
AFFIDAVIT

I, the undersigned,

FAIZEL DAVIDS

do hereby make oath and state:

1. I am an adult male employed as a Junior Legal Project Manager by the Organisation Undoing Tax Abuse (OUTA) with business address 10th Floor, O’Keeffe & Swartz Building, 318 Oak Street, Ferndale, Randburg, Gauteng.
2. The contents of this affidavit fall within my personal knowledge, unless stated otherwise and are in all aspects true and correct.

MANDATE

3. The Organisation Undoing Tax Abuse (“OUTA”) is a proudly South African non-profit civil action organisation comprising of and supported by people who are passionate



about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority with regards to taxpayers' money in South Africa.

BACKGROUND

4. Passenger Rail Agency of South Africa ("PRASA") is a public entity and a national government business enterprise in terms of section 1, read with schedule 3, part B, of the Public Finance Management Act 1 of 1999 ("PFMA"), whose sole shareholder is the Government of South Africa, through the National Department of Transport.
5. PRASA is an organ of state within the meaning of section 239 (b)¹.
6. PRASA is a state institution and as such is subjected to periodic audits by the Auditor-General. The Auditor-General publishes financial management reports in which matters relating to the audit are set out.
7. The Public Protector has published a report, titled, "Derailed". The report published the findings of an investigation into allegations of maladministration concerning financial mismanagement and tender irregularities in respect of PRASA. The report was prepared following the investigation of thirty-seven complaints initially lodged

¹ the Constitution of the Republic of South Africa Act 108 of 1996.



by the South African Transport and Allied Workers Union and later pursued by the National Transport Movement.

8. The content of the reports referred to above required PRASA's Board to take control and to institute investigations into the various matters that were raised in the reports.
9. Subsequently, the investigations by PRASA uncovered more than fruitless, wasteful and irregular expenditure and irregularities in the awarding of tenders and contracts by the applicant. The investigations revealed corruption and criminal conduct by the senior employees of PRASA.
10. As a result, PRASA filed criminal complaints and reported the commission of various offences to the South African Police Service regarding *inter alia* the award of the Siyangena and Swifambo tenders and contracts and approached the High Court Gauteng Local Division, to review and set aside the decisions to award and concluded the contracts ("the review applications").
11. The criminal complaints were first made in July 2015 and, despite the lapse of almost five years, the investigations have not been completed and no criminal charges have been brought against anyone involved. The irregularities and alleged corruption at PRASA have been a matter of major public interest since the publication of the reports by the Auditor-General and the Public Protector.
12. OUTA seeks to assist the National Prosecuting Authority ("NPA"), to investigate and bring to finality its investigation in the criminal conduct and corruption alleged by PRASA concerning the Siyangena and Swifambo matters.

13. At the time relevant to the audit by the Auditor-General and the investigations conducted by the Public Protector, Mr Lucky Montana ("Mr Montana") was the group chief executive officer ("GCEO") of PRASA. PRASA, under the management of Mr Montana, awarded numerous tenders and contracts that were, at the very least, irregular and, at worst, unlawful and corrupt.
14. PRASA is a large, state-owned, public transport company that provides rail and bus services to millions of South Africans and operates its business through various divisions which include the following:
 - 14.1. PRASA Rail is responsible for the Metrorail rail commuter services in the metropolitan areas and long-distance passenger rail services between major cities. In turn, it operates three business units, namely Metrorail, Shosholozza Meyl and Premiere Classe.
 - 14.2. PRASA Cres (Corporate Real Estate Solutions) is responsible for managing PRASA's executive property portfolio.
 - 14.3. PRASA Technical is responsible for improving and modernising the current rolling stock, depots and strategic infrastructure at PRASA.
 - 14.4. Autopay is responsible for long-distance road transport passengers.
 - 14.5. Intersite is responsible for identifying commercial opportunities for PRASA for the fulfilment of PRASA's secondary objective.



15. The national government has appointed a Board of control, vested with the power and authority to lead, control, manage and conduct the business of PRASA. The Board is required to exercise its powers subject to PRASA's policies, and the shareholders compact concluded between the Minister and the Board. The Board carries out its functions and duties in terms of a delegation of authority. The delegation of authority is referred to as set out below.

16. The following can be derived from the delegation of authority:
 - 16.1. The GCEO is responsible for the development and maintaining an effective, efficient and transparent system of procurement that is fair, equitable, transparent, competitive and cost-effective. The GCEO is required to consult the group chief financial officer ("the GCFO") and executive committee. The Board is accountable for this governance and control.
 - 16.2. The GCEO is responsible for maintaining and implementing a system of procurement which complies with the requirements of section 217 of the Constitution and section 51(1) (a)(iii) of the PFMA.
 - 16.3. The GCEO is responsible for approval of strategic capital investments. The GCEO has to consult the GCFO and executive committee. The Board is accountable for the approval of the investment.
 - 16.4. The GCEO is responsible for the approval of capital expenditure.
 - 16.5. The GCEO has to consult the GCFO and EXCO. The Board is accountable for the approval of the investment of a particular financial nature.



