

**SUPPLEMENT**

**TO**

**EXHIBIT S11**



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

2<sup>nd</sup> floor, Hillside House  
17 Empire Road,  
Parktown  
Johannesburg  
2193  
Tel: (010) 214-0651  
Email:

[inquiries@sastatecapture.org.za](mailto:inquiries@sastatecapture.org.za)

Website: [www.sastatecapture.org.za](http://www.sastatecapture.org.za)

---

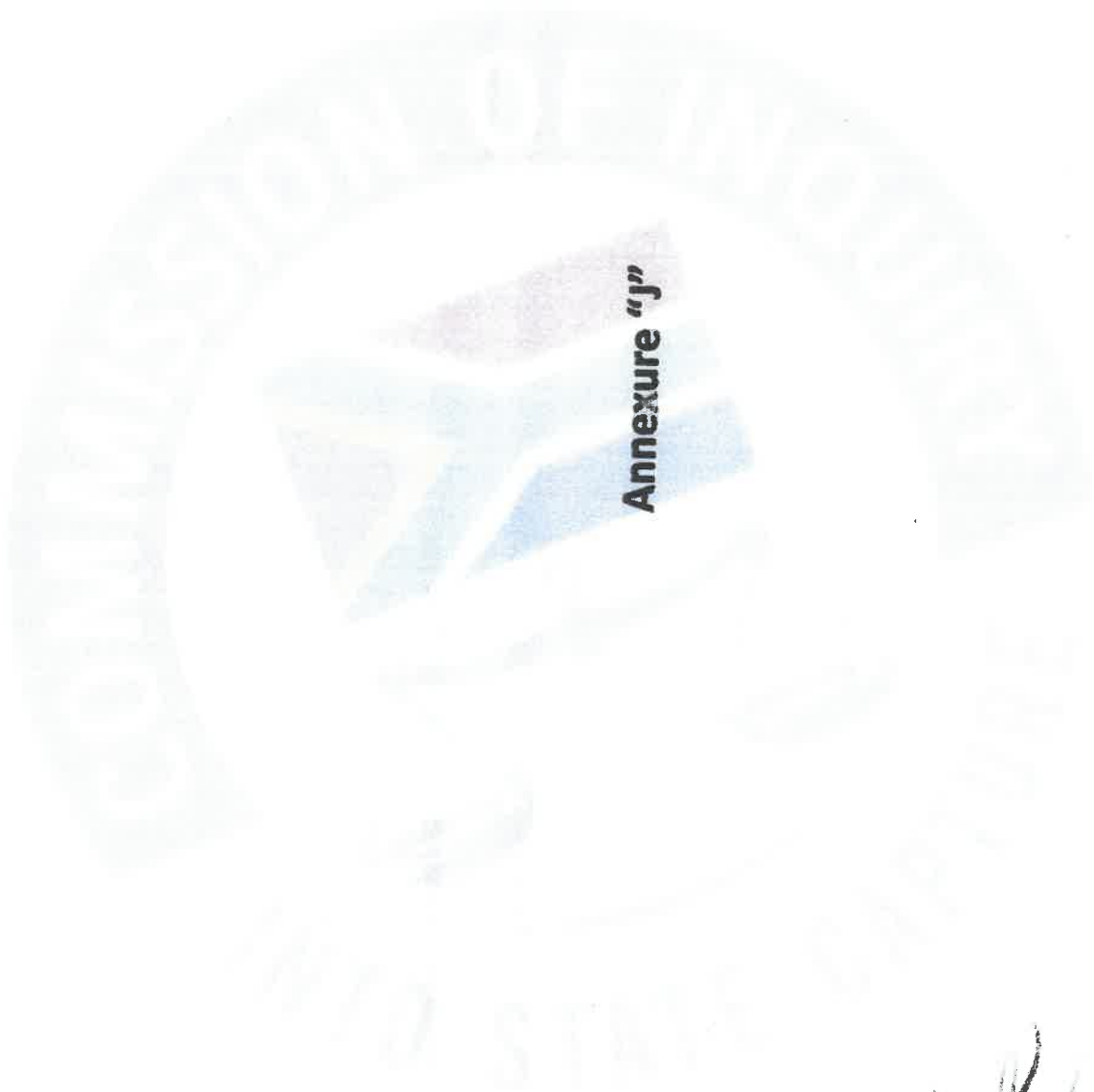
**INDEX: SUPPLEMENT TO EXHIBIT S11**

---

| <b>Description</b>                            | <b>PAGES</b>     |
|---|------------------|
| Annexure "J" to affidavit of Angelo Agrizzi   | AA-278 to AA-344 |
| Annexure "Q3" to affidavit of Angelo Agrizzi  | AA-388 to AA-392 |
| Annexure "Q4" to affidavit of Angelo Agrizzi  | AA-393 to AA-395 |
| Annexure "Q5" to affidavit of Angelo Agrizzi  | AA-396 to AA-399 |
| Annexure "Q6" to affidavit of Angelo Agrizzi  | AA-400 to AA-404 |
| Annexure "Q8" to affidavit of Angelo Agrizzi  | AA-417 to AA-443 |
| Annexure "Q12" to affidavit of Angelo Agrizzi | AA-477 to AA-480 |
| Annexure "Q13" to affidavit of Angelo Agrizzi | AA-481 to AA-484 |

Annexure "J"

"j"



WISCONSIN

A handwritten signature in black ink is located in the bottom right corner of the page.

## EXECUTIVE SUMMARY

The Special Investigating Unit (SIU) functions within the statutory framework set out in the Special Investigating Units and Special Tribunals Act 74 of 1996 (the Act). The SIU may only investigate matters referred to it for investigation by the President in terms of section 2(1) of the Act. The SIU's intervention in this investigation is authorised by presidential proclamation R44 of 2007 gazetted on 28 November 2007 (the Proclamation).

In 2006, various allegations surfaced in the media relating to the allegedly irregular awarding of contracts by the Department of Correctional Services (DCS) to Bosasa Operations (Pty) Ltd (Bosasa) and its affiliated companies.

Later in 2006, the Public Service Commission (PSC) and the Office of the Auditor General (OAG) referred specific allegations relating to contracts awarded to Bosasa to the SIU for investigation. Some of the more serious allegations are that:

- An irregular relationship existed between Bosasa or members of the Bosasa Group of Companies and two DCS officials, namely, the former Commissioner of Correctional Services, Mr L Mti (Commissioner Mti) and the DCS Chief Financial Officer (CFO) Mr P Gillingham (Gillingham)
- Commissioner Mti and Gillingham may have unduly received benefits as a result of the award of some of the contracts awarded by DCS to Bosasa and its affiliates
- Two tenders, namely, the kitchens tender and the access control tender, were irregularly extended
- Bosasa and its affiliates were responsible for drafting the bid specifications for these tenders.

Shortly after the publication of the proclamation, the SIU commenced with the investigation of the contracts awarded to Bosasa and its affiliates, namely, the kitchens, access control, fencing and television contracts.

The purpose of this report is to refer in terms of section 4(1)(d) of the Act, the evidence gathered by the SIU relative to the abovementioned contracts which, in its view, points to the commission of an offence by Bosasa and its affiliates and the persons mentioned in this report, to the Acting National Director of Public Prosecutions (NDPP) and further, to advise the DCS in terms of section 5(7) of the Act, that the evidence gathered by the SIU justifies the institution of legal proceedings by it against Bosasa and its affiliates and the persons mentioned in this report.



Two handwritten signatures in black ink, located in the bottom right corner of the page.

**Findings in respect of the kitchens tender: HK2/2004**

This contract was awarded to Bosasa on 20 July 2004.

The evidence gathered by the SIU, shows that there were clear deviations from the *National Treasury Supply Chain Management: A Guide for Accounting Officers/Authorities (SCM: Guide for Accounting Officers)*<sup>1</sup>, more particularly, in that the end user departments were not included in the bid process. There was also no proper financial planning for this tender in that there was no feasibility study nor needs analysis conducted.

The evidence clearly shows that Gillingham, outside the course of his normal duties, played an integral role from the outset in the procurement process and was irregularly instrumental in developing the tender specifications.

On the evidence of a whistleblower, a former employee of Bosasa (the witness), Bosasa irregularly participated in drafting the specifications for this tender. On the evidence of the witness, the specifications were drafted in such a manner that the security aspects of the tender provided Bosasa with a clear advantage over other bidders.

During the course of a search and seizure operation conducted at Gillingham's residence, a document containing the bid evaluation criteria and guidelines for evaluating the kitchens tender was found in the form of electronic data. Mr J Malan (Malan) the SIU cyber forensic expert, determined that this document originated from the computer of Mr A Agrizzi (Agrizzi), Bosasa's Chief Executive Officer/Managing Director. According to Malan, the document was last saved by Agrizzi on 28 June 2004. The evidence shows that this was on the same day that the DCS commenced with its screening of the bids received in respect of the kitchens tender. Whilst, Malan could not determine the date of first creation of the document on Agrizzi's computer, the evidence raises two concerns: first, whether Agrizzi (and as such Bosasa) was in possession of the document at the time that Bosasa's tender was submitted for the kitchens tender, and second, whether Bosasa was a party to the drafting of the evaluation criteria and guidelines for evaluating the tender. Obviously, if this were so, it would not only have subverted the entire procurement process because it would have placed Bosasa in an unduly advantageous position with reference to its competitors, but it would also have exposed the DCS to civil suits from unsuccessful bidders.

The evidence clearly indicates that Gillingham and Commissioner Mti received financial benefits from Bosasa after the award of this tender. The SIU was unable to find any lawful cause for such benefits being made to Gillingham and Commissioner Mti. The evidence

<sup>1</sup> Issued to all Accounting Officers on 26 February 2004; attached as Annexure 1



Two handwritten signatures in black ink, one above the other, located in the bottom right corner of the page.

further shows that Mr WD Mansell (Mansell) and Mr J Smith (Smith)<sup>2</sup>, both employees of the Bosasa Group, were instrumental in effecting these benefits to Gillingham and Commissioner Mti. The timing of the benefits appear to be sufficiently linked to the awarding of the kitchens tender. In the circumstances, it was unlawful for Gillingham and Commissioner Mti to have received these benefits.

The kitchens contract was extended by Commissioner Mti on 17 May 2005. In light of the irregular benefits received by him the extension of this contract was irregular and unlawful.

**Recommendations in respect of the kitchens tender**

The SIU recommends that:

- the DCS considers instituting civil proceedings in the appropriate forum for the recovery of any losses that might have been sustained by the DCS on account of the award of the kitchens tender to Bosasa
- the DCS considers instituting disciplinary proceedings against Gillingham (Commissioner Mti no longer being in the employ of DCS) arising from his irregular conduct relating to the procurement process involving the kitchens tender
- the NDPP considers instituting criminal proceedings against Gillingham, Commissioner Mti, Bosasa, the latter's office bearers and to the extent that Mansell, Agrizzi and Smith may not be office bearers of Bosasa, that they also be considered for prosecution in their personal capacities.

**Findings in respect of access control tender: HK2/2005**

This contract was awarded to Sondolo IT (Pty) Ltd (Sondolo), an affiliate company within the Bosasa Group, on 11 April 2005.

The evidence shows that there were clear deviations from the *SCM: Guide for Accounting Officers*, more particularly, in that the end user departments were not included in the bid process. According to the evidence, there was no proper financial planning for this tender in that there was no feasibility study nor needs analysis conducted. The budget for this tender was also significantly exceeded.

The evidence shows that Gillingham, outside of his normal duties, played an integral role from the outset in the procurement process and was irregularly instrumental in developing the tender specifications.

<sup>2</sup> Mr WD Mansell is a consultant to Bosasa; Mr J Smith is the Bosasa Financial Administrator

Handwritten signatures and initials, including a large 'B' and a signature that appears to be 'J. Smith'.



According to the evidence of both the witness and Malan, Bosasa was irregularly involved in drafting the bid specifications for this tender.

On the evidence of the witness, Agrizzi requested him to prepare specifications in line with the technology Bosasa was employing in the kitchens contract. According to him, the specifications prepared by him were drafted in such a manner that the security aspects afforded Sondolo a clear advantage over the other bidders. The witness subsequently identified a number of similarities between the specifications prepared by him and those in the advertisement for this tender.

On the evidence of Malan, a document titled "cctv bid.doc" was retrieved from the DCS and Bosasa systems. The document contained specifications for the access control tender. Version 2 of the document was found on the Bosasa system, whilst version 4 thereof was emailed by Gillingham from an email address belonging to Bosasa, to Mr S Mlombile (Acting Chief Deputy Commissioner: Corrections) (Mlombile) of DCS.

Given the fact that the evidence disclosed that there was a close association between Gillingham and Bosasa, the probabilities point to the fact that he must have been aware of Bosasa's irregular participation in drafting the specifications. In the circumstances, Gillingham and Bosasa's involvement in the drafting of the specifications seriously undermined the fairness of the procurement process.

Despite the fact that the Department of Public Works (DPW) had previously been engaged by the DCS to assist in drafting specifications for tenders involving technical detail, the evidence showed that DPW was excluded by Gillingham and Commissioner Mti from the procurement process for this tender, even though technical detail was involved.

The evidence further showed that the bid submission period was reduced from 30 to 21 days, without any apparent or justifiable cause. Given the technical nature of the tender and Bosasa's participation in the drafting of the specifications for the bid, the shortened period for submission of bids allowed Sondolo to enjoy an unfair advantage over the other bidders.

Given the fact that Bosasa operated the kitchens contract and therefore had knowledge of the correctional centre environment, the probabilities point to the fact that Sondolo enjoyed a significant advantage over its competitors because of its relationship with Bosasa.

Despite it being a bid requirement that bidders should have five years' experience, Sondolo was only registered 7 days before the closing of bids but was still awarded the tender. This was obviously irregular.

*(Handwritten initials and signature)*



The evidence clearly indicates that Gillingham received financial benefits from Bosasa after the award of this and the previous tender. The SIU was unable to find any lawful cause for such benefits being made to Gillingham. The evidence further shows that Mansell and Smith were instrumental in effecting these benefits to Gillingham. The evidence also shows that Gillingham failed to disclose the benefits received by him to either the BEC or the NBAC. Aside from it being unlawful for Gillingham to have received these benefits, it was further irregular for him not to have disclosed this fact before or during the deliberations related to this tender.

The SIU did not conduct a comprehensive financial investigation as in the case of Gillingham, into benefits Commissioner Mti may have received from Bosasa, because of various limitations experienced during the SIU's investigation. However, the limited evidence gathered by the SIU, indicated that he received benefits from Bosasa, a few months before the access tender was granted to Sondolo.

The access control contract was extended by Commissioner Mti on 4 August 2005. In light of the irregular benefits received by him the extension of this contract was irregular and unlawful.

**Recommendations in respect of the access control tender: HK2/2005**

The SIU recommends that:

- the DCS considers instituting civil proceedings in the appropriate forum for the recovery of any losses that might have been sustained by DCS on account of the award of the access control tender to Sondolo
- the DCS considers instituting disciplinary proceedings against Gillingham arising from his irregular conduct relating to the procurement process involving the access control tender
- the NDPP considers instituting criminal proceedings against Gillingham, Commissioner Mti, Sondolo, Bosasa, their office bearers and to the extent that Agrizzi, Mansell and Smith may not be office bearers of either Sondolo or Bosasa, that they also be considered for prosecution in their personal capacity.

Handwritten signature and initials, possibly 'D' and 'K', located at the bottom right of the page.



### Findings in respect of the fencing tender: HK24/2005

The fencing tender was awarded on 29 November 2005 to Phezulu Fencing (Pty) Ltd (Phezulu), an affiliate company within the Bosasa Group.

The evidence shows that there were clear deviations from the DCS SCM User Manual: Directives<sup>3</sup> (DCS procurement directives) in that the end user departments were not included in the bid process. There was also no proper financial planning for this tender in that there was no feasibility study or needs analysis conducted, which resulted in the initial budget being significantly exceeded and in addition being further increased by variation orders valued at R 100 million<sup>4</sup>.

As in the case of the previous two tenders, the evidence shows that Gillingham, outside of his normal duties, played an integral role from the outset in the procurement process and was irregularly instrumental in the developing of the tender specifications.

In this tender, there was a heavy weighting in the evaluation criteria in favour of the integration of the fences with the computer software system, namely, the ON-IMIS system, which Sondolo introduced through the access control tender. This weighting accordingly favoured Phezulu on account of it being an affiliate of Bosasa.

An issue of concern to the SIU was the fact that substantial payments were made to Phezulu at the outset of the contract without adequate performance. The SIU examined payments made to Phezulu in respect of this tender. In terms of the contract provisions, 90% of the contract price was payable on delivery of the raw materials to the construction sites. The structure of this contract resulted in DCS making very large payments to Phezulu at a very early stage of the contract. Since this payment was shortly before the end of the financial year, the SIU concluded that this was a case of fiscal dumping, that is to say, when departments spend large amounts of money just prior to the financial year end to use up their budget, irrespective of whether the department gets value for money for such spending.

A further issue of concern is the fact that the bid conditions stipulated that fences be erected by 17 March 2006. At the compulsory briefing session for this tender, Gillingham confirmed that the erection of the fences was to be effected by 17 March 2006. Two bidders submitted project plans that complied with this deadline. However, Phezulu submitted two project plans

<sup>3</sup> Came into effect in May 2005

<sup>4</sup> The budget for the project was R 340 million, the contract awarded to Phezulu was R 486 million; in addition R 100 million in variation orders were authorised after the conclusion of the contract.



A large, stylized handwritten signature in black ink, located in the bottom right corner of the page.

in terms of which they undertook to deliver raw materials to the sites by 17 March 2008, but would install the fences at a much later date.

In the BEC, Gillingham scored the two service providers referred to above, 0 out of 6 for time and Phezulu a full 6 points, despite the fact that its projected plan did not comply with the timelines. The SIU finds this approach by Gillingham incomprehensible, since on the face of it, Phezulu's project plans clearly did not comply with the tender requirements.

The evidence clearly indicates that Gillingham had received financial benefits after the award of this and the previous two tenders. The SIU was unable to find any lawful cause for such benefits being made to Gillingham. The evidence further shows that Mansell and Smith, with close connections to Bosasa, were instrumental in effecting these benefits to Gillingham.

As previously observed, the SIU did not conduct a comprehensive financial investigation as in the case of Gillingham, into benefits Commissioner Mti may have received from Bosasa, because of various limitations experienced during our investigation. However, the limited evidence gathered by the SIU, indicates that he received benefits from Bosasa, a few months before the fencing tender was granted to Phezulu.

The evidence also shows that Gillingham failed to disclose the benefits received by him to either the BEC or NBAC. Aside from it being unlawful for Gillingham to have received these benefits, it was further irregular for him not to disclose this fact before or during the deliberations related to this tender.

#### Recommendations in respect of the fencing tender

The SIU recommends that:

- the DCS considers instituting civil proceedings in the appropriate forum for the recovery of any losses that may have been sustained by DCS on account of the award of the tender to Phezulu
- the DCS considers instituting disciplinary proceedings against Gillingham arising from his irregular conduct relating to the procurement process involving the fencing tender
- the NDPP considers instituting criminal proceedings against Gillingham, Commissioner Mti, Phezulu, Bosasa, their office bearers and to the extent that Mansell and Smith may not be office bearers of either Phezulu or Bosasa, that they also be considered for prosecution in their personal capacity.







## TERMS OF REFERENCE

The SIU functions within the statutory framework set out in the Act. The SIU was established by the President in terms of section 2(1)(a)(i) of the Act and by Proclamation R118 of 31 July 2001. The SIU may only investigate matters referred to it for investigation by the President in terms of section 2(1) of the Act.

In June 2006, various allegations surfaced in the media relating to the allegedly irregular awarding of contracts by the DCS. The allegations specifically involved the Bosasa Group of Companies and two DCS officials, namely the former Commissioner Mti and the DCS CFO Gillingham.

Later in 2006, the PSC and the OAG referred to the SIU various allegations relating to the allegations made in the media. The PSC and OAG expressed particular concern around the regularity of the procurement processes relating to contracts awarded to Bosasa and two affiliated companies, Sondolo and Phezulu as well as to the nature of the relationship between the said companies and Commissioner Mti and Gillingham.

Some of the allegations the SIU was requested to investigate:

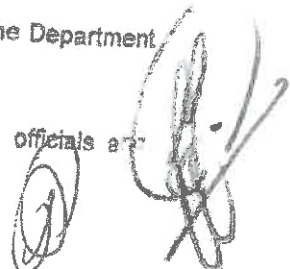
- involved whether Commissioner Mti and Gillingham may have unduly benefited from some of the contracts awarded by DCS to Bosasa
- concerned the problem that in relation to two tenders (access control and fencing) the DCS procured services involving technical detail without involving the Department of Public Works
- involved whether the kitchens tender was irregularly extended to include seven extra kitchens – the contract value grew to over R800 million, which included the adding of the additional kitchens resulting in additional expenditure of R82 million
- involved whether the access control tender may have been irregularly extended to include the staffing of the control rooms – the contract value grew from R237 million to almost R437 million, as Sondolo became responsible for monitoring the CCTV control rooms
- related to whether one of the bidders may have drafted the specifications for one or more of the relevant tenders – there were particular concerns around the specifications of the access control and television tenders
- concerned whether Commissioner Mti may have been involved with a company called Lianorah Investments, which had a relationship with Bosasa
- related to the supply of allegedly inferior quality goods in the access control tender.



The SIU requested a proclamation authorising its investigation of the allegations and was accordingly mandated by the President in terms of the Proclamation to investigate any irregularities perpetrated in connection with the procurement of services by the DCS.

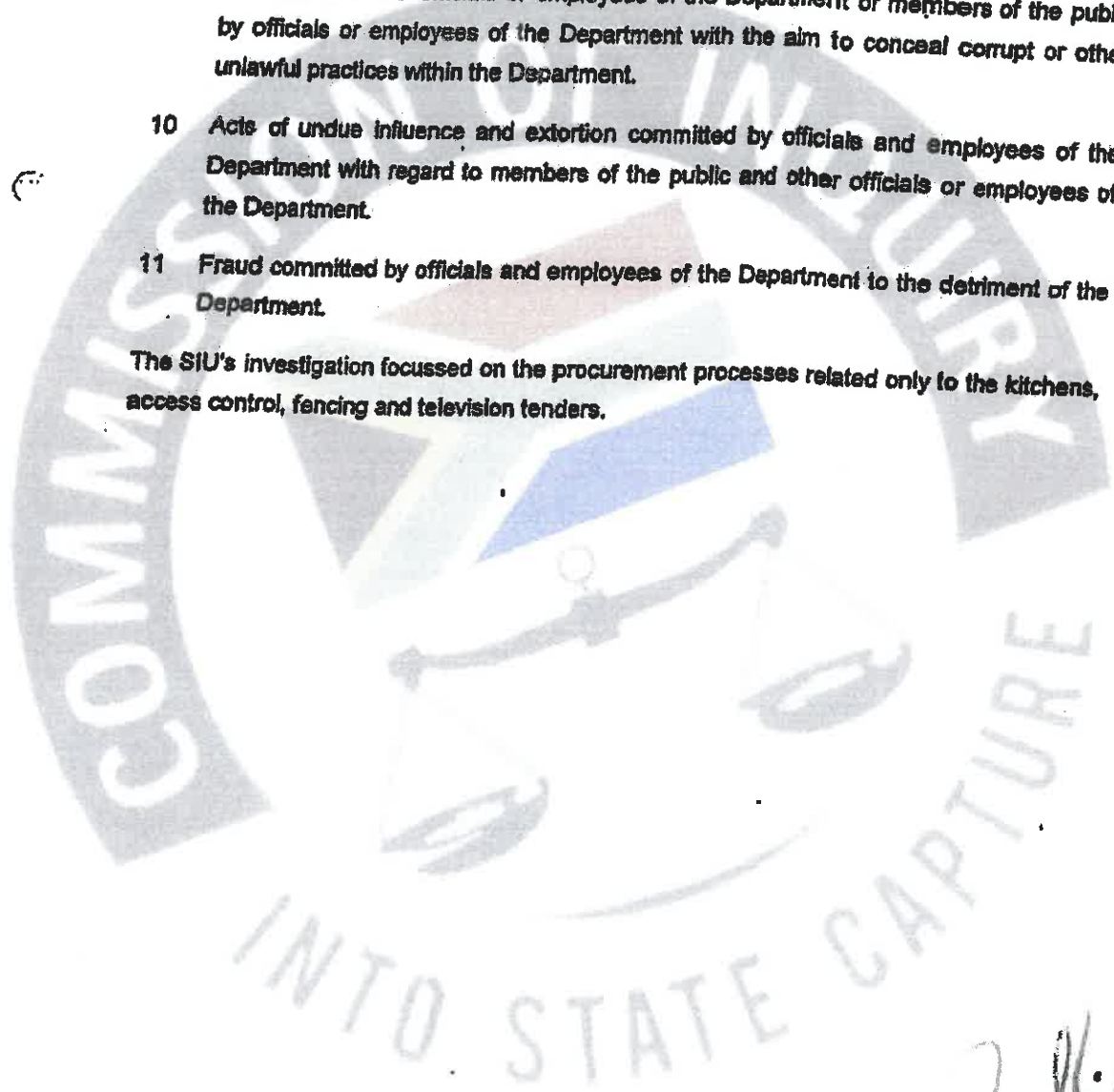
In terms of the Proclamation, the SIU was mandated to investigate:

- 1 The procurement of goods and services by or on behalf of the Department without compliance with the Department's –
  - (a) policies, procedures, prescripts, directives, guidelines or standing instructions (hereinafter collectively referred to as the "prescripts"); and
  - (b) procurement and provisioning systems or supply chain management systems prescribed by applicable legislation;
 in a manner that was not fair, competitive, transparent, equitable and/or cost-effective and payments made in respect thereof.
  
