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INTRODUCTION

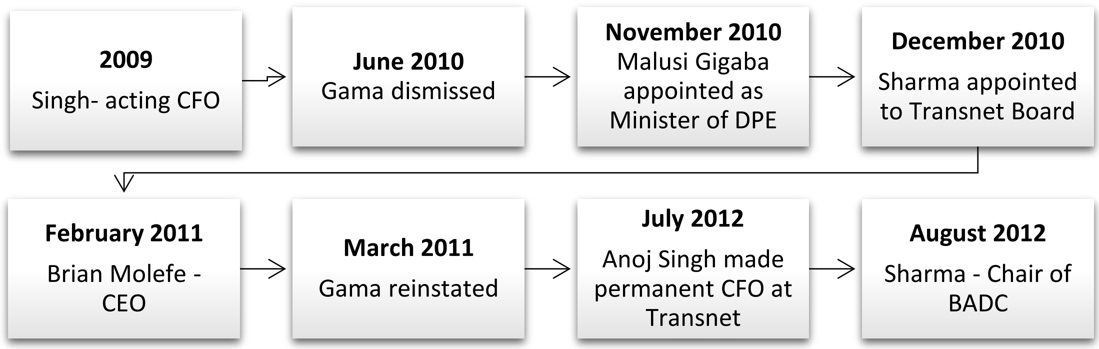
1. Transnet SOC Limited ("Transnet") is a company as contemplated in Item 2 of Schedule 5 of the Companies Act, 71 of 2008 ("Companies Act"), and exists in accordance with the Legal Succession to the South African Transport Services Act, 9 of 1989 or any legislation that replaces it. Transnet is a State-Owned Entity ("SOE") by virtue of its listing as a public entity in Schedule 2 of the Public Finance Management Act, 1 of 1999, as amended ("PFMA"). Transnet is thus subject to the Companies Act and the PFMA.

2. Transnet is the custodian of South Africa's rail, ports and pipeline networks. It operates as an integrated freight company with six operating divisions, namely Transnet Freight Rail ("TFR"), Transnet National Port Authority ("TNPA"), Transnet Port Terminals ("TPT"), Transnet Rail Engineering ("TRE"), Transnet Pipelines ("TPL") and Group leadership at head office. According to Transnet's 2017 Annual Report, Transnet's assets were valued at R351 billion and its annual income for 2017 was R65 billion.

3. In November 2010, former President Zuma replaced Babara Hogan ("Hogan") with Malusi Gigaba ("Gigaba") as Minister of Public Enterprises. During May 2014, Lynne Brown ("Brown") replaced Gigaba as Minister.

4. In December 2010, Gigaba appointed a mid-level Department of Trade and Industry ("DTI") official and Gupta associate, Iqbal Sharma ("Sharma"), to the board of Transnet who, in August of 2012, was appointed to chair the Board Acquisition and Disposal Committee ("BADC"). In March 2011, Brian Molefe

("Molefe") was appointed as Transnet CEO and Siyabonga Gama ("Gama") was reinstated as CEO of TFR. Anoj Singh ("Singh"), who was acting CFO from 2009, became permanent CFO of Transnet during the same period.



5. It was determined by Transnet that the TFR fleet was 33 years old and comprised of 1889 locomotives. The locomotives were procured in the early 1970's and 1980's.

6. The economic design of the locomotives was for a life span of 30 years. Transnet used some of these locomotives for nearly 45 years. Because Transnet didn't replace these locomotives, the old locomotives required increased maintenance which in turn meant increased maintenance costs. Obtaining parts for the old locomotives also became increasingly difficult.

7. For the period 1992 to 2008, no locomotives were purchased for the General Freight Business ("GFB"). In April 2012, the Transnet Board approved Transnet's Freight Rail's Locomotive and Modernisation Fleet Plan for the acquisition of 1202 locomotives for the GFB.

8. In a presentation to the members of the SA Chamber of Commerce, Minister Gigaba announced that an ambitious fleet renewal strategy was being designed. Gigaba mentioned that the current fleet was about 33 years old and that the average age of the locomotive fleet should be brought down.

9. The business case drafted by the Transnet Freight Rail Investment Committee ("TFRIC") provided the rationale for the investment in GFB by procuring 1064 locomotives consisting of 465 diesel locomotives and 599 electric locomotives.

10. Transnet followed a Market Demand Strategy ("MDS") to achieve South Africa's broader socio-economic objectives. The MDS entailed a shift from road to rail to enhance the environmental footprint, to create value for Transnet in that the tonnage delivery was increased and ultimately to lead to job creation.

SYNOPSIS

11. When Brian Molefe was appointed as Chief Executive Officer ("CEO") of Transnet there was a transition towards commissioning large scale projects, procuring key services and goods from private companies and the distribution of government work to selected beneficiaries.

12. Molefe's appointment as Transnet CEO could be described as a sudden appointment. The appointment process appeared to have been designed to establish a formulated outcome. The advertisement for the Chief Executive position was published on 26 January 2011 and candidates were given until 01

February 2011 to respond. The New Age newspaper correctly predicted Molefe's appointment three months before it was announced. It was reported that the Chairperson of the Board, Mafika Mkwanazi (self-admitted personal friend of the Gupta family), submitted three names to Gigaba for the appointment of Transnet CEO, without board approval.

13. In June 2011, Gigaba attempted to appoint Sharma as the Chairperson of Transnet but he was vetoed by Cabinet. In July 2012, Singh was appointed as Transnet Chief Financial Officer ("CFO") and in August 2012 Sharma was appointed as the Chair of the Board Acquisitions and Disposals Committee ("BADC").

14. In late 2011, Transnet issued a R2,7 billion tender for 95 electric locomotives for its GFB. The tender was eventually awarded in October 2012 to a consortium led

by China South Zhuzhou Electric Locomotive ("CSR"). CSR owned 70% of the consortium with its local partner Matsetse Basadi, who owned the remainder of the shares. The contract was awarded to CSR shortly after Molefe visited CSR in Hong Kong.

15. After the contract was awarded to CSR, the BADC chaired by Sharma approved changes to the bid criteria. The changes included the manner in which the costs for the locomotives were calculated and were in favour of CSR.

16. In April 2012, Transnet launched the MDS[1], a capital investment programme totalling an amount of R300 billion. Of the R300 billion, only R50 billion would be directed towards the coal and iron export lines. Transnet initiated one of the largest procurement projects in its history; the purchase of 1064 locomotives. This was supposedly meant to stabilise demand by replenishing old products and by expanding the existing fleet.

17. In 2013, National Treasury raised concerns and questioned the profitability of the 1064 locomotive acquisition project, Transnet's ability to grow its business above the GDP and the tariffs charged above inflation.

18. In October 2013, the then CEO of TFR, Gama, circulated a document calling for the procurement of 100 heavy haul electric locomotives from Japan's Mitsui via confinement.

[1] TR1

19. The motivation was that the delay in the procurement of the 1064 locomotives created a temporary gap in the locomotive fleet and that Transnet would not be able to meet its aggressive freight targets without this emergency procurement. With the intervention of Sharma and Molefe, the contract did not go out on confinement to Mitsui but was awarded under questionable circumstances to CSR.

20. The 1064 locomotive contract ballooned from R38.6 billion to R54.5 billion with the assistance of Molefe, Singh, Sharma and TFR's Chief Procurement Officer, Tamsanqa Jiyane ("Jiyane"). Molefe requested the board to approve the increase in costs saying that the inflated amount was to accommodate fluctuations in currency and variations in cost. However, these had already been factored into the original R38.6 billion.

21. In March 2014, the winning bidders for the 1064 locomotives were announced. It was a split between four companies, namely; China North Rail ("CNR") who was to manufacture 232 diesel locomotives at a cost of R7.8 billion, China South Rail ("CSR") who was to manufacture 359 electric locomotives at a cost of R14.6 billion, General Electric ("GE") who was to manufacture 233 diesel locomotives at a cost of R7.1 billion and Bombardier Transport ("BT") who was to manufacture 240 electric locomotives at a cost of R10.4 billion.

22. The decision to split the order was based on a strategy developed by Regiments Capital Management (Pty) Ltd ("Regiments"). This strategy would make each locomotive more expensive but, because the full complement of 1064 locomotives could be delivered faster it meant that Transnet would save on hedging costs. It would also decrease the risk of relying on delivery from only one supplier.

23. The strategy developed by Regiments made it possible for CSR to pay 21% of their income derived from the three projects (359, 100 and 95 locomotives) to several Gupta related companies. A spreadsheet retrieved from the #Guptaleaks showed that by 6 January 2015, CSR paid US$107,203,921.00 for both the 359 and 100 locomotive contracts to JJ Trading ("JJT") and Century General Trading ("CGT") – two Gupta related companies.

24. JJT and CGT were later replaced by Tequesta Group Limited ("Tequesta") and Regiments Asia Limited ("Regiments Asia"), two companies directed and managed by Salim Essa ("Essa"). These payments were put in place by a contract between Essa's Tequesta and CSR wherein it was stipulated that CSR would pay Tequesta or any other firm chosen by Tequesta, a 21% advisory fee. It appears that the companies JJT and CGT and later Tequesta and Regiments Asia, were used to syphon off money from Transnet to the Guptas as the need for the aforementioned advisory fees are unclear.

25. In 2012, when Transnet issued the 1064 locomotives tender, McKinsey South Africa ("McKinsey") was appointed as the advisory consultant. Financial advisory services were included in their mandate and payment was capped at R35.2 million. Months after the contract was awarded, Transnet cancelled the contract without explanation except to mention conflict of interest concerns.

26. Transnet subsequently proposed Regiments as a substitute. Regiments was given an estimated R10 million share of the advisory contract. The scope and cost of this contract ballooned dramatically over the next three years. This was driven by Transnet's CFO, Singh, and approved by Molefe.

27. BT and CNR were informed that they would need to relocate to Durban. It would appear that the relocation was only thought of by Transnet after the original tender was awarded. During 2015, one year and four months after the conclusion of the tenders, Transnet approved the relocation cost of BT and CNR in the amounts of R618,475,125.00 and R647,181,494.00 respectively.

DEFINITION OF STATE CAPTURE

28. OUTA construes the definition of state capture as follows:

"…*a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interest*".[2]

29. This submission attempts to illustrate the disproportionate and unregulated influence of person/s in decision-making processes. Transnet's policies and procedures were manipulated by a number of persons for personal gain.

30. The decisions made by Transnet's employees and executives in favour of state capture is reflected in the ill-effect it had on the economic development of Transnet and SA, Transnet's regulatory quality, the provision of public services and infrastructure.

[2] TR2

OUTA'S SUBMISSION AND SOURCES

31. OUTA's submission will be divided into two sections:

- **SECTION A** – An overview of the Transnet Locomotive Acquisitions. This section will summarise the findings of several investigations' reports, mentioned below, and will give the reader a summary of how the three major agreements to purchase locomotives for Transnet GFB came about.

- **SECTION B** – This section will detail the actions of individuals and private companies and the roles they played in various Transnet transactions and contracts. It will highlight their relationships with Transnet employees and the Executive.

32. Recently, several investigations into Transnet were conducted. These investigations reports were published and/or leaked to the public. OUTA used these reports, media reports and whistle blower reports to compile this submission.

33. The reports used were the following:
    - PARI Report[3]
    - Budlender Report[4]

[3] TR3 – Transnet Inquiry Reference Book

[4] TR4 - Report for Mr TM Sexwale. Chairperson, Trillian Capital Partners (Pty) Ltd on Allegations with regard to the Trillian Group of Companies and related matters – Geoff Budlender SC – 29 June 2017.

- Werksmans Report[5]
- Werksmans Report Appendice[6]
- MNS Report[7]
- MNS Report Annex Vol 1-5[8]
- MNS Report Annex Vol 6. 1 of 2[9]
- MNS Report Annex Vol 6. 2 of 2[10]
- MNS Report Annex Vol 7. 1 of 2[11]
- National Treasury Report[12]
- Fundudzi Report Chapter I[13]
- Fundudzi Report Chapter II[14]

34. The abovementioned reports covered different topics in detail and stem from a wide range of investigations. The sections of this submission that cover the acquisitions of locomotives for Transnet, form a comprehensive narrative of the

[5] TR5 - Werksmans Attorneys – Acquisition of 1064 Locomotives for Transnet's General Freight Business ("Transaction") Inquiry – 7 December 2017

[6] TR6 - Werksmans Attorneys – Acquisition of 1064 Locomotives for Transnet's General Freight Business ("Transaction") Inquiry – 7 December 2017 (Appendix)

[7] TR7 - Mncedisi Ndlovu and Sedumedi (MNS) Attorneys report on further investigations into the alleged irregularities relating to the procurement and award of the 1064 locomotive tender – 5 June 2018

[8] TR8 – MNS Annex Volume 1 to 5

[9] TR9 – MNS Annex vol 6.1 of 2

[10] TR10 - MNS Annex vol 6.2 of 2

[11] TR11 - MNS Annex vol 7.1 of 2

[12] TR12 – National Treasury: Second Draft Report: Forensic investigation into various allegations at Transnet and Eskom

[13] TR13 - Fundudzi Final Report Chapter I: Final Report: Forensic Investigation into various allegations at Transnet – November 2018.

[14] TR14 – Fundudzi Final Report Chapter II: McKinsey, Trillian and Regiments – November 2018.

actions that took place before, during and after the agreements with several locomotive manufacturers were made.

35. The aim of this submission by OUTA is:

- To give the reader an overview of the three acquisition contracts;
- To provide documentary evidence, retrieved from the #Guptaleaks, to substantiate allegations;
- To provide documentary evidence received from whistle-blowers to substantiate allegations; and
- To describe the roles of individuals in the locomotive acquisitions;

SECTION A

95 ELECTRIC LOCOMOTIVE ACQUISITION - CSR

36. This section of the submission will concentrate on the acquisition of 95 electric locomotives. The motivation for and decisions made regarding this acquisition was scrutinised for any potential irregular and irrational actions.

37. A memorandum from Gama, dated 26 July 2011 and titled *"Approval to proceed with the acquisition of locomotives by Freight Rail in respect of GFB Diesel and Electric Fleets, the locomotive fleet modernisation plan ("The fleet plan") which sets out the fleet modernisation framework for Transnet Freight Rail ("TFR") fleet"* was submitted to the Chairperson of the BADC, Mkwanazi, and was approved by the Transnet Board of Directors[15].

38. As stated in the abovementioned memorandum, TFR commenced with the process of assessing and finalising the funding and affordability concerns of the revised fleet plan.

39. The memorandum further recommended that the TFR undertook the procurement of the locomotives included in the 2011/2012 corporate plan whilst

[15] Quoted from the Fundudzi report (TR13) Page 12

the revised fleet plan was finalised, in order to address the urgent need for traction.

40. At a BADC meeting held on 3 August 2011, BADC approved the acquisitions of the diesel- and electric locomotives for GFB's fleets. The following minutes were taken during the meeting:

"6.1.2 Management indicated that the Locomotive Fleet Plan was budgeted for in the latter years of the 5-year planning cycle. However, due to plans to create the much-needed liquidity in the first three years of the 2011/12FY Corporate Plan, TFR can fund the acquisition of 43 diesel and 95 electric locomotives much sooner than originally planned. Management indicated that the latest requirement for locomotives (R3.6bn) was catered for in the Corporate Plan, and the remaining issues will be dealt with at the forthcoming Board Strategy Session.

6.1.3 Management requested a confinement of 43 locomotives to General Electric as 100 locomotives were recently bought from General Electric and confining to General Electric will assist with the standardisation of locomotives. Management stated that the Company can secure a localisation impact of 60% if the procurement was confined to General Electric. The Committee requested Management to indicate what the local content will achieve in the future, and further detail the previous achievements on CSDP."

41. The BADC approved the following:

- The acquisition of 43 Diesel locomotives on a confined tender basis from GE to be deployed in the GFB operations;
- A transparent procurement process to acquire 45 Electric locomotives in the 2012/13 financial year and a further 50 in the 2013/14 financial year for deployment in the GFB operations;

42. The BADC also authorised the GCE to sub-delegate the resolution above; and; to submit a PFMA application on the approved acquisition to the Shareholder Minister for the acquisition of 95 electric locomotives.

43. The submission titled *"Approval for Transnet Freight Rail to proceed with the acquisition of 138 locomotives (43 diesel and 95 electric locomotives.)",* was prepared by Andre Jonck, Johan Bouwer and Francis Callard ("Callard") and presented to the Transnet Capital Investment Committee ("CAPIC") on 21 August 2011. According to the submission, the acquisition of 138 locomotives would run over three years, 2011/12, 2012/13 and 2013/14, and at an estimated total cost of R3.6 billion. The purpose of the acquisition of 138 locomotives was to expand the core business and to build on Transnet's capacity.

44. Gama, in his capacity as Chairman of TFRIC, and Singh supported the submission on 23 August 2011 and 24 August 2011 respectively. On 5 September 2011, Molefe recommended that the submission be presented to the CAPIC. Molefe and Singh were authorised by CAPIC to support and recommend the submission.

45. According to the TFRIC submission dated 21 August 2011, the BADC approved the acquisition of 138 diesel- and electric locomotives for GFB to the value of the affordable sum of R3.6 billion on 3 August 2011.

46. On 31 August 2011, the Transnet Board held a meeting to *inter alia* consider the submission that requested approval for the acquisition by TFR of the 138 locomotives.

47. The Transnet BOD approved the following:

- *"Transnet proceed with the acquisition of 45 locomotives on confined tender basis to GE to deploy in the GFB operations;*
- *Transnet proceeds with a transparent procurement process to acquire 45 electric locomotives in the 2012/13FY and further 50 electric locomotives in the 2013/14FY for the deployment in the GFB operations; and*
- *The GCE be authorised with powers to further delegate the resolutions above."*[16]

48. According to the minutes of the meeting, the Transnet Board also approved the following:

- *"The Interim Locomotive Fleet Acquisition Plan at a value of approximately R3.6 billion;*
- *Transnet proceed with the acquisition of 43 locomotives on confirmed tender basis following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the*

[16] Quoted from Treasury Report (TR12) page 15

transaction and submit relevant particulars of the transaction to GE to deploy in the GFB operations;

- *Transnet proceed with a transparent procurement process to acquire 45 Electric locomotives in the 2012/13 financial year and a further 50 in the 2013/14 financial year for deployment in the GFB operations;*
- *Molefe be authorised with powers to sub-delegate the resolution above; and*
- *Transnet submit a PFMA application on the approved acquisition to the Shareholder Minister for the acquisition of 95 electric locomotives."*[17]

49. On 6 December 2011, Transnet advertised tender number HOACHO-7801 and the closing date for submissions was 28 February 2012 at 10:00. The aforementioned tender was for the supply and delivery of 95 electric locomotives to the GFB

50. On 19 January 2012, the Deputy Director of CSR's Overseas Business, Wang Pan, sent a letter to Molefe thanking him for the opportunity to take part in the tender to supply 95 electric locomotives to Transnet and that he will visit Transnet's sites later in January 2012. The letter was dated 2011 incorrectly or had a typing error as the tender had not yet commenced in 2011).[18]

51. In the letter, Wang Pan:

- Thanked Molefe for providing CSR the opportunity to participate in the tender for the supply of the 95 electric locomotives;

[17] Quoted from Treasury Report (TR12) page 45

[18] TR15

- Indicated that CSR is reputed as the world's largest locomotive manufacturer in volume and are serious to bid and cooperate with Transnet with regards to their quality and competitive products;
- Confirmed that CSR would be represented at the briefing session to be held on 31 January 2012;
- Requested meetings between CSR and certain Transnet individuals, Departments and third parties, namely:
  - Molefe, to discuss cooperation between the two entities;
  - Transnet Engineering ("TE"), to discuss and optimize the technical specifications;
  - A site visit to some locomotive depot or engineering factory to study existing electric locomotives and investigate the operational conditions; and,
  - Visits and discussion with some potential or preferred companies who are capable of cooperating with them for the localisation of work.

