation that he failed to secure a wording in the contract whereby TRE would perform all the local work to the exclusion of STS was that prior to his signing the document he was advised that the document was with the Group Legal apartment and was further advised by

³⁵² Bundle A2 page 154; page 21 of the Framework document

³⁵³ McMaster, page 108

³⁵⁴ McMaster, page 109

³⁵⁵ McMaster, page 132

³⁵⁶ McMaster, page 132-3

³⁵⁷ McMaster, page 109

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the executive officer for the contract, Mr. Mosweu General Manager Engineering TFR, that he could proceed with the signature of the contract.³⁵⁸ Mosweu has since been disciplined for his conflict of interests due to his interest in STS and resigned from Transnet during that process.³⁵⁹

321 Gama said that there had at an earlier stage been discussions with legal on the manner in which the terms of the board resolution would be met in the contract. There had been some debate about the problem of Transnet contracting with itself in the form of TRE. Defining TRE as a "key contactor" was the method adopted of securing TRE's position in doing all the local work without passing the risk of non-performance or of late delivery back to Transnet.³⁶⁰ This Gama described this as what he understood was the "elegant way" provided by the legal advisors.³⁶¹ Gama said he had previously and long before the time of signature discussed the relevant clauses with legal advisors in the TFR legal team and Group Legal and he was satisfied that they had applied their minds to the issue.³⁶² However the issue which Gama identifies as that which he was given advice on was "the issue of securing TFR's participation without passing on the risk of non-performance or late delivery back to Transnet."³⁶³ That is consistent with what Sicheka told investigator McMaster – namely that she had advised on that issue and on the EMD guarantee – but had not advised on the issue of ensuring that the contract be worded so that TRE would do all the work as per the board's condition.

322 Asked in cross-examination whether he had checked to ensure that the contract contained a clause which stipulated that TRE would carry out all

³⁵⁸ Bundle D2, page 11 paragraph 2.29

³⁵⁹ Singh, page 43

³⁶⁰ Gama, page 25-26

³⁶¹ Gama, page 27

³⁶² Gama, page 26-27

³⁶³ Gama, page 26

engineering and maintenance work, Gama avoided any direct answer to the question saying only that there was a clause in terms of which TRE was defined.³⁶⁴

323 Gama maintained that he had no motive to change or interest in changing the board resolution,³⁶⁵ which assertion contradicts the fact that his memorandum of 11 April 2007 sought to alter the resolution, but he maintained that the intent was always that TRE would do the work³⁶⁶ and he said his understanding was that TRE was preparing to do the work.

324 The company bears the onus to establish wilful conduct on Gama's part. There is no real dispute about the fact that prior to his signing the contract Gama had approached and interacted with the in-house legal advisers at TFR in regard to aspects of the contract. Gama maintained that he accepted that his advice for those legal advisers was to the effect that the board's requirement that TRE perform the work was met in terms of the contract. Actually that appears to be wrong in that he was not ever specifically advised by Shiceka that the requirement in the board resolution had been met in the contract wording. The investigators ascertained from the in-house legal advisers that they had offered advice on other aspects of the contract but not specifically on that aspect. That hearsay evidence was not confirmed at the disciplinary hearing by testimony from any one of the legal advisers at TFR.

325 Wells said that it was not sufficient for Gama to have satisfied himself that the relevant legal advisers were copied on e-mails with drafts of the agreement. He said that if Gama wanted to rely on their sign-off he had to specifically ask them to consider particular aspects of the contract and obtain specific sign-off on that aspect so that he could be sure that the

³⁶⁴ Gama, page 27

³⁶⁵ Gama, page 28

³⁶⁶ Gama, page 28

material issues had in fact been considered by the legal adviser. In a cross-examination however Wells had to concede that there was no such policy requirement in regard to sign-off procedures within Transnet. In the end therefore Wells' evidence on this aspect can be put no higher than that it was a practice followed by some within Transnet and may be the most advisable practice, but it cannot be said that Gama's failure to obtain specific sign-off was irregular or that it was in breach of a practice required in Transnet. Wells is no doubt correct that it was unwise for Gama not to obtain specific sign-off, but and that is with the wisdom of hindsight.

- 326 The crucial question is whether it can be said that the probabilities that when Gama signed the 50 like new contract he did so with the conscious realisation that the wording of clause 7.5 read with the definition of a "key contractor" and the fact that the collateral agreement in the form of schedule 5 was missing, or whether he was merely negligent in this regard and believed that the document which he was being presented with to sign had been approved by the relevant legal advisers and properly prepared by his managers within TFR. While there are certainly grounds for suspicion as to Gama's intention and state of mind when he signed the contract – based on the probabilities of the surrounding circumstances relied on by Transnet as set out above – was intentionally to promote STS. To make a finding that Gama acted wilfully in this regard it is necessary to infer from those circumstances that it is more probable that Gama intentionally signed the contract knowing that it failed to secure the work for TRE than that he did so merely ignorantly. If all that can be inferred is that that he did so merely because he failed to understand at the time of signing the full import of the contractual provisions properly construed with the contract being read as a whole, including having regard to the missing schedule – then he may be negligent, but that is not wilful conduct on Gama's part.

- 327 The principles applicable to drawing such an inference on the civil standard have been set out above under the GNS contract section of these findings and apply similarly here. It is not necessary to repeat them.
- 328 In the light of the undisputed evidence that later, once the fact of STS having set up an assembly plant in opposition was realised and then rectified, other Transnet managers and executives and the internal audit investigators who were tasked with investigating the irregularities all laboured for a considerable period of time under the misapprehension that *terms* of the contract were not so much the problem as the *manner of its implementation*, it cannot I think be said that on a reading of the contract by a lay person - such as Gama was - it would have been unequivocally and blindingly obvious that the contract failed to secure the local work exclusively to TRE. Put otherwise, it is not so improbable that Gama would have realised this failure in the terms of draft contract which had been prepared for him to sign, and about which there had been at least some previous discussions involving the relevant legal advisers, that he must on the probabilities necessarily have realised that what he was signing failed to comply with the board resolution. That is so, even if, as I have found above, of the probabilities that the subject of the legal advice was not pertinently the question of whether or not the contract provided that only TRE would do the work. It follows that Transnet has failed to prove on a balance of probabilities that Gama signed the contract wilfully in the knowledge that and with the intention that STS rather than TRE would perform the work.
- 329 It does not however follow that Gama was not negligent in failing to ensure that the condition that TRE perform the work was embodied in the terms of the contract. The next question to be determined is whether Gama's conduct in signing a contract without securing compliance with the board resolution was negligence and constitutes negligent misconduct.



330 This was an important contract for a significant amount of money. The board had laid down only one single condition and had tasked Gama with executing the contract. He should in the circumstances have taken extraordinary care to ensure that he captured the import of the condition in the contract. This he failed to do. On his own version Gama failed to read the 50 like new contract and make himself sufficiently aware of its content and implications in order to ensure compliance with the board resolution. There is no doubt that Transnet has established that Gama was negligent in failing to secure a contract in terms which provided for TRE to perform all the local work even though he had conferred with his legal department on some aspects, but not on the critical aspect of compliance with the board resolution. This negligent failure does constitute misconduct.

331 Having reached the conclusion which I have on this charge, it is unnecessary to consider the alternative aspect of this charge, namely whether Gama's conduct also constituted poor performance.