- 2 The failure by officials and employees of the Department to disclose that they had a direct or indirect interest in the suppliers and service providers used by the Department, which represented a conflict of interest.
  
- 3 The failure by the officials and employees of the Department to disclose to the Department that they were engaged in unauthorised business activities for remuneration outside the scope of their employment under the Public Service Act, 1994 (Proclamation 103 of 1994) or the Correctional Services Act, 1998 (Act 111 of 1998).
  
- 4 The conduct of –
  - (a) suppliers and service providers to the Department; and
  - (b) officials and employees of the Department,
 which has resulted or may result in a loss of, damage to or a lack of control over public money, public property or other resources of the Department and any conduct directed at or promoting the aforementioned.
  
- 5 False or inflated claims by, or on behalf of officials and employees of the Department from certain medical aid schemes.
  
- 6 The theft or misuse of property and resources of the Department by officials and employees of the Department.




- 7 Illegal or irregular practices in terms of which officials and employees of the Department received or solicited benefits from other officials and employees of the Department or from members of the public in connection with the execution of their duties or the failure to execute their duties.
- 8 The conduct of officials and employees of the Department, which was aimed at influencing or hampering any investigation or the destruction of evidence.
- 9 The intimidation of officials or employees of the Department or members of the public by officials or employees of the Department with the aim to conceal corrupt or other unlawful practices within the Department.
- 10 Acts of undue influence and extortion committed by officials and employees of the Department with regard to members of the public and other officials or employees of the Department.
- 11 Fraud committed by officials and employees of the Department to the detriment of the Department.

The SIU's investigation focussed on the procurement processes related only to the kitchens, access control, fencing and television tenders.

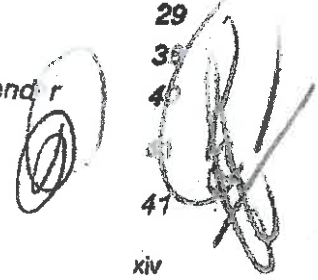


*(Handwritten signature)* *(Handwritten signature)*



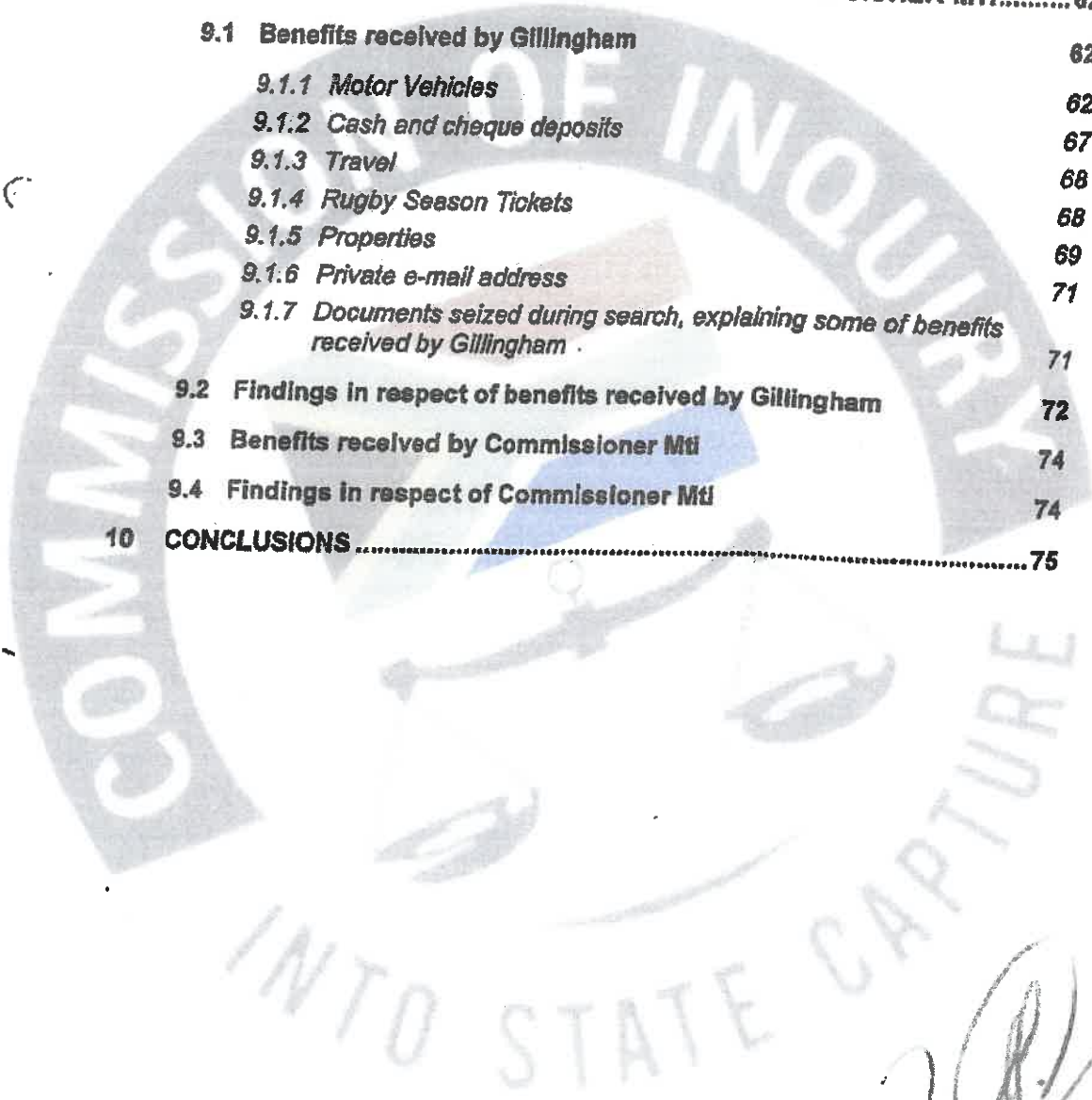
**TABLE OF CONTENTS**

|   | <b>Page</b> |
|---|-------------|
| <b>1 INTRODUCTION .....</b>   | <b>1</b>    |
| <b>1.1 Subject of report</b>  | <b>1</b>    |
| <b>1.2 Background to report</b>   | <b>1</b>    |
| <b>1.3 Objectives of report</b>   | <b>1</b>    |
| <b>2 METHODOLOGY .....</b>  | <b>2</b>    |
| <b>3 OUTLINE OF RELEVANT POLICIES AND SPECIAL LEGISLATION APPLICABLE TO INVESTIGATION .....</b> | <b>3</b>    |
| <b>3.1 The DCS procurement policy</b>   | <b>3</b>    |
| <b>3.2 Treasury guidelines regarding budgeting for the tender process</b>                       | <b>7</b>    |
| <b>3.3 The Construction Industry Development Board legislation and regulations</b>              | <b>11</b>   |
| <b>4 LIMITATION ON THE INVESTIGATION .....</b>  | <b>12</b>   |
| <b>5 CYBER FORENSIC EXPERTISE ENGAGED BY THE SIU .....</b>                                      | <b>13</b>   |
| <b>6 THE BOSASA GROUP OF COMPANIES STRUCTURE .....</b>  | <b>14</b>   |
| <b>6.1 Bosasa Operations (Pty) Ltd</b>  | <b>14</b>   |
| <b>6.2 Sondolo IT (Pty) Ltd and Phezulu Fencing (Pty) Ltd</b>                                   | <b>15</b>   |
| <b>7 COMMISSIONER MTI'S FORMAL RELATIONSHIP WITH BOSASA .....</b>                               | <b>16</b>   |
| <b>8 ANALYSIS OF CONTRACTS .....</b>  | <b>17</b>   |
| <b>8.1 The kitchens tender: HK2/2004</b>  | <b>17</b>   |
| <b>8.1.1 Evidence gathered</b>  | <b>17</b>   |
| <b>8.1.2 Findings</b>   | <b>26</b>   |
| <b>8.1.3 Recommendations in respect of the kitchens tender</b>                                  | <b>28</b>   |
| <b>8.2 The access control tender: HK2/2005</b>  | <b>29</b>   |
| <b>8.2.1 Evidence gathered</b>  | <b>29</b>   |
| <b>8.2.2 Findings</b>   | <b>35</b>   |
| <b>8.2.3 Recommendations in respect of the access control tender</b>                            | <b>40</b>   |
| <b>8.3 The fencing tender: HK24/2005</b>  | <b>41</b>   |
| <b>8.3.1 Evidence gathered</b>  | <b>41</b>   |

STATE CAPTURE  




|       |   |           |
|-------|---|-----------|
| 8.3.2 | <i>Findings</i>   | 49        |
| 8.3.3 | <i>Recommendations in respect of the fencing tender</i>                                   | 51        |
| 8.4   | <b>The television (TV) tender: HK25/2005</b>  | 52        |
| 8.4.1 | <i>Evidence gathered</i>  | 52        |
| 8.4.2 | <i>Findings</i>   | 59        |
| 8.4.3 | <i>Recommendations in respect of the TV tender</i>  | 61        |
| 9     | <b>BENEFITS RECEIVED BY GILLINGHAM AND COMMISSIONER MTI.....</b>                          | <b>62</b> |
| 9.1   | <b>Benefits received by Gillingham</b>  | <b>62</b> |
| 9.1.1 | <i>Motor Vehicles</i>   | 62        |
| 9.1.2 | <i>Cash and cheque deposits</i>   | 67        |
| 9.1.3 | <i>Travel</i>   | 68        |
| 9.1.4 | <i>Rugby Season Tickets</i>   | 68        |
| 9.1.5 | <i>Properties</i>   | 69        |
| 9.1.6 | <i>Private e-mail address</i>   | 71        |
| 9.1.7 | <i>Documents seized during search, explaining some of benefits received by Gillingham</i> | 71        |
| 9.2   | <b>Findings in respect of benefits received by Gillingham</b>                             | <b>72</b> |
| 9.3   | <b>Benefits received by Commissioner Mti</b>  | <b>74</b> |
| 9.4   | <b>Findings in respect of Commissioner Mti</b>  | <b>74</b> |
| 10    | <b>CONCLUSIONS .....</b>  | <b>75</b> |




### LIST OF ABBREVIATIONS

|                             |   |
|-----------------------------|---|
| <b>BEC</b>                  | <b>Bid Evaluation Committee</b>                               |
| <b>CCTV</b>                 | <b>Closed Circuit Television</b>                              |
| <b>CEO</b>                  | <b>Chief Executive Officer</b>                                |
| <b>CEO</b>                  | <b>Chief Executive Officer</b>                                |
| <b>CFO</b>                  | <b>Chief Financial Officer</b>                                |
| <b>CSIR</b>                 | <b>Council for Scientific and Industrial Research</b>         |
| <b>DCS / the Department</b> | <b>Department of Correctional Services</b>                    |
| <b>DPW</b>                  | <b>Department of Public Works</b>                             |
| <b>EFT</b>                  | <b>Electronic Funds Transfer</b>                              |
| <b>eNaTIS</b>               | <b>National Traffic Information Systems</b>                   |
| <b>HCC</b>                  | <b>Head of Correctional Centre</b>                            |
| <b>IT</b>                   | <b>Information Technology</b>                                 |
| <b>JHB</b>                  | <b>Johannesburg</b>   |
| <b>NBAC</b>                 | <b>National Bid Adjudication Committee</b>                    |
| <b>NCC</b>                  | <b>Network Computing Consultants</b>                          |
| <b>OAG</b>                  | <b>Office of the Auditor General</b>                          |
| <b>ON-IMIS</b>              | <b>Open Network Intelligent Management Information System</b> |
| <b>PFMA</b>                 | <b>Public Finance Management Act</b>                          |
| <b>PSC</b>                  | <b>Public Service Commission</b>                              |
| <b>RAMP</b>                 | <b>Repairs and Maintenance Project</b>                        |
| <b>SAPS</b>                 | <b>South African Police Service</b>                           |
| <b>SCMU</b>                 | <b>Supply Chain Management User</b>                           |
| <b>SETA</b>                 | <b>Sector Education and Training Authority</b>                |
| <b>SIU / the Unit</b>       | <b>Special Investigating Unit</b>                             |
| <b>VPN</b>                  | <b>Virtual Private Network</b>                                |



Two handwritten signatures in black ink, one above the other, located in the bottom right corner of the page.

**PROMINENT ROLE PLAYERS**

| <b>Individual</b>                   | <b>Position</b>  |
|-------------------------------------|--|
| Mr Angelo Agrizzi                   | Chief Executive Officer/General Manager, Bosasa Operations |
| Mr Carlos Bonifacio                 | Auditor / Consultant: Consilium                            |
| Consilium (Pty) Ltd                 | Company linked to Bosasa                                   |
| Ms Megan Gillingham                 | Mr Gillingham's daughter                                   |
| Mr Patrick O'Connell Gillingham Jnr | Mr Gillingham's son  |
| Mr Patrick O'Connell Gillingham     | Chief Deputy Commissioner: Finance                         |
| Mr Ryan Albert Gillingham           | Mr Gillingham's son  |
| Mrs Theresa Gillingham              | Mr Gillingham's spouse                                     |
| Grande Four Property Trust          | A trust linked to WD Mansell                               |
| Mr P Leshabane                      | Executive Director, Bosasa Group of Companies              |
| Mr William Daniel Mansell           | Consultant: Bosasa & Consilium                             |
| Mr Jarrod Mansell                   | Mr Mansell's son   |
| Mrs Lisa Mansell                    | Mr Mansell's daughter-in-law                               |
| Mr Linda Mli                        | National Commissioner: DCS                                 |
| Dr Jurgen Smith                     | Director: Consilium<br>Financial Administrator: Bosasa     |
| Andries van Tonder                  | CFO: Bosasa  |
| Frans Vorster                       | Fleet Manager: Bosasa                                      |



BARCODE

**LIST OF AFFIDAVITS OBTAINED**

| Name             | Current Occupation  | No. of Affidavits obtained |
|------------------|---|----------------------------|
| Mr C Aries       | DCS Secretariat Bid Adjudication Committee                          | Applicable to all Tenders  |
| Mr JDE Basson    | DCS Deputy Director: Contract Management                            | HK2/2004                   |
| Mr J Breytenbach | Chief Director: Norms and Standards, National Treasury              | Applicable to all Tenders  |
| Dr JJ Coetzee    | DCS Deputy Commissioner: Operations and Management Support          | HK2/2004, HK25/2005        |
| Mr W Damons      | DCS Deputy Commissioner: Facilities and Security                    | HK2/2005, HK24/2005,       |
| Mr P Du Preez    | DCS Deputy Director: Security Support                               | HK2/2005, HK24/2005        |
| Mr F Engelbrecht | DCS Deputy Regional Commissioner: Gauteng                           | HK2/2004                   |
| Ms B George      | Legal & Compliance Manager: Construction Industry Development Board | HK24/2005                  |
| Mr L Gqili       | DCS Director: Formal Education                                      | HK25/2005                  |
| Mr CJ Haak       | Director: Correctional Services, National Treasury                  | Applicable to all Tenders  |
| Mr P Leslie      | DCS Deputy Director: Budget Control                                 | Applicable to all Tenders  |
| Mr J Lethoba     | DCS Director: Systems Development                                   | HK25/2005                  |
| Mr J Maako       | DCS Director: Contract Management                                   | Applicable to all Tenders  |
| Ms M Mabhena     | DCS Director: Health Services                                       | HK2/2004, HK25/2005        |
| Mr T Mapasa      | DCS Director: Procurement   | Applicable to all Tenders  |
| Mr F Mocheko     | DCS Director: Building and Maintenance                              | HK2/2005                   |
| Mr M Ngubo       | DCS Deputy Commissioner: Supply Chain Management                    | HK2/2005                   |
| Mr W Pretorius   | DCS Deputy Director: Tender Management                              | HK2/2004, HK24/2005        |
| Mr P Ramorotho   | DCS Deputy Director: Nutrition and Hygiene Services                 | HK 2/2004                  |
| Ms J Sishuba     | DCS Chief Deputy Commissioner Development and Care                  | HK2/2004, HK25/2005        |
| Mr HB Steyn      | DCS Director: Security Management Services                          | HK2/2005, HK24/2005        |
| Mr H Truter      | DCS Assistant Director: Professional Services Procurement           | Applicable to all tenders  |
| Ms S Truter      | DCS Assistant Director: Procurement Policy Formulation              | Applicable to all Tenders  |
| Mr AJC Venter    | DCS Area Co-ordinator: Corrections: Gauteng                         | HK2/2005 and HK24/2005     |
| Mr F Venter      | DCS Assistant Director: Risk Profile Management                     | Applicable to all Tenders  |
| Mr JP Venter     | Principal Engineer: Council for Scientific and Industrial Research  | HK25/2005                  |



xviii

| Name        | Current Occupation                      | No. of Affidavits obtained |
|-------------|---|----------------------------|
| Mr M Wolela | DCS Deputy Commissioner: Communications | HK25/2005                  |
| The witness | Former Bosasa Employee                  | HK2/2004 and HK2/2005      |

**LIST OF TABLES**

|   | Page |
|---|------|
| Table 1: Dates of deleted data on Bosasa servers.....   | 13   |
| Table 2: Chronology of events regarding the tender process for kitchens tender.....           | 19   |
| Table 3: BEC and NBAC members for kitchens tender.....  | 23   |
| Table 4: Chronology of events regarding the bid process of tender HK2/2005.....               | 31   |
| Table 5: BEC and NBAC members for the access control tender.....                              | 36   |
| Table 6: Chronology of the key events involved in the bid process for fencing tender.....     | 41   |
| Table 7: BEC and NBAC members for fencing tender.....   | 47   |
| Table 8: Chronology of key events in the TV tender.....                                       | 52   |
| Table 9: BEC and NBAC members for the TV tender.....  | 56   |
| Table 10: Combined scoring percentages obtained.....  | 57   |
| Table 11: BEC and NBAC members for TV tender.....   | 58   |
| Table 12: Suspicious cash and cheque deposits into ABSA account held by<br>Mr Gillingham..... | 67   |

INTO STATE CAPTURE




  
 xbx

## 1 INTRODUCTION

### 1.1 Subject of report

The SIU's findings in the investigation in terms of its terms of reference are set out in this report. The SIU investigated the kitchens, access control, fencing and television tenders. The report addresses the SIU's specific findings in relation to these four tenders.

### 1.2 Background to report

The SIU and the DCS entered their first investigation partnership on 1 October 2002. This partnership was extended for a further 3-year period on 9 June 2006 and terminated on 31 March 2009. As part of its service offering to the DCS, the SIU was requested to conduct procurement investigations.

Fairly early in the renewed partnership various allegations were raised in the media regarding possible irregularities in the procurement processes followed by DCS in procuring the services of Bosasa, Sondolo and Phezulu. Sondolo and Phezulu form part of the Bosasa Group of Companies. Further information pertaining to the formation and directorships of these companies is contained in section 6 (The Bosasa Group of Companies Structure) below.

This matter was then referred to the SIU in late 2006 by the PSC and the OAG. The SIU was requested to investigate various allegations in respect of these service providers (as set out in the terms of reference) and two specific officials within DCS, namely, Gillingham and Commissioner Mti.

The SIU obtained the Proclamation<sup>5</sup>, authorising this and other investigations in the DCS context, which meant the SIU was then in a position to fully investigate these tenders. The SIU then accordingly proceeded with its investigation.

### 1.3 Objectives of report

Section 4(1)(d) of the Act<sup>6</sup> allows the SIU to refer evidence which points to the commission of an offence to the relevant Prosecuting Authority.



<sup>5</sup> Proclamation R44 of 2007, attached as Annexure 2

<sup>6</sup> The Special Investigating Units and Special Tribunal Act 74 of 1996, attached as Annexure 3

Section 5(7) of the Act provides that if during the course of an investigation, any matter comes to the attention of the Head of the SIU which, in his/her opinion, justifies the institution of legal proceedings by a state institution against any person, he/she may bring such matter to the attention of the State Attorney or the institution concerned, as the case may be.

Bearing the aforesaid provisions in mind, the objectives of the report are to:

- give an exposition of the evidence gathered during the investigation
- provide a summary of the findings based on the evidence
- make recommendations on the institution of legal proceedings.

## 2 METHODOLOGY

The SIU conducted the investigation as authorised by the Proclamation. The SIU employed a multi-disciplinary team consisting of forensic lawyers, forensic accountants, forensic investigators and cyber forensic experts to conduct this investigation. The SIU applied a uniform methodology across the investigation, involving the following:

- A review of all relevant documentation related to the tenders listed above
- Determining the level of compliance with DCS procurement policy, the relevant procurement legislation and standards set by Treasury
- Conducting interviews with and obtaining affidavits from officials within the DCS involved in the procurement process
- Conducting interviews with officials within Treasury and where necessary obtaining affidavits from them
- Conducting interviews with other witnesses that could shed light on the investigation
- Conducting a financial analysis into the affairs of Gillingham and a more limited analysis in respect of Commissioner Mti
- Conducting search and seizure operations to obtain evidence related to the investigation
- Obtaining and analysing of computer images obtained from Bosasa and various persons who featured in the procurement process
- An analysis of the documentary and electronic evidence obtained by the multi-disciplinary team.



2025-01-20 10:00:00

Handwritten signature and initials in the bottom right corner of the page.

The SIU's conclusions rely on the facts established from the documentary and electronic information obtained during the course of the investigation.

### 3 OUTLINE OF RELEVANT POLICIES AND SPECIAL LEGISLATION APPLICABLE TO INVESTIGATION

#### 3.1 The DCS procurement policy

A summary of the key steps in the procurement processes in the DCS are set out below.

##### **Identification of a need**

A need should be identified for the acquisition of a service or goods. A need is based on a strategic plan of a department within the DCS that serves as a basis for the identification of resources needed to achieve set objectives. The particular department's operational plan specifies the timelines for the acquisition of the resources and the achievement of its set goals. A budget estimate is prepared which expresses the need for funds necessary to acquire the resources.

##### **Availability of Funds**

All financial matters must first be finalised before bids are invited, i.e. bids should not be invited if funds are not available.

##### **Drafting of specifications**

Specifications should promote the broadest possible competition while simultaneously assuring that critical elements of performance are achieved. Specifications should be based on relevant characteristics and / or performance requirements. The end user is responsible for the drafting of the specifications of tenders, and may obtain assistance from the private sector when preparing the specifications. However, the involvement of the private sector should involve as many role players in the specific sector as possible to ensure that the specifications are as broadly drafted as possible and that they encourage competition.

##### **Site Inspection and Explanatory meetings**

Where it is necessary to invite prospective bidders to a site inspection or explanatory meeting, it should be indicated in the invitation to bidders whether this is compulsory



Handwritten signatures and initials in the bottom right corner, including the number 3.

or not. An attendance register should be completed by all attendees. Minutes of such meetings should be taken and distributed to all prospective bidders that attended.

### **Maintenance**

Bidders are requested to indicate the maintenance structure and cost for the resource that is being tendered for. This information is used for evaluation purposes and budgeting.

### **Preferential Points System**

The Preferential Points System (80/20 or 90/10) was designed to promote the socially desirable aim of Black Economic Empowerment (BEE). Depending on the value of the contract, either the 80/20 or the 90/10 points system is applicable. There is a set threshold for government contracts that determines which of the two points systems applies in any given tender. Assuming for argument's sake that the threshold is R5 million, then contracts below that value will be assessed according to the 80/20 system; if the contract is valued at above R5 million, the 90/10 system applies. Thus in dealing with a tender of R5 million or less, 20% of the bid evaluation points should be allocated to the assessment of the bidder's BEE profile, and conversely, when dealing with a tender above R5 million, the 90/10 principle applies and only 10% of the bid evaluation points are allocated to the evaluation of the bidder's BEE status. The particular points system applicable, whether 80/20 or 90/10, should be indicated in the bid documents.

### **Evaluation Criteria**

In all four tenders referred to above and reviewed by the SIU, the price and functionality evaluation criteria were adopted by the DCS. National Treasury Regulations and Practice Notes set out the circumstances in which the price and functionality criteria should be applied.

