

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

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10

24 MAY 2019

DAY 98

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PROCEEDINGS HELD ON 24 MAY 2019

CHAIRPERSON: Good morning Mr Mokoena, good morning everybody.

ADV PHILLIP MOKOENA SC: Good morning Chair.

MR ROBERTO GONSALVES: Good morning Chair.

CHAIRPERSON: Thank you. Are we ready?

ADV PHILLIP MOKOENA SC: We are ready Chair.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Yes. Mr Gonsalves before we proceed further with your evidence just to recap. Could you please capture a
10 brief synopsis of the testimony that you adduced before the Chair yesterday. Just capture the essence so that we can be able to follow from where we have left yesterday.

MR ROBERTO GONSALVES: Certainly. Good morning Chair.

CHAIRPERSON: Good morning.

MR ROBERTO GONSALVES: So perhaps let me start off with saying that on the 9 August 2012 the CNR consortium informed Transnet that they would tender for both the diesel and electric locomotives. On the 17 March 2014 a locomotive supply agreement was signed for 232 diesel locomotives between the CNR consortium and Transnet TFR.
20 Prior to us signing that locomotive supply agreement Transnet had informed that the assembling and manufacturing of the 232 diesel locomotives would take place in Bayhead in Durban as opposed to Koedoespoort in Pretoria and they requested that we provide them with analysis of the cost impact of assembling and manufacturing in Bayhead as opposed to Koedoespoort. And even though the locomotive

supply agreement had a definition of contractive facility saying either Bayhead or Koedoespoort there was an amendment to that stating that it was going to be at Bayhead – the contractive facility was Bayhead. Then on the 11 March 2014 after the request from Transnet to provide an impact analysis of moving from Koedoespoort to Bayhead a letter was sent to CNR – to TFR stating that the amount was R9.7 million that was the impact of the additional cost associated with the move from Koedoespoort as opposed to Bayhead. Then on the 10 April 2015 we – there was a board meeting and at the board meeting we were – the

10 minority directors were presented with a contract for BEX and they objected very strongly to this when they saw that the contract contained provisions of a fee that could have gone up to R370 million for BEX. They had no idea who BEX was. There were no tender procedures followed by CNR South Africa. Despite all of that the company CNR South Africa signed an agreement on the 23 April 2015 with BEX and they were able to do that because CNR had four directors on the board and the minority directors only totalled three. Then we subsequently received a document dated 21 April 2015 where CNR South Africa produced some calculations showing a supporting amount of R287

20 million as a relocation claim. We felt that the document was very poorly drafted and quite amateurish. Then in July 2015 there was a variation order that had been put together by BEX signed by Jeff Wang of CNR South Africa and Anoj Singh of Transnet for an amount of R647 million the calculation show an amount of R719 million less the 10% discount amounting to R647 million. And then lastly on the 16 August

2016 the minority directors met with the executives of Transnet that included the CEO, the CFO, the head of Legal and Compliance where we expressed our concerns around the BEX contract. At that meeting we provided them with documents showing that BEX was a – and subsequently we emailed it to them and presented hard copies to them showing them that BEX was a sham company. The Sipse documents showed that the director – there is one director only. It was an exempt micro enterprise with a turnover of less than R5 million. We showed them that there was a document claiming that the initial amount was
10 R287 million. We showed them that the amount had increased to R647 million. The only document we were not able to show them at that meeting because we did not have it in our possession at that stage was a document that Mr Gama had signed the acceptance letter of the variation order because we only received that subsequently from Hogan Lovells.

ADV PHILLIP MOKOENA SC: Yes. And yesterday we parted ways at the point where now this matter was referred to KPMG and you were now informing the Chair about the two reportable irregularities and you have also done that up until page 13 paragraph 46. You were just
20 about to elaborate on the contents of that paragraph and proceed with your evidence from that point. Could you please take us through those relevant facts?

MR ROBERTO GONSALVES: Certainly. Chair I think maybe even though we are going to start on paragraph 46 if I perhaps could go to – back to paragraph 42?

CHAIRPERSON: Ja.

MR ROBERTO GONSALVES: Because I think it is a natural flow of events. So on the 22 September 2015.

ADV PHILLIP MOKOENA SC: Yes.

MR ROBERTO GONSALVES: Daisy Chong from CNR called me to say that KPMG was considering issuing a report called irregularity. I called the audit partner from KPMG and on that call he informed me that this was not the first reportable irregularity there had been an initial one. Number which I refer to as the first RI. And the first RI was the BEX
10 matter.

ADV MAHLAPE SELLO: Yes.

MR ROBERTO GONSALVES: I then sent an email to Mr Van Reckitstein the KPMG audit partner requesting that he send me all the information on the reportable
irregularity. And that takes us to paragraph 46 and should I continue from there?

ADV MAHLAPE SELLO: Yes you may then continue from there.

MR ROBERTO GONSALVES: Okay. At – then subsequent I – we informed the Endinamix board of this and the Endinamix board ...

20 **CHAIRPERSON:** I am sorry. Is the conversation between you and this partner from KPMG – does this capture the gist of the conversation what you have just read?

MR ROBERTO GONSALVES: Quite – quite correct Chair and I know that it is accurate because subsequent to the call I sent an email to all my fellow directors saying I have just had a call and I have literally

taken this from my email.

CHAIRPERSON: Yes. So your call to him was more to find out more about the reportable irregularity that he – you were told he was considering making?

MR ROBERTO GONSALVES: Quite correct Chair so I wanted to know what the first – the second reportable irregularity was about.

CHAIRPERSON: Ja.

MR ROBERTO GONSALVES: And I wanted to know what the first one was all about as well because we did not even know there was a first
10 one.

CHAIRPERSON: Okay thank you.

ADV PHILLIP MOKOENA SC: If I understand your evidence that despite being the minority shareholders all this information pertaining to these irregularities or reportable irregularities were never conveyed to the minority shareholders up until the time when at least that information came your way, am I correct?

MR ROBERTO GONSALVES: Chair that is quite correct. We only knew that there was a first reportable irregularity when the second reportable irregularity came to our notice.

20 **ADV MAHLAPE SELLO**: Yes and it was at that point then when you sought clarity as to what does it – what does the first irregularity and the second one entail?

MR ROBERTO GONSALVES: Quite correct Chair.

ADV MAHLAPE SELLO: Yes.

CHAIRPERSON: How long before had the first one being reported if

you got to know prior to the con – telephone conversation that you had with the partner of KPMG, did you get to know?

MR ROBERTO GONSALVES: So my conversation with KMPG was on the 22 September 2017 and the Hogan Lovell's response to KMPG took place in terms of Annexure 20 I will give you the precise date.

CHAIRPERSON: Hm.

MR ROBERTO GONSALVES: It seemed that that was on the 4 September 2017.

CHAIRPERSON: Oh.

- 10 **MR ROBERTO GONSALVES**: So – and it seemed there is an annexure to it with the actual reportable irregularity to IRBA from KPMG and that took place on the 12 June 2017.

CHAIRPERSON: That is the first one?

MR ROBERTO GONSALVES: That is correct Chair.

CHAIRPERSON: Okay thank you.

ADV PHILLIP MOKOENA SC: Do you have any idea as to why this crucial and vital information which ordinarily a shareholder must actually be told about why was it kept away from the minority shareholders?

- 20 **MR ROBERTO GONSALVES**: Chair we have no idea and you will see that we were very, very upset that there could be a reportable irregularity and you know the board – the minority – the other directors of the board not be informed about it and the other shareholders not be informed about it.

ADV PHILLIP MOKOENA SC: And this was kept away from you despite

the full knowledge from the majority shareholders that you had serious concerns that you have raised about the BEX issue and you have even elaborated as to why that money should not be paid to the consortium, am I correct?

MR ROBERTO GONSALVES: Chair that is absolutely correct and I think that is probably the reason why they kept it away from because they already knew that we had concerns and what KPMG was just supporting the concerns that we had.

ADV PHILLIP MOKOENA SC: Yes.

10 **MR ROBERTO GONSALVES:** Just confirming what we had already believed.

ADV PHILLIP MOKOENA SC: Yes you may then proceed with your testimony from paragraph 37.

MR ROBERTO GONSALVES: So – so are saying what happened is on the 27 September there was an Endinamix board meeting and they expressed their concern in paragraph 46 and demanded that a meeting be set up immediately with – between the company, management, KPMG and the shareholders and whatever legal advisors needed to be there.

20 **ADV PHILLIP MOKOENA SC:** Yes proceed.

MR ROBERTO GONSALVES: And then what happened next is on the – the very next day I spoke with Charles You of the Hogan Lovells because I knew that they were their legal advisors to CNR South Africa and on that call for the first time that we realised that the first RI reportable irregularity dealt with the BEX matter. He also informed me

on the call that Hogan Lovells no longer wish to act for the company on that reportable irregularity and to provide any advice to them. The reason for that is that they had heard that one of the BEX directors had a relationship with the Gupta's and those were exact words. And you will remember that in Annexure 20 that is the response that Hogan Lovells gave to KPMG on behalf of the company to support why they believe that the BEX issue was not a reportable irregularity.

ADV PHILLIP MOKOENA SC: Yes. Now just you know to seek clarity here a reason is given that one of the BEX directors I thought that yesterday you informed the Chair that this BEX which ultimately you know was paid this huge sums of money it only had one director as – because it was dormant for some time and at the time when it concluded the agreement there was only one director.

MR ROBERTO GONSALVES: Chair that is quite correct. There is a Mark Shaw I believe his name is he is the only director on the date. Look subsequently whether new directors were appointed or whether he resigned as a director I am not sure about the history post that date. So there could have been new directors on the board that had a relationship with the Gupta's or he could have had a relationship with the Gupta's.

ADV PHILLIP MOKOENA SC: Yes. Now these issues which we are now known to the consortiums you know minority directors where – was Transnet aware of these reportable irregularities and whether or not KPMG did in fact report the issue pertaining to BEX?

MR ROBERTO GONSALVES: Chair I would not know whether Transnet

was aware of that. Remember that we had met with them in 2016.

ADV PHILLIP MOKOENA SC: Yes.

MR ROBERTO GONSALVES: And this is in 2017.

ADV PHILLIP MOKOENA SC: and 17.

MR ROBERTO GONSALVES: Whether the company informed Transnet about it or whether Hogan Lovells did I am not sure.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: Can I take you back a little bit? You said that one of the directors or the director of BEX apparently had a relationship with
10 the Gupta's according to what you were told. Was it one of the directors that had an – one of the – I mean the director – the sole director of BEX that had an agreement with your consortium or was it one of the directors of the other BEX with which your consortium did not conclude an agreement?

MR ROBERTO GONSALVES: Chair I believe it was the BEX entity the 2009 entity that we had signed the legal agreement with because I think the initial BEX entity was never involved with it. It was just a façade and they were just using that company's proper name and registration number and then probably acquired a shelf company and it seems they
20 had acquired a shelf company appointed a director and then signed this agreement with let us call it this new BEX. So my understanding from what Charles You from Hogan Lovells was saying was that the relationship was between the new BEX one of the new BEX directors or the director and the Guptas.

CHAIRPERSON: So what I am trying to establish is whether it was as

you understood it was a reference to the sole director of the 2009 registered BEX or the one that was – one of the directors of BEX that was just used to give the other one some credibility.

MR ROBERTO GONSALVES: Chair I understood it to be either the sole director Mark Shaw or any new directors that had been appointed to the new BEX companies board.

CHAIRPERSON: Oh to the 2009 registered one?

MR ROBERTO GONSALVES: Quite correct Chair.

CHAIRPERSON: Okay but you just did not know whether at that time
10 that 2009 registered BEX still had one director or there were – there were more?

MR ROBERTO GONSALVES: That is quite correct Chair.

CHAIRPERSON: Okay alright.

ADV PHILLIP MOKOENA SC: Yes. I take it that at some point the minority shareholders did have a meeting with KPMG in order to discuss the first reportable irregularity, am I correct?

MR ROBERTO GONSALVES: Chair that is quite correct. On the 10
October we met with KPMG and we discussed both the reportable irregularities. We made it very clear to them that the first reportable
20 irregularity was a concern of ours as well and that is the reason why we had never approved signing the financial statements of the company from 2015 onwards but that we disagreed with them on the second reportable irregularity and we would be giving them evidence to support that.

ADV PHILLIP MOKOENA SC: Yes. And then what happened

subsequent to that?

MR ROBERTO GONSALVES: Then on the 20 October 2017 we sent a letter to which is Annexure 22 to KPMG dealing with the second reportable irregularity.

ADV PHILLIP MOKOENA SC: Yes. May I refer you to folder 22 RG22 Chair is to be found on page 294 and request you Mr Gonsalves simply to identify that document for us and simply take us through the highlight of that document?

MR ROBERTO GONSALVES: Sure Chair this is a letter from CNR
10 South Africa to KPMG on dealing with the second reportable irregularity. It is a document that goes – it is probably a 26 page letter that had probably a few hundred of annexures as well.

ADV PHILLIP MOKOENA SC: Yes.

