



## STATEMENT \* VERKLARING

Station  
StasieCAS no  
MAS no

The following particulars in respect of the offence / incident is supplied:  
Die volgende gegewens met betrekking tot die misdryf / voorval word verskrek:

## PARTICULARS OF OFFENCE/INCIDENT \* BESONDERHEDE VAN MISDRYF/VOORVAL

Date and time of offence/incident  
Datum en tyd van misdryf/voorval

2	0	1	7	0	0	0	0
---	---	---	---	---	---	---	---

H	H	M	M
---	---	---	---

Or  
OfPeriod: Between  
Tydperk: Tussen

H	H	M	M
---	---	---	---

 on  
op

2	0	1	7	0	0	0	0
---	---	---	---	---	---	---	---

 and  
en

H	H	M	M
---	---	---	---

 on  
op

C	C	Y	Y	M	M	D	D
---	---	---	---	---	---	---	---

Day of week  
Dag van week

Su	M	D	W	D	V	S
So	M	D	W	D	V	S

Description of Offence/Incident  
Beskrywing van Misdryf/Voorval

CORRUPTION &amp; FRAUD

Method used/Entrance gained  
Metode gebruik/Toegang verkryType of instrument used  
Tipe instrument gebruik

## SCENE OF CRIME \* TONEEL VAN MISDAAD

Between: Name of place  
Tussen: Pleknaamand: Name of place  
en: Pleknaam

Or / Of

Street name  
Straatnaam

1040 BURNETT STREET

Building/farm/plot/place  
Gebou/plaas/plot/plek

PRASA HEAD OFFICE

Suburb/Extension/Area  
Voorstad/Uitbreiding/Gebied

HATFIELD

Town/City  
Dorp/Stad

PRETORIA

Postal Code  
Poskode

--	--	--	--

Geographical block no  
Geografiese blok no

--	--	--	--	--	--	--	--

Type of premises  
Tipe perseel

OFFICE BUILDING

25/10/2017

Date/Datum

Signature/Handtekening

In a case of theft of a vehicle the statement must be continued on form SAPS 3M(c).  
In a case of theft of a firearm the statement must be continued on form SAPS 3M(d).  
In all other cases the statement must be continued on blank folio paper.

In die geval van diefstal van 'n motorvoertuig moet die verklaring op vorm SAPD 3M(c) voortgesit word.  
In die geval van diefstal van 'n vuurwapen moet die verklaring op vorm SAPD 3M(d) voortgesit word.  
In alle ander sake moet die verklaring op 'n blanke foliopapier voorgesit word.





## PREAMBLE TO STATEMENT \* AANHEF TOT VERKLARING

Station Stasie		CAS no MAS no	
<b>PERSONAL PARTICULARS * PERSOONLIKE BESONDERHEDE</b>			
Title Titel	MR	Initials Voorletters	BCC
Surname Van		THERON	
First names Voornames			
BENJAMIN CECIL CLARKE			
Identity number Identiteitsnommer	6307215114086		Race Ras
Passport number Paspoortnommer			A Br Bl W A Br Sw W
Date of Birth Geboortedatum	21071963	Age Ouderdom	54
Nationality Nasionaliteit	PSA	Citizenship Burgerskap	PSA
		Country of issue Land van uitreiking	
		Gender Geslag	W F M V

I am/am not a member of the SAPS with PERSAL no \* Ek is lid/nie lid van die SAPD met PERSAL no

## RESIDENTIAL ADDRESS \* WOONADRES

Street name Straatnaam		318 OAK STREET	
Building/farm/plot/place Gebou/plaas/plot/plek		O'KEEFE & SWARTZ BUILDING	
Suburb/Extension/Area Voorstad/Uitbreiding/Gebied		RANDBURG	
Town/City Dorp/Stad		JOHANNESBURG	
Telephone number Telefoonnommer	Home Huis	Code	No
Cellphone number Sellulêre foonnommer	082 941 8444	Work Werk	Code 087 No 170 0639
		Fax Faks	Code No

