

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

10 MAY 2019

DAY 92

20

PROCEEDINGS ON 10 MAY 2019

CHAIRPERSON: Good morning Mr Mokoena, good morning everybody.

ADV PHILLIP MOKOENA SC: Good morning Chair.

MR PETER STEPHEN VOLMINK: Good morning.

CHAIRPERSON: Thank you. Good morning. Are you ready?

ADV PHILLIP MOKOENA SC: We are ready.

CHAIRPERSON: Okay you may proceed.

ADV PHILLIP MOKOENA SC: Mr Volmink yesterday when we parted
ways we were just about to deal with the T-Systems with particular
10 reference to page 48 paragraph 105 of your witness statement.

MR PETER STEPHEN VOLMINK: Yes.

ADV PHILLIP MOKOENA SC: Could you please proceed dealing with
those issues there?

MR PETER STEPHEN VOLMINK: Chair this section of my evidence
deals with an award of the IT Data Services tender initially to T-
Systems which was then subsequently withdrawn and awarded now to
Gijima. I will take you through what I say in paragraphs 105 and
following Chair.

ADV PHILLIP MOKOENA SC: It is page 48 Chair.

20 **CHAIRPERSON**: 48?

ADV PHILLIP MOKOENA SC: 48.

CHAIRPERSON: Thank you. Yes.

MR PETER STEPHEN VOLMINK: Chair so I point out in my statement
that during January of 2010 Transnet entered into the initial agreement
with T-Systems for the provision of IT data services. It is a critical

service for Transnet's operations. Effectively it enables access to all critical IT data pertaining to the rail operations, ports, pipelines, personnel, a range of functions that Transnet requires in order to operate effectively and efficiently. I then say that after that initial tender was – the contract was entered into a series of variations or extensions in value to that contract then occurred. And I explain those variations in one of the annexures which I would like to take you to. It is not directly germane to the issue of the award to Gijima which subsequently followed but I thought just for context I would like to give
10 the commission a full sense of the history of the matter.

ADV PHILLIP MOKOENA SC: And how many variations are you talking – are you referring to?

MR PETER STEPHEN VOLMINK: There were in total five variations.

ADV PHILLIP MOKOENA SC: And those were between 2010 and 2019?

MR PETER STEPHEN VOLMINK: That is correct.

ADV PHILLIP MOKOENA SC: And for that period no services went out on tender?

MR PETER STEPHEN VOLMINK: Sorry?

ADV PHILLIP MOKOENA SC: During that period no services went out
20 on tender. It was all extended on variations?

MR PETER STEPHEN VOLMINK: It was extended on variations but parallel to that...

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: The new tender process was being evaluated and awarded and so on.

ADV PHILLIP MOKOENA SC: Yes. Then may I refer you then to...

CHAIRPERSON: I am sorry extended on variations means what?
Extended on variations, what does that mean?

MR PETER STEPHEN VOLMINK: No it is um – I use the term
somewhat interchangeably.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: To extend the contract.

CHAIRPERSON: Oh that it was extended.

MR PETER STEPHEN VOLMINK: Or varied in the sense that

10 **CHAIRPERSON:** Oh yes. Okay.

MR PETER STEPHEN VOLMINK: And the value.

CHAIRPERSON: But basically you mean it was extended?

MR PETER STEPHEN VOLMINK: Exactly Chair.

CHAIRPERSON: Ja okay alright.

ADV PHILLIP MOKOENA SC: Mr Volmink may I then refer you to
Exhibit BB2.1C. Chair that should be the third file with particular
reference to page 1086.

CHAIRPERSON: Is the reference to third file reference to Exhibit
BB2.1.C?

20 **ADV PHILLIP MOKOENA SC:** 1C yes.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: So that at least it becomes easier.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: Chair to locate it.

CHAIRPERSON: And what is the page?

ADV PHILLIP MOKOENA SC: The page number it is page 1086.

CHAIRPERSON: 1086?

ADV PHILLIP MOKOENA SC: Yes Chair.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Mr Volmink are you there?

MR PETER STEPHEN VOLMINK: I am there Chair.

ADV PHILLIP MOKOENA SC: Yes could you please identify that document for us?

MR PETER STEPHEN VOLMINK: Chair this document is a document
10 which was initially prepared by our Group strategic sourcing function
one of the units within the procurement department. It was a report
which was delivered to SCOPA the initial intended date of the
presentation was for December 2017. That engagement finally
happened in January of 2018 and the document has just been updated
to reflect events that have occurred

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: Subsequent to January 2018.

ADV PHILLIP MOKOENA SC: And can you then take us please through
those several variations and extensions that you alluded to?

20 **MR PETER STEPHEN VOLMINK:** Chair what the document then
reflects is that the initial award to T-Systems was a five year contract
with an option to extend for a further two years. So the option was
incorporated into the initial contract which was to run from 1 January
2010 to 31 December 2014 with a total initial contract value of about
R1.9 billion.

ADV PHILLIP MOKOENA SC: That was the initial amount?

MR PETER STEPHEN VOLMINK: That is correct.

ADV PHILLIP MOKOENA SC: And subsequently? You can take us through the variations then?

MR PETER STEPHEN VOLMINK: The variations then were as follows Chair. Firstly the first variation related to the exercising of that two year option.

CHAIRPERSON: Let me just take you back to this issue of variation and extension. Technically variation might be correct when you mean
10 extending but normally or rather I associate variation with an amendment of

MR PETER STEPHEN VOLMINK: The contract.

CHAIRPERSON: The contents of the agreement. Okay. So I just want to confirm that wherever in this document there is a reference to variation should I read it as extension or sometimes variation is used to mean something other than extension?

MR PETER STEPHEN VOLMINK: No Chair it would be the former meaning that...

CHAIRPERSON: Yes.

20 **MR PETER STEPHEN VOLMINK:** Wherever we refer to variation

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: It is an extension.

CHAIRPERSON: An extension.

MR PETER STEPHEN VOLMINK: In both time and value.

CHAIRPERSON: Oh oh

MR PETER STEPHEN VOLMINK: So it is not just the time extension.

CHAIRPERSON: Oh oh okay so...

MR PETER STEPHEN VOLMINK: With the time extension would be a value [indistinct].

CHAIRPERSON: Oh so so variation might be more accurate in that context. That is not just an extension of time?

MR PETER STEPHEN VOLMINK: Yes Chair.

CHAIRPERSON: It is also a variation of the price?

MR PETER STEPHEN VOLMINK: Correct.

10 **CHAIRPERSON:** Effectively an amendment of the price that must of necessity come with the extension of time?

MR PETER STEPHEN VOLMINK: Precisely.

CHAIRPERSON: Yes. Okay. Alright.

ADV PHILLIP MOKOENA SC: Would that also include the variation of the scope of what was intended to be performed?

MR PETER STEPHEN VOLMINK: Sometimes that may well be. It would be extended.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Ja.

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

MR PETER STEPHEN VOLMINK: I was then referring to the first variation Chair which involved really the exercise of that two year option that I had referred to earlier which then extended the contract from 1 January 2015 to 31 December 2016. There were various reasons given for the exercising of this – of the option. Some of them I

will mention briefly. In essence Chair it was said that the Transnet had contracted Gartner to review all the current services that were being received from T-Systems to develop a new strategy. To issue a new set of specifications. The RFP had to be written and the motivation that was given was that we – that two year extension was required in order to complete that part of the work.

ADV PHILLIP MOKOENA SC: And the second extension?

MR PETER STEPHEN VOLMINK: The second extension was for a further period of nine months from 1 January 2017 to 30 September 10 2017 I refer that is on page 1087 just the following page. And what it says Chair is that the nine month extension was requested to enable Transnet to finalise the new IT data services procurement event which was now ready at the adjudication stage. So it had progressed but it had not yet been completed and a further extension of both time and value was then requested.

ADV PHILLIP MOKOENA SC: And the initial amount value which was R1.9 billion it now became R3.8 billion, am I correct?

MR PETER STEPHEN VOLMINK: Correct Chair. With all the extensions there was a significant value extension as well which now 20 stood at R3.8 billion.

ADV PHILLIP MOKOENA SC: And the third?

MR PETER STEPHEN VOLMINK: The third extension...

CHAIRPERSON: That is R3.8 billion hey?

MR PETER STEPHEN VOLMINK: That is correct Chair.

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: Chair the third extension ...

ADV PHILLIP MOKOENA SC: Page 1088 Chair.

MR PETER STEPHEN VOLMINK: Is on page 1088.

CHAIRPERSON: Thank you.

MR PETER STEPHEN VOLMINK: And – and what it related to was an initial request actually for twelve months for – to enable Transnet to essentially extricate itself from the unlawful award that had been made to T-Systems and to award the tender to Gijima as was initially submitted by management. But there was a process of litigation that
10 had unfolded and the concern was that the litigation process would not run its course within a twelve month period. Eventually National Treasury approved the extension but not for twelve months. They only granted an eight month extension during which time I think there was considerable attempt as I say for Transnet to extricate itself from this initial tender award which I will deal with in more detail in a short while I am just giving an overview of the various reasons for the extension.

ADV PHILLIP MOKOENA SC: And the fourth one? Page 1089 that is where you find the fourth one.

MR PETER STEPHEN VOLMINK: Correct Chair. The fourth one the
20 motivation that is stated in the document is that Transnet had requested this extension for the commencement of what I refer to as disengagement processes from T-Systems. It is not the kind of contract where – when the contract ends the service provider moves off and the new service provider comes in immediately. There is a process of disengagement. In fact if recollection – if my recollection is correct the

contract made provision for a six month process of transition and disengagement and treasury only approved a three month extension which was then the fourth variation. And then the fifth variation ...

ADV PHILLIP MOKOENA SC: On page 1090.

MR PETER STEPHEN VOLMINK: Is on 1090. This was for the period 9 September 2018 to 8 March 2019 and there has been no further extensions after that date. So that was the last extension.

ADV PHILLIP MOKOENA SC: And the entire amount pursuant to those extensions or variations was an amount of R4.9 billion.

10 **MR PETER STEPHEN VOLMINK:** That is correct Chair.

CHAIRPERSON: So this contract started in 2010?

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: And it is still ongoing or has just ended?

MR PETER STEPHEN VOLMINK: As currently it is no longer ongoing.

CHAIRPERSON: YEs.

MR PETER STEPHEN VOLMINK: The last extension was – it expired on 8 March 2019.

CHAIRPERSON: This year?

MR PETER STEPHEN VOLMINK: That is when this contract ended.

20 **CHAIRPERSON:** So it – it went on for ultimately about what nine years?

MR PETER STEPHEN VOLMINK: Ja.

CHAIRPERSON: Ja. Originally it was meant to be five years.

MR PETER STEPHEN VOLMINK: Five years.

CHAIRPERSON: But there was a provision for a possible extension?

MR PETER STEPHEN VOLMINK: Correct.

CHAIRPERSON: Ja okay.

ADV PHILLIP MOKOENA SC: That is the point Chair. May I then refer you back to your witness statement paragraph 106 on page 48 and we can continue with the evidence from there having now painted the context to the Chair.