Conclusions

332 In conclusion therefore on this charge I find that Transnet has failed to establish on the probabilities that Gama wilfully signed the 50 like new contract in the knowledge that according to the terms of the contract STS would perform the local work rather than TRE. Transnet has however established that Gama was negligent when he signed the contract without securing the work to TRE as specifically required by the board resolution which he was tasked to implement.

Charge 4 : UNWARRANTED CRITICISM OF TRANSNET EXECUTIVES

- 333 The essence of this charge is that Gama has either directly or through his attorneys during the course of the investigation and the High Court proceedings, and more recently made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified and unreasonable and calculated to cause harm. It is also contended that they indicate an irretrievable breakdown in the trust relationship between Gama as the CEO of TFR and Transnet.
- 334 Transnet contends that Gama's conduct in dealing with the allegations against him and in particular his wide-ranging attacks on agents and officials of Transnet during his attempts to ward off the enquiry, and his use of the public media in making these attacks, constitutes unwarranted conduct that is in itself destructive of the employment relationship and for this reason is to be regarded as misconduct.
- 335 Gama testified that he did not believe that his conduct as set out in this fourth charge means that his relationship with Transnet had irretrievably broken down.³⁶⁷ He indicated that he is prepared to apologise to Mr Wells the Acting Group CEO (who was the target of numerous of these statements) and said that he can work with Wells.
- 336 Before considering the merits of this charge it is apposite to set out the detail of some of the criticisms made by Gama and on which Transnet relies and Gama's testimony in relation thereto.
- 337 Gama's attitude was initially displayed during the interview conducted by Madhav when, as set out above, Gama stated that the discussion which they were having wherein Madhav was questioning him about his authority

³⁶⁷ Gama, page 48

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and the terms of the confinement in relation to the GNS contract were "... discussions that we tend to have here, are really just discussions that are aimed by others to cast aspersions on my integrity and I am not going to allow that."³⁶⁸

338 Many of Gama's statements were aimed at Mr. Wells. Gama brought a High Court application against Transnet and various Transnet executives, including Wells. Wells referred to various passages in that application in which Gama under oath made allegations against Transnet and its executives. These included allegations that Wells was conspiring to scuttle Gama's chances of being considered for appointment as the Group Chief Executive ("GCE"); that the timing of the notice by Mr Maharaj was not coincidental and was deliberate with a view to casting a cloud of suspicion and doubt over Gama's appointment as GCE and that the purpose of taking disciplinary action was to prejudice his chances of appointment. Wells denied any conspiracy on his part. He pointed out that he had no power to determine or influence the appointment of the GCE. He was not the person who had decided to issue the notice of disciplinary action as that was issued by Mr. Maharaj Group Executive : Human Resources. Wells said that the disciplinary action against Gama was not taken lightly and moreover it was not Wells' decision to initiate such action. Effectively this was driven by the Transnet board after two external legal opinions had recommended disciplinary action.

339 Further allegations by Gama in his High Court affidavit claim that the disciplinary process was unlawful and unfair and was motivated by an attempt to prejudice his position and to pursue false allegations against him when he was not responsible for the difficulties which had arisen due to the shortcomings of Mr. Wells.³⁶⁹ Gama further alleged that the disciplinary

³⁶⁸ Bundle D1, page 101

³⁶⁹ Record, page 45

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action had been initiated specifically with the ulterior purpose of prejudicing his prospects as a candidate for GCE.

340 The High Court application was unsuccessful and the court found that there was no indication of any prejudicial behaviour by Wells against Gama.

341 Reference was also made to the contents of a letter dated 31 August 2009 from Gama's attorney Mr Langa to Mr. Philip Hourquebie, the CEO of Ernst and Young³⁷⁰ in which it is alleged on Gama's behalf that Ernst and Young "continues to be a 'conspirator' against Mr. Gama on many issues which should be raised with Mr. Gama as internal auditors but they are instead raised by Chris Wells... and Gama's CFO Nick Thomson."³⁷¹ The same letter refers to Ernst and Young as having abandoned its internal audit responsibilities to Gama "by participating in an investigation and a witch-hunt and his Cabal against Mr. Gama..."³⁷² Wells dismissed these allegations as nonsense.

342 In a further letter from attorney Langa dated 31 August 2009 to Maharaj concerning the suspension of Gama the allegation is made: "Mr. Wells stands to benefit, directly, from the fabrication in that he hopes to conceal the massive financial cost that he caused Transnet to suffer when he made a hasty and unsubstantiated decision when he ordered STS to move their assembly from Iscor to Transwerk at the cost of Transnet."³⁷³ Wells denied that this statement was factually correct. He said that the decision referred to was the last thing that he benefited from and that it was anything but a hasty and unsubstantiated decision. The decision was not one taken by him in isolation as it was a massive strategic decision, but that Transnet had no alternative but to do this in order to complete the process and abide by the

³⁷⁰ Bundle F, page 14

³⁷¹ Bundle F, page 15 paragraph 6

³⁷² Bundle F, page 15 paragraph 7

³⁷³ Bundle F, page 19 paragraph 7

board resolution which required TRE to perform the local assembly and maintenance work rather than for STS, a competitor, to do the work.

- 343 In the same letter Gama's attorney states in relation to the decision to move the assembly works that "*This decision was unnecessary as STS could have built about 10 locomotives at Iscor and built the remaining 40 from Transnet*". Wells stated that it was highly unlikely that STS had the capability to perform the work even in part, as it had run into enormous problems. However, as he pointed out, the key issue was in any event not whether STS was able to perform the work but was the fact that STS was were in terms of the board resolution precluded from doing the local work which was supposed to be done by TRE.
- 344 A further allegation is made in this letter that the timing of Gama's suspension by way of letter on 24 August 2009 was no coincidence and "*It reflects a sinister and mala fide attempt to subvert the candidacy of our client for the group CE position.*"³⁷⁴ Wells testified that the issuing of the disciplinary notice on 24 August 2009 was simply following the process that had been set in motion by the board.
- 345 Later in the same letter the statement is made: "*The information at Mr. Gama's disposal shows that "information" of this default was obtained in the course of malicious skulduggery against him that was aimed at prejudicing Mr. Gama's candidacy for the position as GCE or so as to prefer Mr. Wells' candidate and in so doing discrediting Mr. Gama, at Transnet's expense, which is by itself a much more serious form of misconduct than any alleged charge against Mr. Gama.*"³⁷⁵ Wells denied the allegations of malicious skulduggery either by himself or the board or any other executive. Wells stated that he did not have a preferred candidate that nobody sought his

³⁷⁴ Bundle F, page 20 paragraph 9

³⁷⁵ Bundle F, page 23 paragraph 25

opinion as to the candidacy and his opinion would in any event have had no import.

346 The next paragraph of the same letter questioned the conduct of Ms. Ramos the former Group CEO where it was stated that "*The investigation launched by Mr. Wells therefore essentially brings the responsibilities of the recently departed GCE and Chairman of Transnet into question, and not Mr. Gama's responsibilities and conduct.*"³⁷⁶ Wells denied this. He pointed out that the initial investigations were the result of tip-offs launched not by him or by Ramos and that once TIA had tabled its internal forensic reports in February 2009 the further investigations and disciplinary processes simply took their course. Wells also pointed out that TIA has no power to decide on disciplinary action which remains the responsibility of the relevant executive within Transnet once the reports have been made by TIA. I would add that if a TIA report indicated serious misconduct and the relevant executive failed to institute appropriate disciplinary steps, such executive could himself be criticised or even disciplined.

