

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 36337/17

In the matter between:

**PASSENGER RAIL AGENCY OF  
SOUTH AFRICA**

Applicant

and

**DIRECTORATE FOR PRIORITY CRIMES  
INVESTIGATION**

First Respondent

**NATIONAL PROSECUTING AUTHORITY**

Second Respondent

**ORGANISATION UNDOING TAX ABUSE**

Intervening Party  
Second Applicant

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**INTERVENING PARTY'S FOUNDING AFFIDAVIT**

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I, the undersigned,

**STEFANIE FICK**

do hereby make oath and state:



1. I am an adult businesswoman. I am currently the Head of Legal Affairs at the Organisation Undoing Tax Abuse ("OUTA"), the intervening party. I am authorised to bring this application and depose to this affidavit.
2. The relief sought in this application relies in part on the facts placed before the Court by the applicant, PRASA. I am not an employee of PRASA or a member of its board of control and accordingly in a number of instances I refer to PRASA's affidavits and the annexures attached to the affidavits and information in the public domain for the relevant facts. I respectfully submit that the facts to which I refer are reliable and in the interests of justice the Court should have regard to those facts.
3. Save as aforesaid, the facts contained herein are, unless expressly stated or otherwise indicated by the context, within my personal knowledge, and are to the best of my belief, both true and correct.

#### **Introduction**

4. PRASA is a state institution and as such is subjected to periodic audits by the Auditor General. The Auditor General publishes financial management reports in which matters relating to the audit are set out. The Auditor General published such a report on or about 31 July 2015. In that report, the Auditor General dealt with matters concerning the financial year ending on 31 March 2015. A copy of the report is attached as annexure "FA1" to PRASA's founding affidavit.

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5. The Public Protector too has published a report, entitled, "Derailed". The report published the findings of an investigation into allegations of maladministration concerning financial mismanagement and tender irregularities. The report was prepared following the investigation of thirty seven complaints initially lodged by the South African Transport and Allied Workers Union and later pursued by the National Transport Movement. A copy of the report is attached as annexure "FA2" to PRASA's founding affidavit.
  
6. The content of the reports referred to above required PRASA's board of control to institute investigations into the various matters that were raised in the reports. The investigations by the two institutions and subsequently by PRASA uncovered more than fruitless and wasteful and irregular expenditure, and irregularities in the awarding of tenders and contracts by the applicant. The investigations have revealed corruption and criminal conduct by the senior employees of PRASA.
  
7. As a result, PRASA filed criminal complaints and reported the commission of various offences to the South African Police Service regarding inter alia the award of the Siyangena and Swifambo tenders and contracts, and approached the High Court, Gauteng Local Division, to review and set aside the decisions to award and concluded the contracts. The outcome of those cases is dealt with below.
  
8. The complaints were first made in July 2015 and, despite the lapse of two years, the investigations have not been completed and no criminal charges



have been brought against anyone involved. The irregularities and alleged corruption at PRASA have been a matter of major public interest since the publication of the reports by the auditor general and the public protector.

9. In bringing this application, OUTA acts in own interest as an organisation that is concerned with the principles of democracy, constitutionalism and the rule of law, and in the public interest more generally, which is indisputably present in this matter.
10. OUTA seeks to compel the first respondent, the Directorate for Priority Crimes ("DPCI"), to investigate and bring to finality its investigation in the criminal conduct and corruption alleged by PRASA in relation to the Siyangena and Swifambo matters.

#### **The Parties**

11. The applicant is the Passenger Rail Agency of South Africa ("PRASA"), a legal person established in terms of section 22 of the Legal Succession to the South African Transport Services Act, 9 of 1989 ("SATSA"), with its principal place of business at Prasa House, 1040 Burnett Street, Hatfield, Pretoria.
  - 11.1. An amendment to SATSA in December 2008, changed the name of the South African Commuter Corporation Limited to PRASA. PRASA provides rail services to millions of people in South Africa.

- 11.2. PRASA is a public entity and a national government business enterprise in terms of section 1, read with schedule 3, part B, of the Public Finance Management Act 1 of 1999 ("PFMA"), whose sole shareholder is the Government of South Africa, through the National Department of Transport.
- 11.3. PRASA is an organ of state within the meaning of section 239 (b) (ii) of the Constitution of the Republic of South Africa, Act 108 of 1996.
12. The intervening party is the Organisation Undoing Tax Abuse ("OUTA"), a non-profit company, duly incorporated in terms the company laws of the Republic of South Africa, with its registered address at 318 Oak Avenue, Randburg.
- 12.1. The primary objective of OUTA, according to paragraph 3 of its constitution, is the promotion, protection and advancement of the Constitution in matters relating to policy, laws or conduct that offends against the rights, values and principles enshrined in the Constitution. Copies of relevant extracts from the constitution are attached as annexure "SF 1".
- 12.2. OUTA is an organisation that seeks to promote a prosperous South Africa with effective, practical and enforceable taxation policies, and corrupt free conduct in the use of the collected tax revenue.

- 12.3. In order to achieve its primary objective, OUTA conducts a broad range of activities that includes, where necessary, approaching the courts and using legal processes to advance those values and contribute to a strong civil society that holds private interests, government, individuals and itself accountable.
- 12.4. In addition to its objectives and functions, OUTA seeks to raise awareness about the Constitution and the obligations it imposes upon all state actors acting in the public sphere.
13. The first respondent is the Directorate of Priority Crime Investigation ("DPCI"), established as an independent directorate within the South African Police Service in terms of section 17C of the South African Police Act 68 of 1995 ("the SAPS Act"), as amended, and with its head office is at A5 Promat Building, Cresswell Road, Silverton, Pretoria.
- 13.1. The DPCI was establishment in 2009, within the framework of the South African Police Service.
- 13.2. The DPCI is responsible for combating, investigating and preventing national priority crimes, such as serious organised crime, serious commercial crime and serious corruption in terms of Section 17B and 17D of the SAPS Act, as amended.
14. The second respondent is the National Prosecuting Authority ("the NPA"), established in terms of section 179 of the Constitution and governed by the

National Prosecuting Act 32 of 1998 ("the NPA Act"), with its head office at VMG Building (Corner Westlake & Hartley) 123 Westlake Avenue, Weavind Park, Silverton, Pretoria.

14.1. The Constitution read with the NPA Act provides the NPA with the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.

14.2. No relief is sought against the NPA save for costs in the event that it opposes this application.

#### **THE FRAMEWORK OF PRASA**

15. The main object of PRASA is to ensure that rail and bus passenger services are provided within, to and from the Republic of South Africa in the public interest in terms of the principles set out in National Land Transport Act, 5 of 2009 ("the NLTA"). Section 23(1) of SATSA refers to the principles set out in section 4 of the National Land Transport Transition Act, 22 of 2000 ("the NLTTA"). The NLTTA was repealed by section 94 of the NLTA.
16. The second object and business of PRASA is to generate income from the exploitation of the assets acquired by it (section 23(2) SATSA).
17. PRASA is funded by National Treasury through allocations made to the Department of Transport. The allocations are communicated to the

Department of Transport through a Medium-Term Expenditure Allocation that allocated a budget over a three-year period.