MR PETER STEPHEN VOLMINK: From 106 the point we simply make is that Governance was involved in the reviewing certain of these addenda and was also then quite involved in advising the board to
10 reverse its decision to award to T-Systems and to award to Gijima.

ADV PHILLIP MOKOENA SC: Yes. You may then proceed to deal with the events relevant to Gijima.

MR PETER STEPHEN VOLMINK: Yes so now if I can focus more directly on the award to T-Systems Chair. In paragraph 107 and following I state that during November 2015 Transnet issued this RFP to the open market for the supply of IT data services and T-Systems responded and Gijima responded and a few others responded. After quite a drawn out protracted tender process a recommendation was made by management to award the tender to Gijima. Having said that I
20 should also point out to you Chair that my understanding is management did have some misgivings during the evaluation process about Gijima. There were various commercial and also technical concerns that management had raised and they were not at first in favour of the award to Gijima. But after extensive engagements with Gijima management came to the conclusion ultimately that those risks

had been adequately mitigated. Based on the view that the risks had been mitigated they made the recommendation to award to Gijima. What I then go on to say is that during February 2017 the board took a decision not to award to Gijima based on those risks that management had earlier dealt with and to award it to T-Systems.

CHAIRPERSON: So this is one of those contracts which were dealt with during the period when the board was getting involved in the award of certain tenders?

MR PETER STEPHEN VOLMINK: That is correct Chair. They had
10 delegation of authority.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: In terms of the delegation of authority framework.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: To make those decisions.

CHAIRPERSON: Yes okay.

ADV PHILLIP MOKOENA SC: And would this be an instance whereby the risk factors are only raised at a later stage when they were in fact dealt with by the management adequately but they are raised in order
20 to not grant the award to the [indistinct] bidder?

MR PETER STEPHEN VOLMINK: That is precisely the difficulty that Governance had with this entire transaction. The risks had been highlighted at an earlier stage and as I testified in the view of the technical and other experts who assessed the matter they were satisfied that the risks had been properly dealt with. What then

happened is...

CHAIRPERSON: Well let us talk about that a little bit before you.

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: Move on and – and it takes us to something that we discussed a little bit yesterday namely that if management has a right to take a view on a tender on various factors and – but their role is to make a recommendation and the body that makes the final decision is higher up generally speaking the higher body would be entitled to take a view different to that of management on any of the factors, is it not?

10 Generally speaking.

MR PETER STEPHEN VOLMINK: Generally speaking?

CHAIRPERSON: Yes, yes. Therefore when a higher body takes a view different to that of management on any particular issue or factor that on its own ought not to raise eyebrows but it just depends on everything else.

MR PETER STEPHEN VOLMINK: Ja.

CHAIRPERSON: On all the circumstances of that particular tender whether it should raise eyebrows. But one of the factors that may legitimately be taken into account in saying should this raise eyebrows
20 or not is the expertise that management may have on a particular issue knowledge expertise and experience via a vie knowledge expertise and experience maybe of the body that decides. If it is a – if the subject is about some scientific technical thing and management consists of a committee of scientists and I am sitting on a higher body and I am a lawyer I am going to be very careful to go against the view of scientists

in a field where they are the experts.

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: But it does not necessarily mean that I am going to rubber stamp their view.

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: I may still question and sometimes I might show them that maybe they did not attach proper weight to a particular factor or they might even change their view but what I should not do is basically disregard what they are – the view they have expressed.

10 **MR PETER STEPHEN VOLMINK:** Yes. Precisely.

CHAIRPERSON: So I am just going back to it – to this point which we discuss yesterday simply because you – you just mentioned that you had a certain difficulty with the fact that the board looked at an issue that you had looked at as management. And my question goes back is.

MR PETER STEPHEN VOLMINK: Ja.

CHAIRPERSON: Of course they are entitled to look at...

MR PETER STEPHEN VOLMINK: Ja, ja.

CHAIRPERSON: The same issue that you have looked at and they are entitled to take a different view. The question is whether their view
20 weighed against your view is such that it should point to something.

MR PETER STEPHEN VOLMINK: Ja.

CHAIRPERSON: You would go along with that?

MR PETER STEPHEN VOLMINK: Chair I am – I am in large measure in fact I am in – I am in total agreement.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: With the – with what you say.

CHAIRPERSON: Yes, yes.

MR PETER STEPHEN VOLMINK: Because I – my evidence should not be understood to mean that I am of the view that the board is bound by recommendations of management. It is a board for – it is called the accounting authority for a good reason. That is the body that must ultimately make its decisions. My difficulty does not lie with the principle of the board.

CHAIRPERSON: Yes.

10 **MR PETER STEPHEN VOLMINK:** Arriving at a different conclusion.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: But Chair my concerns firstly is that when these risks were properly evaluated at an earlier stage at the functionality and the commercial gate and the bidder passed that threshold for functionality then in fact we – our own procurement rules in Transnet warns against this concept of double dipping where someone was properly and fully assessed at any earlier stage and then under the guise of a risk evaluation those very issues are now revisited. And – so I think that is the first concern and the second is
20 just the rationality of it.

CHAIRPERSON: Yes. Okay, okay.

MR PETER STEPHEN VOLMINK: Because if management and I am not saying management is always right I mean.

CHAIRPERSON: Yes, yes.

MR PETER STEPHEN VOLMINK: But in this particular case there was

quite a comprehensive motivation

CHAIRPERSON: Hm

MR PETER STEPHEN VOLMINK: Put forward

CHAIRPERSON: Ja which dealt with these issues.

MR PETER STEPHEN VOLMINK: To the board which dealt with all of the issues.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: And one does see a detailed logical

CHAIRPERSON: Response

10 **MR PETER STEPHEN VOLMINK**: Analysis on the part of the board.

CHAIRPERSON: No I...

MR PETER STEPHEN VOLMINK: As to why it held a different view.

CHAIRPERSON: No I think that last part which you say is an important factor because if the one view is fully motivated and the opposing view is not motivated at all or very – or motivated very insignificantly you know it is something to look at. Yes but I think I understand your position. You say it is not the principle.

MR PETER STEPHEN VOLMINK: No.

20 **CHAIRPERSON**: That you have a problem with it is the facts of the case.

MR PETER STEPHEN VOLMINK: Precisely.

CHAIRPERSON: And the fact that at Transnet there was as I understand you a rule or policy against what you double dipping. Okay thank you.

ADV PHILLIP MOKOENA SC: Following from the Chair questions of

clarification. You are also giving this evidence against the background of a number of transactions that suffered the same fate premised on this risk factors whereby a preferred bidder who was being thoroughly assessed just simply being ignored and another entity being awarded the tender, am I correct?

MR PETER STEPHEN VOLMINK: That is...

ADV PHILLIP MOKOENA SC: And that is why – that is why you are raising these issues specifically?

MR PETER STEPHEN VOLMINK: That is correct Chair. This is hardly
10 an isolated

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Incident.

CHAIRPERSON: Okay.

MR PETER STEPHEN VOLMINK: We have seen other cases in the past
where

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Risks are invoked at the eleventh
hour

CHAIRPERSON: Hm.

20 **MR PETER STEPHEN VOLMINK:** As a reason to overlook bidder A in
order to go to bidder B.

CHAIRPERSON: Ja.

MR PETER STEPHEN VOLMINK: The – the PPM does say that risk can
be taken into consideration.

CHAIRPERSON: Hm, hm.

MR PETER STEPHEN VOLMINK: It says it must be a material risk such that it can cause severe prejudice to Transnet if it were not properly taken into account.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And must not involve a reconsideration of the very factors that were earlier evaluated.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: So the principle I have no difficulty with.

10 **CHAIRPERSON:** Hm.

MR PETER STEPHEN VOLMINK: But it is the opportunistic use of risk.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: In order to

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Not award to a bidder X

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: And to award to what appears to be the deferred bidder.

CHAIRPERSON: Ja.

20 **ADV PHILLIP MOKOENA SC:** Let us proceed to deal with specific facts in order to at least you know place them in it proper context. You may then proceed to tell us what happened?

MR PETER STEPHEN VOLMINK: Yes thank you Chair. So what they happened is that Gijima lodged a complaint to the Transnet Procurement ...

CHAIRPERSON: Okay just to complete. Management recommended that Gijima be awarded the contract after the consents or reservations that management had had – had been mitigated through engagement with Gijima.

MR PETER STEPHEN VOLMINK: Correct.

CHAIRPERSON: But the board did not go along with the recommendation of management and decided that the contract should be awarded to T-Systems and largely and if not exclusively their reasons were based on certain risks that they articulated, is that right?

10 **MR PETER STEPHEN VOLMINK**: That is correct Chair.

CHAIRPERSON: And then Gijima lodged a complaint?

MR PETER STEPHEN VOLMINK: A complaint.

CHAIRPERSON: Okay, alright thank you.

MR PETER STEPHEN VOLMINK: The complaint was then received by the Procurement Officer of the Procurement Ombudsman it is one of the functions which I have to oversee within the organisation. But because it implicated the accounting authority there is a national treasury prescription that when a complaint implicates the accounting authority it must not be investigated by the organ of state itself it must be
20 referred to National Treasury. And that process was followed. National Treasury considered the complaint and ultimately came to the conclusion that the proposed award to – or the award in fact that had been made to T-Systems was invalid and that Gijima should be awarded the tender.

ADV PHILLIP MOKOENA SC: And did Governance also agree with

what National Treasury was saying?

MR PETER STEPHEN VOLMINK: Governance agreed with the conclusion that the tender was invalid – um sorry that the tender award to T-Systems was invalid and that the tender had to be awarded to Gijima. So we shared that conclusion. We held slightly different views on how risks ought to be eval – technical dif – differences that we had which perhaps we do not really need to delve into.

ADV PHILLIP MOKOENA SC: But what was then the advice or the recommendation of Governance?

10 **MR PETER STEPHEN VOLMINK:** Well when Governance considered the matter produced quite a comprehensive memorandum on the matter as well spelling out the various risks and how it had been mitigated and we then made the following recommendations which are contained in paragraph 110 ...

ADV PHILLIP MOKOENA SC: Page 49 Chair. Yes you can (intervenes).

MR PETER STEPHEN VOLMINK: And we recommended that Transnet abide – the first recommendation is Transnet must abide by the ruling taken by National Treasury. Secondly that T-Systems should be invited
20 to make representations on how – on Transnet's proposed decision to abide the – the ruling of National Treasury. We felt it would be important to invite – represent - T-Systems had now already been awarded the tender and our proposal was well let us withdraw it and we thought that a procedurally fair process would be to at least invite representations. The third aspect of our recommendation was that

Transnet who should proceed to make the award then to Gijima following a judicial process to set aside the award to T-Systems. We were conscious of the rule against self-help and so and we thought it would be better to follow a judicial process rather than simply withdrawing from one and awarding to another.

ADV PHILLIP MOKOENA SC: And what ultimately happened to that tender?

MR PETER STEPHEN VOLMINK: Chair I should perhaps just say that the views that we had expressed were also confirmed by senior counsel.