52. On 20 January 2012, the letter was mailed to a Worlds Window's Group Director, Rupesh Bansal ("Bansal"). Bansal will play a part in the 1064 locomotive deal again. Bansal forwarded the email to a Worlds Window staffer, commenting in broken English: *"Please provide this letter copy along with update on previous email as required by Piyoosh Ji."* (Piyoosh is Goyal's first name.) *"Please suggest him that this is the letter is sent and the points mentioned in letter are practical and to be pursued by CSR."* The Worlds Window staffer passed the email to Goyal's assistant, who passed it on to a senior Gupta manager, Ashu Chawla

("Chawla") and to Ajay Gupta's son, Kamal Singhala. Piyoosh Goyal is an Indian businessman and politically connected in India.[19]

53. On 20 January 2012, Molefe replied to the mail sent by CSR and informed the sender that he will hand it to Gama to respond. The #Guptaleaks revealed that the mail was also dispatched to Worlds Window and Goyal's assistant. The assistant ultimately passed it onto the Guptas.[20]

54. On 24 January 2012, Jiyane sent a memorandum to Gama requesting an extension of the tender's closing date from 28 February 2012 to 1 May 2012.[21] According to the memorandum, the reasons for the request for an extension of the closing date were *inter alia* the following:

- Three other suppliers, Alstom Transport S&E (Pty) Ltd, Siemens and CSR requested an extension of the closing date.
- The release of the tender in late December 2011 and the festive holiday season limited tenderers' progress on their design concept for locomotives.
- To maximise local content, a high level of transfer of knowledge and product localisation was required but during the festive period most of the suppliers were closed and would only be back at work from mid-January the following year.

55. The tender was advertised on 6 December 2011 and not late December as indicated by Jiyane. This was also confirmed by Gama in the above-mentioned

[19] TR16

[20] TR17

[21] Quoted from Treasury Report (TR12) page 47

memorandum. The letter by Jiyane stating that the tender was advertised in late December was therefore misleading and inaccurate.

56. During the meeting of 31 August 2011, the Transnet Board *inter alia* authorised Molefe to sub-delegate the transparent procurement process to acquire 45 Electric locomotives in the 2012/13 financial year and a further 50 in the 2013/14 financial year for deployment in the GFB operations.

57. On 26 January 2012, Gama approved the extension of the closing date from 28 February 2012 to 17 April 2012. There was no written delegation of authority for Gama to approve the extension. In fact, there was a Supply Chain Management ("SCM") team that was appointed to handle the procurement process for the purchase of the 95 locomotives.

58. The SCM team was formally appointed and delegated to deal with the entire procurement process which included the extension of the closing date of the tender. The extension of the tender should have therefore been given by the SCM team and not by Gama as there was no written confirmation that he was delegated to do so.

59. The approval of the extension of the closing date should have been obtained from the person who obtained the delegation of authority from the Board. In this instance, it should have been Molefe.

60. Paragraph 3.15.1 of Transnet's Procurement Procedures Manual ("PPM") of 26 May 2009 states that *"Transnet is entitled to amend any tender condition, validity period, specification or plan, or extend the closing date before the closing date, or in the case of a compulsory tender briefing session, before the scheduled*

session". "However, a minimum of three working days before the schedule date, such amendments or extension must be advertised and/or all tenderers who obtained tender documents must be advised in writing per fax or e-mail of such amendments or extension. The new closing date and time must be clearly reflected. For this reason, employees issuing tenders shall keep a record of the names and contact particulars of the persons or enterprises to which tender documents have been issued".

61. The extension of the closing date was included in the notes of the compulsory briefing session that was held on 31 January 2012 and also e-mailed to the tenderers.

62. The tender collection list dated 30 January 2012 showed that 22 entities paid and collected tender documents in respect of the tender RFP: HOAC-HQ-7801.

63. CSR was the only tenderer on the tender collection list whose documents were e-mailed to them. All other tenderers collected their documents.

64. The Fundudzi report found that Ms Lindiwe Mdletshe ("Mdletshe"), a Senior Manager: Strategic Sourcing (locomotives), interfered with the issuing and collection of tender documents.

65. A formal compulsory clarification site meeting was scheduled for 31 January 2012 at 10:00 at Transnet, Inyanda House 2.

66. The Fundudzi investigation found that the compulsory briefing session was irregular in that the compulsory payment and collection of tender documents must be done before the briefing can be attended.[22]

67. The Fundudzi investigation also found that the submission of the CSR tender, the registration of the company, the BBBEE status, the evaluation team, Supplier Development (SD), the amendment of the evaluation criteria and the awarding of business to CSR, was irregular. [23]

68. Delivery of the locomotives did not materialise as per the agreement between the parties. The Fundudzi report shows that the deliveries and completion time were one year and two months later than anticipated.[24]

69. There was an advance payment of R268,679,000 (VAT exclusive) made to CSR on 21 December 2012. According to paragraph 1.2.1 of Schedule 1 to the Locomotive Supply Agreement ("LSA"), Transnet agreed to pay CSR 10% of the contract price in advance before CSR delivered any locomotives to Transnet. The advance payment of R268,679,000.00 (VAT exclusive) was correctly calculated as it constitutes 10% of the contract price of R2,686,790,000.00.[25]

70. Clause 20.5 of the LSA stipulates that if CSR fails to deliver or at any time fails to achieve its commitments under and in accordance with any plan or further recognition development commitments (including any recommendations of the

[22] Fundudzi Report (TR13) page 20 -33.

[23] Fundudzi Report (TR13) page 86

[24] Fundudzi Report (TR13) page 87

[25] Treasury Report (TR12) page 178

engineer), CSR shall pay a non-compliance penalty to Transnet in respect of such non-compliance at the applicable rate.

71. The Fundudzi investigation found that based on the review of the Locomotive Acceptance Certificates, CSR did not meet the deadline of 31 January 2015 as CSR did not deliver the 95 locomotives. At 31 January 2015, CSR delivered only 8 Locomotives on time. This meant Transnet was entitled to levy a non-compliance penalty on the 87 remaining locomotives that were not delivered on time.

72. The non-compliance penalty that Transnet should have charged CSR was R135,351,125.38. Transnet failed to charge CSR the non-compliance penalty.

73. Evidence from the #Guptaleaks shows that CSR paid commissions/success fees/advisory fees from the payments received from Transnet for the 95 locomotives. This will be discussed later in this report.

100 HEAVY HAUL ELECTRIC LOCOMOTIVE ACQUISITION - CSR

74. This section of the submission will focus on the acquisition of 100 electric locomotives and how it came about that a well-presented business case was rejected and then altered to disqualify a potential supplier. It will also illustrate how an emergency was created to award a tender to CSR in confinement.

75. On 30 August 2013, Molefe wrote a memorandum to the BADC with the subject: *"MITIGATION OF MDS VOLUMES AT RISK THROUGH THE INVESTMENT*

AND PROCUREMENT OF 100 CLASS 19E EQUIVALENT DUAL VOLTAGE ELECTRIC LOCOMOTIVES AND 60 CLASS 43 DIESEL LOCOMOTIVES". This memorandum was written after a business case in support of amongst others the awarding of the 100 Class 19E electric locomotives tender in confinement to Mitsui & Co African Railway Solutions (PTY) LTD ("MARS"), was received from Mr Francis Callard ("Callard"), a former Transnet Freight Rail Business Case Development Member.[26]

76. Callard explained that the business case recommended confinement to MARS because it had manufactured locomotives for Transnet previously and therefore already had a design in place for locomotives required for the coal line. The importance of having a design in place was that 12 months would not be spent in preparation of the required design. Callard further explained that the locomotives MARS would produce, offered interoperability with the locomotives that were already on the coal line. Callard pointed out that CSR had no design in place and the locomotives it produced had no interoperability. CSR's design required adaption which came at an additional cost.

77. The following extract forms part of the August 2013 memorandum from Molefe to the BADC:

"PURPOSE

1. The purpose of this submission is to request the Transnet Board Acquisitions and Disposals Committee to recommend to the Transnet Board of Directors the following:

[26] TR18

a) *Note the risk to TFR MDS volumes through insufficient traction power resulting from the delay in the procurement of the 1064 locomotives:*

b) *Note the investment in and procurement of 100 Class 19 E and 60 Class 43 Diesels will protect 24.5 nit of General Freight volumes at risk resulting from the delay in procurement of the 1064 locomotives.*

c) *the investment in and procurement of 100 Class 19E equivalent electric locomotives required for the Coal Export Line in the amount of R3 871m (excluding borrowing costs): (Annexure A)*

d) *the confinement and award of the procurement for the 100 Class 19E equivalent electric locomotives to Mitsui & Co African Railway Solutions (PTY) LTD (MARS):*

e) *the investment in and procurement of 60 Class 43 diesel locomotives for General Freight in the amount of R1 826 m (excluding borrowing costs):*

f) *an extension of the current contract with General Electric South African Technologies (GESAT) for 60 Class 43 diesel locomotives:*

g) *The above awards will be conditional subject to paragraphs 78 and 79 and*

h) *The GCE be delegated the power to sign and conclude all relevant documents to give effect to the above resolutions*

EXECUTIVE SUMMARY

2. *The TFR locomotive fleet plan was first approved by the Transnet Board in April 2011 and updated with the 1064 GFB locomotive submission.*

The proposed locomotive acquisitions are in line with the fleet plan and have been budgeted for in the 7 Year Market Demand Strategy (MDS) 2013/14 - 2019/20. The delay in the 1064 fleet acquisition has put General Freight Business (GFB) MDS volumes at risk. The Class 19E dual voltage electric and Class 43 diesel locomotives recently delivered are modern capable locomotives. The Class 19E electric locomotives will be deployed on the Coal Export line which will enable the release (cascade) of 125 locomotives to General Freight. This submission proposes an accelerated procurement to mitigate General Freight MDS volumes at risk by confining 100 Class 19E electric locomotives to MARS and extending the current Class 43 Contract with GESAT by 60 locomotives. The accelerated acquisition will mitigate the MDS shortfall by at least a year with its full effect realised commencing 2014/15. The volumes mitigated increase from 6.2 mt (14/15) to 15.1 mt (16/17) and the cumulative income protected is R9 197 m (13/14 - 16/17).

3. *The Class 19E dual voltage electric and Class 43 have proven themselves in service and will improve service quality through improved reliability and reduced maintenance costs.*

4. *This accelerated acquisition does not put the MDS cash flow at risk and the 1064 acquisition remain unaffected. The acquisitions are funded from the current MDS. The delay in the 1064 will extend its funding to beyond the 7 year period.*

5. *The proposed transactions do not increase the risk related to the 1064 tender process.*

6. Socio-economic benefits will be realised in line with existing commitments and expectations.

GOVERNANCE PROCESSES

7. The following governance processes were followed in developing and approving the business case. In each case the queries and amendments were dealt with.

a) The matter was tabled and recommended by Transnet Freight Rail Investment Committee on 15 July 2013

b) The matter was tabled and recommend by Transnet Capital Investment Committee (CAPIC) on 19 August 2013

c) The matter was tabled and recommended by Transnet EXCO on 21 August 2013.

… …

48. Par a, c and d are relied upon with urgency (a) being the main reason as described in this memo in detail. The urgency is motivated on:

a) The one-year delay between the requirements of the locomotive fleet plan and the delivery and commissioning of 1064 locomotives for general freight, with its related threat to the MDS volumes. The early delivery of these locomotives will release capacity to general freight as outlined earlier and provide a partial *buffer until there are material deliveries of the 1064 locomotives. It buffers the anticipated shortfall in volumes as described earlier.*

b) The need for 60 Diesel locomotives and 100 Electric locomotives in order to deliver upon committed volumes in line with the MDS as a matter of extreme urgency.

49. In 2009, Transnet Freight Rail (TFR) entered into a contract with Mitsui & Co African Railway Solutions (PTY) LTD (MARS) for the procurement of 110 new Class 19E electric locomotives for the Coal Export Line; TFR took delivery of the last locomotive in August 2012. MARS are also delivering the Class 15E locomotives for the Ore Export line and the last one is due to come off the factory line in September 2013:

a) Feedback from the Technical Engineering team is that the Class 19E and Class 15E locomotives are performing well and have proven to be both efficient and reliable.

50. The Class 19E is a modern locomotive and the proposed 100 locomotives will be an extension of the current design. No prototyping or type testing is required conservatively saving 12 months or more."

78. Please note, in paragraph 94(d) of the memorandum to the BADC it is recommended that *"the confinement and award of the procurement of the 100 Class C 19E equivalent electric locomotives to Mitsui & Co African Railway Solutions (Pty) Ltd (MARS) be approved;"*

79. This memorandum was "recommended" and signed by:

- Siyabonga Gama (CE Transnet Freight Rail) on 30 August 2013;

- Garry Pita (Transnet SOC Group Procurement Officer) on 13 September 2013;
- Mohammed Mahomedy (Group General Manager Capital Integration) on 13 September 2013;
- Anoj Singh (Group Chief Financial Officer) on 13 September 2013; and
- Brian Molefe (Group Chief Executive) on 13 September 2013.

80. On 11 October 2013, Gama (The former CEO of the Transnet Freight Rail division) transmitted a document which called for the procurement of approximately 100 heavy haul electric locomotives from Mitsui in confinement.

81. On 14 October 2013, Sharma addressed a letter to Tshediso Matona (former Director General of Public Enterprises). With this letter, Sharma attempted to derail the proposal broadcasted by Gama by challenging the justification for the confinement given in the proposal.[27]

82. On 15 October 2013, Molefe, the then Transnet GCE, wrote another memorandum to Transnet's BADC with the subject: *"MITIGATION OF MDS VOLUMES AT RISK THROUGH THE INVESTMENT AND PROCUREMENT OF 100 CLASS 19E EQUIVALENT DUAL VOLTAGE ELECTRIC LOCOMOTIVES AND 60 CLASS 43 DIESEL LOCOMOTIVES"* The purpose of this memorandum was to recommend to the Transnet Board of Directors to approve *inter alia* the confinement and to award the procurement of the 100 Class 19E equivalent electric locomotives for an amount of R3 871 million.[28]

[27] TR19

[28] TR20

83. In the Executive Summary (paragraph 5 of the memorandum), confinement and the acceleration of procurement is repeated and states the following:
"This submission proposes an accelerated procurement to mitigate General Freight MDS volumes at risk by confining 100 Class 19E electric locomotives to MARS and extending the current Class 43 Contract with GESAT by 60 locomotives."

84. In paragraph 6 of the memorandum, the following is stated:
"The confinement to MARS and the extension to the GE contract is motivated on the basis of urgency."

85. This memorandum was "recommended" and signed by:
- Siyabonga Gama (CE: Transnet Freight Rail) on 11 October 2013;
- Garry Pita (Transnet's SOC Group Procurement Officer) on 11 October 2013;
- Mohammed Mahomedy (Group General Manager: Capital Integration) on 11 October 2013;
- Anoj Singh (Group Chief Financial Officer) on 11 October 2013; and,
- Brian Molefe (Group Chief Executive) (<u>did not sign on copy attached</u>).

86. It is clear that the two memorandums dated 30 August 2013 and 15 October 2013 had a similar request. The memorandums requested that the tender for the manufacturing of 100 Class 19E electric locomotives be awarded in confinement to MARS.

87. It is unclear why the memorandum dated 15 October 2013 (although it was prepared on 09 October 2013 as shown in the footnotes in the memorandum of

Molefe) was signed by all the signatories on 11 October 2013, four days before the memorandum was dated.

88. On 17 October 2013, Sharma mailed two letters to Tony Gupta[29]. The first was the letter he sent to the Department of Public Enterprises' Director-General (TR17) and the other a draft reply from the same Director-General.[30]

89. The letter to the Director-General was in the form of Sharma seeking advice from the Department of Public Enterprises, Transnet's shareholder. In it, Sharma expressed serious doubt about the acquisition, saying: *"My own view as chairman … is to decline the request for confinement and procure by way of an open and transparent tender process."*

90. He added that it *"could appear"* that TFR, which had motivated the acquisition, wanted to "*favour particular companies that have enjoyed similar treatment in the past"*. The Director-General's draft reply – which meta-data shows Sharma authored himself – concluded: *"We do not readily support the use of confinement as a method of procurement and in this instance we would urge the [acquisitions and disposals committee] to not grant approval for this procurement with a confinement."*

91. In a BADC meeting held on 21 October 2013, the matter regarding the acquisition of the 100 locomotives was withdrawn from the agenda. However, the committee requested that it be tabled due to the urgency of the transaction. Transnet's

[29] TR21

[30] TR22

management stated that the matter was previously tabled and certain concerns were raised then.

92. On 21 January 2014, Molefe drafted a memorandum for the BADC's attention[31]. The contents of this memorandum were similar to the memorandum of 15 October 2013. The purpose of the memorandum was:

- To note the risk to TFR's MDS volumes due to insufficient traction power because of the delay in procurement of the 1064 locomotives;
- To approve the investment in and procurement of 100 electric locomotives required for the Coal Export Line in the amount of R3 871 m (excluding borrowing costs);
- To approve the confinement and award of the tender for the 100 electric locomotives;
- To approve the investment and change in the fleet plan to procure 60 Class 43 diesel locomotives for General Freight in the amount of R1 826 m (excluding borrowing costs);
- To approve an extension of the current Class 43 diesel locomotives' contract for 60 additional locomotives;
- To delegate to the GCE the power to sign and conclude all relevant documents to give effect to the above resolutions, including the award and process approval.

[31] TR23

93. According to Molefe, delays in the 1064 acquisition placed GFB's volumes at risk. He further stated that the risk could be mitigated by the urgent acquisition of 100 electric locomotives and 60 diesel locomotives.