18. The Department of Transport issues an allocation letter detailing the budget specifically apportioned to PRASA. The PRASA Enterprise Program Management Office ("EPMO") prepares a Medium-Term Expenditure Framework which, based on that apportionment, details how the funds are to be distributed across various capital projects and operations of PRASA.
19. The transfer of all the liabilities, rights and obligations of Transnet relating to the assets and business operations forming part of the long distance passenger rail services to PRASA was confirmed in an amendment to section 25A(2) of SATSA. A sale agreement was concluded to give effect to section 25A(2) of SATSA. The effective date of the agreement was, extended to, 31 March 2009. The ownership, risk and benefit in the business passed to PRASA on the effective date.
20. PRASA refers to long distance passenger services as main line passenger services. PRASA provides main line passenger services using *inter alia* Transnet's infrastructure.
21. PRASA is a large, state owned, public transport company that provides rail and bus services to millions of South Africans and operates its business through various divisions which include the following:



- 21.1. PRASA Rail is responsible for the Metrorail rail commuter services in the metropolitan areas and long-distance passenger rail services between major cities. In turn it operates three business units, namely Metrorail, Shosholoza Meyl and Premier Classe.
  - 21.2. PRASA Cres (Corporate Real Estate Solutions) is responsible for managing PRASA's executive property portfolio.
  - 21.3. PRASA Technical is responsible for improving and modernising the current rolling stock, depots and strategic infrastructure at PRASA.
  - 21.4. Autopax is responsible for long distance road transport passengers.
  - 21.5. Intersite is responsible for identifying commercial opportunities for PRASA for the fulfilment of PRASA's secondary objective.
22. The national government has appointed a board of control, vested with the power and authority to lead, control, manage and conduct the business of PRASA. The board is required to exercise its powers subject to PRASA's policies and the shareholders compact concluded between the minister and the board. The board carries out its functions and duties in terms of a delegation of authority. The delegation of authority is referred to in and attached to PRASA's review application. A copy of PRASA's review

application is attached as annexure "FA/SWIF" to PRASA's founding affidavit.

23. The following can be derived from the delegation of authority:

- 23.1. The group chief executive officer ("the GCEO") is responsible for development and maintaining an effective, efficient and transparent system of procurement that is fair, equitable, transparent, competitive and cost effective. The GCEO is required to consult the group chief financial officer ("the GCFO") and executive committee. The board is accountable for this governance and control.
- 23.2. The GCEO is responsible for maintaining and implementing a system of procurement which complies with the requirements of section 217 of the Constitution and section 51(1) (a)(iii) of the PFMA.
- 23.3. The GCEO is responsible for approval of strategic capital investments. The GCEO has to consult the GCFO and executive committee ("EXCO"). The board is accountable for the approval of the investment.
- 23.4. The GCEO is responsible for the approval of capital expenditure. The GCEO has to consult the GCFO and EXCO. The board is

accountable for the approval of the investment of a particular financial nature.

23.5. The GCEO can or may approve projects of a capital nature and any other strategic investment to the maximum amount of R100 million per investment, and provided the investment is within the approved budget and in terms of the supply chain management and other conditions set by the board.

23.6. If a tender committee approved a procurement that included the recapitalisation of the fleet, the board and GCEO were responsible and the GCFO, CPO and EXCO has to be consulted. The minister of transport is accountable for the recapitalisation.

23.7. The board is responsible for *inter alia* approval of the budget. The board is required to consult with the GCEO and the GCFO, and the national treasury has to be informed in terms of the PFMA. The minister exercises executive oversight on PRASA's budget. The board's responsibilities are executed in terms of the board charter.

24. In terms of the board charter, a copy which is attached as annexure "FA5" to PRASA's founding affidavit.

- 24.1. The board's primary responsibility is to ensure that PRASA complies with the obligations imposed by various laws and regulations that are applicable to PRASA.
  - 24.2. The board is also responsible for ensuring compliance with regulatory requirements.
  - 24.3. The board members have a duty to PRASA. They have the ultimate responsibility for PRASA's performance and are not mandated delegates or servants of any of its stakeholders.
25. The board charter also identifies reserved powers that cannot be delegated to the executive. The reserved powers include:
- 25.1. The approval of capital expenditure, acquisition and disposal in excess of the discretionary power delegated to the chief executive officer.
  - 25.2. The approval of the remuneration of non-executive board members within the ambit of the laws and regulations that determine the remuneration of the board members of public entities as defined in the PFMA.
  - 25.3. The approval of contracts that do not relate to the ordinary business of PRASA.



26. At the time relevant to the audit by the auditor general and the investigations conducted by the public protector, Mr Lucky Montana ("Mr Montana") was the GCEO of PRASA. PRASA, under the management of Mr Montana, awarded numerous tenders and contracts that were, at the very least, irregular and, at worst, unlawful and corrupt.
27. For example, Mr Montana approved transactions that exceeded the powers conferred upon him by the delegation of authority and which he was obliged to refer to the board. The derailed report and the report of the auditor general implicate Mr Montana in many of the tenders and contracts that were awarded contrary to PRASA's procurement policy and the PFMA.
28. PRASA's procurement policy is set out in the supply chain management policy ("the SCM policy"). A copy of the SCM policy is attached to PRASA's founding affidavit as annexure "FA6".
29. The SCM policy obliges PRASA to ensure compliance with section 217(1) of the Constitution and when contracting for goods and services must do so in a manner that is fair, equitable, transparent, competitive and cost effective.
30. The implementation of the SCM policy rests with the GCEO and the board. Mr Montana was vested with that responsibility by the Constitution and other relevant legislation and PRASA's policies to manage and conduct PRASA's business in the public interest.



31. The extent of Mr Montana's involvement and role in the irregular activities within PRASA is revealed by the derailed report and the report of the auditor general and resulted in Mr Montana tendering his resignation during March 2015.
32. During August 2014, the board was reconstituted and most of the board was replaced. The minister appointed most of the members of the reconstituted board for a fixed period until 31 July 2017.
33. It was the reconstituted board that conducted the investigations and took the decision to lodge criminal complaints with the South African Police Service against the perpetrators that were implicated.
34. The conduct of the minister of transport has frustrated the board in the conduct of the performance of its functions. As evidenced hereto by the correspondence attached as annexures "SF2 – SF6".

#### **The Framework of the DPCI**

35. Section 205 (3) of the Constitution provides for a national police service, whose objects are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.
36. The DPCI is established as separate division in the South African Police Service ("the SAPS") to address corruption and other national priority crimes. The Constitutional Court has stated that corruption has the ability to



undermine the ability of the state to deliver on many obligations in the bill of rights, more specifically those relating to social and economic rights.