### **Compiling bid documents**

Bid documents are compiled and issued to prospective bidders by the Procurement Unit (PU) and consist of Specifications, Terms of Reference (TOR), General Conditions and other standard documents which address issues such as pricing, price adjustments, declarations of interest, etc.



A handwritten signature in black ink, located in the bottom right area of the page, overlapping the 'STATE CAPTURE' watermark.

**Communication with bidders**

Before bids close, communication between the officials of the department and prospective bidders may take place to clarify issues about the bid. During the evaluation of bids, delegated officials of the PU may communicate in writing with the bidders to obtain information where it is incomplete for clarification.

**Approval to procure and appointment of Bid Evaluation Committee (BEC)**

The BEC members are recommended by the end user and approved by the accounting officer of the relevant department seeking to acquire the resource. This committee evaluates bids according to given criteria, supplied at the commencement of the evaluation process. The process remains confidential. All members are required to declare any interests beforehand.

**Appointment of the Bid Adjudication Committee (NBAC)**

The members of the BAC are appointed by the accounting officer of the relevant department seeking to acquire the resource. There is a national BAC (NBAC) that considers recommendations in all cases with an estimated value of above R5 million. All members are required to declare any interests beforehand. No member of the BAC is appointed to the BEC or vice versa.

**Invitation to bid**

The PU is responsible for the compilation of the tender invitation based on detailed specifications and available funding. The bid is advertised in the government tender bulletin and in other media. The minimum period of 30 days between the publication date of the bid invitation and the closing time of bids may be extended for longer periods for tenders that are more complicated or shortened in appropriate circumstances. In terms of the advertisement, interested parties are invited to uplift the bid documents from the Department.

The bid documents contain comprehensive details of the procedure to be followed in submitting bids, qualifying criteria, forms to be completed, how the bids would be scored, special bid specifications etc. The bid documents form the sum total of all the information supplied to bidders to enable them to submit their bids. In the bid documents, the BEC may reserve the right to call for presentations from bidders, should this need arise.



*[Handwritten signature]*

**Receiving bids and opening of bids**

Bids must be opened in public as soon as possible after closing time by officials authorised in writing. Bids are given a registration mark of authenticity and all bids received must be listed. The names of the bidders and their individual total prices should be recorded when bids are opened. All bid documents must be scrutinised and initialled to prevent unnecessary criticism.

In all four tenders investigated by the SIU, the bid documents required bidders to submit their proposals in two separate parts – the one dealing with functionality and the other with price – each part to be contained in a different envelope. The first envelope had to contain the technical proposal (bid relating to functionality) and the second, the price proposal.

**Evaluation criteria of bids by BEC**

The threshold score for functionality in respect of each of the bids was set at 70%. Only those bidders whose functionality proposals met or bettered the threshold score, qualified to have their price proposals considered.

Once the scoring for the pricing proposals is complete, the scores for the functional and pricing proposals are applied to prescribed formulae to determine which of the bidders scored the highest points.

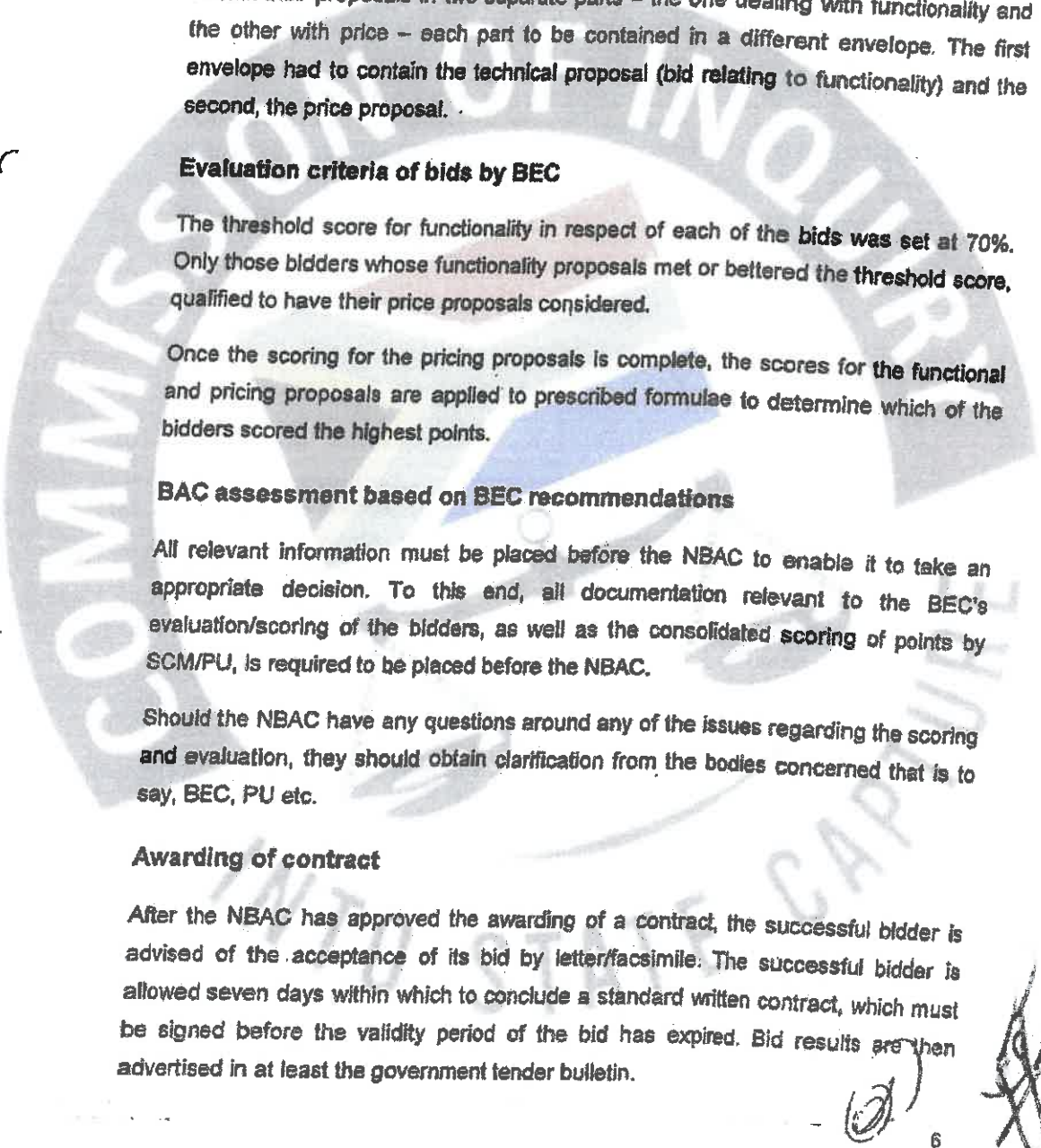
**BAC assessment based on BEC recommendations**

All relevant information must be placed before the NBAC to enable it to take an appropriate decision. To this end, all documentation relevant to the BEC's evaluation/scoring of the bidders, as well as the consolidated scoring of points by SCM/PU, is required to be placed before the NBAC.

Should the NBAC have any questions around any of the issues regarding the scoring and evaluation, they should obtain clarification from the bodies concerned that is to say, BEC, PU etc.

**Awarding of contract**

After the NBAC has approved the awarding of a contract, the successful bidder is advised of the acceptance of its bid by letter/facsimile. The successful bidder is allowed seven days within which to conclude a standard written contract, which must be signed before the validity period of the bid has expired. Bid results are then advertised in at least the government tender bulletin.



Handwritten signatures and initials, including a circled '6'.



television tenders, taken together with a further project relating to information technology and the purchasing of government vehicles, amounted to more than the initial saving of R641 million. Additional funds were subsequently sourced from "white paper" funds in the following year.

Lastly, according to Leslie, National Treasury had complained about spending such large amounts close to the end of the financial year and commented that it was equivalent to "fiscal dumping", i.e. where departments spend large amounts of money just prior to the financial year end to exhaust their budget, ignoring whether the department gets value or not for such spending.

The SIU interviewed Mr J Breytenbach<sup>9</sup> (Breytenbach) of National Treasury with a view to obtaining clarity on a number of aspects applicable to the procurement process and to enable the SIU to appraise the procurement processes followed by the DCS and those prescribed by National Treasury.

According to Breytenbach, all goods and services procured by State Departments were required to be procured through the State Tender Board. The amended State Tender Board Regulations now make it possible for accounting officers of national state departments to procure goods and services either through the State Tender Board Act, or alternatively, in terms of the PFMA. On 5 December 2003, National Treasury issued a circular to all accounting officers confirming that they now had this option available to them and, in addition, issued a number of practice notes in terms of the 2003 regulations.

According to a Ms S Truter<sup>10</sup> (S Truter), Assistant Director Procurement Policy Formulation, on 8 March 2004, Commissioner Mti, opted for the DCS procuring goods and services in terms of the PFMA. As an interim measure, the DCS used the prescripts of the ST37: User Manual: Directives from March 2004 to May 2005, after which its own DCS SCM User Manual: Directives came into effect.

According to Breytenbach, in the event of inconsistencies between the prescripts of the ST37 and the SCM prescripts, the prescripts of National Treasury prevail. Furthermore, section 3(3) of the PFMA provides that if there are inconsistencies between any other legislation and the PFMA, the PFMA prevails.

<sup>9</sup> See affidavit of Mr Breytenbach, Annexure 6  
<sup>10</sup> See affidavit of Ms S Truter, Annexure 7



Further, according to Breytenbach, planning plays an integral part in SCM, and any irregular, unauthorised or fruitless and wasteful expenditure, is regarded as an act of financial misconduct in terms of section 38(1)(h)(iii) of the PFMA.

Paragraph 4.1.1 of ST37 provides that the department with a requirement for a product will usually initiate the drafting of the specifications or identify an existing specification that meets the requirement.

However, paragraph 4.1.1 only prevailed until 26 October 2004. Thereafter National Treasury's circular entitled 'Implementation of Supply Chain Management of 27 October 2004', provides for the appointment of a Bid Specification Committee (BSC), a BEC and a BAC. Paragraph 4.1(a) of the circular, provides that the BSC is responsible for compiling the bid specifications and that the specifications should be written in an unbiased manner to allow all potential bidders to offer their goods and/or services.

The position regarding the drafting of bid specifications changed with effect from 15 March 2005 when a new set of Treasury Regulations (the 2005 Treasury Regulations), issued in terms of the PFMA, came into effect. Regulation 16A8.2(b) of the 2005 Treasury Regulations, prescribes that a supply chain management system must, in the case of procurement through a bidding process, provide for the establishment, composition and functioning of bid specification, evaluation and adjudication committees. As from 15 March 2005, failure to establish a BSC constitutes irregular expenditure in terms of the PFMA.

Treasury Regulation 6.3(c) of the 2003 regulations provides that procurement through a bidding process, must provide for bids to be advertised for at least 30 days prior to closure, except in urgent cases when bids might be advertised for a shorter period as decided by the accounting officer. The shortening of the closing date for a complex tender may also be regarded as unfair to potential bidders in terms of section 217(1) of the Constitution.

According to Breytenbach, there are no specific prescripts regarding the drafting of evaluation criteria, but ideally the criteria should be drafted by the same person/s or committee that drafted the bid specifications.

In respect of the bid evaluation process, regulation 16A8.3(d) of the 2005 Treasury regulations, provides that a SCM official or other role player must ensure that they do not compromise the credibility or integrity of the SCM system through the acceptance of gifts, hospitality, or any other act. Sub-regulations 16A8.4(a) and (b) provide that if



a SCM official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must disclose that interest and withdraw from participating in any manner whatsoever in the process relating to that contract. Failure to do so may be regarded as an act of abuse of the SCM system and the official may be charged in terms of Regulation 16A9 of the 2005 Treasury Regulations.

Further, practice note SCM 3 of 2003 introduced the concept of the evaluation of bids based on functionality and price. The evaluation of bids in terms of functionality and price, however, only applies to bids where the services of consultants, such as consulting firms, engineering firms, auditors and research agencies (professional services), are procured.

Paragraph 1.1 of practice note SCM 3 of 2003, specifically provides that the evaluation of bids on the basis of functionality and price, do not apply to general services such as construction works, manufacture of goods, operation and maintenance of facilities or plants, surveys, catering, cleaning and security in which the physical aspects of the activity predominates.

According to Breytenbach, the evaluation method involving the application of functionality and price, which was applied in the four tenders referred to above, was incorrectly applied and its application was contrary to Treasury Regulations. According to him, the evaluation method that should have been applied to these tenders was where price was the most important factor.

Braytenbach also explained that there is a duty on the BEC to inform the BAC if the tender price of the recommended bids exceeded the available budget. Section 38(1)(h)(iii) of the PFMA, provides that the accounting officer must take effective and appropriate disciplinary steps against any official in the service of the department, who makes or permits unauthorised, irregular, fruitless and wasteful expenditure. In addition, there is a duty on the BEC to ensure that a recommended bidder's price is reasonable prior to recommending to the BAC that the bid should be awarded to their preferred bidder.

With regard to contract administration, and in particular, upfront or advance payments to contractors, regulation 15.10.1.2(c) of the 2005 Treasury regulations, provides that prepayments for goods or services must be avoided, unless required by contractual arrangements with the supplier.



10

A handwritten signature in black ink, located in the bottom right corner of the page, next to the page number '10'.

Section 38(1)(a)(i) of the PFMA prescribes that an accounting officer must ensure that his/her department has and maintains an effective, efficient and transparent system of financial and risk management and internal control.

Paragraph 16.1.1 of practice note SCM 3 of 2003, provides that any changes to a contract that would in aggregate increase the original amount of the contract by more than 15%, is subject to the approval of the accounting officer or his/her delegate. Variation orders should also not infringe on the provisions of section 217(1) of the Constitution of the Republic of South Africa (Act 108 of 1996) (Constitution).

Paragraph 16.1.1 of practice note SCM 3 of 2003, deals with modifications to and extensions of contracts. Although the accounting officer has the authority to approve modifications to and extensions of contracts, such approval should not infringe the provisions of section 217(1) of the Constitution.

Paragraphs 21, 22 and 23 of the practice note SCM 1 of 2003, govern the contractual provisions regarding delays in the supplier's performance, penalties and the determination of default procedures to be followed, when a contractor fails to complete a contract by completion date.

The SIU also interviewed S Truter<sup>11</sup>, Assistant Director: Procurement Policy Formulation in the DCS. S Truter explained the DCS policy pertaining to the submission of tax clearance certificates. According to her, practice note SCM 3 of 2006, provides that if the Department is in possession of an original tax clearance certificate, it is not necessary to obtain a new tax clearance certificate each time a price quotation is submitted from that specific supplier.

Lastly, it needs to be observed, that section 217(1) of the Constitution provides that when an organ of state contracts for goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

### 3.3 The Construction Industry Development Board legislation and regulations

The SIU approached the Construction Industry Development Board (CIDB) to obtain information regarding the legislative framework that was applicable to construction tenders. This is specifically relevant to the fencing tender that was advertised in 2005. The purpose of the initial contact with the CIDB was to determine whether the

<sup>11</sup> ibid



*(Handwritten signature)*

relevant CIDB prescripts had been complied with when the DCS advertised and awarded the tender.

The CIDB was established in April 2001 in terms of the Construction Industry Development Board Act (38 of 2000) (CIDB Act), to regulate and develop the construction industry for improved performance in infrastructure delivery. A further aim of the CIDB, is to promote uniform application of policy with regard to the construction industry throughout all spheres of government.

The SIU interviewed Ms B George<sup>12</sup> (George), the CIDB Legal and Compliance Manager. George advised the SIU on the provisions of the CIDB Act, its regulations and its application to the construction industry. Further details regarding the application of the CIDB Act and its regulations as regards the fencing tender are discussed later herein in sections 8.3.1 and 8.3.2.

#### 4 LIMITATION ON THE INVESTIGATION

The report is based on the review and analysis of documentary and electronic evidence, interviews conducted and affidavits obtained by the SIU. The investigation, however, was constrained by litigation as explained hereunder.

Bosasa has sought by way of application proceedings in the North Gauteng Division of the High Court of South Africa, to interdict the SIU from investigating the full scope of Bosasa's activities regarding the awarding of the four tenders to it by the DCS. As a result of the application, the SIU gave an undertaking not to interrogate material witnesses pending the finalisation of action proceedings for a final order. The SIU has accordingly not interrogated various Bosasa officials, its auditors and other witnesses, who could impart material information regarding issues relating to the investigation. The investigation has accordingly not been as intensive as the SIU would have wanted, and accordingly, any *lacunae* that exist in the investigation, will be addressed upon the resolution of the litigation between the SIU and Bosasa.

<sup>12</sup> See affidavit of Ms B George, Annexure 8



12

**5 CYBER FORENSIC EXPERTISE ENGAGED BY THE SIU**

The SIU employed the services of a cyber forensic expert, Mr J Malan<sup>13</sup> (Malan), to assist it with the retrieval and analysis of electronic data obtained from Bosasa and Gillingham.

The SIU served notices in terms of section 5(2)(b) and (c) of the Act, on Bosasa requesting *inter alia* that Bosasa provide the SIU with access to its servers so that the SIU could obtain electronic copies of relevant data relating to this investigation. Bosasa offered to assist the SIU with its investigation. The SIU and Bosasa reached an agreement in terms of which the SIU would be granted access to Bosasa's servers and laptops so that mirror images could be made of them.

The imaging was initially scheduled to take place in the first week of December 2008, but at the request of Bosasa, this process was postponed until the second week of December 2008. From 8 to 16 December 2008, the SIU made mirror images of the data on the Bosasa file server environment, domain controller system, email server, financial system server as well as of the personal laptops of Agrizzi, Mr A van Tonder (van Tonder) and Mr F Vorster (Vorster). During the imaging process, the SIU was denied access to one server. After the intervention of Adv J Wells, the SIU's Legal Advisor, access was eventually granted and the server was imaged.

Malan analysed the data obtained from Bosasa, using keyword searches. During his initial analysis of the data, he identified that a data deletion utility known as *Erase*<sup>14</sup> had been used to delete a significant amount of data on the servers. Table 1 below, reflects the dates on which the data was erased.

Table 1: Dates of deleted data on Bosasa servers

| Server name         | Document and folder count | Timeline of modification and deletion | Comment  |
|---------------------|---------------------------|---------------------------------------|--|
| Domain server ADS01 | 32 769                    | 24 July 2008                          | Documents appear to have been overwritten and then deleted                     |
| Domain server ADS01 | 60                        | 2 December 2008                       | Mostly archived documents were overwritten and deleted                         |
| File server         | 116                       | 3 December 2008                       | Folder names appear to have been overwritten with random data and then deleted |

<sup>13</sup> See affidavit of Mr J Malan, Annexure 9

<sup>14</sup> The Eraser product is marketed as software that can frustrate cyber forensic investigations.



|                     |       |                 |  |
|---------------------|-------|-----------------|--|
| File server         | 468   | 4 December 2008 | Folder names appear to have been overwritten with random data and then deleted |
| Domain server ADS01 | 7 130 | 6 December 2008 | Documents appear to have been overwritten and then deleted                     |

Because of the use of the *Eraser* utility, Malan had to employ advanced data recovery techniques, which assisted him in his endeavour to recover the maximum amount of data.

Malan also analysed the mirror images of Gillingham's computers and other electronic data storage facilities, obtained during a search conducted at Gillingham's residence in terms of section 6 of the Act. The *Eraser* utility was also found on Gillingham's system, but Malan found that the utility was not used extensively on his computer to destroy data.

Documents of particular relevance to the investigation of the kitchens and access control tenders, were retrieved and analysed by Malan and are dealt with under the discussion of these tenders.

## 6 THE BOSASA GROUP OF COMPANIES STRUCTURE

The SIU conducted an investigation into the establishment and structure of the Bosasa Group of Companies. The SIU's findings are based on information obtained from the Registrar of Companies, the previous auditors of the Bosasa Group, tender documentation submitted by Bosasa, Sondolo and Phezulu and from the official Bosasa website. The SIU's findings are set out below.

### 6.1 Bosasa Operations (Pty) Ltd

During December 1981, a company known as Emafini (Pty) Ltd was formed by Mr SJH Van Ziji (Van Ziji). In December 1984, Smith was appointed to Emafini as a Director. Emafini then changed its name to Meritum Hostels (Pty) Ltd in February 1985.

On 20 June 1996, Van Ziji and Smith entered into a pre-incorporation agreement with a trust, stipulating that a new holding company would be formed and a new operations company would be established to render the services for this holding company, administered by the trust. Mansell signed as a witness to the pre-incorporation agreement.



As a result of this agreement, Meritum Hostels became known as Dyambu Operations (Pty) Ltd (Dyambu Operations), and the trust, as the Dyambu Trust and the holding company, as Dyambu Holdings. In November 2000, Dyambu Operations changed its name to Bosasa Operations (Pty) Ltd.

Mansell was an active Director of Dyambu Operations from 1 June 1997. He resigned as a Director of Dyambu Operations in November 2000, when Dyambu Operations became Bosasa. Despite his resignation from Dyambu Operations, he remained on as a consultant with Bosasa and operated as such during the period that Bosasa was awarded contracts from DCS.

## 6.2 Sondolo IT (Pty) Ltd and Phezulu Fencing (Pty) Ltd

Sondolo, previously known as Mavava Trading (Pty) Ltd, was formed in 2005, while Phezulu, previously known as Nino Construction, changed its name to Phezulu Fencing in 1997.

Upon changing its name in 2005, Sondolo appointed Bester Viljoen Incorporated as its auditors. At this time, Johannes Gumede, Tony Perry, Papa Leshabana, Brian Gwebu, Jacqueline Leyds, Nomazulu Makoko (among others), were appointed as directors of Sondolo. These individuals were all affiliated to Bosasa.

In December 2005, a number of directors resigned from Phezulu, whilst directors such as Jacqueline Leyds and Victor Mhangwana, with previous Bosasa affiliations, were appointed in their stead as the new directors of Phezulu. At this stage, the auditors for Phezulu, were changed from PricewaterhouseCoopers to Bester Viljoen Incorporated, the auditors for Bosasa and Sondolo.

According to the documentation obtained from the Registrar of Companies, Bosasa, Sondolo and Phezulu have the following in common:

- Bester Viljoen Incorporated are their auditors
- Jacqueline Leyds is a director of all three companies
- Bosasa and Sondolo have Johannes Gumede, Munirah Oliveria and Ishmael Mncwaba as directors
- Bosasa and Sondolo share the same physical business address, namely, 1 Windsor Road, Mogale City, Krugersdorp, 1739.

In addition to the above, the documents obtained from the Registrar of Companies indicate that company changes within Sondolo and Phezulu were addressed to



Bosasa. According to the Bosasa website, both Sondolo and Phezulu, fall within the Bosasa Group of Companies.

During the course of the investigation, a document compiled by Agrizzi, was handed to the SIU. This document, entitled *Summary Company Structure*<sup>15</sup>, indicated that Sondolo was owned by four companies, namely, Bancar Investment Holdings (Pty) Ltd (25%), Kgwerano Financial Services (Pty) Ltd (25%), Bosasa Youth Development Foundation (10%) and Bosasa (40%). On its website, Bosasa maintains that these companies are all affiliated to the Bosasa Group. The *Summary Company Structure* document in addition, indicated that Phezulu appointed Sondolo as its project manager and integrator of the fencing contract.

Lastly, the tender documentation submitted by Sondolo and Phezulu, confirm that they are part of the Bosasa Group of Companies and that they are dependent on each other for the delivery of services.

## 7 COMMISSIONER MTI'S FORMAL RELATIONSHIP WITH BOSASA

From the information obtained from the Registrar of Companies, Commissioner Mti is the director of a company called Lianorah Investment Consultancy (Pty) Ltd (Lianorah). Further information from the Registrar of Companies indicated that Lianorah is in one way or another, linked to Bosasa. These links include the following:

- Both Sondolo and Lianorah's registration documentation reflects Mr Stephan Kruger as the initial director, with BGB Smit as the auditors
- Both Sondolo and Lianorah appointed Bester Viljoen Incorporated as their new auditor in place of BGB Smit
- Bester Viljoen Incorporated are the auditors for Bosasa.

At the time Lianorah's incorporation, Commissioner Mti was the DCS National Commissioner. The timing of the registration of the above entity appears to coincide with the awarding to Sondolo of the access control tender, on or about 19 April 2005.

The analysis conducted by the SIU, has revealed that Lianorah was deregistered on 20 April 2007.



<sup>15</sup> See Annexure 10

## 8 ANALYSIS OF CONTRACTS

Against the background of this information, the SIU analysed the procurement process related to the four contracts referred to above. The evaluation of each one, is dealt with below.