17. The GCEO can or may approve projects of a capital nature and any other strategic investment to the maximum amount of R100 million per investment, and provided the investment is within the approved budget and in terms of the supply chain management and other conditions set by the Board.
18. If a tender committee approved a procurement that included the recapitalisation of the fleet, the Board, GCEO and the Group Chief Financial Officer (“GCFO”) were responsible. The Chief Procurement Officer (“CPO”) and EXCO have to be consulted. The Minister of Transport is accountable for the recapitalisation.
19. The Board is responsible for *inter alia* approval of the budget. The Board is required to consult with the GCEO and the GCFO, and National Treasury has to be informed in terms of the Public Finance Management Act (“PFMA”). The Minister exercises executive oversight on PRASA's budget. The Board's responsibilities are executed in terms of the Board charter.
20. In terms of the Board charter:
 - 20.1. The Board's primary responsibility is to ensure that PRASA complies with the obligations imposed by various laws and regulations that apply to PRASA.
 - 20.2. The Board is also responsible for ensuring compliance with regulatory requirements.

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- 20.3. The Board members have a duty to PRASA. They have the ultimate responsibility for PRASA's performance and are not mandated delegates or servants of any of its stakeholders.
- 20.4. The Board charter also identifies reserved powers that cannot be delegated to the executive. The reserved powers include:
- 20.4.1. The approval of capital expenditure, acquisition and disposal in excess of the discretionary power delegated to the Chief Executive Officer ("CEO").
 - 20.4.2. The approval of the remuneration of non-executive Board members within the ambit of the laws and regulations that determine the remuneration of the Board members of public entities as defined in the PFMA.
 - 20.4.3. The approval of contracts that do not relate to the ordinary business of PRASA.
21. Mr Montana approved transactions that exceeded the powers conferred upon him by the delegation of authority and which he was obliged to refer to the Board. The Derailed Report and the report of the Auditor-General implicate Mr Montana in many of the tenders and contracts that were awarded contrary to PRASA's procurement policy and the PFMA.
22. The implementation of the Supply Chain Management Policy ("SCM") policy rests with the GCEO and the Board.



23. Mr Montana was vested with that responsibility by the Constitution and other relevant legislation and PRASA's policies to manage and conduct PRASA's business in the public interest.
24. The extent of Mr Montana's involvement and role in the irregular activities within PRASA is revealed by the Derailed Report and the report of the Auditor-General and resulted in Mr Montana tendering his resignation during March 2015.
25. During August 2014, the Board was reconstituted and most of the Board was replaced. The Minister appointed most of the members of the reconstituted Board for a fixed period until 31 July 2017.
26. It was the reconstituted Board that conducted the investigations and took the decision to lodge criminal complaints with the South African Police Service against the perpetrators that were implicated.
27. The criminal activity alleged by PRASA involves fraud, contravention of PRECCA, corruption, contravention of the PFMA and, as correctly pointed out by the Honourable Court in the Swifambo judgement in the review application, fronting.



FACTUAL BACKGROUND

28. The background to the Siyangena and Swifambo tenders and contracts is dealt with in the review applications brought by the Board. The background also appears from the annexures attached by PRASA to its founding affidavit in this application, which is annexed hereto as the court documents in my possession.

The Siyangena tender and contract will be discussed in more detail below.

29. As alluded to above, the initial complaints investigated by the Public Protector concerned *inter alia* the Siyangena tender. In respect of the Siyangena complaint, the Public Protector investigated the allegation that PRASA had improperly extended the scope of the tender awarded to Siyangena for the supply and installation of high-speed passenger gates at Doornfontein station to a national scope. In the Derailed Report the Public Protector found that the complaint was substantiated. However, the total amount of the contract was R1.95 billion and not R800 million as alleged.

30. The Public Protector also made, *inter alia* the following findings:

30.1. The extension of the tender scope beyond what had been advertised contravened paragraph 11.3.1 of PRASA SCM policy, section 38 of the PFMA, PPPFA and section 217 of the Constitution.



- 30.2. The extension of Siyangena's contract to more stations than were specified in the tender advertisement constituted maladministration and improper conduct.
31. As a result of the Public Protector's findings and directives, PRASA investigated the Siyangena tender. The investigation authorised by the Board involved not only the early 2010 contract extension but also the 2010/2011 and the 2013/2014 tenders and contracts.
32. The review application by PRASA in respect of the Siyangena tenders and contracts was instituted in February 2016. On 3 May 2017, Sutherland J dismissed this application, after a hearing on whether the application by PRASA was brought on time.
33. The merits of PRASA's case were not even argued. The Court found that PRASA ought to have applied for an extension to institute the review application as opposed to asking the Court to condone its non-compliance. Sutherland J held that his judgement on the delay did not mean that PRASA had no case to advance. PRASA has applied for leave to appeal the judgement.
34. The above-mentioned leave to appeal was withdrawn and was reinstated as a review application. The reason for this change was the change in the law, which



emanated from the *Gijima*² judgement on the aspects of legality. The shift in law from PAJA to legality.

35. The above matter has not been heard and is set down for August 2020. However, Werksmans Attorneys has allegedly withdrawn as attorney of record and our office did not receive any formal notice to this effect. It is our view that Unite Behind who was admitted as *amicus curiae* continue with the matter. As they would represent PRASA in this instance.
36. The facts set out in the initial review application concerning the award of the Siyangena tender, evidence that Mr Montana and various other persons received an improper financial benefit for the award of the tender to Siyangena.
37. Several property transactions involving Mr Montana and various other persons and entities associated with Siyangena took place during the period when PRASA was engaged in the evaluation and award of phase two of the tender to Siyangena, this was amplified in the second review application.
38. Furthermore, Martha Ngoya who was the head of legal and Popo Molefe testified at the Zondo Commission regarding the properties Mr Montana received.
39. In April 2014, Mr Montana owned a property situated at 10 Newport Road, Parkwood, registered as Erf 359. Mr Montana purchased the property during July

² State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited [2017] ZACC 40.