MR ROBERTO GONSALVES: What it was purporting to do is give KPMG confidence that this was not a reportable irregularity. The concern that KPMG had I think they were in the media – there is a lot of – in the spotlight in the media. There was concern I think with any companies that had anything to do with rail and you will see subsequently that KPMG did resign as auditors. There were payments,
20 project management fees that was paid from the company CNR South African to Endinamix. They were concerned that maybe these were – there was no commercial substance behind these. And what this document purported to do was demonstrate that there was more than adequate commercial support and economic support for the project management fees and that they were bona fide. I know I am jumping

ahead but subsequently the new auditors that replaced KPMG withdrew the second reportable irregularity as an issue but not the first one, the BEX one.

ADV PHILLIP MOKOENA SC: Yes. No that is fine. Let us – may I refer you back to your statement and please go to page 14 and deal with the events from the 1 November as per your paragraph 51 onwards.

MR ROBERTO GONSALVES: So on the 1 November 2017 we had another meeting with Werksmans. Remember that they had been
10 engaged by Transnet.

ADV PHILLIP MOKOENA SC: Yes.

MR ROBERTO GONSALVES: To look into the BEX matter and we basically gave – shared all the information that we had on the BEX matter with them. At that stage we still did not have the Hogan Lovells annexures we just had their letter. We got that I think the next day from Hogan Lovells and – so we met with Harold Jacobs and his team.

ADV PHILLIP MOKOENA SC: Yes. And when you met with Werksmans were they aware that you know KPMG has actually reported this to irregularities?

20 **MR ROBERTO GONSALVES:** I cannot recall whether they were aware of that or not Chair to be honest with you. I am not sure whether we mentioned that in the meeting to them or not.

ADV PHILLIP MOKOENA SC: Now you have highlighted the seriousness of these issues pertaining to the BEX you know payment and how it was engaged and how the amounts escalated. Was the law

– I mean – any law enforcement agencies engaged in order to deal with this matter?

MR ROBERTO GONSALVES: So Chair subsequent to the meeting with Werksmans it was apparent that this thing was just dragging on and it is still dragging on. And we were concerned that quite a lot of time had elapsed before we were first expressed our concerns to the board and then to Transnet and now Werksmans had been engaged but we did not see significant progress. So we took it upon ourselves as the minority directors to report this to the Hawks and what happened was Lulamila
10 Xate as a director put together an affidavit and both Rowlen Von Gericke and myself signed supporting affidavits

ADV PHILLIP MOKOENA SC: Can I refer you to RG24. Chair it is on page 323 and if you can please identify that document for us and to the extent that is necessary you may simply highlight the important aspects arising from that document?

MR ROBERTO GONSALVES: Sure. Chair it is page 323 this is the affidavit from Lulamila Xate and he basically summarises that he is a non-executive director of the board and he is deposing this affidavit in that capacity. He notifies them that KPMG has raised this reportable
20 irregularity around the fees received from Transnet and the payments made to BEX and he basically also attaches all the Hogan Lovells documents which was extensive record of all the contracts signed between BEX, the variation orders etcetera, etcetera and he signs that on the 29 November 2017.

ADV PHILLIP MOKOENA SC: Yes. Now when the minority

shareholders approached the Hawks what was the reaction of the majority shareholders? Were they aware? They simply ignored what was happening?

MR ROBERTO GONSALVES: We – Chair we informed them that we had reported it to the Hawks because we thought it was the proper thing to do. We had nothing to hide and we knew that it was going to obviously effect the relationship with them but we let them know. Obviously they were not pleased with that.

ADV PHILLIP MOKOENA SC: Yes. What happened after the matter
10 had been reported to the Hawks? Do you know if the Hawks did anything about the matter?

MR ROBERTO GONSALVES: The only thing other engagement with the Hawks was a few months later there was a Captain Frank [Rangwashe] from the Commercial Crime Unit and Serious Economic Offences and he met with Rowlen Von Gericke and just to understand a bit more about the matter but no real progress on it and since then there has been no progress. No other communication from the Hawks.

ADV PHILLIP MOKOENA SC: Where the minority shareholders did they make any follow ups with the Hawks or with the Captain?

20 **MR ROBERTO GONSALVES:** No other than that the – there had been one or two discussions between them and Rowlen Von Gericke. I know someone from the SIU has also made contact with Rowlen Von Gericke but I believe from the Hawks there has been no other communication.

ADV PHILLIP MOKOENA SC: Yes. May I then refer you back to your statement page 14 and summarise for us the contents of paragraph 54?

MR ROBERTO GONSALVES: Sure.

ADV PHILLIP MOKOENA SC: Yes.

MR ROBERTO GONSALVES: Chair so this is a few months later – ten months later we have insisted on a board meeting to understand a few things. Firstly what has happened with KPMG's replacement auditor? We need to understand what the status is of the financial statements could we – had not approved them from 2015. We need to also understand how the reportable irregularities have been dealt with etcetera. At that meeting we were informed that there are new auditors
10 J Theron and Pietersen and they have in fact issued signed audit financial statements in respect of the 2017 year and prior years as well.

ADV PHILLIP MOKOENA SC: When these new auditors were appointed I mean were the minority shareholders engaged in any manner?

MR ROBERTO GONSALVES: Absolute not Chair and there is enough evidence on record where we demanded that we have the right to at least interview who the new auditors were and also to inform the new auditors of the reportable irregularities. We thought it was improper to appoint someone and not let them know of the history and the
20 background of the reportable irregularities.

ADV PHILLIP MOKOENA SC: Okay. It appears that the minority shareholders played no role in this company?

MR ROBERTO GONSALVES: Chair we were absolutely excluded from many, many important decisions and that is why there has been quite a lot of tension at these board meetings.

ADV MAHLAPE SELLO: Was it as a result of the position that you took in relation to the BEX issue or were there any other things that were – you – happening within the company that could have strained this relationship?

MR ROBERTO GONSALVES: So Chair the BEX issues obviously definitely caused a lot of tension. The other tension is around the corporate governance. We insisted on – we demanded from day 1 actually that they appoint a South African financial director, chartered accountant we thought that would be useful for the company. Ensuring
10 compliance with all our rules and regulations. You know we demanded that we have proper genders for board meetings that we have regular board meetings. That all matters pertaining to board meetings are circulated before the board meeting etcetera. The Chinese directors obviously did not like that approach.

ADV PHILLIP MOKOENA SC: Yes. You can then pick up with your evidence from paragraph 55 on page 15.

MR ROBERTO GONSALVES: So following the board meeting Chair on the 25 September the next day I wrote to the audit partner Nadia Pietersen and I informed her that we were very surprised that their
20 audited financial statements for 2017 had been signed off and given that we had not had a board meeting for such a long time and I also told her that we needed to understand how the – they had dealt with the BEX matter and also any other RI's.

ADV PHILLIP MOKOENA SC: Yes. And in paragraph 6 you deal with quite an important letter which was written by Mr Stephen Teti and the

contents of which are quite crucial and important and relevant to the terms of reference of this commission. Could you please you know take us through that paragraph and please read in full the contents of that letter please?

MR ROBERTO GONSALVES: Sure Chair so Stephen Teti who is from Endinamix representing Kopana Ke Matla was at that board meeting on the 25 September and it was quite a hostile meeting because the issue of BEX came up once again and on the 27 September 2018 Stephen Teti signed a letter on behalf of Endinamix to the CNR board and in it
10 he stated the following:

“We as Endinamix regard the payment of R67 181 494,00 including VAT”

ADV PHILLIP MOKOENA SC: Mr Gonsalves I have just received a note that a ten minutes break is being requested. Chair there is a serious technical break that – technical break – that break that needs to be dealt with and on those basis I am not sure whether we were able to capture all the evidence or whether we have lost any or whether it is only related to the camera.

CHAIRPERSON: Let us see it looks like so far we have been
20 recording. Yes okay.

ADV PHILLIP MOKOENA SC: Yes.

CHAIRPERSON: So that is fine so we can take the ten minutes.

ADV PHILLIP MOKOENA SC: Ten minutes.

CHAIRPERSON: Break to enable the technicians to fix the problem. Okay it is half past twelve – ten sorry. Twenty to eleven we will

resume. Thank you. If there is need for more time I will be told. Okay we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: I understand the problem has been fixed.

ADV PHILLIP MOKOENA SC: The problem has been resolved Chair. I am told.

CHAIRPERSON: Okay, thank you. Let us proceed.

ADV PHILLIP MOKOENA SC: Mr Gonsalves just before the short
10 adjournment you were taking the Chair through paragraph 56 of your
statement and I have requested you to also read in full what is
captured in the letter that you are referencing as RG26. Please
proceed to do so.

MR ROBERTO GONSALVES: Thank you Chair. So on
27 September 2018 Stephen Teti who is a Director of Endinamix who
represents Kopano Ke Matla wrote to the CNR Board on behalf of the
Endinamix Board and in the letter he stated *inter alia* the following:

20 “We as Endinamix regard the payment of
“R67 181 494.00” including VAT to BEX as a bribe
to induce the award of this tender. This is a breach
of your fiduciary duties as Directors of CNR. We
therefore demand that CNR take the following
minimum measures to reverse and correct the
situation: i, you report this matter in terms of the
Prevention and Combatting of Corrupt Activities Act

12 of 2004 “PCCA Act”; ii, you report this matter to the SAPS “Hawks” as having been the subject of extortion by BEX; iii, you report the behaviour of BEX in terms of the Financial Intelligence Act 38 of 2001 “FICA”; iv, any other measures necessary to recover the monies that you paid to BEX.”

The next paragraph says:

10 “Our position as Endinamix is simply that unless CNR demonstrates a willingness to correct the BEX matter and all the other issues raised above by the Endinamix Directors we are not willing to sign and confirm any BEE credentials of the joint venture as we will be complicit in the very things we are complaining about and we will be – and we will demand the resignation of the Endinamix Board Director who sits on your Board as that amounts to conflict of interest.”

20 **ADV PHILLIP MOKOENA SC:** Yes. Now did the Board of CNR or Directors deal with the issues which were referenced in this letter? Did they take any remedial action?

MR ROBERTO GONSALVES: Chair despite numerous requests we have seen no reaction by the CNR Board of CNR to this letter.

ADV PHILLIP MOKOENA SC: Yes. You can pick up then from paragraph 57 and deal with the events from 3 October 2018.

MR ROBERTO GONSALVES: Sure and so Chair on 3 October 2018

Lulamile Xate, myself, Jeff Wang the CEO and some other CNR South African representatives met with Nadia Pietersen of J Theron & Pietersen and it was very obvious from the discussions that we had with her that she was not fully informed about the nature of the BEX issue and that management of CNR had not provided them with the full information. Over the next few days we – we proceeded to do that.

ADV PHILLIP MOKOENA SC: Yes but did you furnish them with the relevant information? Did you give them the documents that would sustain – you know- whatever complaint that you had in relation to the
10 BEX matter?

MR ROBERTO GONSALVES: Quite correct Chair. We - we then emailed them all the BEX related documentation.

ADV PHILLIP MOKOENA SC: Do you know whether they reacted to same? What did they do with that information?

MR ROBERTO GONSALVES: Chair I must give them credit. They reacted very quickly. On 8 October 2018 they informed us that they had retracted the 2015/2016 and 2017 annual financial statements and I will quote:

20 “As a result of information that came to our attention after the finalisation of the above mentioned reports.”

And in addition they said – a direct quote:

“We will need to reopen the December 2015 audit.”

ADV PHILLIP MOKOENA SC: So they – they too considered this matter to be very serious?

MR ROBERTO GONSALVES: *Ja*, absolutely Chair and the latest audit report - as I will talk about a bit later - has an emphasis of the matter on – in relation to BEX.

ADV PHILLIP MOKOENA SC: Yes and then on 15 October there – thereabout you wrote a letter to Ms Pietersen?

MR ROBERTO GONSALVES: Yes I wrote on 15 October 2018 to Ms Pietersen and I made it very clear to her and I will quote:

10 “Regarding BEX we “the Directors” representing the minority Directors that is Lulamile Xate of Endinamix, Rowlen von Gericke from Global and Robbie Gonsalves – Cadiz - were dissenting Directors when the Board voted on the BEX contract. That is we did not support the contract and do not support that the payment made to BEX was a *bona fide* payment for services rendered to CRRCSARS.”

Which is CNR South Africa.

ADV PHILLIP MOKOENA SC: Yes.

20 **MR ROBERTO GONSALVES:** “For this reason we wanted to know how this payment was going to be disclosed in the December 2015 annual financial statements. We have as yet not received a response from CRRCSARS on 27 September letter.”

ADV PHILLIP MOKOENA SC: Did Ms Pietersen responded in reacted in any manner to this letter?

MR ROBERTO GONSALVES: Yes they – no remember that Chair on – they – they withdrew the – the financial statements.

ADV PHILLIP MOKOENA SC: Yes.

MR ROBERTO GONSALVES: For 2015/2016 and 2017. They only – the next that we heard from them was on 22 March 2019 - so not very long ago - where I received a copy of the draft financial statements for 31 December 2018 and in that draft financial statements the independent auditors report included an emphasis of matter in respect of the BEX issue.