10 We had sought the opinions of Advocate Sibeko and Advocate Ford and they were in large measure in agreement with the views that were – were expressed. Chair ultimately what then happened is after much deliberation the Board then took a resolution to set aside its earlier award to T-Systems and Transnet then approached the High Court for an order declaring its earlier award to T-Systems to be invalid and a direction that it be allowed to award to Gijima. The matter was initially strongly opposed by T-Systems but after some preliminary skirmishes they withdrew their opposition and the matter was then set down for hearing in the Johannesburg High Court on 12 December 2018 and the
20 court essentially granted the order as prayed for by – by Transnet and I have attached a copy of the judgment in the papers (intervenes).

ADV PHILLIP MOKOENA SC: So it was only after all those interventions that the Board then decided to do the correct thing?

MR PETER STEPHEN VOLMINK: Correct Chair.

ADV PHILLIP MOKOENA SC: Yes. Now from page - 113 paragraph

113 page 50 you are now dealing with the acquisition of the 100 locomotives?

MR PETER STEPHEN VOLMINK: Correct.

ADV PHILLIP MOKOENA SC: Can you please take us through it?

MR PETER STEPHEN VOLMINK: Chair I – I was asked by the investigators to look at this confinement of the – of - for the acquisition of 100 locomotives that was initially confined to a company called Mitsui Africa Rail Solutions or MARS for – for short - and a second confinement where the initial proposed award to MARS was now
10 completely ignored and a second confinement was then motivated for the award of the very same tender to China South Rail or CSR and I was asked to reflect on – just on the rational as contained in the confinement documents itself.

ADV PHILLIP MOKOENA SC: Yes and then what transpired when you have – after having reviewed and assessed you know the two confinements?

MR PETER STEPHEN VOLMINK: Yes. So Chair in essence I say in paragraph 113 and following that the initial motivation was made in October 2013. I said in my initial statement that it was submitted by
20 Mr Brian Molefe but upon further consideration of the documents I see he did not sign that confinement. Hence in my amended statement I simply make the point that a submission was made rather than but apart from that minor change the point that I make is that this confinement described in glowing terms the virtues of Mitsui – MARS. Why we should award to Mitsui Africa Rail Solutions and for example

Chair I point that in paragraph 114 there are a number of sub paragraphs. It says there that these MARS locomotives they were I think for the Class 19E - it is a particular class of locomotives. These MARS locomotives are known they meet requirements and the prototyping is not required. They have done this before. It goes on to say that the confinement to MARS was required for purposes of standardisation because MARS had done a number of these tenders and a number of the locomotives before. That there were MARS facilities that were readily available for immediate production. Lead
10 times would be kept to a minimum and also there would be significant savings. Across the page on page 51 the virtues of MARS are further extolled by the individuals who submitted the memo and it says there that the Mitsui models were operating optimally and in fact exceeded their design parameters that we do not need to train new – to train our drivers on any new model because they have been trained on the Mitsui model. So they also speak about extensive socio economic benefits that would be as a result of the award to Mitsui including job retention at Transnet Engineering and job creation and ultimately they said it was not in the interest of Transnet to follow – to award to anyone else. So
20 in essence what we see ...

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: Is a motivation to – to confine to MARS based on what were depicted as outstanding qualities that – that MARS had.

ADV PHILLIP MOKOENA SC: And that was the justification why not –

Transnet was not supposed to go out of – out to tender on a – on an open fair competitive bidding system?

MR PETER STEPHEN VOLMINK: That – that was the basis for – for the confinement. That is correct.

ADV PHILLIP MOKOENA SC: Yes. However three months down the line there was ...

MR PETER STEPHEN VOLMINK: But then correct ...

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: Correct Chair. This MARS
10 confinement served at – at a Board – at a meeting of the BADC which is a Sub Committee of the Board which is entrusted specifically with procurement matters and I was not at that meeting. I have no personal knowledge as to what transpired who said what at that meeting. All we know from the record is that three months after this initial MARS confinement had been made there was now a second confinement. This time to award the tender to China South Rail and no longer to – to Mitsui and I have also attached a copy of that confinement to the papers.

ADV PHILLIP MOKOENA SC: Yes. If I may refer you to EXHIBIT BB
20 2.1D. You can now ignore C. We are now going to D.

MR PETER STEPHEN VOLMINK: D, sorry. Let me just put C away. Yes.

CHAIRPERSON: In the meantime I can ask whether the – this second submission for confinement meant that there were going to be two submissions before the BADC for confinement – one to Mitsui and the

other one to China Rail or whether the first one was effectively withdraw?

MR PETER STEPHEN VOLMINK: I think it is the later Chair. I think the first one was effectively withdrawn because if one looks at the contents of the China South Rail confinement the – there it is said that Mitsui's quality and all the various aspects that were firstly praised in the first ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Confinement.

10 **CHAIRPERSON:** Yes.

MR PETER STEPHEN VOLMINK: They say no Mitsui is ...

CHAIRPERSON: *Ja*.

MR PETER STEPHEN VOLMINK: Not up to scratch.

CHAIRPERSON: A dilution of ...

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: The praises that had been heaped on Mitsui.

MR PETER STEPHEN VOLMINK: That is correct.

CHAIRPERSON: *Ja*, okay.

ADV PHILLIP MOKOENA SC: If you go to page 1196.

20 **MR PETER STEPHEN VOLMINK:** 1196 or 1197?

ADV PHILLIP MOKOENA SC: 1197. This will be ...

CHAIRPERSON: I am sorry. I thought that was D.

ADV PHILLIP MOKOENA SC: D for ...

CHAIRPERSON: D for Doris.

ADV PHILLIP MOKOENA SC: For Doris.

CHAIRPERSON: *Ja*, okay. D for David. D for Doris, okay.

ADV PHILLIP MOKOENA SC: On page 1197 Chair.

CHAIRPERSON: Okay. So that is 11 ...?

ADV PHILLIP MOKOENA SC: 97.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Could you identify that document for us Mr Volmink?

MR PETER STEPHEN VOLMINK: Chair this is a submission made by Mr Brian Molefe the then Group Chief Executive of Transnet to the
10 Transnet Board Acquisitions and Disposals Committee – the BADC –
and the subject simply says:

“Mitigation of MDS volumes ...”

MDS just stands for Market Demand Strategy.

“MDS volumes at risk through investment in and procurement of 100 Class 19E equivalent dual voltage electric locomotives and 60 Class 43 diesel locomotives.”

ADV PHILLIP MOKOENA SC: And he is the one who was motivating the award in favour of Mitsui?

20 **MR PETER STEPHEN VOLMINK:** That – that is correct Chair.

ADV PHILLIP MOKOENA SC: Yes. Now if you – while you are still opening that memorandum may I also refer you to page 1223 and could you please identify that document for us?

MR PETER STEPHEN VOLMINK: This is a – a submission from Mr Brian Molefe to the Transnet Board of Directors dated

21 January 2014 which has the same heading as the earlier – earlier confinement that I quoted. It also says:

“Mitigation of MDS volumes at risk through investment in and procurement of the 100 dual voltage electric locomotives.”

ADV PHILLIP MOKOENA SC: But this one a different entity was – was motivated for?

MR PETER STEPHEN VOLMINK: Correct. This is now the CSR.

ADV PHILLIP MOKOENA SC: Now did you have an opportunity of
10 reading both these memorandums? Are they different in any manner?

MR PETER STEPHEN VOLMINK: Chair the documents – the two memoranda are essentially - the substance of it is almost identical. Where it differs is where the virtues of CSR are now extolled in the second memorandum whereas the qualities of MARS ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Are highlighted in the first ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: The first document.

CHAIRPERSON: Hm.

20 **ADV PHILLIP MOKOENA SC:** May I now refer you back to your statement – EXHIBIT BB 2.1A ...

MR PETER STEPHEN VOLMINK: Yes.

ADV PHILLIP MOKOENA SC: And page 51 and take us through paragraph 116 and onwards?

MR PETER STEPHEN VOLMINK: Chair in paragraph 116 and following

I simply highlight my – how I deal with my observations of these confinements as I was requested to do by the - by the Commission – the Commission’s investigators and what I say in paragraph 116.1 is that the confinement to China South Rail firstly invokes urgency as a ground for confinement and as we discussed yesterday urgency is something that has to be dealt with immediately because of a potential crisis that is looming and I make the point that three months had already elapsed since this earlier confinement to Mitsui which was also based on urgency – by the way – and no steps had been taken to
10 procure any locomotives during that time and I question whether this matter could genuinely be urgent if no action had been taken but I think more significantly the second point that I make is that this memorandum it misquotes the PPM and perhaps Chair if you would allow me. It is a very short clause from the PPM that I just want to read into the record.

CHAIRPERSON: *Ja*, you may do – do that.

MR PETER STEPHEN VOLMINK: In paragraph 116.2 I say that the memorandum quotes the PPM as stating the following:

20 “Where a genuine unforeseeable urgency has arisen such urgency should not be attributable to a lack of proper planning.”

And then the underlined words are added.

“However where a genuine urgency has been created by the lack of proper planning urgency can still be relied upon as a ground for confinement. In

such cases appropriate action must be taken against the individual or individuals responsible for the bad planning.”

Now I say it misquotes the PPM because those underlined words were contained in a draft which we had submitted to the Board and it relates to a point Chair which you made yesterday which is to the effect that if a genuine urgency has come about but it is as a result – even if it is a result of poor planning ...

CHAIRPERSON: Yes.

10 **MR PETER STEPHEN VOLMINK:** There is still an urgency ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: To be dealt with ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And it can be relied upon ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: As a confinement ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Bu you must deal with the individual

...

20 **CHAIRPERSON:** Yes.

MR PETER STEPHEN VOLMINK: Who has created the crisis ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: But when this was taken to the Board at the time they felt strongly that bad planning could never be an excuse for confinement and they deleted the reference that has been

underlined here.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: So I think the point is that ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: The rule which they had now relied upon ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Is not the – it is a non-existent rule.

CHAIRPERSON: Yes.

10 **MR PETER STEPHEN VOLMINK:** I think furthermore Chair ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: I make the point in paragraph 116.4 ...

ADV PHILLIP MOKOENA SC: On page 52 Chair.

CHAIRPERSON: Well I am just still thinking about this point about poor planning and urgency. You know – for what it is worth. I think you – you understood the point...

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: When we had the discussion yesterday. I mean if – if
20 the Commission's administrative wing was supposed to bring something to my attention to say I must please convene a certain urgent meeting to deal with a certain situation because if I do not convene that meeting and a certain decision is made we are going to – we will not be able to sit in this venue from next week and the commission will have nowhere to sit and I think that the administrative wing should have told me a

month ago. I cannot say I am not going to convene a meeting because you people had poor planning. You should have told me last month.

MR PETER STEPHEN VOLMINK: *Ja.*

CHAIRPERSON: I am going to say you should have told me last month but now that this has happened I must convene the meeting ...

MR PETER STEPHEN VOLMINK: We have to deal with it.

CHAIRPERSON: Because we cannot afford not to sit next month - next week because we will not have ...

MR PETER STEPHEN VOLMINK: Yes.

10 **CHAIRPERSON:** We will have no venue.

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: So I deal with the poor planning but I recognise that there is urgency because - for example - the lease is expiring over the weekend.