2008 for an amount of R1, 850, 000.00. On 5 May 2014, Mr Montana sold the property to Mr van der Walt, Siyangena's attorney, for an amount of R6,800,000.00. Mr van der Walt bought the house in the name of Precise Trade. The market value of the property at the time of the sale was R3 million, which meant, if correct, that the price of the sale was unrealistically inflated.

40. It appears that Mr Montana sold the property at twice its worth to a person closely associated with Siyangena to conceal a financial benefit that was received in exchange for influencing the award of the tender in favour of Siyangena.
41. Another property forming part of the criminal investigation relates to the sale of Erf 225 Rose Street, Waterkloof, Pretoria. The property on Erf 225 was owned by Ms de Beer, through an entity known as Aanami Guest House CC, in which Ms de Beer was the sole member.
42. Ms de Beer demanded a non-refundable deposit of a substantial amount before entertaining an offer from Mr Montana. Mr Montana agreed to pay a non-refundable deposit of R3, 5 million, which he subsequently paid.
43. A sale agreement between Aanmani Guest House CC represented by Ms de Beer and Minor Property Trust represented by a Mr Smith as its trustee, for the sale of the property on Erf 225 in the sum of R11 million was concluded. Mr Smith requested that the contract be altered to Precise Trade. The balance of R7,5 million was paid by Precise Trade and the property is registered in favour of Precise Trade.

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44. Ms de Beer met with Mr Montana after the sale on-site where she took Mr Montana for an inspection and handed over the keys to Mr Montana. This is referred to in the initial review application.
45. It is apparent from the above facts that Mr Montana acquired the property on Erf 225 through a series of transactions which concealed his direct or beneficial ownership thereof. At the time Precise Trade was owned by Mr van der Walt the attorney for Siyangena. The concealing of the true transaction constitutes fraud and an offence under section 34 of PRECCA.

The Swifambo tender and contract will be discussed in more detail below.

46. The Auditor-General published a report on PRASA, dated 31 July 2015, relating to the financial year that ended in March 2015. The report was preceded by a draft report.
47. The detailed audit findings indicated that Swifambo Rail Leasing should have been disqualified from the tender before proceeding to the technical evaluation. In summary, the reasons set out therein are, *inter alia* the following:
 - 47.1. non-compliance with the requirements of the bid documents in terms of the joint venture;



- 47.2. Swifambo Rail Leasing and Vossloh did not have a subcontracting agreement and used third party documents (Vossloh) without substantiating the agreement to sub-contract;
 - 47.3. Swifambo Rail Leasing quoted an amount inclusive of VAT but were not VAT registered;
 - 47.4. the allocation of points to Swifambo Rail Leasing based on letters of satisfaction which belonged to Vossloh;
 - 47.5. Vossloh did not submit a tax certificate;
 - 47.6. the response to the RFP was signed by the representative of Swifambo Rail Leasing and not by Vossloh;
 - 47.7. the Swifambo Rail Leasing score of 70 for technical evaluation was based on the capabilities of Vossloh and there was no joint venture or a subcontracting agreement in place at the time of the bid submission and, in the event that a subcontract agreement existed between Swifambo Rail Leasing and Vossloh at the time of the bid, there was a requirement for Vossloh to submit a tax clearance from its country of origin and co-sign all tender documents with Swifambo Rail Leasing;
 - 47.8. non-compliance with the PRASA supply chain management policy.
48. Accordingly, PRASA applied to review the decisions to award the tender and conclude the contract with Swifambo for procedural and substantive reasons.

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49. In its answering affidavit in the review proceedings, Swifambo *inter alia* disputes that the Afro 4000 was not fit for purpose and claims no knowledge of any tender irregularities.
50. In its replying affidavit, PRASA disputed Swifambo's innocence pointing to facts and circumstances that give rise to reasonable grounds for believing that the Swifambo tender and contract may be tainted with criminality.
51. PRASA contended that Swifambo was not innocent for *inter alia* the following reasons.
- 51.1. The contractual arrangement between Swifambo and Vossloh constituted fronting because:
- 51.1.1. the requirements of the definition of the fronting practice in section 1 of the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("the BBEEA") are satisfied, in particular, because the arrangement undermines the object of the Act;
 - 51.1.2. the definition does not require the misleading or exploitation of the parties to the arrangement;
 - 51.1.3. economic empowerment means substantive empowerment;
 - 51.1.4. the mere payment of money for the use of a black person's status is insufficient in the context of the matter;



51.1.5. Section 130(1) (d) of the B-BBEE Act creates an offence for any person to knowingly engage in a fronting practice; and,

51.1.6. The Court in the PRASA review application held that the relationship between Swifambo and Vossloh amounted to a fronting practice and that fronting constituted a fraud on the public where organs of the state and public entities or individuals within their ranks conspire and collude to award a tender to a front under the disguise of broad-based black economic empowerment.