10 **ADV PHILLIP MOKOENA SC:** Yes. May I refer you to RG29? Chair that will be on page 340. If you may please identify that document for us.

MR ROBERTO GONSALVES: So Chair this is a draft independent auditors report and that would be from J Theron & Pietersen in respect of the 2018 financial statements – year ended 31 December 2018.

ADV PHILLIP MOKOENA SC: Yes and what are the issues which you wish to highlight to the Chair?

MR ROBERTO GONSALVES: So Chair in the audit report about in the middle you will see a paragraph with a heading “Emphasis of Matter”
20 and in it they state:

“We draw attention to the following circumstance.”

I will not read it out word for word but in a nutshell they say that there is a reportable regularity and there are two points here. One, they say according to the information received the proposal by CNR in respect of the relocation from Koedoespoort to Bayhead – and I will – these are

direct words:

“...significantly misrepresented the cost to
Transnet.”

That was the issue and (intervenes).

CHAIRPERSON: Effectively it is the one you quoted in your statement on the last page?

MR ROBERTO GONSALVES: Quite correct Chair.

CHAIRPERSON: *Ja*.

MR ROBERTO GONSALVES: And then the second point that they raise
10 that – is that CNR entered into an agreement with BEX on 25 April 2015
and that it appears that the payments made to BEX sound – lacks
sound commercial substance and purpose.

ADV PHILLIP MOKOENA SC: Yes. Now how was this matter ultimately
resolved if it was resolved? I mean we know that the minority
shareholders did interact with Transnet. They interacted with the
Hawks. They interacted with the auditors. What happened ultimately
with this matter? Do you know if the monies were paid back to
Transnet or whether are they being pursued? What is the *status quo* of
all these issues?

20 **MR ROBERTO GONSALVES**: So Chair to our knowledge from the
company’s perspective absolutely nothing has happened. They have
definitely not repaid Transnet the amount back unless they have done it
without informing us and I understand that they are not pursuing BEX at
all. Remember that we wrote to them demanding that they do that. We
have subsequently written to them a few times and received no

response from it. So I assume that they have done absolutely nothing about it. The only thing that we have managed to achieve is get the financial statements in respect of 2015/2016 and 2017 retracted and an emphasis of matter now included in the later set of financial statements by the new auditors stating that the BEX matter is a reportable regularity and it has not been resolved.

ADV PHILLIP MOKOENA SC: Yes and within that company itself I take it that are – are you still the minority shareholder in that – in the entity?

10 **MR ROBERTO GONSALVES:** So we are still minority shareholders and we still minority Directors other than Rowlen von Gericke who has resigned since. I understand that we are going to have a Board meeting next week. I assume that it is going to be quite a hostile one but that is the plan.

ADV PHILLIP MOKOENA SC: Yes. Did the company – I mean – do you know if the majority shareholders have dealt with this matter or taken – taken it any further?

MR ROBERTO GONSALVES: No not at all Chair and I assume that if they had they would have informed us. So my assumption is that they
20 have done very little on it if anything at all.

CHAIRPERSON: Have you or any of the minority shareholders has interacted with the new Board of Transnet? There was a new Board that was appointed early last year for Transnet and its Chairperson Mr Popo Molefe gave evidence about two weeks ago here and he gave evidence about how the new Board is trying to recover monies that may

have been paid to individuals or entities in the manner – in circumstances where they were not entitled to such payments. Do you know whether any of the minority shareholders have interacted with the Board to say are you aware of this, what is Transnet doing about it?

MR ROBERTO GONSALVES: Chair now we have not. Obviously we reported this to the Hawks and we reported it to the old Transnet Executives.

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: So we have not reported to the new one
10 but I am hoping that as a result of this testimony that I am giving now
...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: That Transnet now will engage with us.

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: We are open. We will give them or share everything with them. We will cooperate fully with them.

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: We want this resolved. So I would be very pleased if Transnet can engage us and assist us ...

20 **CHAIRPERSON**: Yes.

MR ROBERTO GONSALVES: With this matter.

CHAIRPERSON: *Ja*, no I – I would encourage you to take the first opportunity you get after you are finished here to communicate or make contact with the – maybe with the Chairperson of the Board of Transnet to – to bring to his attention that there is this matter and you have

given evidence about – probably – well he was here yesterday morning. I think probably he may well be watching but I believe that he would be interested to know about anybody who may have received payment from Transnet in circumstances that are suspect. So I – I would encourage that you - you do that.

MR ROBERTO GONSALVES: Chair we will certainly take you up on that. I briefly Mr Molefe yesterday ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: In the area outside.

10 **CHAIRPERSON:** Yes, yes but to go back to this BEX issue assuming that you were correct in estimating the cost at R9.-something million. It means that since they were ultimately paid about R600-something million – is that right?

MR ROBERTO GONSALVES: R647 million Chair.

CHAIRPERSON: *Ja* 647 million. It means that if your estimation of the cost was correct it means that there is a good chance – there chance that more than 600 million might not have been justified that was paid by Transnet. Is my rough calculation correct in terms of what may have been unjustified to be paid?

20 **MR ROBERTO GONSALVES:** So Chair we believe that the full R647 million is unjustified.

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: We were already paid R9.7 million that we ...

CHAIRPERSON: Oh, oh that was separate?

MR ROBERTO GONSALVES: That was built into the price of a locomotive. So when we are putting the final price per locomotive ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: In the tender document ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: We included this R9.7 million and increased the price of the locomotives already.

CHAIRPERSON: Oh, yes I think you did say that.

MR ROBERTO GONSALVES: So we have been paid Chair R9.7 million
10 plus ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: R647 million. Even if the R9.7 million Chair was incorrect and it should have been 5 million ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: Or it should have been 15 million ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: Or it should have been 18 million ...

CHAIRPERSON: Hm.

MR ROBERTO GONSALVES: I think it is large – it is irrelevant.

20 **CHAIRPERSON:** Yes.

MR ROBERTO GONSALVES: It was an agreed number ...

CHAIRPERSON: Ja.

MR ROBERTO GONSALVES: The number was agreed with TFR ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: And it was built into the pricing of the

final fixed price per locomotive.

CHAIRPERSON: *Ja.*

MR ROBERTO GONSALVES: So it has already been incorporated in the locomotive price.

CHAIRPERSON: So this whole R647 million that was paid on your evidence was really completely unnecessary and there was really no cause for Transnet – Transnet to pay that amount?

MR ROBERTO GONSALVES: Chair that is what we believe and that is ...

10 **CHAIRPERSON:** Yes.

MR ROBERTO GONSALVES: The reason why we approached Transnet. We thought perhaps (intervenes).

CHAIRPERSON: (Intervenes) you did not know?

MR ROBERTO GONSALVES: Quite correct Chair.

CHAIRPERSON: And nobody told you anything. You did not know up to now?

MR ROBERTO GONSALVES: Chair we are still waiting.

CHAIRPERSON: *Ja.* Nor did your majority shareholders?

ADV PHILLIP MOKOENA SC: No definitely not.

20 **CHAIRPERSON:** You gave everyone an opportunity to explain to you what the justification was both Transnet and the majority shareholders and nobody told you what the justification was. Is that right?

MR ROBERTO GONSALVES: Quite correct Chair and that – that is the reason why we felt obliged to report this to the Hawks.

CHAIRPERSON: Yes, yes. Then the Hawks themselves do not seem to

have acted as quickly as one would have thought they would?

MR ROBERTO GONSALVES: That is quite correct Chair.

CHAIRPERSON: Yes, yes because you reported to the Hawks when?

MR ROBERTO GONSALVES: That would have been towards the end of 2017.

CHAIRPERSON: *Ja*, so there has been a whole year and a half at least?

MR ROBERTO GONSALVES: Quite correct Chair.

CHAIRPERSON: Yes and have the Hawks been keeping you informed
10 about their progress? Have they been in touch with you to make sure
that you know that the delay is not because they are not doing anything
but they are working on the matter in anyway?

MR ROBERTO GONSALVES: Chair there was just one meeting ...

CHAIRPERSON: Hm.

MR ROBERTO GONSALVES: Subsequent to that ...

CHAIRPERSON: Hm.

MR ROBERTO GONSALVES: Subsequent to the affidavits being
submitted and that was with Rowlen von Gericke ...

CHAIRPERSON: Hm.

20 **MR ROBERTO GONSALVES**: But nothing came out of that meeting and
no new information. They already had all the information. So nothing -
it was kind of just a brief update but nothing came out of that.

CHAIRPERSON: So the meeting itself you say there was really no
value to the meeting as such?

MR ROBERTO GONSALVES: No value whatsoever Chair. I mean I

actually spoke to Mr von Gericke – Rowlen von Gericke – this morning just to confirm that and he confirmed it.

CHAIRPERSON: And the meeting had been asked for by them – by the Hawks – or you had asked for it or your side had asked for it?

MR ROBERTO GONSALVES: Chair I do not know whether Mr von Gericke had called them or they ...

CHAIRPERSON: *Ja*.

MR ROBERTO GONSALVES: Or they had called him for the meeting.

CHAIRPERSON: *Ja* but a meeting had taken place but nothing – there
10 was nothing of any significance that came out of it?

MR ROBERTO GONSALVES: Quite correct Chair.

CHAIRPERSON: And the Hawks have never said to you we need some more information or your statements are not adequate or your affidavits are not adequate or there is something that you affidavits do not clarify or they have never said anything like that to you?

MR ROBERTO GONSALVES: No Chair absolutely not. I mean we are willing and able to assist whenever – whenever – if anyone needs any information we are willing and able to assist.

CHAIRPERSON: Yes.

20 **MR ROBERTO GONSALVES**: Whether it is Werksmans whether it is Transnet whether it is the Hawks.

CHAIRPERSON: Yes. Did you get to know who at – at the Hawks was assigned to deal with the matter?

MR ROBERTO GONSALVES: Yes Chair. So the actual statement was signed in front of Lieutenant Colonel Percy Koekeman of the Germiston

Branch of the (intervenes).

CHAIRPERSON: I am sorry. What is his name?

MR ROBERTO GONSALVES: In paragraph 52 ...

CHAIRPERSON: *Ja*.

MR ROBERTO GONSALVES: Of my statement – you will see in the last sentence Chair ...

CHAIRPERSON: Oh yes, yes.

MR ROBERTO GONSALVES: It is Lieutenant Colonel Percy Koekeman for the Germiston Branch and then Chair in the next paragraph you will
10 see a Captain Frank Rangwashi (?) ...

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: Came to visit Rowlen von Gericke.

CHAIRPERSON: Yes. Well it may be that they have a lot of work – a lot on their hands but one would have expected that at least they would keep you informed about what is happening particularly – it is particularly important that they should keep – you know – people who have submitted complaints to them informed because there are all kinds of allegations against some of the law enforcement agencies that for some time they were not pursuing matters that they should be pursuing
20 and so on. So to deal with that it is important that they should keep people who submit complaints to them informed so that those people know that something is happening – you know – because otherwise if people think that they submit complaints to them for investigation and nothing happens people lose confidence in them. So, okay thank you.

MR ROBERTO GONSALVES: Thank you Chair.

ADV PHILLIP MOKOENA SC: Mr Gonsalves I just want to conclude your testimony by referring you to something that does not appear to be quite clear from your testimony. You referred to the two BEX you remember? I mean you identified the one as the real BEX that might be having capacity and necessary resources that you can engage in the transaction of that magnitude but you said that after you were finished with the relevant documents of this other BEX - for want of a better word I will say that you know - the one with one Director. Now did you at any stage as the minority shareholders engage with this you know
10 the real BEX in order to find out as to what was happening? What was the distinction between these two entities and why were you misled as you have testified to the Chair?

MR ROBERTO GONSALVES: So Chair you must realise that we only saw these agreements after they had been signed.

ADV PHILLIP MOKOENA SC: Yes.

MR ROBERTO GONSALVES: So when we – when BEX was first mentioned to us in that April 2015 Board Meeting a document was put on the table that purported to show BEX's capabilities and there were great colour photographs of roads and bridges and trains etcetera
20 showing the expertise of BEX but subsequently obviously we know that they never signed with that BEX entity and so it appears – I think – amaBhungane did an investigation and it seems that there was a hijacking. In other words they just used that company. Now whether they did it to try and fool CNR South Africa or whether they tried to fool us as the minority Directors I do not know what the intent was but it

was obvious that they had hijacked this company and that the intention was never to sign an agreement with this company and – but rather to form a new company. Have a very similar name so there is confusion and unless someone was astute and awake they had probably think that they were dealing with the same entity - BEX - but you will see that the names are different – slightly different and – but the registration number is very different and the new BEX – the second BEX – is a company – a shelf company just newly appointed a Director, never traded and that is the entity that they had signed a contract with.

10 **ADV PHILLIP MOKOENA SC:** I mean surely flowing from that evidence this could have not – not have been a sheer mistake. It appears that there was an effort to place what appeared to be the real BEX before the minority shareholders while whoever did that knew that this other BEX – the second BEX – was the one that they intended to conclude the agreement with.