## ADDRESS--WORK/BUSINESS/INSTITUTION/ORGANISATION \* ADRES--WERK/BESIGHEID/INSTANSIE/ORGANISASIE

Name of Institution/Organisation Naam van Instansie/Organisasie		<del>318 OAK STREET</del> OUTA	
Street name Straatnaam		318 OAK STREET	
Building/farm/plot/place Gebou/plaas/plot/plek		O'KEEFE & SWARTZ BUILDING	
Suburb/Extension/Area Voorstad/Uitbreiding/Gebied		RANDBURG	
Town/City Dorp/Stad		JOHANNESBURG	
Telephone number Telefoonnommer	Home Huis	Code	No
Cellphone number Sellulêre foonnommer	082 941 8444	Work Werk	Code 087 No 170 0639
		Fax Faks	Code No
Would you like to receive information regarding this case via sms? Wil u inligting in verband met die saak ontvang per sms?			
		Yes / Ja	No / Nee

## CONTACT PERSON (IF APPLICABLE) \* KONTAK PERSOON (INDIEN VAN TOEPASSING)

Title Titel		Initials Voorletters		Surname Van	
Telephone number Telefoonnommer	Home Huis	Code	No	Work Werk	Code No

25/10/2017

Date/Datum

Signature/Handtekening



---

## AFFIDAVIT

---

I, the undersigned,

**BEN THERON**

do hereby make oath and state:

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

**A. MANDATE & INTRODUCTION**

3. OUTA is a proudly South African non-profit civil action organisation, supported and publicly funded by people who are passionate about improving the prosperity of our nation. OUTA was established to reintroduce accountability to government and to challenge the abuse of authority with regards to taxpayers' money in South Africa.

**B. THE PARTIES**

4. The Complainant is Mr Ben Theron on behalf of the OUTA, a non-profit Company with limited liability, with company registration number 2012/0642/1308 and NPC number 124-38, duly registered in accordance with company laws of the Republic of South Africa, and with its principal place of business situated at 10th Floor, O'Keeffe & Swartz Building, 318 Oak Avenue, Randburg, Gauteng.

5. The accused is the PRASA Board of Control ("BOC"), in their capacity as same, as appointed by national government and who must carry out its mandate as contemplated in the Legal Succession Act, 1989 and the PFMA. As per the annual reports for the 2012/2013 financial year, the following individuals served on the BOC during the period of the misconduct in question:
- 5.1. Sfiso Buthulezi ("Buthulezi") – Chairperson;
  - 5.2. Tshepo Lucky Montana ("Montana") – Group Chief Executive Officer ("GCEO");
  - 5.3. Zanele Gasa ("Gasa") – Finance, Capital Investment and Procurement Committee ("FCIP") Chairperson;
  - 5.4. Mfenyana Salanje ("Salanje") – Audit and Risk Management Committee ("ARM") Chairperson;
  - 5.5. Xolile George ("George") – Safety, Health and Environmental Committee ("SHE") Chairperson;
  - 5.6. Namhla Mxenge ("Mxenge") – Human Resources and Remuneration Committee ("HR") Chairperson;
  - 5.7. Mawetu Vilana ("Vilana") – designation unknown;
  - 5.8. Marissa Moore ("Moore") – designation unknown;
  - 5.9. Thulani Gcabashe ("Gcabashe") – designation unknown;
  - 5.10. Lindikaya Zide ("Zide") – Company Secretary.
  - 5.11. One Mr or Ms K Pillay – further particulars are unknown.

**C. BACKGROUND**

6. The Passenger Rail Agency of South Africa ("PRASA") is a major public entity as listed in schedule 2 of the Public Finance Management Act, 1999 ("PFMA").
7. Swifambo Rail Leasing Agency (Pty) Ltd ("Swifambo") is a supplier that submitted a bid to PRASA for the delivery of locomotives.