### 8.1 The kitchens tender: HK2/2004

The kitchens tender was awarded to Bosasa on 20 July 2004. The scope of the kitchens tender entailed the providing of full catering services, including full maintenance of kitchen equipment, cleaning and training of DCS staff and inmates, at correctional centres in seven management areas. These areas were Pretoria, Johannesburg, Durban Westville, Krugersdorp, Pollsmoor, Modderbee and St Albans.

The bid was advertised on 21 May 2004, and it required the rendering of services over a 3-year period (1 August 2004 to 31 July 2007), at a cost of approximately R239 427 694 per annum.

#### 8.1.1 Evidence gathered

##### Engagement with the service provider prior to publication of the tender

The SIU ascertained that a DCS Executive Management Committee (EMC) meeting was held at Supersport Park in Centurion, Pretoria between November 2003 and early 2004. At this meeting, Agrizzi and Leshabane from Bosasa made a presentation to the attending DCS officials, including Commissioner Mti, Gillingham and Mr F Engelbrecht, the Regional Commissioner of DCS, Gauteng (Engelbrecht)<sup>18</sup>.

The Bosasa presentation was to advise the DCS of the services Bosasa was able to provide, including catering and measures to prevent the theft of food from prison kitchens.

This meeting took place not only prior to the advertising of the kitchens tender, but also before it was made known within the DCS that it would be outsourcing catering services, the full maintenance of kitchen equipment and the training of DCS staff and inmates at correctional centres.

Engelbrecht raised questions regarding the viability of outsourcing catering facilities after the Supersport Park presentation. His concern related to job security of DCS

<sup>18</sup> See affidavit of Mr Engelbrecht, Annexure 11



staff, the sustainability of such a venture, its budget and the effect of such outsourcing on offender labour. He stated that in response to his questions, Commissioner Mti had rudely instructed him to stop asking questions.

During a later EMC meeting held prior to May 2004, in Magaliesburg, Gillingham did a presentation regarding the outsourcing of catering services due to the amendments to the Correctional Services Act (111 of 1998) (Correctional Services Act). The relevant amendment to the Correctional Services Act provides:

*"Food must be well prepared and served at intervals of not less than four and a half hours and not more than 14 hours between the evening meal and breakfast during each 24 hour period".*

During the presentation, Gillingham highlighted the fact that the amendment set requirements which the DCS might not have the capacity to deal with effectively. In addition, he touched on aspects relating to the theft of food in prisons and general hygiene in prison kitchens. At the time of this presentation, Gillingham was the Regional Commissioner: North West, Mpumalanga and Limpopo.

Shortly after the presentation in Magaliesburg, the DCS CFO, Mr Tshivhase (Tshivhase), announced that the DCS would be outsourcing catering services. Gillingham was appointed as the project leader for this tender, which was then prioritised. Two DCS procurement officials, namely, Messrs W Pretorius<sup>17</sup> (Pretorius) and Truter were requested to assist Gillingham with the project.

According to Engelbrecht, the Directorate: Health Care Services was responsible for nutritional services, and to his knowledge, none of the officials from that Directorate, were consulted by Gillingham regarding the drafting of the specifications for this tender.

#### **The timeline of the tender**



According to Mr H Truter (Truter)<sup>18</sup>, requests to invite bids had to be in writing, and a written instruction to proceed with invitations, needed prior approval. The kitchens tender was approved by Commissioner Mti on 24 May 2004. The bid was advertised on 21 May 2004, and the closing date was 25 June 2004. Compulsory briefing sessions were held from 4-15 June 2004 in all seven management areas where kitchen services were to be outsourced. The awarding of the bid by the NBAC was

<sup>17</sup> See affidavit of Mr Pretorius, Annexure 12

<sup>18</sup> See affidavit of Mr Truter, Annexure 13



18

scheduled for finalisation on 21 July 2004, but due to delays, the bid was only awarded on 27 July 2004, to Bosasa. Due to the abovementioned delays, Bosasa only commenced with performance on 16 August 2004, as opposed to the original performance date, namely, 1 August 2004.

For ease of reference, the chronological sequence of key events in the tender process for the kitchens tender is encapsulated in Table 2 below.

Table 2: Chronology of events regarding the tender process for the kitchens tender

| Date                      | Activity   |
|---------------------------|--|
| 21 May 2004 – 25 Jun 2004 | Advertising of bid   |
| 11 Jun 2004               | Scheduled bid collection   |
| 4 Jun 2004                | Compulsory information meeting   |
| 4 Jun 2004 – 15 Jun 2004  | Compulsory site meetings   |
| 25 Jun 2004               | Closing date for bids  |
| 28 Jun 2004 – 30 Jun 2004 | Screening of the bids  |
| 1 Jul 2004 – 8 Jul 2004   | Evaluation process   |
| 12 Jul 2004 – 13 Jul 2004 | Compiling by the BEC of their recommendations                                |
| 14 Jul 2004 – 16 Jul 2007 | Verification, preparation, recommendation and submission to the NBAC         |
| 20 Jul 2004               | Awarding of the bid to Bosasa  |
| 21 Jul 2004               | Scheduled date on which successful bidder was to be notified of award of bid |
| 27 Jul 2004               | Actual date on which Bosasa was informed that it was the successful bidder   |
| 29 Jul 2004               | Signing of contract between DCS and Bosasa                                   |
| 1 Aug 2004                | Scheduled date for commencement of services by Bosasa                        |
| 16 Aug 2004               | Actual date on which Bosasa started to render services                       |

**Drafting of the bid specifications**

The SIU interviewed Mr T Mapasa (Mapasa), the DCS Director: Procurement<sup>18</sup>. According to him, the user department in terms of DCS procurement directives must assume responsibility for identifying the need, motivating the urgency and importance of the proposed tender, indicating the value or benefits to be derived from the tender and the providing of an estimate of the cost of the tender. Accordingly, a preliminary step in the procurement process is the identification by the relevant department of a need that is catered for in terms of its strategic plan.

<sup>18</sup> See affidavit of Mr Mapasa, Annexure 14



The SIU could find no evidence that a needs analysis or feasibility study was conducted prior to the initiation of this tender process.

Although the kitchens contract should have originated in the DCS Directorate: Development & Care, the SIU established that the need for the kitchens contract did not originate in this directorate nor did this directorate initiate the process.

The SIU interviewed Ms J Sishuba (Sishuba), DCS Chief Deputy Commissioner: Development and Care and Ms M Mabena (Mabena)<sup>20</sup>, DCS Director: Health Services. They advised that their directorates were excluded from the entire tender process, despite the fact that nutrition fell under their directorates as end users. According to them, Gillingham had assumed responsibility for the initiation and implementation of the procurement process.

The SIU interviewed the former Director: Security Management Services, Mr AJC Venter<sup>21</sup> (Venter). Venter confirmed that he had neither taken part in the tender process for the kitchens tender nor was he or any other official from his directorate approached by either Gillingham or any other official for input in respect of the kitchens tender, specifically with regard to the security elements of the tender.

As regards the drafting of the specifications for the tender under discussion, Pretorius informed the SIU that during a meeting he had with Gillingham, the latter advised that he was developing specifications for the tender and handed Pretorius a two-page document that he was requested to peruse. The document handed to him, however, addressed only the aspects of training and equipment, but not the aspects relating to the preparation of food and ration scales, the heart of the kitchens tender. Pretorius advised that he suggested to Gillingham that the specifications used for the outsourcing of catering services at the Ekuseni Youth Centre be used as the basis for the development of the specifications for the kitchens tender. His subordinate, Truter, emailed these specifications to Gillingham.

Truter confirmed that Gillingham's specifications forwarded to him, were very basic and did not address the important aspects of the tender, such as provisioning of food, preparation, rationing scales, etc. In Truter's view, the tender was rushed, because on 10 May 2004, Gillingham had decided that the tender should be published on 21 May 2004.

<sup>20</sup> See affidavits of Ms Sishuba and Mabena, Annexure 15 and 16 respectively

<sup>21</sup> See affidavit of Mr Venter, Annexure 17



According to Pretorius and Truter, they advised Gillingham on how to comply with the procurement process. However, they did not assist him with the technical aspects of the specifications, as they did not possess the required technical knowledge.

It is unclear to the SIU what qualified Gillingham to draft the specifications for this bid as he only possessed a matric qualification and was not a nutrition expert.

A review of the tender specifications revealed that a number of unusual specifications were included in the bid, namely:

- The installation of security cameras
- The requirement that bidders must have accredited security personnel with proven track records of installing and monitoring onsite (CCTV) and internet protocol surveillance and be International Standards Organisation 9001:2000 (ISO) compliant
- Bidders were required to have a fully functional integrated maintenance department experienced in facilities management with a minimum of 5 years experience
- Bidders were required to have a temporary mobile facility which complied with minimum health requirements to be utilised whilst the kitchens were being upgraded
- Bidders were required to procure the services of two qualified dieticians on their full time payroll, despite DCS having full-time dieticians on their payroll.

The SIU has further established from the witness<sup>22</sup> that Agrizzi requested him to develop a solution for the installation of various types of security equipment in correctional centre kitchens. According to him, he was informed by Agrizzi that the solution would be added to the tender specifications to ensure that Bosasa enjoyed an advantage over the other bidders. The witness advises that this solution formed part of the eventual tender specifications.

In the bid, the following security equipment was specified:

- Surveillance cameras in the kitchens
- Digital video recorders in each kitchen office
- Control and review personal computers in each kitchen office
- Access control systems in store rooms and fridges

<sup>22</sup> The affidavit of this witness will be withheld and provided to DCS upon request



*[Handwritten initials/signature]*

- Wide area network connectivity to provide off-site surveillance.

During the security roll-out for the kitchens tender in August/September 2004, the witness was introduced to Mansell who had previously visited the Bosasa premises. The witness was informed that Mansell was a consultant and former partner of a Mr G Watson (Watson), the CEO of Bosasa. According to the witness, Mansell occupied an office in one of the Bosasa buildings and was often in the company of Agrizzi.

#### The bid evaluation and adjudication process

On 1 July 2004, the Code of Conduct and Declaration of Interest forms were signed by the members of the BEC in terms of which they were required to declare their interest, if any, in any of the bidders. Gillingham, as chairperson of the BEC, signed this form and indicated that he had no interest in any of the bidders for the kitchens contract.

Despite the fact that the kitchens contract was not a tender for consultant services, the DCS used the price and functionality tender evaluation method. Truter confirms that only Bosasa and Sechaba Catering Services (Sechaba) met the threshold for functionality and hence qualified for the second phase.

Members of the BEC<sup>23</sup> were informed by Gillingham, the Chairperson of the BEC, that the purpose of the kitchens tender, was to ensure that DCS complied with the amendments to the Correctional Services Act, with specific reference to section 8(5), referred to earlier.

The SIU interviewed Dr J Coetsee<sup>24</sup> (Coetsee), a member of the BEC that evaluated the kitchens tender. He informed the SIU that during the evaluation of the kitchens tender by the BEC, he observed that although the budget for the kitchens tender had been sourced from the Directorate: Health Care Services, this directorate had not requested the tender. Other BEC members further observed that the entire tender process had been managed by Gillingham.

From documentation made available to the SIU, it appears that after the awarding of the contract to Bosasa, a complaint was received from Sechaba, questioning the basis on which the tender was awarded to Bosasa. Sechaba complained that its pricing was reasonable in the light of its knowledge of prisons and high volume

<sup>23</sup> See affidavit of Mr Coetsee, attached as Annexure 18

<sup>24</sup> Ibid



Handwritten signatures and initials.

feeding. In its response to the complaint, the DCS stated that the BEC was satisfied that Bosasa had best met the requirements for the tender.

The SIU in the course of its investigation obtained a file relating to allegations of maladministration and misconduct. It was alleged that Gillingham had an affair with his secretary, submitted fraudulent subsistence and travel claims (S&T claims) and had intimidated certain staff members.<sup>25</sup> Disciplinary action was recommended by DCS Deputy Commissioner: Legal and Special Operations, Adv T Mqobi (Mqobi), and DCS Chief Deputy Commissioner (CDC) Central Services, Ms J Schreiner. Contrary to the recommendations, Commissioner Mti sent a letter to Gillingham in which on the one hand he chides him for his misconduct, but on the other thanks him for repaying the irregularly obtained S&T monies. In the same letter, Commissioner Mti proceeded to appoint Gillingham as the DCS Acting CFO, which effectively gave him oversight of the procurement division. This appointment was shortly before the kitchens tender was awarded to Bosasa.

For ease of reference, the names of the members of the BEC and NBAC are set out in Table 3 below. It will be noticed that Gillingham served on both committees, in the BEC as its chairman and in the NBAC, in an advisory capacity.

| BEC and NBAC members of the ...     |   |
|-------------------------------------|---|
| Bid Evaluation Committee            |   |
| Gillingham (Chairperson)            | CDC Finance   |
| Coetzee                             | Dir: Formal Education   |
| Davids                              | Area Commissioner: Johannesburg Management Area                     |
| Mabena                              | Dir: Health Care Services   |
| Mdletye                             | Area Co-ordinator: Development and Care: Durban Correctional Centre |
| Moodley                             | DC: Personnel Corrections   |
| Maako                               | Dir: Contract Management  |
| Lenkoe                              | Regional Head: Development and Care: Gauteng                        |
| FJ Venter                           | Secretary to BEC  |
| National Bid Adjudication Committee |   |
| Schreiner (Chairperson)             | CDC: Central Services   |
| Sishuba                             | CDC: Development & Care   |
| Gillingham                          | CDC: Finance (Advisory Capacity)                                    |

<sup>25</sup> These details were obtained from the disciplinary file compiled by the DCS DIU



|           |                             |
|-----------|-----------------------------|
| Ngubo     | DC: Supply Chain Management |
| Mapasa    | Dir. Procurement            |
| Pretorius | Procurement: Secretariat    |
| Aries     | Procurement: Secretariat    |
| Truter    | Procurement                 |

**The cyber forensic expert's evidence**

Malan recovered a document entitled *Checklist.doc*, obtained from the images seized at Gillingham's residence. The document contains bid evaluation criteria and guidelines for evaluating the kitchens tender. These criteria and guidelines obviously, should not have been in the possession of any bidder and especially not before the submission of tenders, since it would enable the bidder to know in advance the weighting of certain factors relevant to the tender.

Malan was able to establish that the document was created on 28 June 2004, and saved on the same date by Agrizzi. According to Malan, the document originated from Agrizzi's computer but the date of first creation could not be established, given the fact that Bosasa had used the *Eraser* utility to selectively erase certain information on its servers. Significantly, however, 28 June 2004, was the date on which DCS started to screen the bids in the kitchens tender.

**Email logs between Agrizzi, Mansell and kobus@bfn.co.za**

During the SIU's investigation of the access control tender an email address<sup>26</sup>, Kobus@bfn.co.za, was linked to Gillingham.

According to Venter, Gillingham explained to him that kobus@bfn.co.za was his residential e-mail address.

The SIU determined that this email address belonged to an entity called *Network and Computing Consultants (NCC)*, situated in Bloemfontein.

Mr F De Villiers<sup>27</sup> of NCC informed the SIU that kobus@bfn.co.za was an email address belonging to Bosasa and paid for monthly by Bosasa between August 2004 and March 2005.

<sup>26</sup> Discussed in detail in section 8.2.1 titled "The Bid Specifications"  
<sup>27</sup> See affidavit of Mr F De Villiers, attached as Annexure 19





latter tender process reviewed and set aside. These proceedings are at present pending in the North Gauteng High Court.

#### **Benefits received by Gillingham and Mti**

The SIU has established that Gillingham received financial benefits from Bosasa over a period of time, for which he gave no valuable consideration. Whilst on the evidence, the payment of the benefits cannot be directly linked to a particular tender dealt with in this report, the timing of the benefits and the tenders lead the SIU to conclude that there is on the evidence a sufficient link between the benefits and the awarding of all of the tenders dealt with herein.

The benefits received by Gillingham and Commissioner Mti are dealt with in more detail later in section 9 of this report.

#### **8.1.2 Findings**

The evidence gathered by the SIU, shows that there were clear deviations from the SCM: Guide for Accounting Officers, more particularly, in that the end user department was not included in the bid process. There was also no proper financial planning for this tender in that there was no feasibility study nor needs analysis conducted.

The evidence shows that Gillingham, outside of his normal duties, played an integral role from the outset in the procurement process in relation to the kitchens tender and was irregularly instrumental in the development of the tender specifications for the tender.

According to the witness, Bosasa irregularly participated in drafting the specifications for the tender under discussion and this fact was not disclosed by Gillingham during the bid evaluation process. On the evidence of the witness, the specifications were drafted in such a manner that the security aspects of the tender provided Bosasa with a clear advantage over other bidders. It is therefore not surprising that only two bidders were found to meet the functionality requirements by the BEC.

Furthermore, on the evidence of the cyber forensic expert, a document containing the bid evaluation criteria and guidelines for evaluating the tender was found in electronic data seized at Gillingham's residence, having originated from Agrizzi. The creation date of this document on Gillingham's computer was 28 June 2004 and was saved on Agrizzi's computer on the same day. Significantly, the DCS commenced with the screening of the tenders received in respect of the kitchens tender on 28 June 2004.



Whilst, Malan could not determine the date of first creation on Agrizzi's computer, the evidence raises two concerns: first, whether Agrizzi (and as such Bosasa) was in possession of the document at the time that Bosasa's tender was submitted for the kitchens tender, and second, whether Bosasa was party to the drafting of the evaluation criteria and guidelines for evaluating the tender. Obviously, if this were so, it would not only have subverted the entire procurement process because it would have placed Bosasa in an unduly advantageous position with reference to its competitors, but it would also have exposed the DCS to civil suits from unsuccessful bidders.

Given the fact that there was no BSC constituted to prepare the specifications for the kitchens tender, the fact that Gillingham played an integral role in the preparation of these specifications, the fact that these specifications were prepared in such a way as to favour Bosasa and the fact that a document containing the bid evaluation criteria and guidelines for evaluating the tender, was found on Gillingham's computer – having originated from Agrizzi – leads the SIU to believe that Bosasa along with Gillingham was not only involved in the drafting of these bid specifications for the kitchens tender but also in the drafting of the bid evaluation and guidelines thereof.

Paragraph 1.1 of practice note SCM 3 of 2003 provides that the price/functionality tender evaluation method applies only in tenders where consultant services are procured. It is therefore clear that to the extent that the kitchens tender did not involve consultant services, the price/functionality tender evaluation method applied to the kitchens tender, was in conflict with paragraph 1.1 of practice note SCM 3 of 2003.

The evidence clearly indicates that Gillingham received financial benefits from Bosasa after the award of the kitchens tender. The SIU was unable to find any lawful cause for such benefits being made to Gillingham. The evidence further shows that Mansell and Smith were instrumental in effecting these benefits to Gillingham.

The SIU is of the view that the acceptance by Gillingham of financial and other benefits from Bosasa around the time that the kitchens tender was awarded was both irregular and unlawful.

The impact on the kitchens tender and the other tenders, of the receipt of benefits by Gillingham and Commissioner Mti, are more fully dealt with under the discussion of the benefits received by them in section 9.

Turning to the extension of the kitchens contract, the evidence shows that the kitchens tender was extended upon the recommendation by Gillingham and

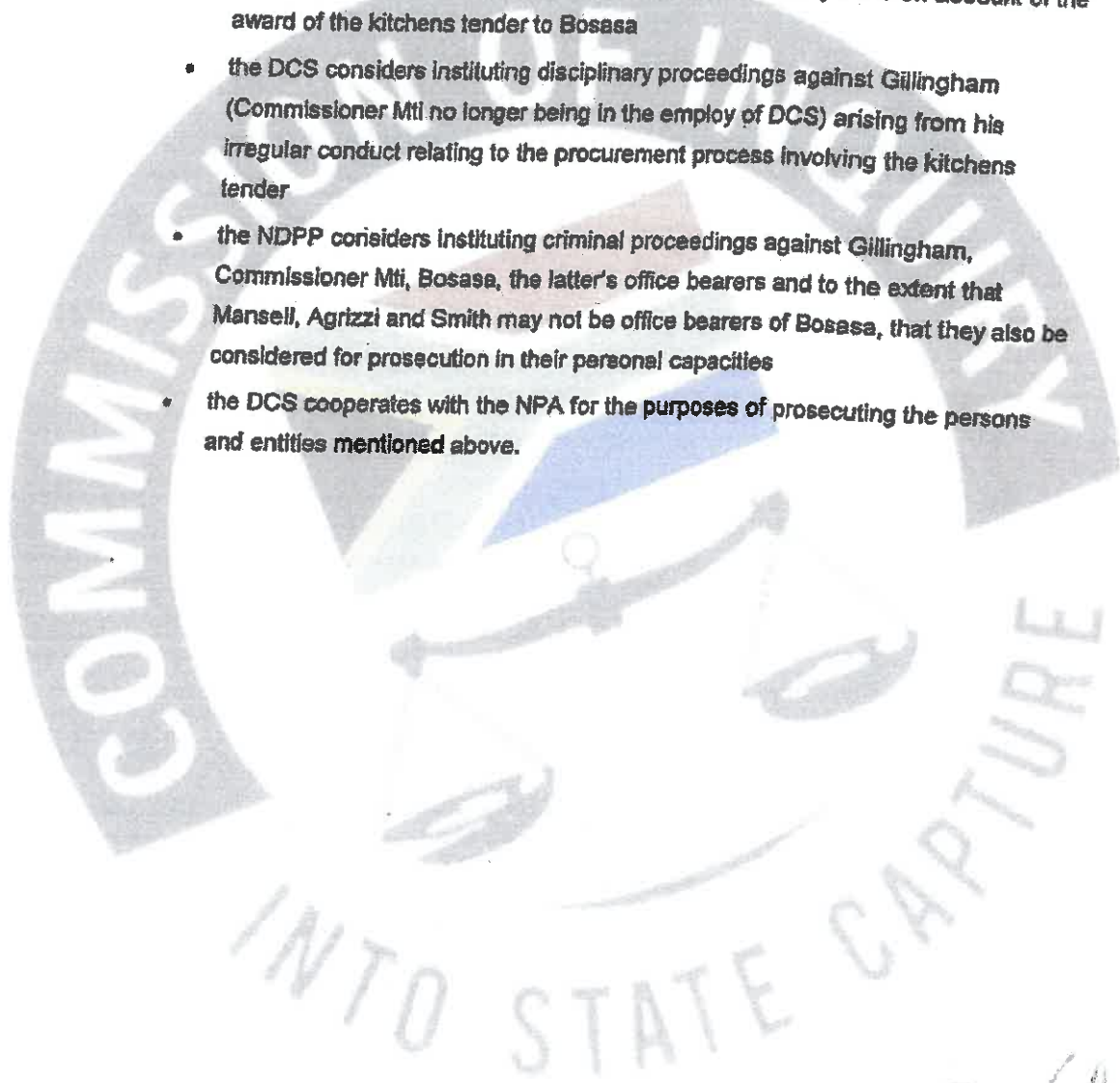


authorised by Commissioner Mti on 17 May 2005. In light of the irregular benefits received by Commissioner Mti the extension of this contract was irregular and unlawful.

**8.1.3 Recommendations in respect of the kitchens tender**

The SIU recommends that:

- the DCS considers instituting civil proceedings in the appropriate forum for the recovery of any losses that might have been sustained by DCS on account of the award of the kitchens tender to Bosasa
- the DCS considers instituting disciplinary proceedings against Gillingham (Commissioner Mti no longer being in the employ of DCS) arising from his irregular conduct relating to the procurement process involving the kitchens tender
- the NDPP considers instituting criminal proceedings against Gillingham, Commissioner Mti, Bosasa, the latter's office bearers and to the extent that Mansell, Agrizzi and Smith may not be office bearers of Bosasa, that they also be considered for prosecution in their personal capacities
- the DCS cooperates with the NPA for the purposes of prosecuting the persons and entities mentioned above.



## 8.2 The access control tender: HK2/2005

The access control tender was awarded to Sondolo on 11 April 2005. The scope of the access control tender entailed the supply, delivery, installation, commissioning, support and maintenance of a comprehensive access control and body scanning system with CCTV coverage of DCS staff and inmates at 66 Maximum Security Facilities/Centres of Excellence. The advertisement for the access control tender was published on 4 February 2005. The contract was valued at R236 997 385.31.

This tender was extended to include the staffing of the control rooms at the 66 sites. This extension took place after the awarding of the initial contract.

### 8.2.1 Evidence gathered

#### The timeline of the tender process

The tender for access control was published on 4 February 2005, with the closing date on 25 February 2005. The usual time for bidders to respond to the tender advertisement is 30 days, but the time for this tender was reduced to 21 days. The authorisation for such a reduction in time was given by the then Acting National Commissioner, Mr V Petersen (Petersen) on 27 January 2005.