37. In order for the state to perform its obligation in terms of the Constitution, the DPCI was established as an independent anti-corruption unit.
38. The DPCI is managed and directed by its national head. The national head of the DPCI was Major General Ntlemeza. Lieutenant General Matakata is currently serving as the acting national head of the DPCI.
39. The DPCI is obliged in terms of Chapter 6A of the Police Act to ensure that:
  - 39.1. it implements, where appropriate, a multi-disciplinary approach and an integrated methodology involving co-operation of all relevant government departments and institutions;
  - 39.2. it has the necessary independence to perform its functions;
  - 39.3. it is equipped with the appropriate human and financial resources to perform its functions; and that
  - 39.4. it is staffed with personnel that are beyond reproach.
40. The DCPI is vested with investigative powers and should conduct its investigations reasonably, giving them due priority and within a reasonable time.



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





44. The criminal activity alleged by PRASA involves fraud, contravention of PRECCA, corruption, racketeering, contravention of the PFMA and, as correctly pointed out by the Honourable Court in the Swifambo judgement in the review application, fronting.

45. The alleged criminal activity falls within the mandate of the DPCI. The DPCI is required to exercise its powers effectively and where necessary involve and enable the NPA to preserve assets and restore monies lost through such activity.

#### **Framework of the NPA**

46. The NPA was created by section 179 of the Constitution.

47. The office of the National Director of Public Prosecutions ("NDPP") was established on 1 August 1998, in terms of Section 179 (1) of the Constitution. The current head of the NDPP is Advocate Shaun Abrahams.

48. In terms of section 179(2) of the Constitution, the national prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings. The National Prosecuting Authority Act 32 of 1998 ("the NPA Act") contains identical provisions.

49. The NPA has different units that are of relevance to the Swifambo and Siyangena investigations and all these units work closely with the DPCI:



- 49.1. The Asset Forfeiture Unit ("the AFU"), focuses on the implementation of Chapter 5 of the Prevention of Organised Crime Act, 121 of 1998 ("POCA"). The AFU is required to establish a relationship with the SAPS and to make an impact on priority crimes.
- 49.2. The Specialised Commercial Crime Unit ("the SCCU") is responsible for the prosecution of commercial crime cases and required to manage and direct investigations and prosecutions of serious organised and complex financial crimes.
- 49.3. The Priority Crimes Litigation Unit ("the PCLU"), is responsible for prosecuting and managing cases that fall within the ambit of priority crimes, as defined in the relevant legislation mentioned above.

### **The Prosecution Policy**

50. The National Director is obliged under section 179(5) of the Constitution to determine the policy and issue policy directives for the prosecution process. A copy of the current policy is attached as annexure "FA7" to PRASA's founding affidavit.
51. In the ordinary course, a person who has a complaint of a criminal nature has to lodge the complaint with the SAPS and, depending on the nature and complexity of complaint, the SAPS will either conduct the investigation into



the complaint or refer the investigation to a specialised unit within the framework of SAPS. The investigations are conducted by the SAPS or the DPCI. It is in the interest of justice that the investigations be conducted reasonably and within a reasonable time.

52. The Swifambo and Siyangena complaints are being investigated by the DPCI as they are investigations of national importance.

53. The following is derived from the prosecution policy.

53.1. The NPA is usually not involved in the decision to start an investigation, this decision, rests with the DPCI. However the DPCI may call upon the NPA to provide advice and guidance in the conduct of the investigations (see part 7).

53.2. In major and complex investigations the involvement of the NPA may occur at an early stage and be of a fairly continuous nature. The DPCI has failed to request the NPA to supervise, direct and coordinate the Swifambo or Siyangena investigations in circumstances that call for such assistance and guidance.

#### **The relationship between DPCI and the NPA in respect of the Swifambo and Siyangena investigations**

54. In terms of section 17D (3) of the SAPS Act, the National Head of the DPCI may, if he or she has a reason to suspect that a national priority offence has

or is being committed, request the NDPP to designate a Director of Public Prosecutions ("DPP") to exercise the powers of section 28 of the NPA Act.

55. DPCI has to the detriment of the investigation failed to invoke the mechanism provided in the section 17D(3), resulting in the investigation being conducted inefficiently with considerable unreasonable delay.

56. Chapter 5 and 6 of POCA deal with the preservation of proceeds of unlawful activities and civil recovery of property. Those remedies need to be initiated at an early stage. If not, the purpose of the protection procedures can be defeated.

"To give effect to the asset preservation and forfeiture provisions, the DPCI has to conduct its investigations reasonably otherwise the assets may be dissipated and become unrecoverable".

### **Factual Background**

57. The background to the Siyangena and Swifambo tenders and contracts is dealt with in the review applications. The background also appears from the annexures attached by PRASA to its founding affidavit in this application.

58. I deal with the remainder of this affidavit under the following headings:

58.1. The Siyangena tender and contract.

58.2. The Swifambo tender and contract.



- 58.3. The Investigative events.
- 58.4. OUTA's standing and entitlement to the relief.
- 58.5. Conclusion.

### ***The Siyangena tender and contract***

- 59. The Siyangena tender and contract concerned the installation of high speed passenger gates at Doornfontein and Nasrec station by Siyangena, the scope of which was extended to 62 others stations in the country.
- 60. The background to the tender and contract stem from PRASA's long term vision of upgrading and automating PRASA's rail way stations and security systems to reduce and ultimately remove the risks of ticketing fraud and fare invasion by passengers.
- 61. PRASA appointed two contractors, Enza Construction to upgrade the Nasrec Station, and Rainbow Construction to upgrade the Doornfontein Station.
- 62. During September 2009, PRASA through its division known then as Intersite, which is now PRASA Cres, appointed Siyangena as a direct subcontractor to both Enza Construction and Rainbow Construction.
- 63. The appointment of Siyangena as the nominated subcontractor followed a procurement process initially advertised by Intersite under tender number



SG/GATES/003/2009 for the supply and installation of access gates at the Doornfontein and Nasrec Stations.

64. The request for proposals ("RFP") for the Nasrec tender required Dallmeier CCTV cameras and Autotec Babylon. The adjudication report for this tender indicated that one of the tenderers was advised by the Original Equipment Manufacture of the Dallmeier CCTV cameras that Siyangena was the sole local agent for this equipment.
65. During January or February 2010, a Mr Luyanda Gantso, at the time PRASA's General Manager: Infrastructure & Facilities Development, addressed a motivation and recommendation report wherein he requested Mr Montana to approve the appointment of Siyangena to attend to a similar system at Cape Town, Rhodesfield, Orlando, Century City, Langa, Moses Mabhida and Bridge City stations.
66. The purported basis for the appointment of Siyangena without following a tender procurement process was the urgency of the project. The agreement was concluded under the guise of an extension to the Nasrec and Doornfontein works. It could not have been an extension because there was no contract between PRASA and Siyangena for Nasrec and Doornfontein. Mr Montana approved the recommendation.
67. The requirement for brand names was raised as a concern by other bidders as Siyangena was the only supplier that was accredited for all the brand related requirements of the RFP.