8. Vossloh Group Ges.m.b.H. ("Vossloh") is a Spanish locomotive manufacturer that subcontracted with Swifambo. Vossloh supplied Swifambo with locomotives that it (Swifambo) then sold to PRASA.
9. On or about 25 March 2013 PRASA entered into an agreement with Swifambo for the delivery of locomotives to the value of approximately R2,65 billion.
10. PRASA's Board Charter ("BC") which addresses its delegation of authority, is attached hereto and marked **ANNEXURE "BT1"**.
11. The final agreement (after the tender had been awarded) materially deviated from the initial bid, as the locomotives ultimately received did not conform to PRASA's rail specifications. Furthermore, the agreement had morphed from a lease agreement to a purchase agreement, in the absence of justification.
12. An arbitration agreement was entered into as a result of the delivery of defective locomotives by Swifambo.
13. In November 2015, Dr Popo Molefe ("Molefe"), former chairperson of the BOC approached the South Gauteng High Court to have the agreement set aside. This relief was granted on or about 3 July 2017, setting aside both the arbitration agreement and the supply agreement. Attached hereto is the judgment, marked **ANNEXURE "BT2"**.

**D. THE COMPLAINT**

**14. Requests for Proposal ("RFP") – lease of locomotives**

- 14.1. According to Molefe' founding affidavit, at paragraph 17.1, PRASA advertised a tender for the supply of locomotives on 27 and 28 November 2011. Molefe noted that the attendance register reflected 27 potential bidders. Nevertheless, only 6 bids were received – including that of Swifambo.



- 14.2. The RFP envisaged a procurement strategy by means of leasing of locomotives for PRASA's haulage passenger trains. The stipulated lease periods were 5 and 15 years respectively, with no option for a full purchase of locomotives by PRASA.
- 14.3. Prior to the awarding of the contract, compulsory evaluation of business and technical requirements would have to be conducted. The bidders were informed that they would be disqualified should they not meet a 70% compliance threshold.
- 14.4. As stated in Molefe's founding affidavit, attached hereto and marked "**ANNEXURE BT3**"<sup>1</sup>, the procurement process for the locomotives required that PRASA's board obtain approval from the Minister of Transport when acquiring a significant asset. Furthermore, written submissions to National Treasury is also required.
- 14.5. Noncompliance with the above-mentioned prerequisites is confirmed in the High Court judgement attached hereto as **ANNEXURE "BT2"**, at paragraph 70.
15. **Swifambo's Proposal**
- 15.1. Swifambo submitted its bid on or about 27 February 2012, under the name of Mafori Finance Vryheid (Pty) Ltd ("Mafori"). The change of name from Mafori to Swifambo was registered on 5 May 2012. For conceptual clarity, Mafori will hereafter be referred to as Swifambo.
- 15.2. Molefe noted in his founding affidavit that Swifambo did not comply with prerequisite requirements of the RFP, which include:
- 15.2.1. Absence of a valid tax certificate relating to its subcontractor (Vossloh);

---

<sup>1</sup> For brevity sake, I only attach the relevant extracts of Molefe's founding affidavit. However, the full document can be made available upon request.

- 15.2.2. The tax certificate submitted by Swifambo did not include a valid Value Added Tax ("VAT") number;
  - 15.2.3. No B-BBEE plan for procurement of goods was submitted;
  - 15.2.4. The bid did not comply with local content requirements as the locomotives were to be manufactured in Spain;
  - 15.2.5. Swifambo could not indicate any previous experience in the rail industry implying that they are incapable to do the work;
  - 15.2.6. There was no indication that Swifambo would be able to perform in terms of the agreement, as it had not (at the time) contracted with Vossloh who possessed the necessary skills;
  - 15.2.7. Swifambo's financial capabilities were not satisfactory.
- 15.3. Though not part of the original RFP, Swifambo in its bid, provided an option for PRASA to purchase 88 locomotives at a price between R3.6 billion to R4.3 billion.
- 15.4. At paragraph 8 of **ANNEXURE "BT2"** it is stated that all irregularities surrounding the awarding and conclusion of the agreement, are undisputed.