MR ROBERTO GONSALVES: So Chair from – from what we can see in the evidence in front of us someone took the time and effort to try and create the impression that there was a contract that was being signed with – with the real BEX company. It – it seems to me it is definitely
20 deliberate. It is not an error. If I was a Director of CNR South Africa and I was signing a contract – an agreement – with an entity and I was going to be paying them initially a fee of R370 million that went down to R67 million and I must just add on the R67 million. It was R67 million plus VAT of 9.4 million. I doubt whether BEX ever paid the VAT across. So we are actually talking about R76 million. I would have made sure

that from – just from a FICA purpose that I was doing the correct work on it and it would be very apparent that I was dealing with a shelf company which would have concerned me and they had the document in front of them. So they have actually shown us that they had the BEE Certificate and they CIPC document. So they know that they signed an agreement with – with an entity that had just been newly formed and never traded before.

ADV PHILLIP MOKOENA SC: Yes. Now what I want to understand also which is not - which is not apparent from – you know your
10 statement is we are dealing here with – you know – I am now talking about your company. There must be obviously policies pertaining to procurement of good and services. How was this BEX – you know – presented to the minority shareholders? You know what was the justification? How were they appointed in order to provide any service for that matter? I mean you have told the Chair clearly that within your entity itself there were resources that could have actually undertaken the task but in this regard here is BEX. Let us assume that you required those services. Ordinarily how would that company be engaged?

20 **MR ROBERTO GONSALVES:** So Chair that is absolutely correct. I mean one of the reasons why we descended as Directors is we said that there were no tender procedures. Why did they not get quotes from other consultancies? If they really needed someone and they thought that within their shareholder base they never had the expertise to formulate a claim why did they not get quotes from other consultants

and the argument was that no other consultants would do this on a risk basis and that BEX was doing it on a risk basis. They would only be paid a success fee and everyone else would charge a fixed fee and therefore they thought this was preferable. We obviously thought that this was laughable given that BEX would possibly earn a fee of R370 million. We said that – we thought that there were other entities far more competent than BEX that would have done the work for far less than R370 million.

ADV PHILLIP MOKOENA SC: Yes.

10 **MR ROBERTO GONSALVES:** And – and if I may just add – I mean – there are other examples where for example we insisted as Directors that the company implement a transfer pricing policy and for that they went out and got quotes from a few of the auditing firms. So for that – you know – for that piece of work they followed these procedures and got quotes but for this massive amount paid to BEX they did not get quotes.

ADV PHILLIP MOKOENA SC: Now lastly I want to take you back to the meeting between the minority shareholders and Transnet officials. Firstly the obvious question was that – was that meeting recorded? Is
20 there a minute to that meeting?

MR ROBERTO GONSALVES: Hm.

ADV PHILLIP MOKOENA SC: To the best of your recollection.

MR ROBERTO GONSALVES: Chair I think there would probably have been an email from us subsequent to that meeting to the other Directors in Endinamix as a report back.

ADV PHILLIP MOKOENA SC: Yes. During that meeting did this raise any eyebrows or did any of the officials of – you know – Transnet – you know – appear to be taking this matter very serious because I mean these are serious issues that you are speaking about. You are even taking to the level of being a bribe that was to be entitled by an entity and the amounts kept on escalating. Those are serious. I mean one would have expected that there must – must have been serious steps – you know – undertaken in that regard. What was your sense – you know – of that meeting after you have concluded with the officials?

- 10 **MR ROBERTO GONSALVES:** So Chair Mr Gama – the CEO did appear to be alarmed at it and he even made a comment that if Transnet paid an amount to CNR South Africa there is a possibility that Transnet could have paid other amounts to other OEMs and – so he genuinely seemed concerned. I did yesterday give evidence that he had signed the acceptance of the variation order. That was a – a year earlier and it is a possibility that he had forgotten that he had signed it. I mean it is a significant amount of R647 million. So it is a possibility that he did. He seemed - the other Executives did not seem too perturbed about it. I would expected a much bigger stronger reaction from
- 20 Executives when approached by shareholders in – in one of the OEMs with so much evidence in front of them.

ADV PHILLIP MOKOENA SC: And – and most will take into account the – the money involved?

MR ROBERTO GONSALVES: Absolutely Chair. I mean we are talking about a massive amount of R647 million and I am not sure whether the

OEM – other OEMs are involved. If they are then maybe that double that amount or treble or even four times that amount. We could be talking about a significant amount.

ADV PHILLIP MOKOENA SC: Yes. Any other issue that you wish to highlight having testified and – you know – furnish the Chair with the facts as you did in your statement and also amplified it in your oral testimony. Is there any other thing that you might wish to highlight arising from – you know – this transaction and all the parties that were involved or engaged in it?

- 10 **MR ROBERTO GONSALVES:** No Chair I think I have – I hopefully covered everything. I have taken a lot of time and effort to put this testimony together. It is over a long period and there are a lot of documents involved, and we hope that we've done it to the best of our ability and I think it was Edmund Burke who said now all it takes in order for evil to triumph is for good men to do nothing and we hope that we've done something that will try and address this what appears to be a very corrupt transaction.

ADV PHILLIP MOKOENA SC: Chair that concludes our questions for this witness.

- 20 **CHAIRPERSON:** Thank you. Now in terms of the arrangement that BEX had made with your consortium in terms of the majority shareholders they were to get about half or maybe a little more than half of what Transnet was going to pay so do you know whether out of the R647million a certain portion came to the consortium in terms of that arrangement or whether it – that all went to BEX?

MR ROBERTO GONSALVES: No Chair of the R647million it all went to the consortium initially but half of it was paid upfront and the other half was paid in instalments over a period I think of two years, it's the variation order, the details and the file I can probably find it, I think it's Annexure 12 or 14, it's got the details on there, perhaps we can turn to that.

CHAIRPERSON: What page is that again?

MR ROBERTO GONSALVES: Chair I will find it now, yes Chair it's page 261.

10 **CHAIRPERSON:** Yes.

MR ROBERTO GONSALVES: So Chair under point 2 the proposed payment terms 50% of it is payable within ...(intervention)

CHAIRPERSON: Within 40 days.

MR ROBERTO GONSALVES: Within 40 days and the other within 24 equal instalments of 13.4million, because this was signed obviously in 2015, the full amount has already been received.

CHAIRPERSON: So the whole amount was to be paid to the consortium and then in turn the consortium would then pay BEX the agreed portion?

20 **MR ROBERTO GONSALVES:** Correct Chair and then they received an invoice from BEX for R67million plus VAT and that is on – I will try and find it now, Annexure 13

CHAIRPERSON: Yes.

MR ROBERTO GONSALVES: So you will see Chair Annexure 13 is a BEX invoice for an amount of – it actually says R647million minus

R580million benchmark, so the fee R67million plus VAT of 9.4 so R76.5million was paid to BEX and Chair we did ask the question it also seems odd why the agreement spoke about an amount of R100million and there was an amount of R67million and what we were told was that the BEX fee was then also going to be paid 50% up front and instalments and they were going to get R100million that way and they rather said can you pay us upfront and we will reduce it R67million.

CHAIRPERSON: Okay, so ultimately BEX could R67million?

MR ROBERTO GONSALVES: Plus VAT.

10 **CHAIRPERSON**: Plus VAT ja.

MR ROBERTO GONSALVES: Plus VAT Chair ja.

CHAIRPERSON: Yes, so therefore we are dealing with a situation – so the real entity from which Transnet should recover this R647million if indeed there was no lawful cause for it to be paid is your consortium?

MR ROBERTO GONSALVES: Chair that's absolutely correct so we as minority shareholders we have requested that the company we pay the full R647million back to Transnet and pursue BEX in respect of the R67million plus VAT.

20 **CHAIRPERSON**: So it's a very strange situation. Transnet pays a lot of money to a company under circumstances which the minority shareholders of that company say we are part of the company, we are minor shareholders we know of no lawful cause why you should pay this amount, please tell us why you should pay this amount to our company. They don't tell you. You ask the majority shareholders you say please tell us we are part of the company, we don't know of any lawful cause

why Transnet should pay our company this amount, tell us why, they don't tell you.

Transnet doesn't take any action to recover the money, they don't come back to you to say no actually this is the reason, we don't know why the majority shareholders didn't tell you, there is a lawful cause, this is the cause. You go to the Hawks, you tell them exactly the same, you give them affidavits, you say we're talking about money that has been paid to our company, we're saying there was no reason for it to be paid it's taxpayers money, please take action, there must be
10 prosecution, investigate. The take the affidavits, there is one meeting a year and a half later you don't know what's happening, you have not been told of anything, there's been no arrest, you have not been told that no you are mistaken, we have actually interviewed the majority shareholders, they have told us the reason for the payment, there is a lawful cause, that hasn't happened. It's quite strange isn't it?

MR ROBERTO GONSALVES: Chair I think you've summarised it very, very well.

CHAIRPERSON: How does it take a year and a half to conclude that kind of investigation. Somebody from within says there is no reason for
20 this payment and says you can ask the majority shareholders, we have asked them, they haven't told us, we have gone to Transnet, we have asked them, they haven't told us what the reason is for them paying this amount, and a year and a half later you sit there, you don't know what's happening about this issue. It's really a matter of great concern.

I think Mr Mokoena the legal team should take steps to be in touch with the head of the Hawks, I want to know what's happening about this, and why should it take so long to – for the matter to be concluded and I think the legal team can itself alert the Chairman of Transnet of this evidence that we have had, and you will also take steps to bring this to his attention.

It's all taxpayers money, it's your monies, my monies, all our money, Transnet is a parastatal, it's a State owned entity, R647million, that's close to a billion Rand. You said you were done?

10 **ADV PHILLIP MOKOENA SC:** Chair indeed we are done, we will definitely pursue the issues that Chair highlighted and in due course we will be able to brief you with the outcome, we will also make sure that we liaise with Mr Gonsalves, so that he can also point us to the right directions of any other information or officials that he might have actually engaged with, with the Hawks.

CHAIRPERSON: Yes, I have not been told – I have not been told what happened, what has happened with regard to the communication that I said should be made to the Commission of Police with regard to the fact that Major General Booyesen gave evidence that it seemed that not
20 much was happening or had been happening with regard to any disciplinary action or I don't know whether also and prosecution, but certainly disciplinary action with regard to Colonel Madoe, I don't know whether communication has been sent to the Commissioner of Police and whether there is any response. Will the legal team look at that and update me.

ADV PHILLIP MOKOENA SC: Chair we will consolidate all those issues and we will ensure that we do brief you accordingly as to the status.

CHAIRPERSON: Yes but the older ones mustn't wait for the new ones, the older ones I need to year what the latest is sometime today if possible

ADV PHILLIP MOKOENA SC: That will be done Chair.

CHAIRPERSON: Okay once again thank you very much for coming forward to give evidence, if need be we will ask you to come back but
10 thank you for much and you are excused.

MR ROBERTO GONSALVES: Chair thank you very much, it's been an absolute pleasure, thank you.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Chair I see that we went past the tea adjournment, could we adjourn at this time?

CHAIRPERSON: Yes will the next witness be immediately available when we resume?

ADV PHILLIP MOKOENA SC: Yes Chair.

CHAIRPERSON: Okay, alright. We will take the tea adjournment now
20 and resume at twenty to twelve. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Ms Molefe.

ADV REFILOE MOLEFE: Thank you Chair.

CHAIRPERSON: Are you ready?

ADV REFILOE MOLEFE: I am Chair the next witness that we will be calling is Mr Sharla Chetty.

CHAIRPERSON: Yes.

ADV REFILOE MOLEFE: And before we start with Ms Chetty's evidence Chair there are just a few preliminary points that we wish to bring to the Chair's attention.

CHAIRPERSON: Ja.

ADV REFILOE MOLEFE: In relation to the evidence to be heard today. Ms Chetty's evidence relates to the recommendation of the award of the
10 network services agreement to Neotel and there has of course been prior evidence given before the Chair relating to this contract and which evidence will undoubtedly assist in truncating Ms Chetty's evidence as there is corroboration in this respect. However there has not been any direct evidence from the decision maker who gave the – who made the decision in respect of the recommendation of the award to Neotel. And so Chair that really is the pertinence of Ms Chetty's evidence as she will be speaking to those two main issues.

CHAIRPERSON: What are the two main issues she will be testifying on?

20 **ADV REFILOE MOLEFE:** Well the first – the first Chair will be her involvement as the decision maker in the award of the – in the recommendation of the award of the contract to Neotel. Secondly she will touch briefly on the circumstances surrounding the overturning of her decision and her view on same as those matters were covered in a document that she will be referring to.

CHAIRPERSON: Of course her involvement the first issue we do know she was involved, is it not? She made the decision?

ADV REFILOE MOLEFE: Yes Chair.

CHAIRPERSON: And that is the decision that was overturned by Mr Brian Molefe?

ADV REFILOE MOLEFE: Certainly Chair.