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68. It is clear that from the manner in which the RFP was formulated and implemented that it was designed to favour Siyangena and materially disadvantage other tenderers.
69. Siyangena was appointed for further extensions that related to the upgrades of railway stations located in the KwaZulu-Natal, Western Cape and Gauteng Provinces for a price of R1, 95 billion. This was referred to as phase 1.
70. During October 2013, PRASA issued the RFP for phase 2. Siyangena was appointed for phase 2. The tender related to stations in Gauteng North and South, the Western Cape and KwaZulu-Natal. The circumstances under which those awards were made were the same. Where brand names were mentioned in the RFP, Siyangena was the only supplier that could supply those brands.
71. As alluded to above, the initial complaints investigated by the public protector concerned *inter alia* the Siyangena tender. In respect of the Siyangena complaint, the public protector investigated the allegation that PRASA had improperly extended the scope of the tender awarded to Siyangena for the supply and installation of high speed passenger gates at Doornfontein station to a national scope. In the derailed report the public protector found that the complaint was substantiated. However, the total amount of the contract was R1.95 billion and not R800 million as alleged.
72. The Public Protector also made, *inter alia* the following findings:



- 72.1. The extension of the tender scope beyond what had been advertised contravened paragraph 11.3.1 of PRASA SCM policy, section 38 of the PFMA, PPPFA and section 217 of the Constitution.
- 72.2. The extension of Siyangena's contract to more stations than were specified in the tender advertisement constituted maladministration and improper conduct.
73. As a result of the public protector's findings and directives, PRASA investigated the Siyangena tender. The investigation authorised by the board involved not only the early 2010 contract extension but also the 2010/2011 and the 2013/2014 tenders and contracts.
74. The review application by PRASA in respect of the Siyangena tenders and contracts was instituted in February 2016. On 3 May 2015, Sutherland J dismissed this application, after a hearing on whether the application by PRASA was brought in time. The merits of PRASA's case were not even argued. The Court found that PRASA ought to have applied for an extension to institute the review application as opposed to asking the Court to condone its non-compliance. Sutherland J held that his judgement on the delay did not mean that PRASA had no case to advance. PRASA has applied for leave to appeal the judgement.

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75. The grounds of review are set out in the review application relating to the Siyangena tenders and contracts, annexure "FA/SIY", pages 427-433 of the applicant's bundle.
76. The facts set out in the review application concerning the award of the Siyangena tender evidence that Mr Montana and various other persons received improper financial benefit for the award of the tender to Siyangena.
77. A number of property transactions involving Mr Montana and various other persons and entities associated with Siyangena took place during the period when PRASA was engaged in the evaluation and award of phase two of the tender to Siyangena.
- 77.1. In April 2014, Mr Montana owned a property situated at 10 Newport Road, Parkwood, registered as Erf 359. Mr Montana purchased the property during July 2008 for an amount of R1, 850, 000.00. On 5 May 2014, Mr Montana sold the property to Mr van der Walt, Siyangena's attorney, for an amount of R6, 800,000.00. Mr van der Walt bought the house in the name of Precise Trade. The market value of the property at the time of the sale was R3 million, which meant, if correct, that the price of the sale was unrealistically inflated.
- 77.2. It appears that Mr Montana sold the property at twice its worth to a person closely associated with Siyangena to conceal a

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financial benefit that was received in exchange for influencing the award of the tender in favour of Siyangena.

78. Another property forming part of the criminal investigation relates to the sale of Erf 225 Rose Street, Waterkloof, Pretoria. The property on Erf 225 was owned by Ms de Beer, through an entity known as Aanami Guest House CC, in which Ms de Beer was the sole member.
79. Ms de Beer demanded a non-refundable deposit of a substantial amount before entertaining an offer from Mr Motana. Mr Montana agreed to pay a non-refundable deposit of R3, 5 million, which he subsequently paid.
80. A sale agreement between Aanmani Guest House CC represented by Ms de Beer and Minor Property Trust represented by a Mr Smith as its trustee, for the sale of property on Erf 225 in the sum of R11 million was concluded. Mr Smith requested that the contract be altered to Precise Trade. The balance of R7,5 million was paid by Precise Trade and the property is registered in favour of Precise Trade.
81. Ms de Beer met with Mr Montana after the sale on site where she took Mr Montana for an inspection and handed over the keys to Mr Montana. This is referred to in the review application to which Ms de Beer's confirmatory affidavit is attached.
82. It is apparent from the above facts that Mr Montana acquired the property on Erf 225 through a series of transactions which concealed his direct or

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beneficial ownership thereof. At the time Precise Trade was owned by Mr van der Walt, the attorney for Siyangena. The concealing of the true transaction constitutes a fraud and an offence under section 34 of PRECCA.

83. Furthermore, according to chapter two of PRECCA, corruption arises when any person gives or accepts or offers to give or accept any gratification amounting to an unauthorised or improper or inducement to act in a particular manner. The conduct described appears to amount to corruption under PRECCA.

84. The offences referred to above fall within the remit of the DPCI and the DPCI has a constitutional mandate to prevent, combat and investigate national priority crimes such as organised crime, corruption, fraud and other crimes referred to in the SAPS Act. The DPCI as an independent investigation unit had a duty to conduct investigations in an effective and efficient manner and to promote and protect the basic human rights of the public arising from the investigations it conducts.

#### **The Swifambo tender and contract**

85. In terms of the sale agreement between PRASA and Transnet, PRASA received 124 (one hundred and twenty four) locomotives from Transnet. PRASA received a mix of 3kV-DC and 25kV-AC electric locomotives and diesel electric locomotives.

86. In terms of the sale of business agreement, Transnet was required to deliver locomotives that were in a condition that was consistent and in accordance with the condition of the locomotives in the Transnet Freight Rail fleet. The locomotives that PRASA received generally were old and in poor condition. The locomotives dated back to the 1970's and on average had been in service for about forty years. Approximately half of the locomotives were not in a condition to provide the services.
87. On 24 and 26 July 2009, PRASA published a request for expression of interest ("RFEI"). The RFEI was prepared by Ingwa Sichula, the Executive Manager: Rolling Stock of PRASA at the time.
88. The RFEI stated that PRASA had a shortfall of locomotives and wanted to lease locomotives for the haulage of passenger trains on various national routes and shunting of Metrorail rolling stock at repair depots and for other tasks. According to the RFEI, in relation to passenger train haulage, there was a shortage of 18 (eighteen) electric locomotives, 23 (twenty three) diesel electric locomotives, 33 (thirty three) hybrids. In relation to shunting, there was a shortage of 11 (eleven) diesel or diesel-electric locomotives.
89. During May 2011, Vossloh inspected PRASA's fleet and prepared a status report. In its report Vossloh recommended inter alia that:
- 89.1. In the short term, rationalising the fleet maintenance and promoted, the minimum number of electric locomotives, one class per voltage supply, and the minimum number of diesel



class locomotive, one for shunting and one for main line service with a concentration of EMD technology. EMD refer to Electro Motive Division, an American based manufacturer of locomotives and locomotives engines. Vossloh used EMD locomotives engines. The recommendation to use EMD technology found its way into the specification developed for the tender.