94. Molefe motivated the confinement and award of the tender to CSR and an extension of the GE contract on the basis of urgency.

95. Although there are many similarities between the memorandums of 15 October 2013 and 21 January 2014, at closer inspection the differences are quite significant. The differences were also detected by Callard and in an email to Gama and Jiyane, he describes the material differences between the initial confinement business case and the case for the 100 electric locomotives as follows:

"Dear Siya and Thami.

This is a difficult mail to write. In helping to format a recent version of the 100 and 80 locomotive business case on Wednesday 22nd, I noticed that the case was changed from that which I had submitted on Monday. This mail is because of the nature of those changes and the implications. The implications are technical and in the rationale for the acquisition which was speedy delivery to mitigate MDS volumes at risk.

Project Shongololo was predicated on 19 Equivalent locomotives. These locomotives are 26 ton per axle, 311 kN at 34km/h and are equipped with Toshiba T-Ethernet interoperability. It is this equivalency of power and interoperability that was at the heart of the business case.

The locomotives proposed are not explicitly specified but if a current and delivered design is the criteria, then it is the 20E. This locomotive is a 22 ton per axle locomotive, 279kN at 40 km/h (284knat 30 km/h) and uses IEC61375 Standard for interoperability. This was specified as a GF locomotive. The implications are that the locomotive is not a heavy haul locomotive, is not as powerful and the locomotive calculations for Operation Shongololo no longer hold and the project and volume targets may be at risk. Furthermore, the locomotives cannot interoperate with the current 19E locomotives adding further complexity to operations. To have the 20E interoperate with the 19E will require that they be fitted with wired DP at an additional cost of around R1m per locomotive. If the locomotives are of a new Co-Co design which will meet the power requirements, then all the arguments relating to time saving using proven design and eliminating type testing no longer hold. The TE assembly line for the current 20E has yet to produce a locomotive. If local assembly is the criteria, then ramping up this line up to meet the 95 20E and this 100 delivery criteria is a risk that has not been – in my humble opinion – been visibly addressed. If imported as complete units then local content is problematic though the delivery program is achieved.

Respectfully for your information and consideration."

96. Although Gama brought this under the attention of Singh, Singh did not submit this to the BADC for consideration.

97. Notwithstanding the concerns of Callard, the BADC recommended that Transnet's BOD approve the request for confinement and award tender for the 100 electric locomotives' procurement to CSR.

98. The minutes of Transnet's Board of Directors' meeting held on 24 January 2014, read as follows:

"4.1.2 Mr Sharma stated that the matter was dealt with at the Board Acquisitions and Disposals Committee ("Committee"). The request for a confinement had been on the Committee's agenda for 3 months, and the matter was extensively deliberated by the Committee. The Company currently has a contract with General Electric South Africa Technologies in terms of the Class 43 diesels. The proposal was to confine the 100 Electrics to China South Rail. There were adverse media reports on the previous Mitsui confinement's processes. To manage reputational matters, the Company seeks to advance to a new supplier. Management indicated that the TFR Locomotive Fleet Plan was first approved by the Board in April 2011 and updated with the 1064 GFB Locomotive submission. The proposed locomotive acquisitions are in line with the Fleet Plan and were budgeted for the MDS. The delay in the 1064 acquisition has placed GFB volumes at risk. The risk will be mitigated by the urgent acquisition of the locomotives. The heavy haul 100 Electrics will be deployed in the Coal Export line and will release 125 locomotives that will be used on GFB pending delivery from the 1064 programme. The 100 Electrics form part of the already approved Fleet Plan. The 60 Diesel also fill the gap pending delivery from the 1064 programme. The 60 Diesels were not part of the approved Fleet Plan and the submission requested an amendment to the Fleet Plan to include the 60 Diesels.

*4.1.3 Management informed the Board that the 1064 Locomotives were delayed due to the withdrawal of the PPPFA exemption. The submission proposed an accelerated procurement to mitigate General Freight MDS volumes at risk by confining 100 Electrics to China South Rail and extending the current Class 43 Contract with General Electric South Africa Technologies by 80 locomotives. The accelerated acquisition will mitigate the MDS shortfall by at least a year with its full effect realised commencing 2014/15FY. The volumes mitigated increases from 6.2mt for the 2014/15FY to 15.1mt for the 2016/17FY and the cumulative income protected will be R9.1bn for the 2013/14FY to 2016/17FY. The confinement of China South Rail and extension to General Electric South Africa Technologies contract was motivated on the basis of urgency. The accelerated acquisition does not put the MDS cash flow at risk and the 1064 acquisitions remains unaffected. The acquisitions are funded from the current MDS. The delay in the 1064 locomotives will extend its funding to beyond the MDS period. The Diesels were in addition to the approved Locomotive Fleet Plan but accord with the fleet strategy. With a year's delay in the 1064 procurement, the 60 Diesels will fill the gap of the first year. 4.1.4 Management stated that the 100 Electrics business case articulated the benefits of the earlier than previously planned delivery of the locomotives to the Coal Export line. TFR was in the process of acquiring 143 Class 43 Diesels Locomotives from General Electric South Africa Technologies (which have been delivered over the past 2 years and have proven to be a capable locomotive). Given the MDS volume shortfall, it was proposed that 60 Diesels be acquired to further mitigate the volume risk as the 1064 programme is likely to come on stream in 2015. The procurement process was carefully considered, with the aspects considered articulated as follows: * Type: the 100 Electrics are 26 ton per axle locomotives for heavy haul use to be* *deployed on the Coal Line. The 599 Electrics in the 1064 are 22 ton per axel locomotives for the GFB use.*

** Delivery: the 60 Diesels were similar to the 465 of the 1064, but the motivation for the extension as contained in the submission was urgency due to an overall delay in the 1064 programme. Including the 60 Diesels in the 1064 will not address the delay or urgency.*

… …

4.1.7 Mr Gazendam sought clarity if the recommendation from the Committee was unanimous. He stated that the 60 and 100 locomotives were being awarded to the same entities recommended for the 1064 transaction and requested Management to ensure that the matter is dealt with sensitively in the media. Mr Skosana stated that the Committee extensively deliberated on the matter and requested the Committee to share critical matters that were an impediment on the Transaction. Mr Sharma informed that board that the Committee was of the view that the initial business case was not properly articulated. Further, the Committee had considered the reputational risk linked to confinement processes. However, the Committee was subsequently convinced by the revised business case and comforted by the fact that the 160 locomotives were awarded to the same entities that were being recommended for the 1064 transaction. Management informed the Board that the Committee had also requested the Company to explore alternative methods for acquisition eg leasing options for the locomotives. To this effect, the Company will procure 23 second hand locomotives from Australia."

99. The record shows that Transnet's BOD approved the confinement and awarded the tender for the acquisition of 100 electric locomotives to CSR.

100. The 20E locomotives of CSR were later revised and CSR was requested to supply 21E locomotives. The change from 20E to 21E locomotives resulted in an increase in the price of the locomotives and in amendments to the technical specifications.

101. Evidence from the #Guptaleaks shows that CSR paid commissions/success fees/advisory fees from the payments received from Transnet for the 100 locomotives. This will be discussed later in this report.

1064 LOCOMOTIVE ACQUISITION

102. On or about 14-16 July 2014 and at the Annual Southern African Institute for Industrial Engineering Conference (SAIIE), Bruno Emwanu ("Emwanu") from the School of Mechanical, Industrial and Aeronautical Engineering at the University of the Witwatersrand (WITS), presented a paper titled "THE TRANSNET MARKET DEMAND STRATEGY (MDS) AND CONTRADICTIONS ARISING FROM ITS IMPLEMENTATION - IMPLICATIONS FOR GOVERNMENT POLICY".[32]

[32] TR24

103. According to Emwanu, MDS was a massive and unprecedented expenditure program worth R300 billion. It was allocated by Government to Transnet as part of Government's National Development Plan. The aim was to spend money on major national infrastructure that would create an impetus to drive economic development while addressing unemployment, poverty and inequity.

104. Furthermore, MDS also formed part of several of government's policy documents which not only included the National Development Plan but also the New Growth Path, the Industrial Policy Framework, and the Industrial Policy Action plan. These policies supported each other by providing a set of integrated frameworks for decision making; from the overall vision stage to implementation stage. Government, Transnet and the public at large expected MDS to assist with economic growth including the much-needed reduction in unemployment.

105. However, the problem identified by Emwanu was that the volumes, frequencies, value and variety of transactions involved in implementing the MDS were significantly higher than any other transactions handled before by Transnet. Government injected a huge amount of capital into Transnet.

106. With the aforementioned academic view in mind, this section of the submission will concentrate on the acquisition of 1064 new locomotives for Transnet. The acquisition of 1064 new locomotives together with the previously discussed procurement of 95 and 100 locomotives, formed the largest part of the capital spending by Transnet. The money used was allocated to Transnet from the fiscus and ultimately from the taxpayer.

107. In February 2011, the BADC, a new board oversight committee for large tenders, was created. Don Mkhwanazi was appointed as the chair.

108. The TFR's Locomotive Fleet and Modernisation Plan was submitted and approved by the Transnet Board in April 2011. It was predicted that 776 general freight locomotives were needed for Transnet to solve its immediate shortage.

109. In May 2011, Minister Gigaba announced to the members of SA's Chamber of Commerce and Industry that the average age of Transnet's locomotives were 33 years and that over the next 15 years, Transnet would annually procure significant amounts of both electric- and diesel locomotives.[33]

110. In August 2011, an updated and modified fleet plan was presented to the Transnet Board for approval which included the acquisition of an additional 426 locomotives. The proposed locomotive acquisitions were in line with the fleet plan and were budgeted for in the 7-year MDS: 2013/14 – 2019/20.

111. On 3 August 2011, the BADC approved TFR's Locomotive Procurement Strategy.

112. Although the Minister of Finance exempted Transnet on 7 December 2011 for a period of 12 months from the application of the PPPFA and its regulation, from 7 December 2012 Transnet was required to strictly adhere to the PPPFA and its regulations.

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[33] TR25

113. On 9 March 2012, the approval process for the procurement of 1064 locomotives commenced when the business case was tabled at the TFRIC. The minutes reflected an Estimated Total Cost ("ETC") of R38,146bn.[34] The business case was prepared by Callard and made provision for contingencies. The total cost calculated in Callard's business case was R38,146 billion.

114. According to the minutes, on 9 April 2012 the TFRIC resolved to support the acquisition of the 1064 locomotives with the following conditions:

- The key assumptions must be rephrased;
- The business case must be reworded (clause 5.6);
- The checklist must be signed off by the relevant parties;
- The financial model must be included in the business case;
- The retention percentage must be reviewed; and
- The expansion and sustaining components must be reviewed.

115. On 19 March 2012, the CAPIC deliberated whether the business case they haven't seen should be approved or not. The Acting Chairperson decided that because the business case was not presented to the committee that a submission must be made to members of the committee and that comments be submitted. It was further stated that Singh and Gama would appoint an external party to review the business case and to provide a risk assessment.

116. The committee resolved not to recommend the business case for approval to the Group Executive Committee but to hold a special CAPIC to deliberate the business case. It was further resolved that the ETC was R38.6 billion as indicated

[34] TR26

in the Corporate Plan and excluded potential effects from forex hedging, forex escalation, other price escalations and borrowing costs. [35]

117. On 25 April 2012, the Board held a meeting and considered the approval of the procurement of 1064 GFB locomotives. The Board resolved to approve the acquisition of the 1064 GFB locomotives subject to approval in terms of the PMFA and in line with the procurement strategy and -process, capital- and financial risk. The Board further resolved to delegate authority to Molefe to approve the RFPs. The delegation was subject to approval in terms of the PMFA.

118. Furthermore, the board determined that approval in terms of Section 54 of the PFMA should be obtained from the Minister of the Shareholder of Transnet prior to the issuance of the RFP's. Section 54 of the PFMA prescribes that the accounting authority, which is the Board, must inform National Treasury of the abovementioned transaction.

119. As per the minutes of the 19th of March 2012 meeting, the CAPIC had a scheduled meeting on 21 May 2012 that was chaired by Singh. The following interesting points regarding the 1064 locomotives were noted:[36]

- The majority of the committee did not comment on the business case;
- Transnet from a group perspective needed to augment the business case and had to ensure that all risks were addressed;

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[35] TR27

[36] TR28

- The Board was requested to approve Transnet's procurement of 1064 locomotives and to approve the issuing of the RFP to the market and subject to PFMA;
- National Treasury and DPE were to be engaged during the PFMA approval process;
- The business case would be tabled for approval at Board meeting in October/November 2102. This included approval from the Board for the procurement process and the short-listed bidders;
- It intended to negotiate with successful tenderers in Nov/Dec 2012 and to award contracts in January 2013 and to make payments in February 2013;
- BADC would be kept updated;

120. Singh also stated that Transnet had conducted the risk assessment and was engaging a multi-disciplinary team of transaction advisors to assist with the business case.

121. The following companies responded to the RFP to appoint advisory services for the acquisition of 1064 locomotives:

- McKinsey & Company
- Letsema Consulting
- Advanced Rail Technologies (ART)
- Nedbank Capital
- Edward Nathan Sonnenbergs (ENS)
- Koikanyang INC
- Utho Capital

122. On 01 July 2012, Singh was appointed as Transnet's Chief Financial Officer ("CFO").

123. On 11 July 2012, TFR submitted its final draft RFP to the Group Supply Chain for a final review. The GCE, Molefe, approved the RFP advertisement.

124. On 15 July 2012, the two tenders collectively referred to as the 1064 tender were advertised, stating that RFP's would be issued to the market on 23 July 2012.

125. On 16 July 2012, National Treasury issued an Instruction Note in line with regulation 9 that was signed by the Finance Minister, Pravin Gordhan.

126. National Treasury's Instruction Note related to the 'Invitation and Evaluation of bids based on a stipulated minimum threshold for Local Production and Content for Rail Rolling Stock' and prescribed the following:
- The Local Content ("LC") threshold for diesel locomotives was 55% and for electric locomotives was 60%;
- The amendments made to the stipulated minimum threshold for LC were not allowed; and
- The bids that passed the minimum stipulated threshold for LC must be evaluated in accordance with 80/20 or 90/10 preference point system prescribed in the Preferential Procurement Regulations of 2011.

127. On 17 July 2012, Transnet's Integrated Supply Chain Management ("iSCM") met with officials from National Treasury in order to understand the implications of the Instruction Note on the Transaction RFP's which were due to be issued to the market on 23 July 2012. National Treasury ("NT") clarified that although the exemption still applied to non-designated sectors, it did not apply to designated

sectors like rail rolling stock. Transnet was thus required to follow the prescripts of the Instruction Note. In particular the scoring preference which should be strictly applied in accordance with the 90/10 principle as the transaction was for a tender above R1 million.

128. The Instruction Note dated 16 July 2012 was issued seven days before Transnet was to advertise the RFP for the procurement of the 1064 locomotives.

129. On 23 July 2012, the Group Chief Supply Chain Officer, Pita, drafted a memorandum for the Transnet BOD and noted the following implications:[37]

- In line with NT's instruction note, the locomotive RFP's needed to be amended. It should be scored strictly in accordance with the 80/20 or 90/10 principle.
- Preference will have to be scored based only on the BBBEE scorecard and FRC should not be included in the evaluation of preference;
- The LC for diesel locomotives was 55% and 60% for electric locomotives and that should not be deviated from;
- The Supplier Development ("SD")/ BBBEE threshold should not form part of stage 1;
- The RFP's must indicate that thresholds are applicable in respect of LC and Quality. Furthermore, that SD should be taken out of stage 2 (final weighting scoring);
- SD could not feature in the evaluation of the tenders.

[37] TR29

- The RFP's could still require bidders to submit their SD proposals as the SD proposals could be used to negotiate the SD value during the post tender negotiation phase.

130. Pita then proposed the following steps forward after he received guidance from the GCE, GCFO and CE TFR:
    - Because delays in the issuing of the RFP's would compromise the MDS's objectives and time frames, the RFP's, amended in line with NT instruction note, would be issued on 23 July 2012;
    - The RFP's would be issued in parts. The first part would be issued on 23 July 2012 and would include the information required by NT, namely:
        - General information;
        - Technical information;
        - BBBEE scorecard;
        - SD – the RFP's still required bidders to submit their SD proposals but it would be used to negotiate the SD value during the post negotiation phase of the tender;
        - The final proposal; and
        - The administrative information e.g. closing dates, briefing sessions, returnable documents, etc.

131. The memorandum further stated that the other parts of the RFP's would be issued at a later stage(s) and would address aspects such as evaluation criteria, evaluation methodology, weightings, supply agreements and the Financial Total Cost of Ownership ("TCO") model.

132. Pita went further and stated that whilst the RFP was in the market, Transnet would approach NT (with support of DPE) as a matter of urgency to obtain full exemption from all the PPPFA regulations. If an exemption was granted, Transnet would issue an addendum to the RFP to align it with the Board approved strategy.

133. He also stated that the suggestions as set out above will have no financial or budget implications.

134. He reminded the BOD that the Group Chief Executive was the delegated authority to approve the RFP's for the 465 diesel and 599 electric locomotives.

135. Pita (Group Chief Supply Chain Officer) and Singh (Group CFO) were the signatories to this memorandum on 23 July 2012. Molefe (Group CEO) did not sign the memorandum.

136. The RFP Part 1 was issued.

137. On 31 July 2012, the BADC were updated by management on the progress of the 1064 acquisition. The NT Instruction Note was discussed, and members of the meeting decided that the issue should be dealt with at Ministerial level.

138. In August 2012, Transnet's PPM Version 1 was published.[38] It was signed off by Pita on 6 September 2012. Section 17.1.8 stated the following:

[38] TR30

"Transnet is entitled to amend any bid condition, validity, period, specification or plan, or extend the closing date before the closing date, or in case of a compulsory briefing session, before the scheduled session.

However, such amendments or extension must be advertised and/or all bidders who obtained bid documents must be advised in writing per fax or e-mail of such amendments or extension a minimum of three working days before schedule date. The new closing date and time must be clearly reflected"

139. On 20 August 2012, Singh wrote a memorandum to Molefe and requested that a transaction advisor be appointed for the 1064 locomotive transaction. He proposed that McKinsey be appointed to provide advisory services and that Webber Wentzel be appointed to provide legal advisory services. He further requested the GCEO to advise McKinsey that they should in turn appoint another partner firm, Letsema. On 22 August 2012, Molefe approved the appointment of the McKinsey consortium to provide advisory services as set out in the memorandum compiled by Yusuf Mahomed and recommended by Pita and Singh. (Molefe approved the appointment of transaction advisors on confinement on 10 May 2012)

140. The appointment of McKinsey as the Transaction Advisor for the 1064 Locomotive Acquisition is discussed later in this report under the McKinsey/Regiments section.