CHAIRPERSON: What more does she need to say about that?

ADV REFILOE MOLEFE: Insofar as her involvement she gives the basis upon which she reached the decision in approving the
10 recommendation of the award of the contract.

CHAIRPERSON: Hm.

ADV REFILOE MOLEFE: Because this was one of the basis upon which Mr Molefe sought to overturn the award of the Neotel contract.

CHAIRPERSON: Hm. Well we can look at that and maybe she should give evidence but one of the witnesses I think it may have been Mr Volmink.

ADV REFILOE MOLEFE: Yes Chair.

CHAIRPERSON: Testified to whether or not Mr Brian Molefe was entitled to revisit that decision and from what I heard it appeared to me
20 it was just a question of – seemed to be a question of law.

ADV REFILOE MOLEFE: Well indeed Chair.

CHAIRPERSON: Whether if – if the power is given to somebody who holds a certain position and at a certain time you are not there and somebody is acting in your position whether you can – when you come back you can come back after the person has exercised that power and

say no I will reverse that or not.

ADV REFILOE MOLEFE: Indeed so Chair. However Ms Chetty's evidence does relate what the Chair has referred to as possibly a point of legal argument.

CHAIRPERSON: Ja.

ADV REFILOE MOLEFE: Ms Chetty bridges the gap that currently exists in the evidence in respect of Neotel because there has been – there has not been given – been any direct evidence from the decision maker.

10 **CHAIRPERSON:** Hm.

ADV REFILOE MOLEFE: Who was involved in the approval of the award to Neotel.

CHAIRPERSON: Hm.

ADV REFILOE MOLEFE: And so it is just that gap that Ms Chetty's evidence would be bridging.

CHAIRPERSON: Hm we did have some document that gave the reasons did we not? That is obviously she can give us more meat but am I right to say there was a document which indicated ...

ADV REFILOE MOLEFE: There was certainly Chair how...

20 **CHAIRPERSON:** The basis of the decision.

ADV REFILOE MOLEFE: Yes.

CHAIRPERSON: There was in lieu of something.

ADV REFILOE MOLEFE: There was – there was a report Chair.

CHAIRPERSON: Ja.

ADV REFILOE MOLEFE: That was prepared in respect of the different

evaluations stages.

CHAIRPERSON: Yes.

ADV REFILOE MOLEFE: But of course as a decision maker Ms Chetty would have to apply her mind to – to that report.

CHAIRPERSON: Ja.

ADV REFILOE MOLEFE: Otherwise it would be rubber stamping.

CHAIRPERSON: Ja.

ADV REFILOE MOLEFE: So it is that basis upon which she approved the recommendation of the award that we will be looking at today.

10 **CHAIRPERSON**: Ja no that is fine. I think let her testify about the basis of her decision but I am not sure other than that whether there is really much else that she would be dealing with without repeating what other witnesses have said.

ADV REFILOE MOLEFE: Well certainly Chair the second aspect which she would have been dealing with in very minor detail.

CHAIRPERSON: Ja.

ADV REFILOE MOLEFE: Would be her opinion of the basis upon which Mr Molefe sought to overturn the decision and she does so because those were matters that were covered in the report that was presented
20 to her by the respective evaluation teams and she has formed the opinion that this has been covered in those reports that she considered when she made the decision to recommend the award to Neotel.

CHAIRPERSON: Hm. Okay let us go and let us see.

ADV REFILOE MOLEFE: As it pleases you Chair.

CHAIRPERSON: Okay.

ADV REFILOE MOLEFE: May I request the witness to sworn in?

CHAIRPERSON: Please administer the oath or affirmation?

REGISTRAR: Please state your full names for the record?

MS SHARLA CHETTY: Sharla Chetty.

REGISTRAR: Do you have any objections to making the prescribed affirmation?

MS SHARLA CHETTY: No I do not.

REGISTRAR: Do you solemnly declare that the evidence that you will give will be the truth; the whole truth, nothing but the truth, if so please
10 raise your right hand and say, I truly affirm?

MS SHARLA CHETTY: I truly affirm.

REGISTRAR: Thank you.

CHAIRPERSON: Thank you.

ADV REFILOE MOLEFE: Thank you Chair.

CHAIRPERSON: Yes. Hm.

ADV REFILOE MOLEFE: Ms Chetty please refer to the bundle that is before you. Chair we have marked this bundle as Exhibit BBC – BB6 rather pardon me Chair and it is – it is before you.

CHAIRPERSON: The lever arch file containing Ms Sharla Chetty's
20 statement will be marked as Exhibit BB6.

ADV REFILOE MOLEFE: Thank you Chair.

CHAIRPERSON: Thank yo.

ADV REFILOE MOLEFE: Ms Chetty please refer to page 1 to 7 of the statement? Is that your statement to the commission?

MS SHARLA CHETTY: Yes it is.

ADV REFILOE MOLEFE: And on page 7 of that bundle is that your signature appearing on that page?

MS SHARLA CHETTY: Yes it is.

ADV REFILOE MOLEFE: The date of the 12 April 2019 is that the date on which you signed the statement?

MS SHARLA CHETTY: Yes it is.

ADV REFILOE MOLEFE: Are there are corrections that you wish to make on the statement?

MS SHARLA CHETTY: I think it was just a spelling error on page 1 and
10 the reference to 17.1 the tier report should have actually been the memorandum.

ADV REFILOE MOLEFE: Okay let us start with the first one. We are on page 1 of the bundle. We are at page 1 which paragraph?

MS SHARLA CHETTY: Paragraph 2.

ADV REFILOE MOLEFE: And what is the correction?

MS SHARLA CHETTY: It is a chartered accountant it says chartered account.

ADV REFILOE MOLEFE: And what is the second correction that you wish to ...

20 **MS SHARLA CHETTY:** That is on page 6 paragraph 17.1 should be based on paragraph 11 of the memorandum that was submitted with the tier report.

ADV REFILOE MOLEFE: Thank you. Chair we will prepare a supplementary in this respect. Do you now confirm the correctness of your statement?

MS SHARLA CHETTY: Yes I do.

ADV REFILOE MOLEFE: Ms Chetty what qualifications do you hold?

MS SHARLA CHETTY: I am a chartered accountant.

ADV REFILOE MOLEFE: And when did you qualify as a chartered accountant?

MS SHARLA CHETTY: In 2000.

ADV REFILOE MOLEFE: What do you currently do for a living?

MS SHARLA CHETTY: I am currently employed in Transnet Port Terminals as the Chief Information Officer.

10 **ADV REFILOE MOLEFE:** And for how long have you been a Chief Information Officer>

MS SHARLA CHETTY: For one year and four months.

ADV REFILOE MOLEFE: When did you join Transnet?

MS SHARLA CHETTY: In 2003.

ADV REFILOE MOLEFE: And what other positions have you held in Transnet?

MS SHARLA CHETTY: I have held various positions but the senior executive positions that I have held Chief Executive of Transnet Pipelines, Chief Financial Officer of Transnet Pipelines and Chief
20 Financial Officer of Transnet Port Terminals.

ADV REFILOE MOLEFE: And these various roles that you have played in Transnet what portfolios if any have you managed?

MS SHARLA CHETTY: I have managed the finance portfolio. I have managed the IT portfolio and the Procurement portfolio.

ADV REFILOE MOLEFE: And what would you say your experience in

relation to high value tenders is having been with Transnet for – since the year 2003 as you have stated?

MS SHARLA CHETTY: So I have a substantial amount of experience with high value tenders and I have been in directly involved in finalising quite a few of the high value tenders in my career at Transnet.

ADV REFILOE MOLEFE: Yes now from paragraph 5 of your statement on page 2 of the bundle you deal with the circumstances relative to the involvement – to your involvement in the Neotel matter, is that correct?

MS SHARLA CHETTY: That is right.

10 **ADV REFILOE MOLEFE:** And this is premised on your acting capacity as the group of – the Group Chief Executive of Transnet?

MS SHARLA CHETTY: That is right.

ADV REFILOE MOLEFE: And can you take the Chair through this acting appointment insofar as the delegations that you have referred to in that paragraph?

MS SHARLA CHETTY: So I was acting in the period of – from the – sorry from the 28 October to the 1 November 2013 and that delegation gave me full authority to act as the Group Chief Executive of Transnet.

20 **ADV REFILOE MOLEFE:** So if I understand it correctly and you have attached the delegation of authority as an Annexure 1 to your statement you had all the powers of authority that were vested in Mr Brian Molefe, is that correft?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: Now you then speak in paragraph 6 of a memorandum that you received for the approval of the procurement

process which has now become common knowledge and in that paragraph you speak of approval being sought from you. Can you take the Chair through this aspect?

MS SHARLA CHETTY: So I received documents via an email to approve the award of the tender for the network services – services to Neotel and I was given the tier report together with the internal audit reports and the letters of regret and the letter for award to Neotel to sign.

ADV REFILOE MOLEFE: Yes can we turn to page 11 of the bundle
10 please? Is that the memorandum you have referred to?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: And do you confirm that it is directed to you as the acting Group Chief Executive?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: And it is dated the 30 October 2013?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: The memorandum also states to be from Mohammed Mahomedy who is cited as the acting Group Chief Financial Officer, Mantsika Matoane who is cited as the Chief Information
20 Officer, Garry Pita who is cited as the Group Chief Supply Chain Officer, is that correct?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: If you go to the page of that memorandum which is page 17 of the bundle. Several signatories appear at the bottom of that page 17 just after the topic compiled by. Are these the

persons who comprised the CFET?

MS SHARLA CHETTY: These were the heads of the subject matter [indistinct] to the various departments. So they were part of the team but not the entire team

ADV REFILOE MOLEFE: Yes and these persons who are cited as signatories can you just for the record state the positions that they have held – that they held at that point?

MS SHARLA CHETTY: So Mandla Dube was the Group Strategic Sourcing which is the part of the procurement team. Fanie Van Der
10 Walt was also Group Strategic Sourcing which is part of the procurement team and Gerrie Van Der Westhuizen was the Executive Manager in the office of the CIO. Peter Volmink Executive Manager Governance and Compliance. Yusuf Lunat was the Executive Manager for the ICT or the EMIS Service Delivery Function. And then Garry Pita the Group Chief Supply Chain Officer, Mantsika Matooane the Chief Commission Officer and then Mohammed Mahomed the acting Group Chief Financial Officer.

ADV REFILOE MOLEFE: Yes and all these signatories as appears on that page recommended the recommendation made in that specific
20 memorandum?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: Now let us please turn to page 19 of the bundle. And that is Annexure 3 which starts on the preceding page, page 18. Are you there Ms Chetty?

MS SHARLA CHETTY: Yes I am.

ADV REFILOE MOLEFE: At the very bottom of page 19 appears to be an email. From whom was this email received?

MS SHARLA CHETTY: The email was received from Gerrie Van Der Westhuizen.

ADV REFILOE MOLEFE: And what is the content of that email about?

MS SHARLA CHETTY: The email covered the tender that Mr Pita had called me about. He called me prior to me receiving the tender documents. He – the documents that were emailed to me was the covering memorandum, the Tier Report, the three internal audit reports
10 and the supporting documents which was the affidavit from T-Systems to mitigate the risk, the email from National Treasury to mitigate the risk. The board resolution with the delegated authority to the GCE to extend the current contract to Neotel. Extension letters to Neotel. Letter of intent to Neotel and the three – sorry the four regret letters to the unsuccessful bidders.

ADV REFILOE MOLEFE: Yes. From paragraph 9 of your statement on page 3 of the bundle you then begin to set out the circumstances and the basis upon which you considered the submissions that were made to you as the acting Chief Group Chief Executive pardon me. Can you
20 please take the Chair through this?

MS SHARLA CHETTY: So in arriving at my decision I had a telecom with Mr Pita. Mr Pita then took me through the documents that had been emailed to me. So we had gone through the Tier Report which is the very important Evaluation Report that takes you to the various stages of the tender process and whether there was compliance or not

to the processes. We then went through to the internal audit reports. I even noticed the issue around the risks that were highlighted around the conflict of interest with T-Systems and the other company that was involved in developing the strategy for networking. And thereafter we would have gone through the – the recommendation with the relevant – with the other relevant documents that were associated with the – with the Tier Report.

ADV REFILOE MOLEFE: Yes. Can you then turn to page 23 of the bundle and that would be Annexure 4 to your statement.

10 **MS SHARLA CHETTY:** Okay.

ADV REFILOE MOLEFE: Is that the Tier Report to which you refer?

MS SHARLA CHETTY: Yes that is the Tender Evaluation and Recommendation Report.

ADV REFILOE MOLEFE: Now in paragraph 11 and particularly 11.1 and 11.12 of your statement you speak of this process that you engaged in considering the Tier Report?

MS SHARLA CHETTY: Yes.

20 **ADV REFILOE MOLEFE:** Now in relation to the rounding of scores as you have referred to we have heard the evidence for Mr Volmink in this respect and we need not repeat that evidence as it has been ventilated in detail. In respect of your reliance on the Gateway Reports you refer to page 19 of the Tier Report. And this appears at paragraph 11.2 of your statement. Page 19 of the report is at our paginated bundle page 41.