347 In a letter of 27 November 2009 to Maharaj attorney Langa on behalf of Gama conveyed his belief that the request to return his laptop and to have his office computer investigated by Transnet was "*a measure to fabricate further allegations as to the current charges against him...*"³⁷⁷ Wells denied that there was any fabrication of charges or that there was an attempt to trump up a charge as alleged later in the same letter. He regarded these allegations against Transnet as not only being nonsense but also constituting serious allegations against Transnet.³⁷⁸ Wells testified that the statements in this letter were totally unfounded and said that these were statements made in relation to an executive controlling the disciplinary

³⁷⁶ Bundle F, page 23 paragraph 26

³⁷⁷ Bundle F, page 73 paragraph 1

³⁷⁸ Bundle F, page 73

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process and undermined Transnet, including the audit process, the integrity of its executive employees and ultimately the board.³⁷⁹

- 348 In a letter dated 8 December 2009 by attorney Langa to attorney Todd of Bowman Gilfillan³⁸⁰ various further allegations are made including that Transnet "... went shopping around for a legal opinion that would tell them what they are currently doing after the first major law firm advised Transnet that their intentions to convert the internal audit report procedural findings into this farce will not meet the approval of the law."³⁸¹ Wells denied shopping around from attorney to attorney for advice. He was aware of only two legal opinions, namely that taken by the chairman of the board from attorneys ENS and the opinion obtained from Bowman Gilfillan. The evidence did however establish that there was a third legal opinion³⁸² which was not produced at the hearing.
- 349 The same letter referred to "a desperate attempt by Transnet to illegally gain access into Mr. Gama's computer files and information when they knew very well that they could have spoken to him for his consent or talk to us".³⁸³ Wells commented that taking control of computer files, laptops and desktop computers was a normal process in the course of disciplinary activity and would occur with any employee in a similar position.³⁸⁴
- 350 This letter also refers to "a trail of unlawful invasion of privacy, violation of his right to be treated fairly by Transnet and the destruction and non-compliance of corporate practice and governance with the intent to pursue the misuse and abuse of process law in order to deny Mr. Gama his legal

³⁷⁹ Record page 57

³⁸⁰ Bundle F, page 80

³⁸¹ Page 80, paragraph 2

³⁸² McMaster, page 137

³⁸³ Page 80, paragraph 4

³⁸⁴ Record page 59

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right to be treated fairly by Transnet.³⁸⁵ Wells denied that there was any violation of Gama's rights and misuse and abuse of the law to deny him his rights. Indeed, the present disciplinary enquiry is an opportunity for Gama to defend himself before an independent tribunal.

351 In a further letter of 15 December 2009 by attorney Langa to Bowman Gilfillan reference is made to "*Transnet's frustration and desperation to break the law at every available opportunity*."³⁸⁶ Wells did not know what was being referred to here but was not aware of any attempt to break the law and said that this was a preposterous allegation.

352 Wells testified that these allegations levelled against and Transnet and himself other Transnet executives were untrue and hurtful. He pointed out that these statements had to be seen in the context of (the undisputed evidence of) the tip-offs in relation to both the 50 like new and the security contract being the origins of the investigations. The process of initiating and conducting the investigations into Gama's conduct involved Ramos' decision to pursue the investigations and ultimately was placed before the board which decided to pursue the matter. The board then tasked Wells with that responsibility of executing the process. He did not initiate the charges.³⁸⁷ Later Wells passed the matter to Maharaj Group Executive HR to take the process further in the form of a disciplinary enquiry. According to Wells this entire process within Transnet was an open one and an attempt to get to the right result. There is no reason not to accept this evidence.

353 Wells testified that these statements had a profound effect on the relationship between Gama on the one hand and Transnet on the other. He said that there was a loss of trust in Gama who was trying to bring Transnet

³⁸⁵ Bundle F, page 81

³⁸⁶ Bundle F, page 88, paragraph 4

³⁸⁷ Page 105

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into disrepute, making false accusations against the board and making false allegations against Wells. Wells testified that Gama's statements had prompted the Chairman of the board to ask TIA to review the allegations which were found to be without substance. This showed a total breakdown in the relationship between Transnet and Gama, particularly following his suspension.

354 Wells said that it was highly unlikely that this relationship was retrievable given that many of these comments were made on public record and undermined the board and Transnet executives as well as the disciplinary process and TIA. Wells found it very difficult to see how the relationship between Transnet and Gama could be restored.³⁸⁸

355 Finally, Wells testified that when serious allegations of misconduct such as those in relation to the GNS security contract and the execution of the 50 like new contract were brought to the attention of a Divisional Chief Executive Officer Transnet would expect that executive to investigate and explore the solutions, and if there is evidence of wrong doing to take action. This Gama had failed to do both in relation to the GNS contract and the 50 like new contract.³⁸⁹ This contributed to the breakdown in the relationship according to Wells.

356 Gama pointed out that the 50 like new charge concerning the non-implementation of the board resolution related to conduct which had been identified 15 months previously in April 2008, so the obvious question was why was this charge raised at that late stage – with the Madhav and McMasters reports going to Ramos on 12 February 2009 and Gama being charged on 24 August 2009 and suspended on 1 September 2009. Gama's case is that it these statements reflect a normal and understandable

³⁸⁸ Page 63

³⁸⁹ Record page 65

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reaction on his part in circumstances. The circumstances were that he was one of the five short listed candidates for the Group CEO position and interviewed a few days before the board meeting of 13 February 2009. He had the expectation that he may get the position. He had significant support both inside and outside of Transnet. Gama contended it was understandable that he should be upset at his suspension when he knew that he had significant support and he also knew that in 2007 he had signed the 50 like new agreement which had difficulties, but that these had been sorted out. It was put to Wells that whether he was able to influence Gama's prospective candidacy or not, charges of this nature would not advance Gama's candidacy. Wells answered that although he was not part of the relevant board meeting, he had been advised that the chairman had said that the charges were not to be taken into account and were only dealt with after the decisions relating to the prospective CEO had been made.³⁹⁰ Wells denied that the difficulties relating to the 50 like new contract had been sorted out and pointed out that the contractual relationship with STS was still in the process of being sorted out. Gama maintained that it was normal for him to have asked: "Why are they charging me now when this happened 18 months ago?" and to infer that the charges and suspension bore some relationship to his application for the position of Group CEO.

357 In addition Gama referred to the fact that in March 2009 there were rumours that he was under investigation. He approached the then chairman of Transnet, Mr Phashwana who denied that he was under investigation.³⁹¹ Sometime after the investigators' 8 April interview and before 11 May 2009 when Gama met with Wells and was told that he was under investigation, Gama was then informed by Mr Dube, a businessman whom he knew, about the conversation which he said he had unexpectedly overheard at the Park Hyatt Hotel on 21 March 2009. The gist of the conversation which

³⁹⁰ Pages 106-107

³⁹¹ Gama, page 69

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Dube said he overheard was that four men – two of whom Dube knew and identified as Wells and Mr van Niekerk - had a discussion about the fact that if Gama intended to become the Group CEO they would do everything in their power to make sure that he did not.³⁹² Gama said that what he stated in the court application papers was because he was under pressure and angry at what was going on.

358 Gama said at the hearing that he was prepared to apologise to Wells and would have a discussion with Wells about the allegations he had made against him. He said that he could work with Wells in future.