The SIU established from Venter, the circumstances leading up to the advertising and awarding of this tender. Venter informs that towards the end of 2004, he was informed by Mr W Damons (Damons), Deputy Commissioner: Facilities and Security Management, that R90 million that had been budgeted for expenditure on infrastructure within the DCS would not be spent by the DCS Building and Management Division, before the financial year end. Damons instructed him to spend the money to improve security at prisons with existing Repair and Maintenance Programme (RAMP) programmes, by means of variation orders. RAMP projects are an initiative started by the DPW to upgrade various government facilities. The DCS, at the time, had many RAMP projects running with the DPW at various correctional centres.

In pursuance of the instruction from Damons, Venter drafted a plan indicating at which correctional centres the money would be spent, what equipment was required, as well as the cost, amounting to R89 517 000. A memorandum requesting approval of the plan was approved by Messrs F Mocheko (Mocheko) DCS Director of Building



2015-02-20 09:59

and Maintenance: Pretoria and Damons on 18 November 2004 after confirmation was received that the money was available.

According to Venter, the plan was approved by Mlombile on 3 December 2004, who commented that Commissioner Mti wanted the option of the DCS acquiring the equipment without the assistance of the DPW due to time constraints. Gillingham then requested him to obtain prices for security equipment as well as the specifications for the following security equipment from the DPW:

- Walk through metal detector
- X-ray scanner
- Security spike boom barrier system, and
- CCTV system (closed circuit television system).

In a memorandum dated 9 December 2004, Venter not only acknowledged the benefits of using the DPW, but also pointed out that his directorate had always been satisfied with the manner in which the DPW had procured equipment in the past. The memorandum was addressed to the following role players within the DCS, namely, Mocheko, Sokupa, Damons, Mlombile, Gillingham and Commissioner Mti.

In Venter's memorandum of 9 December 2004, he requested that the following points be considered:

- Employment of the necessary expertise to ensure that durable equipment was procured
- That the necessary expertise be obtained to ensure that correct equipment was installed, that the components complied with the specifications and were compatible with DCS systems
- The inclusion of a maintenance contract for a minimum period of 5 years
- That long delivery periods may result in some equipment only being installed during the following financial year
- That the DCS should continue to use the expertise of the DPW for the erection of security fences through the RAMP programmes.

According to Venter, he received the following responses to his memorandum:

- Mocheko supported the recommendation that the fences be erected through the DPW
- Sokupa recommended that all the equipment be procured by the DCS's Procurement Directorate



www.orientalstar.com

*[Handwritten signatures and initials]*

- Damons supported the recommendation that the fences be erected through the DPW, but in addition, recommended a tender process by the DCS in respect of the security equipment
- Gillingham supported the recommendation regarding the security fences, but suggested that the DCS follows its own procurement process in respect of the security equipment and that all the funds should be allocated before the end of March 2005

Commissioner Mti, whilst approving the recommendations made by Sokupa, Damons and Gillingham, commented that the relevant concerns raised by Venter would be taken into consideration, but that the DCS should follow its own tender process so as not to experience delays from the DPW.

For ease of reference, the sequence of key events involved in the bid process for the access control tender, is encapsulated in Table 4.

**Table 4: Chronology of events regarding the bid process of tender BK22/005**

| Date             | Activity   |
|------------------|--|
| 18 Nov 2004      | Damons drafts memorandum indicating R90 million available for expenditure, proposing it be utilised at centres with existing RAMP programmes |
| 9 Dec 2004       | Commissioner Mti grants approval to proceed with tender  |
| 14 Jan 2005      | Gillingham commences drafting of tender specifications   |
| 24 Jan 2005      | Gillingham emails Mlombite bid specifications originating from <a href="mailto:kobus@bfn.co.za">kobus@bfn.co.za</a>                          |
| 19 – 26 Jan 2005 | Meetings are held to finalise the drafting of tender specifications  |
| 27 Jan 2005      | Mlombite forwards specifications to Venter   |
| 28 Jan 2005      | Tender specifications are finalised  |
| 4 Feb 2005       | Tender is published in the government gazette  |
| 14 Feb 2005      | Compulsory information briefing is held  |
| 25 Feb 2005      | Bid closed: 17 bids received as well as 3 late bids  |
| 2 Mar 2005       | Initial screening of bids is finalised   |
| 9 Mar 2005       | Motivation for the appointment of BEC members is drafted by Gillingham   |
| 16 Mar 2005      | Gillingham signs the Declaration of Interest and Code of Conduct<br>Instructions are given to the members of the BEC                         |
| 11 April 2005    | NBAC recommends tender be awarded to Sondolo   |
| 19 Apr 2005      | Contract between DCS and Sondolo is signed   |



### **The bid specifications**

According to Venter, Mlombile contacted him on 27 January 2006, in connection with an e-mail he had received from Gillingham. Attached to the e-mail, was a document containing specifications for security equipment. Mlombile was concerned by the fact that the individual who had forwarded the document to Gillingham, a certain Kobus with the email address of Kobus@bfn.co.za, was unknown to him. According to Venter, Mlombile suspected that the specifications contained in the document sent to Gillingham, were not drafted by DCS officials.

Venter informed that he investigated the origin of the email and found that the author of the document was an individual called "Denny" and that the e-mail address from which the document had been sent belonged to an entity called *Network and Computing Consultants (NCC)*, situated in Bloemfontein.

Venter then sent a memorandum to Damons, Mlombile and Gillingham in which he raised his concern not only about the origin of the document forwarded to Gillingham, but also the inadequacy of the bid conditions and specifications in the following respects:

- no provision was made for access control at entrances used by DCS officials and SAPS members, which were also being used for the admission and release of offenders
- no provision was made for access control at gates used by work teams at the Centres of Excellence
- no provision was made for equipment to scan items that were being delivered, or the person/s making the delivery
- the Directorate Security Management Services did not possess the expertise required for the purpose of drafting technical specifications, which the DPW had previously drafted
- the CCTV coverage focussed on people entering the secure areas but no mention was made of people exiting these areas.

Venter further informed that he did not receive any feedback regarding the concerns raised in his memorandum regarding the origin and inadequacy of the bid conditions and specifications that were forwarded to Gillingham. According to Venter, Gillingham explained to him that kobus@bfn.co.za was his residential e-mail address, from which he forwarded the document to his official DCS e-mail address.



Through the SIU's investigation, it was established that there was no Kobus employed as a consultant at the DCS and further, kobus@bfn.co.za, was an email address belonging to Bosasa and paid for monthly by Bosasa between August 2004 and March 2005, which includes the day on which the document was emailed to Gillingham.<sup>29</sup> The SIU was further able to establish that a number of emails were sent by Agrizzi to Kobus.<sup>30</sup>

During a search conducted by the SIU at Gillingham's residence in terms of section 6 of the Act, a business card in Gillingham's name was found that reflected that he was a consultant for *Consilium (Pty) Ltd* (previously established by the SIU as an affiliate company within the Bosasa Group). Furthermore, the contact information on the card included the email address, kobus@bfn.co.za.<sup>31</sup>

The SIU was further able to establish that despite it not being within the course and scope of Gillingham's duties, he had assumed responsibility for the drafting of the bid specifications. This fact accords with Venter's evidence that he was not aware of any committee that was formed for the specific purpose of drafting the specifications for this tender.

The witness referred to previously, advised that in December 2004, he was given a document by Agrizzi that contained specifications for security measures at prisons. Agrizzi informed him that the document was for a tender, which the DCS was going to advertise in the near future. Agrizzi instructed him to ensure that the specifications were up to date with modern technology and to align them with the technology Bosasa was employing in the kitchens contract. The witness further advised that his previous involvement in the drafting of the kitchens tender specifications had made the task assigned to him by Agrizzi easier.

The witness further informed that Agrizzi had told him that he (Agrizzi) had informed the Bosasa team that the bid price had to be in the region of R80 million and the bid presentation should include aspects such as system design, costing and maintenance.

The SIU was further advised by the witness that it took him a few weeks to improve upon the specifications contained in the document given to him by Agrizzi. These improved specifications were later presented to Agrizzi.

<sup>29</sup> See Annexure 19

<sup>30</sup> It is important to note here the email sent between Agrizzi, Mansell and kobus during this tender and the kitchens tender

<sup>31</sup> See Annexure 20



A handwritten signature in black ink, appearing to be a stylized name.

A handwritten signature in black ink, appearing to be a stylized name.

According to the witness, he later identified a number of similarities between his improved specifications and those contained in the tender advertisement.

According to documentation obtained from the Registrar of Companies, Sondolo (Pty) Ltd was only registered as such on 18 February 2005, that is, 7 days before the closing of the tender. Since the tender specifications required a proven track record of at least 5 years in the Information Technology (IT) industry, Sondolo clearly did not satisfy that requirement.

Further information sourced from the Sondolo bid documentation indicated the following shareholding in Sondolo:

- Bosasa (40%)
- Kgwerano Financial Services (Pty) Ltd (25%)
- Bancar Investment Holdings (Pty) Ltd (25%)
- Bosasa Youth Development Foundation (Pty) Ltd (10%) – Section 21 Company

As already observed, Kgwerano, Bancar and Bosasa Youth Development are all affiliate companies within the Bosasa Group.

The witness pointed out the following aspects that would have made it very difficult for other bidders to submit a sufficiently compliant bid:

- Given the close association between Bosasa and Sondolo and the former's knowledge of the prisons environment on account of its contractual relations in terms of the kitchens tender, its prior knowledge of the bid specifications and the exclusion of site visits allowed Sondolo to enjoy an undue advantage over other bidders
- Despite the technical nature of the bid, which would have required intensive research, the normal period of 30 days for the submission of bids was reduced to 21 days.

#### **The cyber forensic expert's evidence**

Malan obtained electronic copies from the DCS of the earliest versions of the tender specifications in respect of all the tenders forming the subject of the SIU's investigation into Bosasa and its affiliate companies. During the course of this investigation, Malan mirror imaged the servers of Bosasa and the laptops of Agrizzi, van Tonder and Vorster



Malan used the electronic copies of the bid specifications that he had obtained from the DCS in an effort to establish whether there were any similar or identical bid specifications in the Bosasa data. Despite the deletion of information by Bosasa from its servers, Malan was able to identify a document named *cotv bid.doc* both in the electronic data received from the DCS and on one of Bosasa's servers.

The document on Bosasa's server indicated that it was last printed on 13 January 2005. The author of the document was "Danny" and the document was revision 2. The document contained specifications relating to the access control tender. This document was also found on the DCS server and was attached to an email Mlombile received from Gillingham on 24 January 2005. This document indicated that it was revision 4 of the document; the document found on Bosasa's server was revision 2.

#### The bid evaluation and adjudication process

On 16 March 2005, the Code of Conduct and Declaration of Interest forms were signed by the members of the BEC, in terms of which they were required to declare their interest, if any, in any of the bidders. Gillingham, as chairperson of the BEC, signed this form, indicating that he had no interest in any of the bidders for this contract.

In this bid, the price/functionality tender evaluation method was utilised. Only Sondolo satisfied the threshold for functionality, thus enabling it to be considered in the pricing phase.

Despite Pinnacle Technology Holding (Pty) Ltd (the second highest bidder) obtaining only 68.13% for functionality, it was included for consideration in the pricing phase.

The BEC recommended to the NBAC that Sondolo be awarded the contract. Following this recommendation, the NBAC after its deliberations awarded the contract to Sondolo on 11 April 2005.

For ease of reference, the name of the members of the BEC and NBAC are set out in in Table 5 below. It will be noticed that Gillingham served on both committees, in the BEC as its chairman and in the NBAC in an advisory capacity.



2019-2020-2021

A handwritten signature in black ink, consisting of a circular flourish followed by a series of vertical strokes.

**Table 5: BEC and NBAC members for the access control tender**

| <b>Bid Evaluation Committee</b>            |  |
|--|--|
| Gillingham<br>(Chairperson)                | CDC: Finance   |
| Tshele                                     | Regional Co-ordinator Security: Gauteng                  |
| Lethoba                                    | Director Systems Development                             |
| Kunene                                     | Regional Commissioner Limpopo, Mpumalanga and North West |
| Malinga                                    | Area Manager Modderbee                                   |
| Lenkoe                                     | Regional Head: Development & Care: Gauteng               |
| Damons                                     | DC: Facilities & Security                                |
| F Venter                                   | Secretary of the Committee                               |
| Steyn                                      | Deputy Director Security Management                      |
| <b>National Bid Adjudication Committee</b> |  |
| Sishuba<br>(Chairperson)                   | CDC: Development & Care                                  |
| Gillingham                                 | CDC: Finance (Advisory Capacity)                         |
| Petersen                                   | CDC: Corporate Services                                  |
| Ngubo                                      | DC: Supply Chain Management                              |
| Sokupa                                     | Dir: Facilities Planning & Development                   |
| Mapasa                                     | Dir: Procurement   |
| Pretorius                                  | Acting DD: Tender Management                             |
| Ntuli                                      | SPAO: Tenders  |
| Aries                                      | Procurement: Secretariat                                 |
| Truter                                     | Clerk: Tenders   |
| Du Preez                                   | Clerk: Tenders   |

**The extension of the access control contract**

Venter was made a member of the steering committee that managed the access control contract after it was awarded to Sondolo, and as such, attended steering committee meetings.

The witness referred to previously, who also attended various steering committee meetings, informed that when the DCS had to identify DCS officials for training by Sondolo to monitor the control rooms, it became apparent that the DCS was experiencing staff shortages of suitably computer literate personnel, an essential skill required for the access control contract. He further informed that Agriz suggested to



www.2025-2026-2027

him that he propose to the steering committee that Sondolo would be able to provide the DCS with trained personnel to fulfil the function, which he accordingly did. He did not attend further steering committee meetings and was not sure if DCS acted upon his recommendation.

At one of the steering committee meetings, Gillingham raised the question of outsourcing the staffing function for the control rooms. Gillingham questioned the fact whether or not it would be a cheaper option for DCS to appoint a contractor to provide the staff for the control rooms.

Cost comparisons conducted internally in the DCS indicated that outsourcing the staff component would be cheaper than training DCS members to man control rooms. According to Venter, the initial plan was to outsource the staffing function of only the regional and national control rooms. However, in awarding the contract to Sondolo, the local control rooms were also included in the contract.

Ngubo a procurement official within the DCS, requested the extension of the contract via a memorandum. Commissioner Mti extended the contract on 4 August 2005 and the extension was valued at approximately R200 million.

#### **Contract management**

According to Mr Steyn<sup>32</sup> (Steyn), the former Deputy Director: Security Management Services, all the work for the access control tender was completed. He confirmed that the maintenance agreement for the tender came into effect on 1 April 2007, and that R2 173 567.92 was paid to Sondolo per month, from the Goods and Services budget of the Directorate Security Management Services, for the maintenance.

Although Steyn indicated that there was no problem in the execution of this tender, the OAG highlighted that it has information that the service provider did not deliver the quality of security equipment specified in the bid specifications.

#### **Benefits received by Gillingham and Mti**

The SIU has established that Gillingham received financial benefits from Bosasa over a period of time, for which he gave no valuable consideration. Whilst on the evidence, the payment of the benefits cannot be directly linked to a particular tender dealt with in this report, the timing of the benefits and the tenders led the SIU to conclude that

<sup>32</sup> See affidavit of Mr Steyn, Annexure 21



there is, on the evidence, a sufficient link between the benefits and the awarding of all of the tenders dealt with herein.

The benefits received by Gillingham and Commissioner Mti are dealt with in more detail later in section 9 of this report.

### 8.2.2 Findings

This contract was awarded on 11 April 2005 to Sondolo, a company in which Bosasa is a 40% shareholder.

The evidence shows that there were clear deviations from the *SCM: Guide for Accounting Officers*, more particularly, in that the end user departments were not included in the bid processes. According to the evidence, there was no proper financial planning for this tender in that there was no feasibility study or needs analysis conducted and the budget for this tender was significantly exceeded.

As in the kitchens tender, Gillingham, outside of his normal duties, played an integral role from the outset in the procurement process in relation to the access control tender and was greatly instrumental in the development of the tender specifications for the said tender.

On the evidence of the witness and Malan, Bosasa participated in drafting the bid specifications for this tender. Agrizzi, according to the witness, requested him to prepare specifications in line with the technology Bosasa was employing in the kitchens contract. The witness subsequently identified a number of similarities between the specifications prepared by him and those in the advertisement for this tender. Furthermore, on the evidence of the witness, the specifications were drafted in such a manner that the security aspects afforded Bosasa a clear advantage over the other bidders.

On the evidence of Malan, a document titled "cctv bid.doc" was retrieved from the DCS and Bosasa systems. The document contained specifications for the access control tender. Version 2 of the document was found on the Bosasa system, whilst version 4 thereof was emailed by Gillingham from an email address belonging to Bosasa, to Mr S Mlombile (Acting Chief Deputy Commissioner: Corrections) (Mlombile) of DCS.

Given the fact that there was no BSC constituted to prepare the specifications for the access control tender, the fact that Gillingham played an integral role in the preparation of these specifications, the fact that these specifications were prepared in such a way as to favour Sondolo and the fact that a document containing the bid



specifications for the tender was found on Bosasa's servers (indicating that it was last printed on 13 January 2005, a day before Gillingham commenced drafting the tender specifications - some three weeks before the tender was published) led the SIU to believe that Sondolo/Bosasa, along with Gillingham, were involved in the drafting of the bid specifications for the access control tender.

The evidence further shows that the bid submission period was reduced to 21 days, without any apparent cause. Given the technical nature of the tender and Bosasa's participation in the drafting of the specifications for the bid, the shortened period for submission of bids and the fact that no site visits were allowed, provided Sondolo with an unfair advantage over the other bidders. The SIU was unable to find any evidence indicating that there was any urgency for the resource covered by the access control tender.

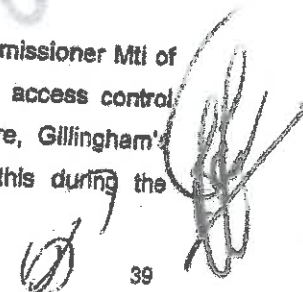
Paragraph 1.1 of practice note SCM 3 of 2003 provides that the price/functionality tender evaluation method only applies in tenders where consultant services are procured. It is therefore clear that to the extent that the access control tender did not involve consultant services, the price/functionality tender evaluation method applied to the access control tender was in conflict with paragraph 1.1 of practice note SCM 3 of 2003.

Since Sondolo enjoyed access to the correctional centre environment because of Bosasa's kitchens contract, the fact that no site visits were allowed, in effect, afforded Sondolo a significant advantage over its competitors.

Furthermore, despite it being a bid requirement that bidders should have five years' experience, Sondolo had only been registered 7 days before the closing of bids, yet Sondolo was awarded the tender. This was obviously irregular, since Sondolo should have been disqualified at the BEC stage.

The evidence clearly indicates that Gillingham and Commissioner Mtshali had received financial benefits from Bosasa. The SIU was unable to find any lawful cause for such benefits being made to Gillingham and Commissioner Mtshali. The evidence further shows that Mansell and Smith were instrumental in effecting these benefits to Gillingham and Commissioner Mtshali.

The SIU is of the view that the acceptance by Gillingham and Commissioner Mtshali of financial and other benefits from Bosasa around the time that the access control tender was awarded, was both irregular and unlawful. Furthermore, Gillingham's failure - he served on the BEC and the NBAC - to disclose this during the



procurement process infringed paragraph 16A8.4 of the Treasury Regulations and as such, constituted an abuse of the supply chain management system.

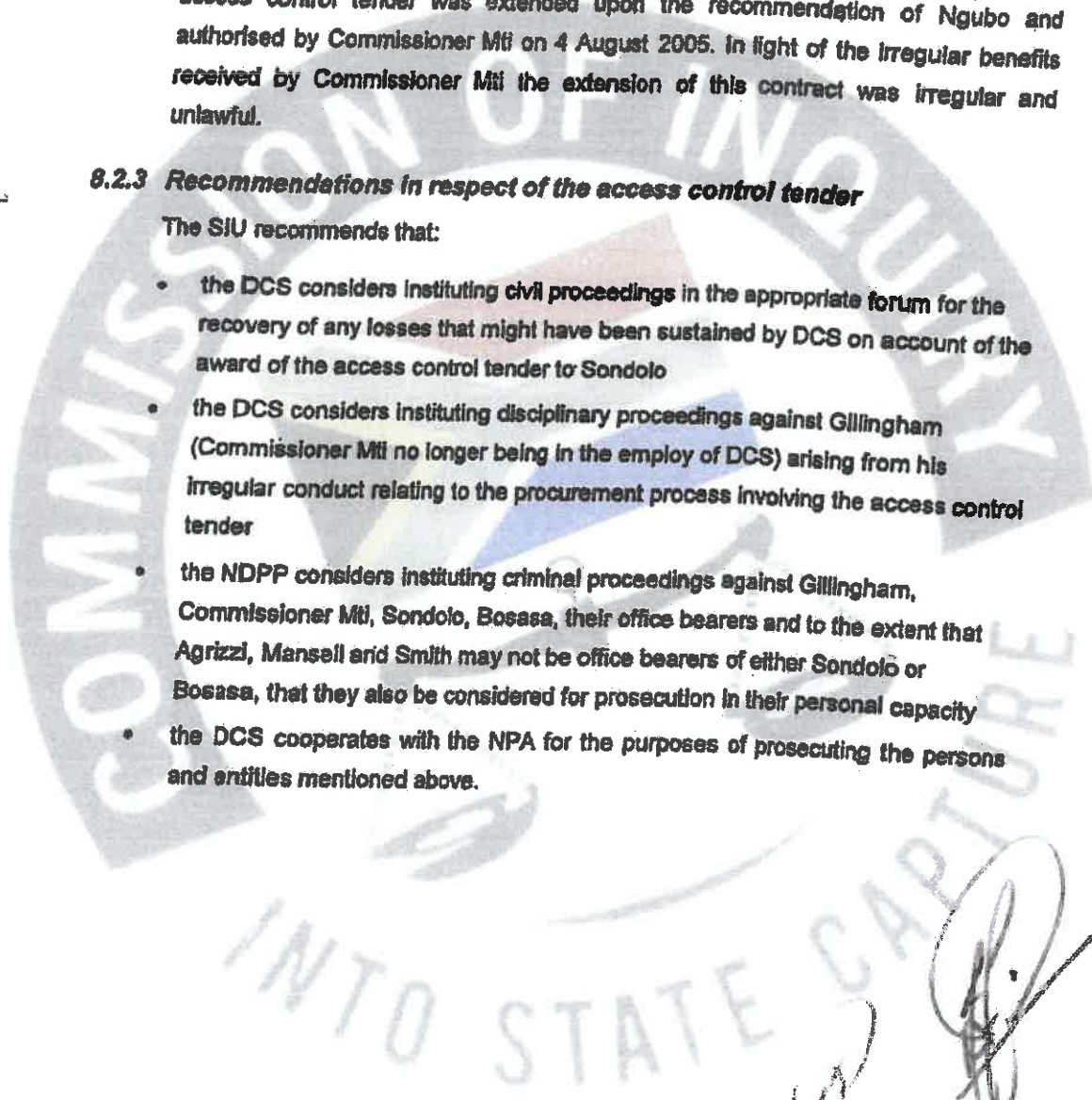
The impact on the access control tender and the other tenders of the receipt of benefits by Gillingham and Commissioner Mti, will be dealt with more fully under the discussion of the benefits received by them in section 9 of this report.

Turning to the extension of the access control contract, the evidence shows that the access control tender was extended upon the recommendation of Ngubo and authorised by Commissioner Mti on 4 August 2005. In light of the irregular benefits received by Commissioner Mti the extension of this contract was irregular and unlawful.

**8.2.3 Recommendations in respect of the access control tender**

The SIU recommends that:

- the DCS considers instituting civil proceedings in the appropriate forum for the recovery of any losses that might have been sustained by DCS on account of the award of the access control tender to Sondolo
- the DCS considers instituting disciplinary proceedings against Gillingham (Commissioner Mti no longer being in the employ of DCS) arising from his irregular conduct relating to the procurement process involving the access control tender
- the NDPP considers instituting criminal proceedings against Gillingham, Commissioner Mti, Sondolo, Bosasa, their office bearers and to the extent that Agrizzi, Mansell and Smith may not be office bearers of either Sondolo or Bosasa, that they also be considered for prosecution in their personal capacity
- the DCS cooperates with the NPA for the purposes of prosecuting the persons and entities mentioned above.



*(Handwritten signatures)*



### 8.3 The fencing tender: HK24/2005

The fencing tender was awarded to Phezulu on 29 November 2005. The scope of the fencing tender entailed the supply, delivery, installation and commissioning of security outer perimeter fences with taut wire for outer and inner fences and CCTV surveillance cameras at various correctional centres. The contract value was approximately R486 937 910.

The fencing tender was published on 14 October 2005, with closing date on 14 November 2005. The contract between Phezulu and the DCS was signed on 30 November 2005.

#### 8.3.1 Evidence gathered

##### The timeline of the tender

For ease of reference, the chronology of the key events involved in the bid process for the fencing tender, is summarised in Table 6 below.