MS SHARLA CHETTY: Yes Advocate.

ADV REFILOE MOLEFE: Can you please explain the basis of your reliance upon the Gateway Report – Gateway Review Report aspect that – pardon me – that the Tier Report sets out.

MS SHARLA CHETTY: So the Gateway Reports are – Gateway Review Reports are very important reports that give you confidence or give you some sort of a comfort that each stage of the tender process was complied with. So the reports were agreeing except for one aspect that addressed the rounding of issue and the conflict of interest with T-Systems. And it indicated that the risks were mitigated around those.

10 **ADV REFILOE MOLEFE:** Yes and who compiles the Gateway Review Reports?

MS SHARLA CHETTY: Those are compiled by the internal auditors.

ADV REFILOE MOLEFE: Of Transnet?

MS SHARLA CHETTY: Yes.

ADV REFILOE MOLEFE: Staying on the Tier...

CHAIRPERSON: By the way is – is it in respect of this tender that there is a high court judgment or is that a different tender? Tender – high court judgment relating to T-Systems.

ADV REFILOE MOLEFE: Here it is – it is a different – it is a different
20 one Chair. It is a different transaction.

CHAIRPERSON: Are you sure?

ADV REFILOE MOLEFE: As far as I recall. I will double check but I...

CHAIRPERSON: Because if that is the one really in terms of processes and all of that has that not been disposed of? I think it – I think the one where there is a high court judgment I think it involves Neotel and

or is it Gijima? Was T-Systems – was T-Systems granted a tender where Gijima was also a bidder and subsequently Transnet brought a review application that was not opposed and a high court judgment set aside the tender to T-Systems and awarded the tender to Gijima.

ADV REFILOE MOLEFE: Yes Chair that is correct.

CHAIRPERSON: Is that – that is a different tender?

ADV REFILOE MOLEFE: It is separate different matter Chair.

CHAIRPERSON: Okay alright.

ADV REFILOE MOLEFE: Thank you.

10 **CHAIRPERSON**: But really what I am very interested in in terms of this witness is why she chose the one and not the other you know. That is what I am very interested in.

ADV REFILOE MOLEFE: Yes Chair that matter is addressed in the statement.

CHAIRPERSON: Ja. Why she chose to – to award the tender the way she did and – and why she may think that it was wrong for Mr Brian Molefe to change that when she has regard to his reasons.

ADV REFILOE MOLEFE: Certainly Chair that is covered in the statement.

20 **CHAIRPERSON**: Ja. So if there is anything that you think I am missing you can bring it to my attention but for all intents and purposes I think that is really the important part.

ADV REFILOE MOLEFE: Certainly Chair.

CHAIRPERSON: Of course if she has still anything to say about the question of authority that does not fall within the legal issue then she

can deal with it.

ADV REFILOE MOLEFE: Indeed so Chair and Mr Chetty will be dealing with those matters. The Chair's microphone is off.

CHAIRPERSON: It is fine today because it looks like we are not – we will not have another witness but there are times when we will be needing to go to another witness and we need use our times fruitfully. A lot of things that really will not be disputed it is unlike in a court of law where one might really have to deal with a lot of things because it is the court of law. So – but that is where my interest is as far as this
10 witness is concerned. If you think there is something else that I am missing you must tell me and then we can look at it.

ADV REFILOE MOLEFE: Certainly Chair and we have been mindful of that aspect.

CHAIRPERSON: Ja. Okay.

ADV REFILOE MOLEFE: Ms Chetty can you please turn to page 28 of the bundle. Still on the Tier Report.

CHAIRPERSON: Did you say 28?

ADV REFILOE MOLEFE: 28 Chair.

CHAIRPERSON: Okay.

20 **ADV REFILOE MOLEFE**: Are you there?

MS SHARLA CHETTY: Yes I am.

ADV REFILOE MOLEFE: Now on page 28 to 30 of that bundle – of those pages in the Tier Report there appears several names of persons who were involved in the different four stages of evaluation, is this correct?

MS SHARLA CHETTY: Yes that is correct.

ADV REFILOE MOLEFE: And on my count did a number of over 40 people who were involved in this process?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: And this also includes the internal audit team that was involved in this process?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: And these would be the number of person involved in recommending the award to Neotel?

10 **MS SHARLA CHETTY:** That is correct.

ADV REFILOE MOLEFE: Now in your next topic in your statement you deal with the overriding of your decision by Mr Molefe and you touch on several issues that Mr Molefe raised in his memorandum which you stated to have been addressed in the reports that were provided to you, do I have that correct?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: In paragraph 12 of your statement on page 5 you address yourself to Mr Molefe's memorandum.

MS SHARLA CHETTY: Yes.

20 **ADV REFILOE MOLEFE:** Can you please take the Chair through that?

MS SHARLA CHETTY: So Chairperson I was made aware of the overturning of the decision when I was presented with the evidence by the investigators so I was not involved or consulted in any way by Mr Molefe in the overturning of the decision. I want to bring to the attention of the Chairperson the fact that Mr Molefe when he had

written the memorandum had asked for his decision to be noted. So he did not ask for a revised recommendation or a review of what his risks were but he basically had made a decision based on his own – I think on his own opinions of what he had thought the risks were at that time and awarded it to a bidder even if the price was considered that bidder would still have not been the number 1 bidder.

ADV REFILOE MOLEFE: And...

CHAIRPERSON: That is T-Systems?

MS SHARLA CHETTY: Yes.

10 **CHAIRPERSON**: What number would they have been?

MS SHARLA CHETTY: They would still have been number 3 on the list.

CHAIRPERSON: Oh who would have been number 2?

MS SHARLA CHETTY: Dimension Data.

CHAIRPERSON: Yes.

MS SHARLA CHETTY: Yes.

CHAIRPERSON: And in his reasons did he deal with why he went for number 3 and not number 2?

MS SHARLA CHETTY: No he did not. He basically all he highlighted was all the risks around the current service provider which is Neotel

20 **CHAIRPERSON**: Hm.

MS SHARLA CHETTY: But those risks were already well dealt with in the Tier Report and in the memorandum.

CHAIRPERSON: Yes.

MS SHARLA CHETTY: And also the – I just want to stipulate the concentration risk that he refers to if you granted the award to T-

Systems which already have the IT data services contract.

CHAIRPERSON: Hm.

MS SHARLA CHETTY: It would have really increased Transnet's concentration risk.

CHAIRPERSON: Hm okay.

ADV REFILOE MOLEFE: Yes can we then turn to page 88 of the bundle which is Mr Molefe's memorandum to Mr Anoj Singh, Mr Mantsika Matoane and Mr Garry Pita.

CHAIRPERSON: On what page is it?

10 **ADV REFILOE MOLEFE**: Page 88. And that is Annexure 16.

MS SHARLA CHETTY: Thank you.

ADV REFILOE MOLEFE: Now on page 88 of the bundle in the purpose of submission stated by Mr Molefe and perhaps before we even go into the memorandum let us go to page 94 which is the last page of that memorandum. And to place it on record that this memorandum was drafted by Mr Brian Molefe, do you see that?

MS SHARLA CHETTY: Yes.

ADV REFILOE MOLEFE: And it was signed by him on the 20 November 2013?

20 **MS SHARLA CHETTY**: That is correct.

ADV REFILOE MOLEFE: Please speak into the microphone Ma'am?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: Thank you. And in his purpose of this submission he sets out that he seeks to inform the Group Chief Financial Officer, Group Chief Information Officer and the Group Chief

Supply Chain Officer of and I quote:

“My decisions to award the abovementioned business to T-Systems South Africa in terms of your request in your memorandum dated 31 October 2013.”

And going further down to paragraph 2 of his memorandum he sets out as his background he says there and I quote:

10 “Your previous correspondence addressed to me dated 30 October 2013 with subject RFP number GSM4/13/04/0722 for provision of network services request for approval to approve the process award contract and issue a letter of intent inviting Neotel to further negotiations as the preferred bidder of this RFP.”

And he states that to be attached as Annexure A and as well attaches the Tier Report. Now in the first opening line Mr Molefe is speaking of a memorandum addressed to and I quote “Me” dated October 2013. Do you have any comment to that?

20 **MS SHARLA CHETTY:** Yes I do. The memorandum was actually addressed to myself in my capacity as Acting GCE at the time. It was not addressed to Mr Brian Molefe.

ADV REFILOE MOLEFE: Yes and that we have seen as you have attached as Annexure 2 to your bundle. Now if we revert back to your statement at paragraph 13 on page 5 of the bundle you speak of the memorandum reflecting a decision to award the network services master, service tender to T-Systems and effectively overturning your

decision and you make reference to paragraph 26 and 27 of Mr Molefe's statement. Can you please take the Chair through that - paragraph 13 on page 5 of the bundle?

MS SHARLA CHETTY: So as I did discuss earlier the decision that he made was on his own without consulting with any of the people – part of the Cross Functioning Evaluation Team or the Recommending Officers. He had made the decision based on his assessment of the risk and his assessment of the pricing which was outside – procedurally outside the normal procurement process.

10 **CHAIRPERSON:** I thought your statement does say that he appears to have met with the recommending of SARS but your concern was that what they had to say to him was not reduced to writing?

MS SHARLA CHETTY: Yes. So there was – there was no indication of any discussions that were held to the two parties for or the various parties in order to arrive at a decision.

CHAIRPERSON: Yes but the – to complain that what they discussed was not reduced to writing is one thing. To complain that he did not consult them is another thing. He may have consulted them and had their views but their views were not reduced to writing.

20 **MS SHARLA CHETTY:** That is correct Chairperson.

CHAIRPERSON: So which is which?

MS SHARLA CHETTY: So it is basically he had not – he had not reduced his discussions with them to the writing.

CHAIRPERSON: Hm. So is your - is your position therefore that he may have consulted but he did not comply with whatever procedure

because the procedure requires that their views that they expressed to him when he consulted them be reduced to writing?

MS SHARLA CHETTY: Yes Chairperson. Those – that view is based on the fact that per the PPM if there is a decision to overturn or overrule a decision made by the Recommending Officers that the reasons for that – it is like a dispute being lodged - has to be referred back to the Cross Function Sourcing Team or the Evaluation Team to then to review those reasons and then come back with a recommendation. It is not common practice that one would overturn a
10 decision, not have the recommendations in front of your remotivation as to why that decision was actually – whether you really consulted with all the Recommending Officers in making that decision.

CHAIRPERSON: Well you need to make a distinction – I say that so that you can clarify the position to me maybe much more than you may have tried to do. There is a difference between somebody who must make a decision being given recommendations by another Body or another person and making his or her decision after having regard to the recommendation and that person may accept – may make his or her decision in accordance with the recommendation or against the
20 recommendation. That is one scenario. The scenario that we are dealing with is a situation where you had made the decision, okay. Is that right?

MS SHARLA CHETTY: That is correct Chairperson.

CHAIRPERSON: You had made the decision. When you made the decision there was a recommendation or there were recommendations

in front of you. Is that right?

MS SHARLA CHETTY: That is correct Chairperson.

CHAIRPERSON: So – so what you are talking about does it apply to the situation we are dealing with the provision that you say says the person must go back to the recommending officials? Does it apply when a decision has already been taken by the person who holds the power to make the decision?

MS SHARLA CHETTY: Hm.

CHAIRPERSON: What is your understanding of the – of what the
10 procedures are at Transnet?

MS SHARLA CHETTY: So my understanding of the proceedings
Chairperson is that once a decision has been made generally that
decision is not overturned unless there is something materially that you
really have not considered and that obviously would have to go back to
the Recommending Officers that made the decision but in my – in – in
this particular case the decision had been made by myself and about 20
days later that decision been overturned but overturned without any
resubmission to that office. So you – you – if there is something
material that happened in that 20 day period that you could say was
20 never something that was even considered during the bidding process.
That was a new material risk that has arisen you are allowed to look at
whether that award would continue or not.

CHAIRPERSON: So – so your – your evidence is that there was
nothing wrong with Mr Brian Molefe overturning your decision as long
as he followed the procedure that you understand to be applicable?

You say he was allowed in certain circumstances to overturn - he would have been allowed in certain circumstances to overturn your decision. Is that what you are saying?

MS SHARLA CHETTY: So Chairperson what I am saying is that if there is a material risk - in any award that we do currently – if there is a material risk that has arisen after the award has been made that could jeopardise the organisation that award has to be relooked at so that you could mitigate – see whether that risk can be mitigated or not. If it cannot be mitigated then obviously you will have to go back to that
10 Evaluation Team and look at maybe the other bidders.

CHAIRPERSON: Yes. No but let us not talk in general. I am talking about Mr Brian Molefe and I am talking about the ...

MS SHARLA CHETTY: So – so ...

CHAIRPERSON: (Intervenues) came before you and you made a decision.

MS SHARLA CHETTY: So Chairperson in this particular case Mr Molefe the risk that ...

CHAIRPERSON: Did he have the power have to change your decision?

MS SHARLA CHETTY: Hm.