141. On 29 August 2012, Sharma was appointed as the chairperson of the BADC by the Transnet BOD.

142. On 6 September 2012, Pita signed Transnet's PPM.

143. On 7 December 2012, Minister Gigaba wrote to the chairperson of the Transnet Board, Mkwanazi. Molefe also received the letter. In his letter, Gigaba stated *inter alia* the following:[39]

- *"Transnet should continue to procure as if extension to the exemption is in place;*
- *No communication should take place between the SOC and National Treasury pertaining to the PPPFA until the situation has been resolved;*
- *Should any queries be directed to the SOC from National Treasury regarding the PPPFA, please refer NT to my office;*
- *With regards to the instruction note relating to the invitation and evaluation of bids based on stipulated stock sector Transnet should procure taking the designation threshold into account;*
- *However, Transnet should not feel constrained by section 5.1.2 of the instruction note and should rather establish an evaluation framework that provides reasonable incentives to suppliers to support our industrialisation and transformation objectives; and*
- *Should my agreement with the Minister of Finance require a change to this framework, Transnet can alert the bidders at that stage."*

144. Gigaba basically instructed Transnet to continue to procure the locomotives as if the exemption was in place.

[39] TR31

145. On 28 December 2012, Mkwanazi wrote to Gigaba and confirmed that Transnet went ahead with the tender as instructed by him, the Minister, in his letter dated 7 December 2012. He further confirmed Transnet's position that Transnet would comply with the instruction note pending an agreement between National Treasury and DPE and will await instruction from Gigaba.[40]

146. On 15 April 2013, Mkwanazi wrote to Minister Gigaba again regarding the 1064 locomotive tenders and requested an intervention. The following extract is from the Chair's letter:

- *"The tender for the procurement of the locomotives was issued on the 23rd July 2012.Transnet noted your correspondence relating to the application of the Preferential Procurement Policy Framework Act (PPPFA) to this acquisition, in particular the letter received on 7 December 2012. Transnet issued Part 2 of the Request for Proposals (RFPs) in compliance with your request. Local Content was included as a stipulated minimum threshold, but Transnet did not consider itself bound by Paragraph 5.1.2 of the Instruction Note on Rail Rolling Stock.*
- *The tenders' closing date has duly been extended to 30 April 2013.*
- *Transnet was informed that National Treasury has indicated that exemptions from the PPPFA will be considered for strategic projects on a case by case basis. Matters have, however, progressed to a point where the closing date is fast approaching and Transnet has not yet received confirmation with regard to the request for exemption in relation to this acquisition.*

[40] TR32

- *While Transnet is completely supportive of the Minister's position, there is a concern that unless an exemption is formally granted by the Minister of Finance, the evaluation process based on the tender documents that have been issued and the subsequent award of the tender will be in conflict with the PPPFA, thus creating significant legal risk for Transnet. Failure to adhere to any aspect of the Act, its regulations and Instruction Notes could expose Transnet's bid processes to legal challenges and also result in irregular expenditure if the contracts are awarded contrary to the requirements of the PPPFA. Hence, to place the process on sound footing, Transnet needs to either comply with the PPPFA or we require a letter from the Minister of Finance specifically exempting Transnet from the PPPFA, its regulations and the applicable Instruction Note in relation to this acquisition."*

147. Only on 16 April 2013, Minister Gigaba approached the Finance Minister and informed him that there was a problem with Transnet's locomotive acquisition and that it required his immediate attention.

148. On 18 April 2013, Molefe and Singh issued a memorandum to the BADC and BOD. They wanted the BADC and BOD to support the submission to the Shareholder Minister to acquire 1064 locomotives for Transnet.

149. According to the memorandum, the acquisition of 1064 locomotives was conceptualised in 2011 and initiated around April 2012. Molefe and Singh further stated that Transnet engaged with the DPE on various occasions in 2012 to take the Department through the transaction.

150. Molefe and Singh further stated that the project exceeded the "materiality and significance framework threshold of R4 billion at the time", and in terms of the PFMA needed the approval from the Shareholder Minister.

151. Molefe and Singh requested the Board to recommend to the Shareholder Minister that the business case for the acquisition of 1064 locomotives should be approved with an ETC of R38.6 billion as per the Corporate Plan that excluded potential effects from forex hedging, forex escalation and other price escalations. As will be discussed below, the ETC of R38.6 billion included forex hedging, forex escalation and other price escalations.

152. The Board approved the acquisition of 1064 locomotives on 25 April 2012, subject to approval in terms of section 54 of PFMA.

153. On 22 April 2013, an EXCO meeting was held and a resolution was passed to recommend to the Transnet Board that the business case for the acquisition of 1064 locomotives at an ETC of R38,6 billion which excluded potential effects from forex hedging, forex escalation and other price escalations, be approved. According to the business case, the amount of R38,6 billion included the effects from forex hedging, forex escalation and other price escalations. EXCO did not correct their recommendation to the Board.

154. On 25 April 2013, the Transnet Board held a special meeting. The Board approved the business case for the acquisition of 1064 locomotives for TFR's General Freight Business at an estimated cost of R38,6 billion (excluding potential effects from forex hedging, forex escalation and other price

escalations). The Board also approved the submission to the Shareholder, the Minister of the DPE, to approve the PFMA application.

155. On 29 April 2013, Singh wrote a memorandum to Molefe requesting him to approve the final business case so that it could be attached to the application for approval of the proposed PFMA application. Molefe signed this off on 30 April 2013.[41]

156. The acquisition process already commenced and the closing date for the 1064 tenders was 30 April 2013. The business case was prepared for Board approval just 5 days before the closing date of the RFP.

157. On 30 April 2013, Mkwanazi wrote to Minister Gigaba seeking approval in terms of Section 54 of the PFMA for the acquisition of the 1064 locomotives for Transnet TFR's GFB.[42]

158. On the same date, Mkwanazi wrote to the Finance Minister to notify National Treasury of Transnet's application to its Shareholder Minister to approve their plans to acquire 1064 locomotives for Transnet.[43]

159. Section 54 approval from the Shareholder Minister was received 9 months after Part 1 of the tender was issued on 23 July 2012 and on the closing date of the tender.

[41] TR33

[42] TR34

[43] TR35

160. Section 54(2)(d) prescribes that before a public entity concludes any transaction related to the acquisition or disposal of a significant asset, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction.

161. Minister Gigaba approved the transaction on 3 August 2013, 18 months after Part 1 of the tender and almost 4 months after the closing date on 30 April 2013.

162. On 3 August 2013, Minister Gigaba wrote to Mkwanazi to inform him that the procurement of the 1064 locomotives was approved with certain conditions. The conditions were as follows:[44]

- *A clear statement by Transnet with regard to TE's vision in the locomotive supply chain and what capabilities would need to be developed to make this vision a reality;*
- *Transnet to provide TE's seven-year locomotive supply chain strategy illustrating what was being imported, what TE was producing, what was being outsourced to the private sector and the broad conditions associated with outsourcing to the private sector and the broad conditions associated with outsourcing that would result in the building of a competitive national industry;*
- *Such conditions may include industry competitiveness benchmarking, investment in plant and skill and requirement that industry masters quality and learn manufacturing disciplines in exchange for long term contracts;*

[44] TR36

- *Transnet to provide a clear plan to the strategic fit of this locomotive procurement to the broader road to rail migration to objective; and*
- *Transnet to provide the Department with a view of the localisation strategy for the following strategic components:*
    - *Traction converter*
    - *Traction motor*
    - *Diesel engine*
    - *Bogies*
    - *Electrical system*
    - *Management system*
    - *Control system*

163. On 23 May 2014, a memorandum addressed to the BADC requested the Committee to recommend to the Board that the ETC for the acquisition of the 1064 locomotives be increased from R38,6 billion to R54,5 billion. According to the memorandum that was signed by Gama, Singh and Molefe, the increase of R15,9 billion was due to the following:

- Cost of escalations from the approved business case to award date;
- Cost of forex from the approved business case to award date;
- Additional costs related to a wider scope of work that was allocated to Transnet Engineering ("TE") in terms of the strategy to enable Transnet Engineering ("TE") to eventually transform into an Original Equipment Manufacturer ("OEM") of locomotives;
- The cost of reducing the batch size;
- The cost of future escalations over the life span of the contract;
- The cost of fixing forex exposure over the life of the contract; and

- The cost of contingencies related to variation orders, options and capital spares.

164. By the time that the above-mentioned requests were submitted, the LSA had already been signed on or about 17 March 2014.

165. On 26 May 2014, Molefe and Singh attended the BADC meeting. The minutes of the meeting recorded that the BADC resolved that *"the Committee noted the reason behind the increase in the Estimated Total Cost and recommend that the Board approves an increase in the ETC for the acquisition of the 1064 Locomotives for the General Freight Business from R38,6 billion to R54,5 billion."*

166. The original ETC included the items that Molefe and Singh told the BADC on 26 May 2014, were excluded. Molefe and Singh therefore misled the BADC and made them believe that the ETC of R38,6 in the Corporate Plan excluded the relevant costs. It was on Singh's instruction that the BADC approved a business case that excluded the relevant costs.

167. On 28 May 2014, the Board noted the reasons, based on a memorandum received from Molefe, Singh and Gama[45], for the increase in the ETC and approved an increase for the acquisition of 1064 locomotives for GFB from R38,6 billion to R54,5 billion.

168. The Transnet Board failed to report this increase to the Shareholder's Minister as prescribed in the Transnet Delegation of Authority Framework.

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[45] TR37

169. The final Treasury Report conducted and compiled by Fundudzi Forensic Services (Pty) Ltd, and submitted November 2018, described the procurement process for the acquisition of the locomotives in detail from page 169 to page 244. This included their findings and recommendations. OUTA supports the findings and recommendations of Fundudzi Forensic Services in this regard and will therefore not repeat the contents of the report.

SECTION B

IQBAL SHARMA

170. This section of the submission deals with Iqbal Sharma and his time as non-executive director of the Transnet Board. As the chairperson of the BADC, he played an integral role when decisions were made on any acquisitions at Transnet above R2,5 billion. We will also highlight his association with the Gupta family, Salim Essa and other important role players in Transnet and the government.

171. On 1 November 2010, former President Zuma appointed Malusi Gigaba as the Minister of Public Enterprises. Gigaba's appointment came after the President dismissed Barbara Hogan as the Minister of Public Enterprises when she resisted the President's interference in appointments to SOE's boards.

172. In December 2010, Minister Gigaba appointed new members to the Transnet board for a 3-year term. A comprehensive list of appointed/ retained members is listed below:

- Mr Mafika Mkwanazi (Chairperson);
- Mr Peter Malungani;
- Mr Israel Skosana;

- Ms Nazmeera Moola;
- Mr Michele "Mike" Fannuchi;
- Ms Doris Tshepe;
- Mr Donald Mkhwanazi;
- Ms Tembakazi Mnyaka;
- Ms Ellen Tshabalala;
- Mr Iqbal Sharma;
- Mr Harry Gazendam; and
- Professor Juergen Schrempp.

The board members who were retained from the previous board were:

- Mr Peter Moyo;
- Ms Nolwazi Gcaba;and
- Ms Nunu Ntshingila.

173. Sharma's name was not on the first proposed list drafted by the department to the Minister but was only added later before the Cabinet meeting held on 8 December 2010.

174. Sharma served as a director of several companies and is the founder of the ISSAR group. He also served as a Deputy Director General in the Department of Trade and Industry ("DTI") where he was responsible for leading the development and implementation of trade and industry policies and strategies. Sharma started his career in DTI back in 2001.

175. On 3 August 2011, the BADC approved the TFR locomotive procurement strategy. Sharma was present at this meeting in his capacity as member of the BADC. Sharma therefore, had full knowledge of Transnet's intention to acquire a fleet in excess of R50bn.

176. Sharma is the co-director of several companies with Gupta links. The close business relationship between the Gupta's and Essa and the non-declarations of certain interests have been made public. Consequently, Transnet lodged an investigation into these allegations and appointed Price Waterhouse Coopers ("PWC") to assist them with the investigation. PWC submitted a draft report to Transnet management on 14 June 2017.[46]

177. On more than one occasion (between 28 February 2013 and 24 April 2014), Sharma failed to declare a possible conflict of interest. The Transnet Declaration of Interest Policy states *inter alia* that all Transnet employees should desist from allowing personal interests to influence business decisions or tasks and are obliged to disclose any actual or potential conflict of interest. The policy also applies to all Executive and non-Executive directors at Transnet.

178. On 10 May 2006, Sharma was appointed as a director of Mafuse Investments (Pty) Ltd ("Mafuse").[47] The PWC report noted that Sharma did not declare his interest in this entity. Mafuse and Appledore Investments (Pty) Ltd ("Appledore") shared the same address details and auditors.

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[46] TR38

[47] TR39

179. Sharma became a director of Appledore on 18 May 2006. Sharma did not declare his interest in this entity as part of his annual February 2013 declaration, his April 2014 declaration or during any BADC meetings. One of Mr Sharma's co-directors was his spouse, Ms Tarina Patel (Sharma's spouse), who was appointed on the same date as Sharma. Sharma did not declare his spouse's interest in this entity[48].

180. On 17 September 2008, Sharma was appointed as a director of Nulane Investments 204 (Pty) Ltd ("Nulane")[49]. Sharma declared his interest in this entity (100% shareholding) on both 28/02/2013 and 24/04/2014. According to PWC, Nulane's auditors and Essa shared the same address details.

181. On 12 November 2009, Sharma was appointed as a director of GMT Concepts (Pty) Ltd ("GMT"). Sharma declared his interest in this entity (20% shareholding) on 28/02/2013 and 24/04/2014 respectively. Sharma's two co-directors were "Yoke Fong Tang" and "Paeck Hla Tam". Both were appointed on the same date as Sharma. The address of GMT previously listed was similar to the address of Issar Investment Holdings (Pty) Ltd ("Issar Investment") and Issar Capital (Pty) Ltd ("Issar Capital")[50].

182. On 17 November 2010, Sharma was appointed as a director of Issar Capital. Sharma declared his interest (100% shareholding) in this entity on 28/02/2013 and 24/04/2014 respectively. Issar Capital and Issar Investment shared the same

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[48] TR40

[49] TR41

[50] TR42

address and auditors. The address of Issar Capital was similar to the previously listed address of GMT[51].

183. On 14 January 2011, Sharma was appointed as a director of Issar Investment Holdings (Pty) Ltd. Sharma declared his interest (100% shareholding) in this entity on 28/02/2013 and 24/04/2014. Issar Investment Holdings and Issar Capital share the same address and auditors. The address of Issar Investment was similar to the previously listed address of GMT[52].

184. Sharma and Essa were co-directors of Daqo South Africa (Pty) Ltd ("Daqo"). Sharma declared his interest in this entity. Sharma's interest in the entity was initially limited to a directorship. On 28/03/2013 and 24/04/2014 respectively, Sharma declared a 28% shareholding. Three of Sharma's co-directors in this entity were "Dafeng Shi", "Feiyu Yao Dafeng" and "Xiang Xu". All of them were appointed on the same date as Sharma. Essa was also listed as a director of this entity and was appointed on the same date as Sharma. Sharma did not declare Essa's interest in this entity. Daqo and GMT shared the same address.[53]

185. Although Sharma is not listed as a director of Elgasolve (Pty) Ltd, he declared a 50% shareholding in this entity on 28 February 2013. Sharma did not declare Salim Essa's interest in the entity.

186. Sharma was appointed by Transnet's Board of Directors as the Chairman of the BADC on 29 August 2012.

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[51] TR43

[52] TR44

[53] TR45

187. On 29 November 2012, Sharma and Essa purchased a property together. The property, 44 Bloulelie Crescent, Annlin Ext 37, Akasia, Gauteng was purchased for R300,000.00. No bond was registered. The sellers were Sylvan Seotlhelo Montshonyane and Juliah Nombulelo Montshonyane.

188. Montshonyane is a former South African Diplomat and Economic Representative stationed in the People's Republic of China and the Republic of Mozambique respectively. Montshonyane also worked for DTI and was assigned the following responsibilities, namely: International Trade & Economic Development, Trade & Investment Facilitation and Promotion, and Bilateral Economic Relations. In addition to this, Montshonyane was the chairman of Zhongfei Consultancy Services and a director at Daqo along with Essa and Sharma.

189. On 22 May 2014, the property was sold back to the Montshonyane Family trust. No bond was registered.

190. On 11 June 2013, Sharma sent an email to Tony Gupta[54] with VR Laser's financial statements attached.[55] The relevance of this will be discussed later in this report.

191. On 8 July 2013, Sharma sent a Project Laser Valuation letter and a non-binding indicative draft offer for the proposed acquisition of VR Laser Services by Issar Investments, to Tony Gupta and Benny Jiyane, a director of VR Laser.

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[54] TR46

[55] TR47

192. On 11 October 2013, Gama broadcast a document that called for the procurement of approximately 100 heavy haul electric locomotives from Mitsui in confinement. Sharma, head of the procurement sub-committee, played an oversight role.

193. On 14 October 2013, Sharma drafted a letter addressed to Tshediso Matona (former Director General of Public Enterprises)[56]. Sharma attempted to derail the proposal broadcast by Gama by doubting the justification for the procurement of approximately 100 heavy haul electric locomotives from Mitsui in confinement. In addition, Sharma also forwarded to Tony Gupta an email from Eric Wood ("Wood") of Regiments Capital pertaining to a R5-billion capital raising proposal for Transnet.[57]

194. On 17 October 2013, Sharma emailed two letters to Tony Gupta[58]. The first letter was to the Department of Public Enterprises' Director-General, and the other a draft reply from the Director-General[59]. The letter to the Director-General was in the form of Sharma seeking advice from the department which represents government as Transnet's shareholder. In the letter, Sharma expressed his concern over the acquisition, saying: "*My own view as chairman is to decline the request for confinement and procure by way of an open and transparent tender process.*"

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[56] TR48

[57] TR49

[58] TR50

[59] TR51

195. He added that it "could appear" that Transnet's FR, who motivated the acquisition, wanted to favour "*particular companies that have enjoyed similar treatment in the past*". The Director-General's draft reply which metadata shows, Sharma authored himself, concluded: "*We do not readily support the use of confinement as a method of procurement and in this instance, we would urge the [acquisitions and disposals committee] to not grant approval for this procurement with a confinement.*"

196. The record shows that Mitsui & Co (who was mentioned in the Sharma letter) did not get the contract for the extra 100 locomotives, but that CSR did. By early 2014, CSR had contracts to supply Transnet with 95, 100 and 359 locomotives; 554 units in total.

197. On 22 October 2013, Benny Jiyane sent an email to Sharma with the latest numbers for the VR Laser acquisition.[60] Sharma forwarded the mail to Tony Gupta immediately.