MR PETER STEPHEN VOLMINK: *Ja.*

CHAIRPERSON: So the meetings that are set - the hearings that are set down for next week and the other week will not take place if I do not meet with the landlord and say the administration has really been poor in planning. They should have brought this to my attention but
20 now they have brought - they should have brought it to my attention much earlier but they have now brought it. Can we do something? I cannot say I am not going to meet with the landlord because they should have told me last month.

MR PETER STEPHEN VOLMINK: *Ja.* I am very fully appreciative of what you are saying Chair.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: That also motivated ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: The – the inclusion ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Of that clause the sentence ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: That was underlined.

CHAIRPERSON: Yes.

10 **MR PETER STEPHEN VOLMINK:** Management felt that if you are dealing with a genuine emergency ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Then we cannot close our eyes to the fact that

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: There could be an operational ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Implosion ...

CHAIRPERSON: Yes.

20 **MR PETER STEPHEN VOLMINK:** As a result of not ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Obtaining a particular.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Let us deal with that perhaps on a confinement basis.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Sometimes with a heavy heart one has to ...

CHAIRPERSON: That is right, yes.

MR PETER STEPHEN VOLMINK: Agree to these things ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: And – and discipline the person ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: But let us acquire the ...

10 **CHAIRPERSON:** Hm.

MR PETER STEPHEN VOLMINK: The product.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: If I recall correctly ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: The Board's concern at the time was these self-created urgencies and how easily it gets invoked as a reason not to follow a procurement process. There was a view that the system had been subject to abuse – considerable abuse ...

CHAIRPERSON: Yes.

20 **MR PETER STEPHEN VOLMINK:** Maybe the pendulum swung ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Quite far ...

CHAIRPERSON: Because of that *ja*.

MR PETER STEPHEN VOLMINK: Onto the one side ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: But I think that ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: That motivated the exclusion of the (intervenes).

CHAIRPERSON: Yes. Okay, no that is fine.

ADV PHILLIP MOKOENA SC: You may proceed from paragraph 116.4.

MR PETER STEPHEN VOLMINK: In paragraph 116.4 I make the point that certain grounds for the confinement that are set out now in the CSR memo were identical to the Mitsui memo. It is as if the grounds
10 for confine – there was like a cut, copy, paste exercise done from the grounds of confinement for MARS and put into the CSR. Now they also say that:

“These diesel locomotives from CSR they are known and they meet technical requirements and set up costs are not required and facilities are readily available for CSR.”

The very – the very things that were said about Mitsui and I make the observation Chair in – sort of in the middle of that paragraph I say assuming that these facts regarding CSR were true that they had all of
20 those qualities why was the confinement then not made to CSR in the first instance and why did it take three months to realise that CSR actually had the same attributes as Mitsui in relation to set up costs and prototyping and at very least that suggests bad planning and when there is bad planning as we have said that effectively negates a ground for confinement and that is the – the observation that is made there.

ADV PHILLIP MOKOENA SC: But let us – let us deal with the effects of these numerous confinements. What they meant was that a party that was never subjected to any tender process a name will be mentioned and an award will be given to that entity?

MR PETER STEPHEN VOLMINK: It is slightly – it is slightly more complex than that. So an entity would be recommended as for the confinement.

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: It has to be approved by the person
10 with delegated authority ...

ADV PHILLIP MOKOENA SC: Exactly.

MR PETER STEPHEN VOLMINK: But it is still a tender process. So an RFP would then be issued to that one or sometimes one or two or three however many entities are listed in the confinement. Submissions must be received. It must be evaluated. It must serve before the Acquisition Council. I think the fundamental difference is that it is not an open invitation to - to any – any bidder to (intervenes).

ADV PHILLIP MOKOENA SC: In this regard there were only two memos. The first one motivated Mitsui?

20 **MR PETER STEPHEN VOLMINK:** Only Mitsui.

ADV PHILLIP MOKOENA SC: And the next one motivated only ...

MR PETER STEPHEN VOLMINK: Only CSR.

ADV PHILLIP MOKOENA SC: Yes. That is the point that – yes.

MR PETER STEPHEN VOLMINK: Yes, yes.

ADV PHILLIP MOKOENA SC: You may proceed then.

MR PETER STEPHEN VOLMINK: I also point out Chair that the CSR memo now refuted the very qualities that had earlier been stated about MARS. It now says that:

“MARS had not done well during the 1064 loco process and there was another 95 loco transaction.”

I also say that:

“This SD of MARS was not ...

Supply Development.

10 “...was not a key factor when MARS was awarded the contract.”

And then it also says that:

“If we continue with MARS that would create unnecessary risk for Transnet.”

It says that:

“CSR on the other hand had excelled in all of these SD requirements.”

20 And Chair in essence I come to the conclusion having dealt with all of this that the about turn in such a limited period of time I think it – it defies rationality. It defies logic at least from my observation. I should also point out and I deal with this in paragraph 117 that it was – in addition it was stated that regarding these reputational risks that Transnet would suffer it was then said that it was not elaborated on but except to say that there was speculation in the media around Mitsui’s local partners and their political affiliations and it said that Transnet would never entertain awards based on the political prowess of any

business partners to an OEM but the risk does not need to be taken into account for – from a reputational perspective. Essentially they were saying look we hear some worrying stories but the point is why were those worrying stories not a factor when MARS was motivated for confinement three months earlier when these stories had come about – I think – way before that. So I think all of this – Chair the most generous interpretation that I can give is that it is as a result of just bad planning and I say that is the most generous. Whether there are other nefarious motives that influence this others will come and testify.

10 **ADV PHILLIP MOKOENA SC:** Yes. Just clearing those bases, fine. Then we can proceed Mr Volmink to deal with the McKinsey confinements.

MR PETER STEPHEN VOLMINK: As far as the McKinsey confinements are concerned Chair ...

ADV PHILLIP MOKOENA SC: Chair they are from page 54 paragraph 118.

MR PETER STEPHEN VOLMINK: Chair I – I say in paragraph 118 that ...

CHAIRPERSON: I am sorry – I am sorry Mr Volmink.

20 **MR PETER STEPHEN VOLMINK:** Yes.

CHAIRPERSON: When the BADC – that Board Committee – dealt with matters such as this – you know – this request for confinement would they have the benefit of somebody at that stage - I know the recommendation that you expressed going forward. Would they call for somebody with some more knowledge of procurement from within

Transnet and say you know there is this request give us some advice. What is your view? You know - is this in compliance is this not in compliance with the prescripts and policies or would they rely on the relevant Executive members of management or CEO and so on?

MR PETER STEPHEN VOLMINK: Chair if memory serves me correctly the ADC called the Group Chief Supply Chain Officer ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: To attend ...

CHAIRPERSON: Hm.

10 **MR PETER STEPHEN VOLMINK:** Their meetings ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And to – I would imagine that if there were procurement process related issues ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: They would look to the Group Chief Supply Chain Officer to say ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Is this correct or not correct.

20 **CHAIRPERSON:** *Ja.* So - so they would have at the meeting available to them such a person?

MR PETER STEPHEN VOLMINK: Correct Chair.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Whether that person as present when these matters were discussed ...

CHAIRPERSON: You do not know?

MR PETER STEPHEN VOLMINK: I cannot say ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: But usually ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: The Group Chief Supply Chair Officer would be present ...

CHAIRPERSON: Would attend, yes.

MR PETER STEPHEN VOLMINK: At - at these discussions.

CHAIRPERSON: Would attend, okay thank you.

10 **ADV PHILLIP MOKOENA SC:** Can you now move on to deal with the McKinsey confinements?

MR PETER STEPHEN VOLMINK: Chair I – with regards the McKinsey transactions I've also been asked to comment on the grounds of the confinement to McKinsey I make the point in paragraph 118 that over a three year period 2012 to 2018 there were at least eight contracts that were awarded to McKinsey consulting for various consultancy work.

ADV PHILLIP MOKOENA SC: And this all eight were on confinements?

20 **MR PETER STEPHEN VOLMINK:** All eight followed a confined tender process and I – a summary is contained in the bundle in the Annexures but on the next page Chair, on page 55 paragraph 1251 to 1258 I summarised these confinements.

ADV PHILLIP MOKOENA SC: And what is the value – the total value of these confinements?

MR PETER STEPHEN VOLMINK: Chair the combined value of these various confinements came to about 1.6billion and with some amendments and increases to scope of work and value to about 2.1billion.

ADV PHILLIP MOKOENA SC: All that did not go out on tender?

MR PETER STEPHEN VOLMINK: It did not go out on open tender, it was awarded by of a confined tender process.

ADV PHILLIP MOKOENA SC: Yes now from paragraph 120 you express certain views about the justifications that were contained in the
10 confinement, could you please take us through them?

MR PETER STEPHEN VOLMINK: Chair I highlight various views which I have of the confinement starting with the entrenching of monopolies.

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: And I say that because in the PPM which is our manual of how these things are to be done it, in fact, cautions that because confinement is a departure from an open tender process it must be dealt with, with great “circumspection” and it warns – just lower down in that paragraph I say that the PPM also warns that
20 the misuse of confinement has the potential to entrench monopolies and as such is at odds with the imperatives with the new growth path which was one of the flagship government policies at the time. I make the point, Chair, in paragraph 122 that our procurement procedures required our delegated authorities to be vigilant against the creation of monopolies and at face value any company who has received work by

way of a confined tender process over a two year period with eight awards being made totalling 1.6billion, on the face of it, that seemed to create a monopolistic situation. What I also highlighted is that there was some awareness even on the part of the Group Chief Executive about the dangers of monopolies so when certain of these confinements were brought forward – I deal with this in paragraph 123 there is a submission that served before the Acquisition Council at one point and it contained the following paragraph, which you will find in italics towards the end of paragraph 123 and it says,

10 “during post-tender negotiations the GCE raised a concern that Transnet had been awarding business excessively to McKinsey and Company and as a result this will expose Transnet to insurmountable risks should any unsavoury circumstances occur”,

And at that point a decision was made to award part of the business to Deloitte’s, but even that ended up in being cancelled and the award was made to McKinsey. So I think, in essence, despite the earlier concerns and awareness that we could be dealing with a monopolistic situation the award proceeded, nevertheless on all of these things.

20 **ADV PHILLIP MOKOENA SC:** Yes take us through the grounds of confinement as you discuss in paragraph 1.5.

MR PETER STEPHEN VOLMINK: Chair in 1. – sorry in 125, I just again quote what the – our internal grounds are and I say that these confinements relied on two grounds, urgency firstly, I mention that as ground A) in paragraph 126 and ground D) which is that services are

highly specialised and largely identical to work previously performed and I just want to engage for a few moments on both of those grounds, whether they were justified in the context of the McKinsey transactions. Under urgency Chair, it is stated that the ground for confinements are urgent based on certain revenue related risks. It was stated that EBITDAR is at risk and there's a need to deliver on MDS, the Market Demands Strategy which was a flagship programme of Transnet at time and it states that if we don't get these services we could place the whole MDS at risk.