Table 6: Chronology of the key events involved in the bid process for the fencing tender

| Date            | Activity  |
|-----------------|---|
| 19 Sept 2005    | Received the standard technical specifications for outer perimeter fences for prisons from DPW  |
| 20-30 Sept 2005 | Compilation of bid specifications   |
| 4 Oct 2005      | Compilation of Bid documents  |
| 6 Oct 2005      | Request to government printers to publish the bid invitation  |
| 14 Oct 2005     | Bid invitation is published   |
| 18 Oct 2005     | Memorandum dated 13 October 2005 received from Dir. Facilities Planning and Development confirming availability of funds and providing "Request to Invite Bids" |
| 25 Oct 2005     | Compulsory information meeting  |
| 14 Nov 2005     | Closing date for bids: 6 Bids were received   |
| 15 Nov 2005     | Initial screening commenced, Tax clearance certificates were requested from 5 of the 6 bidders  |
| 15 Nov 2005     | Memorandum to Dir. Security Management to convene BEC   |
| 17 Nov 2005     | Briefing of the BEC   |
| 18 Nov 2005     | Evaluation of the points for phase 1  |
| 18 Nov 2005     | Opened financial proposal of short-listed bidder (phase 3)  |



**Table 6: Chronology of the key events involved in the bid process for the fencing tender**

| Date        | Activity   |
|-------------|--|
| 18 Nov 2005 | Calculation of points for phase 4                  |
| 18 Nov 2005 | Compilation of draft recommendation                |
| 23 Nov 2005 | Finalising recommendation to the NBAC              |
| 29 Nov 2005 | Recommendation approved by the NBAC                |
| 30 Nov 2005 | Contract between DCS and Phezulu Fencing is signed |
| 1 Dec 2005  | Request government printers to publish the results |

**Planning of the tender**

The SIU could find no evidence indicating that a needs analysis, feasibility studies or proper business plans were compiled for the fencing tender.

The fencing tender was initiated by Gillingham, who on 11 August 2005, requested Damons to obtain permission from Commissioner Mti to erect security fences at 26 Centres of Excellence and 22 High Risk Correctional Centres. Damons in turn instructed Venter to draft the required memorandum. Venter's memorandum was dated 24 August 2005. Venter's memorandum requesting approval for the project and:

- dealt with the utilisation of capital funds earmarked for the construction of 4 New Generation Prisons for the purpose of erecting security fences at 26 Centres of Excellence and 22 High Risk Correctional Centres
- identified the centres where security fences should be erected at an estimated cost of R86 487 000 for the Centres of Excellence and R71 379 500 for the High Risk Centres respectively, bringing the estimated cost of the entire project to R157 866 500
- requested that the procurement process be handled by Gillingham and Ngubo.

Attached to the memorandum were the standard technical specifications for outer perimeter security fences normally used by the DPW. Venter had obtained the specifications, on request of Gillingham, from Mr P du Preez (Du Preez), employed at the Mechanical Engineering, Fire and Security division of the DPW.

The need for fencing at correctional centres was previously identified during initial discussions for the access control tender during which Venter had indicated the





The fencing tender was later amended by subsequent variation orders, amounting to approximately R100 million. The additional work that was required to be done, included, *inter alia*, the removal of trees and sub-stations, construction of guard houses, blasting and installation of generators due to inadequate electricity supply as well as erecting additional fences.

According to Steyn by 22 May 2009, R94 700 270.77 had been paid to Phezulu in respect of variation orders, with R4 335 087 12 still due to them.

### The bid specifications

The evidence revealed that Gillingham was the project leader for the fencing tender. Although he held meetings with Damons and Venter from the Security Directorate (the end user), he did not discuss the technical fencing specifications with them. His discussions with them concerned issues relating to the bid document, such as what type of fences should be installed and at which centres.

According to Venter, the end user was excluded to a large extent in the tender process. Neither he, nor any other official from his directorate, was involved in the drafting, amending or approval of either the tender specifications or the evaluation criteria. His involvement was limited to obtaining standard specifications from the DPW and identifying the centres where fencing was required.

According to Venter, no tender specification committee was constituted for the fencing tender. According to Truter, Gillingham had, in accordance with paragraph 3.3.1.2 of chapter 3 of the SCM User Manual, certified that the specifications for the bid were obtained from the DPW as a standard set of needs that were adapted to DCS's specific circumstances. According to him, Gillingham, however, failed to indicate who assisted in or was responsible for making the adaptations to the specifications.

### The bid evaluation and adjudication

There was great interest shown in the bid by virtue of the fact that the compulsory information meeting held on 25 October 2005 attracted 85 attendees from various enterprises, including Phezulu, Bosasa and Sondolo. However, despite the fact that there was wide interest shown in the bid, also manifested by the fact that documents were issued to 73 entities, only six bids were received.

Truter, a procurement official with the DCS, informed the SIU that he had received a request from his supervisor, Pretorius, after closure of the bids, to inform



Two handwritten signatures in black ink, one above the other, located in the bottom right corner of the page.

Commissioner Mti who the bidders were. Despite being uncomfortable with the request, because information relating to the tender was confidential and people outside the procurement process should not have access to such information, Truter drafted such a memorandum to the Commissioner.

The Code of Conduct and Declaration of Interest forms were signed by the members of the BEC on 17 November 2005. Only Mr SG Oosthuizen declared an interest by virtue of the fact that his son was employed by one of the bidders' subcontractors, namely, Teqcon (Pty) Ltd. However, Gillingham signed the Declaration of Interest forms indicating that he did not have a personal interest in any of the bids forming the subject matter of the procurement process in the fencing tender.

The BEC used the functionality and price evaluation method for evaluating the fencing tender. However, according to Breytenbach, this approach was incorrect. The functionality and price evaluation method is only applicable when procuring the services of consultants, and not for general services such as construction work, catering, cleaning or security. The correct evaluation method that should have been used in this tender was the preference point system, as previously described.

It was a bid requirement – confirmed by Gillingham at the compulsory briefing session held on 25 October 2005 – that the erection of fences had to be completed by 17 March 2006.

However, Phezulu submitted two sets of project plans. The first dealt with the delivery of materials up to the completion date of 17 March 2006, while the second dealt with erection of the fences by the middle of 2007. The erection, addressed in the second project plan, ran far beyond the completion date.

However, other bidders, such as Provicom and Intervid, submitted a single plan for the tender with a completion date of 17 March 2006.

Despite the fact that both Provicom and Intervid's project plans were consistent with the completion date, Gillingham scored both these companies 0 out of 6 for time frames, while scoring Phezulu full marks for its time frames.

The DCS, according to George, did not comply with the CIDB prescripts, for the following reasons:

- The fencing tender was subject to the provisions of the CIDB Act and its regulations.
- In terms of regulation 24, the DCS should have stated in its invitation for tender that only contractors that were duly registered with the CIDB would be



45

Handwritten signature and initials in the bottom right corner, including the number 45.

considered for the tender and, in addition, the DCS should have placed the Invitation on the CIDB website.

- In terms of regulation 18, the DCS (as the employer) should have registered the fencing project with the CIDB within 21 days of it having been awarded.
- George, requested the CIDB Registry Department to confirm whether the DCS was registered as an employer at the time the tender was advertised and awarded; it was not
- Table 8 of regulation 17, prescribes the upper limits of the value range for the different grades and a contractor can only do construction work for the public sector up to the maximum values consistent with its grade
- In terms of regulation 25(9), the DCS should have established whether Phezulu was registered with the CIDB prior to awarding the contract to it. George, requested the CIDB Registry Department to confirm whether Phezulu had been registered at the time. The Registry Department indicated that Phezulu had registered for the first time on 10 May 2007, with a "7" grading which meant that Phezulu could only do construction work up to a maximum value of R30 million. The DCS should consequently have awarded the tender to a bidder with a grading of "9" due to the fact that the tender exceeded R30 million. There is no limit for a "9" grading.

The evidence shows that the non-compliance by Phezulu with the CIDB Act and its regulations were not brought to the attention of the NBAC by the BEC.

The minutes of the NBAC meeting reflect that Gillingham attended the meeting not only in his capacity as CDC Finance, but also as a BEC representative. The minutes further reflect that Petersen, in his capacity as chairperson of the NBAC, confirmed with all officials present that none had any financial interest in any of the bids before the NBAC, since such person(s) would be required to excuse themselves when the relevant bid is presented. Two bids were evaluated during this particular NBAC meeting, namely, the fencing tender and tender DCS9/2005. The Declaration of Interest forms were distributed to all officials present at the meeting for their signatures and were returned to the chairperson. As in the case with the BEC, Gillingham signed the Declaration of Interest form on which he declared that he had no interest in either Phezulu or its sub-contractor, Sondolo.

For ease of reference, the names of the members of the BEC and NBAC who participated in the fencing tender, are set out in Table 7 below.

  
46

Table 7: BEC and BEAC members to the tender boards

| <b>Bid Evaluation Committee</b>            |   |
|--|---|
| Gillingham (Chairperson)                   | CDC: Finance  |
| Damons                                     | DC: Facilities and Security                                   |
| Venter                                     | Dir. Security Management Services                             |
| Oosthuizen                                 | DD: Project Management  |
| Madisa                                     | Regional Co-ordinator: Corrections: Gauteng                   |
| Morel                                      | Area Co-ordinator: Corrections: Gauteng                       |
| Phaal                                      | Secretary of the Committee                                    |
| <b>National Bid Adjudication Committee</b> |   |
| Petersen (Chairperson)                     | CDC: Corporate Services                                       |
| Gillingham                                 | CDC: Finance (CFO) (Advisory Capacity and BEC representative) |
| Miombile                                   | CDC: Corrections  |
| Schreiner                                  | CDC: Central Services   |
| Ngubo                                      | DC: Supply Chain Management                                   |
| Mapasa                                     | Acting Dir. Procurement                                       |
| Kgwele                                     | SCO: Secretariat  |
| Arles                                      | COII: Secretariat   |
| Truter                                     | Clerk: Tenders  |
| Davids                                     | Clerk: Tenders  |

**Contract management**

On 30 November 2005, Truter forwarded a memorandum to Pretorius, instructing that payments were to be made in strict accordance with the contractual conditions, which provided that:

*"The contract manager must certify invoices to the effect that services were delivered correctly and in accordance with the contract before payment can take place".*

After the commencement of the contract, the DCS received correspondence from Phezulu indicating that all materials to be used in fulfilling the tender would be purchased from local manufacturers and leading suppliers, including Sondoio and a company by the name of Teqcon (Pty) Ltd.



On 14 December 2005, Phezulu forwarded to the Commissioner, a list of deposits required from DCS, as well as an invoice for a pre-payment of R56 410 172.69. The invoice was attached to a spending plan that reflected how payments should be made in terms of the contract. Venter, who had been appointed as project manager, advised that payment of the first invoice was made on 19 December 2005, by Mr F Venter (F Venter) from Gillingham's office, without any materials having been delivered or work done. Venter only became aware of the payment after it had been made.

On 18 January 2006, F Venter, forwarded Phezulu's second invoice, dated 13 January 2006, to Damons, requesting him to certify it as correct. The second invoice was for R79 138 225.30. Damons, in turn, forwarded this invoice to Venter.

On 20 January 2006, Venter advised Phezulu that it was not clear from the invoice whether materials amounting to the invoice total had been delivered to the sites, as there were no certified delivery notes attached. Venter's concern was that in terms of the contract with Phezulu, 90% of the contract price was only payable on delivery of the full bill of materials. Gillingham, however, instructed Venter that he should verify the spending plan and make payments in terms thereof. The sole purpose, however, of a spending plan, according to Venter, is to determine when materials would be delivered and their value and thus not to make payments that are contrary to the contract.

On the evidence, it would appear that because of the poor planning of this project, the budget was significantly exceeded and in addition gave rise to variation orders valued at R 100 million<sup>24</sup>.

The evidence shows that Phezulu received 90% of the contract value, amounting to approximately R392 million, prior to the end of the financial year in March 2006 and before any fences had been erected.

The evidence further shows that the integration of the fence to the ON-IMIS access control system at the Johannesburg Correctional Centre is still outstanding, despite the completion date for the project being 17 March 2006.



<sup>24</sup> The budget for the project was R 340 million, the contract awarded to Phezulu was R 486 million.

Annexure "Q3"

"Q3"

Annexure "Q3"



2014-01-26 10:20:00

A small, circular handwritten mark or scribble.

A large, stylized handwritten signature or scribble.

OFFICE OF THE DPP  
PRETORIA  
SCCU PRETORIA

# Memo

**To:** ADV M SIMELANE – NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS  
**From:** GLYNNIS BREYTENBACH  
**CC:** DR S RAMAITE SC, ADV S C JORDAAN SC  
**Date:** February 4, 2010  
**Re:** BOSASA INVESTIGATION

Dear Adv Simelane

The so-called Bosasa matter was received in this office directly from the SIU during late November 2009. As a result, it had to be referred to the SAPS in order for them to study the material and take a decision on whether or not to open a case docket.

Due to the profile and sensitivity of the matter I approached Commissioner Hans Meiring (the National Head of the Commercial Branch) for assistance in getting the matter allocated to the office for Serious Economic Offences of the SAPS.

The Acting Commanding Officer allocated the matter to Snr Superintendent D J Kriel for further investigation.

Once the material supplied to us had been studied by myself, Adv I Grobler and Mr G Nkadmeng (the prosecution team), and the investigating officer, we had a follow up meeting with Mr Clint Oellermann of the SIU to discuss



24

the material in their possession but not yet supplied to us, and the admissibility thereof.

Mr Oellermann supplied us with copies of the civil litigation conducted between the SIU and Bosasa during late December, which was then studied by all the role-players when they all returned from their annual leave, in order to determine the impact thereon on the criminal investigation, if any. This was done chiefly with a view to obtaining a clearer understanding of the issues involved, and to avoid any later problems arising as a result of possible derivative evidence. It was essential to understand the nature of the legal challenge against the SIU before proceeding with the investigation proper.

A compact disc containing the initial start-up documentation of the SIU investigation was also supplied, the contents of which have been studied by the team.

Mr Willie Hofmeyr was approached during late 2008 to facilitate a meeting with the Acting Commissioner (Jenny Schreiner), since Mr Oellermann indicated that Mr Hofmeyr had easy access to the Acting Commissioner. This meeting has not yet taken place. It is essential to meet with the Acting Commissioner, since she would be the apposite person to depose to an affidavit to form the "founding" affidavit on which to base the investigation.

In the absence of this statement, the investigation has continued, in as far as it is possible, but no statements have as yet been re-taken by the investigating officer due to the fact that the case docket cannot be registered without the affidavit of the "complainant".

The SIU has not supplied the source documents relating to their report, and we are currently attempting to gain access to these source documents in



*[Handwritten signatures]*

order to determine precisely what they have, and how it was obtained, before proceeding with any requests for information from banks and other parties

It is essential to understand whether the documents so obtained by the SIU are admissible and can be used in the criminal investigation, or not admissible, in which case we must retake / re-obtain them in a fashion which allows them to be used in court. This is also to avoid a duplication of documents and work done, and to avoid asking for the same documents more than once from the same institutions.

It was hoped that we would be able to meet with Mr Oellermann during the course of this week in order to refine an affidavit from him which omits all the unnecessary references to the civil litigation currently contained in the report. This aspect has been canvassed with him in detail, and the draft thereof needs to be refined and finalised. He has unfortunately not been available this week, and it is hoped to finalise this aspect during the course of February, along with the affidavit of the Acting Commissioner

In the interim the documents received from the SIU have been read and sorted into what will form the basis of the case docket once the affidavit of the Acting Commissioner has been finalised

An issue that needs to be addressed on an urgent basis is the position of Mr Linda Mtl, who is one of the two main suspects, and who currently holds the position of Head of Security : 2010 World Cup and the impact that this investigation, once it gains momentum (and attracts the attention of the media), might have. Some guidance in this regard would be greatly appreciated.

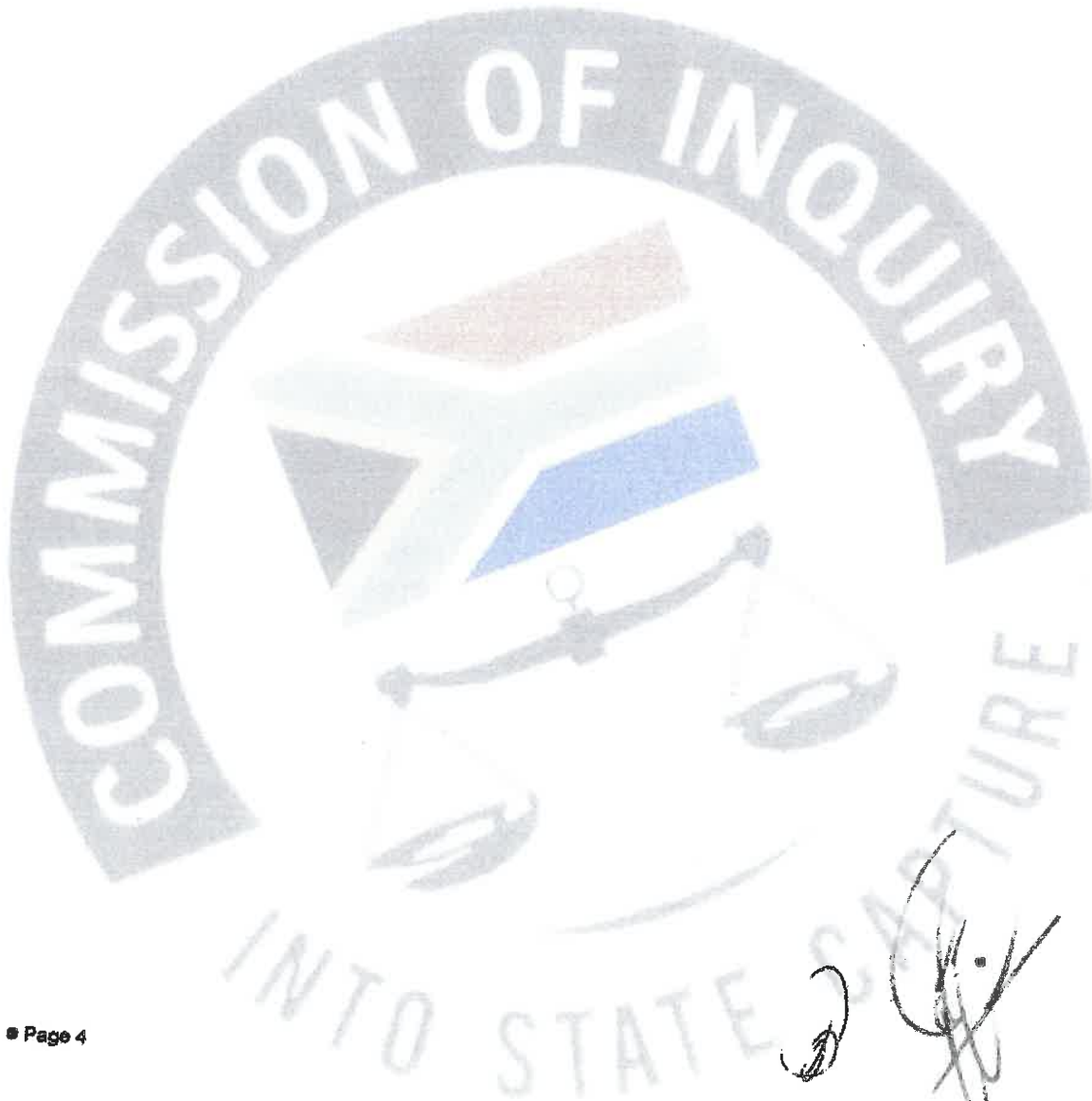


A handwritten signature in black ink, consisting of a large, stylized 'L' and a smaller 'M' or 'Mtl' to its left.

26

Yours faithfully

GLYNNIS BREYTENBACH  
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS  
SPECIALISED COMMERCIAL CRIME COMPONENT  
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA



A handwritten signature in black ink, appearing to be "G. Breitenbach", written over the bottom right portion of the watermark logo.



Annexure "Q4"



27



The National Prosecuting Authority of South Africa  
Igunya Jikelele Labatshuishi Bo Mzansi Afrika  
Die Nasionale Vervolgingsgesag van Suid-Afrika

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

**INTERNAL MEMORANDUM**

TO: ADV G BREYTENBACH

Cc: Dr S RAMAITE, SC  
CC: ADV C JORDAAN  
Cc: ADV S MZINYATHI

FROM: ADV. M. SIMELANE  
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT: BOSASA INVESTIGATION

DATE: 08 FEBRUARY 2010

Dear Adv Breytenbach,

I have considered your memorandum dated 04<sup>th</sup> February 2010. Having done so, I am concerned about the turn that the case is taking.

A [redacted] has been reported on with suggestions that it [redacted] the opposite, I am [redacted] concerned that a simple act of obtaining a statement with which to open a docket is proving difficult to do. I would have hoped that by now the SIU itself would provide the required affidavit since it has locus standi to investigate. It therefore can legitimately open a case with the

S.I.U. PROSECUTORS WITH DELEGATIONS



police. The Department of Correctional Services is less important in this respect. The South African Police Service must be advised to expedite this process.

It also appears that the NPA staff are unlikely to contribute materially at this stage. I suggest that you advise Senior Superintendent DJ Kriel, in writing, what process to follow to get the investigation going. You and your team of Adv Grobler and Mr G Nkadmeng must withdraw from the case until I am advised by the police that a docket has been opened and it is specified what assistance is required from the NPA.

*[Redacted]* you are...  
*[Redacted]* and...  
...prosecute. Please confirm the withdrawal by 09 February 2010.

I note the point that you make regarding Mr Mti. It is mischievous to say the least. Firstly, there is no police docket or investigation underway. Secondly, and by your own admission, there is still an assessment to be made on the evidentiary value of the information currently available. How therefore you can start speculating and making suggestions regarding any person, is beyond belief, unless of course it is a manifestation of a mindset with predetermined outcomes. My suggestion would be that you follow the advice in the last sentence of paragraph 3 above

Kind regards

*[Signature]*  
Adv. M. Simelane

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

DATE:

INTO STATE CAPTURE

S.I.U. PROSECUTORS WITH DELEGATIONS

*[Handwritten signature]*



Annexure "Q5"

"Q5"



*(Handwritten initials and signature)*

SPECIAL EXTENDED MINISTERIAL MEETING



MINUTES

|   |                                      |                     |                           |
|---|--------------------------------------|---------------------|---------------------------|
| <b>Business Unit Name:</b>              | National Prosecuting Authority       | <b>File Ref:</b>    | 3/2/3/2                   |
| <b>Meeting Name:</b>                    | SPECIAL EXTENDED MINISTERIAL MEETING | <b>Time:</b>        | 09:00 – 13:00             |
| <b>Venue:</b>                           | CAPE TOWN, MINISTRY J&CD             | <b>Secretariat:</b> | Mr T Tlali & Ms J Lepinka |
| <b>Meeting Number:</b>                  | 01/2010                              |                     |                           |
| <b>Date:</b>                            | 2010/03/09                           |                     |                           |
| <b>Chairperson:</b>                     | Minister of Justice & M. JT Radebe   |                     |                           |
| <b>Purpose/objective(s) of meeting:</b> | Briefing on various matters          |                     |                           |

DISTRIBUTION:

Name:

Capacity

Documents distributed to all attendees

Minister JT Radebe, Minister NN MAPISA-Nqakula, Adv M Simelane

39



- Minister of Police and NatComm to be taken on board and be advised of the concerns raised.
- Statements taken without the consent of the Executive Authority, which is of grave concern.

4. The year in perspective

AFU

- Adv Willie Hofmeyr to be informed that all AFU regional heads will report to DPPs in each jurisdiction with effect from 01.04.2010.
- Letter informing him that he cannot head two institutions has been given to him and the Presidency has been advised of the need for a new head of SIU and/or possible Proclamation for SIU to fall within DPCI.