359 Gama conceded that the accusations which he made against Wells were serious.³⁹³ He also accepted that he had never approached Wells to discuss the matter with him before accusing him in public of a serious conspiracy.³⁹⁴ His explanation was that he felt he was being persecuted.³⁹⁵ Gama accepted that he had acted unfairly towards Wells by making accusations in public against him without first giving him an opportunity to deal with them and accepted that with the benefit of hindsight and being able to reflect on the matter he would have done things differently.³⁹⁶

360 It was argued for Mr Gama that it is not necessary to decide whether or not to accept or reject the evidence of Mr Dube concerning the conversation which he overheard at the Park Hyatt. That is correct as the issue is really Gama's state of mind. Dube said one of the persons involved in the discussion which he overheard was an Indian man possibly by the name of Bret Maharaj.³⁹⁷ Mr Pradeep Maharaj, Group Executive Human Resources, was consequently called to testify about the incident which Dube overheard

³⁹² Gama, pages 71-73

³⁹³ Page 56

³⁹⁴ Page 55

³⁹⁵ Pages 56-7

³⁹⁶ Page 58

³⁹⁷ Dube page 30 and pages 24 to 25

as he was of Indian origin. Maharaj said that he did not participate in the selection process for the Group CEO and denied at any stage having a conversation in which the merits or demerits of the candidates for the position were discussed. He also denied ever having been to the Park Hyatt Hotel. Under cross-examination he did accept - hypothetically- that it was possible that the three executives of Transnet could have made that the hotel on 21 March 2009 which was a public holiday.³⁹⁸

361 It was not disputed by Gama that the various comments made in the court application and in the correspondence and elsewhere as set out above had never been made or should not be attributed to him.

362 In argument on behalf of Mr Gama was submitted that a relationship of trust was still possible there being no evidence that anyone would not be able to work again with Mr Gama and in the light of his preparedness to apologise to Wells. I was urged to view Gama's comments in the light of the circumstances which prevailed and the explanations given by him. It was contended that his suspicions that there was more to the charges than a simple disciplinary process were not unjustified and unreasonable.

363 For Transnet it was argued that Gama's conduct was unwarranted, destructive of the employment relationship and should be declared to be misconduct. The charge alleges that these statements are indicative of an irretrievable breakdown in trust relationship between Gama and Transnet³⁹⁹ and indeed both parties made submissions addressed to that aspect, which in my view is an aspect that goes to the question of sanction which is not presently the subject of consideration in these findings. The fourth charge however also refers⁴⁰⁰ to Gama's criticisms having resulted in a situation of incompatibility between him and Transnet and its leadership. This charge

³⁹⁸ Pages 90-92

³⁹⁹ In paragraph 4.3

⁴⁰⁰ In paragraph 4.62

also refers to Gama's statements having been calculated to cause harm to Transnet, and that they were not justified or reasonable for him to make in the circumstances.⁴⁰¹ The Transnet Disciplinary Code sets out examples of disciplinary transgressions for which disciplinary action may be taken. Included under "Primary Offences" are the following which are relevant: "*Gross insubordination or serious disrespect; When an employee, at any time, acts in a defiant or provocative manner towards a person of authority in the company; and Insulting behaviour.*" In these findings what must be considered is whether Gama's statements constitute misconduct as envisaged by any of these categories of primary offences.

364 It may be so that Gama thought he had reason to believe that Wells and other Transnet executives were conspiring against him to ensure that he did not succeed in becoming the new Group CEO. No such conspiracy has been proved. Gama was no doubt suspicious, but those suspicions have not proved to be justified and I do not think that they can be regarded as reasonable suspicions. A reasonable person in Gama's position would not in my view have been prepared to utter the criticisms which he did, some in public and others in correspondence, unless he had certain evidence in support of his claims which it appears Gama did not have.

365 The statements are critical of Wells in particular, but also infer a wider criticism of Transnet executives and arguably even of the Transnet board for having an ulterior motive and conspiring in preferring the charges against Gama. These are serious allegations and allege dishonest conduct. This constitutes serious disrespect and gross insubordination insofar as criticisms were made of Wells who was then the Acting Group CEO. Certain of the criticisms also constitute insulting behaviour and conduct which is defiant and provocative of persons in authority. TIA was criticised as was the previous Group CEO, the Chairman of Transnet and Transnet in

⁴⁰¹ In paragraphs 4.1 and 4.2

general. The fact that Gama is belatedly prepared to apologise to Wells and discuss the issues with him whilst perhaps going some way to resolving their personal differences, but does not constitute a reason why this conduct should not be regarded as being misconduct as defined in the Transnet Code. In my view Mr. Gama overstepped the mark with his trenchant criticism which impugned the honesty of Wells and other senior executives.

366 For these reasons I find that Gama is guilty of misconduct under this charge.

Transnet's delay in instituting the disciplinary proceedings

367 Clause 6.2 of the Transnet Disciplinary Code deals with the disciplinary process and provides that:

"6.2.1 A disciplinary hearing must be held as soon as possible after the commission of an alleged offence.

6.2.2 Transnet must endeavour to hold the disciplinary enquiry as soon as possible after it has finalised its investigation into the conduct of an employee. While Transnet will make every effort to ensure that discipline is implemented contemporaneously with the offence allegedly committed by the employee, it is recognised that certain investigations will take longer to complete and that it is not always possible to bring disciplinary proceedings contemporaneously."

368 For Transnet it was submitted that the present case falls within the category of cases for which provision is made in clause 6.2.2 which recognises that there may be inevitable delays in instituting disciplinary proceedings. It is worth emphasising that the starting point for determining whether there has been an unacceptable delay as envisaged in this clause is the date at which the investigation into the conduct of the employee is finalised.

369 Gama was charged with misconduct on 24 August 2009 having first been informed on 11 May 2009 by Wells that he was formally the subject of an

investigation in relation to both the 50 like new contract and the GNS security contract.

- 370 In relation to the 50 like new contract the fact of Gama's having failed to comply with the board resolution was established in about March 2008 and certainly by 10 April 2008. On 10 April 2008 a meeting was arranged for the purpose of discussing the update on progress in the 50 like new contract implementation. The progress to be reported on at that meeting was an update on how many locomotives had been manufactured as the contract had been awarded almost a year earlier on 1 May 2007. The meeting was not a report on the progress of any investigation. It was attended by senior executives, including representatives of TRE. Mr Wells then Group CFO had by then ascertained that the board resolution had not been complied with so he attended that meeting, raised that point and said that Transnet had an obligation to rectify the contract to ensure that it was in line with the board resolution. All parties present, which included STS and EMD, then agreed that this would be done.⁴⁰² At that time the relevant Group executives knew of the facts underlying the complaint against Gama that he had failed to secure in the 50 like new contract the board's requirement that TRE perform all the local work. That was already an accepted fact in the investigation which did not require further investigation as to whether or not there had been non-implementation of the board resolution.⁴⁰³
- 371 It was conceded in argument for Transnet that there was a significant delay from that point in April 2008 until the time when the investigators concluded and recommended that charges be brought against Mr Gama in relation to this issue. The McMaster forensic report by TIA which recommended that action be taken against Gama as the signatory to the 50 like new contract was concluded and handed to Oates and also to Ramos the Group CEO on

⁴⁰² Oates page 57

⁴⁰³ Oates page 108

12 February 2009. That was some 10 or 11 months after it was known that Gama had concluded the contract without ensuring compliance with the board resolution.

The 50 like new investigation

372 The investigators explained the delay in investigating the 50 like new charge some detail. In summary, the evidence established in relation to the circumstances of this delay is as follows. It is not set out strictly in sequence as the various witnesses all had different input relevant to the delay issue.