10 Now as I testified yesterday, the grounds for urgency is that it must be a genuine unforeseeable urgency and I say in my statement that the PPM contemplates that the situation that gave rise to the urgency should not be anticipated and should therefore be genuinely unexpected and I question whether the revenue risks that were highlighted were genuinely unexpected. A revenue risk is not something which Transnet would realise now, one sees declines in volumes and declines in revenue usually over a period of time and I certainly don't think that, that was unforeseeable. On the second ground which relates to the fact that the services from Mckinsey are

20 highly specialised and largely identical to work which they previously did. I say the following in paragraph 130 of my statement Chair, I say that, "all the confinement memos justified the confinements to Mckinsey on the grounds that it would result in wasted time and money. It was stated that a new service provider would have to acquaint itself with Transnet's pricing strategies, capital programme, overall MDS, whereas

McKinsey already had that knowledge” and ground D) does make allowance for a situation where I can confine to someone on the grounds that it’s a highly specialised service and I just want a bit more from that person based on what they have done before. We, in Transnet we refer to it sometimes as the school fees, the school fees clause. We say we have paid the school fees of this consultant he has come to learn all of our shortcomings, our difficulties, our systems and we want him to do an extra bit of work but if we have to go out on tender, I must pay the school fees now of another person whose having
10 to re-learn all of these difficulties.

So in an appropriate case, I think there is justification for such awards, in fact I think the first few McKinsey transactions – the first two or three, I was – I supported that at the time, I thought there was a justification for it based on this school fees clause but what we have here Chair is that it is now said that McKinsey has all of – they’ve got – they’re proprietary iron or demand and supply model and they’ve got proven toolkits for negotiation and the like and the point...(intervention).

CHAIRPERSON: I guess that since we’re looking – we’re talking about
20 quite a high number of contracts that were awarded to McKinsey, I think your statement says about eight.

MR PETER STEPHEN VOLMINK: Correct.

CHAIRPERSON: I guess that you might not have just paid, you know, the school fees, you must have taken them to university as well so it had to take long.

MR PETER STEPHEN VOLMINK: We could have paid for many universities Mr Chair.

ADV PHILLIP MOKOENA SC: On that university note, I see it's quarter past eleven.

CHAIRPERSON: Okay we'll take the tea adjournment and resume at half past eleven, we're adjourned.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay let us proceed.

10 **ADV PHILLIP MOKOENA SC:** Thank you Chair.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Mr Volmink just before the tea adjournment you were still taking the Chair in relation to paragraph 131 of your statement please continue and summarise what you are saying there?

MR PETER STEPHEN VOLMINK: That is correct. Thank you Chair. The point that I was addressing before tea relates to the second ground for confinement where it was said that the services are highly specialised and only obtainable from Gijima. What I say in paragraph
20 131 is where the PPM...

CHAIRPERSON: Did you – did you say from Gijima?

ADV PHILLIP MOKOENA SC: Not Gijima.

MR PETER STEPHEN VOLMINK: Sorry you asked?

CHAIRPERSON: We long past Gijima?

ADV PHILLIP MOKOENA SC: You mentioned Gijima.

MR PETER STEPHEN VOLMINK: Oh.

CHAIRPERSON: We long past Gijima.

MR PETER STEPHEN VOLMINK: Sorry my – my apologies Chair.

What I – what I...

CHAIRPERSON: China South and Mutsui, Mutsui.

MR PETER STEPHEN VOLMINK: Yes I think we had also past...

CHAIRPERSON: That is where we are.

MR PETER STEPHEN VOLMINK: Past there.

CHAIRPERSON: Oh we are past that as well.

10 **MR PETER STEPHEN VOLMINK:** I think we are now with McKinsey.

CHAIRPERSON: Oh ja.

MR PETER STEPHEN VOLMINK: I think I meant to say McKinsey.

CHAIRPERSON: Oh we are at McKinsey ja. Okay.

MR PETER STEPHEN VOLMINK: The point that I wanted to make is that where this ground is dealt with in the PPM it says that when this ground D is relied upon proper consideration must be given to the public interest as well as Transnet's interest. In other words it conveys the notion that it is not sufficient for Transnet officials to consider the fact that the services are highly specialised and can only be obtained
20 from McKinsey. I make the point that there is an overwhelming public interest in open, fair, competitive tendering processes and the avoidance of monopolistic situations. And had that requirement of the public interest being taken into consideration as well when that ground D was considered I think it would have pointed us away from repetitive confinements to McKinsey when the public interest in fact required

something else.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And there can in my view Chair be no distinction between the public interest and Transnet's interest as a public body. Chair I then deal with another concern which I picked up and that is that in a number of instances payments were made to McKinsey even before the tenders were awarded. So the tender is still underway and payments are being made. And I deal with that in paragraph 132.

10 **ADV PHILLIP MOKOENA SC**: Yes. May I then take you to Exhibit BB2.1D for David?

MR PETER STEPHEN VOLMINK: Yes. And if you may please go to page 1342.

MR PETER STEPHEN VOLMINK: Yes.

ADV PHILLIP MOKOENA SC: In order to substantiate what you are saying in paragraph 132 you then place reliance on a number of emails starting from page 1342 onwards. Can you please take us through the emails?

MR PETER STEPHEN VOLMINK: Gladly Chair.

20 **ADV PHILLIP MOKOENA SC**: You can follow the chronology that suits you know the version.

MR PETER STEPHEN VOLMINK: Chair perhaps just for purposes of chronology it may be better to start with the first email which you will find further down in the annexure.

CHAIRPERSON: I am sorry. I am on BB2.1D, is that the wrong lever

arch file?

ADV PHILLIP MOKOENA SC: That is the right one.

CHAIRPERSON: That is the right one?

ADV PHILLIP MOKOENA SC: Yes. On page

CHAIRPERSON: Page 1

ADV PHILLIP MOKOENA SC: 1342.

CHAIRPERSON: Oh.

ADV PHILLIP MOKOENA SC: 1342.

CHAIRPERSON: I think I was on 1242. Yes.

10 **MR PETER STEPHEN VOLMINK:** Chair if we can start on page 1344.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: It is an email written by the then procurement manager Cindy Felix to Mr Edward Thomas

CHAIRPERSON: The one at the bottom?

MR PETER STEPHEN VOLMINK: That is correct Chair.

CHAIRPERSON: Ja.

MR PETER STEPHEN VOLMINK: Right at the bottom. And it is dated the 11 July 2014. And it says:

20 “Dear Edward, I refer to your text message received this morning where you have instructed us to create purchase orders for payments to be made to McKinsey where no contracts exist. As the P to P that is Procure to Pay business process owner for TCC she is now describing herself please be advised that I require written permission via email from you

as the acting Group Chief Supply Chain Officer to request my team to create purchase orders as this is a deviation in the P to P process and effectively our supply chain policy and procurement procedures which is based on the regulatory statutes we are bound by as a state owned company. It is my understanding that the payment requests is from Business and it is being approved as duly payable by the Group Chief Financial Officer Anoj Singh as the
10 respective delegated authority for Transnet and custodian of these transactions.”

She continues:

“We assume that the applicable risks in making such payments have been considered before release of these respective requisitions.”

And she then lists these various transactions where payment is supposed to be made. She says:

“The tenders according to you affected include the following:”

20 She refers to:

“The coal breakthrough of 2 metric tonnes”

That is one of the confinements to McKinsey. And she says – she is now getting a status update – she says:

“No evaluation is in progress. Business is not responding and the business owners wanted – noted

that business does not agree to this request.”

In essence she is saying there is no evaluation has happened yet but we must pay the service provider. She mentions the next one relating to the renegotiation of the Kumba iron ore contract also one of the confinements. She again says:

“No evaluation in progress Business not responding and Business owner wanted to...”

I think she pretty much the same status. Regarding the third confinement regarding the manganese execution initiative she again

10 says:

“It is currently in evaluation stage.”

The fourth confinement. NMPPD Risking and Acceleration currently in evaluation stage and Capital Optimisation which is the fifth one she says:

“It is only issued on 10 July and we only received supply chain management sign off this week.”

And she concludes by saying:

“Kindly be advised that we do not and she underlines do not recommend that this be paid.”

20 And she puts it in bold.

“Until such time as these contracts are concluded as the scale of the risk is significant in relation to the payments being made to service providers who knowingly took on the risk of doing work without a proper tender process being completed.”

There are other paragraphs which follow but I think that is ...

ADV PHILLIP MOKOENA SC: That captures the essence.

MR PETER STEPHEN VOLMINK: That captures the essence of what she was saying which in my view captures the internal controls absolutely correctly.

ADV PHILLIP MOKOENA SC: And then what happened after she have now dispatched that email?

MR PETER STEPHEN VOLMINK: Well then Chair we have another email from Mr Edward Thomas now in response to the email from Cindy

10 Felix and the contents you will find on page 1344 and he says:

“Dear Cindy firstly a contractual obligation has been created once the confinement process was approved.

A letter was issued to McKinsey whereby Transnet requested them to commence work while the RFP was issued and they were to respond to the RFP indicating that should Transnet not conclude the procurement event after the RFP was completed Transnet commits to pay for work delivered until that point. Thus a contract is in place thus no

20 condonation is required at all for any payment that is to be made thus there are no risks regarding this payment that can be validly made. The fact that Transnet will be negotiating price further through the RFP process will be taken into account in future payments to be made.”

And in essence he is saying that as far as he is concerned a contract exists and payments can be made against that contract.

ADV PHILLIP MOKOENA SC: Despite that analysis that really showed that the process was incoherent at that stage and there was no contracts in place at that stage?

MR PETER STEPHEN VOLMINK: That is correct Chair. With respect I think the contents of this second email – the contents are patently incorrect. A confinement when one gets approval to confine

CHAIRPERSON: It does not create a contract?

10 **MR PETER STEPHEN VOLMINK:** It does not create a contract at all.

CHAIRPERSON: And everybody should know that.

MR PETER STEPHEN VOLMINK: I would imagine.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And all it does is to say you have permission not to issue this RFP

CHAIRPERSON: For open tenders.

MR PETER STEPHEN VOLMINK: For open tender

CHAIRPERSON: Hm.

20 **MR PETER STEPHEN VOLMINK:** But you can now issue the RFP to this one or two or three or however many you have confined to and then what follows

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Is a process which mirrors the open tender process.

CHAIRPERSON: Yes but confined to those

MR PETER STEPHEN VOLMINK: But confined to those two or one or however many.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And the contract gets concluded at the end of that process.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: It is unheard of that one can conclude a contract first and then

CHAIRPERSON: Evaluate.

10 **MR PETER STEPHEN VOLMINK:** Evaluate later.

CHAIRPERSON: The supplier later.

MR PETER STEPHEN VOLMINK: I have never heard of such.

CHAIRPERSON: I mean what – what point would – would it serve to evaluate whether the supplier is the right kind of supplier if you have already concluded a contract?

MR PETER STEPHEN VOLMINK: Well precisely Chair because even if it is a confined – a confined tender

CHAIRPERSON: Hm.

20 **MR PETER STEPHEN VOLMINK:** It must go through a rigorous evaluation process.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: If that bidder does not make any of thresholds let us say for functionality or local content that bidder is excluded, the bidder falls away. But if I already have contract in place I really put the cart before the horse and I think that is exactly what

happened in this instance.

ADV PHILLIP MOKOENA SC: An email that you want us to – that you want to complete with?