20 **CHAIRPERSON:** Whether he was not justified in changing. That is a different question. Did he have the power generally speaking to change the decision if a certain situation existed?

MS SHARLA CHETTY: I believe he would have the power Chairperson.

CHAIRPERSON: He would have the power?

MS SHARLA CHETTY: Yes.

CHAIRPERSON: That is your understanding?

MS SHARLA CHETTY: Yes.

CHAIRPERSON: But do you know under what circumstances he could exercise that power?

MS SHARLA CHETTY: Chairperson generally that will only be done in cases where there is a material risk to the organisation ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: That has not been evaluated or even considered that arose – a brand new risk that arose directly ...

10 **CHAIRPERSON:** Afterwards.

MS SHARLA CHETTY: After we made the award and if you look at Mr Molefe's memorandum all the risks that he highlighted had already been covered and mitigated substantially in the Tier Report.

CHAIRPERSON: Huh-uh.

MS SHARLA CHETTY: So the risk that he had – had and the reasons he had given for overturning were not justified in my opinion Chairperson.

CHAIRPERSON: Hm. Do you know whether in a situation where somebody has the power to make a decision on a tender and has made
20 the decision whether the same person – whether the power to change that decision resides with the same person or with the same – with the person occupying the same position or whether it can only be changed by a higher authority within the organisation? So if – in other words the – the procedure that you have told me about if – let us say it was Mr Brian Molefe who had made the original decision in this case not

you would he have been entitled to say no I want it back. I want to change my decision under circumstances or would he have needed to report to somebody higher like the Board or a certain Committee of the Board and say no I made this decision on such and such a day in regard to this tender. It has since been brought to my attention that the following has happened or is the position something maybe I did not know at the time. Could you please change it that is now in the Board somebody higher or would he be free to change it himself?

MS SHARLA CHETTY: So – so Chairperson because the authority was
10 delegated to him by the Board and he wants to change a decision that he made based on the authority granted to him by the Board ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: Ideally he will have to go back to the Board if he wanted to revert that decision.

CHAIRPERSON: Hm.

MS SHARLA CHETTY: Because that delegation of power was granted to him by the Board and was concurred by the – the Board Acquisitions and Disposals Council.

CHAIRPERSON: Well – well your – I understand your answer but the
20 reason you give I am not sure that it supports it because if the Board has delegated the – the power to him it may have been intended that he should exercise the power.

MS SHARLA CHETTY: *Ja*, we have had – because - Chair because this is an unusual circumstance where you actually overturning a decision that you have made based on the power that you were delegated ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: I would think that because it is such a high value tender you may have to go back to the Board ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: Maybe from a reporting perspective ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: To say – you know – I need to retract this decision and leave out the material risk why I need to retract that decision but it is not – it is not governed in any document or in our
10 PPM – our Procurement Procedure Manual – or any of the documents that I am aware of that one has to ...

CHAIRPERSON: Hm.

ADV REFILOE MOLEFE: But I think one has to apply their mind from a sound governance perspective.

CHAIRPERSON: Hm but your evidence is that in terms of Transnet procedures and rules and so on he was entitled to change the decision in certain circumstances ...

MS SHARLA CHETTY: Yes.

CHAIRPERSON: And you say if something arose after the decision had
20 been – you – had been made?

MS SHARLA CHETTY: That is correct Chairperson.

CHAIRPERSON: And that put the organisation at risk and so on?

MS SHARLA CHETTY: That is correct Chairperson.

CHAIRPERSON: Okay.

ADV REFILOE MOLEFE: Thank you Chair. Ms Chetty can I please

refer you to page 12 of your bundle and that is the memorandum that was submitted to you for the approval of the recommendation to appoint Neotel. At paragraph 6 of that memorandum that is the delegation that you have just spoken of in terms of which power or rather subject to the approval of BADC the power to – the authority to approve the sourcing strategy RFP, advert and award was delegated to the Group Chief Executive Officer. Is that correct?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: And at the last line on that paragraph the
10 BADC resolution had delegated this authority to the Group Chief Executive. Is that correct?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: Can we then turn to page 262 of the bundle and that would be the Procurement Procedure Manual? We will just be referring briefly to one aspect in that manual. Are you there?

MS SHARLA CHETTY: Yes I am.

ADV REFILOE MOLEFE: At paragraph 20.5 the heading there is “Disagreement Regarding Award of Business”. Is that correct?

MS SHARLA CHETTY: That is correct.

20 **ADV REFILOE MOLEFE:** Now at 20.5.1 it states there that:

“Should a dispute arise between the Recommending Officers and the AC - being the Acquisition Council - regarding a submission after the AC has referred the matter back to the Recommending Officer for remotivation the matter must be escalated to the

entity CEO for a final decision.”

Is that correct?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: And it also talks about – it goes further to talk about the recommendation of the Evaluation Team:

“If that is in conflict with the opinion of the end user the matter must be referred back to the AC for a ruling.”

Is that correct?

10 **MS SHARLA CHETTY**: That is correct.

ADV REFILOE MOLEFE: Now if we refer to Mr Molefe’s memorandum can we please go to – to page 92 at page – at paragraph 7 rather of his – so that would be Annexure 16 in the bundle and we will be referring to page 92 at paragraph 7. Are you there?

MS SHARLA CHETTY: Yes I am.

ADV REFILOE MOLEFE: Mr Molefe states there that:

“I have the following specific concerns with your recommendation ...”

20 **CHAIRPERSON**: I am sorry. Did you say we must go to page 16 of the bundle?

ADV REFILOE MOLEFE: No, no Chair Annexure 16.

CHAIRPERSON: Annexure 15?

ADV REFILOE MOLEFE: 16 – 1-6.

CHAIRPERSON: 1-6, okay.

ADV REFILOE MOLEFE: And we are at page 92 Chair.

CHAIRPERSON: Okay, yes.

ADV REFILOE MOLEFE: We will start with paragraph 6 of Mr Molefe's memorandum where he states there:

“I have given consideration to your recommendation as per your previous correspondence mentioned earlier.”

Now if we were to turn back to the first page of that memorandum at paragraph 2 and we have already covered this issue. Mr Molefe refers to the memorandum as having been addressed to him. Is that correct?

10 **MS SHARLA CHETTY:** That is correct.

ADV REFILOE MOLEFE: And if we were to – we refer to your Annexure 2 it is clear that the memorandum is – is directed to you as the Acting Group Chief Executive. Is that correct?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: Now when we consider the procedure – the Procurement Procedure Manual together with the delegation to the Group Chief Executive the result would be that in the result of a dispute the matter would be referred by Mr Molefe back to himself. Is that not the case?

20 **MS SHARLA CHETTY:** Yes it is. That is the case because powers have been delegated to him by the AC and he is also the CE. So matters are being referred back to him.

ADV REFILOE MOLEFE: Yes and that would be logical insofar as good governance is concerned?

MS SHARLA CHETTY: I would say that is illogical.

ADV REFILOE MOLEFE: Yes.

MS SHARLA CHETTY: In terms of governance.

ADV REFILOE MOLEFE: Now going back to paragraph 6 of Mr Molefe's memorandum ...

CHAIRPERSON: I am sorry. What is illogical? Let me understand that.

MS SHARLA CHETTY: So Chairperson the – this particular paragraph in terms of Section 25 of the Procurement Procedure Manual it says that if you have a dispute between the Recommending officer and the
10 AC that matter must be referred back by the AC and then the final decision gets made by the CE.

CHAIRPERSON: Hm.

MS SHARLA CHETTY: Now in this case all powers from the AC have been delegated to Mr Molefe or the GCE.

CHAIRPERSON: Hm.

MS SHARLA CHETTY: So he basically will be the final decision maker because it is illogical that there is no AC involved here now anymore because powers have been delegated to Mr Molefe. So if he is disputing it he refers it back to the Recommending Officers and then he
20 still makes a final decision. There is no intermediate party like the AC involved here.

CHAIRPERSON: Hm.

MS SHARLA CHETTY: Which of a high value tender is – it is kind of illogical.

CHAIRPERSON: But assuming that he is in power to deal with it if he

did differently would he not be acting outside of the procedures? Was there any other way prescribed in which he could deal with it other than dealing with it in that way if he was to comply with the procedures?

MS SHARLA CHETTY: So ...

CHAIRPERSON: In other words was it his mistake or was it the mistake of the procedures because if that is what the procedure required then it is not his mistake. It is the mistake of those who drafted the manual.

MS SHARLA CHETTY: Chair I would say it is a mistake of maybe – it
10 is my opinion – the AC of granting him full authority.

CHAIRPERSON: Sorry.

MS SHARLA CHETTY: Chair I would say it is in my opinion maybe a mistake of the AC for granting him full delegation ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: Where there is no intermediate party involved when there are disputes ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: Because he is a sole decision maker in this – in this aspect and basically there is no intermediate body that can
20 evaluate whether the recommending – recommendation from the Recommending Officers should be disputed or not disputed.

CHAIRPERSON: Hm. So – but – so on the – on – on – as far as you know on the procedures that were applicable once the delegation was given to him it had to be dealt with in that way?

MS SHARLA CHETTY: Yes. He complied based on what was

delegated to him Chairperson.

CHAIRPERSON: Hm – but that procedure is it applicable before the authority that has power to make the decision has made the decision before he or she makes the decision or does it apply after the authority or person who has the authority has decided? I – I have a sense that what maybe contemplated but I have not checked. What may be contemplated is that if the power to decide on a tender vests in you and you have got recommendations from other people who are making a recommendation that you should award the tender to A and you take a
10 different view you think the award should be – the tender should be awarded to B. You should go back to them before you make the decision so that you ask them what about this what about that. You tell them your concerns and you hear what they have to say. Maybe they will say oh we overlooked that. You are right or they will say we actually did consider that but not – that notwithstanding we came to this conclusion because of A, B, C, D but then you must still make – make your decision whether having interacted with them like that you stick to your view that the tender should be awarded to B or you agree with them that it should be awarded to A. I have a sense or a suspicion
20 that maybe that is what it is talking about but I have not checked. Do you know whether it applies to that situation or it applies to the situation were a decision has been taken?

MS SHARLA CHETTY: So this is before a decision has been taken. So this particular paragraph of the Procurement Procedure Manual refers to before you make your decision ...

CHAIRPERSON: Yes.

MS SHARLA CHETTY: And you have got – still got a recommendation at hand.

CHAIRPERSON: Yes.

MS SHARLA CHETTY: That if you are not happy with the recommendation you do not believe it is covered all the points you can send it back to the Recommending Officers for them to come and remotivate based on new things that you have highlighted to them.

CHAIRPERSON: Hm.

10 **MS SHARLA CHETTY:** In this case there is no resubmission or anything but the award was already made on 31 October by myself Chairperson.

CHAIRPERSON: Hm.

MS SHARLA CHETTY: That is after the fact and he does not indicate any new material risk that could have resulted in overturning of the decision. So ...

CHAIRPERSON: Hm.

MS SHARLA CHETTY: He supplied the paragraph 20.5 but why – why I said it was illogical goes to the fact that – you know – he made the
20 decision on his own but it is also after the award was made. So it is ...

CHAIRPERSON: Well ...

MS SHARLA CHETTY: It is not exactly what the – the paragraph was aimed to do. It was aimed to finalise your decision before – you know – arriving at ...

CHAIRPERSON: Yes.

MS SHARLA CHETTY: Before you arrive at that decision.

CHAIRPERSON: If – if you are correct in that then I would understand that. I would understand that but I would not see it as illogical because all it would mean is that it recognises that there are people who have dealt with the matter before it comes before you. They have considered it. They have made recommendations and I assume they would give reasons for their motivation. It simply says if you are not persuaded to go this - to take their – to accept their recommendation just go back to them, put your concerns to them, hear what they have to say, then make a decision.

10

MS SHARLA CHETTY: That is right.

CHAIRPERSON: And when you make the decision you can go with their recommendation or go against it but you have had the – you have – you have followed a process where you give them a chance to address your concerns. You have heard what they have to say and you make a decision on an informed basis. So that would not be logical to - illogical to me.

MS SHARLA CHETTY: Yes. Chairperson the part with illogical was the EC granting full delegation and not having any element by the PPM where you could resort to where a Body can review and -and check that – you know – the recommendation from the Officers. You have taken into account all the motivations, all the reasons. So I think that is the part where I refer to as illogical in my opinion Chairperson.

20

CHAIRPERSON: Okay, alright thank you. Ms Molefe.

ADV REFILOE MOLEFE: Thank you Chair. Can we go back to page 92

if you had moved from there – 92 of the bundle? Are you there?

MS SHARLA CHETTY: Yes.

ADV REFILOE MOLEFE: At paragraph 7 of that memorandum Mr Molefe lists the several concerns that he had with the recommendation that you had approved – well in his paragraph 7 he states there:

10 “I have the following specific concerns with your recommendation and responses to me including the responses to me in the various meetings held with the Recommending Officers for remotivation.”