373 Wells testified that the Transnet Chairman Mr. Phaswana came to him with the first tip-off document which related to the 50 like new locomotives which was received via the Minister of Public Enterprises on 5 February 2008.⁴⁰⁴ Ramos was away at time, Wells handed the document to the TIA team and asked them to investigate.

374 Oates testified⁴⁰⁵ that when TIA received the call case in relation to the locomotive tender he needed to identify and authenticate as quickly as possible the nature and ambit of the allegations. The first step was to determine who was alleged to be involved and in this process a detailed CIPRO search was conducted which identified a number of entities. Probably 20 companies were involved with some 100 directors all interlinking. This took some time to investigate and understand. Wells said that later during the course of the investigations he attended a meeting at which a detailed chart was shown depicting corporate structures, owners and registered shareholders and directors of various related companies in relation to the 50 like new and 212 locomotive procurement processes. At

⁴⁰⁴ Bundle D, pages 1 - 3.

⁴⁰⁵ Page 49

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one of those meetings Gama was present. Wells testified that this was an extraordinarily complex investigation and that the diagram depicting the various interrelated entities and individuals apparently involved was a real spider web. TIA had to wade through the various corporate records and there was a large amount of work to be done in this regard. This took a lot of investigation time to get to the bottom of what was occurring.

375 At the 10 April 2008 meeting already mentioned above all the parties to the 50 like new contract agreed to rectify the position. Oates' explained that initially the focus of the efforts of all concerned were to ensure that the situation was rectified so that the board resolution was fully complied with. During the meeting of 10 April 2008 STS raised the issue that it had incurred wasted costs in setting up its manufacturing facility and that those costs needed to be addressed. It was agreed that Transnet would look at those costs subject to their being reasonable and capable of audit. The TIA team was thereafter responsible to perform this audit function. This also engaged the team's resources.

376 Oates testified that TIA performs numerous investigations at any one time. The normal process adopted by the Ernst and Young team with TIA is that update reports are prepared throughout an investigation at various stages where appropriate rather than at specified regular intervals. That was similarly the process adopted by TIA in this instance. Rectifying the situation which arose out of the 50 like new contract involved shifting back to TRE the locomotive manufacturing facility that had been created outside of TRE. This entailed finalising an appropriate agreement between STS and TRE; identifying the wasted costs that had been incurred by STS and auditing those costs. The rectification also entailed entering into a termination agreement with STS which involved the Transnet legal team. Oates said that all this took place from about June 2008 until about October or November of 2008.

like new contract with Transnet's lawyers. He was then advised by the lawyers that the contract was very favourable to the service provider. On closer inspection of the contract Oates determined that STS was in a strong position pursuant to the contract which arrangement was in fact in conflict with the board resolution.

384 Initially, Oates had accepted the explanation given to him by the TIA team, namely that the terms of the 50 like new contract had made allowance for compliance with the board resolution. In other words, the fact that the board resolution had not been complied with did not mean that in terms of the contract that was actually entered into the resolution could not have been complied with. Oates conceded that from March 2008 until January 2009 the investigative team did not perform any work on determining whether the board resolution had been complied with because that had already been accepted at a very early stage in the process in March / April 2008.⁴⁰⁹ Oates and his entire investigative team were satisfied with the initial explanation which was given to them by in house legal advisers that the 50 like new agreement was concluded in terms which permitted compliance with the board resolution, although he qualified this by saying that the TIA team were not legal experts.⁴¹⁰

385 In January 2009, on the basis that rectification would never be achieved, Oates asked the investigation team to ascertain who had to be held responsible for the situation and tasked them to review the board resolutions in detail.

386 Oates explained that the investigation into the 212 locomotives did not end there as there were other aspects which required resolution. A deputation, which included Gama, was sent to the United States to explain to the

⁴⁰⁹ Oates page 115

⁴¹⁰ Oates page 116

original equipment manufacturer ("OEM") a company known as EMD what had occurred around the procurement process. This was very sensitive because no wrong doing on the part of EMD had been identified but another unrelated tender for 100 locomotives had gone out and Transnet had to defend an attempt to interdict the awarding of this contract which was linked to the 212 locomotives contract. According to Oates the TIA investigators were involved until about March or April 2009 in relation to the 212 locomotives contract and the court proceedings. Accordingly the TIA team was essentially fully occupied in the defence of the interdict proceedings from about mid-December 2008 through to mid-March 2009. In the period June to December 2009 there was a lull in the investigation process relating to the 212 locomotives as this was the period in which the senior executives and managers visited the USA to explain to EMD (as well as General Electric who was the other tendering party in the process) what had occurred. During this lull or "*interim period*" referred to by Oates the TIA team refocused their attention on investigating and correcting what had occurred in the 50 like new contract.

387 This investigation into the 50 like new contract culminated in the McMaster report of 12 February 2009. That report suggested that corrective action be taken against Gama as the signatory to the agreement and was based on legal advice which Oates had obtained.⁴¹¹

388 In relation to the 50 like new contract Wells accepted under cross-examination that Gama's failure to carry out the board resolution of 26 April 2007 was a breach which was known to him in April 2008. He also conceded that when the deputation including Ramos, Gama, Vallihu and Wells which went to the United States in July 2008 to meet with EMD, all knew that Gama had not complied with the board resolution. Asked why Gama had not been charged at that stage with failure to comply with the

⁴¹¹ Oates page 66

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board resolution Wells' answer was that a further detailed investigation was continuing into the locomotive assembly contract and that although they knew there was a problem with compliance they were not sure why it had happened and who was responsible, what explanations there were for the situation and what the full implications were thereof. Wells accepted that the implications became more serious in the minds of the investigators when it became clear what the agreement was with STS.⁴¹² Pressed as to what this further investigation would have entailed other than a comparison of the terms of the board resolution and the terms of the contract ultimately signed with the joint venture it became clear in cross-examination that further investigation was not really necessary in order to establish the fact of the breach. However the implications of the breach were what Wells kept referring to in his answers and those implications were not clear until very much later and did require further investigation.

389 Wells accepted that he knew as at April 2008 that the board's condition that TRE perform the work had not been complied with but he did not accept that the charge which Gama faced was limited to that aspect. Wells contended, correctly in my view, that the charge goes beyond that and relates also to the implementation of the board resolution. In this regard the charge specifically refers to the execution of the contract. It was then put to Wells that to the extent that it was possible to implement the board resolution that had occurred by July or August 2008. Wells disagreed with this saying that the transfer of the work back to TRE had occurred by then but that even as at the time of the disciplinary hearing the contractual arrangements had not been concluded and were not in place. He contended that the implications thereof could be very large or very small but were still unknown.⁴¹³

⁴¹² Page 79

⁴¹³ Page 88

390 It was put to Wells that it was unfair to Gama that he was charged in August 2009 for the failure to comply with the board resolution in the 50 like new contract when some 16 or 17 months earlier in April 2008 it was clear to all that the board resolution had not been complied with.⁴¹⁴ Wells accepted that the genesis of the charge had occurred in April 2008 but pointed out that the ramifications thereof and implications therefore continued and only became clear much later. Also, the difficulties pursuant to the 50 like new contract as initially implemented with STS have not been fully resolved.

The GNS security contract investigation

391 While the primary complaint over delay in getting to the disciplinary process stage related to the 50 like new investigation, it was never cleanly separated out from the investigation into the GNS security contract irregularities, and rightly so. In relation to the GNS contract the evidence established the circumstances of the investigation as follows.