MR PETER STEPHEN VOLMINK: It – I think that is then just a follow up email where the staff is told that look Eddie has now informed us that there is no breach or deviation and payment must now be made. I think that the staff felt that they now had no alternative.

CHAIRPERSON: Ja they had made their points and.

MR PETER STEPHEN VOLMINK: They have made their point, they
10 have stated their position.

CHAIRPERSON: And – hm.

MR PETER STEPHEN VOLMINK: But someone higher up in the food chain had instructed that the payment must be made and I think the impression that one gets is under protest the payments then flow.

ADV PHILLIP MOKOENA SC: Can you take us from page 60 paragraph 133 onwards?

CHAIRPERSON: That is back to the statement?

ADV PHILLIP MOKOENA SC: Yes back to the statement Mr Chair.

MR PETER STEPHEN VOLMINK: Yes. Chair I then just I make the
20 point there that there should have been no confusion about this to begin with because in our procurement rules in the PPM of the 2013 version which applied at the time there was a provision which I quote on – in paragraph 134 where it says:

“No employee shall anticipate the approval of acceptance of bids. Therefore no employee may

enter into contracts verbally or in writing or place any orders before the prescribed adjudication process has been performed. An authority has been duly granted by a manager with appropriate DOA.”

So that rule was always there and there is a further provision that says:

“Even if you have a confined tender it says those tenders will “close at the relevant acquisition council”.

What that simply means as I have explained before is a tender gets
10 issued. There must still be a closing date. There must – and all the normal processes of adjudication then follows.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: And that is what I deal with on – in paragraph 134 yes.

ADV PHILLIP MOKOENA SC: And 135?

MR PETER STEPHEN VOLMINK: In paragraph 135 I say that on the 9
April 2014 well before these RFP’s were issued the Group Chief
Financial Officer who was Mr Anoj Singh at the time wrote to both
McKinsey and Regiments and requested them to “mobilise a McKinsey
20 led consortium” he says to have initial discussions with our teas. But
we know now from what we have seen it was not just discussions. They
were mobilised to do actual work and – and I think that for me is a
fundamental breach of process. As a result of this Chair we actually
felt the need to issue a further directive to Business. And I deal with
that in paragraph 136 the directive itself I think is attached as PV46

which...

ADV PHILLIP MOKOENA SC: Chair it is on page 1353.

MR PETER STEPHEN VOLMINK: And I do not propose to read the entire directive Chair save to say that this directive explained to Business that a confinement – a confined tender process is still a tender process and that no one should jump the gun. That everyone should wait until the tender process is completed be it a confined tender process or an open tender process. There should be no engagements with a bidder until that process has been completed and
10 only after the relevant delegated body has made the award only then can one engage and issue letters of intent and contracts can be concluded etcetera. And that is in essence the contents of the directive that was issued.

CHAIRPERSON: Was that directive prompted by knowledge of the response to Ms Cindy Felix.

MR PETER STEPHEN VOLMINK: Ja Felix.

CHAIRPERSON: What was her surname?

MR PETER STEPHEN VOLMINK: Felix.

CHAIRPERSON: Felix, Felix.

20 **MR PETER STEPHEN VOLMINK:** Yes.

CHAIRPERSON: To Ms Felix email.

MR PETER STEPHEN VOLMINK: Yes it was Chair.

CHAIRPERSON: It was prompted by that?

MR PETER STEPHEN VOLMINK: Yes it was she raised not only Cindy but other people in the supply chain community came to Governance

and said you must address this issue because we are being asked to make payments while tender processes are still underway. And that is when we issued this to the entire organisation.

CHAIRPERSON: And do you know whether Mr Anoj Singh would have seen the directive quite soon after it was circulated or issued or is that something you do not know?

MR PETER STEPHEN VOLMINK: Chair it is addressed firstly to all EXCO and extended EXCO members of which Mr Anoj Singh was a member.

10 **CHAIRPERSON**: Was a member. Yes so...

MR PETER STEPHEN VOLMINK: But he would have.

CHAIRPERSON: Yes so – so he – it was to be expected that he would see it?

MR PETER STEPHEN VOLMINK: That he would have seen it.

CHAIRPERSON: Ja. Okay. But after there was no change of attitude in the – on his part after the issuing of this directive in relation to payments to this entity?

MR PETER STEPHEN VOLMINK: I am not aware that there has been any.

20 **CHAIRPERSON**: You are not aware.

MR PETER STEPHEN VOLMINK: Change.

CHAIRPERSON: Okay, okay. Alright.

ADV PHILLIP MOKOENA SC: You conclude on that topic Mr Volmink on page 137.

MR PETER STEPHEN VOLMINK: In paragraph 137.

ADV PHILLIP MOKOENA SC: Paragraph 137 yes.

MR PETER STEPHEN VOLMINK: I simply say Chair that it was most irregular to engage McKinsey to commence work before the tender process and I say that it creates the impression that the confinements to McKinsey amounted to little more than an Ex post facto exercise to justify the award of Business that had already occurred. Why go through the pretence of a confined tender process when in fact the teams are already on the ground doing the work? And it just creates the impression in my mind that this was Ex post facto justification for
10 what had already happened.

ADV PHILLIP MOKOENA SC: And from paragraph 138 you addressing a new topic. Take us through it?

MR PETER STEPHEN VOLMINK: This is now still on the McKinsey contracts. I am raising a further concern that I have with the contracts Chair. And it relates to what we refer to as parcelling of transactions.

ADV PHILLIP MOKOENA SC: What does that – what does that mean?

MR PETER STEPHEN VOLMINK: Well in essence what it means is that you cannot break up a transaction into smaller value components to bring it to a lower level of delegation when in fact if you take the
20 cumulative value it should go to a higher level of delegation. It is even dealt with I think in our code of ethics where it is stated that it is considered an ethical breach to unbundle a transaction into smaller components in order to avoid higher levels of authority and scrutiny. Now I raise that in the context of the McKinsey contracts because I say that over a period of four days and that is from the 31 March 2014 to

the 3 April 2014 when I reviewed these confinements I noticed that the former GCE Mr Brian Molefe approved four confinements with a combined value of R619 million. Now Mr Molefe had delegation to approve confinements but only up to R250 million. Each one of these four falls under 250. So the first one is 130 million. The second one was 239, the third one was 150 million and the fourth confinement was 100 million. So viewed on their own they would have fell within his delegated authority. But viewed cumulatively it should have been referred to a higher level which is the board acquisition and disposal committee.

CHAIRPERSON: Was it the same transaction?

MR PETER STEPHEN VOLMINK: Chair?

CHAIRPERSON: Was it the same transaction these four confinements? Did they relate to the same job?

MR PETER STEPHEN VOLMINK: They relate to the award of different aspects of what is broadly the McKinsey confinement.

CHAIRPERSON: Okay.

MR PETER STEPHEN VOLMINK: So the coal contract. The coal contract to McKinsey was to appoint McKinsey to help us to improve our efficiencies on the coal. But the iron ore contract which is the second one was also geared at enhancing efficiencies, increasing revenue. The third one which was the manganese contract had the same essential characteristics it was about how we can get McKinsey to help us to improve on our productivity and so on and the NNPP contract. So they – they in essence relate to the same scope of work.

CHAIRPERSON: And they were given over

MR PETER STEPHEN VOLMINK: Four days.

CHAIRPERSON: A few days.

MR PETER STEPHEN VOLMINK: A four day period.

CHAIRPERSON: A four day period.

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: So it is over a very short period and relates to effectively the same project?

MR PETER STEPHEN VOLMINK: Essentially the – exactly.

10 **CHAIRPERSON**: Same project.

MR PETER STEPHEN VOLMINK: And ...

ADV PHILLIP MOKOENA SC: And to the same entity.

MR PETER STEPHEN VOLMINK: And to the same entity.

CHAIRPERSON: And to the same entity.

MR PETER STEPHEN VOLMINK: Yes. And it seemed to me Chair at face value that this amounted to an unbundling of these contracts to fall within the delegated authority of the GCE.

20 **CHAIRPERSON**: Well we will see in the end whether the finding will be that that is what happened but on the face of it it does seem that these factors that you have mentioned could support what you are saying. I mean the manganese one and the NMPP one were done on the same day.

MR PETER STEPHEN VOLMINK: Ja.

CHAIRPERSON: Is that right?

MR PETER STEPHEN VOLMINK: That is correct.

CHAIRPERSON: 3 April 2014 why were they done separately?

MR PETER STEPHEN VOLMINK: Ja.

CHAIRPERSON: And then the iron ore one had been done two days earlier.

MR PETER STEPHEN VOLMINK: Two days earlier.

CHAIRPERSON: And the coal one had been done one day earlier than the iron ore one.

MR PETER STEPHEN VOLMINK: One day earlier. That is my concern.

CHAIRPERSON: So those factors may well support what your
10 proposition may be.

MR PETER STEPHEN VOLMINK: Yes Chair. Um and I conclude that point over the page where I just say that the rules around parcelling in Transnet states the following and I am on page 63 of my statement.

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: Paragraph 141.

20 “The rules around parcelling says that when the full scope of work is known at a point in time requirements may not be deliberately split into parts or items of lesser value in order to keep the transaction within a particular delegation of authority level or to keep it below a particular threshold or a person with higher levels of delegation. This is considered parcelling and will be regarded in a serious light as it amounts to non-compliance with procurement procedures.”

So I think the rules around that were clearly stated in the company at the time.

ADV PHILLIP MOKOENA SC: Yes. And yesterday you did educate us about what you termed the confidential confinements and you had an exchange with the Chair whether – does that conform with the principles of the [indistinct] Section 217 of the Constitution and whether can one justify that within the principles of open competitive transparent tender system?

MR PETER STEPHEN VOLMINK: Yes.

10 **ADV PHILLIP MOKOENA SC:** Can you tell us then what did this also entail in relation to McKinsey?

MR PETER STEPHEN VOLMINK: In relation to McKinsey Chair I indicated yesterday that a number of these confinements were classified as confidential. And I will come back to that aspect in a moment but first let me say this that because confinements is a process that is – that has great potential for abuse where grounds are relied upon that are actually – that should never justify confinement. Various safeguards and levels of revue were built into the process and I mention that it has to start with the operating division. The end user
20 department has to motivate for the confinement. It then has to go to the operation division CPO, the acquisition council and the Chief Executive of that operating division and then it comes to Group where it again has to undergo various levels of revue from the Group Chief Supply Chain Officer and there was even a practice although not uniformly observed that Governance had to review these as well. And I

said yesterday that when a confinement was classified as confidential none of the safeguards applied. So it sailed past all these reviewing bodies and would have gone straight to the GCE. And...

CHAIRPERSON: Were all confidential confinements dealt with by one functionary say the GCEO or the BADC or were they dealt with by different bodies?

MR PETER STEPHEN VOLMINK: It would depend on the value.

CHAIRPERSON: Oh okay.

MR PETER STEPHEN VOLMINK: So...

10 **CHAIRPERSON**: So that principle still applied?

MR PETER STEPHEN VOLMINK: That principle still applied.

CHAIRPERSON: Okay.