16. **Board Approval**

- 16.1. On or about 24 July 2012, the BOC convened a meeting during which several bids were discussed. It was noted in the minutes of the meeting that FCIP recommended the appointment of Swifambo as the preferred bidder at a price of R3.5 billion.
- 16.2. The recommendations presented to the BOC was incorrect and did not inform on the non-compliance of Swifambo's bid. There is no evidence suggesting that the necessary technical evaluations took place. The BOC was not presented with all relevant documentation pertaining to Swifambo's bid – only a recommendation from FCIS. Notwithstanding the lack of sufficient information, the BOC approved FCIS's recommendation.



- 16.3. It is noted at paragraph 26.9 of Molefe's founding affidavit, that the BOC was not in a position to make an informed decision.

17. **Knowledge of Irregularities**

- 17.1. On or about 6 November 2012, Gasa addressed an email marked as urgent to Buthulezi ([sfiso@makana.co.za](mailto:sfiso@makana.co.za)) and Montana. The email is attached hereto and marked **ANNEXURE "BT4"**.
- 17.2. In the email, Gasa raises her concerns about Swifambo and the existence of an intelligence report relating to it. Gasa further requested that she be allowed to *"dig a little bit deeper"*. She reiterated that the Swifambo matter required immediate board intervention.
- 17.3. On or about 20 November 2012, Gasa addressed an email to Chris Mathaba ("Mathaba"). The email is attached hereto and marked **ANNEXURE "BT5"**. It should be noted that Zide and Buthulezi were carbon copied in the email, meaning that the email had been sent to them.
- 17.4. Gasa requested Manthaba to confirm that: *"... a capacity check was properly done in relation to [the Swifambo] contract and that you have satisfied yourself that the necessary checks and balances have been done"*. Gasa further stated the seriousness of awarding an agreement in the absence of such confirmation. There is no evidence suggesting that Manthaba confirmed this statement.
- 17.5. Notwithstanding receipt and/or reasonable knowledge of the statements contained in the above-mentioned emails, the BOC proceeded with negotiations. The evidence indicates that information suggesting irregularities surrounding the tender was presented to Buthulezi and Montana by means of email communication (November 2012).



## 18. Conclusion of The Agreement

- 18.1. After the approval by the BOC and after becoming aware of possible irregularities relating to Swifambo's bid, an agreement was entered into between PRASA and Swifambo on 25 March 2013. The agreement entailed the purchase of 20 Euro 4000 locomotives and 50 EuroDual locomotives at a contract value of R3.5 billion.
- 18.2. Molefe highlights a series of irregularities in paragraph 28 of his founding affidavit (**ANNEXURE "BT3"**) relating to the final agreement, which include:
- 18.2.1. The agreement explicitly stated that the RFP made provision for an outright purchase option – which was not the case;
  - 18.2.2. The agreement suggests that all bids were submitted based on an outright purchase option;
  - 18.2.3. None of the bidders were afforded the opportunity to bid for an outright purchase office;
  - 18.2.4. Swifambo did not possess the necessary technical requirements to conduct the work;
  - 18.2.5. The products (Euro 4000 locomotives) were unsuitable for South African rail networks, as it could only operate at 800 metres above sea level, as opposed to the required altitude of 1800 metres in South Africa;
  - 18.2.6. The locomotives' overall gauge height exceeded that of the required height of the diesel locomotive gauge.
- 18.3. It should be noted that the irregularities (merits) referred to above were undisputed as confirmed in **ANNEXURE "BT2"** at paragraph 39. Swifambo did not respond thereto.
- 18.4. In addition to irregularities surrounding the implementation of the agreement, the parties attempted to rectify Swifambo's non-compliance by concluding a series of addenda. These addenda made



provision for performance bonds to alleviate the loss that resulted from delivery of deficient locomotives to PRASA.

19. The court confirmed at paragraph 36.8 of the judgment (**ANNEXURE BT2**) that the Auditor-General's report of 2015 detailed *"irregular and unlawful activity concerning PRASA's procurement processes"*.

## E. LEGAL FRAMEWORK

### 20. The Companies Act, 2008 ("The Companies Act")

21. In terms of section 76(1)(b) of the Companies Act, a person is a director of a company if he or she is a member of a **committee of a board** of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.