198. On 7 November 2013, Sharma was appointed as a director of the company Nationwide Agricultural Development Project (Pty) Ltd ("NADP") [61] with registration number 2006/010137/07. Sharma and Essa were listed as directors. The shares in this company were held by Elgasolve (80%)[62] and Issar Capital (20%)[63]. Mabengela transferred 30% of its shares. 20% to Issar Capital and 10%

[60] TR52

[61] TR53

[62] TR54

[63] TR55

to Elgasolve. The resolutions for NADP were prepared and were held by the Guptas according to the #Guptamails[64].

199. Sharma did not declare his interest in NADP in April 2014. Sharma's co-director is Essa and Sharma did not declare Essa's interest in this entity. NADP and Ithemba Governance and Statutory Solutions ("Ithemba"), the company secretary and also a director of VR Laser Services, shared the same address.

200. On 9 December 2013, Sharma was appointed as a director of VRLS Properties (Pty) Ltd ("VRLS")[65]. Sharma did not declare his interest in this entity. Sharma's co-director was Ithemba, appointed on 1 March 2014.

201. Two of the previous directors of VRLS, Jacob Hayser Greef and Gary Martin Bloxham, were also previous directors of VR Laser Services and VRLS Investments (Pty) Ltd. Madoda John ("Benny") Jiyane, a former director of this entity, also held an active directorship in VR Laser Services. VRLS and VR Laser Services shared the same address details. VRLS also shared the same business address with several Gupta companies at Graystone Ridge Office Park, 144 Katherine Street, Sandown, Sandton.

202. On 22 September 2017 Sharma resigned as a director of the VRLS Properties and Jagannath Prasad Arora was appointed as the sole director. Arora took up several directorships in Gupta companies when the Gupta brothers resigned. Arora was killed in December 2018.

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[64] TR56

[65] TR57

203. In December 2013, Sharma and Essa allegedly wanted to buy VR Laser, a potential local supplier to the locomotive manufacturers. On 9 December 2013, Sharma became a director of VRLS Properties (registration number 1999/006874/07).

204. As chairman of BADC, Sharma had knowledge of the 1064 locomotive deal and knew that 60% of the deal should be awarded to local companies. Sharma also knew VR Laser had the capability to do the work for Transnet. He allegedly bought the property from VR Laser to rent it out to the manufacturers of the locomotives at a later stage.

205. Documentation retrieved from the Guptaleaks indicated that a Gupta company, Aerohaven (Pty) Ltd ("Aerohaven"), made a R20million rand loan to Iqbal Sharma to purchase VRLS Properties. Reconciliation statements, dated 25 April 2014, indicated that a large transfer of R20 million from Aerohaven was made to Iqbal Meer Sharma. It also indicated that a further loan from Bank of Baroda made up the purchase price of R60 million.[66] It looked like the Guptas, through Aerohaven and Bank of Baroda, facilitated the transaction to buy VRLS Properties and VR Laser. The fact that Sharma resigned, and Arora was appointed, also showed that the Gupta's were the ones driving the transaction and that Sharma had a very close relationship with the Gupta family.

206. On 14 January 2014, Essa became a director of VR Laser Services (Reg nr 2007/031329/07). The PWC report revealed that Sharma did not declare an interest in this entity. He did not declare his own interest or that of Essa. According to the shareholder register for VR Laser Services, Elgasolve owned

[66] TR58

74.9% of the shares in this entity and Craysure Investments (Pty) Ltd owned the remaining 25.1% shares in this entity.

207. In February 2013, Sharma declared that he held 50% of the shares in Elgasolve. PWC's analyses of a Microsoft Excel spreadsheet showed all payments made to VR Laser Services and that Transnet procured services from VR Laser.

208. The following notes were made in the PWC report regarding Sharma, Essa and the Gupta family's interests in VR Laser:

- Sharma and Essa were active directors of NADP, an entity in which Elgasolve and Issar Capital hold 80% and 20% shareholding respectively.
- Essa was the sole director of Elgasolve and Sharma declared a shareholding of 50% in this entity on 28 February 2013.
- Issar Capital in turn held a 100% share in VRLS Properties, the entity from which VR Laser Services rented land.
- As such, Sharma had an interest in VR Laser Services through his involvement in NADP, Elgasolve and Issar Capital.
- Duduzane Zuma and members of the Gupta family were further listed as active directors of Mabengela Investments (Pty)Ltd and Shiva Uranium (Pty)Ltd respectively, entities which previously held shares in NADP.
- Zuma and members of the Gupta family were further listed as active directors of Westdawn Investments (Pty)Ltd, an entity with 100% shareholding in Craysure Investments. Craysure Investments in turn had a 25.1% shareholding in VR Laser Services.

209. In February 2014, Essa and the Gupta's bought VR Laser's operations and Sharma bought the property where VR Laser Services conducted their operations.

210. Sharma's affiliation with VR Laser falls within the definition of a conflict of interest as per the Declaration of Interest Policy. He was required to declare his interests. He failed to do so and was accordingly in breach of the policy.

211. On 26 February 2014, a presentation was made to the BADC for the approval of the acquisition of 465 diesel and 599 electric locomotives. Sharma was the Chairperson of this committee. The committee approved the updated schedule of R52 billion.

212. On 19 May 2014, Sharma sent an email to Tony Gupta and attached the draft agenda of the Transnet BADC to be held on 28 May 2014.[67]

213. At the BADC meeting held on 26 May 2014, the committee noted and recommended to the board of directors of Transnet that an increase in the ETC of the 1064 locomotive contract should be approved.[68]

214. The following points were noted at the BADC meeting:

- The purpose of the submission was stated and that the transaction was approved in April 2013 at R38.6bn which excluded costs listed;
- Reasons for an increase to R54.5bn were outlined;

[67] TR59

[68] TR60

- An assessment that was conducted into Koedoespoort's readiness to accommodate 4 OEMs, showed that it will cost more but there will be other savings (e.g. import costs);
- Most of the increase in the ETC related to Forex risk mitigation and contingencies;
- The Cost of foreign currency hedging would protect Transnet against foreign currency devaluation and was an inherent cost in the transaction;
- Other methods were evaluated from a cost benefit perspective, but the Foreign Exchange Certificate option proved most beneficial for risk mitigation;
- What was requested was not an increase but an update in ETC.

215. The following concerns were raised at the BADC meeting:

- TE would now be more expensive than other OEMs;
- The Durban facilities would need to be significantly refurbished at an unbudgeted additional cost;
- The limited information was gradually being submitted for consideration, while the committee needed full disclosure to be in a position to consider it (the depth of information provided in relation to the TE scope of work not relative to the size of the transaction);
- The consistent price disagreement between TE and TFR, the discontent with TE's expensive pricing and reported conflict with TFR (which management said was resolved).

216. On 28 May 2014, the Transnet Board approved the increase of the ETC for the 1064 locomotive transaction from R38.6 billion to R54.5. It was in accordance with the BADC recommendations.

217. Retrieved from the #Guptaleaks, is an invitation from former President Zuma to Sharma to attend the inauguration of the President-Elect of the Republic of South Africa on 24 May 2014.[69]

218. We don't know why the above-mentioned invitation (and the response) was shared with the Guptas. What it does show is that former President Zuma considered Sharma an important person.

219. On 19 October 2013, Sharma mailed Molefe's memorandum titled *"Mitigation of MDS volumes at risk through the investment in and procurement of 100 Class 19E equivalent dual voltage electric locomotives and 60 43 diesel locomotives"* to Ashu Chawla with *"Please print"* in the subject line[70] Molefe's memorandum contained details of the Transnet Freight requirements and the urgent need for locomotives to be procured because of the delays in the 1064 locomotive acquisition.

220. In paragraph 63 of the memorandum, Molefe stated that one of the options to deal with this urgent matter was to procure locomotives from CSR. It was then noted that this was not an option because Transnet was still waiting for CSR's first delivery and the locomotives were untested.

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[69] TR61

[70] TR62 & TR63

221. In paragraph 75 of the memorandum, Molefe proposed that, considering the volumes, risk and urgent requirement of the locomotives, the procurement be confined to MARS Railway Solutions, a subsidiary of Japan's Mitsui & Co Limited.

222. The specific memorandum will be dealt with in detail later in this report. The reality here is that Sharma felt familiar with the Gupta's enough to share confidential information regarding Transnet's locomotive procurement with them.

223. In October 2013, Sharma, together with Essa, Ben Ngubane ("Ngubane"), and the Guptas, were involved in negotiations with the Central African Republic for potential oil prospecting rights.

224. They operated a company named Gade Oil and Gas (Pty)Ltd. Essa made some misrepresentations regarding the directors of the company and there is no evidence that Sharma tried to stop the misrepresentations. Sharma's actions should have raised questions about his ethical standards as a director and businessman. The Gade Oil and Gas episode is discussed in detail hereunder in the section on Salim Essa.

225. Sharma accompanied Essa and the Gupta family members on several foreign trips. From 10 September 2013 to 12 September 2013, Chawla made reservations for Sharma, Essa and Tony Gupta in the Burj Al Arab hotel in Dubai.[71] The Guptas also booked and paid for the flight tickets for this trip to Dubai. Rajesh Kumar Gupta authorised the Burj Al Arab to charge all the

[71] TR64

expenses incurred by himself, Iqbal Meer Sharma and Salim Aziz Essa to his American Express credit card.[72]

226. On 26 November 2013, Catherine Holmquist of Oakbay investments mailed the Gupta wedding planner and Chawla to make special arrangements for Essa and his wife (Zeenat Osmany) and for Sharma and his wife (Terina), for the Gupta wedding in India and to book them seats on the charter fight. They stayed in India from 5 December 2013 to 9 December 2013.[73]

SALIM ESSA, TEQUESTA, REGIMENTS ASIA

227. Salim Aziz Essa was a close friend and business partner of many of the role players and decision makers at Transnet. He was also a business partner of the Gupta family, former President Zuma's son, Duduzane Zuma and Iqbal Sharma. His relationship with these individuals placed him in close vicinity with procurement contracts of the Government and several SOEs. This section of the submission will show Essa's business relationships with certain individuals and his involvement in Transnet business.

228. The companies Salim Essa was involved in and relevant to this submission, were the following:

- Elgasolve (Pty) Ltd 2010/017836/07

[72] TR65

[73] TR66

• VR Laser Services (Pty) Ltd	2007/031329/07
• Nationwide Agricultural Development Project	2006/010137/07
• Trillian Holdings	2015/168302/07
• K2013184858	2013/184858/07
• Premium Security and Cleaning Services	2013/127549/07
• Zestilor (Pty) Ltd	2011/008985/07
• Daqo South Africa (Pty) Ltd	2012/198829/07
• Gade Oil and Gas (Pty) Ltd	2013/083265/07
• Tequesta Group Limited (Hong Kong)	156268
• Regiments Asia (Hong Kong)	2111264

ELGASOLVE (PTY) LTD

229. Documents retrieved from the #Guptaleaks show that Elgasolve (Pty)Ltd ("Elgasolve") was registered on 31 August 2010.[74] The memorandum of association reflects that 1000 ordinary par value shares were issued at R1 each with the main object of the company general trading in all aspects.[75]

230. A Disclosure Certificate issued by the Commissioner of Companies & Intellectual Property Commission on 11 December 2018, shows that Salim Aziz Essa was appointed as director of Elgasolve on 2 December 2013.[76]

[74] TR67

[75] TR68

[76] TR69

231. On 01 June 2015, Elgasolve, represented by Essa, entered into a Sale of Shares Agreement with Mabengela Investments wherein Elgasolve sold 20 sale shares to Mabengela for the amount of R16,000,000.00. The effective date was the 1st of June 2015[77]. A share certificate to this effect was issued to Mabengela Investments.[78]

232. Essa remained the owner of 80 of Elgasove's shares[79]. An excerpt of the minutes of a meeting held by the Board of Directors of Elgasolve show that the Board resolved to sell these shares and that the minutes were signed by Essa.[80]

233. On the 02 June 2015, Elgasolve and Mabengela Investments entered into a Share Subscription Agreement wherein the subscriber (Mabengela Investments) wanted to increase the shareholding in the company to 68,71%. The company agreed to increase the subscriber's shareholding with payment of the subscription price of R46,000,000.00. The payment was to be made to the company within 30 days from signing of the agreement[81].

234. The parties further agreed that the company shall upon subscription by the subscriber and against payment of the subscription price, deliver to the subscriber:

- Original share certificate in respect of subscription share;

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[77] TR70

[78] TR71

[79] TR72

[80] TR73

[81] TR74

- Certified copies of resolutions of the directors of the company, approving the allotment and issue of the subscription shares to the subscriber; and
- Appointment of such director as the subscriber may nominate to the board of the company.

235. CIPC records show that Essa was the only director of Elgasolve and that Mabengela Investments did not nominate or appoint any new directors as per the Share Subscription Agreement.

236. Documents retrieved from the #Guptamails show that from 8 July 2008 Duduzane Zuma and Rajesh Kumar Gupta were the directors of Mabengela Investments (Pty) Ltd.[82]

237. Share certificates also retrieved from the #Guptamails show that share certificates for Mabengela Investment shares were issued to the following individuals and companies:

- 8 July 2008: 25 ordinary shares to Duduzani Zuma;[83]
- 8 July 2008 25 ordinary shares to Rajesh Kumar Gupta;[84]
- 8 July 2008 5 ordinary shares to Aerohaven;[85]
- 8 July 2008: 3 ordinary shares to Mfazi Investments (Pty) Ltd;[86]

[82] TR75

[83] TR76

[84] TR77

[85] TR78

[86] TR79

- 18 June 2009: 20 ordinary shares to Duduzani Zuma;[87]
- 14 Sept 2009: 2 ordinary shares to Ashu Chawla;[88]
- 15 Sept 2010: 10 ordinary shares to Aerohaven;and [89]
- 4 Sept 2013: 10 ordinary shares to Fidelity Enterprises Limited (Dubai)[90]

238. A Disclosure Certificate issued by CIPC shows that Rajesh (Tony) Gupta resigned as a director on 6 May 2016 and Duduzane Zuma resigned on 25 August 2016. The current directors are Remona Naidu (appointed on 7 April 2016) and Nduduza Jaseph Mtshali (appointed on 25 August 2016).[91]

239. It is evident that there was a business relationship between Essa, Duduzane Zuma and Tony Gupta at all relevant times during the Transnet locomotive transactions. It will also be shown that at the same time there was a business relationship between Essa and Sharma.

VR LASER SERVICES (PTY) LTD

240. A Disclosure Certificate issued by CIPC, shows that Essa was appointed as a director of VR Laser Services on 14 January 2014. Kamal Kant Singhala was appointed as a director of VR Laser Services on 8 December 2014. Pushpaveni Ugeshni Govender was appointed as a director of VR Laser Services on 1

[87] TR80

[88] TR81

[89] TR82

[90] TR83

[91] TR84

February 2015. Ithemba was appointed as the company secretary on 1 March 2014.

241. Early in 2018 VR Laser Services (Pty) Ltd was placed under business rescue and two business rescue practitioners, Kurt Robert Knoop and Johan-Louis Klopper, were appointed as directors on 20 February 2018.[92]

242. A copy of Kamal Singhala's Indian passport, retrieved from the Guptamails, shows that he is the son of Ajay Kumar Gupta and Shivani Gupta.[93]

243. Shares in VR Laser Services were transferred and held by the following entities:

- 1 March 2014: 251 ordinary shares to Craysure[94]
- 17 Feb 2015: 100 ordinary shares to Aerohaven;[95]and
- 17 Feb 2015: 649 ordinary shares to Elgasolve.[96]

244. Essa, Duduzane Zuma and Tony Gupta held shares in VR Laser Services through Elgasolve.

245. Through Craysure, the Gupta's held shares in VR Laser Services.

[92] TR85

[93] TR86

[94] TR87

[95] TR88

[96] TR89

NATIONWIDE AGRICULTURAL DEVELOPMENT PROJECT (PTY)LTD

246. A CIPC certificate or more specifically an abridged certificate for annual returns, retrieved from the #Guptaleaks and downloaded on 30 June 2014, shows that the Directors of Nationwide Agricultural Development Project (Pty) Ltd were Salim Aziz Essa and Iqbal Meer Sharma.[97]

247. The share certificates retrieved from the #Guptaleaks show shareholding and date of shares obtained as follows:

- 8 November 2013: 80 ordinary shares to Elgasolve (Pty) Ltd; and[98]
- 8 November 2013 20 ordinary shares to Issar Capital (Pty) Ltd.[99]

248. As described previously, Essa was the sole director and a shareholder in Elgasolve at the time. Sharma was appointed as the sole director of Issar Capital on 17 December 2012.

249. Sharma failed to declare this business relationship during his tenure as a Transnet Board member.

[97] TR90

[98] TR91

[99] TR92

TRILLIAN HOLDINGS

250. Trillian Holdings (Pty) Ltd was registered on 25 May 2015. Essa was appointed as sole director on 28 August 2015.[100]

251. Trillian Holdings was the holding company for several Trillian affiliated companies:

- Trillian Capital Partners (Pty) Ltd 2015/111759/07;[101]
- Trillian Financial Advisory (Pty) Ltd 2014/122082/07;[102]
- Trillian Asset Management (Pty) Ltd 2008/023108/07;[103]
- Trillian Management Consulting (Pty) Ltd 2015/111709/07;[104]
- Trillian Shared Services (Pty) Ltd 2015/111747/07;[105]
- Trillian Securities (Pty) Ltd 2015/152852/07.[106]

252. Eric Anthony Wood ("Wood") was a director in all the Trillian companies except Trillian Asset Management. Before Essa and Wood became business partners in Trillian, Wood was a director of Regiments Capital[107] who was appointed to

[100] TR93

[101] TR94

[102] TR95

[103] TR96

[104] TR97

[105] TR98

[106] TR99

[107] TR100

give advisory services to Transnet and received millions in payments from Transnet.

253. In the report compiled by Adv Geoff Budlender SC (appointed to investigate the Trillian group of companies on instruction from Mr Tokyo Sexwale, the then Chairperson of the Trillian Board) it was found that Trillian issued invoices to Transnet for millions of Rand. A copy of the said report is attached hereto with specific reference to pages 47 to 56.[108]

ANTARES CAPITAL (K2013184858) (2013/184858/07)

254. This company is worth mentioning. Essa was a director of this company together with *inter alia* Marc Richard Chipkin, Stanley David Shane and Clive Mark Angel.[109]

255. Before 1 March 2016, Clive Angel was the Director of Trillian Capital Partners (Pty) Ltd and Marc Chipkin was a director of Trillian Financial Advisory (Pty) Ltd. Clive Angel, Mark Chipkin and Stanley Shane were directors of Integrated Capital (Pty) Ltd. Integrated Capital (Pty) Ltd was tasked to assist with the setting-up of the Trillian Group.