MR PETER STEPHEN VOLMINK: But it would not go through any of the

CHAIRPERSON: Ja.

MR PETER STEPHEN VOLMINK: Reviewing bodies.

CHAIRPERSON: Yes. A confidential confinement in effect meant that only one functionary person or body would decide it and there would be no multiple stages of involvement by different people?

20 **MR PETER STEPHEN VOLMINK**: That is precisely the case.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: So it would come from the author of the document ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: And be received by the approving

authority ...

CHAIRPERSON: Authority.

MR PETER STEPHEN VOLMINK: With no intervening ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Levels of scrutiny.

CHAIRPERSON: *Ja*, okay.

MR PETER STEPHEN VOLMINK: Chair I then state that on paragraph 149 I make the point that all of these levels of review are bypassed and then in paragraph 150 ...

10 **ADV PHILLIP MOKOENA SC:** On page 65.

MR PETER STEPHEN VOLMINK: On page 65 ...

ADV PHILLIP MOKOENA SC: Yes.

MR PETER STEPHEN VOLMINK: I say that:

“Secondly the confinement memos contain very little if anything that explains why these submissions were classified as confidential.”

I mean ...

20 **CHAIRPERSON:** The – you told me yesterday that the original source of this concept of confidential confinement came from delegated authority from the Board.

MR PETER STEPHEN VOLMINK: It was in the DOA framework, yes.

CHAIRPERSON: Yes. That is where came ...

MR PETER STEPHEN VOLMINK: *Ja*.

CHAIRPERSON: It came from originally and – you know – you had to put into a policy ...

MR PETER STEPHEN VOLMINK: (Intervenes).

CHAIRPERSON: And so on. I do not remember whether I asked this question yesterday but was it provided in that original delegated authority or was it – was there a provision that said under what circumstances a contract or job could be classified or could qualify as confidential – confinement could be regarded as confidential? You told us yesterday and today the grounds in terms of policy - the grounds for confinement. You may confine a tender if one of the following grounds exists.

10 **MR PETER STEPHEN VOLMINK:** *Ja.*

CHAIRPERSON: Whether – was there a similar thing that was put up by the Board when they came up for the first time with this concept of confine – confidential confinement?

MR PETER STEPHEN VOLMINK: Chair there were no guidelines contained in the DOA framework. I think there was simply a line that said when the – when it is confidential ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: It can be considered by the final approval authority without directing it to the lower levels of authority.

20 So there was in essence to answer your question there were no guidelines.

CHAIRPERSON: No guidelines or grounds that were given.

MR PETER STEPHEN VOLMINK: No, no.

CHAIRPERSON: And who was given the authority to declare or decide that a particular confinement would be a confidential one?

MR PETER STEPHEN VOLMINK: The origin – the originator ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Of the document ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Would for various reasons state why he thinks it is confidential.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: It would be taken to the final approval authority.

10 **CHAIRPERSON:** Hm.

MR PETER STEPHEN VOLMINK: Who then review it and if the approval authority agrees that it was confidential it would be signed off.

CHAIRPERSON: It is quite clear from what you – you explain that it meant it was not to be dealt with by different bodies and Committees and functionaries who otherwise would deal with it if it was not a – a confidential confinement. So – so in effect would it be correct that it was therefore to be taken as confidential between the originator – the author – and then the ...

MR PETER STEPHEN VOLMINK: And the (indistinct).

20 **CHAIRPERSON:** Approving body?

MR PETER STEPHEN VOLMINK: Exactly. That is how it would be understood.

CHAIRPERSON: It is – it is quite a strange thing in a – in a State Owned Entity. Somebody says there are certain contracts which will be regarded as confidential but we are not saying which ones – you know

– what are the ...

MR PETER STEPHEN VOLMINK: (Indistinct).

CHAIRPERSON: Criteria for confidentiality and if so and so classifies it as confidential it can come to us and then it does not have to go through other people and we will – we will then decide if we approve or not ...

MR PETER STEPHEN VOLMINK: *Ja.*

CHAIRPERSON: And then – and that could entail a lot of taxpayers money.

10 **MR PETER STEPHEN VOLMINK:** Well that is exactly the danger here Chair that ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: As we have seen in some of these instances that I am talking about ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: This concern is not an abstract ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Academic concern. It is rooted in the real experiences of the organisation.

20 **CHAIRPERSON:** Hm.

MR PETER STEPHEN VOLMINK: Thankfully the concept of confidential confinements ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Has been removed ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: By the current Board but it created huge risk for the organisation at the time.

CHAIRPERSON: Did you ever get to know who exactly came up with this concept or is there something that you really do not know apart from that it came from the Board?

MR PETER STEPHEN VOLMINK: I honestly cannot – cannot say this individual or that individual and (intervenes).

CHAIRPERSON: *Ja*, okay but it came from the Board, *ja*.

MR PETER STEPHEN VOLMINK: But we know that it came – it
10 originated from the delegation (intervenes).

CHAIRPERSON: Originated from the Board, *ja* but other than - the confinement is what was considered to be confidential but once the tender had been awarded the tender itself was not confidential. Is that right?

MR PETER STEPHEN VOLMINK: Yes and I think that in itself is an oddity ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Because it is confidential up until the confinement is approved ...

20 **CHAIRPERSON:** Yes.

MR PETER STEPHEN VOLMINK: But then you must still issue the RFP to that bidder.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: It must still be received. It must still ...

CHAIRPERSON: And at that stage it is not – it is not confidential.

MR PETER STEPHEN VOLMINK: And that – that part is not - is not confidential which is – which is a further ...

CHAIRPERSON: It is very strange.

MR PETER STEPHEN VOLMINK: It is very strange. It is very strange, *ja*.

CHAIRPERSON: So it – I wonder whether it was designed to avoid a situation where lower management and other bodies would say no this is not confidential and it would be difficult for the approving authority to
10 keep on overruling them because they may have wanted to – to treat those as confidential but management saw nothing suggesting ...

MR PETER STEPHEN VOLMINK: Confidential about it.

CHAIRPERSON: *Ja*.

MR PETER STEPHEN VOLMINK: Well there is a provision that directs the lower level bodies ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: As to what they must consider when approving a confinement and it does say there must be a robust review ...

20 **CHAIRPERSON**: Hm.

MR PETER STEPHEN VOLMINK: Of the grounds of confinement and the motivation for the confinement ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Before it is taken to ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: The final approval body.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: The intention Chair is that poorly justified ...

CHAIRPERSON: Motivation.

MR PETER STEPHEN VOLMINK: Or unjustified...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: Motivations either for confinement or whatever the case maybe ...

10 **CHAIRPERSON:** Hm.

MR PETER STEPHEN VOLMINK: Whatever the ground of confinement may be...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And if it is poorly motivated ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: It would be dealt with at that lower level of review.

CHAIRPERSON: Hm.

20 **MR PETER STEPHEN VOLMINK:** So that we do not have to burden the final ...

CHAIRPERSON: Hm, body.

MR PETER STEPHEN VOLMINK: Approval body ...

CHAIRPERSON: *Ja.*

MR PETER STEPHEN VOLMINK: With a poorly motivated ...

CHAIRPERSON: Poorly motivated ...

MR PETER STEPHEN VOLMINK: Submission.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: That was the underlying rationale but if you took those reviewing bodies out of the equation ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Well then it just goes straight through.

CHAIRPERSON: So – so it was a way of ensuring that certain confinement requests were not subjected to the normal scrutiny that the policies and procedures of the company required requests for
10 confinements to be subjected to?

MR PETER STEPHEN VOLMINK: Yes Chair.

CHAIRPERSON: That is what it was about?

MR PETER STEPHEN VOLMINK: That – that - it seemed to me that was the underlying motivation.

CHAIRPERSON: And it was not about keeping secret the amounts relating to the tender because once the confinement had been approved there was nothing secret about the tender. The tender would be dealt with as a confined tender but nothing confidential at that stage.

20 **MR PETER STEPHEN VOLMINK:** Covering the normal ...

CHAIRPERSON: Normal procedures?

MR PETER STEPHEN VOLMINK: Yes, yes. That is correct.

CHAIRPERSON: So – so it seems that the idea was to ensure that such requests for – certain requests for confinement of certain tenders were taken out the normal scrutiny of mechanisms and bodies within

the company?

MR PETER STEPHEN VOLMINK: Correct.

CHAIRPERSON: Okay.

MR PETER STEPHEN VOLMINK: Correct.

CHAIRPERSON: Thank you.

MR PETER STEPHEN VOLMINK: And Chair the ...

CHAIRPERSON: Mr – Mr Mokoena.

ADV PHILLIP MOKOENA SC: It is a strange concept Chair very complicated and complex.

10 **CHAIRPERSON**: Yes.

ADV PHILLIP MOKOENA SC: Firstly a confinement in its own means that it is not open ...

CHAIRPERSON: Hm.

ADV PHILLIP MOKOENA SC: It is not an open competitive tender. Secondly it is confidential.

CHAIRPERSON: *Ja*, confidential.

MR PETER STEPHEN VOLMINK: I – I – *ja*, so it is almost a – you know- a deviation within a deviation.

CHAIRPERSON: Hm.

20 **MR PETER STEPHEN VOLMINK**: Confinement is a deviation.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Why still have a ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: A confidential confinement and the point that I was making is that apart from this anomaly of the principle

if one looks at the substance of the motivations there is nothing that strikes me as even remotely confidential about what is contained in these memoranda. For instance it talks – it says that there are declining revenues and declining volumes and (indistinct) and a risk and that McKinsey is ideally placed to help us to implement various projects but why they could not have followed a normal confinement process – I mean that – I think on any reasonable interpretation and reading of these confinement memos it certainly does not appear that there was anything not even an iota of information is contained that would convince a reasonable reader that there was grounds for confidential – confidentiality.

CHAIRPERSON: They could have simply said certain contracts – certain tenders that require confinement will not go through the normal route before reaching the approving authority. They will go from the originator straight to the – to the approving authority. In effect they could have said that. Is it not because there was nothing – if there was nothing confidential about these things then all – all they wanted to achieve is simply that from the originator it should come straight to the approving authority. It should not be subjected to ...

20 **MR PETER STEPHEN VOLMINK:** Yes.

CHAIRPERSON: Scrutiny by other people.

MR PETER STEPHEN VOLMINK: Chair they could have said that but the difficulty would have been that the same risk still exists where it goes from the originator to the final approver whether you call it confidential or not without that critical middle layer of review.

CHAIRPERSON: No, no, I accept that. We are on the same page. I am simply saying if one accepts that there was – there was no basis for classifying them as confidential ...

MR PETER STEPHEN VOLMINK: *Ja.*

CHAIRPERSON: And that the whole point was that these – these requests for confinement should not be subjected to normal scrutiny by various bodies because they wanted to only certain people or certain bodies to approve them. Then all they needed to do is to say certain requests for confinement will come straight to us or to the GCEO or to
10 the B ...

MR PETER STEPHEN VOLMINK: BADC.

CHAIRPERSON: BADC.

MR PETER STEPHEN VOLMINK: DC.

CHAIRPERSON: BADC. Then we would have had the same thing.

MR PETER STEPHEN VOLMINK: *Ja.*

CHAIRPERSON: Namely there is no scrutiny ...