51.2. The illicit payments of R80 million that the director and chairperson of Swifambo (Mr Auswell Mashaba) alleged were paid to individuals that claimed to be acting on behalf of the ruling party as a donation. The documents provided by Mashaba, read with his version in the replying affidavit, concealed and were intended to conceal the true nature of the transaction and constituted a fraud, forgery and possibly uttering, which are offences under section 34 of PRECCA;

51.3. The ruling party has since publicly denied directly or indirectly receiving this amount from Swifambo;

51.4. If the payments were made to a person who falsely represented that they were authorised to receive the payments on behalf of the ruling party, such conduct would amount to fraud. If the payments were received by persons who were authorised but failed to pay the money to the ruling party, such conduct would amount to theft.



52. It is also reasonably possible that the payments were made as consideration for the award of the tender and contract to Swifambo and possibly, for the protection of this award from scrutiny.
53. In addition to the criminal offences referred to above, the scoring was unlawfully manipulated and concealed:
- 53.1. One of the committee members that evaluated the bids only allocated points to Swifambo's bid in most sections of the scoring sheet, dramatically favouring Swifambo in the scoring of the bids, and the combined scoring sheet prepared after the bids were evaluated included a line item without a description that did not appear on the committee members' scoring sheets for which Swifambo received ten points and all but one of the others received no points;
- 53.2. The blank line does not appear on the individual scoring sheet template or the manuscript scoring sheets of the individual members or the electronic versions. In the electronic version, the blank line was reduced to the width that made it difficult to detect. However, the additional points were retained in the result;
- 53.3. The inference that the scoring was manipulated to ensure its award to Swifambo, is inescapable.



54. On **3 July 2017**, Francis J delivered his judgement in the Swifambo review application. PRASA's decision to award the contract to Swifambo and the decision to conclude the contract with Swifambo was reviewed and set aside. The matter has since been finalized as the Supreme Court of Appeal dismissed the application for leave to appeal and the Constitutional Court agreed with the Supreme Court of Appeal and dismissed the Petition.

The investigative events

55. On 1 August 2014, the Board was reconstituted. It was inducted during September 2014.
56. During March 2015, the reconstituted Board became aware that the Public Protector had prepared a draft report on her investigation into the complaints concerning PRASA. It learned of the draft report through media reports. The Board was unaware that the Public Protector had delivered the report to Mr Montana in or about February 2015.
57. On 15 March 2015, Mr Montana provided the draft report after demands made by the chairperson of the Board, Mr Popo Molefe ("Mr Molefe"), and tendered his resignation. The Board accepted his resignation on 1 April 2015. Montana worked at PRASA until 1 June 2015.



58. Montana failed to respond to the Public Protector's draft report and requests for information. During June 2015, the Public Protector requested Mr Molefe to intervene to ensure that a response was received.
59. Mr Molefe instructed Mr Mamabolo (Assistant Manager, Special Operations at PRASA) to report any and all suspected criminal conduct to the SAPS.
60. On 8 July 2015, Mr Mamabolo filed a complaint at the Rosebank SAPS. It was moved to and registered with the Hillbrow SAPS 405/07/2015. Mr Mamabolo subsequently amplified the complaints in respect of both the Siyangena and Swifambo matters.
61. The Directorate of Priority Crime Investigation ("DPCI"), established as an independent directorate within the South African Police Service in terms of section 17C of the South African Police Act 68 of 1995 ("the SAPS Act"), as amended.
- 61.1. The DPCI was established in 2009, within the framework of the South African Police Service.
- 61.2. The DPCI is responsible for combating, investigating and preventing national priority crimes, such as serious organised crime, serious commercial crime and serious corruption in terms of Section 178 and 17D of the SAPS Act, as amended.



62. The DPCI was managed and directed by its national head. The national head of the DPCI at that time was Major General Ntlemeza. Subsequent to Major General Ntlemeza's tenure, Lieutenant General Matakata acted and served as the acting national head of the DPCI. The current head of the DPCI is Advocate Godfrey Lebeya.
63. The DPCI is obliged in terms of Chapter 6A of the Police Act to ensure that:
- 63.1. it implements, where appropriate, a multi-disciplinary approach and an integrated methodology involving the co-operation of all relevant government departments and institutions;
 - 63.2. it has the necessary independence to perform its functions;
 - 63.3. it is equipped with the appropriate human and financial resources to perform its functions; and that
 - 63.4. it is staffed with personnel that are beyond reproach.
64. The DCPI is vested with investigative powers and should conduct its investigations reasonably, giving them due priority and within a reasonable time.
65. Due to the large amounts involved in the Siyangena and Swifambo complaints, PRASA appears to have been working tirelessly to assist the DPCI with its investigations and to enable the prompt and efficient asset preservation and protection.



66. The DPCI is seized with numerous criminal complaints and reports on investigations by PRASA, including the Swifambo and the Siyangena investigations. The DPCI is required by the Constitution and other legislation, to co-operate with PRASA in obtaining the necessary evidence required to finalise its investigations and more importantly with the NPA as an institution that is empowered with the mechanisms to preserve assets that are the proceeds of corruption and criminal activity.
67. The DPCI's functions, in terms of section 17D of the SAPS Act, are to prevent, combat and investigate:
- 67.1. national priority offences, which in the opinion of the National Head of DPCI need to be addressed;
 - 67.2. selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 PRECCA; and,
 - 67.3. any other offence or category of offences that is referred to the DPCI by the National Commissioner of SAPS.
68. A "National Priority Offence" means organised crime, a crime that requires national prevention and investigation, or crime which requires specialised skills in the prevention and investigation thereof, as referred to in section 16(1) of the SAPS Act.