256. There are 3 companies in the Integrated Capital Group:

- Integrated Capital Investments (Pty)Ltd;[110]

[108] TR101

[109] TR102

[110] TR103

- Integrated Capital Management (Pty)Ltd; and[111]
- Integrated Capital SA (Pty)Ltd.[112]

257. Stanley Shane was also a non-executive board member of Transnet. He was appointed to the board on 11 December 2014. He resigned from the Transnet Board and as Chairman of the TSDPF in July 2017.

<u>PREMIUM SECURITY AND CLEANING SERVICES</u>

258. Salim Essa was, together with John Anthony Duarte, Sphilile Mabaso, and Richard Jean Mazaham, a member of this close corporation.[113] On 26 July 2013 the close corporation was converted into a private company. Essa, Duarte and Mabaso resigned on 5 February 2018.[114]

259. Duarte is the son of the ANC Deputy Secretary General, Jessie Duarte.

260. Mabaso is the son of the former Chairperson of the Transnet Board, Linda Mabaso. Linda Mabaso was appointed to the Transnet Board on the same day that Stanley Shane was appointed as a non-executive director of Transnet, 11 December 2014.

261. Mabaso was also the political advisor to former Minister of Mineral Resources, Mosebenzi Zwane.

[111] TR104

[112] TR105

[113] TR106

[114] TR107

262. On 12 July 2014, Naresh Khosla of the Gupta affiliated company, Sesindia in India, made a booking for Salim Essa, Duduzane Zuma and Malcolm Mabaso in the Doon Leishure and Hospitality Hotel in Uttarakhand, India. He also informed the hotel to not take any money from the guests and that all payments should be charged to his credit card.[115]

ZESTILOR (PTY) LTD

263. Salim Essa's wife, Zeenat Osmany[116], was a director[117] and shareholder[118] of Zestilor (Pty) Ltd.

264. T-Systems South Africa ("TSSA"), the local branch of German ICT company T-Systems, bought into a local IT company namely ariva.com in 2009. TSSA had a 5-year contract (worth R1.7 billion) to supply Transnet with ICT services. The contract was supposed to come to an end in 2014 but was then extended for a period of two years, a decision that earned the company nearly R1.3 billion in additional revenue.

265. In 2014, when the Transnet contract was up for extension, TSSA ceded the contract to Zestilor. This session was signed on behalf of Transnet by Transnet's CEO Brian Molefe.[119] Essa, through his wife's company, received millions from Transnet when the TSSA contract was ceded to Zestilor.

[115] TR108

[116] TR109

[117] TR110

[118] TR111

[119] TR112

DAQO SOUTH AFRICA (PTY) LTD

266. Essa and Sharma are co-directors in Daqo South Africa (Pty) Ltd. Sylvan Seotlhelo Montshonyane was a co-director of this company. Essa and Sharma bought Montshonyane's property in 2012 and sold it back to the Montshonyane's Family in 2014. Details of this business relationship between Essa and Sharma is fully described in the Iqbal Sharma section above.

GADE OIL AND GAS (PTY) LTD

267. Essa was also a co-director in a company known as Gade Oil & Gas (Pty) Ltd with former SABC and Eskom Chairperson, Ben Ngubane.[120]

268. In September 2013, Essa instructed one Ian McGregor to design business cards, a letterhead, a web page and an e-mail host for Gade Oil and Gas (Pty) Limited. He included in his instruction all the details of the persons involved and stated that the business address of Gade Oil and Gas was at Suite 4, 12th Floor, The Forum, 2 Maude Street, Sandton, South Africa. It was the same address as Sharma's company, Issar Capital.[121]

269. On a Gade Oil and Gas letterhead retrieved from the #Guptaleaks, it was shown that the directors of the company were B. Ngubane, A. Macaulay, I. Sharma and S. Essa with the business address Suite 4, 12th Floor, The Forum, 2 Maude Street, Sandton, 2196.[122]

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[120] TR113

[121] TR114

[122] TR115

270. Also retrieved from the #Guptaleaks, are the Gade Oil and Gas business cards that were designed for Ben Ngubane (Chairman)[123], Andy Macaulay (Chief Executive Officer)[124], Iqbal Sharma (Director)[125] and Salim Essa (Director)[126]. This was in accordance with Essa's instruction to McGregor.

271. If these business cards and letterhead were ever used and/or distributed, the individuals who distributed the stationary made misrepresentations to those receiving the stationary regarding the directors of the company.

272. It is indicated on the company stationary that Gade Gas and Oil conducted their business from the same premises as Issar Capital, a company owned by Iqbal Sharma. This is an indication of the relationship between Essa and Sharma. It further shows that Sharma felt comfortable to use a business card and a letterhead that showed that he was a director of a company when he was in fact never a director of that company.

273. In October 2013, Sharma forwarded a copy of his and Ngubane's passports[127] to Tony Gupta to make travel arrangements for them to visit the Central African Republic. The trip was arranged to enter negotiations for an exploration permit for oil in BLOCK A in the North-East of the Central African Republic ("CAR").[128]

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[123] TR116

[124] TR117

[125] TR118

[126] TR119

[127] TR120

[128] TR121

274. The Guptas paid the chartered flight to the CAR for Ngubane and Sharma to visit and to negotiate with the government.

275. Although this company Gade Oil and Gas did not do any business with Transnet, it does show the close relationship between Essa, Sharma (while he was a Transnet Board member), the Guptas and Ben Ngubane, a former Chairperson of the Eskom board.

TEQUESTA GROUP LIMITED (HONG KONG)

276. According to the Incorporation Form NNC1 issued by the Company Registry in Honk Kong for a Company Limited by shares, Tequesta Group Limited, company registration number 2111262 ("Tequesta") was registered on 20 June 2014. The first director of the company was Salim Aziz Essa with residential address 2 New Forrest Road, Forest Town, Johannesburg, South Africa and with passport number M00073786.[129]

277. 10,000 shares with share capital of 10,000HK$ were issued but the shares were not taken up on date of registration.

278. Form ND4 of the Companies Registry in Hong Kong shows that PAMM Corporate Secretary Limited was appointed as the Company Secretary.[130]

279. On 17 November 2016, Essa resigned as a director of Tequesta. Aashika Singh was appointed on the same date. Her residential address was captured as 233

[129] TR122

[130] TR123

Karunamayee Ghat Road, Dhara Para, Tollygunge, Kolkata, West Bengal, India. Her Indian passport number is L1999184. This information is captured on a ND2A form of the Companies Registry in Hong Kong[131]. This document is the official proof for any director change in a company in Hong Kong.

280. On a Tequesta letterhead that was retrieved from the #Guptaleaks, Essa was shown as the only director of Tequesta. The business address is shown as the same as that of the Company Secretary of Tequesta, PAMM Corporate Secretary Limited at 15/f, Hillier Commercial Building, 65-67 Bonham Strand, Sheung Wan, Hong Kong.[132]

281. On 18 May 2015, Essa, on behalf of the Tequesta Group Limited, entered into a Business Development Service Agreement with CSR (Hong Kong) Co Ltd.[133] CSR's registered address is indicated as Room 4112, 41/F, Office Tower, Convention Plaza, Wanchai, Hong Kong. On the front page of this agreement, the registration number for Tequesta Group Limited was indicated as 156268. Online investigations at the Hong Kong Companies registry show that this registration number belongs to a company called "Daily Flight Limited".[134] This company was registered on 20 August 1985 and deregistered in 1995. It is not clear why this registration number appears on the contract. All other documentation and evidence show that the registration number for Tequesta is 2111262.

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[131] TR124

[132] TR125

[133] TR126

[134] TR127

282. It should be noted that Tequesta Group Limited was notified by publication in a Gazette Notice of the Companies Registry dated 15 February 2018, that unless an objection to the deregistration is received by the Registrar within 3 months after publication, the company may be deregistered.[135] It is not known if Tequesta was indeed deregistered.

283. The agreement between Tequesta and CSR include *inter alia* the following important and relevant terms:

- *"TEQUESTA, with its long subsisting relationships in the territory of South Africa (hereinafter "The Territory") has acquired a familiarity with regulatory, social, cultural and political framework whereby it is capable to closely co-ordinate with the designated authorities to comprehend the applicable Government policies, identify the opportunities of participation in various Government and Private projects, render consultancy on participating in various tenders and bidding processes and thus facilitating trade of goods and services concerning such projects.*

- *The COMPANY is a global company specializing in the manufacture of Electric locomotives and Spare Parts for the same, with a focus on emerging markets. The COMPANY has approached TEQUESTA to provide advisory services in respect of the Project, for expanding their business in the Territory and help it in achieving their BEE (Black Economic Empowerment) objectives in the Territory on a long-term basis.*

[135] TR128

- *The Parties have, after mutual discussions, acknowledged and agreed that they have suitable and complementary resources to jointly harness the opportunities in the Territory through a Business Development Services Agreement, whereby TEQUESTA will play active role in providing advisory services in respect of the Project, Business development and BEE structuring and management in the Territory.*

- *In view of the above-set background, the Parties have agreed to reduce in writing their mutual understanding and their respective fundamental interests, rights, duties, obligations and liabilities in relation to the agency, their respective roles in this regard, the terms and conditions on which the Parties would implement the agency relationship and certain other matters thereto."*

284. The Definitions and Interpretation of the agreement state *inter alia* the following:

- *"Project 359" - refers to any portion of the Tender for the supply of 359 Electric Locomotives (22E) to Transnet SOC limited, South Africa (hereinafter "the Client")."*

- *"Nominee" - means any juristic person or Company that may be nominated by TEQUESTA from time to time to continue with and fulfil the obligations of this Agreement and/or to provide the necessary Invoices for executing the commercial aspects of this Agreement"*

285. The following General Conditions should be noted:

- *"The Company hereby appoints TEQUESTA to provide advisory and consulting services in respect of the Project and to aid Business Development and to assist in achieving the Company's BEE objectives in the Territory.*

- *The Parties hereby agree and acknowledge that they are independent contractors. No partnership, joint venture or employment is created or implied by this Agreement.*

- *The Company has advised TEQUESTA that a previous Agreement had been signed between CSR Zhuzhou Electric Locomotive Co., Ltd. and JJ Trading FZE (hereinafter referred to as the "'JJT'"). However, the Company advises TEQUESTA that in the event that JJT disputes or contests the cancellation or non payment in a court of law and if the Court decrees that the Agreement with JJT is valid or the mutual agreement is reached between TEQUESTA and JJT, then the financial compensation to JJT, (which will not exceed the retention amount, that is 15% of the total amount payable to TEQUESTA under this Agreement) will be deducted from the amount retained from TEQUESTA as per Clause 6.1.6 and the balance (if there is) will then be paid to TEQUESTA within thirty (30) days after the Company receipt of the last payment and/or return of all bank guarantees released by the Client, whichever occurs later. Under this circumstance, the invoices with retention to the Company shall be not claimable and returnable to TEQUESTA. TEQUESTA shall resolve dispute with the JJT* *through amicable consultation and ensure there is no further dispute with the Company from either side.*

- *During the period of the project, any penalty enforced by the Client to the Company shall be taken by TEQUESTA and deducted from the Advisory Fee as per Clause 6.1.1, except that caused by the fault of the Company, such as failure to deliver or product defect."*

286. Regarding remuneration and payment terms, the following is noted:

- *"For the Project-related Advisory Services provided by TEQUESTA, as detailed in Annexure "A", TEQUESTA shall be entitled to an Advisory Fee of 21% (Twenty percent) of the Contract value of Project 359 awarded to the Company, based on 2% (Two percent) of the Contract value as the success fee and 19% (Nineteen percent) of pro-rata to the milestone-based payments received by the Company from the Client. The Company has already paid 3.9% of the Contract value (R706,770,480.00) to JJT up to the Agreement date. The total payable amount to TEQUESTA under this Agreement is 17.1% of the Contract value (R3,098,916,720.00).*

- *19% of each payment to be made by the Client to the Company shall be due and payable to TEQUESTA when the Company receives the payment. Namely, each time the Company receives a payment from the Client as a percentage of the total Contract value, same proportion of the Advisory Fee shall be paid to TEQUESTA"*

287. Although Tequesta and CSR only entered into this agreement on 18 May 2015, Tequesta and Essa's other Hong Kong based company, Regiments Asia Limited received payments from CSR and CSR affiliates, Da Lian Locomotive & Rolling Stock Co Limited and CNR (Hong Kong) Co Limited, as early as December 2014.

288. In an email retrieved from the #Guptaleaks, Rupesh Bansal sent a mail[136] to "*Business Man*" on 7 January 2015 with an attachment.[137] The attachment was a reconciliation table of payments. The reconciliation table was mailed from Rupesh Bansal to an email address zhangminyu54642@qq.com who forwarded this email to "*Business Man*" with the email address infoportal1@zoho.com. This mail and attachment was then forwarded by "*Business Man*" to Chawla.

289. Note that Rupesh Bansal was the author of this mail and the January 2012 mail to Molefe. Both mails were sent via the same route and email address, zhangminyu54642@qq.com.

290. The reconciliation table shows the value for each of the three Transnet/CSR contracts: R2.7-billion, R4.4-billion and R18.1-billion, and the "fee" CSR was to pay on each: R537-million, R924-million and R3.8-billion (21%). This was in accordance with the Business Development Service Agreement that was signed between CSR Hong Kong and Tequesta.

291. The reconciliation table, as it appears in the #Guptaleaks, is displayed on the next page for ease of reference.

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[136] TR129

[137] TR130

359, 100 and 95 PROJECT WORKINGS

HEADS	359 Project	100 Project	95 Project	TOTAL
Each Loco Value	ZAR 50.48m	ZAR 44m	ZAR 28.28m	
PROJECT VALUE	ZAR 18122.32 m	ZAR 4400 m	ZAR 2686.60m	ZAR 221522.32 m
Total receivables will be from CSR for the whole Projects (20% for 95 and 21% for 359 & 100)	ZAR 3805.6872 m	ZAR 924 m	ZAR 537.32m	ZAR 5267.0072 m
CSR PAID till today (6th Jan 2015) including all transfers. (NOTE: CSR Paid at different times when it was due and CSR applied various Forex rate ZAR/USD at the time of payment, JJT/CGT received all in USD)	USD 107203921		USD 16699902.89	USD 123,903,822.89
Receivables from CSR	21% is Total Receivables (2% Advance Success Fee & 19% Receivables on actual basis when it is due from CSR)		20% is total receivables	ZAR 5267007200
"JJT/CGT" and Expenditures	Out of 2% Success Fee = (1% Success Fee for JJT and 1% expenditures) Out of 19% CSR receivables, JJT receives 15% and expenditure is 85%		Out of 20% receivables = (CGT Receives 15% and expenditures 85%)	
HENCE Receivables FIGURES WILL BE FOR WHOLE PROJECT	Expenditures ZAR 3862577880 JJT = ZAR 867109320		Expenditures = ZAR 456722000 CGT = ZAR 80598000	Total Expenditures = ZAR 3908250080 JJT/CGT = ZAR 947707320
Expenditures	(A)SUCCESS FEE: 1% (USD 21005903) expenditures. (B) 85% of remaining Receivables = USD 55413297.75 expenditures done		85% of receivables = USD 14194917.45 expenditures done	Total Expenditures = USD 90614118.20
JJT/CGT	(A)SUCCESS FEE: 1% (USD 21005903) retained by JJT (B) 15% of remaining balance = USD 9778817.25 retained by JJT		15% of receivables = USD 2504985.43 retained by CGT	JJT/CGT = USD 33289705.68
PLEASE NOTE	1. JJT/CGT in total have to receive ZAR 5267007200. CSR has made several payments using applicable forex rates to transfer ZAR into applicable USD.			
	2. Request CSR to inform that in total how many ZAR CSR has transferred and applicable exchange rate for which (JJT/CGT) received in total USD 123,903,822.89 till now.			
	3. The above ZAR amount which was used to transfer USD 123,903,822.89, this can be deducted from total receivables ZAR 5267,007,200. This figure will give the balance dues total from CSR.			
	4. The above balance "X" amount in ZAR to be paid by CSR in Future to JJT/CGT and JJT/CGT have to account 85% towards expenditures.			

292. Of the total amount of R5.3-billion, CSR had paid US$124-million (R1.4 billion) to JJT and Century General Trading ("CGT") until December 2014.

293. JJT Trading was essentially a front for the Guptas. JJT signed the original agreements with CSR but sent the proceeds to the Gupta companies. Presumably the same went for CGT in respect of the 95 locomotives. The relationship between the Guptas and JJT and CGT, will be discussed later in this report.

REGIMENTS ASIA (HONG KONG)

294. When Essa registered Regiments Asia Limited ("Regiments Asia"), he followed the same *modus operandi* as when he registered Tequesta.

295. According to the Incorporation Form NNC1 for a Company Limited by shares issued by the Company Registry in Hong Kong, Regiments Asia Limited with company registration number 2111264, was registered on 20 June 2014. The first director of the company was Salim Aziz Essa with residential address 2 New Forrest Road, Forest Town, Johannesburg, South Africa and with passport number M00073786.[138]

296. 10,000 shares with share capital of 10,000HK$ were issued but the shares were not taken up on date of registration.

[138] TR131

297. PAMM Corporate Secretary Limited was appointed as the Company Secretary.

298. On 17 November 2016, Essa resigned as a director of Regiments Asia. Aashika Singh was appointed on the same date. Her residential address was captured as 233 Karunamayee Ghat Road, Dhara Para, Tollygunge, Kolkata, West Bengal, India. Her Indian passport number is L1999184. This information is captured on a ND2A form of the Companies Registry in Hong Kong.[139] This document is the official proof for any director change in a company registered in Hong Kong.

299. It is believed that Aashika Singh was once an employee of ANN7. This information should be verified. It was reported by amaBhungane on 23 August 2017 that in correspondence (retrieved from the #Guptaleaks[140]) between Ronica Ragavan, the Acting CEO of Oakbay, KPMG and King & Spalding a law firm in Dubai, that Aashika Singh acted as a director in a Dubai company established for the Gupta's. The emails explained how two special purpose companies would be established in the Dubai International Financial Centre, a financial free zone. These would be used to channel foreign funds to another business in Dubai. The emails suggested the Dubai structures were designed to create a disconnect between the nominal shareholders and the beneficial owners – Kamal Singhala and Varun Gupta appear nowhere, and the entities avoid

[139] TR132

[140] TR133A

South African tax because Soo Young[141] Jeon and Aashika Singh[142] are not South African tax residents.[143]

300. As seen above, Tequesta entered into a Business Development Service Agreement with CSR.

301. From December 2014, Regiments Asia received payments from CSR as the company being nominated by Tequesta to provide the necessary invoices for execution of payment. The definition of a nominee is described in the agreement as: *"any juristic person or Company that may be nominated by TEQUESTA from time to time to continue with and fulfil the obligations of this Agreement and/or to provide the necessary Invoices for executing the commercial aspects of this Agreement".*

302. Regiments Asia and Tequesta together received US$145,176,466.00 (One Hundred and Fourty Five Million, One Hundred and Seventy-Six Thousand, Four Hundred and Sixty-Six US Dollars) from the Chinese locomotive manufacturers.