5. Closing remarks by Chairperson

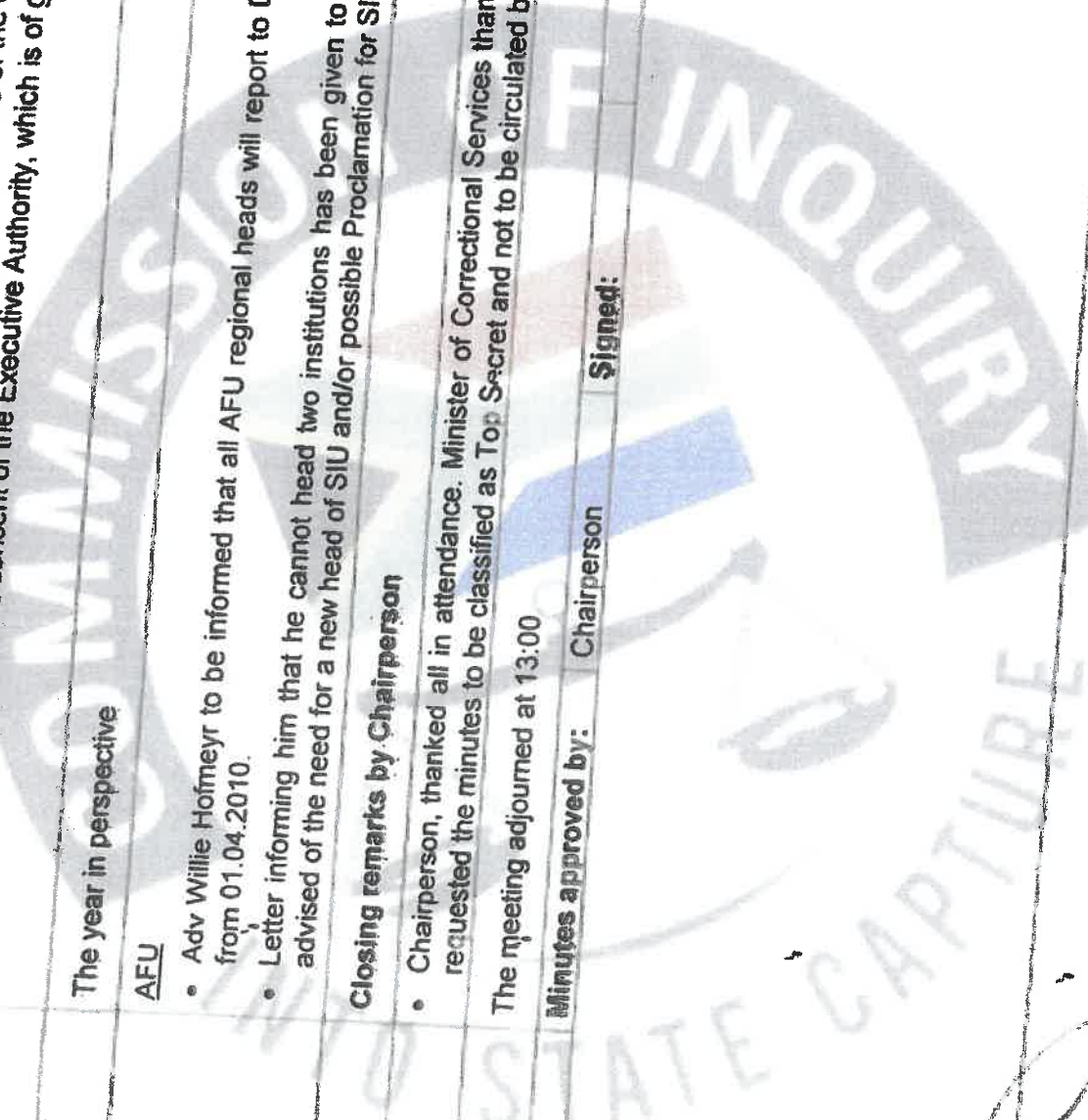
- Chairperson, thanked all in attendance. Minister of Correctional Services thanked the NDPP for the briefing and requested the minutes to be classified as Top Secret and not to be circulated by email.

The meeting adjourned at 13:00

Minutes approved by:

Chairperson

Signed:



Annexure "Q6"



38

**SPECIALISED COMMERCIAL  
CRIME UNIT**



**PRETORIA**

tel + 27 401  
27 30 9704

228 Visagie Street  
Pretoria

P/Bag X,297  
Pretoria  
0001  
South Africa

[www.ndpp.gov.za](http://www.ndpp.gov.za)



TO : The National Director of Public Prosecutions:  
Adv. Menzi Simelani

FROM : Adv MC de Kock

DATE : 17 November 2010

SUBJECT : BOSASA Matter

1. Purpose

The purpose of this report is to apprise the NDPP of the status quo with regard to the Special Investigation Unit report on BOSASA.

2. Introduction

The SIU recommended that the NDPP considers instituting criminal proceedings against Mr Gillingham, Commissioner Mtshali, Sondolo, Bosasa, their office bearers and to the extent that Messrs Mansell and Smith may not be office bearers of either Sondolo or Bosasa, that they also be considered for prosecution in their personal capacity.

This conclusion was reached as a result of the investigation conducted by the SIU and the "evidence" that they had gathered.

3. Limitations of the SIU investigation

The SIU report makes it clear that their investigation suffered from certain limitations. I quote from page viii of the executive summary. "...the SIU did not conduct a comprehensive financial investigation as in the case of Gillingham, into benefits received by Commissioner Mtshali from Bosasa, because of various limitations experienced during our investigation", and "...the limited evidence gathered, indicates that he (Mtshali) received benefits from Bosasa, some months before the television tender was granted to Sondolo."

4. The evidence gathered by the SIU

The SIU started with their investigation shortly after the Presidential Proclamation was issued on 28 November 2007. They investigated the contracts awarded to Bosasa "and its affiliates" and ended up recommending that legal proceedings

be instituted against Bosasa "and its affiliates and the persons mentioned in the report."

The SIU investigation into the Bosasa group of companies followed on various media reports of irregularities pertaining to the awarding of contracts by the Department of Correctional Services to Bosasa Operations (Pty) Ltd and its affiliated companies. The importance of and reliance on the company profile and structure is made clear by the fact that a full chapter gets devoted to this topic

The following is stated in respect of the SIU investigation. " the SIU's findings are based on information obtained from the Registrar of Companies, the previous auditors of the Bosasa Group, tender documentation submitted by Bosasa, Sondolo and Phezulu and from the official Bosasa website."

It would appear as if the SIU relied on information that was submitted to them without questioning the veracity of the facts that were conveyed to them. In order to illustrate my point I will quote from the SIU report and then provide the contrasting or contradictory information thus far revealed by the SAPS investigation.

The SIU reported on the origins of Bosasa Operations (Pty) Ltd and said.

"During December 1981, a company known as Emafini (Pty) Ltd was formed by Mr SJH Van Zijl. In December 1984, Smith was appointed to Emafini as a Director. Emafini then changed its name to Meritum Hostels (Pty) Ltd in February 1985.

On 20 June 1996, Van Zijl and Smith entered into a pre-incorporation agreement with a trust, stipulating that a new holding company would be formed and a new operations company would be established to render the services for this holding company, administered by the trust. Mansell signed as witness to the pre-incorporation agreement.

As a result of this agreement, Meritum Hostels became known as Dyambu Operations (Pty) Ltd ...."

We are in possession of the certificate of change of name of a company (Form CM 9) supplied to us by CIPRO. According to the CIPRO documentation, Meritum Hostels (Edms) Bpk requested the registrar of companies to note the fact that Meritum Hostels would in future be called Dyambu Operations (Pty) Ltd. The change of name was officially recorded on 11 April 1996. If the information that was made available to us is correct, the official change of name and the "special resolution" taken by the company preceded the "pre-incorporation agreement" allegedly entered into between Van Zijl and Smith. (Compare SIU report p.14 - 15)

The following is stated in respect of "Sondolo IT (Pty) Ltd":

"Upon changing its name in 2005, Sondolo appointed Bester Viljoen incorporated as its auditors. At this time, Johannes Gumede, Tony Perry, Papa Leshabane, Brian Gwebu, Jacqueline Leyds, Nomazulu Makoko (among others), were appointed as directors of Sondolo ...."

The CIPRO documentation that was made available to me would seem to indicate that Mevava Trading 119 (Pty) Ltd, changed its name to Sondolo IT on 22 February 2005 and that Terrence Anthony Perry was appointed as "public officer" (company secretary) a few days earlier on 10 February 2005. Terrence Anthony (Tony) Perry was never appointed as a director of Sondolo IT



2

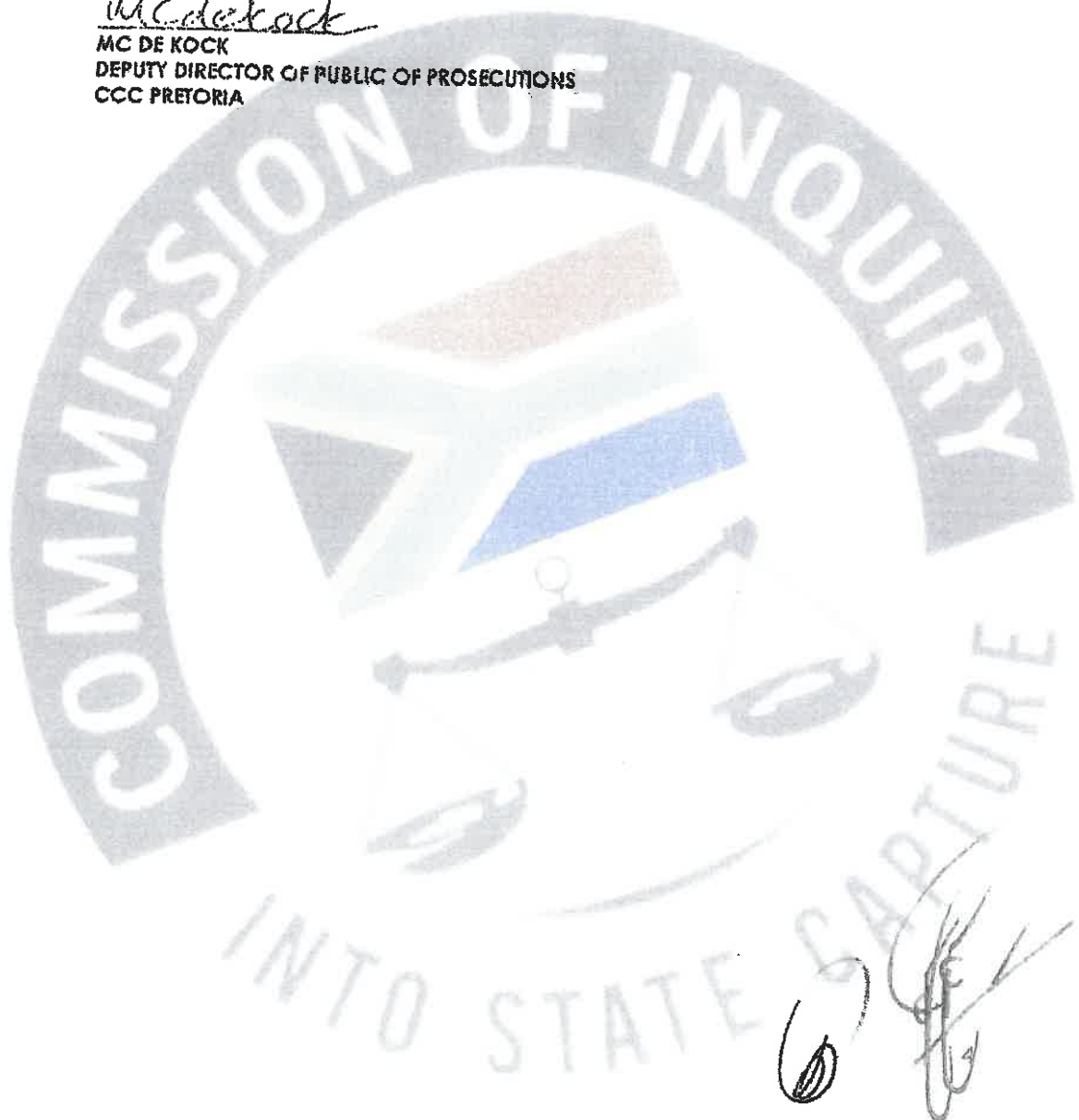


41

The purpose of the SIU investigation may have influenced and informed the product that they produced. In as far as the report may have been true to their mandate it is also clear that it would not stand up to scrutiny in a criminal court. The burden of proof that is placed on the prosecution in a criminal trial has its own specific requirements. The criminal investigation must empower the prosecution to bear the onus and succeed in their quest to prove the case against the accused.

Yours faithfully

*MC de Kock*  
MC DE KOCK  
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS  
CCC PRETORIA



*[Handwritten signatures]*



Annexure "Q8"



d.c.

CONFIDENTIAL

55

Mail & Guardian Subpoena duces tecum dated 14 February 2011Background

During October 2011 I received a request to comment on a subpoena *duces tecum* that was served on the Special Investigative Unit during February 2011.

The subpoena was issued by the Registrar of the South Gauteng High Court in Johannesburg at the behest of the Mail & Guardian Newspaper. It informs the SIU that Willie Hofmeyr is to appear in the Johannesburg High Court on 28 July 2011 in order to produce the following documents "in his possession or control":

(a) A copy of the report prepared by the Special Investigative Unit in 2009 into alleged procurement irregularities in the Department of Correctional Services, and

(b) The deeds, documents, writing or tape recordings referred to in paragraph 1.

The request itself appears ambiguous as "paragraph 1" of the subpoena only mentions a report and nothing else.

It is not known if the SIU requested the Mail & Guardian for clarity on this issue. For purposes of this discussion I will assume that the subpoena was meant to request copies of any (title) deeds, documents, writings or tape recordings referred to in the SIU report.

The Weber Wentzel Covering Letter dated 15 February 2011

The subpoena *duces tecum* dated 14 February 2011 was accompanied by a covering letter issued by Weber Wentzel Attorneys. The covering letter was dated 15 February 2011.

In the covering letter it is stated that Weber Wentzel represents Mr. Adriaan Basson (a newspaper journalist) and M&G Limited in a defamation action brought against them by Bosasa Operations (Pty) Ltd

Paragraph 2 of the covering letter calls on Willie Hofmeyr (the Head of the SIU) to "produce to the court a copy of the report prepared by the



11/11/2011 09:26:12

CONFIDENTIAL



82

CONFIDENTIAL

57

process was carried out in such a haphazard way that the witness cannot be sure that a due process was followed and that the subpoena was indeed issued "out" from the office of the registrar.

The requirement of a legible and verifiable signature of a designated public official on what appears to be official documents is the first safeguard against possible abuse of the authority of the registrar and his office. (Compare *S v Stevens 1983 (3) SA 649 (A)* at 658D-G for the views of our courts on documents that gets produced under cover of defective and illegible signatures)

The right to subpoena witnesses by way of a subpoena duces tecum

Civil litigants sometimes abuse their right to subpoena witnesses by way of a subpoena *duces tecum*. The issue relating to the abuse of a legitimate court process was discussed in *Meyers v Marcus and another [2004] 2 All SA 438 (C)* paragraph 24. The following was said:

"As the above extract from the judgment in *Beinash v Wixley (supra)* clearly shows, a subpoena may amount to an abuse of the process of the court notwithstanding the fact that the subpoenaed witness may be able to give relevant evidence or produce relevant documents. To put it differently, the issues of relevance and abuse of process, though possibly interrelated, are separate and distinct. Thus, a subpoena issued in respect of a witness unable to give relevant evidence or to produce relevant documents will ordinarily amount to an abuse of the process of the court.

However, the converse is not necessarily true: the evidence sought to be obtained may be relevant and yet amount to an abuse of the process. This will be so, *inter alia*, where the subpoena is issued for an improper purpose."

It will be argued that the issuing of the Mail & Guardian subpoena amounts to an abuse of process on both these levels.



FORM 2010C-20-120130

CONFIDENTIAL

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a surname, with a horizontal line underneath.

CONFIDENTIAL

58

Defamation

The Defamation Action

The Webber Wentzel letter dated 15 February 2011 fails to mention anything specific about the civil action that was brought by Bosasa Operations (Pty) Ltd except to say that it relates to defamation.

During May 2010 the Mail & Guardian newspaper published a newspaper report entitled '*The Story Behind 'Kitchen confidential'*' in it they divulge more detail about the said defamation action. It would appear as if the Mail & Guardian is being sued for damages in the amount of R500 000.00.

The Facts surrounding the Defamation Action

The facts surrounding the defamation action can be pieced together from information divulged in media reports like, '*The Story Behind 'Kitchen confidential'*' mentioned above.

In this particular newspaper report, the second defendant, reports on the 'investigation' of the first defendant.

The style of the newspaper report is in the form of an interview. The second defendant gives a 'verbatim' account of the 'story behind the story' as it unfolded during January 2009. I quote from the newspaper report:

"My investigation intensified in January 2009 after Bosasa was awarded yet another multimillion rand tender by the prisons department.

After I published an article (January 23) asking serious questions of the Department of Correctional Services (DCS) for awarding yet another tender to Bosasa, the department placed expensive advertisements in two Sunday newspapers, urging members of the public with evidence of wrongdoing to come forward. The *Mail & Guardian* answered then minister Ngconde Balfour's call on January 30 by publishing a litany of email correspondence between Bosasa's chief operating officer and the department's finance chief (Patrick Gillingham), showing a *blatant corrupt relationship* between the parties."



21

CONFIDENTIAL

59

The defamation action would appear to be founded on this particular allegation, namely, the existence of a *corrupt relationship* between the parties.

I quote from the same newspaper story:

"The *M&G* was also continuously threatened with legal action by Bosasa's lawyers. Bosasa never pursued criminal charges against the *M&G* and me, but in *July* they issued summons against us, claiming damages of R500 000 in the South Gauteng High Court for alleged defamation.

The *M&G* is defending the case and *we are satisfied that we have more than enough proof to justify labelling the relationship between the parties as "corrupt".*

The Defamation Action and the SIU Report

The defamation action would seem to flow from the fact that the *Mail & Guardian* decided to use the infamous "corrupt relationship" label to describe the bond or connection between the parties.

This may not be the only 'fact' forming the basis of the defamation action but this particular newspaper report at least makes it clear that the defamation action was launched at least three (3) months prior to Willie Hofmeyrs' report to parliament.

Definition and elements of defamation

The following is stated in LAWSA in respect of the delict of defamation:

"The delict of defamation is the unlawful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff. A statement is defamatory if it has the effect of injuring a plaintiff's reputation. ... The elements of the delict can therefore be summarised as the unlawful or wrongful publication, *animo iniuriandi*, of a defamatory statement concerning the plaintiff: *It is not an element of defamation that the statement should have been false because the defamatory nature of a statement is not dependent on its falsity.* Once the plaintiff establishes that a defendant has published a defamatory statement concerning him or herself, it is presumed that the publication was both

*(Handwritten signature)*



P2

CONFIDENTIAL

60

unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts either unlawfulness or intention." (Compare LAWSA (2<sup>nd</sup> edition) Volume 7 – paragraph 234)

The fact that the *falsity* (and therefore also the *truth*) of a statement is irrelevant as far as the elements of the delict are concerned finds support in a number of decisions emanating from the Supreme Court of Appeal. (Compare *Sutter v Brown* 1926 AD 155, and *National Media Ltd v Bogoshi* [1998] 4 ALL SA 347 (SCA))

The *Bogoshi* judgment (supra) makes this issue quite clear. Hefer JA said:

"In my judgment we must adopt this approach by stating that the publication in the press of *false* defamatory allegations of fact will not be regarded as unlawful if, upon consideration of all the circumstances of the case, it is found to have been *reasonable* to publish the particular facts in the particular way and at the particular time." (Compare p. 361)

The newspaper will in essence have to prove that the "defamatory statement" or allegations were based on information obtained from a reliable source and that they took the necessary steps to verify the information, prior to publication. (Compare *Bogoshi* (supra) p. 361)

I have not fully researched this issue but if the general viewpoint or statement of the current legal position is correct, then the contents of the SIU report cannot make *any contribution* towards the issues that would be central to the defamation claim. Put differently, the SIU report was not available at the time of the publication of the defamatory newspaper report(s) and could therefore not have been used to "*verify*" the information that the newspaper received from the source.

The SIU may rightfully want to know in what way the report may possibly contribute towards or assist the *Mail & Guardian* in their defence of the defamation action.

Possible abuse of civil procedure by the plaintiff

The defamation action instituted by Bosasa Operations may be nothing but a clever tactical ploy. Bosasa may have more than one purpose in mind. They may be trying to force the M & G Media Limited to present



SD

CONFIDENTIAL

61

them with a copy of the "Mail & Guardian report" and thus in a way attempt to "legitimize" evidence that they themselves have obtained illegally.

The defamation action may be a disguised attempt to force the SIU to "publish" the report. Bosasa may also (by way of the Mail & Guardian as "intermediary") want to obtain privileged source material. They may have realised that the SIU report and the attachments would be the first line of defence to be raised by the newspaper.

The possible motivation and subjective (self serving) aims of the parties to the civil suit will be discussed in more detail below.

### Docket Privilege and Risks

#### Nexus between the SIU report and the defamation action

It is difficult to fathom how the SIU report could assist the Mail & Guardian in defending a defamation action. The SIU report could at most only serve to corroborate the views of the first defendant as published by the second defendant.

The traditional views on "corroboration" is that it is evidence that could (in some material respect) support evidence derived from another source. The SIU report would not appear to have been in existence at the time when the 'defamatory' newspaper report or series of newspaper reports were first published.

#### Possession and Control of the SIU report

The Mail & Guardian subpoenaed the head of the SIU for a report transmitted to another government institution. The report is at present in the possession and under the control of the SAPS. It is currently under protection of a specific type of privilege namely "docket privilege". The Mail & Guardian may arguably not even be entitled to a copy of the report from this particular source as they would hardly be cited as an accused in any future criminal prosecution.





CONFIDENTIAL

63

- Should the State decide to call the head of the SIU or any other official from the unit to testify about the report the suspects would get a second opportunity to cross-examine on the contents of the report as well as the preparation thereof.
- The Mail & Guardian will use the opportunity to consult with the "witness" and extract as much out of him as is possible in order to "fuel" future newspaper reports and fill in the gaps that may exist in their own investigation.

These are but a few of the practical risks and possible prejudice that could be suffered by the prosecution. The premature "release" of the fruits of the SIU investigation could also hamper the ongoing criminal investigation.

### Claiming Privilege

#### Privileged Documents

Rule 38(1)(b) of the Uniform Rules of court states the following:

"Any witness who has been required to produce any deed, document, writing or tape recording at the trial ....shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged..."

The rule only refers to "privilege" as a generic concept and fails to specify the particular type of privilege that could be claimed.

#### Litigation Privilege

I am of the view that the SIU report may be protected from disclosure by "work product" privilege or "litigation" privilege. The authors of "The South African Law of Evidence" (formerly Hoffmann and Zeffertt), devotes a full chapter to the topic "Privilege". They discuss two (2) lesser known areas of privilege "work product" and "litigation privilege".

The area of "litigation privilege" relates to materials obtained in anticipation of litigation. The authors refer to the Canadian case of *Ottawa-Carleton (Regional Municipality) v Consumers Gas Co. (1990)* 74 OR (2d) 637 at 643 where the following was stated: "The adversarial system is based on the assumption that if each side presents its case in



Ed

CONFIDENTIAL

AA-427

64

the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel..." (Compare p. 591). The authors elaborate on this point by referring to *R v Steyn 1954 (1) SA 324 (A)* and other cases that followed it. They proceed to say: "It has been recognised by our courts that 'when statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, those statements are protected against disclosure'. I would like to define the principle even further by stating that "and documents attached to the statement as annexure" would also be protected.

The wider privilege entitles a litigant to refuse to disclose any communication that forms part of a litigation brief. In the United States this area is called the "work product" doctrine. (Compare p. 592-3) The authors explain the difference between "legal professional privilege" and "litigation privilege". Litigation privilege will in short cover "the materials for the brief". Protecting the records collected by the SAPS during the investigation phase of the case from disclosure would avoid interests that are "contrary" to the enforcement of justice. This will not only avoid the tampering with witnesses but prevent the unscrupulous from obtaining any unfair advantage. (Compare p. 593 - 4)

#### Finding Support for the 'work product' argument

The SIU was requested to investigate certain issues and supply the government with a report. The executive summary to the SIU report states that evidence was gathered that points to the commission of certain offences and that the matter is therefore referred to the relevant Prosecuting Authority. The SIU referred to the provisions of section 4(1)(d) and 5(7) of the SIU Act. The Promotion of Access to Information Act states that an information officer of a public body may refuse a request for access should the "record" contain "an account of a ...deliberation that has occurred" for the purpose of taking a decision in the exercise of a power or performance of a duty "conferred or imposed by law." (Compare section 44(1)(a)(ii) of PAIA) It may be argued that the SIU report would fall into this category of information.



PAGE 2019-01-06 12:00:00

CONFIDENTIAL



2j

CONFIDENTIAL

66

) publishing a still confidential report, they must not shy away from the consequences.