MR PETER STEPHEN VOLMINK: *Ja.*

CHAIRPERSON: And they decide themselves.

MR PETER STEPHEN VOLMINK: Yes.

20 **CHAIRPERSON:** *Ja.*

ADV PHILLIP MOKOENA SC: You conclude Mr Volmink on this concern that you are raising how McKinsey was treated throughout. You do so in paragraphs 151 and 152.

MR PETER STEPHEN VOLMINK: Yes Chair I – I then just conclude that portion by saying that the added difficulty with using confidentiality

is that it was sometimes quoted as a ground for confinement itself whereas our rules on confinement only recognise four grounds – urgency, sole supplier, standardisation and what I refer to earlier as the school fees clause where there is highly specialised things and – those are the four grounds of confinement. Confidentiality can be cited as a reason not to take it through the reviewing process but we see that sometimes confidentiality is even quoted as a further ground for confinement which I – I think was incorrect. Chair I am ...

CHAIRPERSON: I am sorry. You said that you had to incorporate his
10 new procedure or requirement of confidentiality into the policy?

MR PETER STEPHEN VOLMINK: Yes.

CHAIRPERSON: After the Board had put it into a delegated – delegation. When you put it into your policy documents what did you put as the grounds on which it could be initiated. In other words what did – what do you do? Did you put in some grounds or did you just do what the Board had done.

MR PETER STEPHEN VOLMINK: Well Chair we had some debates
20 about - about that and if memory serves me correctly the debate was resolved that on the basis that the grounds as stated in the delegation of authority would be incorporated into the policy. There was some concern – if memory services me correctly – about over regulating or over prescribing what may be considered as confidential grounds or no confidential grounds. So it was – it was left somewhat open even in the past.

CHAIRPERSON: But you said in the delegated authority there were no

grounds.

MR PETER STEPHEN VOLMINK: Yes. So the only ground...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Is confidential – is that if it is confidential ...

CHAIRPERSON: *Ja*. No there cannot be a ground.

MR PETER STEPHEN VOLMINK: *Ja*. So ...

CHAIRPERSON: *Ja*.

MR PETER STEPHEN VOLMINK: So the ground ...

10 **CHAIRPERSON**: *Ja*.

MR PETER STEPHEN VOLMINK: For bypassing all of these delegated bodies ...

CHAIRPERSON: *Ja*.

MR PETER STEPHEN VOLMINK: Would be if some – if it is classified as a confidential ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Confinement.

CHAIRPERSON: *Ja*. So you just took what was (intervenes) authority?

MR PETER STEPHEN VOLMINK: I think in essence it was – it was ...

20 **CHAIRPERSON**: *Ja*.

MR PETER STEPHEN VOLMINK: Completed as such.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: And paragraph 152?

MR PETER STEPHEN VOLMINK: I think it is – I (intervenes).

ADV PHILLIP MOKOENA SC: (Intervenes).

MR PETER STEPHEN VOLMINK: The same point in 152.

ADV PHILLIP MOKOENA SC: You are dealing with a further concern which is the gap analysis. Can you explain it to the Chair and take us through what you sought to convey in relation to that concern?

MR PETER STEPHEN VOLMINK: Chair I point out in paragraph 153 and following under the heading “gap analysis” – I say that a National Treasury issued an instruction which would have been applicable to some of these McKinsey contracts and the instruction I have annexed as Annexure PV48 which you will find on page 1389 and what this
10 instruction says Chair is that a consultant may only be appointed after a proper business case has been done and a – what is referred to as a gap analysis – has been done to confirm that Transnet does not have the requisite skills or the resources in place to perform this work. In other words it must be confirmed that in the – there is no one among the 50 000 employees who work for Transnet that there is expertise of this nature and that – and there needs to be a proper motivation for that. There is a passing reference to that in some of the McKinsey confinements but no proper gap analysis was done to show – and that is a mandatory requirement. It is not nice to have. It says that the
20 organ of State must conduct such a gap analysis before it can proceed to appoint a consultant and I could not find evidence of such gap analysis.

ADV PHILLIP MOKOENA SC: Yes and you conclude your statement with the last concern that is the remuneration model.

MR PETER STEPHEN VOLMINK: That is correct Chair. The last

aspect which I deal with in my statement relates to the remuneration model that McKinsey sought to implement and the McKinsey contracts made provision for two kinds of fees Chair. The first is the so called fixed fee component. So they would say to do preparatory work or to do whatever there is - our fixed fee is that and then they would have what is referred to as a contingent fee component. This was usually related to McKinsey sharing a percentage of any increase in revenue which would come about as a result of their efforts. So if I take – let us say – the coal or the manganese contract if it could be established that
10 as a result of their interventions that revenue had increased by a certain amount there would be a predetermined percentage that would be allocated to them over and above the fixed fee that they had signed up for.

CHAIRPERSON: So it was like a performance bonus? If they – if they had done such a good job that there was an increase in revenue then they would get extra ...

MR PETER STEPHEN VOLMINK: Extra.

CHAIRPERSON: Extra payment?

MR PETER STEPHEN VOLMINK: *Ja.* I suppose one could regard it as
20 a performance bonus of – of sorts.

CHAIRPERSON: Okay.

ADV PHILLIP MOKOENA SC: And they were paid those contingency fees?

MR PETER STEPHEN VOLMINK: Yes. Now – now on the face of it Chair I was concerned that this contingent fee arrangement was not

aligned to National Treasury's instruction on cost containment which in fact there is an instruction that directs that fees for consultants will be subject to certain prescripts. You cannot – a consultant cannot charge you whatever and I think I may even have attached a copy of that - of that instruction.

ADV PHILLIP MOKOENA SC: It is page 1398 Chair. Would that be the one Mr Volmink?

MR PETER STEPHEN VOLMINK: 1398 if you just bear with me. I think it is a little bit earlier. Chair if you turn to page 1389 you will find a
10 copy of the cost containment instruction ...

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: And if you turn the page to page 1390 ...

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: And if you look at paragraph 4.2.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: It states the following:

“Consultants may only be remunerated at the rates
...”

20 And then it lists three categories.

“A, determined in the guideline for fees issued by
SICA.”

Which is a South African Institute of Chartered Accountants.

“B, set out in the guide on hourly fee rates for
consultants by the Department of Public Services

and Administration...”

These are called DPSA rates.

“...or prescribed by the body regulating the profession of the consultant.”

So these are regulated rates and a concern which we had at the time is that the – the contingent fee model did not align well with what seemed to be regulated rates.

CHAIRPERSON: Hm.

MR PETER STEPHEN VOLMINK: Chair the difficulty then – well let me
10 say that we then engaged with National Treasury on whether the use of contingency fees could be a basis for remunerating consultants and the Accountant General responded in a letter to Transnet dated 25 June 2014 and perhaps I should turn to it Chair. It is Annexure PV49 which is the last annexure in the – in my bundle and ...

ADV PHILLIP MOKOENA SC: Page 1398?

MR PETER STEPHEN VOLMINK: 1398.

CHAIRPERSON: Yes.

MR PETER STEPHEN VOLMINK: And he responds to various questions that we had posed to him and under the – in paragraph 7 under the
20 heading “Use of Consultants” the Accountant General quotes that paragraph 4.2 of the instruction which I have just read which says what the prescriptions are for remuneration and then Chair he says the – he said the following.

“The above mentioned documents merely provide the tariffs that PFMA compliant institutions may pay

consultants and these tariffs are not related to additional revenue or earnings – if any – that entities may realise or benefit from their appointment.”

And it seemed to open the door to the possibility of a contingency fee arrangement and I think on – on the basis of this letter Transnet proceeded to implement the contingency fee arrangement.

ADV PHILLIP MOKOENA SC: Yes. Now finally Mr Volmink you have dealt with a number of transactions. The Neotel Network Services, confinement of the CCTV, the award of the IT Data Service Contract to T-Systems, the 100 locomotives transaction to China South Rail and the McKinsey consulting the confinement that you have taken us so eloquently through. What do you make about these contracts? What do you make about the conduct giving rise to the issues that you have raised to – before the Chairperson? Could you ascribe this as sheer incompetence or lack of understanding of the applicable prescripts?

MR PETER STEPHEN VOLMINK: Chair I have sought to give a candid view on the compliance with prescripts that – that was followed and if the – if the rule that was no followed if it was an obscure highly complicated difficult to understand provision then I – I would be more inclined to think that there could be just innocent bungling but Chair if we look at the rules around how confinements are supposed to be done the principle that you cannot pay someone before you award a tender to them - all the other breaches that I have dealt with over the last two days Chair it is not deeply complex principles that were no followed and

it – it suggests in my view an – an element of either gross negligence or wilfulness in – in not following the transactions.

ADV PHILLIP MOKOENA SC: Chair that is – that concludes the questions for Mr Volmink.

CHAIRPERSON: No, thank you. Thank you very much Mr Volmink for coming forward to clarify the experiences that you found at Transnet with regard to these particular transactions and your understanding of the procurement prescripts applicable to Transnet during the times of these transactions and if a need arises you will be asked to come back,
10 thank you very much you are release.

MR PETER STEPHEN VOLMINK: Thank you Chair.

CHAIRPERSON: Thank you.

ADV PHILLIP MOKOENA SC: Thank you Chair, Mr Pretorius will address you.

ADV PAUL JOSEPH PRETORIUS SC: Chair the next witness for Transnet is Mr Mohomedy he won't give evidence today because we are adjourning early today.

CHAIRPERSON: Ja.

ADV PAUL JOSEPH PRETORIUS SC: And I understand that Monday as
20 well as Tuesday the Chair and others are otherwise engaged and that unless you decide otherwise Chair we will begin on Wednesday once more at 10am with Mr Mohammed, his evidence for Transnet.

CHAIRPERSON: Yes we will not sit on Monday and Tuesday we will resume on Wednesday. I was thinking that we should try, next week to start earlier than normal to try and – if we can recoup some of the time

that we will have lost. We might not be able to recoup all of it, do you – are you able to indicate whether there will be any difficulties from the legal team if we start early on Wednesday?

ADV PAUL JOSEPH PRETORIUS SC: Well there's two issues the availability of the witness and the evidence leader that can always be arranged.

CHAIRPERSON: Yes.

ADV PAUL JOSEPH PRETORIUS SC: The other, however, is that the legal team are involved in other tasks so it reduces that time but if the
10 programme permits, then certainly our preference would be for the normal hours but if your concern is to make up time, then we shall just have to start at 9.

CHAIRPERSON: Do we have an idea how long the next witness is likely to be on next week?

ADV PAUL JOSEPH PRETORIUS SC: Two days and I'm informed by Mr Mokoena that if we start at 10 on Wednesday and Thursday we will finish Mr Mohomady in two days.

CHAIRPERSON: In two days, okay maybe let's start at 10 o'clock on Wednesday if we need to change we'll announce. So on Wednesday we'll
20 start at 10.

ADV PAUL JOSEPH PRETORIUS SC: Thank you Chair.

CHAIRPERSON: Yes, we'll then adjourn for today, we adjourn.

INQUIRY ADJOURNS TO 15 MAY 2019