Which is discussed further in this document and those five issues are the issues which you address as having been addressed in the respective evaluation reports and as well as by the internal audit component of Transnet. Is that correct?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: Can you please take the Chair through those five grounds and your reasons for stating that they were not valid reasons provided by Mr Molefe?

20 **MS SHARLA CHETTY:** So Chairperson the counterparty risk and (indistinct) of state assets that risk was covered quite substantially in the memorandum and in the Tier Report. Where it spoke of the – the – if the Competition Commission approved the – the sale to Vodacom that Neotel will still continue with their services. So that could have been dealt with contractually between Vodacom and Transnet should that risk have materialised. The concentration risk as Transnet is Neotel’s

largest client I think Chairperson I did state earlier that T-Systems also is an IT data services provider to Transnet at the time and by awarding the contract to them you also would have increased your concentration risk. The BBBE partners – Chairperson as part of your evaluation criteria your BEE accreditation is taken into consideration in your evaluation points. So that was already considered. The information security incident that resulted – Chairperson those risks were covered in detail in the Tier Report and in the memorandum where it was indicated how those risks were being mitigated both by T-Systems and
10 by Neotel and how they have increased the – the security for Transnet again which could have been dealt with contractually. The CCTV Network issues – Chairperson those are isolated incidence that were brought up that could have been dealt with as part of contract management with Neotel at that time. So they were not new risks that Mr Molefe had – had addressed but basically highlighted risks that had already been covered for and been mitigated in both the Tier Report and in the memorandum.

ADV REFILOE MOLEFE: Can we then turn to page 93 of that same memorandum? Are you there?

20 **MS SHARLA CHETTY:** Yes.

ADV REFILOE MOLEFE: At paragraph 21 Mr Molefe makes reference to strict timelines having been set by Transnet. He says there:

“Post the close of the final offers been submitted T-Systems indicated that they unfortunately due to the strict timelines set by Transnet only managed to

get confirmation from their shareholder on certain pricing elements and that they would be in a position to reduce the price submitted the week before by a further 248 million.”

As we have heard and as is now common knowledge T-Systems bid was unsuccessful due to pricing amongst many of the other matters that you have spoken to?

MS SHARLA CHETTY: Yes.

ADV REFILOE MOLEFE: Can I then refer you to page 36 of the Tier
10 Report - paginated page 36 rather?

MS SHARLA CHETTY: I am there.

ADV REFILOE MOLEFE: In paragraph 18 of your statement you deal with this pricing element relative to – to the Tier Report?

MS SHARLA CHETTY: Yes that is correct.

ADV REFILOE MOLEFE: As well as the possible price reductions that are spoke of by Mr Molefe in his memorandum?

MS SHARLA CHETTY: That is correct.

ADV REFILOE MOLEFE: Can you please take the Chair through – through your opinion in that respect?

20 **CHAIRPERSON:** Before she does that are you able to say anything about Mr Brian Molefe’s decision to overturn your decision other than that he took a different view on certain matters to the view that you took? Is there anything more you can say about this other than I took this view he took that view? I disagree with him.

MS SHARLA CHETTY: Mr Chairperson if I look at how he took his view

I would say that it is - it is not in compliance with governance because he evaluated his risk. His pricing that he considered Chairperson you cannot consider pricing – revised pricing after your Best And Final Offers have been submitted. So he made decisions (intervenes).

CHAIRPERSON: I am sorry. Just go back a bit. Just start again. I think I missed something. Just start again your answer.

MS SHARLA CHETTY: So Mr Chairperson he – the manner in which he overturned the decision I would say was – was procedurally not correct. By – by that I mean is that he had – said he had consulted with various
10 people and these were the risks that he had highlighted but those risks were already mitigated. Then he further goes on to state that the price of - of T-Systems need to be reconsidered and their Best And Final Offer would be taken into account the 240 million that he refers to. Chairperson those are considered as not been fair and transparent in the bidding process because you cannot consider pricing once a bid has been – your Best And Final Offer has been submitted. You cannot say I need to entertain the bid of – the pricing of one bidder and not – not give the opportunity to the other bidders to review their pricing as well. So all of those things make the decision that he has made to
20 overturn procedurally unfair and not transparent.

CHAIRPERSON: Talk to me about the – not transparent part. Why are you saying they were not transparent?

MS SHARLA CHETTY: So – so Mr Chairperson Neotel – sorry – T-Systems when they were asked to submit their Best And Final Offer they did submit their Best And Final Offer and then they were asked to

confirm that offer when given to all the bidders and asked to confirm. T-Systems said yes that is my offer but we have been in discussions with our – our partner and they are considering giving a further – you know – discounted price of 248 million. Now that could not be considered because your Best And Final Offer was already in like all other bidders had been given the time period to submit that offer and even considering that offer there is still not – they came out still lower than Neotel in the pricing. So if you look at all the evaluation criteria which you consider is our commercial and your technical Neotel still
10 needed in terms of being the preferred bidder.

CHAIRPERSON: Well I may have heard evidence about something that was brought in about after the best offer, best and final offer. Ms Molefe I continue to be concerned about the significance of this witness's evidence.

ADV REFILOE MOLEFE: Thank you Chair, we are nearing the conclusion.

CHAIRPERSON: So I continue to be concerned, you know what my concerns are, maybe you can deal with her, lead her evidence in a way that removes my concerns.

20 **ADV REFILOE MOLEFE:** Thank you Chair, we will be dealing with the lat matter in Ms Chetty's evidence and that's in relation to the pricing.

CHAIRPERSON: Yes okay, but you must tell me if I am missing something. Feel free to say if you think I am missing something.

ADV REFILOE MOLEFE: Thank you Chair.

CHAIRPERSON: Okay, alright.

ADV REFILOE MOLEFE: Ms Chetty can we go to page 94 of the bundle.

CHAIRPERSON: What page?

ADV REFILOE MOLEFE: 94.

CHAIRPERSON: Okay. 94?

ADV REFILOE MOLEFE: Yes.

CHAIRPERSON: Okay.

ADV REFILOE MOLEFE: And that is Annexure 16, are you there?

MS SHARLA CHETTY: Yes I am.

10 **ADV REFILOE MOLEFE:** At paragraph 22 of his memorandum Mr Molefe states, and this evidence that has been given, but it becomes material insofar as your analysis on the pricing aspect, he says there:

“I approved that the R248million be taken into consideration as part of T-Systems best and final offer as the commitment was made in writing to Transnet and shortly after the best and final offers have closed, and I don’t believe that any other bidders were prejudiced by this.”

Do you have any comment on this paragraph?

20 **MS SHARLA CHETTY:** Yes Advocate Molefe, the best and final offer was – has already closed and he said it was still acceptable to accept an offer thereafter, because he believed it didn’t prejudice any of the other bidders, but he didn’t give any of the other bidders a chance then to because this is a revised offer that is being considered, ideally he would give all the other bidders a chance then to revise their offers as well or give them opportunities to resubmit their best and final offers.

ADV REFILOE MOLEFE: Yes and at paragraph 23 of that memo Mr Molefe further goes on to say:

“I further do not believe it is necessary to request another best and final offer from any of the vendors as all three preferred bidders were given the opportunity to confirm if the prices submitted are accurate and if they have omitted anything.”

And you have just given evidence that in your view as the other bidders would not have been given another opportunity as T-Systems, as would have been afforded to T-Systems that this would be unfair?

10 **MS SHARLA CHETTY:** That’s correct Advocate Molefe because the other, T-Systems was afforded a bit more time than the other bidders so they could have raised an objection to say that they could have done a better offer having been given more time.

ADV REFILOE MOLEFE: Yes. And at paragraph 24 and leading to 25 it says there:

“As per the Tier report should this R248million be taken into account and business not be awarded to Neotel due to the risks stated above T-Systems would be the preferred bidder.”

What is your comment to that?

20 **MS SHARLA CHETTY:** He is – Advocate Molefe he is correct in that T-Systems does come out to be bidder number two if the R248million is considered, and if Transnet decides that those risks are new risks and they are material risks then the award to T-Systems he would be then correct as bidder number one.

ADV REFILOE MOLEFE: Yes and if this R248million is not taken into

account?

MS SHARLA CHETTY: T-Systems wouldn't be bidder number one, if you exclude Neotel it would be Dimension Data.

ADV REFILOE MOLEFE: Second to Neotel?

MS SHARLA CHETTY: Yes.

ADV REFILOE MOLEFE: And at paragraph 25 he states there that management must ensure that more favourable prices are agreed with T-Systems to at least be at a similar level to the prices submitted by Neotel as part of the post-tender negotiations, what is your comment to
10 that?

MS SHARLA CHETTY: So Chairperson you're allowed to negotiate to market related prices, so there is nothing wrong with negotiating to market related prices provided that Neotel was excluded on a proper basis.

ADV REFILOE MOLEFE: Yes and insofar as this pricing element the Tier Report sets that out in the paginated bundle rather at page 36.

CHAIRPERSON: Is that 36?

ADV REFILOE MOLEFE: Three six Chair.

CHAIRPERSON: 36, okay.

20 **ADV REFILOE MOLEFE:** And through to page 37.

CHAIRPERSON: Okay.

ADV REFILOE MOLEFE: And the evaluation of the prices was divided into four different categories, the first one appears on page 36, do you have it there?

MS SHARLA CHETTY: Yes I do.

ADV REFILOE MOLEFE: And the first price evaluation for network services, RFP, would be the consideration of pre-due diligence, is that correct?

MS SHARLA CHETTY: That's correct.

ADV REFILOE MOLEFE: Can you please take the Chair through the evaluation outcome?

MS SHARLA CHETTY: So Chairperson if you look at the evaluation outcome after – before the due diligence was done bidder number three actually higher than bidder number one and bidder number five, bidder
10 number three was Dimension Data at that time but it was not considered a like for like comparison.

ADV REFILOE MOLEFE: And why was that the case?

MS SHARLA CHETTY: With pricing you've got to reach a common basis, and make sure that everybody is using the common basis on their templates for pricing, so they had to go back to the teams and then ask them to re-price on a common basis.

ADV REFILOE MOLEFE: And insofar as the second aspect of the price evaluation that appears on paginated page 37 can you take the Chair through this second stage which is entitled the post-due diligence?

20 **MS SHARLA CHETTY:** So the post-due diligence revealed that bidder number one, which is Neotel, scored the highest points and T-Systems came out to be the second ranked in terms of pricing. Thereafter, after the normalisation exercise was done it was revealed that T-Systems came out as the third preferred and Neotel still the first preferred bidder from a pricing and normalisation perspective.

ADV REFILOE MOLEFE: Yes and the post-normalisation would be the third category of the pricing evaluation?

MS SHARLA CHETTY: That's correct.

ADV REFILOE MOLEFE: And what was the outcome in that respect?

MS SHARLA CHETTY: When Neotel was the number one bidder and T-System ended up being the third preferred bidder.

ADV REFILOE MOLEFE: And who was the second preferred bidder?

MS SHARLA CHETTY: It was Dimension Data.

ADV REFILOE MOLEFE: And lastly in respect of the fourth price
10 evaluation aspect that was considered can you please take the Chair through that?

MS SHARLA CHETTY: So that was basically just an evaluation done to say if the 248 was considered where would T-Systems fall and they basically came out to be the second right tenderer, but it clearly says there that the price reduction could not be taken into account since the final pricing had already been submitted.

ADV REFILOE MOLEFE: Yes and that appears immediately above the heading the fourth price evaluation?

MS SHARLA CHETTY: That's correct.

20 **ADV REFILOE MOLEFE:** I think the last sentence of that entire paragraph.

MS SHARLA CHETTY: That's correct.

ADV REFILOE MOLEFE: Is there any other matter you wish to bring to the Chair's attention in respect of the pricing?

MS SHARLA CHETTY: No there isn't Chairperson.

ADV REFILOE MOLEFE: Is there any other matter you wish to bring to the Chair's attention insofar as the consideration of Neotel against T-Systems?

MS SHARLA CHETTY: No Chairperson.

ADV REFILOE MOLEFE: Chair unless there are any other further questions I have no further questions for Ms Chetty.

CHAIRPERSON: Thank you Ms Molefe. Thank you Ms Chetty for having come forward to give evidence, you are excused.

MS SHARLA CHETTY: Thank you.

10 **CHAIRPERSON:** Thank you.

ADV REFILOE MOLEFE: Thank you Chair, Mr Mokoena will address you.

ADV PHILLIP MOKOENA SC: Mr Chair that concludes the business of the day and we resume on Monday with Mr van der Westhuizen as the next witness.

CHAIRPERSON: How long is he likely to be, will he take more than a day?

ADV PHILLIP MOKOENA SC: It's one day.

CHAIRPERSON: It's one day?

20 **ADV PHILLIP MAKOENA SC:** Yes.

CHAIRPERSON: Should we start early or should we not? We will finish within one day, so we can start at ten o'clock.

ADV PHILLIP MAKOENA SC: At ten o'clock Chair.

CHAIRPERSON: Oh okay, then we will start at ten. We will adjourn for the day and on Monday we will start at ten o'clock, we adjourn.

INQUIRY ADJOURNS TO 27 MAY 2019