303. **Due to the sensitivity of the information the source documents for the abovementioned payments, will exclusively be made available to the Commission of Inquiry into State Capture and to South African and International law enforcement agencies.**

[141] TR133B

[142] TR133C

[143] TR134

304. According to the reconciliation table retrieved from the #Guptaleaks, an amount of US$123,903,822 (One Hundred and Twenty-Three Million, Nine Hundred and Three Thousand, Eight Hundred and Twenty-Two US Dollars) was paid to JJT and CGT.

305. According to the payment schedule forwarded to "*Businessman*", the total payments from CSR should have amounted to R5,267,007,200.

306. Take note that Salim Essa was the sole director of Tequesta and Regiments Asia at all relevant times when these payments were received by the two companies.

307. Essa also accompanied the Gupta's on several overseas trips and he was a regular passenger on the Gupta owned private jet, ZS-OAK.

308. Payments of millions of Rands also show that there was a close business and personal relationship between them. The table below indicates just some of the payments that were made to Essa (from emails and bank statements retrieved from the #Guptaleaks). These payments and many others should be investigated, and the purpose should be explained by the relevant parties. [144]

[144] TR135A to 135J

DATE	AMOUNT	ATTACHMENT
3 Sept 2013	R1,600,000.00	TR135A
4 Dec 2013	R22,000,000.00	TR135B
4 Jan 2014	R11,000,000.00	TR135C
23 Apr 2014	R3,000,000.00	TR135D
30 Apr 2014	R3,100,000.00	TR135D
30 Apr 2014	R100,000.00	TR135D
13 May 2014	R330,000.00	TR135E
3 June 2014	R7,000,000.00	TR135F
5 June 2014	R4,000,000.00	TR135G
30 Sept 2014	R4,000,000.00	TR135H
21 Oct 2014	R2,000,000.00	TR135I
11 June 2015	R16,000,000.00	RT135J

JJ TRADING & CENTURY GENERAL TRADING

309. The #Guptaleaks revealed that the Transnet 95-locomotive "fee" went to a company called "CGT" while, in respect of the other two contracts (100 & 1064 locomotives), it went to "JJT".

310. These "fees" were paid by the Chinese locomotive manufacturers as and when they received payment from Transnet.

311. On 19 January 2018, amaBhungane, News24 and Scorpio published an article - *#Guptaleaks: Meet the money lauderers*.[145] This article describes in detail the

[145] TR136

relationship between the Gupta's, Worlds Window, JJ Trading and Century General Trading

312. In summary - JJT is a United Arab Emirates (UAE)-registered company associated with Piyoosh Goyal, the chair of India's Worlds Window group, which had a mining joint venture (Arctos Trading (Pty) Ltd – Reg No 2011/002541/07) with the Guptas in Mpumalanga. The relationship between the Guptas and Goyal through Arctos Trading is evident in a mail sent by Ravindra Nath of Oakbay to Goyal, requesting him to instruct the "Trading Division" to provide information to enable the auditors to finalise Arctos' 2013 audit. In the mail Nath requests *inter alia* the origin of transactions for JJ Trading FZE in the amount of R12,699,935.33. He further requests the debtor statements of Century General Trading (CGT).[146]

313. CGT is also a UAE-registered company linked to Worlds Window and JJT. Like JJT, CGT's website claims that it trades scrap metal, grains and beans. Ramratan Jagati – the JJT "general manager" who takes orders from Worlds Window registered CGT's website. A sequence of events relating to JJT and CGT's involvement in the Transnet scandal is highlighted in the paragraphs below.

314. In June 2011, Shanghai Zhenhua Heavy Industries ("ZPMC"), a Chinese state-owned crane manufacture, signed a deal with JJT to help them land a crane contract.

[146] TR137

315. In September 2011, ZPMC won the contract to supply Transnet with seven ship-to-shore cranes. The contract included a US$12m premium to be paid to JJT. Transnet announced that ZPMC would *"…build, deliver and commission seven tandem-lift ship-to-shore cranes for the container terminal at Durban harbour.*"

316. In December 2011, ZPMC paid the first tranche. ZPMC allegedly made payments of at least US$4.2m to JJT during the period of December 2011 to January 2013. These payments were highly inflated, from US$81m (R570m at the time) to US$92m (R650m) to pay "commissions and fees" of US$12m.

317. In 2012, CSR, a state-owned locomotive manufacturer, was bidding to sell to Transnet 95 new locomotives. In October 2012, Transnet awarded CSR the R2.7-billion 95-locomotive contract. CSR then entered into a "consulting" agreement with JJT and started to pay 20% of the contract back to JJT and CGT. It appears that JJT was just a front for the Guptas and used to sign the original agreements with CSR. The proceeds were forwarded to Gupta companies.

318. In December 2012, CSR allegedly made a $6-million payment to CGT. In the following weeks, approximately $2-million was wired from JJT and CGT's Dubai HSBC accounts to several Gupta companies. This was reported in an article published in The Wall Street Journal on 10 November 2017.[147] Transnet then ordered another 100 locomotives from CSR at a cost of R4.4-billion and started paying JJT and CGT 21% of the costs.

[147] TR138

319. By February 2013, the Guptas and Worlds Window, which is the parent company of JJT and CGT, have allegedly made 251 transactions between their companies in Dubai, India and South Africa (including distributing payment from CSR and ZPMC).

320. About three years after the first Transnet kickbacks flowed to JJT's accounts, HSBC shut down JJT and CGE's accounts. The kickback flow was then rerouted from JJT and CGE in Dubai to HSBC accounts of Regiments Asia Limited and Tequesta Group Limited in Hong Kong. As previously seen, these two companies were owned and directed by Gupta associate, Salim Essa.

MCKINSEY & REGIMENTS

321. There was a close relationship between McKinsey and the Transnet CFO, Singh, from 2012.

322. McKinsey arranged for Singh to attend the 2012 CFO Forum conference in London from 8 June 2012 to 16 June 2012 and helped with arrangements for Singh to meet with financial institutions in Dubai.

323. In 2013, McKinsey again sponsored Singh to attend the 2013 CFO conference in London. Singh departed from Johannesburg on 12 June 2013 and returned on 24 June 2013. During this trip Singh also visited Dubai and Russia.

324. On 20 August 2012, Singh wrote a memorandum to Molefe and requested that a transaction advisor be appointed for the 1064 locomotive transaction. He proposed that McKinsey be appointed to provide advisory services and Webber Wentzel to provide legal advisory services. Molefe approved the appointment of the McKinsey consortium to provide all the advisory services.[148]

325. On 4 December 2012, Singh sent a signed Letter of Intent (LOI) to McKinsey stating that Transnet accepted McKinsey's offer and that McKinsey's consortium was awarded the contract for the provision of advisory services during the acquisition of the 1064 locomotives tender.[149]

326. The LOI *inter alia* stated that McKinsey was awarded a contract for the provision of Advisory Services over a period of 9 months commencing 15 January 2013 and expiring 15 October 2013. The timeline could be extended at no extra costs to Transnet if the deliverables were not executed within the stipulated time.

327. The LOI further stated that the supplier (McKinsey) would partner with Regiments Capital for the procurement and supplier elements and that all legal services would be rendered by Weber Wentzel. Advanced Rail Technologies, Nedbank and Utho Capital were identified as the rest of the consortium partners.

328. Clause 2.2 of the LOI stated that if negotiations between the parties break down for any reason, McKinsey would immediately invoice Transnet for all reasonable and actual costs incurred and that such amount would become due and payable

[148] TR139

[149] TR140

by Transnet against an undisputed tax invoice. This clause will become relevant when it is discussed later in this submission.

329. The fees and related costs would be capped at R35,2 million. The amount excluded disbursements and was attributed as follows:

- Contracting Strategy – Nedbank/Utho/Regiments/Burlington -R1.4m;
- Business Case Validation – McKinsey – R6.1m;
- Technical Evaluation & Execution – McKinsey/ Advanced Rail – R13.5m;
- PMO, Integration, Stakeholder Management – Regiments/McKinsey – R7.6m.

330. The LOI was signed by Singh on behalf of Transnet on 4 December 2012 and Michael Kloss on behalf of McKinsey on 6 December 2012.

331. A formal agreement (GSM12/05/0447) was drafted in terms of the abovementioned LOI. This agreement was titled "*Agreement between Transnet and McKinsey Incorporated – For the provision of Advisory Services Related to the Acquisition of the 1064 Locomotive Tender*".[150]

332. On the cover page the commencement date was 15 January 2013. In the contract the commencement date was defined as 5 January 2013 (notwithstanding the signature date of the agreement). The expiry date was noted as 31 March 2014. This time frame was not in accordance with the LOI.

[150] TR141

333. In terms of clause 12.1 of the agreement, the fee was fixed for the duration of the agreement and was detailed in Annexure A of the agreement. Annexure A stipulated that the deliverables had to be executed for a fee of R35,200,000.00

334. Clause 19 of the agreement determined the conditions of termination. Clause 19.6 stated *"that any party may cancel the agreement without cause by giving 30 days prior written notice of such termination"*.

335. Clause 21 determined that neither party could assign the benefit of this agreement without prior consent of the other party.

336. Clause 29 of the agreement stated that for any change to the agreement to be valid, it had to be in writing and signed by both parties as an addendum to the main agreement.

337. This formal agreement was signed by Singh on behalf of Transnet and David Fine on behalf of McKinsey. There were no witnesses to the signature of Singh. For Fine, there were apparently two witnesses namely Beverley Phiri and Fabio Pedrazzi.

338. It is not clear from the copy attached hereto when Singh signed the agreement, but the date of Fine's signature was clearly 21/02/2014. The signature date was strange and confusing as the agreement was signed long after the commencement date.

339. Schedule 1 to the agreement that made the provision for advisory services for the acquisition of the 1064 locomotive tender over a period of 9 months, was only

signed by Singh. Again, the date of signature is difficult to establish. The schedule was not signed by any representative of McKinsey.

340. On 22 May 2013, Singh sent a letter to Kloss of McKinsey, informing him of Nedbank Capital's potential conflict of interest.

341. On 19 November 2013, Singh sent another letter to McKinsey regarding Nedbank Capital's conflict of interest in part of the consortium. McKinsey acknowledged the conflict of interest and both parties recommended Regiments Capital as an alternative partner to provide the required services instead of Nedbank.[151]

342. On 31 January 2014, McKinsey sent a memorandum to Singh outlining a revised scope as requested by Transnet. According to this memorandum, Transnet requested McKinsey to assist with a commercial strategy and negotiation process for the acquisition of the 1064 locomotive tender. The contents of the memorandum outlined the ways and means to achieve this strategy.[152]

343. On 4 February 2014, McKinsey sent Singh a Memorandum of Withdrawal[153] from the 1064 locomotive acquisition wherein they indicated that they would no longer provide any advisory services on the transaction. The memorandum stated that the transaction was in an advanced stage and only a few terms were open for negotiation and buyer leverage.

[151] TR142

[152] TR143

[153] TR144

344. According to the memorandum, McKinsey strived to serve Transnet only on issues they could have an outsized impact on and that it would not be in Transnet or McKinsey's interest to continue with the advisory service if they (McKinsey) could not assist Transnet with any advice.

345. McKinsey notified Transnet in the same memorandum that they incurred expenses, spent expert time on interviews and rendered professional services and that an invoice for these expenses and services would be delivered to Transnet in the amount of R1.65m, excluding VAT.

346. On the same day, 4 February 2014, McKinsey and Transnet entered into an agreement that constituted a third addendum to the original agreement (GSM/12/05/0447). In the preamble of this addendum it is stated that McKinsey Incorporated is the principle lead. Clause 2 of the addendum made it clear that the original LOI and addendum constitutes the sole agreement and no variation shall be of any force and effect unless reduced to writing and signed by or on behalf of both parties.

347. The addendum was signed by Singh for Transnet and by Wood for McKinsey. Wood was never a director of McKinsey or authorised to sign this agreement on behalf of McKinsey. The contract was then altered on the signature page; McKinsey's name was scratched out and Regiments Capital's was written in. The agreement was not co-signed by witnesses.[154]

348. Clause 4.1 of the third addendum increased the initial price of R35,200,000.00 with R6 million to a total amount of R41,200,000.00.

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[154] TR145

349. On 16 April 2014, Vikas Sagar ("Sagar") of McKinsey sent a letter to Singh indicating that McKinsey ceded all its rights and obligations to Regiments on 5 February 2014. Sagar further stated in the letter that there was an agreement reached with Transnet regarding this cession and that all work related to and in respect of the mandate, was conducted by Regiments and not by McKinsey.

350. On the same day, Singh signed a memorandum for Molefe wherein he sought approval for amendments to the original agreement. The amendments were the substitution of McKinsey with Regiments as advisors and a change to the remuneration model. Singh also sought a delegation of power to execute the amendments as requested.[155]

351. The budgeted fees for Regiments amounted to R78,4million.

352. Molefe approved the request the next day, 17 April 2014.

353. On 24 April 2014, Transnet and Regiments signed a so-called first addendum to the GSM/12/05/0447 agreement. According to the preamble of the addendum, Transnet and McKinsey signed an MSA on 21 February 2014 in respect of advisory services.

354. This was inconsistent with the Memorandum of Withdrawal from McKinsey dated 4 February 2014. It was also in contradiction with the letter from Sagar stipulating that there was a cession of the contract to Regiments on 5 February 2014.

[155] TR146

355. According to the addendum signed by Transnet and Regiments, McKinsey appointed Regiments to execute the financing aspects of the 1064 locomotive acquisition and that Regiments would assist Transnet with negotiations to accelerate the delivery schedule that would result in savings on future inflation related escalation- and foreign hedging costs.

356. It is OUTA's submission that the abovementioned cession, new agreements and addendum was invalid in that the proper procurement processes were not followed. It seems that Singh, McKinsey and Regiments tried to get documentation in place to rectify and justify payments that were made to Regiments from 13 February 2014 as shown below.

357. On 13 February 2014, only nine days after McKinsey's letter, Regiments Capital issued Transnet with an invoice (TRX1064TCO01) for R4,902,000.00. The description of the work done, was: "*Transaction Advisory Services (acquisition of the 1064 locomotives)*." The reference was shown as GSM12/05/0477 which was the same RFP number allocated to the advisory services tender for the appointment of advisory services related to the acquisition of the 1064 locomotives.

358. This amount included R4 million for Professional fees and R300,000.00 for "Out of Pocket Expenses". The VAT was calculated as R602,000.00. On 18 February 2014, Singh signed the invoice off for payment.

359. The table below shows the invoices issued by Regiments to Transnet for Transaction Advisory Services (acquisition of 1064 locomotives).

Invoice Date	Payment Date	Invoice No	Description on Invoice	Fee	Expenses	VAT	Total
13 Feb 2014	18 Feb 2014	TRX1064TCO01	Transaction Advisory Services (acquisition of 1064 locomotives) - TCO work done to date	4,000,000	300,000	602,000	4,902,000
13 Feb 2014	19 Feb 2014	TRX1064FRM01	Transaction Advisory Services (acquisition of 1064 locomotives) – FRM work done to date	6,000,000	450,000	903,000	7,353,000
24 Feb 2014	26 Feb 2014	TRX1064FRM02	Transaction Advisory Services (acquisition of 1064 locomotives) – FRM work done to date	6,000,000	450,000	903,000	7,353,000
24 Feb 2014	26 Feb 2014	TRX1064TCO02	Transaction Advisory Services (acquisition of the 1064 locomotives) – TCO work done to date	3,000,000	225,000	451,500	3,676,500
24 Feb 2014	26 Feb 2014	TRX1064TE01	Transaction Advisory Services (acquisition of the 1064 locomotives) TE work done to date (escalation modelling insurance and warrantee)	2,000,000	150,000	301,000	2,451,000
27 March 2014	30 April 2014	TRX1064RISK01	1064 Locomotives Foreign exchange and warranty bonds	69,500,000		9,730,000	79,230,000
31 March 2014	2 April 2014	TRX1064FRM03	Transaction Advisory Services (acquisition of 1064 locomotives) – FRM work done to date	3,000,000	225,000	451,500	3,676,500
31 March 2014	7 April 2014	TRX1065TA01	Transaction Advisory Services (Financial modelling, escalation calculation, pricing and contract negotiation support)	5,000,000	375,000	752,500	6,127,500
31 March 2014	7 April 2014	TRX1064TCO03	Transaction Advisory Services (acquisition of the 1064 locomotives) – TCO work done to date	1,000,000	75,000	150,500	1,225,500
Total				**99,500,000**	**2,250,000**	**14,245,000**	**115,995,000**

360. All the invoices in the table above were approved for payment by Singh.

361. Annexed to this report, are copies of all invoices as shown in the table above.

- TRX1064TCO01;[156]
- TRX1064FRM01;[157]
- TRX1064FRM02;[158]

[156] TR147

[157] TR148

[158] TR149

- TRX1064TCO02;[159]
- TRX1064TE01;[160]
- TRX1064RISK01;[161]
- TRX1064FRM03;[162]
- TRX1065TA01;[163]
- TRX1064TCO03.[164]

362. All the above invoices were issued and paid without any legal and binding agreement in place between the parties. It is notable that the total fees for Regiments proposed by Singh in his memorandum to Molefe was exactly the amount that was paid to Regiments before the request for approval i.e. R99,500,000.00, excluding VAT.

363. When the invoices were submitted to Transnet and when payment was received by Regiments Capital (Reg No: 2004/023761/07), Wood was a director of Regiments together with Litha Mveliso Nohonyha and Magandheran (Niven) Pillay.[165]

[159] TR150
[160] TR151
[161] TR152
[162] TR153
[163] TR154
[164] TR155
[165] TR156

364. On 28 August 2014, the Transnet Board approved the loan transactions with China Development Bank ("CDB") and US Exim. This approval was subject to the negotiation for better rates on the US Exim facility.

365. Transnet's Treasury negotiated with the two financial institutions to source the funding for the 1064 locomotives contract. During the negotiations with the banks, Singh indicated to Transnet's Treasury that Regiments would take over the negotiations with CDB.

366. On 16 April 2015, Molefe concluded a mandate letter with CDB for a $2,5 billion loan facility to finance the acquisition of 232 diesel locomotives and 459 electric locomotives.