22. In terms of section 76(2)(a)(i), a director may not use his position to gain advantage either to him – or herself or a third party. Section 76(2)(b)(ii) stipulates that a director may not knowingly cause harm to a company of which he is a director.

23. In terms of section 76(3)(a) and (b) a director of a company must act in good faith and for a proper purpose and in the best interest of the company.

24. In terms of section 214(1)(c), a **director of a company** is guilty of an offense if he was knowingly a party to an **act or omission by a company calculated to defraud** a creditor or employee of the company, or **a holder of the company's securities**, or with another fraudulent purpose.

### 25. Public Finance Management Act, 1999 ("PFMA")

26. In terms of section 49(2)(a), the board of a company is the accounting authority. The accounting authority must, in terms of section 50(1):



- 26.1. *“(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*  
*(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*  
*...*  
*(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.”*
27. In terms of section 50(2)(a) of the PFMA, members of the accounting authority may not act in way that is inconsistent with the provisions of the act.
28. Section 51(1)(a) states that an accounting authority must maintain effective, efficient and transparent systems of financial and risk management and internal control; a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective a system for properly evaluating all major capital projects prior to a final decision on the project.
29. In terms of section 51(1)(b), an accounting authority must take the appropriate steps to collect all revenue due to the public entity, prevent irregular, fruitless and wasteful expenditure and manage available working capital effectively and economically. Section 51(1)(c) states that an accounting authority must safeguard the public entity against irregular, fruitless and wasteful expenditure.
30. Section 51(1)(e) states that the accounting authority must take effective and appropriate disciplinary steps against any employee of the public entity who contravenes any provision of the PFMA, undermines the public entity's financial management and internal control and who makes or permits irregular, fruitless and wasteful expenditure.



31. Section 51(1)(h) states that the accounting authority must comply and ensure compliance with the PFMA and any other applicable legislation.
32. Should an accounting authority be unable to comply with any responsibilities as set out in the PFMA, it must promptly report its inability to comply together with reasons, to the relevant executive authority and treasury in terms of section 51(2).
33. In terms of section 86(2), an accounting authority is guilty of an offense if it failed to comply with section 50, 51 and 55 **wilfully** or in a **grossly negligent** way.
34. **Prevention of Corrupt Activities Act, 2004 ("PRECCA")**
35. The BOC's conduct, as detailed above, constitutes contraventions of the following sections of the Prevention and Combating of Corrupt Activities Act, 2004 ("PRECCA").
36. In terms of section 3(b), a person is guilty of corruption, if he or she gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, acting in an illegal and dishonest manner, abuses his or her position or aims to achieve an unlawful objective.
37. In terms of section 4(a), a public officer is guilty of corruption, if he or she directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person.
38. In terms of section 4(b), a public officer is guilty of corruption, if his or her conduct in relation to section 4(a), is illegal, dishonest or biased entails the abuse of his or her position or has the aims to achieve an unlawful objective.



39. In terms of section 34, a person holding a position of authority is guilty of corruption, if he or she fails to report an offense in terms of PRECCA of which he or she had known, reasonably had known or suspected to the relevant authorities.

40. **Fraud**

41. Fraud is the unlawful and intentional making of a misrepresentation which causes actual or potentially prejudicial to another.

42. **Board Charter of the Control Board of the Passenger Rail Agency of South Africa ("BC")**

43. In terms of clause 15.6 of the BC, only the BOC may approve capital expenditure, acquisitions and disposals that exceeds the discretionary powers of PRASA's Chief Executive Officer ("CEO").

**F. CONCLUSION**

44. The BOC is classified as being directors in terms of section 76(1)(b) of the Companies Act. Clause 15.6 of the BC grants the BOC the authority to approve contracts that exceeds a contract value of R100 000 000.00. It is the BOC's reserved power to approve such expenditure.

45. The BOC's approval of Swifambo's bid, knowing that the relevant procurement procedures had not been followed, is in contravention of section 76(2)(a)(i) and (ii) of the Companies Act.