- 89.2. In the medium to long term, replacing the existing fleet with new material and either concentrating the main line locomotive fleet or dual locomotives (with 3/25kV electric diesel and diesel electric engines) or bi-current (3.25kV) electric locomotives and 3000HP diesel electric locomotives.
90. During November 2011, the RFP was published. The RFP envisaged a procurement strategy by way of a lease of locomotives to PRASA by a successful bidder. The bids had to comply with the RFP requirements and non-compliant bids would be disqualified. The essential RFP requirements assessed were security screening, bank rating, technical, BBBEE and price.
91. Swifambo responded to the tender as Mafori Finance Vrydheid t/a Swifammbo Rail Leasing. Mafori Finance Vrydheid (Pty) Ltd was registered on 22 April 2010 and was acquired by Swifambo Holdings (Pty) Ltd on 7 February 2012.
92. The change of name from Mafori Vrydheid (Pty) Ltd to Swifambo Rail Leasing (Pty) Ltd was registered on 5 May 2012 with CIPC.



93. The bid submitted by Swifambo did not comply with the requirements set out in the RFP. The bid indicated that Swifambo would rely solely on the experience and technical capabilities of Vossloh Espana S.A to fulfil its obligations. However, at the time the bid was submitted, Vossloh Espana S.A was not a co-bidder as defined in the RFP and Swifambo had not concluded a sub-contract with Vossloh. There was no legal relationship between Swifambo and Vossloh Espana S.A and therefore no indication that Swifambo could perform.
94. Despite all the glaring irregularities with the bid submitted by Swifambo, during July 2012, Swifambo was appointed as the preferred bidder.
95. On 25 March 2013, PRASA and Swifambo concluded the main contract and the contract was signed by Mr Montana. A copy of the main contract is attached to the review application, annexure "FA/SWIF" to PRASA's founding affidavit.
96. The contract was for the purchase of 20 (twenty) Euro 4000 locomotives and 50 (fifty) EuroDual locomotives with the contract value of R3.5 billion including VAT.
97. The main contract materially deviated from the terms of the RFP. The RFP required a lease of the locomotives and the main contract provided for the purchase of the locomotives. The Euro 4000 locomotives were not evaluated and did not comply with the specifications set out in the RFP in material respects. The EuroDual was hopelessly below the minimum threshold in the

technical evaluation, and the scoring of the bids was unlawfully manipulated to favour Swifambo and concealed by employees of PRASA.

98. The consequence of the material deviation from the locomotive specifications in terms of the RFP, is that PRASA is saddled with locomotives that are not fit for their purpose and unsafe to operate on the South African rail network.
99. The auditor general published a report on PRASA, dated 31 July 2015, relating to the financial year that ended in March 2015. The report was preceded by a draft report. The relevant extracts of the report are attached as annexure "FA1" to PRASA's founding affidavit.
100. The detailed audit findings indicated that Swifambo Rail Leasing should have been disqualified from the tender prior to proceeding to the technical evaluation. In summary the reasons set out therein are, *inter alia* the following:
- 100.1. non-Compliance with the requirements of the bid documents in terms of the joint venture;
- 100.2. Swifambo Rail Leasing and Vossloh did not have a subcontracting agreement and used third party documents (Vossloh) without substantiating the agreement to sub-contract;
- 100.3. Swifambo rail Leasing quoted an amount inclusive of VAT but were not VAT registered;



- 100.4. the allocation of points to Swifambo Rail Leasing based on letters of satisfaction which belonged to Vossloh;
- 100.5. Vossloh did not submit a tax certificate;
- 100.6. the response to the RFP was signed by the representative of Swifambo Rail Leasing and not by Vossloh;
- 100.7. the Swifambo Rail Leasing score of 70 for technical evaluation was based on the capabilities of Vossloh and there was no joint venture or a subcontracting agreement in place at the time of the bid submission, and in the event that a subcontract agreement existed between Swifambo Rail Leasing and Vossloh at the time of the bid, there was a requirement for Vossloh to submit a tax clearance from its country of origin and co-sign all tender documents with Swifambo Rail Leasing;
- 100.8. non-compliance with the PRASA supply chain management policy.
101. Accordingly, PRASA applied to review the decisions to award the tender and conclude the contract with Swifambo for procedural and substantive reasons. (The grounds for review are in paragraphs 29-33, pages 879-887 of PRASA's bundle in this application).





102. In its answering affidavit in the review proceedings, Swifambo *inter alia* disputes that the Afro 4000 was not fit for purpose and claims no knowledge of any tender irregularities. (See paras 34 to 90, pp.794 to 826).
103. In its replying affidavit PRASA disputed Swifambo's innocence pointing to facts and circumstances that give rise to reasonable grounds for believing that the Swifambo tender and contract may be tainted with criminality.
104. PRASA contended that Swifambo was not innocent for *inter alia* the following reasons.
- 104.1. The contractual arrangement between Swifambo and Vossloh constituted fronting because:
- 104.1.1. the requirements of the definition of the fronting practice in section 1 of the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("the BBBEEA") are satisfied, in particular because the arrangement undermines the object of the Act;
- 104.1.2. the definition does not require the misleading or exploitation of the parties to the arrangement;
- 104.1.3. economic empowerment means substantive empowerment; and



- 104.1.4. the mere payment of money for the use of a black person's status is insufficient in the context of the matter.
- 104.1.5. Section 130(1) (d) of the B-BBEE Act creates an offence for any person to knowingly engage in a fronting practice.
- 104.1.6. The Court in the PRASA review application held that the relationship between Swifambo and Vossloh amounted to a fronting practice and that fronting constituted a fraud on the public where organs of the state and public entities or individuals within their ranks conspire and collude to award a tender to a front under the disguise of broad-based black economic empowerment.
- 104.2. The illicit payments of R80 million that the director and chairperson of Swifambo (Mr Auswell Mashaba) alleged were paid to individuals that claimed to be acting on behalf of the ruling party as a donation. The documents provided by Mashaba, read with his version in the replying affidavit, concealed and were intended to conceal the true nature of the transaction and constituted a fraud, forgery and possibly uttering, which are offences under section 34 of PRECCA.