392 The first indication of irregularities surrounding the GNS contract originated on around 9 or 10 October 2008 when Mr. Gary Peter Head of Internal Control for Transnet approached Oates and showed him an anonymous letter which had been received by Ramos the Group CEO. The letter was date stamped 18 September 2008 and contained *inter alia* allegations of irregularities regarding GNS. It mentioned the name Siyabonga Gama and suggested that he be interviewed.⁴¹⁵ The cover sheet to the letter bore a note from Wells asking Gary Peter to review the anonymous letter and discuss it with Oates. Wells' note was dated 9 October 2008.

393 Oates then marked-up on the anonymous letter seventeen points which required investigation in order to assess the authenticity of the claims made in the letter. The letter referred to Gama in only two places, first as the

⁴¹⁴ Record pages 109 -110

⁴¹⁵ Oates page 69; Bundle D1, pages 4 - 10

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person who had brought the company GNS to Gauteng (for one or other reason known to him). Second, the letter suggested that Gama as the Chief Executive of TFR be interviewed in relation to the complaints in the letter. Importantly, the letter did *not* allege that Gama had exceeded his authority including the GNS contract.

- 394 The anonymous letter also contained allegations concerning an alleged rape, not related in any way to Mr. Gama. Oates testified that these allegations were taken very seriously by the Group CEO Ms. Ramos. The rape allegation was ultimately not pursued only because the victim was not prepared to lay charges of sexual harassment. The rape allegation and the human resources irregularities initially took precedence in those investigations.
- 395 After he had performed the background check on the aspects which he had noted in the anonymous letter (and numbered 1-17 on the document) Oates' advice to Mr Peter was that he viewed the allegations as very serious and that they required full investigation. The background checks revealed that the allegations were fairly accurate and as a result further work was required to determine whether the claims of irregularities were unfounded or not.
- 396 On 1 December 2008 a complaint was referred to TIA which arose from Tip-Offs Anonymous which is an independent organisation contracted to Transnet to receive on a confidential basis any complaints in relation to Transnet. Many of these complaints are of a human resources nature and would not be dealt with by TIA. Complaints involving fraud or corruption or very sensitive matters were referred to TIA. This second tip-off dealt with the same issues as the first but in a slightly different fashion. Tip-offs would not necessarily be routed through a Transnet executive but in this instance Oates said that both Peter and Wells would have known about this complaint in the second anonymous tip-off.



- 397 On 1 December 2008 Oates received an e-mail from Wells instructing him to investigate allegations which were set out in an e-mail addressed to Ramos of 19 November 2008 and which concerned the TFR security department. Oates contacted Mr. Nick Thomson the CFO at TFR and advised him of the issue and the need to investigate aspects regarding the security department. Thomson said that he should first speak to Gama which Oates then did.
- 398 Oates then met with Gama at a breakfast meeting on 10 December at Esselen Park. The meeting was also attended by Mr. Naicker, the Group Forensic Manager. In broad terms Oates informed Gama that there were three aspects to be investigated: the rape investigation, the investigation of irregular appointment and promotion of friends and the investigation into the GNS contract.
- 399 The lead investigator at TIA in relation to the security contract investigation was Mr. Madhav. He began his investigation into the GNS contract in early December 2008. The investigation process was that in order to investigate Gama's involvement in the GNS contract Madhav met with his investigating team members, including Lenny Da Silva and Subaz Chetty to decide how to proceed. The initial process of the investigation was to obtain background searches on the various companies and entities mentioned in the call reports to see whether they are interlinked and then to check whether from a process point of view, internal Transnet procedures had been correctly followed in terms of the DPP policy and any other policies. Madhav himself, together with Chetty determined whether the correct processes had been followed and approached and interviewed persons in the TFR security department. They first approached Mr. Khanye who was the Contracts and Admin Manager in the security department and therefore in possession of the relevant documentation. That was in early December 2008. Khanye provided the investigators with a file which contained the signed GNS contract, the GNS confinement motivation, the GNS



confinement document which had served before HOAC as well as some e-mails. The GNS contract was the formal contract which Mr Fernhead had signed in June 2008. Mahav testified that the GNS confinement document would have been obtained from Khanye by the investigation around early December 2008 by one of the investigation team members.

400 Madhav pointed out that the GNS confinement motivation and GNS confinement request to the HOAC both contained references to an open tender that had been cancelled. The investigators therefore had to obtain those tender documents to investigate what tender process had been followed. Madhav pointed out that the matter was not straight forward given that without a review of the documents of the previous process it was not possible to say whether Gama had exceeded his delegation because there could in fact have been an open tender process.

401 As of 10 December 2008 the investigators were not aware of any allegations of misconduct against Gama. Madhav testified that as he was relatively new in the TIA he would not have known Gama's authority without examining the DPP and Delegation Framework documents but that in around December 2008 he would have ascertained that Gama had exceeded his authority on confinement. Madhav said that on 15 December 2008 he had discussions with Messrs. Singh and Petit⁴¹⁶ which confirmed what their investigation had already established, namely that Gama had apparently exceeded his authority in approving a confinement in excess of R10 million.⁴¹⁷ Certainly by the end of December 2008 therefore they had examined the contract with GNS and knew that it exceeded Gama's authority, knew that this was serious and that legal advice had to be obtained.⁴¹⁸ Madhav said that given that Gama was a very senior employee they had to be very sure of an allegation that he had breached

⁴¹⁶ Reflected in his report at paragraph 4; Bundle D1, page 54

⁴¹⁷ Madhav page 122

⁴¹⁸ Pages 126-7

his authority on confinement before recommending that any steps be taken against him.

- 402 In about January 2009 Oates had a face-to-face meeting with Ramos at which he expressed his concern about the signatories to the GNS contract.⁴¹⁹ (Oates testified that he gave no feedback to anybody on the board or at the level of the Audit Committee save that to the latter committee he mentioned that there was an investigation taking place around the locomotives contract and the security contract.)
- 403 Madhav concluded his investigation towards the end of January 2009 and thereafter it took a few weeks to settle some outstanding matters in relation to that investigation.⁴²⁰ His report on the GNS contract was handed to Oates who in turn handed it to Ramos on 12 February 2009.
- 404 The Group CEO Ramos was leaving Transnet at the end of February 2009. On 19 February 2009 Oates met in Cape Town with the Transnet Chairman Mr. Phaswana and Professor Geoff Everingham the Chairman of the Audit Committee and Mr. Joubert of the Risk Committee and Mr. Norman Hastings of the Remuneration Committee. Oates presented the TIA reports of McMaster and Madhav at this meeting and went through the key aspects of those reports. Shortly thereafter Oates was contacted and informed that the chairman and directors had decided to obtain a legal opinion from attorneys Edward Nathan and Sonnenbergs (ENS).
- 405 In March 2009 attorney Stewart Harrison of ENS who had been requested to provide an opinion on whether allegations of misconduct against Gama

⁴¹⁹ Oates pages 6-7

⁴²⁰ Page 85

warranted disciplinary action met with the two lead investigators. Harrison provided an opinion dated 26 March 2009.⁴²¹

- 406 Oates thought that he may thereafter have again met with Phaswana to give him an update and he would have met with attorneys ENS after Phaswana briefed them for an opinion. Oates was not certain whether he had again met with Phaswana before attending a further meeting on 23 April 2009 when he reported back.
- 407 The 23 April 2009 meeting was called by the Chairman of the board Phaswana who called a meeting of the chairmen of all the sub-committees on the board together with attorney Stewart Harrison from ENS who had prepared the legal opinion. Oates testified that at that meeting a decision was made to pass both these investigations on to the Acting Group CEO, who at that stage was Mr. Wells.
- 408 In discussion with Maharaj, Oates and the Board's Legal Advisor Wells decided that it would be advisable to obtain for himself his own separate legal opinion before deciding how he would proceed. Wells then sought such an opinion from attorneys Bowman Gilfillan who were instructed in March 2009 attorneys to provide an opinion as to whether Gama had exceeded his delegation of authority. (The previous opinion requested of those same attorneys related to a different aspect namely the consequences of the absence of PSIRA registration).
- 409 The legal opinion from Bowman Gilfillan attorneys was provided in the form of a letter to Mr. Maharaj dated 29 May 2009 and was produced in evidence.⁴²² The legal advice was to the effect that the issues were serious, needed to be dealt with through an appropriate process which would give Gama an opportunity to respond to the specific issues.