69. The criminal activity alleged by PRASA involves fraud, contravention of PRECCA, corruption, contravention of the PFMA and, as correctly pointed out by the Honourable Court in the Swifambo judgement in the review application, fronting.
70. The alleged criminal activity fell within the mandate of the DPCI. The DPCI is required to exercise its powers effectively and where necessary involve and enable the NPA to preserve assets and restore monies lost through such activity.
71. The DPCI agreed that it would give the matters involving allegations against Swifambo and Siyangena priority.
72. The Board appointed Werksmans Attorneys ("Werksmans") to perform forensic investigations in relation to various allegations of irregular, fruitless, wasteful and unauthorized expenditure incurred by PRASA, and all unlawful activity related thereto as outlined but not limited to the report by the Auditor-General. These reports are annexed hereto as ("Werksmans Reports").
73. On 14 December 2015, PRASA made an application through Werksmans for the appointment of forensic accountants. PRASA proposed the appointment of forensic accountants on the basis that the investigation is of a complex nature and extensive, involving a number of entities and individuals (including employees of PRASA), and therefore there was a need to perform a forensic investigation.
74. Werksmans appointed Horwath Forensics SA (Pty) Ltd ("Horwath") to provide all necessary forensic auditing services to assist DPCI in the Swifambo investigation,



which would include providing expert testimony which may be required pursuant to any prosecutions.

75. On 16 October 2015, Horwath addressed a letter to the DPCI and the NPA on their appointment by Werkmans and attached its certificate in terms of section 4 the Protection of Information Act 84 of 1982.
76. On 23 December 2015, Adv Chauke, Acting Head of the SCCU: NPA addressed a letter to Mosito of the DPCI and indicated support for the appointment of Horwath in respect of the Swifambo matter. The letter recorded that forensic accountants should be required to:
 - 76.1. perform a forensic investigation into the Swifambo tender. The forensic investigation must cover all identified bank accounts/details, all identified entities and individuals implicated in the process of awarding of the tender as well as those entities that benefited therefrom.
 - 76.2. conduct a forensic audit in relation to all bank accounts, currently identified and that will later emerge, to trace the flow of funds in order to establish whether any of the individuals or entities and PRASA employees involved in the awarding of tenders fraudulently or irregularly benefited from the process.
77. On 28 December 2015, Brigadier NP Mhlongo, Head of Commercial Crime Unit at the DPCI wrote to Head, Cyber Crime and Digital Forensic Laboratory of the DPCI

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indicating that he supported the appointment of Horwath. The support was given on the understanding that the services to be rendered would be at no cost to the SAPS and the information provided would be used exclusively in the criminal investigation relating to the Swifambo complaints.

78. On 3 February 2016, Mr Hotz of Werksmans addressed a letter to Adv Wolfaardt of the NPA ("Adv Wolfaardt") to provide him with a synopsis of the Swifambo review application.
79. On 16 February 2016, Mr Molefe addressed a letter to Adv Wolfaardt to request that the NPA appoint Advocates Hodes SC and Manaka to assist the prosecution of various matter at no cost to the State.
80. On 13 May 2016, Mr Molefe addressed a letter to National Head of DPCI Major General Ntlemeza and the National Director, Adv Shaun Abrahams. In the letter Mr Molefe requested inter alia the following:
 - 80.1. the DPCI declares the matters as serious offences and assigns resources to the cases;
 - 80.2. the NDPP consider assigning NPA resources sufficient to the complexity of the cases and the measure of losses and continued risk to the State and PRASA.



81. On 11 August 2016, Adv Abrahams responded to Mr Molefe's letter of 13 May 2016. In his response, Adv Abrahams noted that the matter was currently the subject of an investigation by the DPCI under the guidance of a prosecutor. Further, that a decision on whether or not to prosecute would be taken after the investigations had been finalised by the DPCI.
82. On 18 September 2016, Mr Molofe addressed a letter to Major General Khana. The letter was addressed as a follow up to a meeting on 18 April 2016. It emphasized the importance of co-operation from the DPCI and the NPA and a commitment to "eradicating the mammoth scale of unlawful behaviour". The letter requested:
- 82.1. a follow-up meeting with DPCI on the status of the forty-three criminal complaints lodge by PRASA with DPCI following the forensic investigation commissioned by the Board: and
 - 82.2. written authorisation to Horwath for purposes of analysing the flow of funds in respect of the criminal complaint relating to Siyangena.
83. On 29 September 2016, Major General Khana addressed a letter to Ms Ngoye and the then AGCEO, Mr Collins Letsoalo. This letter was handed to the addressees at a meeting on 27 October 2016 at PRASA's offices in Hatfield. The letter records that both CAS 405 and CAS 278 which was initially two separate cases opened and subsequently joined into one case bearing the CAS 405, had been referred to the DPCI's Serious Economic Offences Unit ("SEOU") for further investigation and

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emphasised that the Siyangena and Swifambo matters would be given priority. The letter proceeded to request further supporting documents to Mr Mamabolo's statement.