- 104.3. The ruling party has since publicly denied directly or indirectly receiving this amount from Swifambo.
- 104.4. If the payments were made to a person who falsely represented that they were authorised to receive the payments on behalf of the ruling party, such conduct would amount to a fraud. If the payments were received by persons who were authorised but failed to pay the money to the ruling party, such conduct would amount to theft. The offences of fraud and theft fall within the remit of the DPCI.
105. It is also reasonably possible that the payments were made as consideration for the award of the tender and contract to Swifambo and possibly, for the protection of this award from scrutiny.
106. In addition to the criminal offences referred to above, the scoring was unlawfully manipulated and concealed.
- 106.1. One of the committee members that evaluated the bids only allocated points to Swifambo's bid in most sections of the scoring sheet, dramatically favouring Swifambo in the scoring of the bids, and the combined scoring sheet prepared after the bids were evaluated included a line item without a description that did not appear on the committee members' scoring sheets for which Swifambo received ten points and all but one of the others received no points.



- 106.2. The blank line does not appear on the individual scoring sheet template or the manuscript scoring sheets of the individual members or the electronic versions. In the electronic version, the blank line was reduced to width that made it difficult to detect. However, the additional points were retained in the result.
- 106.3. The inference that the scoring was manipulated to ensure its award to Swifambo is inescapable.
107. As an independent anti-corruption unit the DPCI has a duty to conduct its investigations concerning the Swifambo and Siyangena tenders without inference, whether political or from any other persons.
108. On 3 July 2017, Francis J delivered his judgement in the Swifambo review application. PRASA's decision to award the contract to Swifambo and the decision to conclude the contract with Swifambo was reviewed and set aside. I attach a copy of the judgement hereto as annexure "SF7".

#### **The investigative events**

109. On 1 August 2014, the board was reconstituted. It was inducted during September 2014.
110. During March 2015, the reconstituted board became aware that the public protector had prepared a draft report on her investigation into the complaints concerning PRASA. It learned of the draft report through media reports. The



board was unaware that the public protector had delivered the report to Mr Montana in or about February 2015.

111. On 15 March 2015, Mr Montana provided the draft report, after demands made by the chairperson of the board (Mr Popo Molefe), and tendered his resignation. The board accepted his resignation on 1 April 2015. Montana worked at PRASA until 1 June 2015.
112. Montana failed to respond to the public protector's draft report and requests for information. During June 2015, the public protector requested Mr Molefe to intervene to ensure that a response was received.
113. Mr Molefe also instructed Mr Mamabolo (Assistant Manager, Special Operations at PRASA) to report any and all suspected criminal conduct to the SAPS.
114. On 8 July 2015, Mr Mamabolo filed a complaint at the Rosebank SAPS. It was moved to and registered with the Hillbrow SAPS 405/07/2015. Mr Mamabolo subsequently amplified the complaints in respect of both the Siyangena and Swifambo matters.
115. Due to the large amounts involved in the Siyangena and Swifambo complaints, PRASA appears to have been working tirelessly to assist the DPCI with its investigations and to enable the prompt and efficient asset preservation and protection.

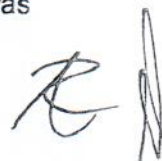
116. The DPCI agreed that it would give the matters involving allegations against Swifambo and Siyangena priority.
117. The board appointed Werksmans Attorneys ("Werksmans") to perform forensic investigations in relation to various allegations of irregular, fruitless, wasteful and unauthorised expenditure incurred by PRASA, and all unlawful activity related thereto as outlined but not limited to the report by the auditor general.
118. On 14 December 2015, PRASA made an application through Werksmans for the appointment of forensic accountants. PRASA proposed the appointment of forensic accountants on the basis that the investigation is of a complex nature and extensive, involving a number of entities and individuals (including employees of PRASA), and therefore there was a need to perform a forensic investigation.
119. Werksmans appointed Horwath Forensics SA (Pty) Ltd ("Horwath") to provide all necessary forensic auditing services to assist DPCI in the Swifambo investigation, which would include providing expert testimony which may be required pursuant ant prosecutions.
120. On 16 October 2015, Horwath addressed a letter to the DPCI and the NPA on their appointment by Werkmans and attached its certificate in terms of section 4 the Protection of Information Act, 84 of 1982. A copy of Horwath's letter and certificate is attached as annexure 'FA8' and 'FA9' respectively to PRASA's founding affidavit.



121. On 23 December 2015, Adv Chauke, Acting Head of the SCCU: NPA addressed a letter to Mosito of the DPCI and indicated support for the appointment of Horwath in respect of the Swifambo matter. The letter recorded that the forensic accountants should be required to:
- 121.1. perform a forensic investigation into the Swifambo tender. The forensic investigation must cover all identified bank accounts details, all identified entities and individuals implicated in the process of awarding of the tender as well as those entities that benefited therefrom.
  - 121.2. conduct a forensic audit in relation to all bank accounts, currently identified and that will later emerge, to trace the flow of funds in order to establish whether any of the individuals or entities and PRASA employees involved in the awarding of tenders fraudulently or irregularly benefited from the process.
122. A copy of the letter from Adv Chauke, dated 23 December 2015, is attached as annexure "FA11" to PRASA's founding affidavit.
123. On 28 December 2015, Brigadier NP Mhlongo, Head of Commercial Crime Unit at the DPCI wrote to Head, Cyber Crime and Digital Forensic Laboratory of the DPCI indicating that he supported the appointment of Horwath. The support was given on the understanding that the services to be rendered would be at no cost to the SAPS and the information provided would be used exclusively in the criminal investigation relating to Swifambo complaints. A

copy of this letter is attached as annexure "FA11" to PRASA's founding affidavit.

124. On 3 February 2016, Mr Hotz of Werksmans addressed a letter to Adv Wolfaard of the NPA ("Adv Wolfaard") to provide him with a synopsis of the Swifambo review application. A copy of this letter is attached as annexure "FA12" to PRASA's founding affidavit.
125. On 16 February 2016, Mr Molefe addressed a letter to Adv Wolfaard to request that the NPA appoint Advocates Hodes SC and Manaka to assist the prosecution of various matter at no cost to the State. A copy of this letter is attached as annexure "FA13" to PRASA's founding affidavit.
126. On 13 May 2016, Mr Molefe addressed a letter to National Head of DPCI Major General Ntlemeza and the National Director, Adv Shaun Abrahams. A copy of this letter is attached as annexure "FA14" to PRASA's founding affidavit. In the letter Mr Molefe requested *inter alia* the following:
- 126.1. the DPCI declares the matters as serious offences and assign resources to the cases;
- 126.2. the NDPP consider assigning NPA resources sufficient to the complexity of the cases and the measure of losses and continued risk to the State and PRASA.
127. On 11 August 2016, Adv Abrahams responded to Mr Molefe's letter of 13 May 2016. In his response, Adv Abrahams noted that the matter was





currently the subject of investigation by the DPCI under the guidance of a prosecutor. Further, that a decision on whether or not to prosecute would be taken after the investigations had been finalised by the DPCI.