⁴²¹ Oates, page 8

⁴²² Bundle D1, page 123

- 410 Oates met with Gama on 2 June 2009 and in the interim obviously Oates had various meeting with his investigative team.
- 411 Desirous of a resolution of a collegial nature Wells then put the various allegations in writing and by way of the letter of 18 June 2009 requested a written response from Mr. Gama to his concerns.
- 412 During July 2009 Oates was called to meet with Chairman Phaswana and Wells after a board meeting in order to report back on the investigations.
- 413 Madhav was the lead investigator on the GNS contract. He also testified about matters which are relevant to the issue of the delay in his investigation between the December 2008 and February 2009. The relevant parts of his evidence are as follows.
- 414 At the stage where the investigation commenced in December 2008 into the GNS contract had just come to end as the period of the contract was for 1 year from November 2007 to end of October 2008. The initial perusal of the tender file documents revealed several anomalies. The two main anomalies were (i) that the evaluation criteria utilised to evaluate the tender were not stipulated clearly, and (ii) that the price evaluation was misleading as it did not take into account the overall costs or the price that the bidders were actually proposing. This led to discussions with the Chief Procurement Officer and various other Supply Chain managers focusing on resolving those problems.
- 415 Madhav said that during the period December 2008 to February 2009 one of the biggest problems that they had with regard to the investigation was obtaining the documentation from TFR and from the Supply Chain Department and the Security Department. At times the investigative team had to physically go into the relevant offices of Supply Chain and Security to obtain the files with the required documentation.

- 416 Towards the beginning of the investigation in December 2008 and in January 2009 many people were on leave and it was difficult to contact them to extract either information or documentation and to obtain their explanations of what had transpired.⁴²³
- 417 In order to obtain a holistic view of what had occurred and place it in context it was necessary to consider documents which preceded the GNS confinement contract as well as those subsequent to the GNS contract. The investigation into the situation which preceded the GNS contract revealed that CPI was appointed during November 2005 to conduct certain specialised security services relating to the apprehension and prosecution of persons responsible for cable theft in the Gauteng region. The circumstances of the conclusion of CPI contract, its extensions and termination were also relevant and required investigation. Madhav testified that it took a very long time to find the file which dealt with the open tender process that had preceded the GNS confinement (but been stopped). This required a physical search at the supply chain offices in order to find the documents.⁴²⁴
- 418 In addition Madhav said that both Senemala the Security Manager for TFR and Khanye the Manager Security for TFR were not entirely cooperative with the investigation and the investigators had repeatedly to go to their offices in order to obtain the information requested.⁴²⁵ Madhav also testified that after he submitted his report on the Security Department on 12 February 2009 to Mr. Oates he continued with his investigation up until the time of the present hearing.

⁴²³ Madhav page 69

⁴²⁴ Madhav page 68

⁴²⁵ Madhav page 60

- 419 On 8 April 2009 Madhav and McMaster interviewed Gama in relation to their respective investigations in order to clarify with him various aspects of their investigations.
- 420 On 9 April Oates sent an e-mail to Gama clarifying and answering a question raised by Gama in the interview held on the previous day by the investigators Madhav and McMaster regarding the two enquiries. That e-mail clarified the issue of who was mandating the investigators explaining that because the investigators had previously reported to Ramos who had since left Transnet, the Chairman of the Board Mr. Phaswana had instructed that the investigators report directly to the board and not to any members of the executive. That remained the situation until 23 April 2009 when the board referred the matter back to the then Acting Group CEO, Wells for finalisation as set out above.⁴²⁶
- 421 It was submitted for Transnet that in the case of the GNS security contract there was no material delay between the time of the receipt of the original tip-offs around 9 October 2008 and the stage when Gama was advised on 10 December 2008 of the investigation into the irregularities the GNS contract – which investigations were at that stage not directed at or focused on Gama. There was also no particular delay in obtaining the Madhav report which was given to the outgoing CEO on 12 February 2009. Having regard to the nature of the investigation into the GNS security contract and the evidence of the investigators as to the circumstances of the security contract investigation. I accept the correctness of these submissions.
- 422 On 12 February 2009 both the Madhav and the McMaster reports by TIA were handed to the Group CEO Ms Ramos. The events which followed after 12 February 2009 in instituting disciplinary steps were not specifically criticised in respect of the delays involved. Rather, the focus of Gama's

⁴²⁶ Bundle D122(b); Oates page 101

complaint about delay was that he was only charged in August 2009 in relation to the 50 like new contract when Transnet executives had been aware 16 or 17 months earlier of the fact of his having signed the contract without complying with the board resolution.

423 For completeness, the events which occurred after 12 February 2009 related to the instituting of disciplinary steps are summarised as follows:

- 423.1 The person who was responsible for deciding whether or not to implement disciplinary steps against Gama was the Group CEO Ms Ramos. She left Transnet at the end of February 2009 and in consequence handed the matter of both investigations over to the board at the February 2009 board meeting.
- 423.2 Thereafter the Chairman of the board (together with other board members) was briefed by Oates and the chairman sought independent legal advice. In the circumstances of the alleged misconduct involving a very senior employee, this was a reasonable and appropriate step to take.
- 423.3 The legal advice obtained indicated that the issues were serious and warranted further investigation and possibly disciplinary action. The board accepted this advice and handed the matter back to the executive on 23 April 2009 by which time Mr Wells was the Acting CEO.
- 423.4 Wells in consultation with Maharaj and other executives decided to seek his own independent legal advice as to whether to proceed with disciplinary action against Gama.
- 423.5 On the 11 May Wells met with Gama, told him that he was the subject of a formal investigation and sought his co-operation. Wells offered a collegial approach to discussing and resolving the issue.

Pursuant thereto Wells set out his concerns in detail in writing and these were sent to Gama on 18 June 2009. Gama was invited to respond thereto. Gama requested additional time to answer and ultimately furnished his written response on 20 July 2009.

423.6 After considering Gama's written response a decision was then taken during August 2009 to charge Gama with misconduct.

423.7 Formal charges were drawn up and handed to Gama on 24 August 2009.

424 Undoubtedly Transnet dealt with the complaints against Gama cautiously. It is clear that both the board and later Wells, once he became seized of the matter, were at pains not to act precipitously or unnecessarily and to institute formal disciplinary proceedings if they could be avoided. Before proceeding two external legal opinions were obtained. The investigators interviewed Gama in April 2009 to clarify aspects with him. Thereafter, and before he was charged, Gama was afforded the opportunity to furnish written submissions in response to the detailed written concerns raised by the Acting CEO, Wells. It is submitted that Gama's senior position and standing as an executive of Transnet have in fact tended to shield him from what might otherwise have been far more swiftly taken disciplinary steps. This appears to be correct.