84. On 25 November 2016, Ms Ngonye addressed a letter to Major General Khana, in response to his letter of 23 September 2016. Ms Ngonye notes *inter alia* the following in her response:

84.1. On 28 April 2016, a meeting chaired by Mr Molefe was held between officials of the DPCI, the forensic investigators (led by Werksmans) and PRASA officials. The following was discussed at the meeting:

84.1.1. The forensic investigators were introduced to the DPCI and composition and reason for the composition of the investigative team was explained.

84.1.2. The events that had led to the appointment of Werksmans were explained.

84.1.3. That the DPCI had indicated that it had decided to focus the investigation on the Siyangena and Swifambo matters as a starting point. The DPCI also indicated that it had identified the main suspects in those matters, that the subpoenas in terms of section 205 of the Criminal Procedure Act had been issued, that analysis of

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data obtained would commence and preparations would be made for forfeiture of assets in terms of POCA.

84.1.4. That the DPCI has noted the appointment of Horwath in the Swifambo matter and the DPCI would appoint Horwath to assist it in the Siyangena matter.

84.1.5. The DPCI indicated that meetings would be held between the investigators and officials from the AFU to start preparations for the preservation procedure.

84.2. That Ms Ngoye had attended a subsequent meeting where PRASA was introduced to the officials of AFU.

84.3. The documents filed in the review applications, in respect of the two matters, had already been provided to the DPCI and AFU: NPA and that those documents contained everything they required.

84.4. Mr Mamabolo had provided enough evidence in support of the suspicion of criminal conduct, common purpose and the benefit of the proceeds of crime.

85. On 25 January 2017, Major General Ntlemeza addressed a letter to Ms Ngoye and Mr Letsoalo. This letter requested a meeting as a follow up to the 29 September 2016 letter from Ms Ngoye.

86. On 13 February 2017, Mr Molefe addressed a letter to Major General Ntlemeza. In this letter, Mr Molefe points out that:

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- 86.1. PRASA had been assisting the DPCI and AFU with the investigations in the Siyangena and Swifambo matters from August 2015 and engaging with the NPA on an ongoing basis.
- 86.2. The DPCI was not reasonably complying with its Constitutional and statutory obligations to investigate the Siyangena and Swifambo matters and to bring the investigations to finality. As a consequence, the persons alleged to be responsible for national priority offences had not been held to account and there was a serious risk that the ability to recover significant public funds using the NPA's powers under the NPA Act was or may soon be compromised.
- 86.3. Horwath had uncovered a substantial amount of material information relevant to the Siyangena and Swifambo matters as well as other matters that had been reported.
- 86.4. The DPCI had retained control over the investigations and had not triggered the provisions of section 170 of the SAPS Act to request the NPA to exercise its section 28 investigative powers.
- 86.5. PRASA was gravely concerned about the lack of progress in the investigations, failure to progress and finalise the Siyangena and Swifambo investigations and to facilitate asset preservation procedures.
- 86.6. Since 27 January 2016, the investigations and related asset preservation procedures had effectively stalled and pointed out that this coincided with the appointment of Major General Khana to lead the investigations.



86.7. Mr Molefe highlights the key concerns concerning each investigation:

86.7.1. In relation to the Swifambo matter:

- 86.7.1.1. The DPCI was in a position effectively to investigate the Swifambo matter from at least 14 January 2016, and an approved investigation plan was by then in place.
- 86.7.1.2. The material information and evidence from Horwath's investigations have been available to the DPCI for a significant period of time, but the DPCI has failed or declined to receive it.
- 86.7.1.3. The Swifambo financial analysis which has been available since October 2016.
- 86.7.1.4. Sixteen lever arch files containing documentary evidence available to the DPCI since July 2016.
- 86.7.1.5. It is apparent that the DPCI has simply failed to obtain necessary witness statements despite long being apprised of both witnesses and suspects.
- 86.7.1.6. It is also apparent that no suspects have been issued with any warning statements.
- 86.7.1.7. Major General Khana has sought to suggest in his correspondence that PRASA has not provided the



DPCI with sufficient information relating to the Swifambo tender to enable DPCI to conduct its investigations. From this, it appears that Major General Khana and his team have failed to acquaint themselves with the material already provided to them.

86.7.2. In relation to the Siyangena matter:

- 86.7.2.1. The DPCI has been in possession of the detailed statement of Mr Mamabolo, which includes eight lever arch files of relevant and supporting annexures since March 2016. The DPCI was in a position to prepare its own investigation plan.
- 86.7.2.2. The section 205 procedures have not been followed for purposes of conducting a cash flow analysis in relation to the Siyangena matter.
- 86.7.2.3. The DPCI has repeatedly undertaken to appoint Horwath to conduct the Siyangena financial analysis. This has not been done prejudicing the investigation and asset protection. Horwath is in a position to do the Siyangena financial analysis promptly and within three weeks of DPCI providing it with the information obtained as a result of the section 205 procedures.