128. On 18 September 2016, Mr Molofe addressed a letter to Major General Khana. A copy of this letter is attached as annexure "FA16" to PRASA's founding affidavit. The letter was addressed as a follow up to a meeting on 18 April 2016. It emphasised the importance of co-operation from the DPCI and the NPA and a commitment to "eradicating the mammoth scale of unlawful behaviour". The letter requested:
- 128.1. a follow up meeting with DPCI on the status of the 43 criminal complaints lodge by PRASA with DPCI following the forensic investigation commissioned by the board; and
  - 128.2. written authorisation to Horwath for purposes of analysing the flow of funds in respect of the criminal complaint relating to Siyangena.
129. On 29 September 2016, Major General Khana addressed a letter to Ms Ngoye and the then AGCEO Mr Collins Letsoalo. This letter was handed to the addressees at a meeting on 27 October 2016 at PRASA's offices in Hatfield. The letter records that both CAS 405 and CAS 278 had been referred to the DPCI's SEOU for further investigation and emphasised that the Siyangena and Swifambo matters would be given priority. The letter proceeded to request further supporting documents to Mr Mamabolo's



statement. A copy of this letter is attached as annexure "FA17" to PRASA's founding affidavit.

130. On 25 November 2016, Ms Ngonye addressed a letter to Major General Khana, in response to his letter of 23 September 2016. A copy of this letter is attached as annexure "FA18" to PRASA's founding affidavit. Ms Ngonye notes *inter alia* the following in her response:

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

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

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

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



issued and that analysis of data obtained would be commenced with and preparations would be made for forfeiture of assets in terms of POCA.

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

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

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

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

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

131. On 25 January 2017, Major General Ntlemeza addressed a letter to Ms Ngoye and Mr Letsoalo. A copy of this letter is attached as annexure "FA19" to PRASA's founding affidavit. This letter requested a meeting as a follow up to the 29 September 2016 letter from Ms Ngoye.

132. On 13 February 2017, Mr Molefe addressed a letter to Major General Ntlemeza. A copy of this letter is attached as annexure "FA20" to PRASA's founding affidavit. In this letter Mr Molefe points out that:

- 132.1. PRASA had been assisting the DPCI and AFU with the investigations in the Siyangena and Swifambo matters from August 2015 and engaging with the NPA on an ongoing basis.
- 132.2. The DPCI was not reasonably complying with its Constitutional and statutory obligations to investigate the Siyangena and Swifambo matters and to bring the investigations to finality. As a consequence, the persons alleged to be responsible for national priority offences had not been held to account and there was a serious risk that the ability to recover significant public funds using the NPA's powers under the NPA Act was or may soon be compromised.
- 132.3. Horwath had uncovered a substantial amount of material information relevant to the Siyangena and Swifambo matters as well as other matters that had been reported.
- 132.4. The DPCI had retained control over the investigations and had not triggered the provisions of section 17D of the SAPS Act to request the NPA to exercise its section 28 investigative powers.



- 132.5. PRASA was gravely concerned about the lack of progress in the investigations, failure to progress and finalise the Siyangena and Swifambo investigations and to facilitate asset preservation procedures.
- 132.6. Since 27 January 2016, the investigations and related asset preservation procedures had effectively stalled and pointed out that this coincided with the appointment of Major General Khana to lead the investigations.
- 132.7. Mr Molefe highlights the key concerns in respect of each investigation:
- In relation to the Swifambo matter:
- 132.7.1. The DPCI was in a position effectively to investigate the Swifambo matter from at least 14 January 2016, and an approved investigation plan was by then in place.
- 132.7.2. The material information and evidence from Horwath's investigations has been available to the DPCI for a significant period of time, but the DPCI has failed or declined to receive it.
- 132.7.3. The Swifambo financial analysis which has been available since October 2016.

A handwritten signature in black ink, consisting of stylized, overlapping loops and lines, located in the bottom right corner of the page.

- 132.7.4. 16 lever arch files containing documentary evidence available to the DPCI, available since July 2016.
- 132.7.5. It is apparent that the DPCI has simply failed to obtain necessary witness statements despite long being apprised of both witnesses and suspects.
- 132.7.6. It is also apparent that no suspects have been issued with any warning statements.
- 132.7.7. Major General Khana has sought to suggest in his recent correspondence that PRASA has not provided the DPCI with sufficient information relating to the Swifambo tender to enable DPCI to conduct its investigations. From this it appears that Major General Khana and his team have failed to acquaint themselves with the material already provided to them.

In relation to the Siyangena matter:

- 132.7.8. The DPCI has been in possession of the detailed statement of Mr Mamabolo, which includes 8 (eight) lever arch files of relevant and supporting annexures since March 2016. The DPCI was in a position to prepare its own investigation plan.

132.7.9. The section 205 procedures have not been followed for purposes of conducting a cash flow analysis in relation to the Siyangena matter.

132.7.10. The DPCI has repeatedly undertaken to appoint Horwath to conduct the Siyangena financial analysis. This has not been done prejudicing the investigation and asset protection. Horwath is in a position to do the Siyangena financial analysis promptly and within 3 (three) weeks of DPCI providing it with the information obtained as result of the section 205 procedures.

132.7.11. The DPCI has taken only limited statements and interviewed only limited potential witnesses.

132.8. Mr Molefe called for undertakings that the actions requested in his correspondence of 13 February 2017, would be taken on or before 17 February 2017. There was no response to his letter.

133. On 28 February 2017, Mr Molefe addressed another letter to Gen Ntlemeza and sent copies to Adv Abrahams and Mr David Douglas Van Rooyen, the Minister of Co-operative Governance & Traditional Affairs ("Mr Van Rooyen"). Mr Molefe requested Gen Ntlemeza to consider the dispute between PRASA and DPCI to be a formal intergovernmental dispute and extending an invitation to Gen Ntlemeza and his representatives as

contemplated by section 42(1) of the Intergovernmental Relations Framework Act, 13 of 2005 ("the IRFA") on or before 15 March 2017. A copy of this letter is attached as annexure "FA21" to PRASA's founding affidavit.

134. On 1 March 2017, Mr Molefe addressed a letter to Mr Van Rooyen, in his capacity as the designated member of the cabinet who facilitates such disputes in terms of the IRFA. A copy of this letter is attached as annexure "FA22" to PRASA's founding affidavit. There was no response from the Mr Van Rooyen.
135. On 8 March 2017, the Minister of Transport decided to remove Mr Molefe and the other directors from the board. On 10 April 2017, they were reinstated with effect from 8 March 2017 by the Court after they instituted urgent court proceedings.
136. On 24 April 2017, Mr Molefe addressed a letter to Major General Khana and copied in the new Acting Head of the DPCI, Lt Gen Matakata. A copy of this letter is attached as annexure "FA23" to PRASA's founding affidavit. This letter noted mainly that General Khana had still not provided response to Mr Molefe's letter of 13 February 2017 and called for a response to the letter by no later than 28 April 2017.
137. A response to Mr Molefe's letters was received only on 19 May 2017. Lieutenant General Matakata advised that the following progress had been made:





- 137.1. The two investigations were referred to the SEOU under the leadership of Brigadier Makhinyane.
- 137.2. The team was screening the documents (twenty lever arch files) in preparation for the case planning meeting with the NPA end of May.
- 137.3. Advocates Bhengu and Wolfaardt of the NPA were consigned to handle the matters.
- 137.4. The DPCI was awaiting a preliminary report from Horwath. (This report has already been supplied).
138. I respectfully submit that it is apparent that the DPCI has not been conducting the investigations reasonably. As correctly stated by Mr Molefe in his letter to Gen Ntlemeza, the South African citizens and the fiscus are prejudiced by the fact that DPCI has done nothing tangible to respond effectively to the Swifambo and Siyangena matters, despite PRASA's ongoing co-operation and assistance.
139. PRASA has supplied the DPCI with sufficient and relevant information to conduct the investigations. However, it is apparent that the DPCI has not applied itself to the documents supplied or worse they have no intention to ensure that these investigations are finalised.