Traditionally all relevant evidence was admissible and South African court had very little concern with how it was obtained. The Mail & Guardian would still seem to operate under the impression that illegal is "OK". The traditional position has changed dramatically as a result of the South African Constitution. Now, evidence obtained through a breach of fundamental rights can only be admitted if it is justifiable in terms of the limitation clause of the Bill of Rights contained in the Constitution. Civil court also has the discretion to exclude unfairly obtained evidence. Civil courts are also obliged to promote the spirit, purport and objects of the Bill of Rights. [Compare LAWSA Volume 9 paragraph 765 for a discussion of illegally and unfairly obtained evidence]

Unauthorised Possession of the SIU Report

Background

The matter of *Protea Technology Limited and another v Wainer and others [1997] 3 ALL SA 594 (W)* provides us with the following interpretation of the phrase "confidential information":

"The Act does not define "confidential information" but the expression must surely mean such information as the communicator does not intend to disclose to any person other than the person to whom he is speaking and any other person to whom the disclosure of such information is necessary or impliedly intended to be restricted. I think that there is a distinction between "confidential" information and "private" information. The scope of privacy will be discussed below. Confidentiality can exist even in relation to the communication of information which is in the public domain or is the property of another and, therefore, not private." (Compare judgment p. 603)

(1) Possession and Distribution of the report



*(Handwritten signatures)*

CONFIDENTIAL

67

The Eversheds letter dated 16 November 2009 and addressed to the State Attorney Cape Town allege that a copy of the SIU report was furnished to Bosasa Operations (Pty) Ltd by "Mr. Gillingham's attorneys".

Neither Mr. Gillingham nor his attorneys could legally receive disclosure of the report unless they received the "prior written consent of the Head of the SIU."

I have not been placed in possession of any application / requests for such a "written consent" or a copy of a document purporting to have been issued by the head of the SIU allowing partial or full disclosure of the report to anyone except the persons mentioned on the distribution list. The person(s) who provided Mr. Gillingham or his attorneys with a copy of the report would clearly have committed a criminal offence.

It is my respectful submission that Bosasa Operations is in possession of an unauthorised copy of the SIU report. The mere fact that they (may have) received a copy of the report from an attorney does not in any way legalize their possession of the document.

Possession of the report by M & G Media Limited

I have been informed that extracts from the SIU report appeared in the City Press newspaper. M & G Media Limited has not given any indication as to the origin of their copy. They may have received their copy from Mr. Gillingham's attorney but I doubt this to be the case. If the report was "leaked" to them, their copy would be illegal and unauthorised.

Full particulars as to the source of their copy may in due course be revealed to us.

Unauthorised Disclosure of the Report

The SIU report clearly prohibits that unauthorised distribution and/ or possession thereof. The confidentiality clause inserted in the report clearly states that disclosure of the contents amounts to a criminal offence. The document would appear to have been classified as 'confidential' instead of 'restricted'



CONFIDENTIAL

68

The publication *Constitutional Law of South Africa (2<sup>nd</sup> edition) Volume 3* p. 42 – 171 provides the following information on the national security policy of South - Africa.

The Minimum Information Security Standards ('MISS') was approved by Cabinet in 1996. The following is stated about 'MISS':

"MISS has not been published in any official document nor is it generally publicised though it is applicable to all departments and organs of state."

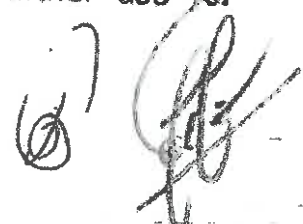
MISS *inter alia* provides for document security. The author states that the document classification regime is at the heart of 'MISS'. Documents may be classified as (a) restricted, (b) confidential, (c) secret, or (d) top secret.

The author refers to the failure of government to publish 'MISS', and proceed to state the following:

"It is remarkable in itself that, in a constitutional democracy founded in part on openness, a document so broad in scope and setting out the detailed constraints upon the exercise of power to withhold information from the public domain, which has the form of regulations or legislation, and which potentially results in the imposition of severe criminal sanctions should not be published through the standard mechanisms for government publication and, at the very least, gazetted."

In terms of 'MISS' the responsibility for classification rests with the author or head of the state institution concerned, or his delegate. By 'imposing' a particular classification on a document the author or head of the state institution in question, in essence removes the document from the public domain. 'MISS' itself does not create offences, but a wide range of offences, with severe penalties, for unlawful disclosure of classified information are created under a number of different pieces of legislation, including the *Protection of Information Act 84 of 1982*.

The deliberate violation or repeated violations of the confidentiality clause contained in the SIU report would be of importance in deciding whether the illegally obtained evidence is to be of further use (or perhaps abuse) by the M & G Limited.



CONFIDENTIAL



CONFIDENTIAL

69

The mere fact that the report fails to mention the *Protection of Information Act ('PIA')* or gives any formal description of the applicable legislation does not detract from the serious nature of any violation of the applicable legislation.

## (2) Disclosure of the Report

Both Bosasa and the Mail & Guardian may want to claim having legitimately received disclosure of the report. I am of the view that neither of the parties will succeed in arguing for 'legitimate disclosure'. It is quite conceivable that the reports were obtained from two or more separate sources. The factors that would militate against a defence of lawful disclosure will be discussed individually

### (a) The Bosasa Report

I am of the opinion the Bosasa will not succeed in claiming legitimate possession or disclosure of the report.

The following factors will inhibit such a defence:

- The report makes it clear that only five (5) individuals / entities will be allowed to possess the report.
- The copy said to be in possession of Bosasa / Eversheds were allegedly supplied to Gillingham by DCS at his disciplinary hearing. If this allegation proves to be correct, the DCS officials responsible for the disclosure / "release" of the report may arguably face disciplinary steps and / or criminal prosecution as a result of his / her / their behaviour.
- It may be argued that the "confidentiality" in respect of the report remains intact because disciplinary proceedings are "confidential" in themselves. The fact that Gillingham has received a copy merely indicates the fairness with which DCS were conducting his disciplinary hearing. Possession of the report (under these circumstances) would not necessarily amount to a breach of the confidentiality clause. The disclosure of the report was for a specific (and limited) purpose and occurred under 'confidential' circumstances.
- If the report was indeed made available to Gillingham for purposes of the disciplinary hearing, it would be safe to assume that



CONFIDENTIAL

CONFIDENTIAL

70

Gillingham would have been informed of the still intact confidential status of the report.

- It would be safe to assume that Gillingham would have been informed that the report can and will be made available to him for the limited purpose of the disciplinary hearing. Possession or disclosure of the report must be distinguished from the distribution thereof. If he distributed the report or caused the distribution thereof to others, he may very well be in breach of confidentiality.
- It would be safe to assume that DCS did not waive the confidentiality of the report by providing Gillingham with a copy. The only person that would legally be entitled to "release" the report would be the individual or entity that restricted it. If the SIU removed the report from the public domain by classifying it as "confidential" then they would also be the only entity that can remove the restriction. DCS would not have the capacity to "de-classify" the report.
- DCS was at all times in control of the "disciplinary process". It can be argued that Gillingham would have received a copy of the report on condition that the contents are treated as 'confidential'. It would be "for his eyes only".
- When Gillingham was dismissed he ceased to be a DCS employee and his subsequent possession of the report became illegal.

#### (b) The Mail & Guardian Report

I am of the opinion that Adriaan Basson and M & G Media Limited would find themselves in a more precarious situation should they face the possibility of a criminal prosecution or further civil action flowing from their possession and subsequent publication of portions of the classified SIU report. I am of the view that they will not succeed with any defence claiming legitimate possession or valid disclosure of the report. The "right to know" and the sister argument "to let the public know" will appear anaemic against the tapestry of facts surrounding the publication of the Bosasa / DCS saga.

The following factors will inhibit any defence:



CONFIDENTIAL

Two handwritten signatures in black ink, one above the other, located in the bottom right corner of the page.

CONFIDENTIAL

71

- If the newspaper reporter obtained his copy from Gillingham or the same attorneys as was mentioned in the Eversheds letter, the 'Bosasa' argument would also apply to them.
- If someone else (besides Gillingham) provided the M&G with a copy it must be illegal because:

They only have an incomplete version of the report – i.e. the narrative version without the annexures'.

This in itself proves (1) that the unknown person who supplied them with a copy did not have access to the complete report, or (2) only 'leaked' a portion of the report with the purpose of keeping the rest a secret.

If the source had access to the complete report (and legally so) they would not have hesitated to provide the M&G with a full report. Logic dictates that the person would have supplied the M&G a complete set of documents if it had been obtained legally.

The source in all likelihood made a clandestine copy of the "narrative portion" of the report. If the person had possession of the full report and ample time to copy the complete set of documents, then he or she would have done so.

The incomplete nature of the report as well as the secretive and clandestine manner of disclosure will indicate that the reporter as well as the newspaper that published the extracts must have been aware of the fact that they have obtained an unauthorised copy.

NB

They will struggle to convince a court that they did not have knowledge of their dishonest possession and the possible dishonest motivation of the person that provided them with a copy of the report.

NB

The illegal nature of the report finds illustration in the fact that it is was only disclosed in part and is therefore incomplete.

The Facts

Fact Driven Approach



CONFIDENTIAL

72

### Determining the Facts

Every matter involving the disclosure of restricted, confidential or secret information will involve a determination of the facts. Every case has its own unique "basket of facts" that would determine the right(s) that requires protection. The "fact driven" approach was also endorsed in cases such as *Unitas Hospital* and the *Masetla* matter. (Compare paragraph [18])

In the *Masetla* matter (supra) Sachs J made mention of issues such as the "factual matrix" and the specific enquiry required when "constitutionally protected interests interact with each other" as well as the "intensity of their engagement".

He specifically referred to the *Shabalala* matter and said: "...the names of informers in criminal matters should not be revealed at any stage even if such non-disclosure were to some extent to limit the capacity of the accused to make his or her defence." (Compare judgment paragraphs [161] and [162])

### The position of the Mail & Guardian

The executive summary of the SIU report states that the SIU's "intervention" was authorised by a presidential proclamation R44 of 2007 gazetted on 28 November 2007. The SIU only commenced with their investigation into the contracts awarded to *Bosasa and its affiliates*, shortly after the publication of the proclamation. The SIU was not the first entity that displayed an interest in the activities of *Bosasa*. The media would appear to have reported on this matter as early as 2006. The SIU report states the following:

"In 2006 various allegations surfaced in the media relating to the alleged irregular awarding of contracts by the Department of Correctional Services (DCS) to *Bosasa Operations (Pty) Ltd (Bosasa)* and its affiliated companies."

It can be assumed that the reference to "media" was meant to imply the *Mail & Guardian Newspaper* as well as its reporter *Adriaan Basson*. I conducted a five minute search on the internet and uncovered the following information:



08982019-01-26 12:01:00

CONFIDENTIAL

CONFIDENTIAL

73

"The *Mail & Guardian*" reported in late 2007 on the SIU's investigation into tender rigging in the department, which includes massive tenders awarded to the Bosasa group."

In the May 2010 report with the title *The Story Behind "Kitchen confidential"* the reporter boasts that:

"The *M&G* was also continuously threatened with legal action by Bosasa's lawyers. Bosasa never pursued criminal charges against the *M&G* and me, but in July they issued summons against us, claiming damages of R500 000 in the South Gauteng High Court for alleged defamation."

The reporter adds the following rider to the "defamation" twist:

***"The M&G is defending the case and we are satisfied that we have more than enough proof to justify labelling the relationship between the parties as 'corrupt'."***

### Legitimising Unconstitutionally Obtained Evidence

#### The Constitutional Perspective

Courts would normally look favourably upon a claim of a litigant if the request to gain access to documents or other information can "reasonable be required to assert or protect a threatened right or to advance a cause of action". (Compare *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) paragraph [25])

The *M&G* will have to prove that they require the SIU report in order to protect a threatened right. I am sceptical that they will succeed with this argument

#### Related Legislation

Under PAIA information officer of a public body may refuse access to records of a public body if "the prosecution of an alleged offender is



2019-01-26 14:01:06

CONFIDENTIAL

E1

CONFIDENTIAL

74

being prepared or about to commence or pending and the (particular) record could reasonably be expected to (1) impede the prosecution, or (2) result in a miscarriage of justice in that prosecution". (Compare section 39(1)(b)(ii) of the Act)

### Using a Legitimate Process to achieve an Illegitimate Purpose

Civil proceedings differ substantially from criminal proceedings. In civil proceedings, a litigant is obliged to disclose his case. He or she is also obliged to discover all documents, including those which might damage his own case, or which might directly or indirectly enable his adversary to advance his case. Obtaining tainted or illegitimate documents or other records may conceivably advance the case of a party to a civil suit and may therefore become a desirable objective. The traditional or "Pre-Constitutional" approach taken by our courts was that relevant evidence was admissible and that a court was not concerned with how it was obtained. With the advent of the Constitutional era things changed. Civil courts no longer follow a mechanical approach to illegally obtained evidence. The *Fedics* and *Protea Technology* matters to be discussed below will illustrate the new and more balanced approach taken by civil courts.

*Fedics Group (Pty) Ltd and another v Matus and others; Fedics Group (Pty) Ltd and another v Murphy and others [1997] 4 ALL SA 14 (C)* considered the civil approach to evidence obtained in violation of a civil litigant's constitutional rights. The facts of the matter are not important to this discussion except to say that the tainted documents forming the subject matter of the dispute was obtained by way of an illegal search.

The court first gave consideration to the "traditional approach" and thereafter made the following remarks in paragraph [92] of the judgment:

"Without trying to formulate principles of general validity or rules of general application, the implications of these differences between criminal and civil proceedings in the present context are, in my view, twofold. On one hand, the litigant who seeks to introduce evidence which was obtained through a deliberate violation of constitutional rights



159412018-010501200100

CONFIDENTIAL

CONFIDENTIAL

75

will have to explain why he could not achieve justice by following the ordinary procedure – including the Anton Pillar procedure – available to him. On the other hand, the Court will, in the exercise of its discretion, have regard to the type of evidence which was in fact obtained. Is it the type of evidence which could never be lawfully obtained and / or introduced without the opponent's co-operation, such as privileged communications, or the recording of a tapped telephone conversation – or is it the type of evidence involved in this case, namely documents and information which the litigant would or should eventually have obtained through lawful means? In the latter case, the Court should, I think, be more inclined to exercise its discretion in favour of the litigant who seeks to introduce the evidence than it would be in the case of the former."

In addition to the desired approach to be taken by civil courts in respect of unconstitutionally obtained evidence the court made the valid remark that it was (a) not asked to *authorise* an infringement, or (b) to *condone* a constitutional infringement, but that it was asked to (c) *ignore* the constitutional infringement for the purposes of *this* litigation. [Compare paragraph [86] of the judgment]

The admissibility of evidence obtained in breach of a right was also taken under scrutiny in the matter of *Protea Technology Limited and another v Walner and others* [1997] 3 ALL SA 594 (W). The learned judge made the comment that the common law was for many years inflexible in its refusal to exclude evidence illegally obtained. The court referred to the erstwhile reliance on the philosophy that the end justifies the means. The almost fatalistic approach would seem to have been that unlawful conduct would expose the perpetrator to a possible criminal prosecution and that the criminal sanction could be made more severe by an action for damages. If the threat of prosecution and the possibility of paying damages were insufficient discouragement to those that had the intention to break the law, then the attitude of the courts would be "so be it". Views like these are today outdated.

The learned judge referred to the modern approach as required by the Constitutional era:

CONFIDENTIAL



Two handwritten signatures in black ink, one above the other, located in the bottom right corner of the page.

21

CONFIDENTIAL

76

"If the common law is at odds with the Constitution the courts must, if that can realistically be done, develop the common law in such a manner as to promote the spirit, purport and objects of the Bill of Rights. Such development requires the test of admissibility to be formulated differently: any evidence which depends upon the breach of a fundamental constitutional right can only be admitted if the admission of the evidence is justifiable by the standards laid down in section 36(1). Thus if a person proves, whether in civil or criminal proceedings that a right identified in Chapter 2 of the Constitution has been infringed, the onus lies upon the party who seeks the benefit in any way from that infringement to satisfy the court that the common law (or statute as the case may be) provides a limitation of the nature referred to in section 36(1). *Prima facie*, the complainant has the right to have it excluded. In order to decide whether it should be regarded as partially or wholly overridden, each case will have to be considered on its own facts and discretion exercised with judicial regard to the substance of section 36(1). Thus, for example, that the breach of rights occurred in conjunction with a breach of the criminal law is not itself decisive .... Section 36(1) of the Constitution seeks to ensure that the wider vision is maintained. Uncovering the truth and exposing the ungodly are not thereby relegated to unimportance. They are, as they ever have been, weights in the scales of justice." (Compare p. 610 – 611 of the judgment)

In the matter of *Protea Technology* (supra) the court pointed out that both parties to the litigation were accused by the other of dishonesty and improper motives and that the process of balancing interests can seldom be mathematically quantified. The court decided to admit the unconstitutionally obtained evidence as it would be quite wrong to allow one party to damage and malign the other while depriving the other of relevant material at its disposal to disprove such allegations. (Compare judgment p. 612)

The matter at hand can on a factual level be distinguished from both the *Fedics* and *Protea Technology* matters referred to above. The particular and distinguishing features of the *Bosasa Operations (Pty) Ltd / Basson and M&G Media Limited South Gauteng Court Case*





CONFIDENTIAL

78

Protecting the Integrity of the judicial process

Courts may be called upon to protect the integrity of the judicial process. The following was stated in the *Brummer* matter (supra): "There is no doubt in my mind that the integrity of the judicial process is an essential component of the rule of law and the integrity of the judicial process may be severely compromised if a record, which a party to litigation intends to use to prove his claim or disprove the other party's claim, was made available to a third party before the trial is finalised. A disclosure might create a huge risk of prejudice to the administration of justice." (Compare paragraph [46] of the judgment)

The early release of information forming part of a police investigation (albeit for a valid reason) may be devastating to the final outcome of the criminal case. (Compare *Masetlha* (supra) paragraph [33] for the "early release" response to a claim for disclosure). The principles laid down in the "Shabalala" matter may result in information being restricted and the "non-disclosure" may limit the rights of accused and/or others. (Compare *Masetlha* (supra) paragraph [162] for competitive interests that may be brought to bear on matters due to "context-sensitive jurisprudence that is driven by justice rather than rules".)

Disclosing the fruits of the criminal investigation

The normal disclosure process of the contents of a police docket excludes third parties like the news media. The *Shabalala* judgment is not the only source of information or legal guideline that we have in determining the use (or abuse) of information contained in a police docket. Subsequent legislation like section 39 of the PAIA also refers to this topic. The mandatory protection of police dockets is of high importance. Section 39 refers to some of the limitations aimed at the protection of the administration of justice.

It must be understood that the body of law relating to the "protection of the administration of justice" is a broad category that evolves from day to day. Government is seized with the duty to protect society in general this includes the "right" to ensure effective policing and to facilitate the investigation and prosecution of crime. This may also include the responsibility to ease the prosecution's task of securing convictions in



CONFIDENTIAL

*[Handwritten signatures and initials]*

CONFIDENTIAL

79

certain high priority crime areas. (Compare *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC) paragraph [16])

### Conclusion

#### Summary of the Facts

- (1) The manner in which the Mail & Guardian obtained a copy of the SIU report. [The Mail & Guardian never approached the Office of President / SIU to validly obtain a copy of the SIU report]
- (2) The *Mail & Guardian* wants the "duces tecum" copy of the SIU report to replace their illegally obtained document. This approach is a clear indication and demonstration of their intended abuse of the court process.
- (3) The subpoena *duces tecum* amounts to nothing more than a fishing expedition. Courts should not encourage this type of behaviour. Courts must strive to promote fairness and avoid abuse. (Compare *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA))
- (4) The mere fact that the *Mail & Guardian* decided use a subpoena *duces tecum* to obtain legitimate disclosure and possession of the SIU report, do not detract from the fact that an investigation is under way, and that a prosecution may flow from such an investigation, would thus in itself be a factor that requires consideration.
- (5) The court will have to give recognition to the 'conflicting public interest' principle. The well known decision of *Key v Attorney General* pointed out that tension exists in any democratic criminal justice system and that this principle will inevitably require that conflicting public interests namely the "right to access of information" and the equally important public interest in bringing criminals to book, be weighed up. (Compare *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at 195G-196B)
- (6) The Constitutional Court has a duty to preventing conduct that hinders or threatens to hinder the administration of justice. (Compare *S Singo* 2002 (4) SA 858 (CC) at paragraphs [41] and [42] for the



CONFIDENTIAL

PI

CONFIDENTIAL

80

expression of the desire to provide "appropriate relief" to those in need of assistance)

The health and wellbeing of the administration of justice is of paramount importance to society. Courts may respond to an overzealous request for information by allowing it to be trimmed and proceed to supply the applicant with a reduced record. (Compare *CC// Systems* (supra) paragraph [11] for an example of a voluntary decision taken by the applicant to water down the original request.)

(7) The "integrity of the judicial process" is of high importance. If documents are made available before any criminal trial is finalised, the disclosure itself may create a huge risk of prejudice to the administration of justice. Courts will interpret the Act with fairness to all. (Compare *Brummer* (supra) paragraphs [46] and [47])

(8) I am of the view that there are various levels of argument that could be advanced in support of the view that the subpoena amounts to an abuse of the process of court.

---

Adv. M. C. De Kock

(SCCU) Pretoria

28 October 2011



A handwritten signature in black ink, located in the bottom right corner of the page.

Annexure "Q12"





145

deposits, foreign travel and the property referred to as Erf 106 Midstream Estate. The investigation in respect of the benefits received by Commissioner Mti is still underway. The current SAPS investigation relates to three (3) previously unknown bank accounts of Mti.

**Section 205 subpoenas issued in respect of Mr. and Mrs. Taverner**

Two witnesses a Mr. and Mrs. Taverner have recently been subpoenaed to appear in court and testify about payments in the amount of R550 000 made to an entity called Stylus Metal Design Studio. Prior to the scheduled court appearance on 20 November 2012, Brian Biebuyck of the firm Eversheds, called on Advocate Mrwebi (the SCCU Special Director) to withdraw the subpoenas issued by the court. Mr. Biebuyck, described the court process as efforts to harass his clients and the employment of strong arm tactics. He described the section 205 process as intimidation and badgering constituting an abuse of process. We informed the Special Director that the Eversheds letter amounted to an irregular attempt to review the issuing of the subpoenas, avoid the required court appearance by the witnesses and mislead the NPA as to the true facts concerning the legal process. The Special Director informed Brian Biebuyck that the application to the magistrate for the issuance of the subpoena was well considered and that the activities related to a lawful investigative process. He declined to withdraw the subpoenas stating that such behaviour would amount to an unlawful review of the decision of the issuing magistrate.

Mr. and Mrs. Taverner duly appeared in court on the 16th of November 2012 and the matter was postponed until the 14th of February 2013. The date was so arranged at the request of Advocate Theron appearing on behalf of the examinees.

**Matters under investigation and way forward**

The investigation of the matter is not yet completed and a charge sheet has not been drafted. Almost 200 statements have been obtained since the start of the investigation. We are still of the view that the investigation will take another six (6) months to complete. Advocate van Rensburg and myself are in regular contact with the investigators.

**Anticipated Date of Enrolment**

It is difficult to speculate on the anticipated date of enrolment but it would definitely be impossible to enrol the matter prior to the 14th of February 2013.



146


**Other Issues**

I am not yet in a position to specify the proposed charges against the suspects. The investigation is still in progress and I cannot give a summary of the nature and quality of the current and still to be obtained evidence except to say that we do not anticipate it to be challenged on any known grounds. No legal issues and/or challenges other than the court proceedings mentioned above has been brought to our attention. We will have more clarity on the issuing of the section 205 subpoenas on the 14th of February 2013.

Hoping you find the above in order.

Regards

MC DE KOCK  
DEPUTY DIRECTOR OF PUBLIC OF PROSECUTION  
SCCU PRETORIA



Annexure "Q 13"



*Handwritten initials/signature*

**Specialised Commercial  
Crime Unit**



The National Prosecuting Authority of South Africa  
Iguqwa Jikelele Labotsutshisi boMzantsi Afrika  
Die Nasionale Vervolgingsagag van Suid-Afrika

**PRETORIA**

Tel: +27 12 401 0420  
Fax: +27 12 322 9204

228 Visagie Street  
Pretoria

P/Bag X297  
Pretoria  
0001  
South Africa

[www.npa.gov.za](http://www.npa.gov.za)

**TO: ADV L MRWEBI  
SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS**

**FROM: ADV MC DE KOCK / ADV AGJ VAN RENSBURG**

**DATE: 30 APRIL 2013**

**SUBJECT: PROGRESS REPORT ON THE BOSASA INVESTIGATION**

**1.1 Introduction**

In response to the request for more information and a detailed report in respect of the progress with the investigation of Pretoria Central CAS 1556 / 2 / 2010 I wish to report as follows:

**1.2 The prosecution of Patrick O'Connell Gillingham**

I am busy working on a draft charge sheet in respect of Patrick O'Connell Gillingham. The proposed charges against him involve corruption, money laundering and fraud. It is alleged that POC Gillingham received corrupt benefits in the amount of approximately R3.6 million. These benefits consisted of both movable and immovable property. It is important to notice the sequence of payments as this gives an indication of the nature of the corrupt relationship that existed between Gillingham and individuals related to the BOSASA Group of Companies. I attach an extract from the draft charge sheet with highlighted dates and events. (Compare Annexure A) During the period 2004, 2005, 2006 and 2007 Patrick Gillingham received a stream of benefits at very regular intervals.

Justice in our society, so that people can live in freedom and security