367. On 28 April 2015, Gama sent a memorandum to the Acquisitions and Disposals Committee ("ADC") to get approval for the following:

- The confined appointment of JP Morgan to hedge the financial risk (interest rate, credit and currency risk) emanating from the US$ 1.5 billion CDB loan back to ZAR;

- The confinement appointment of JP Morgan to lead and underwrite the equivalent syndicated ZAR loan of $1,5 billion;

- The appointment of Regiments as transaction advisors of and support to Transnet on the 1064 locomotives transaction and to increase the contract amount from R99,5 million to R265,5 million; and

- The delegation of authority to the Acting GCE to approve all documentation related to this confinement.

368. According to the memorandum, Regiments was to receive a success fee of R166 million.

369. The memorandum was drafted by Phetolo Ramosebudi and recommended by Pita, Singh and Gama. The memorandum was compiled on 24 April 2015, but the loan was already concluded on 16 April 2015. Molefe was appointed as Eskom GCEO the next day, 17 April 2015, by Minister Lynn Brown with immediate effect.

370. On 3 June 2015, Regiments prepared an invoice (Invoice number TRXFR00001)[166] for R189,240,000.00 (VAT included). The R166,000,000.00 on the invoice was reflected as: *"Debt origination $1,5 billion – China Development Bank – Arrangement of cross currency Swap and credit default Swap with JP Morgan. Success contingency fee – R166,000,000.00"*.

371. On 11 June 2015, Singh signed the payment advice and on 12 June 2015, Transnet made a payment to Regiments in the amount of R189,240,000.00. The payment was made less than two months after Gama, Singh, Pita and Ramosebudi signed the recommendation to appoint Regiments to perform the services as reflected in the invoice.

372. A month after the payment as described above, Transnet and Regiments entered into an agreement (second addendum to Master Service Agreement), mandating

[166] TR157

Regiments to do *inter alia* Cross Currency Swaps and to assist Transnet in the negotiations with all the identified Chinese potential funders but in particular CDB.

373. Paragraph 3.1.3 of the addendum stated that the Service Provider would be entitled to a success risk-based fee to a monetary value of R166 million. The addendum was signed by Gama on 16 July 2015 on behalf of Transnet and by Wood on behalf of Regiments.

374. In this instance, just as with the previous payments to Regiments, the agreements between Transnet and Regiments were only signed after invoices were issued and after payment was made to Regiments. This was in violation of the prescripts contained in Transnet's Procurement Procedure Manual.

TRILLIAN

375. Essa was appointed as a director of Trillian Holdings (Pty) Ltd on 28 August 2015.

376. Wood was a director and shareholder of Regiments Capital (Pty) Ltd but left Regiments on 29 February 2016.

377. On 1 March 2016, Trillian officially opened its doors and according to the CIPC database, Wood was appointed as a director of all the Trillian companies and subsidiaries on 1 March 2016.

378. On 01 March 2016, all the staff of Regiments Advisory, who chose to move to Trillian, was transferred to Trillian in terms of Section 197 of the Labour Relations Act. It is important to note that up until 29 February 2016, all the staff that moved to Trillian were still employed and paid by Regiments.[167]

379. On 24 March 2015, Molefe signed a memorandum that was addressed to the ADC. It contained a request to award a tender in confinement to Regiments. The contract was for professional services to be provided that would help Transnet to increase GFB with a breakthrough and to reach the planned volume targets for the 2015/2016 and 2016/2017 financial years (RFP: GSM/15/1255). The memorandum was compiled by Gama.

380. On 30 March 2015, the BADC resolved that the GFB breakthrough contract was awarded to Regiments Capital for a maximum amount of R375 million. The BADC also delegated the GCEO to approve all contract amendments related to this award.

381. No tender process was followed in the award of the GFB breakthrough contract to Regiments as it was awarded in confinement.

382. On 18 May 2015, a letter was sent to Regiments informing them that they were identified as the preferred supplier to provide professional services that will help

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[167] TR158

Transnet to increase their GBF (with a breakthrough) and to reach its planned volume targets in the next two financial years.

383. The LOI was signed by Pita and Gama on behalf of Transnet and by Wood on behalf of Regiments.

384. In November 2015, Gama signed the contract after some amendments were included. The final contract value was R375 million.

385. On 15 March 2016, Niven Pillay ('Pillay") sent a letter to Pita informing him of Regiment's restructuring and that Wood would relinquish his shareholding at Regiments Capital. The letter also indicated that Wood would acquire shareholding in Trillian Capital.

386. Pillay also noted in the same letter that the GFB breakthrough contract (GSM15/03/1255) would be ceded to Wood and Trillian and that Trillian was authorised by Regiments to execute the work and services relating to the contract.

387. On 13 April 2016, Wood sent a letter to Transnet informing Transnet that, in terms of a separation agreement between himself and Regiments, all Transnet's contracts awarded to Regiments were ceded to him (Wood) and that he in turn ceded all contracts to Trillian with effect 1 March 2016.

388. "Thomas" on behalf of Transnet, compiled a memorandum to inform the ADC of the cession and to request approval for the following

- The cession of the GFB contract from Regiments to Trillian;

- An increase in the scope of the detailed capital optimisation support services;
- An increase in the contract value from R375 million to R463.3 million;
- An extension of the end date from 30 September 2016 to March 2018.

389. The memorandum was signed off by Gama and Pita.

390. On 19 August 2016, Pillay sent a letter to Pita informing him that the restructuring of Regiments did not take place and that Wood, through his family's trust The Zara Share 1, was still a shareholder of Regiments. He further informed Pita that no contracts were ceded to Wood and that Regiments retained all rights under the Transnet contracts.

391. On 12 September 2016, Pillay wrote another letter to Pita and raised his concerns about the payments that were made to Trillian in respect of the GFB breakthrough contracts. Pita signed off on several Trillian invoices for payment on 29 June 2016. The invoices[168] [169] [170] for the GFB breakthrough contract were:

[168] TR159

[169] TR160

[170] TR161

Invoice Date	Invoice No	Invoice Description	Amount
23 May 2016	TCP-GFB01	Transnet GFB Breakthrough Professional fees: Work done to date (31 March 2016)	R7,980,000.00
23 May 2016	TCP-GFB02	Transnet GFB Breakthrough Professional fees: Work done to date (30 April 2016)	R7,980,000.00
7 June 2016	TCP-GFB03	Transnet GFB Breakthrough Professional fees: Work done to date (31 May 2016)	R7,980,000.00
Total			**R23,940,000.00**

392. The three invoices submitted by Trillian, had similar supporting documents and it appears that Trillian charged Transnet three times for the same work done.

393. On 20 October 2016, the ADC resolved to cancel the GFB contract. Notwithstanding this resolution, Gama still wrote to the Committee requesting that they approve the cession of the contract from Regiments to Trillian.

394. In a short period of time, Trillian submitted several other invoices to Transnet and received several payments from Transnet.[171] [172] [173] [174]

[171] TR162

[172] TR163

[173] TR164

[174] TR165

Invoice Date	Invoice No	Invoice Description	Amount
15 April 2016	TFA2016-FA07	Transnet Property Database	R41,040,000.00
19 April 2016	TE2016-CP01	Financial Structure	R11,400,000.00
20 May 2016	TCP-GCIA01	Fees for April 2016	R2,689,830.00
7 June 2016	TCPSWAT II-01	SWAT II Project	R36,014,296.91
TOTAL			**R91,144,126.91**

395. Except for one payment, all the other payments to Trillian were made on the same date; 01 July 2016. Invoice TFA2016-FA07 dated 15 April 2016, was paid on 26 May 2016.

396. According to the Budlender report, Regiments identified Transnet's property portfolio as an opportunity to enhance Transnet's EBITDA.

397. Fuel Property (Pty)Ltd headed up by Mark Pamensky (an Oakbay and Eskom Board member), was sourced to analyse Transnet's property portfolio and to propose a structure in this regard. Fuel Property performed the Transnet property analysis. The proposal was given to Pita by Wood in mid-April 2016 and it was delivered to Gama together with a R36 million invoice on 15 April 2016.

398. In the Budlender report, the invoice with number TE2016-CP01 was discussed.

399. According to the report, the former CEO of TFA stated that on 2 February 2016, Wood instructed her to organise a meeting with TE to discuss their order book for other African countries and to possibly provide them with a funding proposal that would assist their African expansion strategy

400. The meeting occurred on 4 February 2016 at the offices of TE. She said that shortly after the meeting, Wood called her and instructed her to draft a funding proposal and requested the finance section to generate an invoice for R10 000 000 (excluding VAT).

401. She stated that she could not send the client an invoice for the proposal as no work was performed and that her team only drafted the proposal for TE.

402. She was further instructed to send the proposal to Mr Clive Angel ("Angel"), Director of Integrated Capital, who sent the proposal to Jiyane of TE. She said that Angel sent the proposal to Jiyane on 17 February 2016 with an invoice for: *"Professional fee: Financial structuring advisory services in the fund raising to facilitate APican and Global sales of rolling stock".*

ANOJ SINGH

403. In previous sections, Singh's role in the various locomotive acquisitions, McKinsey, Regiments and Trillian was covered. This section we will concentrate on his relationship with the Gupta family and other role players like Essa, Sharma and Wood.

404. Singh obtained a B.Acc degree and qualified as a chartered accountant in 2000 at the University of Kwazulu Natal. Singh was a senior financial manager at Transnet's Freight Rail Division from 2003 to 2009. Between 2009 and 2012, he was the Acting Chief Financial Officer of Transnet. On 1 July 2012, he was

appointed as the CFO of Transnet. In September 2015, he was moved from Transnet to Eskom by Minister Lynn Brown and appointed as CFO of Eskom.

405. During his tenure at Transnet, the Gupta family arranged, booked and paid for several trips for him to Dubai.

406. In a string of mails between Ashu Chawla, Sahara's COO, and Sarah Ben Haouem, the Corporate Sales Executive of the Oberoi Hotel in Dubai, a booking was confirmed for Rajesh Gupta and Essa from 29 April 2014 until 1 May 2014. On 1 May 2014, Chawla wrote that another luxury suite was booked and that the guest, Singh, had already checked in for two nights.

407. Chawla also confirmed that he would settle the entire account for this guest.[175] From the mails it is evident that Singh, Essa and Tony Gupta were staying at the Oberoi at the same time and that the bookings and payments were taken care of by the Gupta's.

408. From 6 - 9 June 2014, Singh travelled to Dubai and stayed at the Oberoi hotel. The Gupta's paid for the travel and accommodation. This was three months after the award of the 1064 locomotive contract.[176]

409. From 7 – 12 August 2014, Singh travelled to Dubai and stayed at the Oberoi Hotel. Chawla sent this message to the Oberoi: *"Please swipe card for all charges"*.[177]

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[175] TR166

[176] TR167

[177] TR168

410. From 7 – 9 November 2014, Singh again travelled to Dubai. The reservations were again taken care of by Chawla.[178]

411. On 23 February 2015, the Oberoi Hotel emailed Chawla and confirmed the reservation for Singh from 24 – 26 February 2015.

412. During the abovementioned period (24 – 26 Feb 2015) Chawla also booked rooms for Rajesh Gupta and Aashika Singh. In the Essa section above, Aashika Singh was named as the successor for Essa as the director of Regiments Asia and Tequesta. She was also the person who was nominated to be a director on the company of Kamal Singala that was registered in Dubai. The reason why she accompanied Rajesh Gupta and Anoj Singh to Dudai is not known and should be investigated further.[179]

413. On 11 June 2015, the Oberoi sent an email to Chawla confirming a reservation for Singh from 12 June 2015 until 15 June 2015.[180]

414. Like with several reservations for accommodation and travel arrangements for individuals like Daniel Mantsha, Siyabonga Gama, Kim Davids, Duduzane Zuma, Salim Essa, Iqbal Sharma, Matshela Koko and others, Chawla was tasked to make the bookings and to arrange for payment on behalf of Singh.

[178] TR169

[179] TR170A & TR170B & TR170C

[180] TR171

MALUSI GIGABA

415. This section will concentrate on former Minister Gigaba's role in the appointment of members to the Transnet Board and the appointment of Molefe as GCEO.

416. At the Transnet Annual General Meeting ("AGM") held on 24 July 2010, it was resolved to re-appoint the current non-executive directors. The meeting was attended by the then Minister of Public Enterprises, Barbara Hogan.

417. It was also resolved at the AGM that the Articles of Association of Transnet be amended as follows:

- *Existing Article 69 of Articles of Association be deleted in its entirety and replaced with the following new Article 69:*
    - *The Company in General Meeting shall designate the Chairman;*
    - *The Board of Directors shall appoint the Managing Director of the Company who shall be referred to as the Group Chief Executive and determine any terms and conditions applicable to such appointments after consultation with the Shareholder;*
    - *The Board of Directors shall appoint the Chief Financial Officer and inform the Shareholder accordingly. The Shareholder shall appoint the Chief Financial Officer as a member of the Board of Directors.*

418. On 1 November 2010, former President Zuma appointed Malusi Gigaba as the new Minister of Public Enterprises.

419. On 24 November 2010, a memorandum was prepared by Phumzile Maseko (Assistant Director: Financial Analysis) and Raisibe Lepule (Acting DDG: Transport) on behalf of Dr Andrew Shaw and signed off by Ursula Fikelepi (Acting DG of DPE). The memorandum was for Minister Gigaba.

420. The purpose of the memorandum was to request the Minister to approve the appointment of the candidates on the list as Non-Executive Directors of the Transnet Board.

421. It proposed the retention of 3 Non-Executive Directors and the appointment of 12 new non-executive Directors.

422. The *ex-officio* members were Christopher Wells (Acting CEO) and Anoj Singh (Acting CFO).

423. The retained members were MP Moyo, NBP Gcaba and NR Ntshingala.

424. The new members proposed were:

- Mafika Mkwanazi;
- Donald Mkwanazi;
- Peter Malungani;
- Israel Skosana;
- Nazmeera Moola;
- Mike Funnuchi;
- Doris Tshepe;
- Ellen Tshabalala;
- Nombulelo Moholi;
- Vijay Raman;

- Prof Juergen Schrempp; and
- Harry Gazendam.

425. The skill profiles of the proposed candidates were supposed to strengthen the skills and effectiveness of the Board. Please note that Mr Vijay Raman was the only rail expert on the list of candidates.

426. The Minister was further requested to approve the Memorandum before it was submitted to the Cabinet Committee for the Economic Sector, Employment and for Infrastructure Development (ESEID). The sitting of the ESEID was scheduled for 1 December 2010. It was anticipated that Cabinet would endorse the appointments on 8 December 2010.

427. On 8 December 2010, Ursula Fikelepi (Acting DG) prepared documents for Minister Gigaba's signature. The one set of the documents was letters of appointments and re-appointments of the board members, and the other one was a memorandum.

428. The memorandum and the addendum with the names of two new board members, showed some interesting and unexplained statements. It was recorded in this memorandum that the Cabinet meeting of 10 November 2010 considered the list of people to serve on the Transnet Board as Non-Executive Directors and proposed that the list be withdrawn and revised to secure the best governance capacity for Transnet.

429. The memorandum further stated that the revised list was presented to the Economic Sectors, Employment and Infrastructure Development Cabinet

Committee for consideration on 1 December 2010 and that the committee recommended that Mr Vijay Raman and Ms Pinky Moholo be substituted with Mr Iqbal Sharma and Ms Thembekazi Mnyaka.

430. Although a Cabinet meeting was held on the 10th of November 2010, nowhere in the minutes was the abovementioned proposal (that the list be withdrawn and revised to secure the best governance capacity for Transnet Board members) noted.[181]

431. On 12 December 2010, Minister Gigaba approved the proposal and noted that the Board members have enough experience to fill any gaps that may be identified.

432. Why did the Minister/Cabinet/ESEID decide to replace the only rail expert on the board when the department pointed out that Transnet was facing significant challenges in rail operations and was taking on huge investments in rail?

433. The new Transnet Board was appointed on 13 December 2010 with Mafika Mkwanazi as Chairperson.

434. On 16 February 2011, it was announced by Minister Gigaba in a media statement that Molefe was appointed as the new Group Chief Executive Officer of Transnet. In the same statement, the chairperson, Mafika Mkwanazi, on behalf of the Board of Directors congratulated Molefe with his appointment.

[181] TR172

435. In this statement Gigaba also stated the following – "*I would also like to thank the board for their sterling work in ensuring that we met the shareholder's tight deadlines for the process. It was not an easy task. It is quite heartening to note the calibre of individuals - hugely talented men and women who are keen to serve their country in this capacity".*

436. On 17 February 2011, Prof Schrempp (a German National) notified Minister Gigaba of his resignation as Board member of Transnet.

437. The following reasons were being given to the Minister for his resignation:

- *"I have learned from the media about the decision to appoint a new CEO without having been consulted or officially informed.*

- *To quote the newspaper "The parastatal's board of directors submitted a short list of three candidates for CEO to the cabinet for selection after it considered 63 candidates" At no stage was I involved or party to this process.*

- *You will appreciate that to be excluded from a far-reaching decision like the appointment of a CEO is under the circumstances totally inappropriate. It breaches the spirit of my undertaking to you and it represents poor Corporate Governance.*

- *As I will not be able under those circumstances be adequately discharge my fiduciary duties as a Non-Executive Director I have come to the conclusion that in order to protect my reputation and integrity I have no other option than to step down from this post."*

438. It was reported by the Mail & Guardian ("M&G") on 4 March 2011, that several anomalies with the appointment of Molefe were discovered.[182] It confirmed the statement by Prof Schrempp that there were 63 applications but only three names were submitted to Gigaba.

439. According to M&G, the board's Corporate Governance and Nominations Committee chaired by Mafika Mkwanazi, handled the whole process. The Transnet Annual Report of 2011 did not indicate who the members of the Corporate Governance and Nominations Committee were. Transnet reiterated that the whole Board approved the names. This was inconsistent with the resignation letter of Prof Schrempp.

440. FIN24 reported on 12 December 2010 (the date the new Board was announced to the media) that according to The New Age (Gupta newspaper), Molefe was identified to fulfil the position as the new CEO. TNA did not reveal its sources.[183] Molefe was subsequently appointed as the new GCEO of Transnet.

441. It is important to note that in the same time period – December 2010 to February 2011 – Minister Gigaba appointed several board members. Most significantly was the appointment of Essa as a non-executive director to the Board of Broadband Infraco.

[182] TR173

[183] TR174

BRIAN MOLEFE

442. The role Molefe played throughout his tenure as GCEO of Transnet, is noted in detail in several investigation reports compiled for the Transnet Board, the Inquiry into State Capture and the Public Protector.

443. The above-mentioned reports highlight in detail his misconduct and his participation in illegal and irregular conduct.

CONCLUSION

444. Although not all the role players in the capturing of Transnet and the irregularities that occurred were discussed in this submission, it is OUTA's firm belief that with the information and evidence submitted herewith, will assist the Judicial Commission of Inquiry into State Capture with their investigations into Transnet.

445. OUTA is committed to assist the Commission in any which way possible to enable the Commission to make findings and recommendations with their inquiry into State Capture.