46. The BOC is PRASA accounting authority as contemplated in section 49(2)(a) of the PFMA. The BOC's approval of Swifambo's bid is in contravention of sections 50(1)(a), (b) and (d), 50(2)(a) and 50(2)(b) of the PFMA.



47. The BOC's approval of Swifambo's bid is in contravention of section 51(1)(a) of the PFMA in that bids that had been received from other suppliers, were not afforded the opportunity to bid for an outright purchase.
48. The BOC's approval of Swifambo's bid resulted in the conclusion of a purchase agreement between the latter and PRASA. The delivery of the defective locomotives could have been averted had the BOC not approved the bid. The agreement, in turn, resulted in financial loss to PRASA as defective locomotives had been delivered – this is in contravention of sections 51(1)(b) and 51(1)(c) of the PFMA.
49. The BOC's failure to reprimand individuals who had approved Swifambo's bid and/or concluded the agreement is in contravention of section 51(1)(e) of the PFMA.
50. The BOC's failure to comply with the provisions of the PFMA, is a contravention of section 51(1)(h). There is no evidence that the BOC reported the irregularities to the relevant executive, which is a possible contravention of section 51(2) of the PFMA.
51. The BOC's decision to approve Swifambo's bid, by virtue of their authority set out in the SCM is in contravention of sections 3(b), 4(a) and (b) of PRECCA. Swifambo benefitted from the awarding of the contract, to which they were not legally entitled to.
52. The failure of the BOC to report the approval of Swifambo's bid to law enforcement authority, knowing that it did not comply with the relevant procurement procedures, is also in contravention with section 34 of PRECCA.
53. The BOC's approval of Swifambo's bid was subject to the latter complying with the relevant pre-qualifications and procurement procedures. The BOC's approval thereof, was a misrepresentation to PRASA that implied that Swifambo had in fact met the necessary bidding criteria. Such misrepresentation constitutes fraud.



SIGNED AT **RANDBURG** ON THIS 25 DAY OF **OCTOBER 2017**.

*[Signature]*

DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT ~~SHE~~/HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO BEFORE ME AT **RANDBURG** ON THIS 25<sup>th</sup> DAY OF **OCTOBER 2017**, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R1258 OF 21 July 1972, AS AMENDED, AND GOVERNMENT NOTICE NO. R1648 OF 19 AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.

*[Signature]*  
COMMISSIONER OF OATHS

FULL NAME:

POSITION HELD:

BUSINESS ADDRESS:

**ANDREA KORFF**

PRAKTISERENDE PROKUREUR/PRACTISING ATTORNEY RSA

KOMMISSARIS VAN EDE/COMMISSIONER OF OATHS

1085 JUSTICE MAHOMED STREET

BROOKLYN

TEL: 087 701 5874



ek sertifiseer dat bostaande verklaring deur my  
algemeen is en dat verklaarder erken dat  
hy/sy verstaan is met die inhoud van hierdie ver-  
klaring en dit begryp. Hierdie verklaring is  
voor my beëdig/bevestig en verklaarder se  
handtekening/merk/duimafdruk is in my teen-  
woordigheid daarop aangebring.

I certify that the above statement was sworn  
by me and that the deponent has acknowl-  
edged that he/she knows and understands the  
contents of this statement. This statement was  
sworn to/affirmed before me and deponent's  
signature/mark/thumbprint was placed thereon  
in my presence.

at RANDBURG on 2017-10-25 at 12 05  
of 04560062

(HANTEKENING) KOMMISSARIS VAN EDE  
(SIGNATURE) COMMISSIONER OF OATHS  
HULANI SHABALALA

VOLLE VOORNAME EN VAN IN DRUKSKRIF  
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS  
20 SHEPHERD AVE.

BESIGHEIDSADRES (STRAATADRES)  
BUSINESS ADDRESS (STREET ADDRESS)  
KENSINGTON 3

W/O  
RANGVRANK  
SA POLISIEDIENS  
SA POLICE SERVICE