- 86.7.2.4. The DPCI has taken only limited statements and interviewed only limited potential witnesses.
- 86.7.2.5. Mr Molefe called for undertakings that the actions requested in his correspondence of 13 February 2017, would be taken on or before 17 February 2017. There was no response to his letter.
87. On 28 February 2017, Mr Molefe addressed another letter to General Ntlemeza and sent copies to Adv Abrahams and Mr David Douglas Van Rooyen, the then Minister of Co-operative Governance & Traditional Affairs ("Mr Van Rooyen"). Mr Molefe requested General Ntlemeza to consider the dispute between PRASA and DPCI to be a formal intergovernmental dispute and extending an invitation to General Ntlemeza and his representatives as contemplated by section 42(1) of the Intergovernmental Relations Framework Act, 13 of 2005 ("the IRFA") on or before 15 March 2017.
88. On 1 March 2017, Mr Molefe addressed a letter to Mr Van Rooyen, in his capacity as the designated member of the cabinet who facilitates such disputes in terms of the IRFA. There was no response from Mr Van Rooyen.
89. On 8 March 2017, the Minister of Transport decided to remove Mr Molefe and the other directors from the Board. On 10 April 2017, they were reinstated with effect from 8 March 2017 by the Court after they instituted urgent court proceedings.



90. On 24 April 2017, Mr Molefe addressed a letter to Major General Khana and copied in the new Acting Head of the DPCI, Lieutenant General Matakata. This letter noted mainly that General Khana had still not provided a response to Mr Molefe's letter of 13 February 2017 and called for a response to the letter by no later than 28 April 2017.
91. A response to Mr Molefe's letters was received only on 19 May 2017.
92. Lieutenant General Matakata advised that the following progress had been made:
- 92.1. The two investigations were referred to the SEOU under the leadership of Brigadier Makhinyane.
 - 92.2. The team was screening the documents (twenty lever arch files) in preparation for the case planning meeting with the NPA end of May.
 - 92.3. Advocates Bhengu and Wolfaardt of the NPA were consigned to handle the matters.
 - 92.4. The DPCI was awaiting a preliminary report from Horwath. (This report has already been supplied).
93. I respectfully submit that it is apparent that the DPCI has not conducted the investigations reasonably. As correctly stated by Mr Molefe in his letter to Gen Ntlemeza, the South African citizens and the fiscus are prejudiced by the fact that DPCI has done nothing tangible to respond effectively to the Swifambo and Siyangena matters, despite PRASA's ongoing co-operation and assistance.



94. PRASA has supplied the DPCI with sufficient and relevant information to conduct the investigations. However, it is apparent that the DPCI has not applied itself to the documents supplied or worse they have no intention to ensure that these investigations are finalised.
95. The DPCI's conduct and the delay in conducting the Swifambo and Siyangena investigations are contrary to its Constitutional and statutory obligations.
96. The collusion and corruption in tenders and contracts in public bodies threaten the growth and survival of an economy.
97. The PRASA Siyangena and Swifambo investigations concern an organ of state that has a vital duty to the public, which duty is to provide an efficient and effective public transport as envisaged in section 195 of the Constitution.
98. OUTA filed its intervention application to PRASA's *mandamus* application against DPCI. PRASA's *mandamus* is based on the omission of DPCI to implement the recommendations set out in report by the Auditor General and Public Protector (their main application – the one in which OUTA intervened – was launched in May 2017).
99. Furthermore, OUTA's application was opposed. OUTA's application was heard on 04 May 2018 and subsequently granted relief to join the proceedings as co-applicant,

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including costs of two counsel. Since OUTA's intervention, OUTA only received DPCI's answering affidavit to PRASA's main application (after the order had been granted to intervene).

100. Litigation went stagnant and no further processes which we are aware of have been exchanged and Werksmans subsequently withdrew as attorneys of record, allegedly by end of 2019, however, our office did not receive any formal notice to this effect.

CONCLUSION

101. I respectfully submit that the DPCI has failed to conduct the Swifambo and Siyangena investigations reasonably and with due priority in various respects.

101.1. Firstly, the DPCI has made multiple changes to its investigation team, its leadership and structure.

101.2. Secondly, the DPCI has failed to conduct the investigations in a manner that enables effective asset protection.

101.3. Thirdly, the DPCI has failed to reasonably co-operate with PRASA and to utilize the substantial assistance that has been on offer from PRASA.

101.4. Fourthly, the DPCI has failed to reasonably co-operate with the NPA for purposes of assets protection procedures and ensuring that the investigation is properly guided if not led under section 28 of the NPA Act.



102. The criminal conduct and corruption of the persons implicated in the Siyangena and Swifambo investigations go to the very heart of the protection afforded by section 217 of the Constitution, namely, public procurement that must be fair, equitable, transparent, competitive and cost-effective.

CHARGES

Contraventions of the Public Finance Management Act (“PFMA”)

103. I allege that the above mentioned PRASA individuals acted in contravention of the PFMA. In that, they inter alia neglected to make *“effective, efficient, economical and transparent use of the resources of the department”* and they failed to safeguard and to then maintain the assets.

104. In terms of section 86(1) of the PFMA:

“An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years if that accounting officer willfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.”

Fraud



105. I further allege that the corrupt individual committed Fraud in that he unlawfully and intentionally made misrepresentations knowing it was false which caused actual and/or potential prejudice.

Corruption

106. I further allege that the individual's conduct, as detailed above, constitutes contraventions of the following sections of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PRECCA"):

106.1. Section 3 of the PRECCA states:

"Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or



(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.”