140. The DPCI's conduct and the delay in conducting the Swifambo and Siyangena investigations is contrary to its Constitutional and statutory obligations.

**OUTA's standing to bring this application and entitlement to relief**

141. The DPCI is an independent body that has been tasked with fighting organised crime and corruption as required by the Constitution, other legislation and emphasised by the Constitutional Court. The DPCI is integral to the fight against corruption.

142. OUTA seeks mandatory relief aimed at ensuring that the investigation in PRASA's Siyangena and Swifambo complaints are conducted reasonably and brought to finality.

143. I am advised that the relief sought by OUTA affects a final determination of rights. It is sought in order to secure a permanent cessation of an unlawful course of conduct or state of affairs. An applicant desirous of applying to court for a final interdict must demonstrate: a clear right, an injury actually committed or reasonable apprehended and absence of an alternative remedy.

144. In terms of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law (section 9), everyone has a right to dignity (section 10), to freedom and security of the person (section

precedents applicable to other cases. Litigation of this nature can serve to foster respect for the rule of law and can contribute to the creation and maintenance of an environment conducive to the protection and promotion of the values of the Constitution.

152.2. For example, OUTA was the applicant in *National Treasury and Others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) and *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* (17141/12) [2012] ZAGPPHC 63 (28 April 2012). OUTA approached those matters with its members, the public and key objectives in mind.

153. The rights demonstrated above are violated and undermined when a person becomes a victim of crime and corruption. As stated by the Constitutional Court, when corruption is left unchecked and unpunished it poses a serious risk to the democratic state.

154. Where the DPCI fails to perform its constitutional duties, the fight against crime is undermined and person are exposed to an increased risk of being victims of crime and corruption.

155. The criminal investigations in relation to PRASA's Siyangena and Swifambo complaints concern offences of national priority as defined in the SAPS Act. Those investigations have to be conducted reasonably, efficiently and without delay to enable the effective use of asset preservation procedures.



Despite the progress in the early months of the investigation, the DPCI investigations have effectively and unreasonably stalled in respect of both the Siyangena and Swifambo complaints.

156. In support of the averment that I bring this application in the public interest, I refer to the following:

156.1. In the Swifambo review, the Court found that enough evidence had been placed before it to prove, on a balance of probabilities, that the arrangement between Swifambo and Vossloh, constituted fronting. In particular, because the arrangement undermines the object of the B-BBEE Act. The core of the B-BBEE Act is viable, effective participation in the economy through ownership of productive assets and the development of advanced skills. The B-BBEE Act creates an offence where any person engages in a fronting practice.

156.2. The collusion and corruption in tenders and contracts in public bodies threatens the growth and survival of an economy.

156.3. The PRASA Siyangena and Swifambo investigations concern an organ of state that has a vital duty to the public, which duty is to provide an efficient and effective public transport as envisaged in section 195 of the Constitution.

157. Accordingly, I respectfully submit that OUTA has standing to seek the relief set out in the applicant's notice of motion.

### Conclusion

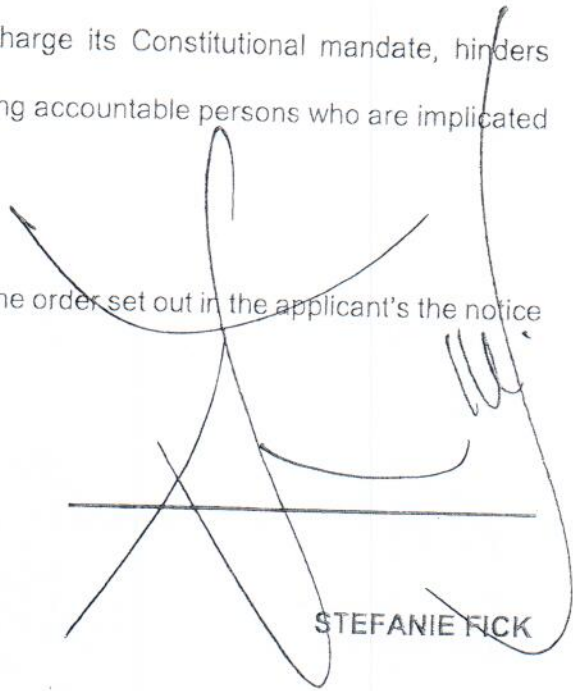
158. I respectfully submit that the DPCI has failed to conduct the Swifambo and Siyangena investigations reasonably and with due priority in various respects.
- 158.1. Firstly, the DPCI has made multiple changes to its investigation team, its leadership and structure.
- 158.2. Secondly, the DPCI has failed to conduct the investigations in a manner that enables effective asset protection.
- 158.3. Thirdly, the DPCI has failed to reasonably co-operate with PRASA and to utilize the substantial assistance that has been on offer from PRASA.
- 158.4. Fourthly, the DPCI has failed to reasonably co-operate with the NPA for purposes assets protection procedures and ensuring that the investigation is properly guided if not led under section 28 of the NPA Act.
159. The criminal conduct and corruption of the persons implicated in the Siyangena and Swifambo investigations, goes to the very heart of the protection afforded by section 217 of the Constitution, namely, public



procurement that must be fair, equitable, transparent, competitive and cost-effective.

160. The failure of the DPCI to discharge its Constitutional mandate, hinders PRASA and the public from holding accountable persons who are implicated in wrong-doing.

161. In the premises, OUTA prays for the order set out in the applicant's the notice of motion.



STEFANIE FICK

I hereby certify that the deponent declares that the deponent knows and understand the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **RANDBURG** on this the **31<sup>st</sup>** day of **JULY** 2017 and the regulations contained in Government Notice R1478 of 11 July 1980 as amended by Government Notice R774 of 20 April 1982 concerning taking an oath have been complied with.

**ANDREA KORFF**  
PRAKTISERENDE PROKUREUR/PRACTISING ATTORNEY RSA  
KOMMISSARIS VAN EDE/COMMISSIONER OF OATHS  
1085 JUSTICE MAHOMED STREET  
BROOKLYN  
TEL: 087 701 5874



COMMISSIONER OF OATHS