425 There is little doubt that this was an unusually complicated investigation. In relation to the 50 like new contract the investigators were significantly sidetracked by having to deal with the more immediate problem of whether the R6.5 billion 212 locomotive contract which was about to be signed was subject to similar irregularities. Understandably, that investigation took precedence. Thereafter, the TIA team was significantly engaged in dealing with the interdict proceedings. However, it is clear that the main reason why steps were not immediately taken was because the view of both the in-

house legal advisors and the TIA investigators was that the contractual arrangement could be regarded as having complied with the board's condition that TRE perform the local work and that it was only the *implementation* of the contract (i.e. with STS performing the work) which had failed to comply. Under those circumstances the focus was not on the fact of Gama's failure to comply with the resolution but was rather on seeking to rectify the situation. Only once it became clear that STS intended to sue for damages and refused to co-operate in rectifying the situation did the investigators again focus on determining who was accountable for the consequences of the failure to comply with the board resolution. These events account in large measure for the delay in reaching the point where Gama was charged with misconduct in relation to the 50 like the contract.

- 426 In addition, the fact that the GNS contract investigation was underway and that from December 2008 Gama was potentially also implicated in irregularities in relation to that contract is also relevant. It would have made no sense from about January 2009 onwards to charge Gama separately in relation to the 50 like new charge and then have to again charge him in relation to the GNS contract if it transpired that disciplinary action was called for in relation to that charge as well.
- 427 This is not a case in which there is no explanation for the delays which have occurred. On the contrary, Transnet's investigators and executives have offered a full explanation and exposition of the events which occurred. There is nothing inherently wrong with the approach adopted by Transnet to these investigations. Certainly, it may have been preferable to pursue the issue of Gama's failure to comply with the board resolution at an earlier stage. However, it is clear that the full implications of Gama's failure to ensure that the 50 like new contract resulted in TRE performing the local work were not realised until a very much later stage. In this regard, it is relevant to consider that clause 6.2.2 of the Transnet Disciplinary Code envisages that an enquiry will be held as soon as possible after the

investigation is finalised. Although there is no dispute that in March and certainly by April 2008 the relevant Transnet executives were aware that Gama had failed to comply with the board resolution, that was not all that was considered relevant and necessary to investigate before pursuing what would obviously be disciplinary proceedings which would be potentially very disruptive to the organisation. The investigation continued with the preparation of the McMaster report, the obtaining of external legal opinions, an interview with Gama in April 2009 and an opportunity for Gama to present his side of the story in his written response to Wells' concerns. It could be argued that the investigation was only sufficiently complete for the final decision to be made as to whether or not disciplinary proceedings should be instituted after Wells had had the opportunity to consider Gama's written responses made on 20 July 2009. Gama was formally charged about one month later. There is indeed something to be said for the submission that Transnet was perhaps "over cautious" in its approach to perusing discipline against Mr Gama.

428 From 1 September 2009 Gama was suspended. I presume that such suspension was on full pay as there was nothing to suggest the contrary. A persuasive factor in the present circumstances is that there is nothing in the delay which has caused any material prejudice to Mr Gama or which can be properly described as either unexplained or so grossly unfair that it may be taken to preclude the employer from taking disciplinary steps. Gama's suggestion that the disciplinary proceedings were part of an orchestrated campaign to prevent his becoming the new Group CEO has not been established on the evidence. It can therefore not be said that he was prejudiced as regards his application for that post as a consequence of the delay in the disciplinary proceedings. Certainly, the fact that Gama applied for the post of CEO can never be a reason why disciplinary proceedings should not have been preferred against him where there was sufficient evidence for the executives responsible to reasonably decide that

disciplinary action was required and that Gama needed to explain fully in a disciplinary enquiry what had occurred in relation to both the 50 like new contract and the GNS contract. Neither is there any evidence of conduct by Transnet that could be characterised as a waiver on its part such that it would be precluded from calling Gama to account for his conduct.

429 In consequence, I find that the delays such as they are do not constitute grounds for why Transnet should not proceed with this disciplinary enquiry against Gama.

The alleged inconsistency Issue

430 On the issue of inconsistency in relation to discipline Oates was cross-examined in relation to a tender process audit report into procurement dated 7 October 2008 which was sent to the General Manager: Group Strategic Supply Management (Exhibit G). Whilst that report contained various records of confinement contracts concluded beyond the level of authorisation and reported on instances of contracts having been concluded and money spent without formal contract documentation in place, Oates pointed out that this report had to be distinguished from a fraud investigation because it was simply an internal audit report which was a report to management on its controls. This was entirely different from a forensic investigation which is the other type of work which TIA performs for Transnet. In a forensic investigation one receives an allegation and pursues a process of establishing the authenticity of the allegation made. The tender audit report which was referred to was a tool to address management controls and as such the fact that an overall report classification of "unsatisfactory" was given based on a number of instances identified in the report meant no more than that the audit revealed that corrective action should be taken by management. Such corrective action is a management function and not the function of TIA. The report was

essentially aimed at identifying risks in the procurement system which management should seek to address.

- 431 Mr Singh who was the General Manager Compliance for Transnet in 2007 and 2008 and later held the post of Key Financial Officer was then called to testify on the issue of compliance. He received the October 2008 audit report into procurement (Exhibit G) a few days before he testified in the hearing. He explained what the report entailed. He accepted that it identified nineteen instances of what are termed "Level 1 Observations" which are observations by the auditors of circumstances which *"could cause material financial, regulatory or reputational risk at Group level. Deviations from the Group's approved Code of Ethics. Deviations from the Group's approved policies e.g. DPP. " or "Multiple individual control failures which result in multiple control objectives/risks not being appropriately mitigated."*⁴²⁷ He was however not in a position to provide information regarding the underlying circumstances leading to each of these Level 1 Observations. There was accordingly no evidence led of the circumstances of the various underlying instances which the auditors identified in this report where managers had exceeded their delegated authority or breached Transnet's policies or Code of Ethics in other ways.
- 432 There is accordingly no evidence of another set of similar, never mind identical, circumstances in which Transnet made different decisions or adopted a different approach to disciplining its employees from the approach adopted in Gama's case. The only evidence is that of the auditor's categorisation in a compliance report by TIA, but the underlying facts of the instances which gave rise to that report were not canvassed in evidence before the enquiry.

⁴²⁷ Bundle G, typed page 43; Singh: record page 50

433 There was unchallenged evidence that in each case conducted by Transnet a discretion was exercised in relation to the particular circumstances and Gama does not identify any case where someone who did what he is alleged to have done was treated differently and not charged. Gama has failed to lay a credible basis for the claim of inconsistency and accordingly there is no question of Transnet having failed to discharge the onus to disprove the allegation of inconsistency.⁴²⁸

434 I find that there is no merit in the argument of inconsistency.

Conclusions and Summary of Findings

435 I understand that these findings are in the nature of a recommendation to Transnet. In summary, and for the reasons fully set out above, I find Gama guilty of misconduct on charges 1, 2 and 4.

436 These findings have dealt only with the merits of the misconduct charges. The issue of what sanction ought to be imposed in consequence of the findings of misconduct which have now been made is to be considered under the Transnet Disciplinary Code and Procedure⁴²⁹ in a separate proceeding as was the arrangement which was made with the parties at the close of the previous hearing.

D.M. Antrobus SC
Disciplinary Enquiry Chairman
Sandton Chambers
4 June 2010

⁴²⁸ Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC)
⁴²⁹ Parmalat SA (Pty) Ltd v CCMA and others [2009] 6 BLLR 558 (LC)
Clause 6.3.1