106.2. Section 4 of the PRECCA states:

“(1) Any-

(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public

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officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

- (i) that amounts to the-*
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased;*
 - or*
 - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
- (ii) that amounts to-*
 - (aa) the abuse of a position of authority;*
 - (bb) a breach of trust; or*
 - (cc) the violation of a legal duty or a set of rules;*
- (iii) designed to achieve an unjustified result; or*
- (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public officers.*

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1), includes-

- (a) voting at any meeting of a public body;*
- (b) performing or not adequately performing any official functions;*



- (c) *expediting, delaying, hindering or preventing the performance of an official act;*
- (d) *aiding, assisting or favouring any particular person in the transaction of any business with a public body;*
- (e) *aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;*
- (f) *showing any favour or disfavour to any person in performing a function as a public officer;*
- (g) *diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or*
- (h) *exerting any improper influence over the decision making of any person performing functions in a public body."*

106.3. Section 21 of the PRECCA states:

"Any person who-

- (a) *attempts;*
- (b) *conspires with any other person; or*
- (c) *aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act,*

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is guilty of an offence.”

106.4. Section 34 of the PRECCA states:

“(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more;

must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act 68 of 1995).”

107. I further allege that the individuals conduct, as detailed above, constitutes contraventions of the following sections of The Prevention of Organised Crime Act 121 of 1998 (“POC”):

107.1. Section 3 of the POC, which states:



“Any person who, directly or indirectly-

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-*
 - (i) that amounts to the-*
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased;*
or
 - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
 - (ii) that amounts to-*
 - (aa) the abuse of a position of authority;*
 - (bb) a breach of trust; or*
 - (cc) the violation of a legal duty or a set of rules,*
 - (iii) designed to achieve an unjustified result; or*

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- (iv) *that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.”*

107.2. Section 4 of the POC, which states:

“(1) Any-

- (a) *public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*
- (b) *person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-*
- (i) *that amounts to the-*
- (aa) *illegal, dishonest, unauthorised, incomplete, or biased; or*
- (bb) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional,*

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statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public officers.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1), includes-

(a) voting at any meeting of a public body;

(b) performing or not adequately performing any official functions;

(c) expediting, delaying, hindering or preventing the performance of an official act;

(d) aiding, assisting or favouring any particular person in the transaction of any business with a public body;

(e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;

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- (f) *showing any favour or disfavour to any person in performing a function as a public officer;*
- (g) *diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or*
- (h) *exerting any improper influence over the decision making of any person performing functions in a public body.”*

107.3. Section 7 of the POC, which states:

“(1) Any-

- (a) *member of the legislative authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*
- (b) *person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the legislative authority, whether for the benefit of that member or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-*
 - (i) *that amounts to the-*

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(aa) *illegal, dishonest, unauthorised, incomplete, or biased; or*

(bb) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*

(ii) *that amounts to-*

(aa) *the abuse of a position of authority;*

(bb) *a breach of trust; or*

(cc) *the violation of a legal duty or a set of rules;*

(iii) *designed to achieve an unjustified result; or*

(iv) *that amounts to any other unauthorised or improper inducement to do or not to do anything,*

is guilty of the offence of corrupt activities relating to members of the legislative authority.

(2) *Without derogating from the generality of section 2 (4), 'to act' in subsection (1) includes-*

(a) *absenting himself or herself from;*

- (b) *voting at any meeting of;*
- (c) *aiding or assisting in procuring or preventing the passing of any vote in;*
- (d) *exerting any improper influence over the decision making of any person performing his or her functions as a member of; or*
- (e) *influencing in any way, the election, designation or appointment of any functionary to be elected, designated or appointed by, the legislative authority of which he or she is a member or of any committee or joint committee of that legislative authority."*

107.4. Section **21** of the POC, which states:

"Any person who-

- (a) *attempts;*
- (b) *conspires with any other person; or*
- (c) *aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act,*

is guilty of an offence."

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107.5. Section **34** of the POC, which states:

“(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

- (a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2;*
or
- (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more;*

must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act 68 of 1995).”

107.6. In terms of **Section 26** of POC:

“(1) Any person who is convicted of an offence referred to in-

- (a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable-*




- (i) *in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;*
- (ii) *in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or*
- (iii) *in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years.*
- (3) *In addition to any fine a court may impose in terms of subsection (1) or (2), the court may impose a fine equal to five times the value of the gratification involved in the offence."*

With reference to the contents of this affidavit, I humbly request that the elements of criminal activities such as, but not limited to, fraud and corruption be thoroughly investigated by the SAPS and other relevant law enforcement authorities.

Should it be found that there is indeed fraud and corruption and convictions to follow, that Section 26 of POC apply in imposing the harshest sentence possible and or a fine equal to five time the gratification equal to the offence.


Signed at **RANDBURG** on this 18th day of **MAY** 2020.





DEPONENT

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this Affidavit which was signed and sworn to before me at **Randburg** on this the 18th day of **May** 2020, the regulations contained in Government Notice No. R35 dated the 14 March 1980 having been complied with.



COMMISSIONER OF OATHS

RASHAAD PANDOR
EX-OFFICIO COMMISSIONER OF OATHS
PRACTICING ATTORNEY
UNIT 35, WATERFORD OFFICE PARK,
WATERFORD DRIVE, FOURWAYS